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Article abstract

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Constitutional Patriation as prologue: phase two constitution-making and reform of federal institutions

Edward McWHINNEY *

L'auteur évalue l'opération de rapatriement de la Constitution du Canada entreprise de 1980 à 1982. Il juge qu'elle fut un exercice imparfait ou, du moins, incomplet. Il se demande si la phase deux de l'élaboration de la Constitution se concrétisera.

For numbers of reasons, it may be suggested that the recent Canadian constitutional « patriation » project, over the period 1980–82, was a flawed, or at least incomplete, exercise in constitution-making.¹ It did, to be sure, remove some historical anachronisms, — albeitly belatedly and long after the movement of historical events had reduced the Imperial (British) rôle to a purely honorific or symbolic one. The old, Imperial (British) *Grundnorm* was, in effect, replaced in 1982 by a Canadian one; though what Prime Minister Trudeau called the « cutting of the Imperial Gordian Knot » had already been consummated in legal terms as early as the two Imperial Conferences of 1926 and 1930 and recognised, as such, by the British themselves in the *Statute of Westminster* of 1931.² And the substitution of a wholly Canadian constitutional amending process for the old, Imperial « made-in-Britain » machinery of a statute of the British Parliament enacted,

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1. Discussed, more fully, in the author's recent constitutional trilogy: *Quebec and the Constitution*, Toronto, University of Toronto Press, 1979; *Constitution-Making*, Toronto, University of Toronto Press, 1981; *Canada and the Constitution*, Toronto, University of Toronto Press, 1982.
2. See, generally, I. JENNINGS, « The Statute of Westminster and Appeals to the Privy Council », (1936) 52 *Law Quarterly Review* 173; R.T.E. LATHAM, « The Law and the Commonwealth », in W.K. Hancock (éd.) *Survey of British Commonwealth Affairs*, (1937), vol. 1, p. 533; and see also the present author's « "Sovereignty" in the United Kingdom and the Commonwealth Countries at the present day », (1953) 68 *Political Science Quarterly* 511.

in modern times, at the request and to the letter of the advice of the Canadian (federal) Government, merely did away with a vestigial survival from Imperial time past in which as British Prime Minister Margaret Thatcher, with cool political realism, recognised during the Canadian-British pre-patriation negotiations,³ the *rôle* of the British could be no more than purely formal and absolutely non-discretionary. The new *Canadian Charter of Rights and Freedoms* was, perhaps, another matter, constitutionally entrenched as it was in contrast to the earlier, purely statutory, Diefenbaker Bill of Rights of 1960. But, even here, since the actual substantive law contents of the new Charter were somewhat more modest and conventional than Prime Minister Trudeau and his advisers might privately have hoped, or publicly admitted after the event, the major change and impact is likely to be political-psychological in character. It should help to complete the shattering of the « classical », Imperial British and Common Law, constitutional-legal mind-set in which the higher judiciary in Canada have substantially operated since 1867. It should also, for better or for worse, speed up that process of « reception », already evident before World War II, of American legal thought-ways and substantive constitutional-legal ideas⁴ and, in particular the special institutional conception of a broadly legislating, policy-making Supreme Court both filling the gaps in existing law and also moving boldly to chart out new legal frontiers in response to new societal problems. Curiously enough, the enactment of the new Canadian Charter of Rights seems to have been ventured upon with very little advance consideration of the possible impact of a Court-based, Charter of Rights jurisprudence upon other institutions of federal Government, coordinate with the Court, and their own specialised constitutional *rôles* and missions, and also of the practical political consequences for traditional concepts of judicial independence and for the judicial appointing power and even claims to judicial tenure. These problems must now be faced after the event and appropriate constitutional remedies or counterweights devised, if the Supreme Court at least is to be spared embarrassing public attacks and criticism in the more overtly political arenas of government.

In one other major respect, the constitutional « patriation » project must also be considered as, at best, inchoate in character. It does not really address itself to the needs for constitutional up-dating and modernisation

3. *Canada and the Constitution*, *supra*, note 1, pp. x—xi, 68-9, 72-4, 90, 117, 125-6, 133.

