ECONOMIC UNION

LIVING TREE OR WIRED BONSAI? THE FEDERAL GOVERNMENT'S CONSTITUTIONAL PROPOSALS ON THE ECONOMIC UNION

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INTRODUCTION

The purpose of a constitution is to help sustain the spirit and the life of a nation. For all of its flaws, Canada's constitution has exhibited remarkable adaptability. Governments have been able to respond to changing fiscal and social circumstances, as evidenced by the development of fiscal federalism and the use of the spending power for shared-cost programs such as health care and social assistance. Judicial decisions have enhanced the responsiveness of the federal system by applying the "living tree approach". The living tree metaphor, which was first suggested in the 1930 Judicial Committee of the Privy Council decision in the Person's Case, compares the constitution to a "living tree capable of growth and expansion within its natural limits" (*Re Section 24 of the B.N.A. Act*, pp.106-107) we believe that the flexibility and adaptability of the constitutional framework has helped promote liberal democracy in Canada. Yet current constitution-makers do not seem to be sufficiently aware of the need for simplicity in the constitutional document, as evidenced by their apparent desire to "constitu-tionalize" everything but the kitchen sink.

Our paper analyzes the federal government's constitutional proposals regarding the economic union. We argue that these proposals pose a fundamental challenge to the principles of federalism and liberal democracy in Canada. Certain of the provisions will prevent democratically elected political representatives from changing the policies of past governments or enacting new legislation. Other proposals, if enacted, will constrain and confuse judicial decision-making by limiting the courts to a narrow, history-bound approach to constitutional interpretation and by presenting contradictory constitutional goals.

While we believe the proposals will undermine the rights of all citizens to democratic representation, we feel the proposals are particularly harmful to women and other socially, economically and polititically disadvantaged groups. The economic provisions are insensitive to gender and class differences — differences in access to economic resources and rental property, in mobility, and in need for social services and labour force regulations. If enacted, the economic union provisions will further entrench the economic inequality of women, aboriginal Canadians, the disabled, visible minorities and others who face systemic discrimination.

THE COMMON MARKET CLAUSE AND THE ECONOMIC UNION

The federal proposals recommend additions to sections 121 and 91 of the BNA Act. Revisions to section 121 are designed to induce a common market by ensuring economic mobility within Canada. The new clause will prohibit government action which limits the free movement of goods, people, capital and services.

The clause is directed in particular at provincial trade barriers such as preferential treatment for local suppliers of goods and services (*Partnership for Prosperity*, p. 17). However, the federal government proposes to permit two categories of exceptions, one for the federal government and one for the provinces. (There is also a "national unity" exception, to be discussed below, but use of this exception requires the support of the federal government and 2/3 of the provinces with at least 50% of the population.) Firstly, the federal government is allowed to enact laws which further the principles of equalization or regional development. Secondly, provincial governments can make laws to eliminate economic disparities within the province as long as the laws prove no more onerous to the people outside the province than those within it. Given the federal government's poor record with respect to encouraging regional development, the fact that regional development and equalization policies will be exclusively a federal matter is cause for concern (see Savoie).

It seems odd that while interprovincial trade barriers are forbidden by the clause, intraprovincial barriers are sanctioned despite the federal government's belief that this exception will still permit various problematic trade barriers. This is where the proposal for a revised section 91 steps in. As the federal government document explaining the economic union proposals states:

> A revised section 121, while potentially wide-ranging, may not address the full range of barriers. Certain impediments, such as those that arise as a result of differing regulatory practices, may not be characterized by the courts as being

> barriers or restrictions within the meaning of a revised section 121.... In addition, governments may wish to avoid the uncertainty, costs and time associated with addressing certain kinds of barriers through the courts by having recourse to an alternative forum for the resolution of these problems. (*Partnership for Prosperity*, pp. 23-24)

For these reasons, the federal government suggests section 91A, which will give the federal government the power to ensure "the efficient functioning of the economic union". This clause is intended to add "punch" to the common market clause (121) by giving the federal government a political as well as a judicial means of addressing trade barriers. It allows the federal government to respond immediately to provincial barriers which "do not result from explicit discrimination" (*Partnership for Prosperity*, p.24) If a province enacts a regulation or law which the federal government and two thirds of the provinces representing a least 50% of the population deem a hindrance to interprovincial trade, then the federal government may use Section 91A to disallow the legislation *even if it is viewed by the courts as furthering the principles of equalization or regional development*. In other words, barriers to mobility which may be allowed under section 121 could be overruled by section 91A. In this way, the goal of "efficiency" overrides the principles of equalization and regional development.

There are three serious problems with these proposals. First, it will be quite difficult for governments to deal with economic inequalities which do not result from regional differences. The second problem is that the proposals challenge fundamental principles of federalism and liberal democracy. Thirdly, the goal of "efficiency", which underlies these proposals, will constrain governments' ability to act and will confuse judicial decision-making. These three areas of concern are elaborated upon below.

1. NON-REGIONAL INEQUALITIES

The federal government proposals appear to assume that the only legitimate purpose of government regulation of the free market is to correct regional imbalances. Women, visible minorities, the disabled, aboriginal Canadians, and others who face poverty should be concerned about the proposed economic union provisions. There appears to be little room for governments to address economic circumstances affecting disadvantaged individuals and groups. Would the economic union clauses allow governments to enact policies such as employment and pay equity regulations, training programs designed to integrate women into non-traditional fields, and tax credits for companies which offer corporate day care? Perhaps, under the third area of exception under section 121; laws declared by the Parliament of Canada to be "in the national interest". However, exempting such laws under this category requires the support of the federal government as well as two thirds of the provinces representing at least 50% of the population of Canada.

For example, say the government of Alberta wishes to offer tax incentives and start-up costs to companies providing on-site child care. Some companies may be offended by the law; small businesses and corporations employing few women may feel disadvantaged. The law will be vulnerable under section 121 because its goal is not to develop the region or promote equalization; rather, the policy is intended to help achieve economic equality for women. Alberta's new policy could be declared "in the national interest" but only with the support of the federal government and six other provinces representing at least 50% of the population. Why should the government of Alberta need the approval of other governments to further the legitimate social and economic goals of its citizens?

The federal government has admitted that other exceptions to a revised section 121 may be "appropriate", and has asked the Special Joint Committee to consider this. At the very least, the following exception should be added:

> 3) Subsection (2) does not render invalid:....
>
> d) a law or program or activity of the Parliament of Canada or the legislature of a province or territory that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

The revised section 121, with the additional exception listed above, would be consistent with the Charter of Rights and Freedoms. But, would governments actually be able to make policies which ameliorate the conditions of the disadvantaged? Yes — if other governments do not mind. This brings us to the second problem.

2. FEDERALISM AND DEMOCRACY

Let us assume the "best case" scenario — that subsection 3(d) is added to the revised section 121 — and develop an example which is based in fact. The government of Ontario presently has a pay equity policy which regulates the private sector. This is allowed under our improved section 121 because it seeks to address the economic discrimination faced by women in the paid labour force. However, businesses in Ontario do not like the policy. They say it imposes unfair costs and constrains their ability to operate efficiently in the

marketplace as their ability to compete with companies based in other provinces (which are not required to abide by such regulations) is thus hindered. Ontario businesses could appeal to the federal government, which may agree with them. Provincial governments, which do not wish to enact pay equity policies in their own provinces, may also wish to support the private sector in Ontario. The federal government, with the support of 7 provinces comprising 50% of the population, could use the revised section 91 to make a law prohibiting private sector pay equity policies, arguing that such policies impair efficiency. The government of Ontario could declare that the Act of Parliament does not apply in Ontario, but this would require a resolution passed by 60% of the members of the legislative assembly; as well, the government of Ontario could only "opt out" for 3 years. As it currently stands, the NDP government of Ontario does not have 60% of the seats in that province.

In a federal state, power is divided between two levels of government, each of which has legislative jurisdiction in its own sphere. The Canadian federation features considerable jurisdictional overlap as well as areas of joint jurisdiction; in other words the division of powers is not pure, nor is it simple. Recent court decisions in the area of environmental legislation attest to this fact. The revised section 91A extends this practice by allowing Parliament to "pass legislation for the efficient functioning of the economic union *in areas beyond its existing jurisdiction*" (*Partnership for Prosperity*, p. 24, emphasis added). This is not a new element of Canadian federalism; the spending power allows the federal government to act outside its jurisdiction via cost-shared programs. What is new is the involvement of the provinces. The "national interest" exemption under section 121 and the "efficient functioning" provision of 91A each require the ratification of 2/3 of the provinces with a least 50% of the population, thereby introducing a new and undemocratic dynamic to federal-provincial relations. To put it very simply, provinces will be able to gang up on each other (and on the federal government). The power to promote the efficient functioning of the economic union will allow governments to act outside their areas of constitutional jurisdiction and override the decisions of other democratically elected governments.

More problematic for federalism and democracy in Canada is the fact that corporations will be able to go to the courts to challenge the regulatory actions of government. This is not new: Mallory observed in *Social Credit and the Federal Power* "how vested economic interests challenged both provincial and Dominion legislation as being *ultra vires*, if that legislation meant a regulatory encroachment on the economic system." (Mallory, in Porter, p. 381). As Mallory stated:

> In a federal country, those resisting [regulation] were able to cloak their economic motives in a concern for the public interest by raising doubts as to the power of the legislature to enact laws to which they objected....Even in cases where a statute had been referred to the courts for an opinion on its validity there is reason to believe that objection often existed more to its purpose than to its source. (Mallory, p. 32)

Under the proposed revisions to sections 121 and 91, the business sector will appeal to the courts by claiming that the natural order, determined by free market forces, must not be hindered by government policy and regulation. They will be supported by the "efficient functioning" clause embedded in 91A. In short, the proposed revisions to sections 121 and 91 will have businesses running to the courts claiming all manner of legislation to be "ultra vires", thereby confusing jurisdictional issues, overloading the courts, and preventing governments from acting on legitimate matters of concern.

