TOWARDS A NEW CANADA: THE CANADIAN BAR ASSOCIATION'S REPORT ON THE CONSTITUTION

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Introduction

In September, 1977, the Canadian Bar Association embarked on the largest and most important, not to say controversial, research undertaking in the history of the Association. This was its study of the Canadian constitution made pursuant to the resolution adopted at the 1977 Annual Meeting of the Association setting forth a declaration of policy on the future of Canada. The resolution reads as follows:

> (i) THAT the Association recognizes and willingly accepts a duty to advance and protect the interest of all Canadians by promoting throughout this country confidence, pride and a strong sense of Canadian identity.
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> (ii) THAT the Constitution of Canada be rewritten so as better to meet the aspirations and present-day needs of all the people of Canada and to guarantee the preservation of the historical rights of our two founding cultures.
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> (iii) THAT this Association do constitute and fund a special committee to undertake, on its own initiative and in cooperation with others, the search for a definition of the essential constitutional attributes of a Canadian federalism, taking into consideration the views put foward by the various other interested groups and organizations across Canada and that such committee do report its progress at the midwinter meeting of council and at the next Annual Meeting.
>
> (iv) THAT this Association re-dedicate itself to develop programs at both its national and provincial levels which are specifically designed to contribute towards the achievement of stronger harmony among all Canadians.[1]

The resolution was born in controversy. Spurred by the election of the *Parti québécois* on November 15th, 1977, the then President of the Association, Mr. Boyd Ferris, had pressed for the passing of a resolution underlining the commitment of the Association to a united Canada. As originally proposed, however, the resolution was so worded that many members of the Association, particularly from Quebec, could not accept it, and some feared that it offended against the Association's tradition of admitting lawyers of every political stripe. There was some movement to have the resolution tabled, but

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[1] The National, Sept. 1977.

following considerable negotiations, the resolution was passed with amendments in the form above given.[2]

It is one thing to pass a resolution; it is quite another to give it effect. This was the challenge facing the newly elected President, Jacques Viau, and the Executive following the Annual Meeting. To meet the challenge, three different steps had to be taken. Sufficient funds had to be raised to make the project viable. This step was made possible by an initial grant from the Donner Canadian Foundation, followed later by grants from the Alberta, British Columbia and Ontario Law Foundations, and by personal contributions from members of the Association. A Committee had to be found to undertake the work. It was decided that there should be one representative locally chosen from each province, with two from Quebec to ensure that the views of that province were fully presented, and that, because of the importance of the work, it should be chaired by the President of the Association, Mr. Viau.[3] Finally, there had to be an adequate research component. I was named Executive Vice-Chairman and Director of Research on November 15th, 1977, and shortly thereafter I arranged for Mr. Joel Fichaud to be my assistant. Between us we organized most of the work; other research was prepared by a number of persons on a contractual basis,[4] and many others offered advice and assistance as needed.[5]

The Committee's first meeting was held on November 17th, 1977 and thereafter it met for two or three days at intervals of three weeks to a month, culminating in a week-long meeting in early July, 1978. In all, it met around thirty days and it was a rare occasion for any member to miss a meeting. Between meetings, I arranged for and distributed to the Committee position papers on the various issues as well as voluminous other material. The members of the Committee also attended many of the meetings on national unity and the constitution then being promoted by various groups throughout Canada. To expedite matters, we agreed that decisions of a majority would be the decision of the Committee, though in fact the Committee was unanimous on most of its proposals. If at the

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[2] *Ibid.*

[3] The Committee consisted of the following: Jacques Viau, Q.C. (Chairman), G.V. La Forest, Q.C. (Executive Vice-Chairman), John A. Agrios (Alberta), Douglas McK. Brown, Q.C. (British Columbia), George D. Finlayson, Q.C. (Ontario), L. Yves Fortier, Q.C. (Quebec), Joseph A. Ghiz (Prince Edward Island), William L. Hoyt, Q.C. (New Brunswick), Robert Lesage, Q.C. (Quebec), David Matas (Manitoba), John P. Merrick (Nova Scotia), D.E. Gauley, Q.C. (Saskatchewan), Clyde K. Wells, Q.C. (Newfoundland).

[4] Ivan Bernier, J.-G. Castel, Howard Eddy, David Jones and Chris Johnston.

[5] These included R.M. Burns, André Dufour, Dale Gibson, Peter Hogg, Patrick Keniff, W.R. Lederman, James C. MacPherson, Senator G.L. Molgat and Richard Simeon.

beginning of the exercise some of the members had limited familiarity with many aspects of the constitution, at the end the Committee had become a highly sophisticated group, able to delve quickly and deeply (but never easily, for the subject matter does not allow it) into the many issues that must be weighed in considering constitutional arrangements for Canada.

I. *The Mandate.*

One of the earliest tasks facing the Committee was to interpret its mandate. Our duty was to "undertake . . . the search for a definition of the essential constitutional attributes of a Canadian federalism". We were, therefore, not asked, and we did not attempt, to compare one system of association with another (or to unravel the mysteries of "sovereignty-association"). We confined our work to an examination of a working "federalism" for Canada, a term we interpreted in its proper sense, that is "as involving two levels of government with separate powers both elected directly by the people—not a loose confederacy of independent states".[6] This view was supported by the statement in the resolution that the Association recognized and accepted the duty of "promoting throughout this country confidence, pride and a strong sense of Canadian identity".

