WILLIAM KURELEK MEMORIAL LECTURES 1978

Reshaping Canadian Federalism

KENNETH M. LYSYK, Q.C.

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For the inauguration of this series we welcome Professor Ramsay Cook of York University and Dean Kenneth Lysyk of the University of British Columbia. We expect that the lectures will be published by the University of Toronto Press, and express our gratitude to the Ukrainian Professional & Business Club of Toronto for their financial support of the series and the publication.

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The Ukrainian Professional & Business Club of Toronto has named these annual lectures in honour of its most distinguished member, William Kurelek. They are intended to provide a forum for individuals prominent in the fields of arts and letters, academics and politics. The Club wishes to express its thanks to the University of Toronto for agreeing to co-sponsor the William Kurelek Memorial Lectures.

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RESHAPING CANADIAN FEDERALISM

K. M. LYSYK, Q.C.†

In these two lectures I want to talk about a federal system that meets distinctively Canadian needs. For if Quebec is not a province *comme les autres*, neither is Canada a federation like the others. Of course we can, and should, try to benefit from the experience of other federations, but ultimately a lasting constitutional framework must accommodate itself to the special character of our own society.

I.

Let me begin by identifying some of the fundamental issues and concerns involved in the constitutional debate, and certain perceptions held by participants in that debate about the direction our constitutional development has been taking. I hope that it will supply some perspective, and assist in explaining the views I shall express later respecting specific proposals for constitutional change.

The election of a separatist government in Quebec has focused public attention to an unprecedented degree on the adequacy of our constitutional and institutional arrangements. What do we expect from our central government? What responsibilities can be handled as well, if not better, by the provinces? To what extent would the cause of national unity be advanced by restructuring some of our institutions of government to provide a more faithful reflection of, and respect for, regional and cultural diversity? The emergence of the Parti Quebecois has certainly raised the consciousness of the Canadian public concerning the importance of such questions. And as a result there is, no doubt, a greater receptivity to change than would have been likely in the absence of a crisis situation.

† Dean of the Faculty of Law, University of British Columbia. This is the revised text of two lectures delivered at the University of Toronto on April 5 and 6, 1978, for the inauguration of the William Kurelek Memorial Lectures, and reprinted with the permission of the William Kurelek Memorial Lecture Series, University of Toronto.

Quite apart from recent events in Quebec there would have been much to be said for a thorough reassessment of our constitutional arrangements. For this is a very different country from the collection of colonies assembled by the Fathers of Confederation 111 years ago. I need scarcely remind you of the more obvious changes. Canada's boundaries have expanded to the point where they now encompass the world's second largest nation. Political independence has been achieved. By 1867 the original Indian inhabitants of this part of the world had only had occasion to greet the first waves of new Canadians, almost all of French and British origin; the subsequent flow of immigrants has altered the ethnic mix and we have become a country of minorities with more than one quarter of the population having ancestral roots which are neither British nor French. In recent years there has been a remarkable flowering of francophone culture in Quebec, and accompanying it a renewed sense of pride and determination to protect and nourish that distinctive culture. The country's economic centre of gravity has been moving westward. So too has the political balance tilted in that direction, and in the next federal election the western provinces will, for the first time, send more members of parliament to Ottawa than will Quebec.

So changing the Constitution to reflect present day realities involves taking account of forces at work elsewhere in the country, as well as in Quebec. And indeed the immediate objective of constitutional reform can hardly be to develop proposals acceptable to the Levesque government, for it would be an illusion to imagine that that government is anxious to rearrange the terms of the Constitution to make Quebecers more comfortable within the Canadian federation. If anything, the P.Q. Government will have a vested interest in seeing such discussions fail in order to demonstrate that the attainment of a sufficiently flexible federal system is impossible, and that independence is, therefore, essential.

Putting to one side considerations having to do with the tactics of the Péquistes, the priorities of Quebec are, of course, of great importance and I will have some observations to make about them. But I also wish to suggest to you that there are significant constitutional concerns that are not unique to Quebec, and I will mention some of particular importance to western Canada. It is necessary to guard against a myopic approach that neither reflects the social and economic facts, nor responds to the needs, of the country as a whole.

A fundamental issue which I should like to explore in these lectures has to do with the degree of centralization that is appropriate

for Canada, and I shall be talking about the division of powers under our Constitution and the institutions which play a part in allocating and exercising those powers. I will be concentrating on the Canada of today, and on current constitutional trends, and I do not propose to embark on a historical account of the events which led up to Confederation or to trace in any detail the developments over the succeeding decades.

As I will, however, have quite a lot to say about the direction of constitutional development, perhaps I might take note in passing of an argument from history that is sometimes offered in support of a centralist position. It takes as its starting point the observation that the Canadian Constitution was originally designed to include features that would provide a strong central government. However, a misguided Privy Council, acting as our court of last resort, distorted the original grand design so that the role of the central government has turned out to be a much lesser one than that contemplated by the far-seeing Fathers of Confederation.

Well, perhaps this is so, although the architects of our Constitution were far from unanimous in their stated objectives or, after the event, in what they thought they had accomplished. And it is not difficult to find support in our constitutional history and in the Confederation debates for an argument that a higher degree of provincial autonomy was contemplated in some areas than the federal government has been prepared to concede.[1] Still, it is a fact that the British North America Act[2] did incorporate certain unmistakably centralist features. For example, there is the federal veto power — in the terminology of the Constitution, the power of "disallowance" — of provincial laws.

But what this line of argument overlooks is that an equally striking aspect of the original grand design was the degree of control retained by the Imperial government over the colonial government in Ottawa. Let me remind you of a few elements in that design. Under the terms of the B.N.A. Act, the federal power to disallow provincial laws was matched by a power in the Imperial government to disallow federal laws. Also, for two thirds of a century after Confederation, Imperial enactments could override Canadian laws with which they conflicted, federal no less than provincial laws. Con-

[1] Of particular importance is the very broad scope of the phrase "Property and Civil Rights" as understood prior to Confederation, and assigned by the B.N.A. Act to provincial jurisdiction. See, *e.g.*, W. R. Lederman, *Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation* (1975) 53 CAN. B. REV. 597, at 601-03.

[2] British North America Act, 30 & 31 Vict., c. 3 (as am.).

duct of foreign relations, including treaty making, was in the hands of the Imperial government. The Constitution permitted, but did not require, the establishment of a general court of appeal for the new federation, and when the Supreme Court of Canada was established eight years after Confederation its decisions were subject to being appealed to the Privy Council in London, a situation which prevailed for the next three quarters of a century.

In short, the Constitution did not contemplate the independent and fully sovereign Canada which has evolved. It was a Constitution drafted for a colony. Literal application of all its terms according to the expectations of 1867 would certainly startle Canadians in 1978, and I am sure would be greeted with as much dismay by the federal government as by the provinces. If the role of the provinces has developed somewhat differently than would have been guessed one hundred years ago, the transformation of the federal government has certainly been no less remarkable. To draw attention to the former while ignoring the latter is to indulge in selective nostalgia.

The point is that since 1867 Canada has evolved into a country so different from that which was contemplated a century ago that arguments proceeding from "original intent" must be recognized as containing a greater component of rhetoric than of guidance useful for charting a constitutional course for the future.

It is, nevertheless, important to have some appreciation of the direction our constitutional development has taken in order to identify and appreciate the significance of certain recent trends, which I shall discuss later, and to place in perspective some of the critical issues to be faced in constitutional reform. I have referred to the fact that until relatively recently — 1949 to be precise — appeals in constitutional cases could be taken from the Supreme Court of Canada to the Judicial Committee of the Privy Council in England. The power to interpret the Constitution is, of course, a power of cardinal importance, for it carries with it the power to effect incremental change in the law of the Constitution. In terms of constitutional development in Canada, judicial interpretation has been of far greater significance than formal amendments changing the B.N.A. Act through legislation.[3]

[3] Since confederation there have been only three amendments to the B.N.A. Act that actually transferred legislative powers from one level of government to another. All three amendments were post-World War II, and all three involved transfer of power from the provinces to Ottawa: first, with respect to unemployment insurance; second, with respect to old age pensions; and third, with respect to benefits supplementary to pensions.

Now those who would have preferred to see a more highly centralized federal system in Canada have been inclined to cast the Privy Council as the villain of the piece. And they are quite right in concluding that to the Privy Council belongs in considerable measure the responsibility — really, the suggestion is, the blame — for the fact that the balance which evolved between the component parts of the Canadian federation is quite different from that in the United States. It is the case that Canadian provinces are not as completely overshadowed by Ottawa as are the states by Washington, D.C. But is that necessarily to be viewed with dismay?