3. EFFICIENCY

It is not clear that "efficiency" serves as an appropriate standard for legal interpretation of issues of national interest. And, the term may restrict the courts to a very narrow frame of reference, and may present the courts with constitutional contradictions.

What does the term "efficiency" mean? There is popular agreement among economists that efficiency is determined by the ratio of output to input. Where efficiency is a goal, the objective is to minimize inputs and maximize outputs in order to have a competitive nation. In reference to competitive capitalism, Friedman explains the importance of voluntary cooperation and the social benefits of a free exchange of goods and services. Further, for Friedman, the household is a relevant unit of analysis in this regard:

> In its simplest form, such a society consists of a number of independent households — a collection of Robinson Crusoes, as it were. Each household uses the resources it controls to produce goods and services that it exchanges for goods and services produced by other households, on terms mutually acceptable to the two parties to the bargain. It is thereby enabled to satisfy its wants indirectly by producing goods and services for others, rather than directly by producing goods for its own immediate use. The incentive for adopting this indirect route is, of course, the increased product made possible by division of labor and specialization of function. Since the household always has the alternative of

> producing directly for itself, it need not enter into any exchange unless it benefits from it. Hence, no exchange will take place unless both parties do benefit from it. Cooperation is thereby achieved without coercion. (Friedman, p. 13)

The problem is that Friedman assumes there is no poverty, because all households produce goods and services to satisfy "wants". What about the single-parent household which is dependent on the state and cannot meet its needs within the natural order of the marketplace?

Moreover, Friedman does not consider the fact that, within a household unit which is able to meet its *overall* needs, specific individuals may not have their needs satisfied. Friedman overlooks individuals within the household and assumes lack of coercion within the household. Indeed, it is possible for children, women, the sick and the elderly to be coerced through deprivation and violence. A similar analysis could be applied to the Canadian nation; the GNP may rise even though certain provinces or regions are experiencing economic hard times. Economic growth in the centre may be achieved at the expense of the peripheries (especially the Atlantic provinces). The unintended consequences of the goal of efficiency may, therefore, include an unjust distribution of wealth which will not show up in a monetary measurement of the ratio of input to output.

Many observers may ask, "efficiency for whom?" Academic ambiguities inherent in the definition of efficiency are further evidenced in discussion of how to achieve an objective measure. For instance it is uncertain whether a decrease in efficiency is determined by changes in the physical employment of capital (the way labour is working), or by change in the value of capital assets (see Keynes, p. 138). The ambiguity will be up to the courts to resolve, and the courts will be constrained because they cannot take unintended consequences into consideration. For instance, in the case of the GST (an initiative intended to increase efficiency in the economic union), an assessment of the full economic impact of the legislation could not be made. As the Alberta Court of Appeal stated: "Effect is relevant for colourability only to the extent that it is evidence of purpose" (*Reference Re: Goods and Services Tax (Alta)*, p.604). In other words, consequences other than those expressly stated by the legislation and predicted by the social theory underlying the legislation cannot be entered into evidence before the courts. The argument that the GST would disadvantage certain segments of society was viewed by the Court to be irrelevant to the judicial decision-making process in this case. The term efficiency and the effects of policies based on premises of "natural order" (e.g. market forces), including effects which are unintended, are of *academic* rather than of constitutional and legal character.

The goal of efficiency (however defined) will conflict with other constitutionally entrenched goals and principles, such as the rights and freedoms articulated in the Charter and the commitment to regional development and equalization discussed earlier. The Courts will need to balance the supposed benefits of government initiatives designed to increase *national* efficiency with the needs of "have not" provinces and with the rights of individuals. What will take primacy; the goal of efficiency for the nation as a whole or the principle of regional development? Efficiency at the level of the household or individual rights and freedoms? What will happen to aboriginal governments: they may have very different views of efficiency and section 121 will undoubtedly undermine their attempts to build local economies.

The Canadian economic union is a political creation. Confederation brought together disparate colonies which had few trading links. McDonald's National Policy fostered east-west trade, transportation and communications. Attempts have been made by politicians to remedy regional economic disparities and to provide a social safety net for those disadvantaged by the free market system. While the pursuit of economic efficiency is laudable, it must be remembered that in Canada, this quest has always been tempered by equally admirable social and political goals.

HARMONIZATION OF ECONOMIC POLICIES

The proposal suggests that the governments of Canada develop guidelines for the harmonization of fiscal policies and write these into federal legislation under section 91A. These guidelines would require the approval of at least seven of the provinces representing 50% of the population and up to three provinces could opt out. This may be a laudable goal, but it must not be pursued at the expense of democratic politics. The government of Alberta, for instance, may agree to the harmonization guidelines and choose to "opt in". A newly elected government in that province may disagree with the guidelines but will be *required* to abide by the agreement made by their predecessors. Specific policy processes should not be binding on future governments.

NEW OR NEWLY RECOGNIZED AREAS OF PROVINCIAL JURISDICTION

Policies in the areas of job training, immigrant services, recreation and housing are expensive and some provinces will not be able to afford new responsibilities (training, immigration) or will not find it easy to adjust to the withdrawal of federal funding in areas of provincial responsibility (recreation, housing). Many programs may be abandoned unless governments have sufficient

flexibility in cost-sharing arrangements to maintain commitment to these areas. Some examples which come to mind include: job training programs designed to integrate women into traditionally male occupation, ESL programs for immigrant women, low-income housing, second-stage housing for battered women, and summer recreation programs for children. Further, some of these programs, if funded and implemented at the provincial level, may be seen as barriers to economic mobility under section 121.

LEGISLATIVE DELEGATION

This is a powerful clause allowing federal or provincial governments, by mutual consent, to delegate legislative authority from one level of government to the other. It could add a necessary element of flexibility to the federal system, and is a potentially useful provision. For example, it could be used to respond to the demands of Québec. Problems could arise however. For instance, a deadlock could be reached if a provincial government agrees to delegate responsibility over an area such as post-secondary education; if a new government is elected in the province and it wants the legislative authority back, what happens if the federal government refuses? Moreover, problems could emerge if a provincial government has lost fiscal power and the federal government refuses to take any responsibility.

CANDIDATES FOR STREAMLINING

Governments should take gender into account when rationalizing government services. The policy demands of the women's movement do not fit neatly into jurisdictional boxes, and often require legislation and funding by three levels of government (federal, provincial, municipal) plus financial support from the business sector. However, it should be noted that this process does not require constitutional amendment.

THE FEDERAL SPENDING POWER

The federal spending power has provided flexibility in Canada's federal system. However, under this provision, new shared-cost programs or conditional grants will require approval of two-thirds of the provinces with 50% of the population. In other words, introducing a new social program will require a *de facto* constitutional amendment. Certain policies — homemaker's pension, a national child care strategy, a guaranteed annual income program — are highly unlikely to "pass" such a restrictive test. Current federal policy allows provinces to "opt out" of shared-cost programs, with full financial compensation (a provision important to the province of Québec). Why change the status quo, which allows considerable flexibility on the part of both levels of government?

THE COUNCIL OF THE FEDERATION

The proposed Council of the Federation will entrench the practice of executive federalism and place it within an unelected, unaccountable extra-parliamentary body. Such a proposal contradicts the federal government's stated commitment to institutional reforms designed to enhance the representative nature of democratic institutions.

PROPERTY RIGHTS

While this provision is not part of the economic union proposals, property rights will challenge the economic security of many individuals, especially women. Most women do not own property and many are renters of property. The property rights provision could override provincial human rights legislation which prohibits discrimination by owners of rental accommodation. A property rights clause in the Charter could be used to challenge divorce legislation which requires equitable distribution of marital property. It could also be used to challenge maintenance enforcement policies (attempts by governments to collect maintenance payments). This "right" would make it extremely difficult for governments to address the feminization of poverty.

CONCLUSION

Inclusion of the goal of "efficiency" in the management of the economic union clearly serves as a limit upon judicial interpretation. Given the specific political nature of the common market clause, traditional liberal interpretation is restrained. Court decisions about the nature of disputes would be assessed on the basis of a rigid constitutional framework which embodies specific expectations of human behaviour under supposed "free market" conditions. As well, the restrictions on government decision-making posed by these constitutional provisions limit the rights of citizens to democratic expression and representation.

The federal constitutional proposals designed to ensure an efficient economic union will have the effect of pruning the constitutional living tree. Hence, the "living tree" becomes the "wired bonsai".

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SOURCES CITED

Friedman, Milton, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1982).

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that the objecting province would be subject to the federal authority whether it liked it or not unless it had previously exercised its right to declare the amendment non-applicable. Those who accepted the amendment will have waived that right by accepting it.

If the federal government expects the clause to be accepted it will need to make at least two modifications to the proposal. First, allow for provinces to opt out for a fixed period and agree that opting out can be renewed an indefinite number of times. Second, require the federal legislative authority to be renewed periodically, say every five years. Why? One reason is that it will allow those provinces which have agreed to a transfer to change their minds — particularly after a change in government. It will also allow for fine-tuning of the federal legislative authority. It also means that there is clear recognition that the provincial legislative authority is only temporarily borrowed. There are some strong parallels here to fiscal arrangements which have been the subject of five-year reviews over the past fifty years. Unless changes along the lines I have suggested are added, section 91A has no chance of being adopted. Few, if any, provinces will be prepared to write a blank cheque.

Assuming good intentions on the part of the federal government, I am gradually coming to the conclusion there is simply too much on the table at this time. Moreover, the agenda is expanding, with matters such as a social charter being added by Ontario and equalization and Established Programs Financing being added by Manitoba. There has been no mention of removing the federal government's powers over disallowance and reservation or of providing a provincial role in international affairs, all of which have been discussed before. It is difficult to see when agenda-building will end. Everything cannot be discussed at once and everything cannot, and should not, be in the constitution. We are better off leaving things out and leaving them to the political process than inserting them into the constitution. The constitution cannot solve all our problems.

