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**The Entrenchment of Paradox:
Identity, Equality and the Constitution Act, 1982**

by

J. Heather McPherson, B.A.

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of

Master of Arts

Department of Law

Carleton University

Ottawa, Ontario

January 8, 1996

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submitted by **Jean Heather McPherson, B.A. (St. Mary's)**

in partial fulfilment of the requirements for
the degree of Master of Arts

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ABSTRACT

This thesis explores the issue of identity, equality and the potential for their attainment through constitutional reform. It begins by looking at the impetus behind Confederation and at the establishment of state in order to provide a context and a framework to the questions of identity recognition. It focuses on the Constitution Act, 1982, viewing it as both an agitator for and as an impediment to constitutional reform. It specifically looks at three paradoxes that the Constitution Act, 1982 has entrenched: Unity - Disunity, which focuses on universality, citizenship and difference; Equality - Hierarchy which discusses equality as sameness, formal and substantive equality, and rights discourse; Democracy - Judicial Review, which looks at the evolving concept of democracy and legitimacy formation. The above listed categories look at their effects on identity formation, recognition and support. It concludes with some considerations that may be taken into account when considering constitutional strategies for identity recognition.

Table of Contents

Introduction.....	1
 Chapter One:	
Identity and the Canadian Federal State.....	8
Origins of Federalism.....	10
Resulting State and its Constitutional Basis.....	15
A Dilemma of the Post Industrial Canadian State.....	26
Recognition and Support of Identity.....	29
Conclusion.....	39
 Chapter Two: State Builders at Work.....	41
Federal Agenda.....	43
Competing Agendas	
Dualism.....	48
Regionalism.....	50
Democracy and the Charter.....	57
First Nations.....	57
Women.....	59
'Night of the Long Knives'.....	62
 Chapter Three: Identity Complex.....	70
Unity - Disunity	
Universality, Citizenship, Difference.....	75
Equality - Hierarchy.....	81
Strengthening Democracy -	
Strengthening Judicial Review.....	91
 Conclusion:.....	99
 Bibliography.....	115

INTRODUCTION

On October 31, 1995, the headlines of the Ottawa Citizen blazed, "Divided We Stand," capturing the precarious position in which Canada finds itself after the Quebec sovereignty referendum. The results of this, the second referendum Quebec has held on the issue of sovereignty, show an increase in support for an independent Quebec with 49.4 percent saying yes in 1995 compared to 40.4 percent in 1980. The slight margin that moved the "Non" forces past the "Oui" side gives Canada little reason to celebrate a victory for unity.

The first referendum in 1980, gave a sense of urgency to the country to resolve the dissatisfaction of the province of Quebec, prompting the government to enter into constitutional negotiations promising a renewed federalism for Canadians. While that same sense of urgency was again felt across Canada, the federal and provincial governments are refusing to enter into a new constitutional round, preferring to meet some of Quebec's demands through alternate mechanisms.

These events are a response by Quebec to its perceived

lack of identity recognition and maintenance within the larger Canadian community, and it is this issue of identity recognition, unity, equality and legitimation that this thesis is most concerned with. It focuses on the Constitution Act 1982 for the constitution and the state structures it supports are involved in the forming and sustaining of identity. The Constitution Act 1982, was an attempt to manage the existing tensions with identity but instead exacerbated those tensions.

Subsequent to the latest referendum, the federal government moved to grant 'distinct society' recognition to Quebec as well as give it veto powers which will also be granted to Ontario and the other regions. This, however, is not acceptable to Quebec for in granting veto powers to Ontario and the other regions, there is a dilution of the impact of the distinct society designation. Lucien Bouchard has stated that Quebec already realizes it is distinct. What it wants are the provisions that it believes should accompany this designation, namely control over areas that are presently the jurisdiction of the federal government. Further, without constitutional recognition, the provisions that are granted to Quebec are subject to the continuing support of the successive governments.

Quebec's demands and the resistance to reopening constitutional debates is a product of the history of Canadian identity(ies) and the process of constitutional

reform. Its new demands also are indicative of the transformation that Quebec has gone through since confederation in terms of how it perceives its identity and its position relative to English speaking Canada and also how it conceives of maintaining that position.