While a high degree of centralism might be suitable for a unilingual country which has seen itself as a "melting pot", is it equally appropriate for a country with two official languages, two distinct legal systems, and a small multicultural population thinly distributed over a huge land mass? Or is it just possible that the jurisprudence passed on to us by the Privy Council, so roundly condemned as ignorant or perverse, may in fact have reflected an appreciation that an attempt to impose complete domination from the centre would have imposed strains on the Canadian federation which, quite simply, would have proved unacceptable? Writing in 1968, a law professor named Pierre Trudeau put it this way:

> It has long been a custom in English Canada to denounce the Privy Council for its provincial bias; but it should perhaps be considered that if the law lords had not leaned in that direction, Quebec separatism might not be a threat today: it might be an accomplished fact.[4]

My purpose is not to act as an apologist for the Privy Council. I am glad that appeals to that tribunal were abolished. An independent country, as Canada had become, should not need to have recourse to a court in another country to resolve important constitutional questions. But I believe it must be acknowledged that, on the whole, the Privy Council did a creditable job of interpreting our Constitution in a way which preserved a balance in the Canadian federation.[5] And one of the principles that it firmly established was that federal and provincial governments were not in a relationship of superior to inferior but, instead, were of coordinate power —

[4] P. E. Trudeau, FEDERALISM AND THE FRENCH CANADIANS (1968) 198.

[5] For an outstanding analysis of the performance of the Privy Council as constitutional arbiter, see A. Cairns, *The Judicial Committee and Its Critics* (1971) 4 CAN. J. OF POL. SCI. 301. The author concludes, at 339, that the critics "were moved more by the passions of nationalism and desires for centralization than by federalism", and, at 343, that it is "clear that the Judicial Committee was much more sensitive to the federal nature of Canadian society than were the critics."

that is to say, each was sovereign within the area of jurisdiction assigned to it by the Constitution. It is the Supreme Court of Canada that now has the critically important responsibility of maintaining an appropriate balance between federal and provincial governments, and I shall have more to say about its role later in these remarks.

Now if the balance between federal and provincial governments has turned out somewhat differently than some had foreseen in 1867, that is not entirely due to the handiwork of the Privy Council. Equally important, I suggest, was a change in the public's expectations concerning the appropriate responsibilities of government. Thus social security measures (such as they were at the time) and education were clearly located at the provincial level. But in 1867 these responsibilities were not all that significant in terms of level of expenditures or government activity. Social services were largely left to private charity, supplemented by poor laws administered at the municipal level, and public educational objectives were modest. Of course, the situation has changed radically. The importance (and unfortunately the cost) of social security programmes and of education has increased enormously. The Privy Council cannot be blamed for that. The growth in provincial responsibilities simply reflected a change in the electorate's perception of the relative importance of these areas of government activity.

And what this has also meant, in political terms, is that a great deal of "the action", the real action, has turned out to be at the provincial level. Social programmes have a visibility and an immediacy which readily translate into voter appeal. As a result the temptation has been strong for federal politicians to encroach upon areas of social policy which the Constitution assigned exclusively to the provinces. And such encroachment was further encouraged by an imbalance that had developed in our federal system. While legislative authority was located at the provincial level, the money was in Ottawa. Of course, from the point of view of the provinces lacking funds to discharge adequately their constitutional responsibilities in the area of social policy, it would have been preferable if the central government had not arrogated to itself a policy-making and programme role in that area, but had instead made appropriate fiscal arrangements to allow the provinces to mount their own programmes. The exercise of the federal spending power in this fashion, as well as through conditional grant programmes, has been a source of continuing tension with Quebec in particular, and it is one which will require attention in any thoroughgoing constitutional reform.

I shall return to the subject of constitutional trends and developments that have caused concern to the provinces. If their concern is well-founded, it does seem anomalous that our constitutional arrangements should take on a more centralist orientation at a time when the thrust from Quebec is in the opposite direction. As I indicated earlier, however, I do not believe that it is necessary or desirable to limit our outlook to current events in that province. I hope I have already made it clear that, in making that statement, I do not seek to diminish the importance of developments in Quebec, or of the priorities of Canadians who live there. However, there is sometimes a tendency to dismiss other aspects of the constitutional debate as mere distraction, and as reflecting little more than petty political rivalries between federal and provincial governments. There is much more at stake, and I should like to take a few moments to remind you of one or two other reasons why Quebecers are not alone in their concern about a centralist drift, and in wishing to arrest or even reverse it. Why is it that British Columbians, for example, might wish to maintain or strengthen capacity for decision-making at the provincial level?

In my opinion, one of the most compelling reasons for preferring a federal to a unitary state has to do with the potential for experimentation in the "social laboratory" that each constituent part represents. But that potential will not be realized if the constituent parts of the federation, in our case the provinces, are too weak — either in terms of legislative authority or in terms of revenues available — to mount innovative programmes and to withstand the strong pressures that can usually be brought to bear by defenders of the status quo. A province with both legislative jurisdiction and the wherewithal to exercise it is able to pioneer programmes which, if their worth is demonstrated, may commend themselves for adoption elsewhere in the country. At the national level change comes more slowly, and even measures which are the product of federal-provincial deliberations are apt to represent the least common factor of disagreement. Consensus politics at these levels tends not to be conducive to bold new programmes, or indeed anything that is very controversial. Experimentation and innovation, I wish to suggest, are more readily engaged in at the provincial level.

Let me draw some examples from legislative initiatives that have been taken by a single province, Saskatchewan. One of the programmes successfully initiated there was universal medicare. It was introduced over the bitter opposition of the Saskatchewan medical profession, which enjoyed generous financial support from profes-

sional colleagues in the United States as well as elsewhere in Canada. Another health programme introduced in Saskatchewan was a universal prepaid hospitalization plan and, as with medicare, it was in due course adopted elsewhere in the country with the assistance of federal funding. The same province introduced no-fault automobile insurance administered through a public agency, and similar schemes have since been introduced in Manitoba, British Columbia and now Quebec. More recently Saskatchewan has introduced additional health services in the form of a new denticare programme for children and an innovative public prescription drug programme. It has also undertaken a number of new initiatives in connection with natural resources involving, among other things, the active participation of Crown corporations in mining and exploration. The 1976 legislation authorizing the acquisition of potash mining companies[6] represented an economic equivalent, so to speak, to the new ground broken by medicare in the social sphere. With its most recent acquisition, the Crown corporation which is the vehicle for this initiative (the Potash Corporation of Saskatchewan) became the largest producer of potash in the western world. There was no precedent in Canada or the United States for this type of large scale conversion to public ownership of enterprises in the area of resource-based production. More recently still, the government of that province has acquired a major stake in uranium exploration and development through the mechanism of joint venture arrangements with private sector corporations.

Let me emphasize that I am not concerned to judge whether any or all of these programmes are good or bad, philosophically or practically. My only point is that the experimentation itself is valuable. One programme might prove itself while another is shown to be unsound: the rest of the country has an opportunity to observe and to draw the appropriate conclusions. But in the absence of a provincial programme, how much longer might it be necessary to wait for a federal initiative or for a consensus to emerge at a federal-provincial meeting? If the capacity to innovate in this fashion were lost to the provinces because of lack of financial resources and loss of constitutional authority to Ottawa, I invite you to consider whether Canada would not be a much less interesting place than it is at present.

Another reason for guarding against undue centralization has to do with the desirability, in general, of keeping democratic decision-

[6] The Potash Development Act, S.S. 1975-76, c. 2.

making as close as possible to the citizenry. And the fact is that the central government is more remote, and for that reason tends to be less responsive to its electorate. Part of that remoteness, in a country that is four thousand miles wide, is obviously a product of geography. You are understandably less conscious of that in central Canada; many Ontarians and Quebecers, in fact, are closer in a physical sense to the national capital than to their own provincial capital. The perspective is a little different in western Canada and, no doubt, in the Atlantic Provinces.

But apart from geography, there is another and more significant type of remoteness which is simply a function of size. If you will permit a broad generalization, perhaps I can make the point by suggesting to you that there is normally an inverse relationship between the size of the governmental bureaucracy and its responsiveness. Discussing the problems of size in the context of corporate organizations, E. F. Schumacher wrote:

> Even today, we are generally told that gigantic organizations are inescapably necessary; but when we look closely we can notice that as soon as great size has been created there is often a strenuous attempt to attain smallness within bigness. The great achievement of Mr. Sloan of General Motors was to structure this gigantic firm in such a manner that it became, in fact, a federation of fairly reasonably sized firms. In the British National Coal Board, one of the biggest firms in Western Europe, something very similar was attempted under the Chairmanship of Lord Robens; strenuous efforts were made to evolve a structure which would maintain the unity of one big organization and at the same time create the "climate" or feeling of their being a federation of numerous "quasi-firms". The monolith was transformed into a well coordinated assembly of lively, semi-autonomous units, each with its own drive and sense of achievement. While many theoreticians — who may not be too closely in touch with real life — are still engaging in the idolatry of large size, with practical people in the actual world there is a tremendous longing and striving to profit, if at all possible, from the convenience, humanity, and manageability of smallness.[7]

Of course, the argument about the advantages of smallness can be overdone and, in terms of Canadian federalism, there are many vitally important functions that can only be satisfactorily handled by the central government. But it is the case that the growth of our central government in recent years has been very rapid, and increasing concern is being expressed about that phenomenon.

Earlier I alluded to the fact that the United States is a more highly centralized federation than Canada. And it has long been

[7] E. F. Schumacher, SMALL IS BEAUTIFUL (1973) 53.

fashionable for those who advocate greater centralization here to point to the American model as one we should strive to emulate. But major differences between the two societies, I suggested, should lead us to beware of making easy assumptions about how readily American solutions can be applied to Canadian constitutional problems.