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1. (Ottawa: Supply and Services Canada, 1991).
2. *Ibid.* at 50.
3. *Ibid.* at 18.

(Continued / Urquhart ...69)

2. Richard Johnston, *Public Opinion and Public Policy in Canada* (Toronto: University of Toronto Press, 1985).
3. Canada, Royal Commission on the Economic Union and Development Prospects for Canada, *Report, Volume Three*, (Ottawa: Minister of Supply and Services Canada, 1985) at 86-92.
4. R. H. MacDermid, "Regionalism in Ontario," in Alain G. Gagnon and James P. Bickerton, ed., *Canadian Politics: an introduction to the discipline* (Toronto: Broadview, 1990).
5. Alan C. Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake" *Canadian Public Policy*, Vol. XIV, Supplement (1988).
6. Donald V. Smiley and Ronald L. Watts, *Intrastate Federalism in Canada*, (Toronto: University of Toronto Press, 1985).
7. See Alberta, Select Special Committee on Upper House Reform, *Strengthening Canada: Reform of Canada's Senate*, (Edmonton: 1985); Peter McCormick, Ernest C. Manning and Gordon Gibson, *Regional Representation: The Canadian Partnership*, (Calgary: Calgary West Foundation, 1981).

(Continued / Trimble & Morley ...74)

Government of Canada, *Shaping Canada's Future Together* (1991)

Government of Canada, *Partnership for Prosperity* (1991)

J.M. Keynes, *The General Theory* (First Harbinger Edition, 1964)

Mallory, James, *Social Credit and the Federal Power* (Toronto: University of Toronto Press, 1954).

Porter, John, *The Vertical Mosaic* (Toronto: University of Toronto Press, 1965).

Re Section 24 of the B.N.A. Act, [1930] 1 D.L.R. 98 (J.C.P.C.)

Reference Re: Goods and Services Tax (Alta.) (1992), 84 D.L.R. (4th) 577 (Alta. C.A.)

Savoie, Donald, *Regional Economic Development: Canada's Search for Solutions* (Toronto: University of Toronto Press, 1986)

THE ENVIRONMENT

SHAPING CANADA'S FUTURE TOGETHER or A DOOMED ATTEMPT TO ESCAPE FROM REALITY

Elaine Hughes

From space, we see a small and fragile ball dominated not by human activity and edifice but by a pattern of clouds, oceans, greenery, and soils. Humanity's inability to fit its doings into that pattern is changing planetary systems, fundamentally. Many such changes are accompanied by life-threatening hazards. This new reality, from which there is no escape, must be recognized — and managed.

This quote is taken from page 1 of *Our Common Future*,[1] the 1987 report of the World Commission on Environment and Development. This Commission spent five years synthesizing the ideas of thousands of people from around the world in order to prepare their report: a document of nearly 400 pages which explains and illustrates the links between environmental degradation and current development patterns. Its conclusions may be summarized as follows: that we must change our current patterns of development and integrate environmental concerns into every sector of our political and economic institutions, or risk the very survival of life on earth. This new pattern of development — sustainable development — requires that the "ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, and other dimensions."[2] Every time. Starting now.

The Canadian federal government has stated publicly that it wholeheartedly endorses sustainable development. Indeed, as part of the new federal proposals for constitutional reform, our government has suggested that sustainable development is one of the fundamental characteristics of Canada and one of the underlying values of Canadian society.[3] It is hard to imagine a policy proposal of greater significance than the amendment of our constitution, so, of course, one might expect that the environmental implications of these proposals would be carefully considered — given the reality that sustainable development is a prerequisite for survival and that it will require "far-reaching changes to produce trade, capital and technology flows that are more equitable and better synchronized to environmental imperatives."[4] Yet an examination of the federal constitutional proposals reveals little by way of environmental protection and much that is environmentally dangerous, leaving one to wonder whether the drafters of the document have ever even read the World Commission report. Sustainable development does not mean sustaining current development levels or patterns, or putting economic prosperity first.

In 1990 a special committee of environmental law experts submitted a report to the Canadian Bar Association.[5] The Committee's mandate was to identify "key national and international law reform issues and (make) recommendations to promote sustainable development in Canada."[6] Its report suggested federal leadership was "urgently required" and 197 recommendations were made for federal environmental law reform.[7] To give a few examples, it was suggested that the federal government:

- o adopt a comprehensive national environmental agenda
- o establish minimum national environmental standards
- o expand the federal environmental impact assessment (EIA) process to include all new and existing initiatives, including policy, planning, expenditures, regulatory activities, permit practices and cost-shared programs
- o provide citizens with environmental rights, including constitutional rights to a healthy environment
- o develop legislation on solid waste management
- o increase regulation of toxic substances and move toward both pollution prevention (not control) and zero discharge standards
- o increase regulation of pesticides
- o develop alternative energy sources
- o develop strict marine pollution controls including coastal management programmes
- o prohibit water diversions for export
- o increase regulatory activity over pulp mills, forest harvesting and silviculture
- o increase control over fisheries and endangered species management
- o generally, increase the legislative and regulatory role relating to environmental protection including enforcement and compliance.

I would like to review briefly some of the specific proposals for constitutional reform to determine whether the federal government is heeding this advice about how to achieve sustainable development. I will limit my discussion to the proposals relating to the division of powers, including legislative inter-delegation.[8] As an aside, I should make clear my underlying premise that federal — provincial jurisdictional arguments ought not to be considered a justifiable excuse for government inaction in relation to environmental concerns, given that what is at stake is the "survival of the planet."[9]

First, the federal government is "prepared to recognize the exclusive jurisdiction of the provinces" in relation to tourism, forestry, mining, recreation, housing

and municipal/urban affairs. Under the existing constitutional regime the provinces already exercise primary jurisdiction in these areas due to their powers over 'public lands,' 'municipal institutions,' 'property and civil rights' and 'development, conservation and management of non-renewable natural resources and forestry.' So one might say that this is an empty proposal which means nothing from an environmental viewpoint.

Yet all of these areas have major environmental impacts. It may mean *something* to give 'exclusive' jurisdiction over forestry to the provinces, rather than their existing power to enact laws regarding 'development, conservation and management.' For example, how would this affect federal laws regulating pulp mill discharges into watercourses? Are pulp mill discharges part of 'forestry'? If so, would the federal laws become more vulnerable to challenge or, generally, lose the source of their constitutional validity?

If we give *exclusive* jurisdiction to the provinces, what happens to the impetus for developing national standards or a national forestry policy? What happens to the recommended increased role of the federal government in relation to harvesting and silviculture operations? Where is the increased federal role in environmental impact assessment? Can we continue to hold the federal government partially accountable for the way our forests are managed? Perhaps this subtle tinkering with legislative jurisdiction does nothing to the *status quo* but, if it does, it is hard to determine exactly what its effect is. Currently, the federal government can influence forest management via its use of the spending power and its 'trade and commerce,' 'peace, order and good government' (POGG) and 'fisheries' jurisdictions. Could provincial jurisdiction over all of 'forestry' result in a redefinition of the scope of such powers? Certainly, the proposal does nothing to clarify the extent of federal jurisdiction, and may in and of itself stifle federal initiative, particularly initiative which involves unilateral federal action.

One of the other constitutional reform proposals is to limit conditional transfers and the exercise of the federal spending power in areas of 'exclusive' provincial jurisdiction (unless 7 + 50 provincial approval[10] is obtained). By increasing the list of 'exclusive' provincial powers in environmentally-relevant subject areas, there is no doubt that in these areas the federal role in influencing policy through conditional grants and shared-cost programs could be inhibited. Environmental initiatives are usually costly and impeding the use of the federal spending power not only limits federal influence, but leaves provinces — including poor provinces — to try to pick up the tab. With more provincial control, but less federal money, some provinces simply could not proceed with better environmental protection even if they wished to do so. While bilateral arrangements are still possible, at some point a number of bilateral agreements become a nation-wide program and open to scrutiny if the 7 + 50 standard is not met. Conversely, nation-wide shared cost programs are never initiated without substantial provincial agreement, so we may have another meaningless amendment which does not change the *status quo* in any readily definable way.

Second, we have two proposals designed to alter federal legislative jurisdiction which are relevant to environmental protection: the addition of s. 91A (power to manage the economic union) and 'clarification' of the federal residual power (POGG).

In relation to POGG, the federal government intends to retain its jurisdiction over national matters and emergencies, while transferring to the provinces authority for non-national matters unless specifically assigned to the federal Parliament in the constitution or by the courts. Environmental problems change over time and past experience shows that they frequently move from local matters to problems with regional, national or international implications. Under both the existing POGG clause and the new proposal, once a matter is 'national' in scope, the federal government can assume jurisdiction. Is this more meaningless tinkering? Or could it have adverse implications for issues such as the federal role in an expanded EIA process? What does this do to the recommended federal action in relation to solid waste management, including municipal waste? What about national enforcement and compliance standards for all environmental laws? At a minimum, nothing has been done which would help citizens, government or the courts decide when an issue has reached a 'national' dimension so as to justify federal intervention. Continued uncertainty about how to tell when a matter is 'national' means that nothing has been done to either encourage federal leadership, or discourage the use of jurisdictional arguments as an excuse for inaction.

Section 91A is designed to create a new federal power to manage the 'economic union', subject to 7 + 50 provincial approval; provincial ability to 'opt out' is also suggested. Given the links between economic matters and environmental issues this provision has enormous environmental implications. Undoubtedly, this could limit unilateral federal initiatives under the general trade and commerce power and thus might inhibit the expansion of federal EIA or the introduction of new measures in relation to fisheries, forestry, water export and other resource developments. Again, we see a provision which has the potential to stifle unilateral federal initiatives which might be environmentally advantageous. In addition, there is nothing in the proposal, or the mandate of the proposed Council of the

Federation which would oversee its use, which requires the government to consider the environmental impacts of economic decision-making.