Although the continuing Quebec question predates confederation, the Constitution Act 1982, added and/or accentuated dimensions to the continuing Canadian 'Constitutional Odyssey,' to use Peter Russell's term. For the "Oui" campaign, Bouchard appealed directly to Quebec's sense of identity and pride, promising that maintenance of that identity and the ability to control their own destiny could best be realized in a separatist Quebec. The strategy the federalists employed was to warn that if the "Oui" side prevailed, the destruction of the unity of the Canadian nation would ignite a financial crisis for both a separatist Quebec and Canada. Subsequent responses to Quebec by the provincial governments regarding accommodating Quebec's demands have been framed in the language of the equality of the provinces whereby greatly lessening the chances that any sort of agreement will be reached.

In this thesis I will explore the issue of identity recognition and support and the potential for its attainment using the constitution, considering it as a medium through which we can continue to reinvent society as it provides the foundation of our political structures which reflect who we

are as a society and defines what constitutes us as a polity. I will organize this examination through posing the question, "Has the Constitution Act 1982, become an impediment to further constitutional reform and as such, affect its contribution to identity formation, recognition and support?"

My conclusion is that it has contributed to the failures of subsequent constitutional rounds. In regards to this affecting identity the answer becomes qualified. Its support of the identities it does recognize is less than was hoped for but this is not to necessarily disincline identities from pursuing objectives through the constitution or through its reform. It is to invite discretion that necessitates an analysis of the complex interrelatedness of state, society, identity and their various projects as they are played out in the forums of law and politics.

I do not focus explicitly on Quebec for its identity is joined by other emerging identities in the competition for state recognition. I use the term "identities" to refer to ethnicity, culture, gender, sexual orientation, regions, and disability. However, I do realize that among the groups I've named there exists differences in power both between the groups and in relation to the dominant groups in society and this power alters in specific contexts. It is not meant to conflate the histories, or realities of the various groups. I'm using the term because it appears to exist as a

commonality between the groups in that the various projects they are engaged in are forms of identity recognition. What conditions have to ultimately be met before recognition and equality of recognition is attained, vary.

In Chapter One, I begin by reviewing some of the history of Confederation to show that societal influences impacted on the state formation. The resulting state and its constitutional basis reflected the interests and motives of the Fathers of Confederation and it provided the conditions necessary to enable inherited British social and political traditions to be maintained and flourish. Identity was infused in the structure and symbolism of the Canadian state and this privileged certain identities. Further, the state would continue to influence the composition of society and be utilized in identity formation and support although this would be accomplished in alternate forms and through differing rationales.

The second part of the chapter discusses briefly the role of the federal state and the resulting dilemma it finds itself in as two of its mandates conflict with each other frustrating their attainment. Capitalist economic processes generate inequalities that are assigned to various identities, the distribution of which is related to the favouring of certain identities which are supported by the existing federal system. The involvement of the state with identity helps politicize the identities which may seek

remedy that is perceived as threatening the unity of the larger community which in turn, threatens the stability conducive to positive accumulation conditions.

The last part of the chapter explains how federalism and its institutions act as organizational mechanisms that benefit certain identities and their subsequent organization intended to influence state and state policy. The frustrations emerging identities experience with the existing structure points to a crisis in the constitution of federalism in that it can no longer adequately manage the cleavages existing in society. The success in achieving reforms sought will be largely influenced by their potential impact on the mandates of the state and its territorial integrity.

In Chapter Two, I outline the competing agendas of the federal and provincial governments as they attempt to remedy these existing tensions in the federal system. I provide a brief background to the situations that inform the various identities and their resulting positions in constitutional negotiations. The resulting document of pragmatic concessions that are contained in the Constitution Act 1982, have entrenched various paradoxes that would significantly effect the subsequent constitutional rounds proving the Constitution Act to be an impediment to constitutional change of the "mega-constitutional" reform variety.

The third chapter looks at these paradoxes, why they

exist, why they frustrate some types of social reform and why they resist alteration. I look at three paradoxes: Unity - Disunity, which focuses on universality, citizenship and difference; Equality - Hierarchy, which discusses equality as sameness, formal and substantive equality, and rights discourse; Democracy - Judicial Review, which looks at the evolving concept of democracy and legitimacy formation. All of the above categories look at the effects of the paradoxes on identity formation, recognition and support. The concluding chapter summarizes the thesis and provides some considerations that may be taken into account in devising strategy for identity recognition.