4. As to the changing trends and emphasis in legal education in Canada and the « reception », post-War, of American constitutional and general legal ideas, in displacement of British ones, see « Legal Theory and Philosophy of Law in Canada », in E. MCWHINNEY (ed.), *Canadian Jurisprudence. The Civil Law and Common Law in Canada*, Toronto, Carswell, 1958, p. 1.

that are being faced by all other Western, or « received »-Western, constitutional systems today, some of these with relatively ancient constitutions and others with charters adopted as recently as the post-World War II wave of constitution-making.⁵ It is increasingly evident that the constitutional institutions and processes inherited from yesterday are not always attuned to the complex, multi-faceted decision-making of the contemporary post-industrial society, and that they may, at times, be a positive obstacle to rational community problem-solving. We need to rethink our federal institutions, and to devise new concepts of constitutional countervailing power, and institutionalised checks and balances.

For reasons canvassed elsewhere,⁶ it may be suggested that the times were not especially ripe for constitution-making and general acts of constituent power, in Canada and other Western societies, at the close of the decade of the 1970s and the beginning of the 1980s. It was a period of doubt, with forewarning of decline and decay. An era of economic growth and some public confidence and optimism for the future, had clearly come to an end in the West, without any significant new societal consensus having emerged as to new, realisable community goals and directions for the era of transition that would follow — in Canada, not less than in the World Community as a whole. One of the historical curiosities in the Canadian « patriation » exercise of 1980–2 was that in seeking to profit from one of those rare moments in any nation's history favourable to ambitious new constitutional projects — the public euphoria (in English-speaking Canada) resulting from the clear defeat of Premier Lévesque's « sovereignty-association » proposal in the Quebec referendum of May, 1980, and the consensus (among English-speaking Canadians) on the need to do something, in gratitude and compensation, for Quebec and French-Canada — the federal Government directed itself only marginally, and in passing, to the constitutional imperatives as to preservation of the French language and French culture and the historical duality of Canada itself, flowing from the preceding two decades of « Quiet Revolution » in Quebec. Indeed, and in so far as it touched on special Quebec issues, the federal Government's « patriation » project did so in ways not always seemingly congruent with Quebec opinion as expressed in the two great French Language Charters of two successive Quebec Governments of opposing political ideology — the Bourassa Government's Bill 22 of 1974 and Lévesque Government's Bill 101 of 1977.⁷

5. *Constitution-Making*, *supra*, note 1, pp. 12 *et seq.*

6. *Ibid.*; and see, also, « The vocation of our age for law-making: constitutional and international codification in an era of transition and rapid change », in A.R. BLACKSHIELD (ed.), *Legal Change. Essays in Honour of Julius Stone*, 1983, pp. 241 *et seq.*

7. *Quebec and the Constitution*, *supra*, note 1, pp. 56 *et seq.*

The new constitutional ideas in Canada since 1960 are largely Quebec derived or Quebec inspired, — from French-Canadian jurists and politico-logues and political leaders, in Quebec City or in Ottawa. Such Anglo-Canadian thinking on constitutional change as there has been, has tended to be purely reactive in character — a delayed and usually only partial and limited response to original Quebec proposals, advanced either by Quebec Provincial political and intellectual leaders within Quebec itself, or by Quebec federalist political leaders within the federal Government in Ottawa. Such Anglo-Canadian responses have tended to occur some time after the event, and often too late to be effective or relevant in constitutional problem-solving. The federalist impulse within the more generalised Quebec intellectual *Risorgimento* is now associated, in its origins, with the then Professor Trudeau and the group of young intellectuals he assembled under the *Cité Libre* banner in Montreal,⁸ and found its practical outlets, ultimately, in the pursuit of French-Canadian power within the Canadian Government itself; the establishment of a significant and continuing French presence within the federal Cabinet and the federal bureaucracy; and the consolidation and, where need be, implantation of the French fact throughout Canada through the constitutionalisation of French-English bilingualism within the federal Government, and, more generally, as a citizen's right to receive federal services in either Official Language, French or English, at choice, throughout Canada. The other parallel and not necessarily conflicting, impulse within the Quebec intellectual *Risorgimento*, was particularist rather than federalist, and found its outlet in interesting proposals for institutional reform within Canadian federalism to produce, henceforward, a special Quebec institutional weighting or bias. In the first, and intellectually most creative decade of Quebec's « Quiet Revolution », in the 1960s, and under the rubric of « special constitutional status » for Quebec, a group of young Quebec thinkers — Jacques-Yvan Morin, Claude Morin, Léon Dion, Gérard Bergeron, and others⁹ — separately and severally, and with very little apparent direct contact or exchanges of ideas, put forward concrete proposals for reconstituting or reordering existing federal institutions, like the Senate and the Supreme Court. Such proposals were, of course, linked to the embryonic Quebec case for a « special constitutional status » for Quebec within the Canadian federal system, more or less reflecting the special historical, *deux Nations* conception of Confederation. In so far as constitutional dualism has presumably received, for the time being at least, a constitutional quietus with