Finally, there is the proposal for legislative inter-delegation. This, effectively, permits bilateral federal-provincial agreement to delegate legislative authority between levels of government over any issue which seems politically desirable, regardless of whether it is environmentally desirable. This circumvents the need for future constitutional amendments to transfer legislative powers, including powers over the environment. EIA is the obvious candidate for transfer to the provinces, given that Conservative House Leader Harvie Andre was reported to have said that the federal government "wants to leave the provinces as the primary decision-makers on developments that don't cross provincial boundaries" and specifically expressed concern over duplication of environmental review processes.[11] Areas targeted by the federal government for 'streamlining', probably under the proposed inter-delegation power, include wildlife conservation, transportation of dangerous goods, soil and water conservation, and inspection programs in areas such as fisheries.

Again, one might say that nothing is done here that could not be done by administrative inter-delegation under the current constitution although, arguably, a legislative inter-delegation is more cumbersome to repeal. Presumably inter-delegation could be used to *add* to federal environmental powers so that sustainable development goals could be reached. Yet, viewed in concert with the previous provisions and in light of the current federal government's not-so-hidden agenda as expressed by the House Leader, it seems that *provinces* are given an increased role while the federal government gets to save substantial sums of money — money it would otherwise need to spend on the enormously expensive implementation of sustainable development. If provinces overexploit resources or cannot take effective action due to the costs involved in environmental protection, the federal government may have a nice excuse for inaction (it's now a provincial responsibility). Thus, these proposals seem to be in direct opposition to the recommended and "urgently required" federal leadership in environmental issues.

To summarize, I would say that the new constitutional reform proposals do not involve a radical change to the existing division of powers. That is a major flaw. Nothing has been done to clarify environmental jurisdiction. Nothing has been done to expand federal jurisdiction to permit a national environmental agenda to be implemented. The option of express concurrent jurisdiction has not been explored. If anything, some of the measures may well dampen federal initiative and provide further excuses for inaction.

My primary suggestion in relation to the constitutional reform proposals is this: we should do a full environmental impact assessment of the entire reform package. Only in this way can we fully explore in advance what the environmental implications of this proposal might be and integrate environmental considerations into our decision-making as required by our "commitment to the objective of sustainable development." In addition, we must consider amending the proposal to ensure that environmental jurisdiction is clarified, to eliminate disincentives to decisive government action, to consider the merits of particular changes (such as requiring an EIA before permitting legislative interdelegation) and to consider the inclusion of a constitutionally-protected right to a healthy environment.

Life on earth may be in jeopardy if we cannot change our development patterns and become environmentally responsible. This is reality according to the World Commission on Environment and Development. We must stop parroting their words in a "Canada clause" that has all the substance of Santa Claus. Canadians deserve some action now. The citizens of this country need to tell our federal government to quit trying to escape from reality and get started on the job of *truly* shaping Canada's future together.

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1. World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).
2. *Ibid.* at 39.
3. *Shaping Canada's Future Together: Proposals* (Ottawa: Minister of Supply and Services, 1991) at 9-10, proposes that the "Canada clause" in s. 2 of the Constitution entrench a "commitment to the objective of sustainable development in recognition of the importance of the land, the air and the water and our responsibility to preserve and protect the environment for future generations."
4. WCED, *supra* note 1, at 41.
5. *Sustainable Development in Canada: Options for Law Reform* (Ottawa: CBA, 1990)
6. *Ibid.* at (i).
7. *Ibid.* at 27-54.
8. There are several other provisions in the constitutional proposals of environmental concern. For example, the proposed property rights clause in the Charter raises concerns about the validity of environmental standards that restrict certain uses of private property. Also, the proposed common market clause (s. 121) might invalidate any environmental standards that could be construed as trade barriers.
9. WCED, *supra* note 1, at 23.
10. Approval of at least 7 of 10 provinces representing at least 50% of the Canadian population.
11. M. Tait, "Environment Under Review" *Calgary Herald* (28 September 1991).

DELEGATION POWER

THE DELEGATION POWER PAST AND PRESENT

David Schneiderman

INTRODUCTION

In the aftermath of the Meech Lake Accord, there is still lingering suspicion on the part of Canada-outside-Québec about the "distinct society" clause and everything that "distinctiveness" entails. Recent public opinion polls show that, while there now is less equivocation about including the clause directly in the text of the Charter and in the proposed "Canada Clause", opposition to it continues to run deep if it means more power to, and 'special status' for, Québec.[1] This sentiment endures despite the apparent single-mindedness of Québec's political, economic, and cultural elites that a far more serious devolution of power will be required to salvage the union and forestall a referendum on independence in Québec.

Perhaps, the drafters of the federal proposals saw in the proposed delegation power a way out. The clause could enable the federal or provincial governments to transfer to the other jurisdictional responsibility for any number of matters which strict adherence to the text of the constitution would prohibit. This bilateral transfer of power could skirt around the rigours of the amending formulae and, all the while, remain faithful to the notion of the equality of the provinces. It is the latter which Alan Cairns, for example, has identified as a powerful rhetorical tool, both in the fight to thwart Meech Lake as well as in this round of reform.[2]

While the language of a delegation power can maintain the appearance of provincial neutrality — each province has equal opportunity to strike a deal — it is in practice that the clause will grate against the equality "principle". For it is ultimately with Québec that the federal government will be expected to negotiate arrangements for the delegation of power, likely in the direction advocated by the Liberal Party of Québec in the Allaire Report. The recent constitutional conference on the division of powers in Halifax embraced the notion of asymmetrical federalism, and it is with the aim of achieving less symmetry that the power likely now will be employed. This has not always been the intention of those who in the past have recommended the creation of just such a power. And, as the aim of legislative delegation has shifted, so has the appeal of such a proposal to appease aspirations within Québec for greater jurisdictional room. The aim of this essay is to explore some of the historical roots of the proposed delegation power, and consider those past proposals in light of current political and constitutional conditions.

PAST PROPOSALS

Attempts at delegating legislative power directly between the two orders of government — federal and provincial — have been thwarted by judicial interpretation. The courts defined sections 91 and 92 as largely carving out mutually exclusive spheres of jurisdiction, with some areas of concurrency.[3] The courts would not permit excercise of powers beyond legislative jurisdiction,[4] even where consent to such excercise was given through the development of cooperative, inter-governmental schemes. This was the case, for example, in early attempts at creating an old-age pension scheme[5] and marketing schemes for certain products.[6]

As a result of these restrictive interpretations regarding, particularly, federal powers over economic matters, the Rowell-Sirois Report recommended that a delegation power would be a "useful device" for overcoming these constitutional deficiencies: "Unified control and administration in the hands of a single government is sometimes desirable".[7] The report recommended a delegation power that would permit transfers of power in specific instances from the provinces to the federal government, and vice versa. But, written as it was in the wake of the depression of the '30s, it is likely that Rowell-Sirois had more in mind the former than the latter.

The issue of legislative delegation was dealt with conclusively in the 1951 *Nova Scotia Inter-Delegation* case,[8] where the Supreme Court struck down a proposed scheme which would have permitted the delegation of jurisdictional responsibilities from the province of Nova Scotia to Parliament, and vice versa, including a power to impose an indirect sales tax, if Parliament so agreed. This transfer of plenary jurisdiction over matters assigned "exclusively" to either level of government amounted, for the Court, essentially to an amendment to the constitution.[9] While Parliament or the legislatures could delegate responsibilities to subordinate agencies, they could not "abdicate their powers" and invest jurisdiction in bodies not empowered to accept such delegation.[10] The decision came under stinging criticism for the Court's failure to appreciate the nature of legislative delegation;[11] it was not an abdication of power, but an "entrusting...of the excercise of power...*with complete power of revocation or amendment remaining in the delegator.*"[12]

The direction of the transfer, from the provinces to the federal government, began to change even before the matter was taken up again in the constitutional conferences of 1950 and then again, more specifically, in the Fulton-Favreau proposals. The issue of a new delegation power was raised, and strongly promoted, by Premiers Macdonald of Nova Scotia and Douglas of Saskatchewan at the January 1950 Constitutional Conference of Federal and Provincial Governments. The matter then was referred, together with the larger question of an amending formula, to the Standing Committee of the Constitutional Conference.[13] Favreau reports in his *Amendment to the Constitution of Canada* that such a provision was proposed to circumvent the unanimity which likely would have been required in amending formulas being discussed at the time.[14] The matter dropped off the table in subsequent conferences,[15] and was not revived again until the early '60s.

The Fulton-Favreau proposal in 1960-61 included a new power to delegate in an amended s. 94 of the *British North America Act*,[16] and it is used as the failed benchmark for future proposals. It permitted instances of delegation from the provinces to the federal government in only a number of provincial matters, including the very broad power over property and civil rights, and unlimited transfers of federal matters to the provinces. The delegation would take the form of a statutory scheme, and no statute could take effect without the consent of a number of legislative assemblies and Parliament. In order for any delegation, in either direction, to occur, at least four provinces normally would have to participate. If other provinces did not participate, in the case of a provincial transfer to Parliament, Parliament had to declare that it had consulted with the governments of all of the provinces, that the statute in question was of concern to fewer than four provinces, and that those provinces had consented to the delegation. As delegation did not signify abandonment of jurisdiction, provisions were made for the revocation of consent by the delegator and the repeal of statutes.[17]

The formula was cumbersome and impractical: as William Lederman wrote, the delegation proposals were either "dangerous or useless."[18] Moreover, wrote Lederman:[19]

> Certainly it can have no attraction to those who desire to develop a particular status for Québec, because the consent of four Provinces would be required for a delegation of federal powers, and where are Québec's three companions in the circumstances?