Moreover, within the United States itself there appears to be developing a growing body of opinion which challenges the extent to which decision making has become centralized in that country. For example, in his book entitled *Twilight of Authority*,[8] Nisbet identifies decentralization as a major element of pluralism, and develops the theme in the following vigorous terms:

> Centralization, Lamennais wrote, breeds apoplexy at the center and anemia at the extremities. From Aristotle through Aquinas, Althusius, Bodin, Burke, Tocqueville, Durkheim, and Weber, through the whole succession of minds in the West in which respect for social diversity and individual autonomy is to be seen, there has been profound stress upon the need for decentralization — not merely in political government alone, though there preeminently, but in all large institutions. Few things have more grievously wounded the political community in our time than the kind of centralization that has become virtually a passion in the political clerisy during most of the century and that is increasingly becoming but another word for the Federal government today. Dispersion, division, loosening, and localization of power: these are all vital needs today, and they can be brought about only when weariness with centralization and sickness of its consequences become so great that the philosophy of decentralization will achieve once again the prestige it had among the Founding Fathers.[9]

Let me pause at this point to make two preliminary observations about constitutional reform arising out of these general considerations. I have spoken about the importance of provincial governments as vehicles for social experimentation and innovation. As long as the Constitution allows the provinces sufficient latitude in terms of constitutional authority and financial resources, there is scope for significant political and cultural self-expression at the provincial level, and that is highly desirable. In so far as the central government is concerned, I have also referred to the problems of remoteness and lack of responsiveness.

My first observation has to do with the type of constitutional reform which calls for provincial representation in the organs and agencies of central government. I have in mind such proposals as

[8] R. Nisbet, TWILIGHT OF AUTHORITY (1975).

[9] *Id.*, at 237-38.

those for reconstituting the Senate by providing for provincial selection of senators, appointing provincial representatives to federal regulatory agencies, and the like. Such reforms may have their place, but I suggest they do not meet the concerns I have just been talking about, simply because the focus is upon the machinery of central government and not upon what is attainable at the provincial level.

Reference is sometimes made in this context to the role of the U.S. Senate as representing the interests of the states. And in a sense this is achieved when, for example, a senator secures a federal contract for an industry in his home state. But it is one thing to endeavour to see that an appropriate share of the central government's largesse is spent within the state, and quite another to stand for states' rights in the sense of adopting the position that a particular programme is one more appropriately handled by the state rather than by Washington. I do not think it at all surprising that U.S. senators, by and large, have not been champions of state governments. It is quite natural for an actor to concentrate on the action on his own stage rather than remind the audience that it really belongs in another theatre.

I will come back to the question of whether a revised Canadian constitution might not usefully include provincial representation of various kinds in mechanisms of central government. The point I wish to make now is simply that this type of constitutional reform does not meet the objective of ensuring that the provinces themselves will enjoy sufficient autonomy to allow for vigorous initiatives to be taken at the provincial level.

A second observation I would make is that our constitutional framework should be sufficiently flexible to allow some ebb and flow between central and provincial governments according to the needs of the time. We are dealing not in absolutes, but in matters of degree, of emphasis, and of direction. It is all too easy to attach "centralist" or "decentralist" labels in this context, but that can be quite misleading. The objective, on which we can no doubt all agree, is a balanced federalism. Our views concerning the direction to be taken in order to achieve or maintain that balance will be influenced by our perception of the present course of our constitutional development. Earlier I quoted Schumacher, and I would like to refer to one more passage where a similar thought is expressed, still in the context of "bigness". He states:

> What I wish to emphasize is the *duality* of the human requirement when it comes to the question of size: there is no *single* answer. For his

different purposes man needs many different structures, both small ones and large ones, some exclusive and some comprehensive. Yet people find it most difficult to keep two seemingly opposite necessities of truth in their minds at the same time. They always tend to clamour for a final solution, as if in actual life there could ever be a final solution other than death. For constructive work, the principal task is always the restoration of some kind of balance. Today, we suffer from an almost universal idolatry of giantism. It is therefore necessary to insist on the virtues of smallness — where this applies. (If there were a prevailing idolatry of smallness, irrespective of subject or purpose, one would have to try and exercise influence in the opposite direction.)[10]

Similarly, I wish to suggest, there is no single answer in terms of a federal structure that will prove to be ideal for all Canadians at all times. But if we take stock of where we are now and examine the direction in which we have been moving, that should help us identify some of the major elements that should be taken account of in the process of constitutional reform.

At the beginning of these remarks I suggested that there were significant constitutional concerns which were not unique to Quebec and to this point I have been speaking in general terms of certain broad considerations which underlie the allocation of law-making and decision-making authority under the Canadian Constitution. They are issues which should interest all Canadians. Now I should like to change the focus a bit, and say something about the constitutional debate from the perspective of the part of Canada in which I live. For there is a new factor in the constitutional equation. What has emerged in the last few years is that increasingly serious concerns are being expressed in western Canada about current constitutional trends. And some of these concerns, at least, are similar and complementary to those which have been, and are being, expressed by Quebecers. Just as Quebec has spoken of the importance of being master in its own house, so the western provinces in the 1970s have begun to speak in terms of the necessity of asserting greater control over their own destiny. There are other elements in common between the two situations. Like Quebec, the western provinces have become concerned with what appears to be a strong trend towards centralization in the Canadian federation. That trend is seen as being promoted through aggressive constitutional thrusts by the federal government into what has heretofore been regarded as provincial domain.

[10] *Supra*, note 7, at 54.

Let me say a few words about the setting against which these developments are perceived to be taking place. I do not believe that in the past western Canadians have viewed Confederation in terms of cold, economic self-interest — a "what's in it for us?" attitude; nor are they disposed to do so now. But they are perhaps more inclined today to raise questions about the historical pattern in which western Canada (and the same might be said of the Atlantic Provinces) has remained more or less of an economic hinterland, and in what is seen as almost a colonial relationship with central Canada. The west has supplied raw materials for the tariff-protected industries of central Canada, and it provides a captive market for the finished goods.

Westerners are aware that their resources — both renewable and non-renewable resources — have been successful in competing in world markets. The prairie grain farmer has been as efficient as any in the world. The products of mines and forests are sold abroad and contribute handsomely to Canada's balance of payments. Occasionally these resources are sold to Canadians at less than the world price, such as when western oil is sold in Canada, as it has been for the last few years, at considerably less than the world price. The same can hardly be said of the finished goods produced in central Canada — the automobiles, the household appliances, the textiles, produced in Ontario and Quebec. These manufactured goods, by and large, are not competitive in world markets, and indeed they would not be competitive in Canada without the protection of a tariff wall.

I mentioned western oil and it provides an example of the different perspective one may have depending on which part of this country one lives in. Not many years ago when Alberta was most anxious to sell its surplus oil, central Canada was not in a hurry to buy it. In due course that was changed with the construction of a pipline but Alberta oil still did not find its way east of the Ontario-Quebec border because Venezuelan oil could be imported a bit more cheaply and why should the east, after all, be expected to subsidize Alberta by having to pay anything more than the world price for oil? Then we had the surge in oil prices brought about by the O.P.E.C. countries beginning in late 1973. Alberta oil (and Saskatchewan oil) was suddenly a great bargain. Two things happened. The oil producing provinces were not allowed to lift the price of their oil to world price levels immediately, and indeed they did not press for that because they recognized an obligation to cushion the shock by spacing price increases over a period of time (meanwhile

providing a very substantial subsidy to central and eastern Canada). But certain price increases were made, together with the suggestion that eventually Canadians would have to think in terms of paying the world price. The result was a good deal of talk in the east about the blue-eyed Arabs of the west. Could not a westerner be pardoned for wondering about a double standard? Is there anything which central Canada sells to the west at a lower price than it can obtain on the world market? Indeed, would it not be a pleasant change to be able to buy an automobile or a refrigerator or an overcoat at the world price, not at an inflated tariff-protected price?

And it might be added that although natural resources have always been regarded as being at the very heart of what the Constitution reserves to the provinces, the federal government appropriated a large share of the increased revenue now obtainable from western oil. This was done through levying an export tax on oil exported to the United States and, more notably, through certain tax measures aimed at oil sold within Canada. Specifically, a new federal budget disallowed royalties paid to the provincial governments for purposes of calculating federal corporate income tax, thus compelling the provinces to surrender additional revenues from the provincial resource: a measure which Mr. Claude Ryan, in an editorial in *Le Devoir*, has described as "an imposition on these two provinces of one of the single most odious statutes ever imposed on the Canadian provinces".[11] These were unprecedented measures, with nothing similar having been applied to resource or energy exports from central Canada or any other part of the country.

That is one example, admittedly a dramatic example, of what has happened with respect to a single natural resource of great importance to western Canada. But there have been other developments which have caused concern. I wish simply to make brief mention of what has been happening in other areas. In the last few years the federal government has seemed to the provinces to be adopting increasingly aggressive tactics in seeking to extend its authority into areas reserved by the Constitution to the provinces. This was of such concern that the four western Premiers recently took the unusual step of setting up a task force on constitutional trends, and the task force issued a report in May 1977.[12] The report deals with what are seen as federal thrusts into a number of areas regarded as historically and properly within the provincial sphere. In what it describes as an

[11] Le Devoir, 28 Nov. 1977, at 4 (trans.).

[12] Western Premiers' Task Force on Constitutional Trends, Report (May, 1977).