CHAPTER ONE

Identity and the Canadian Federal State

There are nations that instead of creating states have themselves been created by long-established states. If there is a Canadian nation it must be of the latter kind.¹

Society is increasingly confronted with various groups attempting to obtain recognition of their diverse 'identities' such as gender, ethnicity, class, sexual orientation, culture, and disability. This articulation of difference is being claimed against the perceived dominant groups and also against each other; for identity is established in relation to difference and its existence requires self and societal recognition in order to be.² The

¹ H.McD. Clokie, Canadian Government and Politics (Toronto: Longmans, 1944) 7-8, quoted in Philip Resnick, The Masks of Proteus: Canadian Reflections on the State (Canada: McGill-Queen's University Press, 1990) 210-11.

² The introspective element of identity recognition is significant to the politics of recognition. Viewing it as a political process in itself has contributed to political fragmentation, or a loss of solidarity that is essential to progressive politics. Further, it encourages the idea that self-transformation is political change rather than being a prelude to political change. This sends the message that "[individuals] must change and that political action is

shaping of personal identity is also affected by its societal absence or misrecognition by others; the result being potentially damaging if society, "mirrors back to them a confining or demeaning or contemptible picture of themselves."³ The definition and meaning of various identities, being socially constructed, shift over time and place and reflect alterations in the dynamics between identities. The recognition of identity is not necessarily new in Canada although the number of identities and the methods of pursuit have altered or multiplied. From the time of Confederation, the French in Quebec have demanded identity recognition and it originally found expression in the form of the constitutional order that supported federalism. Later demands would take the form of transfers of powers, constitutional rights and 'distinct society.'

Identity was made into a political issue which affected the construction of the state so that it constituted French Quebec as a political community, whereby enabling Quebec to maintain and protect its culture though the success of that project is subject for controversy. The state as such has been a site of struggle for the expression of society's

either unnecessary or futile" which undermines the perceived need for political engagement with external sources of power. L.A. Kauffman, "The Anti-Politics of Identity," in Socialist Review, vol.20 (Jan.-March) 1990: 167-80

³Charles Taylor, Multiculturalism and "The Politics of Recognition", Amy Gutman, ed. (Princeton: Princeton University Press, 1992) 27.

identities and politics has been a medium through which they can be articulated.

This chapter examines how the social power underlying our state's democratic political institutions was formed and maintained in order to understand why there exists an unequal representation of identity and the distribution of political opportunities which accompany these identities. Understanding the relationship between the Canadian state and society allows an assessment of the capacity and power of the federal state to provide the mechanisms needed to provide recognition and support of society's identities. It also allows the evaluation of the ability of society to engage in state building and reorganization intended to transform that state.

The Origins of Federalism and the Establishment of State

Federalism was only an accident imposed by the circumstances of the time; union was the essential achievement.⁴

There were a number of internal and external factors that combined to bring about Confederation and establish the

⁴ Frank H. Underhill, "The Conception of a National Interest" in In Search of Canadian Liberalism (Toronto: Macmillan of Canada, 1961) 177.

Canadian state. The terms of what became Canada's constitution reflected both the diversity of interests and motives of the politicians who attended the confederation conferences in Quebec in 1865 and in London in 1866.

Historians of Confederation have emphasized the role of capitalist interests in bringing about this event. Politicians representing the desires of economic elites⁵ sought to build a new basis for economic prosperity that would expand and support capitalist markets. Within this structure, they would have to manage the intense linguistic and religious differences of the French and English cultures. The resulting institutional structures that comprised the Canadian state were thus an embodiment of the beliefs, interests, and experience of the confederation politicians and their attempt to accommodate capitalist and societal interests.

By 1860, it became clear that the existing union between Upper and Lower Canada was not working. Various objectives and arrangements had been tried but had been unsuccessful. Originally, following the Peace of Paris when

⁵ Quite often politicians were members of the economic elite. The existing views on what were considered acceptable relationships between businesses and government were very different in the 19th century than they are today. Politicians were directly involved in railways, banks, etc. For example, John A. Macdonald was the president of an insurance company, Manufacturers Life, during the same time that he was Prime Minister. Stephen Brooks and Andrew Stritch, "Business and Government in Historical Perspective" in Business and Government in Canada (Scarborough: Prentice-Hall, 1991) 36.