In the meanwhile, the courts became more receptive to the idea of delegation through administrative channels. Federal schemes, for example, which delegated regulatory responsibility to provincial administrative agencies were constitutionally permissible,[20] as was a federal statute which delegated wholesale responsibility for licensing to provincial transport boards.[21]

These devices provided the kind of flexibility demanded of modern societies with divided jurisdiction. Compared to previous proposals for a delegation power, the "practical result achieved by the courts", wrote Gerald La Forest, "may well be as good as we are likely to get."[22]

Nonetheless, subsequent proposals for a delegation power were included in the 1979 Pepin-Robarts Report,[23] which recommended recognition of the power to delegate "by mutual consent, legislative powers on condition that such delegations be subject to periodic revision and be accompanied where appropriate by fiscal compensation."[24] The Québec Liberal Party "Beige Paper" recommended such a power which could be used for specific purposes, for a limited duration, and ratified by a new Federal Council.[25] The Macdonald Commission on the Economic Union also recommended amendment to the constitution to permit legislative delegation.[26] More recently, the Beaudoin-Edwards Committee appointed to study the process for amending the constitution of Canada in the wake of the death of Meech Lake, "strongly" recommended that the joint parliamentary committee study the question "in the framework of the division of powers."[27] This was necessary because Beaudoin-Edwards advocated the adoption of an amending formula which employed four regional vetos. This was the kind of unanimity requirement the Premiers in 1950 feared would stifle constitutional change and which generated the exploration for a delegation mechanism.

PRESENT CONCERNS

Many of the concerns which motivated a delegation power have been alleviated by the 1982 amending formulae. No province (except for the few matters listed in s.41) has a veto over constitutional change: transfers of legislative power can be accomplished with the assent of at least seven provinces representing at least fifty percent of the population. It could be argued that some of the work of a delegation power can be accomplished using the s.43 amending formula, amendments involving one or more, but not all, of the provinces.[28] None of the formulae, admittedly, have the flexibility which can be gained by legislative delegation.

Moreover, much of what the courts may have prohibited in the past, and which fuelled discussion of a delegation power, can now be accomplished by

administrative delegations and incorporations of another jurisdiction's legislative schemes by reference. As Peter Hogg describes the present situation, what could not be done directly can now be done indirectly.[29]

What are some of the aims, then, that can be served by the proposed delegation power? As the Allaire Report suggests, jurisdictional responsibility could be streamlined to make more "efficient" the economic union, so as to reduce overlap or gaps in power. But, streamlining could flow not only from Parliament to the provinces.[30] For example, provinces could consent to a federal scheme for securities regulation. Equity concerns could be addressed: for example, provinces could consent to having Parliament legislate directly over child care in order to institute a national day-care strategy. But, what if some provinces decline to participate in the delegation to Parliament? These concerns were raised in the economic union context by A.E. Safarian:[31]

> Frequent resort to delegation could bring about disparity in supposedly national programs with common market objectives in the event that one or more provinces declined to delegate. In the face of changing economic conditions and changing federal and provincial perceptions of interests, it places a heavy load on negotiation between governments to achieve consistency on a continuing basis.

Perhaps the most practical application of the delegation power would be in one-on-one circumstances, where the exigencies of one province call for immediate, but revocable change. Or, it can facilitate the idea of federalism as a social laboratory. Premier Tommy Douglas, at the 1950 constitutional conference, described the delegation power as "a useful means for testing action by results, which may be very important in affording evidence to whether there should be a permanent transfer of legislative jurisdiction from the dominion to the provinces or vice versa."[32]

Further, what are the implications for political accountability? Professor Lederman, as already noted, characterized the power of legislative delegation as "dangerous".[33] He feared the obfuscation of jurisdictional responsibilities which would result from frequent use of the delegation power:

> It would be all too easy to engage frequently in such delegation under strong but temporary political pressures of the moment, thus creating a patch-work pattern of variations Province by Province in the relative powers and responsibilities of the federal and provincial legislatures. This could seriously confuse the basic political responsibility and accountability of members of the federal Parliament and the federal Cabinet, and too much of this could destroy these federal institutions.

Transfers of legislative power could confuse, and confound, the citizenry about who is responsible for what. Moreover, the consultative and consensual nature of a delegation power can dull otherwise imaginative and progressive legislative schemes. This critique should be of considerable concern in any democracy, particularly one based on federal principles.[34] But, it could be that Lederman presumes too little: that the Canadian public is not conscientious and vigilant enough to ascertain those spheres of responsibility when necessary and then take to account those responsible. He may also presume too much: that the Canadian public already has a clear conception of jurisdictional responsibilities which would be undermined by legislative delegation.[35] The complaint also assumes that this intermeshing of responsibilities has not already been achieved, to some degree, under the present constitutional arrangements; an assumption which Hogg, among others, discredits.[36]

THE PRESENT PROPOSAL

Safeguards

It is presumed that delegations will occur as has been described in earlier proposals: each delegation will be for specific purposes and pursuant to statute. What otherwise could have been accomplished pursuant to constitutional amendment, could become a *de facto* amendment. In other words, once having delegated power, it may be unlikely that such power would be reclaimed back. Justice Rand foresaw this possibility in the *Nova Scotia Inter-delegation* case: "Possession here as elsewhere would be nine points of law...The power of revocation might in fact be no more feasible, practically, than amendment" of the constitution.[37] If that would be the practical effect, if not the intention, of delegation, it would be highly inappropriate to avoid the constitutional requirements for amendment. For this reason, it would be appropriate to have a sunset clause of, say, five years included in any statute which gives effect to a delegation.[38] The legislatures would have to re-visit this delegation every five years, as required when opting out of Charter rights and freedoms under s.33, then debate and decide either to renew or let lapse their legislative commitment to this delegation. Repeal of delegation statutes, or revocation of consent, could occur prior to the five year period, with proper notice.[39] No delegation, it could be argued, is thereby permanent, rather, the emphasis is on the nature of delegation as borrowed jurisdiction.[40]

Concerns over financial compensation for accepting a delegation will arise. The Pepin-Robarts Report suggested that, where appropriate, financial

compensation follow the delegation. The Québec Liberal Party in 1980 also preferred that the government delegating continue to assume the financial burden of the activities delegated. Given the temporary shifting burden involved in delegation, it would be sensible that financial responsibility reside with the delegating jurisdiction, and that in most cases equivalent fiscal resources be made available to the receiving jurisdiction to carry out its new responsibilities.

And, in order to overcome the objections raised in the *Nova Scotia Inter-delegation* case, that the division of powers in the constitution assigns the power to make laws "exclusively" to either Parliament or the provincial legislatures, it would be advisable that any amendment take the form of a notwithstanding clause. This was proposed in the Fulton-Favreau formula and by the First Ministers in April 1981.[41]

Could, as the Canadian Bar Association suggests, the federal government transfer jurisdiction over "Indians and Land reserved for Indians" under the proposed power?[42] Aboriginal peoples look first to the federal government for the honouring of treaty obligations and aboriginal rights: they have a "principal and special relationship with the federal government...[the] relationship with provincial governments is secondary."[43] The Supreme Court of Canada has described this special relationship as "trust-like", "requiring a high standard of honourable dealing" on the part of the federal Crown.[44]

Section 35.1 commits the government of Canada and the provincial governments to convene a constitutional conference to which aboriginal representatives will be invited to participate in the event that "any amendment" is proposed to be made to s.91(24) of the *Constitution Act, 1867*. As the delegation is not an "amendment", s.35.1 offers little protection to aboriginal peoples who, as long as they remain a "subject matter" under s.91(24),[45] could be subject to legislative delegation. As a result, it is imperative that any delegation power between the federal and provincial governments exclude a s.91(24) transfer or that s.35.1 be amended to include delegations and beefed-up to give aboriginal peoples a vote at the conference table.[46]

Consideration could also be given to delegations between aboriginal governments and the federal or provincial governments. While this would not satisfy completely demands for full control over local aboriginal government, it could provide the opportunity for future cooperation and experimentation.

Amending Formula

Henri Brun, in his testimony before the National Assembly Commission to Study All New Constitutional Offers, suggested that the federal proposal for a new delegation power would trigger the rigours of the unanimity formula. He argued that, as this was an enabling provision which permitted future re-divisions of power, this would be an amendment to the amending formula, requiring the unanimous approval of all of the provinces.[47]

This is an interesting, and somewhat compelling, argument. One's conclusion may turn on how one characterizes the purpose or intent behind the amending formulae. The amending formulae concern: amendments affecting only Parliament or only the provincial legislatures; amendments of concern to Parliament and all of the provinces; and amendments which concern Parliament and one or more but not all provinces. The formulae which apply to amendments of concern to Parliament and all of the provinces, or one or more but not all provinces, provide a method for changing the distribution of powers and certain national institutions. The formulae are concerned only with *permanent*, as opposed to *temporary*, changes to jurisdiction or national institutions. But, delegations are only temporary; ultimate jurisdiction continues to reside as mandated in the constitution. In this way, the delegation operates as does the proposed spending power provision: both will permit temporary alterations of spheres of jurisdiction. Those alterations will be by ordinary statute, subject to repeal, perhaps with notice, in the ordinary way. With appropriate safeguards, the proposed delegation power should be seen as enabling administrative agreement between two levels of government, and not an amendment to the amending formula.