Nor was the Committee asked to examine the underlying forces that go to make up the Canadian union. This would have gone well beyond our competence as lawyers. We were not asked to examine the essential attributes of Canadian federalism, but rather "the essential *constitutional* attributes of a Canadian federalism". In short, our mandate was confined to what laywers can perhaps do best in the field—"analyzing, describing and assessing the strengths and weaknesses of proposed institutional arrangements".[7] This interpretation was fortified by the further provision in the resolution that "the Constitution of Canada be rewritten".

Nonetheless, the Committee had to take into account the broad social forces that had led to the national crisis in weighing possible constitutional arrangements. Some basic assumptions, therefore, had to be made about these social forces. We knew, of course, that the crisis had begun in Quebec with the concern of French Canadians about the preservation and development of their way of life. But we also knew that the malaise had spread and that the problem of national unity raised different issues in different parts of Canada. The Committee thus put it:[8]

> The national debate that began in Quebec in time spilled over into the rest of the

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[6] Towards a New Canada, Committee on the Constitution, The Canadian Bar Association (Montreal, 1978), p. XVI.

[7] *Ibid.*

[8] *Ibid.*, p. 2.

> country. And as the soul-searching as to what might be done to meet the needs of Quebec increased, other weaknesses in the general structure of the country became increasingly apparent. Regional economic disparities were perceived as a source of disunity, particularly in the Maritimes. A feeling of isolation from national decisions and institutions emerged, especially in the West, a by product of the uneven regional strength of the national political parties and vast distances. New Canadians became concerned that their interests might be overlooked in a national accommodation. The omnipresence of government spawned competing jurisdictional claims which added to the confused and confusing conflict between regional and national identity.

That the Committee's assumptions were not far from the mark was amply demonstrated by the careful analysis of these underlying forces made by the Task Force on Canadian Unity.[9]

The Committee's task, then, was to attempt to devise concrete and reasonably workable proposals that could usefully serve in rewriting and restructuring the Canadian constitution. The Committee, of course, never assumed that a new constitution could by itself solve the problems of Canadian unity. National unity can only be achieved by the desire of the Canadian people to continue to live together as a nation, and in a country as diverse as Canada, this requires constant effort both in promoting common goals and in fostering respect and understanding for the diverse cultures and traditions. The resolution reflected an awareness of this reality by calling upon the Association "to develop programs . . . designed to contribute towards the achievement of stronger harmony among all Canadians".

II. *The Constitution as Symbol.*

The Committee did, however, see an important role for a new constitution in fostering Canadian unity. "A country's constitution", it notes, "should be one of its important unifying symbols".[10] To do this, it must set forth the other basic symbols of government and give expression to the fundamental values all Canadians share, the rights of the individual, of regions and of different cultural groups. It must in other words give voice to the basic understanding on which government rests, as well as the structures of governmental institutions. In this regard, the existing constitution is wholly deficient. The British North America Act[11] was intended to describe and establish new structures to create a federation out of the separate British North American colonies and territories. Many of the basic institutions of government, such as

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[9] The Task Force on Canadian Unity, A Future Together, Observations and Recommendations (Ottawa, 1979).

[10] *Op. cit.*, footnote 6, p. 5.

[11] 1867, 30 & 31 Vict., c. 3, as am. (U.K.).

responsible government, are nowhere referred to; they are assumed. Still less does the existing constitution give symbolic expression to the values and understandings we as a people expect to foster by government.

The Committee laid great stress on symbols to express the reality of Canadian nationhood. That is why it opted for a constitution that would not only be, but be seen to be, wholly Canadian. It is also why the Committee opted for a Canadian as head of state. The same reasoning underlies the Committee's recommendation that a preamble be adopted to set forth some of the essential attributes of Canadian federalism. Symbolism, along with some measure of protection, played a significant role in the Committee's decision to set forth in the constitution the basic rights—political, egalitarian, linguistic and economic—Canadians should enjoy as citizens. The same is true of the recommendations that a number of our basic institutions and principles, at best tangentially referred to in the British North America Act—responsible government, the existence and independence of the courts, the Supreme Court of Canada—, should be enshrined in the constitution. The constitution should establish and set forth our basic governmental structures and give expression to the constitutional objectives and values to which we wish governments to conform.

III. *Constitutional Objectives.*

The preamble proposed by the Committee would set forth the following as essential attributes of Canadian federalism:

—Recognition of Canadians as a free people exercising self-government through democratic institutions.

—Dedication to human rights and to freedom under law applied by independent courts.

—Recognition of the equal partnership between the English and French-speaking communities, and the accordance as a consequence of constitutional protection to the English and French languages throughout the land.

—Recognition and promotion of the richness of our multicultural society.

—Affirmation of the special place of the native peoples of Canada.

—Adherence to a federal system that can achieve common aims and purposes while respecting cultural and regional diversities, and in which the need for collaboration by the various governments through adequate mechanisms of consultation and co-operation is recognized.