8. P.E. TRUDEAU, *Le fédéralisme et la société canadienne-française*, Montréal, Éditions H.M.H., 1967.

9. *Quebec and the Constitution*, *supra*, note 1, pp. 21 *et seq.*

the Supreme Court decision of December, 1982,¹⁰ and subsequent Quebec Government public statements,¹¹ then no doubt those same, special constitutional, dualistic elements, can now also be divorced from the original proposals for constitutional reform, leaving remaining the larger issues of the testing of antique constitutional institutions and processes, inherited from 1867, by the dry light of empirically-based reason and the constitutionally more enlightened standards of contemporary legal science.

Can, for example, purely appointive legislative chambers, like our federal Senate, maintain any claims to constitutional legitimacy in an era of representative, participatory democracy?¹²

Can Courts intervene to rule on great political *causes célèbres* that will normally be resolved, one way or another, through the ordinary political processes and in the ordinary political (executive-legislative, inter-governmental) arenas, and expect to retain traditional claims to judicial independence and to freedom from partisan political criticism, and to non-answerability, politically, to the directly-elected (executive-legislative) institutions of government?¹³ It may be suggested, in this regard, that in the Quebec Veto case, the Supreme Court of Canada, in its judgment rendered in December, 1982, seemed unduly anxious to give a ruling, (though the issue, such as it was, had already become moot and non-justiciable by the standards that most Supreme Courts, in most countries, apply);¹⁴ and that, on the legalised abortion issue, the Supreme Court conceded standing-to-sue to a middle-aged, male litigant who would have found himself barred, in almost every other comparable Supreme Court jurisdiction, as having no sufficient constitutional « interest ».¹⁵ More judicial self-restraint in relation to great public-political issues where Angels, (and other Supreme Courts with more accumulated experiences with judicial legislation and judicial policy-making), would prudently choose not to tread, might help to palliate the problem; but the Supreme Court's own seeming eagerness to get involved in these issues will undoubtedly bring the matter to a head. An

10. *Re A.-G. Que. and A.-G. Canada*, (1982) 140 D.L.R. (3d) 385 (S.C. Can.).

11. B. DESCÔTEAUX, « Pour René Lévesque, La fin de 115 ans d'illusions », *Le Devoir* (Montreal), December 7, 1982.

12. See, generally, *Reform of the Senate, a Discussion Paper* (Government of Canada, Hon. Mark MacGuigan, Minister of Justice, June, 1983).

13. See, generally, the author's *Judicial Review*, 4th ed., 1969; W.R. LEDERMAN, « The Independence of the Judiciary », in *Continuing Canadian Constitutional Dilemmas* 1981, pp. 109 *et seq.*

14. (1982) 140 D.L.R. (3d) 385.

15. Decision of the Supreme Court of Canada on the preliminary, jurisdictional issue only, conceding constitutional standing-to-sue on the abortion issue to one, Joseph Borowski, December 1, 1981.

interesting range of alternative institutional-processual reform options, involving the Court, is available for *Phase Two* Constitution-Making, if and when it is properly entered upon.