Another response may be to argue that the proposed delegation power would not be included in Part V of the *Constitution Act, 1982*, and would not be, thereby, "an amendment to this Part". It may be significant that previous proposals, such as the Fulton-Favreau formula, suggested that the power be included as an exception to ss. 91 and 92 and be placed in either sections 93 or 94 of the 1867 Act. But, this does not directly address the concerns raised by Professor Brun.[48]

It is worth noting that, if Brun is correct, and temporary transfers of jurisdiction are included in the amending formula, not only would the delegation power be caught by unanimity, but so would the proposed spending power, the enabling provisions for agreements regarding culture and immigration, and possibly the new federal power to make laws for the efficient functioning of the economic union.

CONCLUSION

In the present political context the delegation power can achieve some of the aims of the Québec government, namely, devolution of responsibility from Parliament to the Québec National Assembly in a number

of key areas. Peter Meekison, for example, cites unemployment insurance as a subject matter ripe for transfer under a new delegation power.[49] Other likely candidates could be communications, marriage and divorce, or even the power of indirect taxation.

Will this kind of asymmetry be politically acceptable to a public already deeply suspicious about the substance of constitutional reform in so far as it meets Québec demands? At the Halifax constitutional conference on the division of powers, reaction to this proposal "was largely negative". Some called it "back door asymmetry". On the other hand, the conference delegates preferred that Québec's aspirations be met more directly through administrative, rather than legislative, delegation or a direct transfer of specific powers.[50]

Would the proposed delegation power satisfy the concerns of the government of Québec? Past proposals for legislative delegation made clear that legislative transfers were only available through specifically approved statutory schemes, revocable on the insistence of either party. And, concerns about the transfer of financial compensation related to the delegation remain unclear. This hardly qualifies as the type of "profound change" the Bélanger-Campeau report calls for;[51] it provides neither the stability or autonomy called for in the Allaire Report as guiding objectives in the new political and economic order.[52]

In the result, it may be that the proposed delegation power, arising long after the crisis which precipitated its consideration; after other forms of delegation have succeeded in achieving similar objectives; after an amending formula is in place which does not require unanimity for general redistribution of powers; and after demands from the province of Québec have outstripped any accommodations which may have been available under a federally-controlled delegation power, will be relegated to the backwater of constitutional amendments, available, when necessary, for administrative convenience but with little contemporary resonance.

But, it could also result in more effective and creative governance. The delegation power furthers the aim of federalism, providing "laboratories for different types of public policy"[53] which may be more responsive to the demands of differing political communities within Canada.

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1. See "Breaching the Barriers" *Maclean's* (6 January 1992) 54.
2. See Alan Cairns, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake* (Toronto: McLelland and Stewart, 1991)
3. See W.R. Lederman, "Some Forms and Limitations of Co-operative Federalism" (1967) 45 Can. Bar Rev. 408 at 417.
4. See Lord Watson in *C.P.R. v. Notre Dame de Bonsecours*, [1899] A.C. 367 quoted in Lefroy, *Canada's Federal System* (Toronto: Carswell, 1913) at 70.
5. *A.G. Can. v. A.G. Ont.*, [1937] A.C. 355.
6. *A.-G. B.C. v. A.-G. Can*, [1937] A.C. 377. See generally J.A. Corry, *Difficulties of Divided Jurisdiction* (A Study Prepared for the Royal Commission on Dominion-Provincial Relations) (Ottawa: King's Printer, 1939) at 11-20.
7. Donald Smiley, ed., *The Rowell-Sirois Report, Book 1* (Toronto: Macmillan, 1978) at 198.
8. [1950] 4 D.L.R. 369 (S.C.C.).
9. See *ibid.* at 377, per Taschereau J.
10. *Ibid.* at 381-82, per Taschereau J.
11. See, for example, Ballem, Case and Comment, (1954) 32 Can. Bar Rev. 788; Bourne, Case and Comment (1965) 34 Can. Bar Rev. 500.
12. Raphael Tuck, "Delegation — A Way Over the Constitutional Hurdle" (1945) 23 Can. Bar Rev. 79 at 89 (emphasis in original).
13. See *Proceedings of the Constitutional Conference of Federal and Provincial Governments* (January 10-12, 1950) (Ottawa: King's Printer, 1950) at 21 and 37, respectively. The provinces of Manitoba and New Brunswick also supported the proposal.
14. In Anne F. Bayefsky, *Canada's Constitution Act, 1982 & Amendments: A Documentary History*, Vol.I (Toronto: McGraw-Hill Ryerson, 1989) at 45.
15. See *Proceedings of the Constitutional Conference of the Federal and Provincial Governments* (Second Session, September 25-28, 1950) (Ottawa: King's Printer, 1950) at 36.
16. It was also proposed that it be included as s.93A. See Bayefsky, *supra*, note 14, Vol.I at 11.
17. See generally Eugene Forsey, "The Canadian Constitution and its Amendment" in *Freedom and Order* (Toronto: McLelland and Stewart, 1974) 227.
18. *Supra*, note 3 at 427.
19. *Ibid.*
20. *P.E.I Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392.
21. *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569.
22. Gerard V. LaForest, "Delegation of Legislative Power in Canada" (1975) 21 Can Bar Rev. 131 at 147.
23. The McGuigan-Molgat Committee and the Canadian Bar Association both recommended only permission to delegate administrative, and not legislative, powers. See Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, 1972, "Final Report" in Bayefsky, *supra*, note 14, Vol.1 at 260 and Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (Ottawa: Canadian Bar Foundation, 1978) at 66-67.
24. The Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Supply and Services, 1979) at 104.
25. The Constitutional Committee of the Québec Liberal Party, *A New Canadian Federation* (Montreal, Québec Liberal Party, 1980) at 71-72.
26. Royal Commission on the Economic Union and Development Prospects for Canada, *Report,* Vol.3 (Ottawa: Supply and Services, 1985) at 256-257.
27. Report of the Special Joint Committee of the Senate and the House of Commons, *The Process for Amending the Constitution of Canada* (June 1991) at 29.
28. See, for example, "An Option if Meech Lake is Not Ratified" (ed), *The Globe and Mail* (27 April 1990) A6. The consensus as to the original intent behind the provision appears to be that it is not available for re-divisions of power under ss. 91 and 92. See J.

Peter Meekison, "The Amending Formula" (1982) 8 Queen's Law J. 99.
29. *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 303. But see E.A. Dreidger, "The Interaction of Federal and Provincial Laws" (1976) 54 Can. Bar Rev. 695 at 700-703.
30. As proposed by F.R. Scott, "Social Planning and Canadian Federalism" in M. Oliver, ed., *Social Purpose for Canada* (Toronto: University of Toronto Press, 1961) at 399.
31. *Canadian Federalism and Economic Integration* (Ottawa: Information Canada 1974) at 104.
32. *Supra*, note 15 at 37-38.
33. *Supra*, note 3 at 426.
34. For the same concerns in the spending power context see Andrew Petter, "Meech Ado About Nothing? Federalism, Democracy and the Spending Power" in K. Swinton and C. Rogerson, eds, *Competing Constitutional Visions* (Toronto: Carswell, 1991) at 190-192.
35. See LaForest, *supra*, note 22 at 146.
36. Hogg, *supra*, note 32 at 300. See also McDonald Commission at *supra*, note 29 at 257.
37. *Supra*, note 8 at 387.
38. *Supra*, note 27 at 104.
39. As the notice requirement may be constitutionalized, it may be distinguished from *Reference re Canada Assistance Plan*, [1991] 6 W.W.R. 1 (S.C.C.).
40. See *Laskin's Canadian Constitutional Law*, 5th ed., Vol.1 (Toronto: Carswell, 1986) at 43.
41. Bayefsky, Vol.2, *supra*, note 14 at 812-813.
42. Canadian Bar Association, *Rebuilding a Canadian Consensus* (Ottawa: C.B.A., 1991) at 291.
43. Assembly of First Nations, *First Circle on the Constitution* (November 21, 1991) at 22.
44. See *R. v. Sparrow* (1990), 70 D.L.R. 385 (S.C.C.) at 408-409.
45. This idea is borrowed from Patricia A. Monture-OKanee,"Seeking My Reflection: A Comment on Constitutional Renovation" in D. Schneiderman, ed., *Conversations: Women and Constitutional Reform* (Edmonton: Centre for Constitutional Studies, 1992) at 30.
46. See Andrew Bear Robe, "First Nations and Aboriginal Rights" (1991) 2:2 Constit. Forum 46
47. Québec, Assemblée Nationale, Commission parlementaire spéciale, *Journal des débats* (10 Octobre 1991) CEOC-97.
48. There may be other reasons why a delegation amendment may trigger unanimity, for example, it could be argued the "office of the...Governor General and Lieutenant Governor of a province" is amended. But see Hogg, *supra*, note 32 at 292.
49. "Distribution of Functions and Jurisdictions: A Political Scientist's Analysis" in Ronald L. Watts and Douglas M. Brown, *Options for a New Canada* (Toronto: University of Toronto, 1991) at 279.
50. Atlantic Provinces Economic Council, "Renewal of Canada: Division of Powers Conference Report" (January 22, 1992) at 16.
51. Québec, *Report of the Commission on the Political and Constitutional Future of Québec* (March 1991) at 72.
52. Liberal Party of Québec, Report of the Constitutional Committee, *A Québec Free to Choose* (January 28, 1991) at 25.
53. See Katherine E. Swinton, speaking of the value of diversity in federal jurisdictions in *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990) at 49.

ESSAY

"THE WEST": MYTH OR REALITY IN THE CONSTITUTIONAL REFORM PROCESS?

A. Anne McLellan

INTRODUCTION[1]

For many Canadians, "the West" is apparently not merely a geographic location but short-hand for a common set of constitutional grievances and demands. For those who live outside the West, there is a belief that the four provinces which comprise the region will speak with one, unvarying voice on constitutional matters. For example, many believe (perhaps, including the federal government) that the West wants Senate Reform and, in particular, reform based upon the principal of "Triple E". There is also a perception that the West seeks greater decentralization of power from the federal level to the provincial. As I listen to constitutional experts comment on what will be needed to keep our country together, I am struck, again and again, by the assumption that the West has a common set of concerns and a common set of demands to resolve these concerns. It will be my suggestion that this attitude is dangerously simplistic and probably wrong. As is more apparent as the months go by, the cleavages between the four western provinces are becoming more pronounced. They define the nature of our constitutional crisis differently and proffer diverse solutions for its resolution.