"New France" had become a British possession, the objective was forced assimilation of Roman Catholic French Canadians. This objective ceased officially when the Quebec Act 1774 granted French Canadians religious freedom and the retention of their civil law but it did not establish representative institutions. This did not come into existence until 1791. In that year, the Constitution Act divided Quebec into English speaking Upper Canada and French speaking Lower Canada, establishing legislative assemblies for both. The purpose of this was to reduce "'dissentions and animosities' among two 'classes of men, differing in their prejudices, and perhaps in their interests.'"⁶

Lord Durham, Governor General of British North America, issued a report providing measures that he believed would be conducive to a successful system of government. There were two central recommendations that were put forward in the report, the first of which, accomplished in 1840, was the creation of the United Province of Canada with a single legislature. In the elected lower house of this legislature, what previously had been Upper and Lower Canada, had equal representation regardless of their population. The second recommendation was for a form of government responsible to the majority in the elected branch of government and this was first accomplished in Nova Scotia

⁶ Quoted in Peter H. Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People? 2nd ed. (Toronto: University of Toronto Press, 1993) 13.

in 1848.⁷

The long term plan for the legislative union once again became the assimilation of French into the English culture. Lord Durham stated, "I entertain no doubts as to the national character which must be given to lower Canada; it must be that of the British Empire; that great race which must, in the lapse of no long period of time, be predominant over the whole of the North American continent."⁸ However, French Canada resisted assimilation, and bilingualism was accepted in parliament with the Governor General announcing in 1849 that French had the same status as English. Durham's single legislature idea did not see fruition as the legislature was conducted on a "quasi-federal" basis allowing English Canada to decide on matters affecting it and French Canada legislated on items pertaining to them. This allowed French and English to function as culturally distinct provinces.

This arrangement did not work well and by 1860, Canada West's population was increasing to the point where it surpassed Canada East. George Brown and his Reformers (a force in Canada West) began to push for representation by population. This posed a threat to French Canadians who could potentially be put in a subordinate position to

⁷ Russell, *supra* note 6, at 14-5.

⁸ Quoted in George F. G. Stanley, A Short History of the Canadian Constitution (Toronto: Ryerson, 1969) 49.

English Canadians who now made up two thirds of Canada's population, though French were still a majority in Canada East.⁹

Accompanying this unrest was the movement for economic development and expansion. At the time of union, Montréal was the largest city and the leading economic centre, with Toronto establishing similar economic significance. Toronto's businessmen were interested in the potential of the West in terms of it becoming an extension of Toronto's agricultural hinterland. Turning the West into a market for eastern goods and a supplier of raw materials would facilitate the expansion of capitalist markets.¹⁰

French Canadians were not so interested in westward expansion as they feared the growing economic, demographic, and political power of Canada West which would potentially increase further with the annexation of the western hinterland. Montreal French were interested in uniting with the Maritimes to build the intercolonial railway, which would direct more trade throughout their city. Nova Scotia hoped to gain access to Canadian markets for its coal industry.¹¹

Externally, forces were also coming together to push

⁹ Russell, *supra* note 6, at 17.

¹⁰ Garth Stevenson, Unfulfilled Union: Canadian Federalism and National Unity (Toronto: Gage, 1988) 34.

¹¹ Stevenson, *supra* note 10, at 36.

the colony towards confederation. The British government had not been interested in Confederation until 1864 at which time there was a perceived threat from the United States. British relations with the American government had deteriorated during the Civil War and it was now felt that some sort of defence was necessary to thwart American expansionism. It was believed that this could best be achieved by a united British North America, tied together by a railway, which would be more defensible and could shoulder some of the expense of its own security. There also existed the economic fear that the United States would abrogate the Reciprocity Treaty of 1854 which it did in 1866, forcing the colonies to reorient their trade on an east-west basis rather than a north-south.¹²

Resulting State and its Constitutional Basis

*Canada was in its origins not merely a new society, but a transplanted society.*¹³

The new Canadian state was to retain the form of a confederation under a constitutional monarchy under the British Crown, ensuring, "British laws, British connection,

¹² Stevenson, *supra* note 10, at 38.

¹³ Reg Whitaker, "Images of the State in Canada" in The Canadian State: Political Economy and Political Power, Leo Panitch, ed. (Toronto: University of Toronto Press, 1977) 30.

and British freedom."¹⁴ The framers of the Canadian Constitution provided the conditions necessary to enable inherited British social and political traditions to be maintained and to flourish.