"inventory of federal intrusions", the report sets out an extensive list of recent federal forays. I will not stop to review the catalogue, but perhaps I can give you some impression of its scope by noting that it lists 61 items under the following eight headings: (1) Consumer and Corporate Affairs; (2) Resources; (3) Housing, Urban Affairs and Land Use; (4) Economic Development; (5) Communications; (6) Demography and Immigration, Manpower and Training, and Labour; (7) Administration of Justice; and (8) Interventions by the government of Canada before the Supreme Court of Canada. With respect to that last item, the report notes that in the four years from January 1973 to January 1977, the federal government attacked the validity of provincial legislation in nine out of ten cases in which provincial legislation came before the Supreme Court of Canada in that period.[13]

Further, there is a perception that in the last few years the Supreme Court of Canada has taken an increasingly restrictive view of provincial powers and a correspondingly broad view of the reach of federal legislative authority. The question of the role of the Supreme Court in constitutional decision-making is at once difficult and delicate, yet it cannot be ignored. The fact is that the Court is presently the single most important agent for constitutional change in this country, and each constitutional issue which comes before it holds the potential for new interpretation amounting to a de facto amendment of the distribution of legislative powers between Ottawa and the provinces.

I have mentioned that appeals to the Privy Council in constitutional cases were not abolished until 1949. Abolition of this right of appeal was viewed with considerable apprehension by many constitutionalists in Quebec who saw the Privy Council's decisions as recognizing the dangers of over-centralization, and as being in basic harmony with regional pluralism. The concern was that the Supreme Court of Canada, as an institution of central government, might be less sensitive to the federal nature of Canadian society. The Tremblay Report of 1956[14] reflected these concerns, and proposed a drastic restructuring of the Court.

In the years which followed, it cannot be said that these concerns have been allayed. On the contrary, the uneasiness about the direc-

[13] Shortly after these lectures were delivered the Task Force published a further report: WESTERN PREMIERS' TASK FORCE ON CONSTITUTIONAL TRENDS, SECOND REPORT (April, 1978).

[14] QUEBEC, ROYAL COMMISSION OF INQUIRY ON CONSTITUTIONAL PROBLEMS (1956).

tion of constitutional interpretation by the Court appears to have deepened in Quebec and to have become much more marked in other regions of the country. Here again caution must be exercised so as not to overstate the case. Nonetheless, the performance of the Supreme Court is certain to be one of the focal points in the constitutional debate. It is therefore relevant to ask what basis there might be for an impression that the course of decision has tended to favour federal, at the expense of provincial, legislative authority, and it is possible to point to several developments which have no doubt played a part in feeding the concerns to which I have referred.

One factor contributing to this perception of the Court has to do with the overall pattern of its decisions. In its day as our constitutional court of last resort, the Privy Council had occasion to strike down a substantial number of important federal enactments as well as provincial enactments. Since 1949 the Supreme Court of Canada has ruled unconstitutional a considerable range of provincial enactments, including some of very major importance. Federal legislation, on the other hand, has been upheld with very few, and relatively insignificant, exceptions.[15] On the surface, the Court's track record since 1949 resembles that of the Privy Council less than it does that of the United States Supreme Court, where a successful challenge to an Act of Congress on the basis that it has trespassed upon the exclusive domain of the states has become an extremely rare event.

With respect to what has been seen as the Supreme Court of Canada's restrictive approach toward provincial power and an expansionist view of federal authority, perhaps the single most important area has been in connection with recent decisions involving the federal power to regulate trade and commerce. In the 1970s that constitutional clause has been used to strike down Manitoba hog marketing legislation,[16] and it is one of the two grounds used in the recent decision striking down Saskatchewan's legislation designed to capture windfall profits earned by the oil companies following the O.P.E.C. crisis.[17] In those two decisions the Supreme Court struck

[15] *MacDonald v. Vapour Canada Ltd.* [1977] 2 S.C.R. 134, and *Reference re Agricultural Products Marketing Act* (1978) 84 D.L.R. (3d) 257 (S.C.C.). In addition, the Court has, on constitutional grounds, given a limited construction to certain statutory provisions conferring jurisdiction on the Federal Court: *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.* [1977] 2 S.C.R. 1054, and *McNamara Construction (Western) Ltd. v. The Queen* [1977] 2 S.C.R. 654.

[16] *Burns Foods Ltd. v. Attorney-General for Manitoba* [1975] 1 S.C.R. 494.

[17] *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan* (1977) 80 D.L.R. (3d) 449 (S.C.C.).

down legislation which provincial courts, at both trial and court of appeal levels, had upheld.[18] Earlier in the 1970s, in a reference from Manitoba that also involved farm products (the chicken and egg reference),[19] the Court had reached a conclusion unfavourable to provincial jurisdiction. That was in 1971, and in another noteworthy decision that year it upheld federal legislation in circumstances involving a new extension of federal regulatory authority over transactions in imported products taking place entirely within the boundaries of a province.[20] Now this is not the occasion to engage in a technical legal analysis of the case law, and you will appreciate that I am painting with a broad brush. My purpose is not to dissect particular judgments but to convey an impression of what has been seen as a new trend of decision with respect to a dynamic and vitally important clause in the Constitution.

Constitutional lawyers are very conscious of the fact that in the United States it has been the commerce clause of the Constitution which has provided the vehicle for the extremely broad legislative authority Congress presently enjoys. Indeed, the commerce power has been given such a broad interpretation by the United States Supreme Court that it is now accepted on all hands that Congress can rely upon it to enact virtually any law it wishes to without having to worry about being challenged for trespassing upon states' rights. Indeed, it is not very often now that one hears anything about states' rights in that country. A question being asked in some quarters is whether the Supreme Court of Canada has started down the path taken by its American counterpart.[21]

[18] Since these lectures were delivered, the Supreme Court has relied on the trade and commerce clause to strike down another provincial regulatory scheme: *Central Canada Potash Ltd. v. Government of Saskatchewan* (1978), not yet reported. The enactments were aimed at controlling the rate of production and minimum selling price for potash. The Saskatchewan Court of Appeal had unanimously upheld the constitutional validity of the legislation ([1977] 1 W.W.R. 487), and the Supreme Court was unanimous in reversing that decision.

[19] *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association* [1971] S.C.R. 689.

[20] *Caloil Inc. v. Attorney-General of Canada* [1971] S.C.R. 543.

[21] For a brief discussion of the concept of the "current of commerce" as an aid to the interpretation of the commerce power in the United States, see the dissenting reasons for judgment of Dickson J. in the *Canadian Industrial Gas and Oil* case, *supra*, note 17, at 486-87, which concludes with the following passage: "Implicit in the argument of the appellant is the assumption that federal regulatory power pursuant to 91(2) [of the B.N.A. Act] follows the flow of oil backward across provincial boundaries, back through provincial gathering systems and finally to the well-head. A secondary assumption is that sale at the well-head marks the start of the process of exportation. In the view I take of the case it is unnecessary to reach any conclusion as to the

A second area of high importance for the provinces is that of ownership and control of their natural resources, matters which have always been regarded to be incontestably and peculiarly within the provincial domain. In my comments on the trade and commerce power I made passing reference to the majority decision of the Supreme Court which reversed the Saskatchewan courts and held Saskatchewan's special tax legislation on oil produced in the province to be unconstitutional. As illustrative of concern in this area it will suffice to quote from another Claude Ryan editorial which concludes a highly critical analysis of the decision with the following paragraph:

> In all of this, what results from the Supreme Court decision opposing CIGOL and the Government of Saskatchewan is what could be a considerable and dangerous constitutional impact. The Supreme Court has just proposed an interpretation of the federal powers of indirect taxation and regulation of inter-provincial and international trade which opens almost limitless horizons for the expansion of the federal presence in these areas. On the other hand, this interpretation restricts provincial power to control their natural resources to such an extent that there is a risk of their being reduced to almost nothing each time Ottawa wishes to gain the same dominance in this area as it enjoys in others.[22]

A third area of constitutional sensitivity relates to communications. Quebec has been especially conscious of the influence of communications — particularly television and cablevision — on culture and education. Other provinces also have a high interest in the area. The Supreme Court recently delivered three judgments in the area of communications[23] and it is some indication of the state of the law, and of the ramifications, that the Court was divided in all three decisions. The effect of the first two, delivered at the end of last November, was generally to support federal, and reject provincial, regulatory authority over cable television undertakings. Commenting on the appeal from Quebec in which provincial authority was denied, a *Globe and Mail* editorial entitled *The Centralist Urge*, concluded as follows:

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validity of either of these assumptions. *It is, however, worth noting that neither American nor Canadian jurisprudence has ever gone that far.*" (emphasis added).

[22] Le Devoir, 29 Nov., 1977, at 4 (trans.).

[23] *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* [1978] 2 S.C.R. 141; *The Public Service Board (Quebec) v. Dionne* [1978] 2 S.C.R. 191; *Attorney-General of Quebec v. Kellogg's Company of Canada* [1978] 2 S.C.R. 211.

The majority of the Supreme Court are saying that because cable firms distribute broadcast TV signals they must be designated as carriers and everything they distribute must come under federal control.

Nonsense. Let Ottawa control the broadcast signals as it now does at points of origin. Let it prohibit any changes cable distributors want to make in broadcast shows, if it must.