—Commitment to promoting the social, economic and cultural development for the general welfare while seeking equality of opportunity for all Canadians in all regions of Canada.

—Declaring our desire to contribute to peace and security, and the general welfare of all mankind.[12]

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[12] *Ibid.*, p. 9.

Interestingly, this list is similar to that adopted by the Pepin-Robarts Task Force,[13] and the Constitutional Amendment Bill of the Federal Government.[14] This is neither surprising nor sinister. A rather similar list had been proposed some years before by the Special Joint Committee of the Senate and House of Commons on the Constitution, a committee composed of members of all parties in the Canadian Parliament.[15] This itself was probably influenced by the work done by federal and provincial officials during the constitutional process preceding the Victoria Conference in 1971. The list probably constitutes a realistic assessment of the principles that must underlie a viable Canadian federalism, although it by no means follows that those who agree with these principles necessarily agree with particular constitutional arrangements to give them effect. Certainly there are wide differences of views in the above mentioned documents.

Preambular statements of this kind are more than mere window-dressing. They constitute an authoritative statement of the fundamental assumptions about our political arrangements and can be used as a test to measure the actions of political authorities. They are particularly useful in the field of human rights where individuals who feel aggrieved can appeal on the basis of authoritative statements in a country's most fundamental document.

IV. *Fundamental Rights.*

The constitution proposed by the Committee would do far more in the field of individual freedoms than a preamble, however important that may be. The Committee recommended that a Bill of Rights be enshrined in the constitution for enforcement by the courts. The proposed Bill of Rights is in very wide terms. It incorporates the political rights the First Ministers had agreed to in the Victoria Charter, for example, freedom of religion, opinion and expression, of peaceful assembly and association, universal suffrage and so on. But it goes further by adopting the legal rights traditionally enjoyed by Canadians, most of which are now incorporated in the Canadian Bill of Rights.[16] These include such matters as the right not to be deprived of life, liberty and security of the person except by due process of law, the right of a person to be informed promptly of the reason for his arrest, the right against unreasonable search and seizure. These, as the 1972 Joint Committee on the Constitution

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[13] *Op. cit.*, footnote 9, p. 121.

[14] 1968, Bill C. 60.

[15] The Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Final Report (Ottawa, 1972), p. 11.

[16] S.C., 1960, c. 44.

pointed out, can also be looked upon as political rights.[17] They are essential to our political as well as our personal freedom.

The same can be said of the right to privacy. As the Bar *Report* notes: "The right to privacy is a prerequisite to freedom of speech, expression, thought, conscience, opinion, assembly and association."[18] The *Report*, therefore, proposes—the first of the constitutional studies to do so—that this right be constitutionally protected against unreasonable interference. The *Report* takes a similar view—also an innovation in Canadian constitutional discussion—about the twin freedom of reasonable access to public information in the possession of all levels of government. The rationale for this approach is that "the democratic process cannot function adequately without timely information about the activities of Parliament"[19] and other legislative bodies.

Egalitarian rights—the right not to be discriminated against by the state by reason of race, colour, religion, sex and so on—are to be protected by a clause recognizing the right of the individual to equality before the law. The courts are effectively assigned the duty of defining the extent of these rights and of balancing them against others. Finally, protection of other fundamental rights is accorded by a provision that they are not to be diminished by the enumeration of the rights in the proposed Bill.

V. *Language Rights.*

Language rights were also proposed for the new constitution. The Committee would constitutionally entrench English and French as the official languages of Canada, and accord people whose ordinary language is English or French a number of rights to the use of these languages in dealing with government at the federal, provincial and territorial level, and before the courts. These rights would apply throughout Canada and would include: the right to use either official language in Parliament, the provincial legislatures and the territorial councils; publication of all statutes in both languages, and at the federal level the Parliamentary records and journals as well; the right to be tried in whichever of these languages is one's ordinary tongue, and in civil actions to use that language in giving evidence or in any pleadings and process; the right to communication in either official language with head offices of federal and provincial departments and agencies, and with the principal federal offices in areas where a substantial proportion of the population uses the language; and finally that parents have the right to have English or French as the

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[17] *Op. cit.*, footnote 15, p. 20.

[18] *Op. cit.*, footnote 6, p. 16.

[19] *Ibid.*, p. 18.

main language of instruction of their children in areas where the number of people speaking that language warrants that course.

The major argument made in the *Report* is a political one: that without language guarantees, Canada's existence as a nation is in danger. French Canadians are determined to maintain their language and culture on a largely English-speaking continent. This is becoming increasingly difficult in a society where commercial activities and communications are fast integrating us all at a global level. Like other groups similarly situated throughout the world, French Canadians seek institutional protection. The Committee concluded that "constitutional language guarantees are required if Quebeckers are to continue to feel that Canada is their country and that they are not constrained to turn solely to the government where they have majority control".[20]

The argument might equally have been made in terms of human rights. An individual obviously functions best in his own language. Like other human rights, its practical definition and support must be within the limits of the possible. But in a country where close to two-thirds have English and one-third have French as their mother tongue, it should certainly be both possible and reasonable to guarantee to each of these groups the level of governmental services recommended in the *Report*. We are not, after all, talking about obscure languages, but about two of the major languages of the world. And we are not talking of forcing anyone to use a language other than his own. Quite the contrary. Good sense, it is true, would seem to dictate that all of us should try to gain more knowledge of both of our official languages—a sentiment that a growing number of Canadians seem to share—but that must remain a personal choice. The language guarantees would also strengthen the national market—a cornerstone of the Committee's economic policy—by encouraging the free flow of people throughout Canada.