Are the times, however, any more ripe now than they were in the period 1980-2 for fundamental reform, federal institutional or otherwise? One has the impression that the question of constitutional reform, if it ever were a popular concern, has become displaced by basic issues of economic survival; and in any case the new constitutional amending-machinery — the « all-Canadian » process — established under the *Canada Act* and the *Constitution Act of 1982* is likely to prove cumbersome and difficult to operate, even in regard to politically non-controversial matters; and rigid and unyielding in regard to the really urgent and necessary reform projects. The final elimination from the federal constitutional « patriation » project of the recourse to participatory democracy and the constitutional remedy of a popular referendum vote, to resolve deadlocks in the new amending process,¹⁶ conferred too much negative, frustrating power on reluctant, and on the whole constitutionally backward-looking, Provincial Premiers. We may thus have placed ourselves into a constitutional straight-jacket for the future, with the constitutionalist's skills perforce directed to informal, indirect modes of change not involving recourse to the oligarchic, inter-Governmental process envisaged under the *Constitution Act, 1982*. The opportunities here, however, remain considerable, granted sufficient constitutional wit and imagination; and some of the recent, more revolutionary proposals, — for rationalising and stream-lining and modernising executive-legislative relations at the federal level, for example — would appear to fall wholly within federal constitutional amending power and thus involve federal constituent powers alone. For these matters — touched on, in part, by the House of Commons Special Committee on Standing Orders and Procedure (Lefebvre Committee),¹⁷ the constitutional initiative rests with the

16. The federal Government opening to participatory democracy via the referendum route to constitutional amendment, was made in s. 47 of the *second* (so-called Consolidated) version of the proposed constitutional patriation Resolution, tabled in the House of Commons on February 13, 1981 and approved by both federal Houses in April, 1981. The popular referendum escape-route from federal-Provincial deadlocks over proposed constitutional amendments was, however, deleted once and for all from the patriation package after the federal-Provincial heads-of-government political compromise deal of November 5, 1981: it appeared neither in the third version of the patriation Resolution nor in the *fourth*, final version adopted by the federal Parliament and formally enacted by the British Parliament and proclaimed as law in Canada on April 17, 1982: *Canada and the Constitution, supra*, note 1, pp. 149, 167, 172.

17. See, generally, House of Commons, Special Committee on Standing Orders and Procedure, Third Report to the House (First Session of the Thirty-Second Parliament, 1980-81-82), Issue No. 7, November 4, 1982; *ibid.*, No. 8, November 9, 1982; *ibid.*, No. 12, December 7, 1982.

federal Government, and it needs only civil courage on its part to move, with resulting far-reaching reform and up-dating in our federal institutions and federal decision-making. In other areas — Senate reform, for example, designed to bring the federal upper house in line with all major trends in democratic constitutionalism by replacing a purely executive-appointed body by a popularly elected one, — a major constitutional impediment to change was created, unexpectedly perhaps, by the Supreme Court's intellectually somewhat unpersuasive *per curiam* ruling of December, 1979,¹⁸ rendered under the unusual and difficult circumstances for a collegial decision-making body created by the Chief Justice's prolonged absence through illness immediately after the oral argument in the matter had been completed.¹⁹ The problem will either have to be faced head on, and a fresh Supreme Court ruling sought, on a far more substantial and empirically-based record, on the same issue, or else the federal Government will have to grit its teeth and actually use the complex, oligarchic, inter-governmental, consensual process enjoined henceforth, under the *Constitution Act, 1982*, for reform and modernisation of antique federal Governmental institutions and procedures. The cause of fundamental constitution novation is too important, however, to be abandoned through counsels of despair resulting from the constitutional strait-jacket effectively created, in many areas of constituent power, by the new, autonomous, all-Canadian constitutional amending machinery created as part of the constitutional patriation package of 1980–1982.

18. *Reference re Legislative Authority of Parliament to Alter or Replace the Senate*, (1980) 102 D.L.R. (3d) 1.

19. See, generally, *Canada and the Constitution*, *supra*, note 1, pp. 16–21.