But please, don't argue that the right to control the broadcast signal should give Ottawa the right to control everything else cable distributors want to disseminate. That switches the discussion from the constitutional question of deciding whether an undertaking is local to the political question of discussing whether broadcasting can survive the competition.

Confusing the two issues is a sleight of hand loved by centralists.[24]

Let me reiterate my purpose in citing these examples, for I am anxious not to be misunderstood. I certainly do not wish to be taken as suggesting that quotations from a few newspaper editorials can be passed off as constitutional legal analysis, or that they represent telling criticisms of the Court's judgments. But these perceptions of recent Court decisions are also part of the setting against which the constitutional debate will take place, and thus form part of the present reality.

A fourth area, and the last illustration I wish to give in this context, has to do with the power to enact legislation to implement treaties entered into with other countries. The leading authority is the decision of the Privy Council in the *Labour Conventions Case*[25] forty years ago where it was concluded, in the words of the Judicial Committee, that "the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth".[26] A paragraph from Lord Atkin's reasons will serve to illustrate the Privy Council's concern for maintaining the integrity of the division of legislative authority effected by the Constitution. His Lordship said:

For the purposes of ss. 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to

[24] *The Globe and Mail*, 5 Dec., 1977, at 6.

[25] *Attorney-General for Canada v. Attorney-General for Ontario et al.* [1937] A.C. 326 (P.C.).

[26] *Id.*, at 352.

which the British North America Act gives effect. If the position of Lower Canada, now Quebec, alone were considered, the existence of her separate jurisprudence as to both property and civil rights might be said to depend upon loyal adherence to her constitutional right to the exclusive competence of her own Legislature in these matters. Nor is it of less importance for the other Provinces, though their law may be based on English jurisprudence, to preserve their own right to legislate for themselves in respect of local conditions which may vary by as great a distance as separate the Atlantic from the Pacific. It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to effect Provincial Rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy.[27]

In a decision delivered two years ago the Supreme Court of Canada considered an argument which, in effect, invited it to reverse the decision in the *Labour Conventions Case* and uphold federal legislation on the basis that it was enacted to implement a treaty. The argument failed for other reasons. However, in its reasons for judgment the Supreme Court appeared to go out of its way to intimate that when the issue comes before it for determination in a future case, it is ready to overrule the *Labour Conventions Case* and hold that the existence of a treaty does indeed enable the Parliament of Canada to legislate upon matters otherwise exclusively reserved to the provinces.[28]

Now you may or may not consider that such a change in our constitutional law would be desirable. The point is that it would represent another important change — a de facto amendment of the Constitution — the effect of which would be to expand federal authority at the expense of that of the provinces.

The areas I have mentioned are, of course, intended to be illustrative only, not exhaustive. A fuller treatment of the Court's constitutional interpretations which have contributed to provincial concerns would include discussion of the *Off-Shore Minerals Reference*[29] ten years ago, where the Court found that Ottawa, not British Columbia, enjoyed proprietary rights and legislative authority over off-shore mineral rights. Worthy of mention as well would be the

[27] *Id.*, at 351-52.

[28] *MacDonald v. Vapour Canada, supra,* note 15, at 167-69, and 176.

[29] *Reference re Offshore Mineral Rights* [1967] S.C.R. 792.

recent decision in the *Anti-Inflation Reference*[30] which some consider to have been unduly deferential to Parliament's judgment as to the circumstances which should enable it to invoke its sweeping power to displace provincial authority on the basis that a crisis or "emergency" of some kind has arisen.

Let me conclude my remarks on this subject by simply reminding you that my purpose is not to debate the merits of the judgments of the Court to which I have referred. What is relevant for present purposes is the cumulative effect of these decisions in giving rise to the perception, and in so far as the provinces are concerned the apprehension, that the Court is not as sensitive to the importance of guarding provincial autonomy as was the Privy Council, or as they (the provinces) might wish a future constitutional court of last resort to be. For this reason, proposals for constitutional reform touching the Supreme Court are of key importance, and I shall return to that subject.

II.

I wish to move now to another important and sensitive area of the constitutional debate: language and cultures. It is of utmost importance that the issues here be defined clearly and that the task of resolving them be approached in a spirit of understanding. More than a decade has passed since the federal government appointed a royal commission to examine the whole question of languages and cultures in Canada.[31] It was not called a royal commission on languages and cultures but a royal commission on *bi*lingualism and *bi*culturalism. The very name of the commission suggested that it was to take as its starting point that this is a country of two languages and two cultures. And a few years and a few million dollars later when the commission reported, the thrust of its findings seemed to be that this was indeed a country of two languages and two cultures, and that those conclusions should guide government policies.

Well, it was half right. I wish to suggest that at least for purposes of determining what the role of governments should be, it is necessary to separate the question of languages from the question of cultures. There is a strong case to be made for recognizing two and only two *official* languages in this country, while at the same time recognizing Canada to be a nation not of two cultures, but of many. It is

[30] *Reference re Anti-Inflation Act* [1976] 2 S.C.R. 373.

[31] ROYAL COMMISSION ON BILINGUALISM AND BICULTURALISM (1967).

possible and desirable in my opinion to reconcile a policy of official bilingualism on the one hand with a policy of recognizing, indeed encouraging, multiculturalism on the other. Let me touch on what I consider to be some of the reasons which justify drawing an important distinction between language policies and cultural policies.

First, there is the matter of history. I believe we can be mindful of the history of this country, while not being held captive by it. Governments, like the people they represent, should not attempt to divorce themselves from the events, the forces, and the historical processes that have shaped the Canadian nation. But the character of the country is not static and policies that refuse to recognize and mould themselves to change can become shackles, and can produce stresses and tensions that are not in the best interest of Canadians.

What does the history of this country tell us about languages and cultures? For my own part I have never been overly impressed with the suggestion sometimes made that policies respecting languages and cultures in the last quarter of the twentieth century ought to be determined on the basis of which races or nationalities can point to the longest elapsed time since their ancestors arrived in this country. Indeed, phrases such as "two founding races" or "two charter groups" or "two founding peoples" seem a bit presumptuous, since they tend to overlook the fact that if history provides the standard there are no claims which can compete with those of the true first Canadians — the Indian and Inuit inhabitants of this country. In historical perspective the first white men invited themselves to this continent just the other day, so to speak. Is it of great significance in which order, and from where, the waves of immigrants then proceeded to arrive?

Putting to one side for a moment the question of the native peoples, it is obvious that the cultural make-up of Canada has changed radically in the time since the first Europeans arrived. For the first century and more the Canadian part of North America was essentially unicultural, and that culture was French. And a hundred years ago one could plausibly say that this was a bicultural country. The first census after Confederation, held in 1871, showed that only eight per cent of Canadians were of other than British or French origin. But the eight per cent has risen to well over a quarter of the population, and if present trends continue there will be, within a very short time, roughly a one-to-one relationship among the three major groupings in the Canadian social structure: French, British, and "other". What this suggests is that cultural policies frozen to reflect a situation which prevailed at some arbitrarily selected point in

Canadian history are not appropriate. The present reality of the Canadian scene is not bicultural but multicultural.

Having said that, I return to my earlier point that official language policy need not necessarily follow cultural policy. History suggests, for example, that the claims of Indian and Inuit cultures should rank second to none in the Canadian mosaic. It does not, however, dictate that the various native languages should rank as official languages of Canada, because other intensely practical considerations must be heeded. These considerations have to do with numbers and geographic concentration. At the time of the first Canadian census the French-speaking element of this country numbered just under one third, and the percentage of francophones has not varied all that much from then till now. It has been true since Confederation, and it is true now, that the overwhelming majority of Canadians can speak either French or English and that very many Canadians speak only French or only English. This has been a fact of life in Canada for two hundred years and more and it will continue to be so for a long time to come.

As you know, the special position of these two languages has been recognized in our Constitution from the outset and the right to use both languages in certain institutions of the central government, and in Quebec, has been guaranteed in the B.N.A. Act. (Again, the distinction between languages on the one hand and cultures on the other may be noted, for the Constitution has nothing to say on the subject of cultures). But it would be a mistake to suggest that the extent to which a language survives and thrives is dependent primarily on what constitutions and law books say. There are other much more important factors which explain why French, like English, occupies a position different in kind from that of other languages in Canada. It is a fact that the French language is the only language other than English in which a large number of Canadians live exclusively, or almost exclusively, on a day-to-day basis, at work as well as at home and in their social life. Quebec is an area that compares in size with the larger countries of Western Europe and in population with the smaller countries such as the Scandinavian nations, and more than 80 per cent of its population is francophone. It is perfectly possible for a Canadian speaking only French or only English, depending on the part of the country in which he lives, to participate fully in all levels of his society. That is not the case with respect to any other language.

While I am arguing that language policy can and should be separate from cultural policy, I do not question the fact that there is

a link between language and culture. I recognize that language is not only a means of communication but a means of self-expression, with all that that implies in terms of culture. But what must be recognized is that the realities of our society point toward a two-language policy, and to a special status for French and English, just as clearly as they point, in my opinion, to multiculturalism. What I am saying then, is that there are perfectly good reasons why French and English should enjoy an *official* status in our Constitution and in our law, giving them a privileged place in our institutions of government — the legislatures, the courts, and so on, and I would go further and argue that they should enjoy a favoured position in our educational system as well.