For other language and ethnic groups far less can be done as a practical matter, but the Committee felt that in addition to the preambular statement on multiculturalism, the constitution should explicitly recognize the right of the federal and provincial legislatures to assist these groups in promoting their languages and cultures. This and the provision respecting equality before the law should, the Committee felt, "underline the commitment of Canadians to fair treatment for all the people of Canada".[21] For one group of Canadians, our native people, the Committee would have gone further—it recognized their special place in the Canadian mosaic. It added that agreements made with our native people should be

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[20] *Ibid.*, p. 23.

[21] *Ibid.*, p. 26.

scrupulously honoured, and the constitution should expressly set forth our commitment to abide by our obligations to them.

The *Report's* approach to language rights is markedly different from that taken in the Pepin-Robarts *Report* and to some extent by the Federal Government Bill. The Task Force proposed constitutional language guarantees in federal matters much along the same lines as the Bar Committee and, indeed, would have gone further by guaranteeing access to radio and television services in both official languages. But it was prepared to trust the provinces to provide adequate services for its linguistic minorities. This logically led to a recommendation that the limited guarantees afforded the minority language in Quebec and Manitoba be removed. This, the Task Force thought, would more likely be successful, in the long run involve less confrontation, and be more in agreement with the federal system.

There must be few more pious expressions of hope in a public document than this one. Neither the English minority in Quebec nor the French minority in the rest of Canada can accept this approach with equanimity, and history provides them with little comfort. It is significant that the Task Force did not have any representative from these, the two largest minority language groups in Canada—each a million strong. Even if the fondest hopes of the Task Force were to come about, these minorities would not feel satisfied. Minorities always fear the fickleness of majorities, and if the majority is to accede to the needs of the minority anyway, why should they not be constitutionally guaranteed? The notion that the approach of the Task Force is "more in agreement with the spirit of the federal system" is, of course, completely gratuitous. It depends on what federal system is proposed. The United States constitution, for example, gives the federal government considerable power to protect the rights of minorities. For my part, I prefer a federalism with the broad and sensitive regard for human rights proposed by the Bar Committee. The inspirational value of a constitution lies in the fact that it expresses a people's ideals about the objectives of government, not (though this may be necessary) in its assigning powers to one level of government or another to define the rights of the people.

The proposals in the Government Bill guarantee rights similar to those proposed by the Bar Committee, but only in Ontario, Quebec and New Brunswick and such other provinces as may elect to do so, are simply a reflection of a political assessment of what was thought possible in the existing context. This is hardly a ringing declaration by a nation of its belief in the right of the individual to freely develop his own culture to the greatest extent possible. It smacks rather of a hard bargain between two separate peoples: "If you tolerate the rights of the English minority in Quebec, we will do the same for the

large French population near Quebec''. From Quebec's perspective, it seriously undermines the notion that all of Canada belongs to French Canadians as it does to other Canadians (except of course at the price of giving up their language and culture).

VI. *Economic Rights*.

The Committee clearly recognized the importance of economic rights. ''Equality of opportunity'', the *Report* notes, ''is probably as important to the average individual as freedom of speech, association and religion''.[22] The Committee felt, however, that this was not a matter that could be enforced by the courts. Governmental activity and political judgment were required. Because of the importance of the problem of regional disparity in Canada, however, the Committee recommended that the constitution should contain special provisions on the matter, notably by setting forth in the constitution a commitment by both levels of government to promote equality of opportunity and well-being for all, to ensure public services of reasonable quality for all individuals and regions without imposing a disproportionately high tax burden on those individuals or regions, and to promote economic development. This constitutional obligation would not be enforceable by the courts, but be left to the pressure of public opinion. The Committee noted that steps could be taken to ensure an informed public opinion by establishing a Commission to monitor the steps taken by the various governments to meet the constitutional objective.

VII. *The Division of Powers*.

The emphasis placed by the Committee on the importance of unifying symbols and the rights of the people and of the individual did not prevent it from tackling the knotty problems of the division of legislative powers between the federal Parliament and the provincial legislatures. Indeed, the bulk of the *Report* is devoted to these questions, and according to many knowledgeable observers,[23] the *Report* contains the most comprehensive and probing examination of the issues involved during the current phase of constitutional re-examination. Though the Pepin-Robarts *Report* deals with the matter to some extent (indeed it adopted many of the recommendations in the Bar Committee's *Report*), its major value is in the analysis of the underlying forces that must be taken into account in

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[22] *Ibid.*, p. 29.

[23] See, *inter alia*, the remarks of the members of the Joint Committee in Minutes of the Special Joint Committee on The Constitution of Canada, Sept. 6th, 1978; Report on Confederation, Oct. 1978, p. 31; Leo Barry, Book Review, [1979] Dalhousie L.J. 402.

coping with the problem of national unity. It makes suggestions for the direction of constitutional change but some of the more important ones are vague and others on analysis appear to be in conflict. The federal government and some of the provincial governments have covered the ground to some extent,[24] but these of course, are necessarily made against a background of political negotiation and lack the measure of detachment that the Bar Committee's *Report* provides.