Of course, many Canadians can be forgiven for thinking that the West speaks with one voice. At least since the late 1970s, Canadians outside the region have heard, regularly and forcefully, a litany of Western grievances, most particularly concerning control over the region's national resources and the implementation of the natural energy policy. And of course, few Canadians who witnessed it, will forget the ongoing confrontation between the Premier of Alberta, Peter Lougheed, and the Prime Minister of Canada, Pierre Elliot Trudeau, over these and other matters.

It is my view that during this period (including the constitutional crisis of 1980-82) and up to the mid-1980s when he left office, Canadians outside the region assumed that the views and concerns of Peter Lougheed were synonymous with the concerns of the West. His was the voice heard most frequently, and most powerfully, during this time and for most of us living outside the region, his concerns *were* the West's concerns. It was during this time that Alberta assumed a prominence and influence in constitutional affairs that it only recently may have lost. The effect of this influence was to leave an impression that the Alberta agenda was the West's agenda, thereby creating the illusion that the four western provinces had identical constitutional concerns and demands.[2]

POLITICAL ECONOMIES AND IDEOLOGIES

There are a number of underlying socio-economic factors that I believe mitigate against the four western provinces sharing common constitutional agendas. I'll briefly outline some of them.

In Canada, we rather crudely categorize our provinces as being either "haves" or "have-nots". "Have" provinces are those which do not receive equalization payments from the federal government; these payments being unconditional transfers to less prosperous provinces. Only three provinces in Canada currently can claim this status: British Columbia, Alberta and Ontario. The economic strength and potential of these provinces is much greater than that of "have-not" provinces, such as Manitoba and Saskatchewan.[3] It is, therefore, not surprising to find that both Alberta and British Columbia have argued for greater decentralization within the Canadian federation. These provinces believe they should be left to develop and diversify their own economies, retain more of the benefits therefrom for their provincial treasuries, and establish their own social welfare and spending priorities, with minimal interference or guidance from the national government.

Massive decentralization appears to be of little interest to Manitoba and Saskatchewan; for example, one need only refer to the Manitoba Constitutional Task Force Report of October 28, 1991:[4]

> Our presenters were united in their view that the central government must have sufficient power and authority to redistribute wealth to the benefit of the have-less regions and the less advantaged citizens of our nation. This has been a central and enduring feature of our federal system much admired far beyond our boundaries.

Under the heading, "The Maintenance of a Strong Central Government", the Task Force offered its belief:[5]

> That in a period of intense international competition a strong central government is essential to national well-being. As well, a strong

central government can create a sense of nationhood and association between different parts of the country by supporting effective and visible institutions.

Manitobans believe that all Canadians should be able to share equitably in the resources and benefits of the nation as a whole. A strong central government is required for such programs as equalization, established programs financing (EPF) and the Canadian Assistance Program (CAP). We are concerned, therefore, by federal cutbacks to such programs. While means can be found to ensure that these national programs better reflect the regions, they are essentially national in scope and play a crucial role in preserving national unity.

The Manitoba Task Force Report calls for, at best, a tinkering with the present distribution of power. While I do not suggest that British Columbia and Alberta support the vision of a decentralized Canada propounded in the Allaire Report of the Québec Liberal Party,[6] it is fair to say that both provinces have argued for a decentralization of powers that goes well beyond that endorsed by the Manitoba Task Force Report.

The recent comments of Howard Leeson, a former senior advisor to the New Democratic government of Alan Blakeney in Saskatchewan, are also revealing in this regard. At a recent conference on the Constitutional Futures of the Prairie and Atlantic Regions, he was quoted as calling for "an agenda directed towards small farmers, workers and other powerless groups in the West."[7] He went on to say: "Such an agenda would guarantee a role for the national government in helping the economically subordinate regions."[8]

In addition, both Mr. Leeson and the Manitoba Task Force Report call for a strengthening of the equalization section of the constitution, as such a provision operates as a form of insurance for poorer provinces.

These comments reflect the economic reality of the provinces of Manitoba and Saskatchewan. Because the fiscal position of these provinces is such that they are net beneficiaries of federal transfer payments, they will not support any significant diminution in the ability of the federal government to redistribute wealth, be it through equalization, shared-cost programs, procurement programs, etc.

One should also be aware of the different sources of economic prosperity in the four western provinces. While it is true in general terms that the four provinces depend largely upon the exploitation of natural resources for their economic well-being, there are significant differences in relation to the nature of these natural resources and the markets for them. For example, in a recent paper, Chambers and Percy document the following:[9] approximately 50% of Alberta's total exports come from crude petroleum and natural gas. In British Columbia, approximately 50% of that province's total exports come from the forest; in Saskatchewan, wheat represents 27% of the province's total exports, with crude petroleum representing 20% and potash 13%. Manitoba presents quite a different picture, with only 23% of its exports coming from natural resources (wheat - 14%; nickel and alloys - 6.12; canola - 3.17%).

The distinctive nature of Manitoba's economic base has led Professor Paul Boothe to question whether its economic interests might not be more closely aligned with those of Ontario than those of the other three western provinces.[10]

As these statistics point out, despite the importance of the natural resource and agricultural sectors in each of the western provinces, significant economic diversity exists between them. Chambers and Percy have observed in relation to patterns of employment:[11]

> The comparison of employment across the four western provinces indicates that differences between the provinces are also striking. Within the prairie provinces, agriculture's relative importance in Saskatchewan is more than twice as great as in Alberta and Manitoba. In all provinces the proportion of employment in the non-agricultural primary industry exceeds the national, more so in Alberta than the other three provinces because of the energy sector. While all four provinces have smaller shares of employment in manufacturing than the national average, manufacturing is relatively more important in B.C. and Manitoba.

Further, when one considers the export destinations of goods produced in the four western provinces, one is immediately aware of differences which may have significance for ultimate constitutional positions.

Current Dollar Exports of Goods by Destination in 1984[12]

	Interprovincial Trade	International Trade
Manitoba	59.2	40.8
Saskatchewan	35.4	64.6
Alberta	61.1	38.9
B.C.	23.2	76.8

Source: Unpublished Provincial Input-Output Data, Input-Output Division, Statistics Canada.

Manitoba and Alberta are much more dependent upon inter-provincial trade than either Saskatchewan and British Columbia and therefore may be more concerned with the effect of interprovincial trade barriers upon their ability to do business. In contrast, the economic well-being of British Columbia is largely dependent upon international trade, and in particular, trade with United States and the Pacific Rim. Indeed, trade with the Pacific Rim now represents approximately 40% of the province's total exports.[13] This diversification of markets will ultimately make B.C. less vulnerable to the vagaries of both the Canadian and U.S. economies and will probably ensure that B.C.'s constitutional concerns in relation to trade will have a particular international dimension.

It is important to keep in mind these kinds of differences between the four western provinces when predicting their ultimate constitutional positions. Reliable and accessible markets will ensure the economic well-being of the four provinces — however, the location, and relative importance of these markets, will vary among the provinces, as will their constitutional positions regarding topics such as economic union, trade policy, tariff barriers, etc. Chambers and Percy offer the following caution about the West:[14]

> ... despite the importance of natural resource and agricultural sectors in each of the Western provinces, significant economic diversity exists between them. These intra-regional differences are probably sufficiently large that many of the problems which currently confound federal-provincial relations would remain, and perhaps be even more serious for a grouping of western Canadian provinces. For example, the issue of regional disparities, the need for an equalization mechanism and of the possible conflicts between equity and efficiency would remain.

A further basis for distinction between the four provinces is the political ideology of the governments presently in power. Recent elections have returned New Democratic governments to power in Saskatchewan and British Columbia. As one might expect from social democratic governments, even moderate ones, such as those in Saskatchewan and British Columbia, their rhetoric speaks of concern for the powerless and the disadvantaged and the necessity to redistribute wealth to ensure that these people share in what is generally a very high standard of living enjoyed by most Canadians. This is not the rhetoric of the present Conservative government of Alberta and it is unclear, at this point, what the formal position of the Conservative government of Manitoba will be. However, if one looks to the Manitoba Constitutional Task Force, one sees a much greater concern with issues of social welfare than one does in Alberta. I presume that these expressed concerns with the powerless and the disadvantaged will lead to a somewhat different constitutional agenda than that which is being proposed by Alberta. Indeed, while neither Premiers Romanow or Harcourt have embraced Premier Rae's notion of a "social charter", it is my sense that, by whatever name, we will see a greater infusion of social welfare issues into the present constitutional debate than we have so far.[15]

In addition, the New Democratic governments of British Columbia and Saskatchewan appear to have a much stronger commitment to aboriginal self-government than does, at least, Alberta.[16] In the case of British Columbia, this is a remarkable reversal of position — considering that the Social Credit government of Premier Bill Vander Zalm consistently refused to recognize Aboriginal claims to self-government. The degree of commitment to the inclusion, and definition, of the right to aboriginal self-government in this constitutional round will probably prove to be yet another point of distinction between the four western provinces.

BRITISH COLUMBIA — CANADA'S FIFTH REGION?