I have suggested secondly that cultural policy is another matter and here, to the extent that our Constitution is to deal explicitly with cultures at all (and I am not at all convinced that it should) it should be on a multicultural, not a bicultural, basis. There are both symbolic and practical reasons for this. One concern, to put it bluntly, is about a possible line of progression leading from "two charter groups", through *bi*culturalism, to conscious or unconscious attitudes of bi-élitism. To many Canadians, that is simply not acceptable. This perhaps is also an element in a slightly different perspective in the west, where the ethnic mix is rather different than it is in central Canada.

Thirdly, I have noted that we should not ignore the fact that there is an interplay between language and culture, because language is a distinctive mode of self-expression. On this point, there are obvious implications for governments and for ethnic groups who naturally desire to foster and develop their distinctive cultures. Recognizing that language is related to culture, it seems to me that governments should not put obstacles in the way of use of minority languages. Further, education is intimately connected with culture and there is no reason why educational institutions should not respond to the wishes of the communities they serve by making available instruction in all languages for which the demand is sufficient, and for which resources are available.

Lastly, government impact on cultures is not merely a matter of laws and regulations and directives. It is also a matter of financial support. The amount of financial support will obviously depend, among other things, on the resources available to government at a particular time. All I would say on this subject is that one hopes that provision of this kind of support would be related to the reality of Canada's present multicultural society. But these are matters of

policy and I do not suggest that they require treatment in the Constitution.

So far in the course of my remarks I have had relatively little to say about the specific constitutional concerns of Quebec. That may seem remarkable, because it is not unusual nowadays to hear discussions of constitutional reform that are directed solely at what might be necessary to accommodate Quebec. I hope I have made it clear that in talking about constitutional concerns in a broader context it was not my purpose to detract in any way from the importance and the urgency of being responsive to the concerns of Quebecers. I did wish to make the point that Quebec is not isolated in its concerns on many of these matters, and that all Canadians should seize the present opportunity to reflect upon the shape of a federal system that is most likely to reflect their own priorities.

Let me now introduce the subject of other constitutional reforms with a few, brief comments about the Quebec situation. To begin, it is hardly necessary to remind you that the pressure for important changes in the Canadian federation did not begin with the election of the Parti Quebecois government. Since Confederation, and indeed for a century before, Quebec has been very conscious of a need to preserve and protect its position as representing the French fact in North America.

For many years and, generally speaking, extending through to the Duplessis era, the concerns were largely to protect the authority which the Constitution already conferred, that is to say, the Constitution as it had been interpreted by the Privy Council when it was the court of final appeal in constitutional matters.

More recently, following the so-called Quiet Revolution in Quebec, the governments of the province moved toward a more affirmative position. It was no longer thought sufficient to react defensively and negatively toward some proposed new federal programme. Increasingly, the constitutional position of that province has been defined in positive terms. The overall objective was expressed in terms of the importance of Quebecers being masters in their own house, and what was sought was increased control over their own affairs. There can be no doubt at all that this constitutional direction, charted well before Mr. Levesque joined the Parti Quebecois, will be continued even if his government is defeated at the next election. That continuity is one reason why the constitutional issues must be seriously addressed now, even if the prospects for successful intergovernmental discussions in the short run are not bright.

If the present government of Quebec, or (more likely) a subsequent one, does in due course re-engage in serious constitutional discussions, it will become necessary to be specific about the ways in which the Constitution presents an obstacle to Quebec achieving its objectives. For it is one thing to deal in abstractions, and at a high level of generality, with such concepts as the need to maintain the cultural integrity of French Canada, or at least of French Canada within the borders of Quebec. It is another matter again to specify precisely which initiatives the government would wish to take, but cannot, because the terms of our Constitution stand in the way.

There are, certainly, a number of constitutional changes which Quebec has spoken of in the past and which could be quite readily effected. First, the federal government could well agree to amending the Constitution so as to give up certain legal powers which now carry more symbolic value than real substance. For example, I have referred to the federal government's power of disallowance which permits it to nullify unilaterally any provincial statute within a year of the time it was passed, and regardless of whether or not a court would have held that statute unconstitutional had it been challenged in court. But that federal constitutional power has not been used for over thirty years and any attempt to revive it now to disallow a provincial statute would undoubtedly result in a great political furore. For that reason, the power of disallowance is not likely to be used even if it remains in the Constitution, and federal agreement to abolish it would not represent a major concession. Indeed, the federal government offered to give up the power of disallowance in the round of constitutional meetings which broke down at the Victoria conference in 1971.

And it is not difficult to suggest other constitutional amendments which could be made to safeguard the constitutional authority of the provinces, without jeopardizing essential powers of the federal government. There is the federal power to declare a particular "work" to be for the general advantage of Canada, by virtue of which declaration the business or enterprise is transferred from provincial regulatory authority to the federal sphere. In the years following Confederation the declaratory power was used very often, particularly with respect to local railways during the heyday of railroad construction. But in recent years it has rarely been invoked, and it is the case that other federations have managed to get by without having this type of unilateral power vested in the central government. Of course, provinces other than Quebec have an interest in the fate of this constitutional clause. (Perhaps some thought has

been given in Edmonton to the possibility that at some future date the Parliament of Canada might choose to exercise the declaratory power with respect to the oil and gas facilities in Alberta!)

Then there are certain federal powers that were based on historical considerations which no longer prevail — for example, the authority to make laws for marriage and divorce, and respecting Sunday observance. These might be logical candidates for tranference of legislative authority to the provinces.

I have made passing mention of the federal spending power, and that is a feature of the Canadian Constitution in respect of which Quebec has been particularly sensitive. Conditional grants have been used by the federal government to influence areas which the Constitution assigns to the provinces. A provincial government has constitutional authority to deal with such matters as health, education, and highways. But when the federal government offers, for example, to pay half the cost of a new programme, subject to certain conditions, the pressures on a province are very strong to take advantage of such a programme based on fifty cent dollars. And that is so even if the conditions imposed mean that it is a very different kind of programme from the one the province otherwise would have mounted, and even when it is realized that the province could be left to carry the full cost of the programme should Ottawa choose to terminate its cost sharing. So provincial priorities become distorted in areas that are supposed to be entirely within its own bailiwick. In the round of intergovernmental meetings that preceded the collapse of the constitutional discussions at Victoria in 1971, a formula was developed for requiring provincial consent before new spending programmes of this kind could be initiated by Ottawa, although the Victoria Charter did not include any such provision. This type of constitutional amendment would go a considerable distance toward meeting some of the concerns that Quebec has expressed in the past.

And of course there are a number of other constitutional reforms that can be instituted to guard against over-centralization in Canada. I have made reference to certain areas of legislative authority which have recently received the attention of the Supreme Court of Canada, and the results of which were disappointing to the provinces. Mention was made of the decisions respecting communications and respecting provincial jurisdiction to regulate and generate revenues from natural resources. In addition, some attention might be given to certain dynamic powers in the Constitution that carry considerable potential for the expansion of central government authority. The trade and commerce power is in that category, and

another federal head of power frequently mentioned in this context is Parliament's residual authority to legislate on all matters not specifically assigned to the provinces.

The list of matters I have touched upon is, it must be acknowledged, fairly lengthy. And it is not exhaustive of the subjects that have been raised. However, while the range of constitutional provisions touched upon is undoubtedly broad, I would suggest that the task of coping with so many issues is less daunting than might first appear. For one thing, a good deal of the homework was done, and some estimation of the attainable arrived at, in the course of constitutional discussions resulting in preparation of the charter considered at the Victoria conference in 1971.[32] You will recall that the Victoria Charter embodied a package of proposals that were, at the time, acceptable to Ottawa and to all of the provinces except Quebec, the latter government deciding in the final analysis that the proposals did not go far enough in terms of protecting the provinces' interests, particularly with respect to social policy. At least some of the Charter should be salvageable. For instance, the final part, headed *Modernization of Constitution*, would accomplish the objective of repealing a considerable number of outdated sections of the B.N.A. Act, such as those providing for disallowance.

And the sections of the Victoria Charter dealing with such matters as language rights, amendments to the Constitution and regional disparities, if not now acceptable to all governments in their present form, at least provide a solid basis for discussion. The same is true of the section on political rights which deals with certain fundamental freedoms: freedom of thought, conscience and religion, freedom of opinion and expression, and freedom of peaceful assembly and of association. The principle of enshrining fundamental freedoms in the Constitution has won a considerable degree of acceptance, subject to concerns in some quarters over the assignment of broad new powers to the courts to put certain kinds of measures beyond the reach of both levels of government. The reservation is one related, ultimately, to the degree of confidence with which the court of final appeal is regarded.

Let me conclude my remarks on legislative authority by noting suggestions sometimes made to the effect that Canada is already so decentralized that the federal government is hamstrung in national policymaking, and that any further reallocation of authority in favour of the provinces would weaken the central government to the

[32] A Constitutional Charter for Canada. Proposed at the Federal-Provincial Conference, Victoria, B.C., 1971.

point where it could no longer pursue legitimate national objectives. As to the first part of that proposition, it can hardly be said that Parliament's legislative initiatives have been frustrated by the courts in recent years. It might be remembered in this context that since the Supreme Court became the court of final appeal almost thirty years ago, no federal programmes or regulatory schemes have been struck down as unconstitutional.[33] And with respect to the possible constitutional changes I have been talking about, I would suggest that most, if not all, are ones which have a strong local flavour and that recognition of that fact need not inhibit the central government from addressing truly interprovincial, national, and international responsibilities.