It is, of course, not possible in this brief overview to deal in any detail with the specific recommendations of the *Report* in this area and it must suffice to set forth the general views of the Committee. Generally, it concluded that "any massive shift of power between the two levels of government would result in serious harm to Canadian federalism".[25] At the same time, it did not hesitate to propose rearrangements whenever this "conformed to the underlying purposes for which both levels of government exist".[26] Generally, the Committee concluded that "the federal government must have sufficient power to manage the national economy, the defence of the country, and generally to function as the government of all Canadians".[27] Accordingly, most of its existing powers to regulate the economy would be retained—for example, its power to regulate international and interprovincial trade and the monetary system, as well as its comprehensive powers of taxation. Similarly, it would retain its power to defend the country, to direct foreign policy and to regulate national systems of transportation and communications.

In fact, the reality of Canada as an economic union would receive more precise constitutional definition and protection. Thus the constitution would guarantee the free flow of people, goods and services throughout the country. Moreover, some federal economic powers would be clarified or expanded. For example, the federal power to spend money for national purposes would be clearly provided for, and its powers to regulate competition, the extra provincial securities market and (with a measure of provincial support) to establish general economic objectives and to harmonize

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[24] Some, but limited, discussion of the division of power appears in the latest federal constitutional papers: Pierre Elliott Trudeau, A Time for Action (Ottawa, 1978), and Marc Lalonde, The Canadian Constitution and Constitutional Amendment (Ottawa, 1978). Some of the provincial documents contain more discussion: see Harmony in Diversity, A New Federation for Canada (Alberta Government Position Paper on Constitutional Change, 1978); British Columbia Constitutional Proposals, presented to the First Ministers' Conference on the Constitution (1978); see also Western Premiers' Task Force on Constitutional Trends, First and Second Reports (1978).

[25] *Op cit.*, footnote 6, p. 3.

[26] *Ibid.*

[27] *Ibid.*

extra-provincial trade regulations in the interest of the national market—all would be strengthened.

At the same time, provision is made to ensure that certain of these expanded powers, and some of the more controversial existing ones—such as the declaratory power and peacetime aspects of the emergency power—could not be used without a measure of support from the provinces, thus protecting the provinces from unwarranted intrusions in matters that normally fall more squarely into the area of provincial concern.

In the Committee's view, "the provinces should have primary authority over cultural matters and local affairs".[28] Accordingly, some matters having considerable impact on local culture now assigned to the federal Parliament would be transferred to the provinces. Thus, marriage and divorce would be wholly provincial, the problem of mobility of divorced spouses and their children being dealt with by a specialized "full faith and credit" clause. Again, telecommunications, now virtually a matter within exclusive federal control, would become a concurrent power. And the provinces' right to engage in international activities, subject to federal overriding power over foreign policy, would be expressly recognized.

As the foregoing illustrates, the primary provincial responsibility over cultural matters would not be conferred by the simplistic device of assigning "culture" to the provinces—almost any activity, be it economic, social or technical, must necessarily have an impact on cultural matters. Rather an attempt is made to grant to the provinces those powers that have primary impact on Canadian culture. Nor does the Committee view the provinces as having exclusive concern over cultural matters. In its view, "the federal Parliament should have adequate legislative power in this and other areas to maintain a national identity".[29] In the discussion of telecommunications, for example, much is made of the need for a national radio and television system to bolster Canada's cultural integrity, particularly having regard to the cultural impact of American radio and television. "[I]n a country as diverse as Canada with a population spread over vast distances, a strong national system is required to bind the nation together."[30]

On the other hand, the Committee was mindful of the fact that viable provincial cultural policies require a strong economic substructure. In its view, "it is probably also necessary that the provinces maintain considerable power over economic concerns in

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[28] *Ibid.*

[29] *Ibid.*, p. 63.

[30] *Ibid.*, p. 122.

the province if they are to have sufficient real power to support a local culture''.[31] Not only did it recommend that the provinces have legislative power to regulate the provincial economy, it took pains to fortify existing provincial economic powers. This was especially true in the field of natural resources over which the provinces would have exclusive legislative power respecting exploration, exploitation and management, whether these were privately or provincially owned, subject of course to Parliament's regulation of extraprovincial trade. The provinces' ownership would extend to offshore resources, and their powers of management of atomic energy, fisheries and agriculture would be expanded. Their control of the economy would also be fortified by their control over intraprovincial transportation, including aerial transportation. And their taxing powers would be rationalized. Generally, residuary matters would reside in the provinces unless a matter was clearly beyond provincial interests, for example the extra-territorial impact of developments on international rivers or pollution extending beyond a province.