I will briefly outline a few facts which might support the recognition of British Columbia as a fifth region in Canada, a position the province has asserted for sometime. British Columbia is to a large extent geographically isolated from the rest of Canada, due to the presence of the Rocky Mountains. In addition, of the four western provinces, it is the only maritime province. While it is true that Manitoba has a small sea coast on the Hudson Bay and one port at Churchill, this hardly qualifies Manitoba as a maritime power. British Columbia, on the other hand, is a province defined, to a large extent, by the ocean. British Columbia views its relationship with other Pacific Rim nations as crucial to its economic survival.[17] In addition, if one considers some of the areas of constitutional concern which have been identified by the province as important to its development and prosperity, one appreciates their uniqueness; fisheries, ocean oil tanker regulation, offshore resources, law of the sea issues, maritime boundaries, harbour development and ocean shipping.[18] British Columbia's main trading partners are Pacific Rim nations and the United States; therefore, its concerns in relation to international trade policies and tariff barriers will to some extent be different from those of the other three western provinces.

It should also be kept in mind that the population of British Columbia is growing at twice the national average, a fact which merely exacerbates its resentment at what it sees as a lack of equitable representation in our federal institutions. However, unlike the Smith Report, which points to B.C.'s leadership role in calling for the reform of the country's central institutions[19] and which calls for a

reformed Senate, the present New Democratic government has recently announced that it will not support the concept of a Triple-E Senate. The Government appears to believe that the province's long term interests can be better served by gaining additional legislative powers and not through reformed a Senate.

In summary, I believe that a reasonably convincing argument can be made for viewing British Columbia as a distinct region of Canada and one that can rightly argue that it has little in common with its three prairie neighbours.

SIMILARITIES

In spite of the points of difference outlined above that exist between the four western provinces, there are important similarities. The most important of these is an intense feeling of alienation and exclusion from federal institutions of government, be it Parliament, the Cabinet, the S.C.C. or regulatory boards and agencies, such as the C.T.C., C.R.T.C., N.E.B. and the National Harbours Board. For example, Smith reported that in a 1988-89 study of 31 major federal boards and commissions, only 7% of their membership (directors) came from British Columbia.[20] The four western provinces share a sense of being a "hinterland", possessing only limited influence over decision-makers in Ottawa. This sense of alienation and lack of effective voice have been heightened by certain notable events, which have taken on almost "mythic" proportions.[21] I offer, as examples, the National Energy Policy, a policy of the Trudeau Liberal government of the early '80s which stripped the western oil and gas producing provinces of significant revenues from, and control over, their natural resources; and the apparently blatant politicization of the process by which federal government contracts, such as the CF-18, are awarded.

The primary constitutional reform that has been proposed to overcome these feelings of alienation and exclusion is that of Senate reform and in particular, a Triple-E Senate. This is a position strongly endorsed by the government of Alberta. However, support for this model in the three other western provinces is more difficult to gauge. There does not appear to be strong support for the notion of a Senate, made up of equal numbers of Senators from each province, other than in Alberta. The Manitoba Constitutional Task Force calls for equitable representation, as did the Smith Report. As mentioned above, British Columbia appears to no longer have any particular interest in Senate reform and the government of Saskatchewan, while not yet indicating its position, is unlikely to demand equality in representation. There is greater general support for the concept of an effective and elected Senate. But with British Columbia's recent decision to forsake Senate reform, it is no longer realistic to suggest (if it ever was) that Senate reform is the paramount constitutional demand of the West.

Further, during the '70s, there were a number of significant Supreme Court of Canada decisions in which the western provinces felt that the Court reflected an unacceptable centralist bias. Two of these cases, *CIGOL*[22] and *Central Canada Potash*,[23] placed significant limitations upon the ability of resource-producing provinces to regulate those resources in the inter-provincial and international markets. These defeats, probably felt most profoundly by Alberta and Saskatchewan, led even ordinarily reasonable and level-headed politicians, like then Premier Alan Blakeney of Saskatchewan, to suggest that the Supreme Court was biased in favour of the federal government.[24]

While the concerns of the western provinces, at least in relation to the development and exploitation of their natural resources, were accommodated to some extent by the inclusion of section 92.A in the *Constitution Act, 1982*, there is still strong support for some provincial involvement in the selection of Supreme Court of Canada justices. For example, the Meech Lake accord, which would have required the federal government to select Supreme Court justices from lists provided by the provinces, was seen in the West as an important first step in ensuring provincial "input" in the make-up of this important federal institution. However, such participation in the appointment process is a far cry from the proposal put forth by the Smith Report, in which the author recommends that the Supreme Court should have ten members and that the make-up of the Court at all times should be representative of the five regions of Canada, those regions being the Atlantic, Québec, Ontario, the Prairies and British Columbia.[25]

A further irritant for many in the West is the continued reference to the concept of duality in Canadian constitutional law, referring to the English and the French. Westerners will concede that in 1867, two founding peoples was the socio-political reality. What they find more difficult to accept, in 1991, is that the concept should continue to be a controlling constitutional principle. The reality of the West is that of a region in which only 35% of the population identify their ethnic origin as English or French.[26] Westerners are suspicious of any constitutional proposal that appears to give "special status" to one ethnic group over others. This suspicion is translated into ambivalence, if not hostility, toward any form of distinct society clause. During the Meech Lake debate, it became clear that even the possibility of Québec gaining special powers to preserve and promote its distinctiveness was unacceptable to the majority of westerners. Interestingly, however, the premiers of British Columbia, Alberta, and Saskatchewan supported the Meech Lake Accord throughout, with the Premier of Manitoba being the only dissident. However,

in this constitutional round, Premier Getty of Alberta appears to be resiling from his support for the inclusion of a distinct society clause, while his fellow western premiers appear to be much more receptive to the idea. While the principle of "provincial equality" is still an important demand from the government of Alberta, it appears to have less resonance with the governments of British Columbia, Saskatchewan and Manitoba.

CONCLUSION

Obviously, there are important historic and economic similarities among the four western provinces. Further, they share strong feelings of alienation and exclusion from federal institutions. However, on balance, it is my opinion that the differences between the four western provinces outweigh these similarities, thereby making it very difficult and perhaps, even futile, to suggest that there is a "western position" in relation to constitutional reform. The agendas of the four western provinces reflect there should be no expectation that they will speak with one voice in the ongoing constitutional reform process. Indeed, it is my opinion that the differences outlined above will become more pronounced over the coming months, thereby further adding to the array of constitutional "bottom lines" upon which compromise will be required.

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1. Comments presented at the Association for Canadian Studies in the United States, 20th Anniversary Conference, Boston, November 22, 1991.
2. This comment does not ignore the involvement of Premier Blakeney and his government in constitutional affairs during this time. It is simply to reflect my opinion that the dominant player of the time was the Premier of Alberta.
3. On a related point, Roger Smith has documented the disparity in fiscal capacity of the Western provinces. He makes the point that although tax bases are similar for all major taxes and rates are similar, this does not provide for equal fiscal residuals. "At similar levels of local and provincial taxes, in 1982 Alberta could have supported a percapita level of expenditure that was 2.8 times that in Manitoba, and double that in Saskatchewan and British Columbia. Fiscal capacity in Saskatchewan and British Columbia was 40% that in Manitoba. These disparities fell sharply with the fallen energy prices, but remain substantial. By fiscal 1992, fiscal capacity in Alberta was still nearly 1.7 times that in Manitoba." See: Smith, Roger "Constitutional Reform and the Structure of Government: Fiscal Residuals in the West - A Reason for Getting Together", The Economics of Constitutional Change Series, Article No. 2 - June 1991.
4. Report of the Manitoba Constitutional Task Force, October 28, 1991 at 8.
5. *Ibid.* at 40-41.
6. A Québec Free to Choose, Report of the Constitutional Committee of the Québec Liberal Party, January 28, 1991.
7. As reported in the Globe and Mail, Tuesday, November 12, 1991.
8. *Ibid.*
9. Chambers and Percy, "Natural Resources and the Western Canadian Economy: Implications for Constitutional Change", The Economics of Constitutional Change Series, Article No. 5/June 1991. These percentages are compiled from Table 2: Leading 5 Commodity Exports by Province as a Percent of Total Exports.
10. Boothe, Paul, "The Economics of Association: A Regional Approach to Constitutional Design" Research Paper No. 91-11 (A paper prepared for the C.D. Howe Conference on Constitutional Futures, Toronto, November, 1990).
11. *Ibid.* at 4.
12. Canadian Federalism and Economic Union Partnership for Prosperity (Minister of Supply and Services, Ottawa, 1991) at 10.
13. Smith, Melvin, H. Q.C., *The Renewal of the Federation, A British Columbia Perspective* (May, 1991) at 3-4.
14. *Ibid.* at 12.
15. Together with Ontario, these governments now represent over 52% of the population of Canada. As a result, these three provinces may become a potent force in any future constitutional reform, in that, our amendment formula requires the agreement of seven provinces representing 50% of the population. If the provinces of Saskatchewan, British Columbia and Ontario were to agree on the nature of the fundamental constitutional change they wish to see take place, they could prevent any proposed change not in keeping with their vision.
16. The Manitoba Task Force also calls for the recognition of the inherent right of aboriginal peoples to self-government.
17. *Supra*, note 13 at 3-4.
18. *Ibid.*
19. *Ibid.* at 7.
20. Premier's Office, (Intergovernmental Relations) An Analysis of B.C. Representation on Major Federal Crown Corporations and Boards, F.Y. 1988-89, (January, 1990) as reported in Smith, *Ibid.* at 63.
21. See, for example, the draft speaking notes of I.H. Asper, Q.C., as presented at the Canada West Conference — Alternatives 1991, Banff Springs Hotel, September 27, 1991 in which he refers to the NEP as "fiscal rape".
22. [1978] 2 S.C.R. 545
23. [1979] 1 S.C.R. 42
24. This expressed concern with bias was dealt with by Peter Hogg in an article entitled "Is The Supreme Court of Canada Biased in Constitution Cases?" (1979) 57 C.B.R. 721 in which Professor Hogg concluded there was no evidence of centralist bias.
25. *Supra*, note 14 at 62.
26. *Supra*, note 10, Figure 2, Ethnic Origin.