That is all I propose to say about the distribution of specific legislative powers. I have no intention of inflicting upon you a particular set of pet proposals to be incorporated in a new constitution. Such proposals have a way of becoming out-dated very rapidly, in any event, as constitutional development continues in an ad hoc fashion through judicial interpretation, and through federal-provincial agreements, and as political realities change. Furthermore, if the constitutional review process is successful, what will emerge will represent the product of a whole series of trade-offs and compromises, and that is as it should be. So I shall try not to get further enmeshed in detail, but to address myself rather to priorities and to offer some personal views about certain key elements in the constitutional equation.

Let me begin, then, with a few thoughts concerning the scope of the constitutional reform, some hazards in the process, and what it might realistically hope to achieve. Canada, as I have said, is a very different country from the one that came into being with enactment of the B.N.A. Act 111 years ago — in size, in the make-up of its people, and in many other ways. The basic concerns of Quebec predate Confederation, of course, but those concerns have taken on new dimensions and urgency. Western Canada was not a factor at the time of Confederation, as it is now. Then, Canada was a colony; now, it can no longer affix the blame for shortcomings in its national policy on another country. These and many other changes argue for rethinking of fundamentals.

There are some who are drawn to the conclusion that we should therefore scrap the B.N.A. Act and write an entirely new Constitution. I do not agree with that approach. Indeed, I believe it is both

[33] Decisions in which minor provisions in federal enactments have been found ultra vires are noted, *supra*, note 15.

unnecessary and hopelessly impractical. The fact is that important changes in reallocation of authority can be effected with minimal changes in the letter of the Constitution. And if the desired changes of substance can be effected by concentrating upon a relatively small number of constitutional clauses, why disturb the remaining, and greater, part of the Constitution?

It is sometimes said that we should compose a wholly new document because a Constitution should be educative, and even inspirational, and it must be conceded that the B.N.A. Act hardly fits such a description. It is the case that the reading of the B.N.A. Act is not calculated to quicken the pulse. But that is a shortcoming which is not fatal and perhaps not even all that important. Many Canadians enjoy the game of hockey and, whether as players or spectators, are very knowledgeable about it. But relatively few will have found it necessary to pore over the official rule book. With constitutional rules as with other kinds of rules, it is rather more important that they work and are understood than that they represent literary masterpieces.

My choice of analogy here is a bit frivolous, I know, and if we could readily achieve consensus about a wholly new Constitution it would no doubt be a worthwhile added bonus to have it cast in more majestic prose than that which is found in the B.N.A. Act. And if, for example, we are going to incorporate a Bill of Rights in our Constitution, there is no reason why these new sections dealing with fundamental rights and freedoms ought not to be framed in suitably inspirational terms. Similarly, tidying up the B.N.A. Act by eliminating a number of provisions that are anachronistic can and should be done. The Victoria Charter, as I have noted, would have cleaned away much of this constitutional deadwood. But all that is quite different from resolving to write a wholly new Constitution, to start from first principles and to put everything up for grabs. If our constitutional history teaches us anything, it is surely that the achievement of a consensus has been elusive for even very limited changes in our constitutional set-up. The prospect of a complete rewrite, with all the additional possibilities for disagreement that would produce, must surely give pause to even the most incurable optimist.

These are points I would make even in ordinary circumstances, but I do not have to tell you that these are not ordinary times. There are other very good reasons why it would be a mistake to allow our efforts to become diffused by debating cosmetic constitutional changes. The result of drawing out the process, and multiplying areas

for possible disagreement, would be to place additional demands upon the good will that must accompany the process if it is to succeed. There are limits upon the consensus that we can reasonably expect to achieve in a short period of time, and the political reality is such that time is a factor of great importance. I refer, of course, to the situation in Quebec and to the fact that Quebecers will shortly be called upon to make some hard choices about their future. Superficial changes of form in the Constitution are not going to be determinative or even very relevant except, perhaps, in the negative sense of distracting attention from, and therefore impeding, the process of defining the more important substantive changes proposed for the Constitution. As a matter of simple fairness, Quebecers should know what changes are in store with respect to central issues, and they need to know sooner rather than later in order to be able to take that into account when they are called upon to express their views at the polls.

In brief, let us not lose sight of the fact that there is a certain urgency about all this. With that in mind, I suggest that we would do well to concentrate our attention on the pressure points in our present constitutional arrangements. There will be time enough, after the tough issues have been confronted and resolved, for a more leisurely approach to matters of secondary importance, such as recasting the rest of the Constitution in more elegant language.

A further observation I would make is that we should be cautious about assumptions, consciously or unconsciously made, that constitutional arrangements suitable for other federations can be transplanted here, or that they ought to be. Canadians are particularly influenced by the affairs of our great neighbour to the south, and it would be surprising if that were not so. Derivative thinking is one of the risks of this situation. From time to time we are presented with proposals tending in the direction of the Americanization of our Constitution. In itself, of course, that is neither good nor bad, but my point is that we will want to be sure that the proposal has some other virtue to commend it, and that it accords with our own priorities. To illustrate, let me mention an example currently of some interest to the legal profession.

In the United States there is a dual court system. Generally speaking, if you are involved in a dispute concerning state law, litigation takes place in the state courts, and if the dispute raises a question of federal law, litigation proceeds in the federal courts. No doubt it is an arrangement having much to commend it, although resolving the

question of which court has jurisdiction can be costly in terms of both time and money.

In Canada, by way of contrast, we have had what is basically a single court system. Whether the legal question turns on federal or provincial laws, and whether or not they raise constitutional questions, they are dealt with in a single system of provincial courts, with an appeal being available from the provinces' courts of appeal to the Supreme Court of Canada. This hierarchy of courts is used for litigation between citizen and citizen and also for disputes between citizen and provincial government.

The principal departure from the single court system involved the old Exchequer Court of Canada, created in 1875 and lasting to the beginning of the 1970s. It was given jurisdiction to try certain kinds of disputes between a citizen and the federal government. Now it is not altogether self-evident why the federal government felt it required a separate court to hear cases to which it was a party. It cannot have been only because it appointed the judges of the Exchequer Court, because it also appoints judges who sit in the provincial courts in which the proceedings would otherwise be brought. Nor can it have been to achieve uniformity in interpretation of federal laws; the Supreme Court of Canada was created at the same time, presumably to discharge just that function. And, mercifully, no province has felt impelled to create a special court to entertain actions against the provincial government. But there were historical precedents for such a court, both in the United Kingdom and the United States and, in any event, the Exchequer Court was not all that significant a factor in our justice system as a whole. Its jurisdiction remained virtually static for its life span of just under a century.

Then, in 1971, the federal government abolished the Exchequer Court and replaced it with a new two-tier (trial and appellate) court with greatly expanded jurisdiction called the Federal Court of Canada.[34] The Federal Court was given new powers to review decisions of federal administrative tribunals (a task formerly performed by provincial courts), to entertain suits between citizens involving certain areas of federal law, and to entertain proceedings if certain parties subject to federal regulatory authority are involved.

This new legislation, in short, appears to have taken us a long step in the direction of a dual court system similar to that in the United States. But just why that route was chosen is anything but

[34] The Federal Court Act, R.S.C. 1970, 2nd Supp., c. 10.

clear, and there appears to have been no significant support for such a development outside the federal government itself.

And this brings me to my next general observation. Attitudes of governments can be as important as the letter of the Constitution. To go back to my last example, there is no doubt that the B.N.A. Act gives the Parliament of Canada authority to expand greatly the jurisdiction of the Federal Court and, if it chooses to exercise its authority to the fullest, to establish a fully fledged dual court system. The question is not only whether such a development serves any useful purpose but also, taken in conjunction with other initiatives from Ottawa, whether it does not contribute quite unnecessarily to concerns about expansionism on the part of the central government.

Finally, I should like to comment very briefly on certain proposed changes in federal institutions. I propose to make some observations about proposals that call for a reconstituted Canadian Senate or its replacement, and in that context I will say something about federal-provincial conferences. Lastly, I will come back to proposed reforms relating to the Supreme Court of Canada, or the alternative of a constitutional court.

There has been a considerable variety of proposals relating to the Senate or some new body to be created in its place, perhaps to be known as a House of the Provinces. Various responsibilities are suggested as appropriate functions for this second chamber, but the most significant is generally assumed to be a responsibility for acting as a voice of the provinces in Ottawa, and to be the guardian of provincial and regional interests within the federal government. Its role, that is to say, would be much like that envisaged by the Fathers of Confederation for the Senate we now have. The Confederation debates are some evidence of the importance placed on this subject, for almost as much time was spent on discussing the Senate as on the rest of the Constitution.

The Senate, most would agree, has not lived up to expectations. Reforms aimed at energizing it, or ensuring that a new upper house would be more effectual, essentially rely on new methods of selecting its members. Perhaps they could be elected, although that would have serious implications for the kind of cabinet responsibility with which we are familiar. Alternatively, the members could be appointed wholly or in part by the provincial governments.