VIII. *Federal-Provincial Relations.*

The Committee did not attempt to define with precision the constitutional status of the federal and provincial governments. It is obvious, however, that it viewed them as exercising co-ordinate functions and recommended the removal of a number of ''provisions giving the impression that the provinces exercise a subsidiary role''[32] to the federal government—the federal powers of appointing and remunerating provincial Lieutenant-Governors and of disallowing and reserving provincial legislation. Unlike the Task Force, however, the Committee did not view the appointment of judges to the superior courts in the provinces as a remnant of federal centralism. Rather it viewed these courts as the ordinary courts of the land performing a national as well as a local function. These judges also act as a bulwark against arbitrary action by both levels of government. They should, therefore, be named by a government responsible to all the people of Canada and be given constitutional protection. The real alternative is a dual system of courts the complexity of which we would do well to avoid.

Apart from this, it seems doubtful that the Committee would have gone as far as the Pepin-Robarts Task Force which saw the provinces as having ''a constitutional status equal with that of the central government''.[33] It may simply raise a theological argument, but there seems to be something profoundly different between an

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[31] *Ibid.*, p. 64.

[32] *Ibid.*, p. 36.

[33] *Ibid.*, p. 86.

entity with local powers of government, however extensive, and one that manages the national economy, has control of foreign policy, and whose sons and daughters can be called upon to defend it with their lives in foreign lands. This, I suspect, is a widely held view and it should not be papered over by legalisms or semantics.

However that may be, the Task Force is right in its view that neither federal nor provincial politicians, nor public servants at either level, have any reason to feel superior to the other. All are servants of the people and should act accordingly. There should, in fact, be better mechanisms for co-ordinating the policies of both levels of government to ensure that the interests of the people in all their aspects are given adequate weight. The Bar Committee, therefore, favoured the maintenance of an extensive network of techniques of federal-provincial co-operation. In some cases, it was prepared to recommend mechanisms at the constitutional level. In international matters, for example, (in addition to providing for direct international dealings by the provinces in provincial affairs) they would have created a mechanism of consultation to assure the participation of the provinces with Canada in international relations respecting matters falling primarily within provincial legislative powers, and required consultation with the provinces before Canada bound itself to an obligation falling within such provincial powers. As well, the Committee's conception of the proper manner of exercising concurrent powers—for example in communications and in immigration—involves close consultation and co-operation between the two levels of government.

The most important instrument for federal-provincial co-operation proposed by the Committee was an Upper House to replace the existing Senate which would consist of members appointed at pleasure by the various provincial governments. This, it was hoped, would ensure that provincial interests were taken into account in federal legislation and administration, and provide "open debate of regional concerns in a national forum".[34] "The process of consultation", the Committee noted, "would begin at the time legislation is enacted with full understanding of provincial legislative activity and administrative schemes".[35] These arrangements would, moreover, "require provincial governments to take responsibility for their views [affecting national matters] in a national forum".[36] In addition to its role as a conduit pipe for the expression of provincial views on federal action having a deep impact on regional interests, the proposed House would also provide a mechanism for joint action on

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[34] *Ibid.*, p. 37.

[35] *Ibid.*, p. 43.

[36] *Ibid.*

matters that tend to lie in a constitutional no-man's land (joint economic objectives, harmonizing intraprovincial trade regulations), or that could upset the federal-provincial balance (the emergency power, the declaratory power).

Other groups have recommended variations of this type of Upper House[37] and critics have not been wanting.[38] The latter suggest that rather than promoting federal-provincial co-operation, such a House would lead to confrontation and stalemate. Whether one believes such a House would lead to more confrontation or more co-operation is probably a product of one's attitude towards the desire of the various governments to handle the nation's business in good faith and whether one believes in the necessity of public airing of political issues. But unlike some schemes of this kind,[39] the Committee's proposal could not lead to legislative stalemate. It expressly provides that the views of the House of Commons would always prevail except in areas requiring joint action (such as the declaratory power) where political reality now effectively results in inaction.

It must be confessed that the Committee was far more divided on this than on its other proposals. There were varying preferred views. Some would have improved the existing Senate, largely along the lines suggested by the Joint Committee of the Senate and House of Commons in 1972; a significant number would simply have abolished it; and one or two members had their own pet proposals. Only a minority, therefore, clearly favoured the proposal, but it was certainly, as the *Report* describes it, "the predominant view", and the only one around which the members were willing to rally.

What this highlights of course, is that the creation of an Upper House that adequately balances the conflicting purposes for which such Houses exist—regional representation, linguistic and ethnic representation, the need for oversight of the House of Commons' legislative work—is no easy task. It equally points to the fact that given the regional pulls in this country, some formal mechanism for co-ordinating regional and national policies such as that proposed may well become necessary. It may be, for example, that the Federal-Provincial Conference could be raised to a constitutional level, requiring meetings at least yearly and providing for decisions to be formally reached. It is imperative that federal-provincial

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[37] See Alternatives: Towards the Development of an Effective Federal System for Canada, a Discussion Paper prepared for the Canada West Foundation (1978); First Report of the Advisory Committee on Confederation (Ontario) (1978).

[38] See Lalonde, *op. cit.*, footnote 24.

[39] For example, that of the Ontario Advisory Committee on the Constitution, *op. cit.*, footnote 37.

wrangling, at least at the decision-making stage, be conducted in a formal setting, thereby providing a focus for national debate, and that the decision reached be clear, open and effective.

It might be added parenthetically that the Committee never fully considered the possibility of providing some solution to regional imbalance in Parliament (and consequently aid in the identification of Canadians with federal institutions) by the device of having a certain number of members of the House of Commons from each province or region elected on the basis of proportional representation. Such a possibility is well worthy of examination, but the Committee did not have time, when it adverted to the idea, to give it the consideration or to engage in the type of research that would have to be conducted to make a definite proposal about it. For if the idea has merit, there are important considerations that would have to be borne in mind. A proper electoral system of this kind may not be easy to devise. It would have to be so shaped as to ensure a proper balance, for example, between provinces or regions, and between members elected by majority and those elected on the basis of proportional party support. One would have to consider how differently elected members of Parliament would work together. Above all, one would have to give serious thought to the impact on the attitudes of the citizen of a marked change in the electoral system. The various proposals made by the Bar Committee would affect the manner in which politicians do their work, but they would not directly affect the electorate. One should not lightly change the patterns and expectations of the average citizen about the electoral system, certainly not without devoting to the idea far more searching attention and research than the Committee could have mustered in the time and with the resources available.

IX. *Provincial Status and Quebec.*

The provinces vary from one another in many ways, in wealth, in population, and in the ethnic balance of that population. It by no means follows that the constitution must treat each province differently, although some particular accommodations can be made, as the existing constitution does. Quebec, of course, stands apart. The Committee showed complete awareness of the particularity of that province and of the fact that, while there are other major regional problems, the accommodation of Quebec within Confederation is at the heart of the national crisis.

In common with the Pepin-Robarts Task Force and the Government Bill, the Committee rejected the notion of constitutional special status. Like the Joint Committee, it thought this would make Parliament and other federal institutions unworkable, isolate the province concerned, create different classes of citizens and, gener-

ally, jeopardize the integrity of the state. Nonetheless it encouraged the use of various extra-constitutional devices—opting out, bilateral agreements and so on—to meet the particular needs of a province, particularly Quebec. As the *Report* puts it: "[G]iven the major cultural differences between Quebec and the other provinces, we would expect far more specific arrangements to be made to meet the needs of that province."[40]

Rather than accentuate the particularity of Quebec, the Committee responded to the needs of that province in general structural terms. The shape of the federation it proposed was to no little extent dictated by Quebec's needs, as was to some extent the case in 1867. For example, the Committee rejected the American congressional system (which would effectively respond to the need for strong central government while giving voice to regional concerns through a powerful elected senate) in part because, to work well, this would require a degree of centralization and a balancing of political forces that would not serve the interests of Quebec. Quebec, the Committee felt, could maintain its specific identity by exercising the broad powers a province already has, but it was influenced in defining powers because of the particular situation of Quebec. For example, while there are strong arguments in any event for provincial control of marriage and divorce, there are countervailing national arguments owing to the mobility of Canadians. But the arguments for provincial control become far more compelling when one recalls how closely intertwined these matters are with property law and cultural values, and that in both these respects Quebec differs profoundly from other provinces. Again, the Committee proposed that the constitution guarantee Quebec three members on a nine-man Supreme Court to ensure that the court would always have knowledge of Quebec's civil law system and, as well, be sensitive to French Canadian needs and attitudes.

X. *The Reception of the Report.*

The reception of the *Report* can be looked upon at two different levels. First of all, there was the Monarchy issue. The Committee was certainly aware that the issue would raise a furore. I knew that some elements would be highly vociferous. To its credit, the Committee decided to deal with the issue. It felt that it could not avoid it if it was to carry out the mandate assigned by the Bar—"to undertake the search for the essential constitutional attributes of a Canadian federalism". The controversy was fanned to a white heat when portions of the *Report*, including the part dealing with the Monarchy, were leaked to the press during the Queen's visit in July

[40] *Op. cit.*, footnote 6, p. 67.

1978. No one was more surprised than me to learn of the leak during the wee hours when a BBC reporter called from London for comment. The Committee was accused of all kinds of nefarious things, not to mention obtuseness and irresponsibility, its critics overlooking that a majority of a Joint Committee of the Senate and House of Commons—consisting as I have noted of representatives of all parties—had expressed the same view a few years before.

To some, the Monarchy represents what is best in traditional values, values that are so admirably exemplified by the present Monarch. I respect this feeling. To coin a phrase, some of my best friends are monarchists, and I share with them many of the values they associate with the Monarchy. I was distressed to find, however, that many of the monarchists were by no means as tolerant of the views of others.

The meeting in Halifax, where the *Report* was presented, was dramatic (though not nearly as much so as had been predicted). In many ways, it was useful. As an example, it revealed to French Canadians—who sat in disbelief—how deeply attached some Canadians are to the Monarchy. Also instructive was the response of the media. The CBC had its cameras focussed on the meeting throughout the morning when the Monarchy was being discussed. But they were immediately turned off when the meeting got down to such frivolous matters as the control of natural resources, international trade, foreign relations and emergency powers. Thus, did our national broadcasting system acquit itself of its mandate to inform Canadians about national issues and the problems of Canada!