In my first lecture I noted some of the limitations inherent in constitutional reforms which call for provincial representation in the legislative organs and regulatory bodies of central government. Such reforms, I suggested, are no substitute for measures which are

designed to ensure that effective and vigorous initiatives can be taken at the provincial level. At best, an effective upper house could serve as a brake upon central government initiatives seen as threatened intrusions into the provincial sphere.

The latter function is not without importance, of course, and I do not suggest that proposals for a restructured Senate or a new upper house should be dismissed out of hand. But the reform is obviously a very major one, raising difficult issues of principle and of politics relating to representation, definition of powers, and so forth. Is it likely that federal and provincial governments that have been unable to resolve the relatively simple problem of devising a formula to amend the Constitution after all these years would be able to achieve consensus, in a reasonably expeditious fashion, on so complex and contentious a proposal? I think not, and if that assessment is correct I would remind you once again of the advantages of economizing effort and goodwill for application to constitutional changes that can be dealt with in a time frame that comports with the urgency of the task.

There is another forum that has evolved and flourished in the Canadian federal system to provide a voice for provincial governments. That is the federal-provincial conference, an institution which has come to play a major role in the public life of this country. While meetings of First Ministers are not formal decision-making bodies, they tend to capture public attention, and therefore influence public opinion, more effectively than the deliberations of an upper house are ever likely to do. That is partly because such conferences are relatively infrequent, but then the critical issues of federal-provincial relations also tend to be relatively limited in number. And in such meetings, provincial governments speak in the most direct and authoritative way possible. If the principal objective is to ensure authentic and influential expression of the provincial point of view in Ottawa, might it not be preferable to build from existing strength by developing and perfecting the mechanisms of federal-provincial conferences? Indeed, a possible alternative to a House of Provinces might be to confer certain formal decision-making powers on federal-provincial meetings of First Ministers, or their designates.

While I am on the subject of a provincial voice in central government decision-making, may I add a thought respecting proposals for provincial government representation on federal agencies such as, for example, the National Energy Board. I have pointed out that whatever other purpose might be served, such representation on federal instrumentalities could not be expected to contribute toward

safeguarding the capacity for taking important initiatives at the provincial level. There is another reason why I find it difficult to become enthusiastic about such proposals, and that has to do with the principle of accountability. If a regulatory agency like the N.E.B. is converted into a hybrid, the offspring of two levels of government, to which will it be answerable? Which cabinet(s) will control its jurisdiction and reserve the right to overrule its decisions? To which level of government do you, as a voter, communicate your approval or displeasure respecting agency policies? Perhaps it is old-fashioned, but I believe there is a great deal to be said for maintaining clear lines of responsibility, and the device of provincial appointments to federal boards is not easy to reconcile with that principle.

The last subject I propose to touch upon is the question of reforms relating to the Supreme Court of Canada, or the possible establishment of a new constitutional court to entertain constitutional questions. There are no easy answers. Enough has been said, I think, to make it clear that the Court's role in determining the direction of constitutional development is of critical importance, and any discussion of new constitutional arrangements must take account of that fact. It is essential that the Court be seen as one which can be counted upon to preserve a fair balance between the central and provincial governments.

Let me give you a current illustration of just how delicate the balance can be, and how sensitive the role of the Supreme Court is. On January 19, just before commencement of its most recent session, the Court handed down three constitutional decisions involving provincial enactments. In those three decisions, a majority upheld provincial authority in one,[35] decided adversely to it in another[36] and, in the third,[37] struck down one provision in the provincial enactment while supporting provincial legislative authority on the broader issue. But the results are incidental to my present point, which has to do with the division of opinion in the Court. In these three cases, all of which were heard by a full Court of nine judges, the first was decided by a majority of six to three and the other two by a bare majority of five to four.[38] When the result in important

[35] *Attorney-General for Canada v. Dupond* (1978) 84 D.L.R. (3d) 420 (S.C.C.).

[36] *Simpson Sears Ltd. v. Provincial Secretary of New Brunswick* (1978) 82 D.L.R. (3d) 321 (S.C.C.).

[37] *The Nova Scotia Board of Censors v. McNeil* (1978) 84 D.L.R. (3d) 1 (S.C.C.).

[38] On the same date the Court delivered reasons for judgment on a reference concerning both federal and provincial enactments: *Reference re Agricultural*

constitutional decisions may be determined in this way by the slimmest of majorities, it should not be surprising that those who are concerned with constitutional reform should take a high interest in all matters having to do with the make-up and operation of the Court.

Turning now to some of the proposed reforms, one variety which apparently continues to be widely favoured calls for involvement of the provinces in the process of selecting the judges of the Supreme Court. Frankly, I am sceptical about the merits of such proposals. There is no true parallel to proposals for provincially appointed senators or members of regulatory agencies, for a judge is in no sense whatever a delegate of the government that appoints him. He is, and must be, wholly independent, and any suggestion that he would owe allegiance of any kind to the appointing government is, of course, unacceptable.

Further, the possibility that governments would select judges on the basis of what is thought to be their particular constitutional predisposition is, I believe, very remote. It must be remembered that while the Supreme Court's constitutional jurisdiction is of great importance, these cases form only a relatively small part of its workload. The appointing government, at whatever level, must be conscious of that fact and ought, first and foremost, to aim at appointing the most capable jurist available. Indeed, one of the risks in distributing the appointment power over several governments is that it could prove more difficult to arrange for an appropriate mix of different kinds of legal expertise in the court.

The last mentioned difficulty could be avoided, it is true, by the creation of a separate constitutional court. It is quite possible, of course, to have a separate court to determine constitutional questions. That is the situation, for example, in West Germany. A constitutional court would presumably enjoy some of the advantages which accrue to other specialist tribunals as compared to those of general jurisdiction, namely, the benefit of expertise appointees would be expected to bring to the job and to develop through concentration of their energies and experience in the particular area. And the difficulties said to be involved in dealing with constitutional issues separately from others are, I think, somewhat over-rated.

On the latter point, it should be remembered that constitutional

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Products Marketing Act, *supra*, note 15. While the Court was unanimous in the result, the reasons of the Court to which five judges subscribed differ in significant respects from the separate concurring reasons representing the views of the other four.

references have played a very important part in our constitutional history. That is where a government, federal or provincial, has referred a constitutional question for the decision of the courts concerning the constitutional validity of a particular law, or proposed law, or some general question about the distribution of legislative authority. The court then deals only with constitutional issues. Of the decisions of the Privy Council, about one third were references, and their relative importance was even greater than that number suggests because references are usually made only where the constitutional question is one of substantial significance or urgency, whereas constitutional questions arising in ordinary litigation often involve relatively narrow or minor points. And, of course, the Supreme Court of Canada continues to deal with very important questions on references, for example, the 1976 reference on the *Anti-Inflation Act*.[39] So we are quite familiar with the phenomenon of a court dealing with constitutional issues in the abstract, as it were, and there would seem to be no compelling reason why a new constitutional court could not assume the responsibility.

This could well prove to be one of the most difficult questions to resolve in the process of constitutional reform, that is, whether the Supreme Court is to be maintained in its present form, or whether it is to be restructured in some way (such as by increasing the number of judges, or through arrangements for special constitutional panels), or whether there is to be a new constitutional court. Much will depend, I suspect, on the position that Quebec takes on that matter.

In closing, let me say that I have had much to say about the problems we face and must resolve. But this too must be put in perspective. The Canadian federal system has been sufficiently flexible to accommodate different languages and many cultural groups. It has allowed Canadians of different traditions to live together in a spirit of harmony and tolerance rare elsewhere in the world.

We have taken this for granted, and no doubt that is part of our present problem. What is essential now is the determination, understanding, and goodwill to address the issues positively despite differences of perspective and of priority. Above all, it will be necessary to demonstrate a willingness to compromise in the process of working out arrangements designed to allow all Canadians to achieve their aspirations within a revitalized federation.

[39] *Supra*, note 30.

KENNETH M. LYSYK, Q.C.

Kenneth Lysyk was appointed Dean of Law at the University of British Columbia in 1976. Prior to his appointment he had been Deputy Attorney General of Saskatchewan for four years. He was Professor of Law at the University of Toronto from 1970 to 1972, and during the nineteen sixties was a member of the Faculty of Law at the University of British Columbia. One of his primary academic interests has been the law of the Canadian constitution, and he continues to publish and teach in that area.

He has also worked on constitutional matters in a variety of professional capacities. In 1969-70, while on leave from the University of British Columbia, he was engaged on a full-time basis as an Adviser in the Privy Council Office (Constitutional Review Section) for the Government of Canada. His work for the federal government and his more recent responsibilities as Deputy Attorney General of Saskatchewan have involved his participation in many intergovernmental meetings on the constitution. He has acted as counsel in a considerable number of constitutional cases in the Supreme Court of Canada. Other professional involvement has included research and legal advisory work for federal and provincial governments on various constitutional matters. His most recent work of a public service nature was as Chairman of the Alaska Highway Pipeline Inquiry, which submitted its report on August 1, 1977.

Dean Lysyk is a member of the Bars of Saskatchewan, British Columbia and the Yukon, and was appointed a Queen's Counsel (Saskatchewan) in 1973. He has an Arts degree from McGill University and Law degrees from the University of Saskatchewan and Oxford University. His home province is Saskatchewan.He is married, with three children.

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