Apart from the emotional question (which of course cannot be ignored, any more than the countervailing emotions), there really was no substance to the monarchists' arguments. The Monarch, of course, has no power to curb the excesses of government in this country. The Queen acts in respect of Canada on the advice of Her Canadian Ministers and the prerogative of the Crown respecting the choice of First Minister is exercised by the Governor General. Political power, of course, resides where it should—in Canada and with Canadians. Nor was there any desire on the part of the Committee to sever our contacts with Great Britain and other Commonwealth countries. Quite the contrary. The Committee was at pains to support the continuance of the Commonwealth connection and the position of the Queen as head of the Commonwealth. The fact is that the Committee opted for the reality—as opposed to the myth—of the *status quo*. Indeed, several of the institutions defended by the monarchists—responsible government, the position of the Governor General—would have been made institutionally more secure under the Committee's proposals.

What the Committee sought to do, naturally enough, was to make of the head of state a symbol with which all Canadians could identify. This logically means that a Canadian must be head of state. This approach is a reflection of the mature pride in things Canadian that rings throughout the *Report*. It is a shocking commentary on our political maturity that some Canadians should be so violently opposed to a Canadian as head of state. It is surely not treasonous to believe that the living symbol of this great land and its people must be a Canadian.

This is an idea whose time has not yet come if one can judge from English press coverage. Certainly there are far more pressing issues to be resolved in the constitutional debate. But it is significant that two important English language newspapers, the *Toronto Star* and the *Ottawa Citizen*, carried lead editorials advocating the abolition of the Monarchy, and that some of the most staunchly monarchist newspapers agreed that the matter was debatable. This would not have happened a few years ago. None of the French Canadian press favoured the monarchy, but it did not deal as extensively with the matter, rightly focussing on the far more urgent questions raised in the *Report*. But the fact that these divergencies of opinions exist does indicate that the Committee was right in raising the issue.

At the general meeting in Halifax, a resolution was moved to refer the *Report* for study to the provincial branches. Some were disappointed at this action, feeling it was a repudiation of the *Report*; the media widely reported that the *Report* had been shelved, and several influential newspapers roundly criticized the Bar for not dealing with the issue. They failed to note, however, that the same meeting had voiced appreciation of the work done by the Committee, not only for the Bar but indeed for Canada. For myself, I had never expected any other course than the one adopted. How could the Association be expected to take an immediate responsible decision on a detailed and complicated *Report* it had received just before the meeting?

Apart from the Monarchy issue, the *Report* has been widely hailed as an "illuminating contribution" to the debate.[41] The French-speaking media was uniformly enthusiastic—an expression of belief in a federal system that was certainly welcome and not, at the time, as general in French Canada as one would have wished. A similar attitude prevailed in most of the English newspapers that went beyond the one page of the *Report* devoted to the head of state. More important, it has been given very serious attention by public

[41] These words are taken from Le Devoir's leading editorial of Aug. 18th, 1978; see also *supra*, footnote 23.

bodies and officials concerned with the question. Thus almost every member of the Joint Committee of the Senate and House of Commons set up to examine the Government Bill were high in their praise of the work.[42] As well, it is constantly being used as one of the key documents in federal-provincial constitutional negotiations. Not, of course, that all who find the *Report* useful agree with every proposal in it. As I noted in my Foreword to the *Report*, it was never intended for that purpose. Rather, it was intended to focus and clarify the national debate, by identifying the issues that had to be tackled and the values that had to be taken into account in attempting to resolve them.

The Association in subsequent meetings at the provincial level has given and continues to give the *Report* serious study. At the mid-winter meeting of the Bar Council following the Halifax meeting, in February 1978, the Council adopted a resolution accepting the approach of the *Report*. Various tactics were adopted to delay or derail the resolution by some of the most committed monarchists but to no avail. When it reached the floor, it was adopted by an overwhelming majority.[43] This, of course, does not mean that the Association is committed to each and every one of the proposals; it does mean, however, that it supports the *Report's* general approach and thrust. The resolution reads as follows:

> WHEREAS the resolution adopted by the Association during its annual meeting in Ottawa in 1977 contemplated, amongst other things, the setting up of a committee to undertake the search for a definition of the essential attributes of a Canadian federalism;
>
> WHEREAS the report of this committee entitled "Towards a New Canada" was presented to the 1978 annual meeting in Halifax;
>
> WHEREAS this report constitutes a major contribution to on-going constitutional studies;
>
> AND WHEREAS the recommendations are presented by the committee as "useful as a guide in rewriting and restructuring the Constitution";
>
> THEREFORE, IN THE SEARCH OF THE BASIC ELEMENTS OF A RENEWED FEDERALISM, THE CANADIAN BAR ASSOCIATION:
>
> (1) submits the report to the public and the political authorities of Canada as a document of extraordinary value and a sound working document;
>
> (2) accepts the general approach to the renewal of Canadian federalism taken in the report;
>
> (3) encourages the provincial branches to complete their analysis of the Report as a further contribution to the search for the elements of such a renewed federalism;
>
> (4) will willingly take part in the debate on Canadian federalism "so that the decision about Canada's future may be an informed one".[44]

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[42] *Supra*, footnote 23; see also The Hon. Alan Blakeney in The National, July-Aug., 1979.

[43] The National, March 1979.

[44] *Ibid.*