The enthusiasm for a Canadian Constitution similar in principle to that of the U.K.'s was a result of both widely shared sentiment and of more pragmatic considerations. There did not exist the desire to sever identity ties with Britain. This maintenance of a common British identity would foster a sense of alliance that would help maintain the existing economic relationship providing Canada with access to British capital and markets. This access was essential to the economic objectives of confederation and further, if there was a threat to Canada from the United States, British assistance would be needed.¹⁵

Britain provided the parliamentary model of government with its democratic principle of majority rule combined with a strong executive. Democracy however, was a limited concept during this period. Indeed, Sir John A. Macdonald did not hold the idea that man had an inherent right to vote, and in espousing his conservative philosophy stated that, "No man who advocated universal suffrage had any right

¹⁴ Parliamentary Debates on The Subject of the Confederation of the British North American Provinces, (Quebec: Hunter and Rose and Co., 1865) 31.

¹⁵ Stevenson, *supra* note 10, at 43.

to call himself a Conservative."¹⁶ He believed that universal suffrage left a "nation weak and leads towards anarchy and despotism."¹⁷

The Fathers of Confederation looked to the United States to provide the model of federalism which could potentially manage the tensions of the various regional and cultural differences. However, the Canadian structure of federalism would differ from the American model, for in Canada, the terms of union would embody a very centralist concept of federalism. The federal parliament reserved the right to make laws affecting the nation as a whole and reserved jurisdiction over matters not exclusively granted to the provinces. John A. Macdonald believed that the American Civil War might have been avoided if the American Constitution had granted only limited and specified powers to the individual states, rather than leaving them with all powers not granted to the federal government.¹⁸

Macdonald's concept of federalism recognized provincial, regional, and local interests but they were not considered as important as the national interest. The very existence of such diversity prompted the idea that strong

¹⁶ Sir J. Pope, Memoirs of the Right Honorable Sir John Alexander Macdonald (Toronto: Oxford University Press, 1930) 616.

¹⁷ From a speech delivered in the Legislative Assembly, 1861. Public Archives of Canada, Macdonald Papers, Vol. 158, 64123.

¹⁸ Stevenson, *supra* note 10, at 43.

central government was needed in order to prevent a fragmentation and breakdown of the Canadian state. For Macdonald,

The true principle of a confederation lay in giving to the general government all the principles and powers of sovereignty and that the subordinate or individual States should have no powers but those expressly bestowed on them. We should thus have a powerful Central Government - a powerful Central Legislature, and a powerful decentralized system or minor Legislatures for local purposes.¹⁹

The British North America Act, 1867, was mainly concerned with the division of powers between the federal parliament and the provincial legislatures. The major attraction for French Canadians was the establishment of a Quebec legislature as it was a tool which they believed would enable them to preserve and protect their cultural identity. As such, the powers they demanded for their legislature were mainly related to social institutions, education, the family, and the legal system, which were institutions that were felt to have cultural significance.

The joining of parliamentary supremacy with federalism was in a sense logically incompatible. The British parliamentary tradition does not contemplate divided sovereignty nor the sharing of powers. However, this

¹⁹ Macdonald Papers, Vol. 158, pp. 64121.

"hybrid" suited the kind of union that Macdonald and most of his colleagues wanted to create. Thus, the BNA Act institutionalized or built into state structures the competing models of Westminster centralized cabinet government with decentralized federalism.

The BNA settlement recognized two main linguistic and religious communities. It did not seek to advance any new principles or rights, it simply preserved existing rights and British tradition which was seen as capable of providing those rights to both French and English. It was the British Crown and British parliamentary institutions that would afford French Canadians those rights necessary for their cultural survival. This was a dubious proposition from the outset, for the central government, strongly infused and steeped in British identity and practice, was charged with the task of establishing a collective political identity capable of inspiring loyalty to its political institutions. This strong central government, which was awarded all the important economic powers, sources of revenue, the powers of reservation and disallowance and the declaratory power, was by its very design, structurally and ideologically, aligned with English identity. Canadian central government would thus represent internally and externally, this transplanted British identity.

Dominant identities and their goals and objectives were made possible through the establishing of state structures

that were sympathetic to those needs. Identity impacted on the state and the state in turn, helped to maintain those identities. It would be involved in various ways in the project of constructing both identity and society.

It had significant impact on the ethnic and cultural characteristics of the Canadian settlement, for the "cultural sensitivity" that was afforded the French was not extended to the already present First Nations whose culture was under attack. Missionaries had already brought a new set of religious beliefs to the First Nations which were to "cleanse" them from the "awful" beliefs that they held. This process not only required the acceptance of Christianity, it required an "improvement" of their culture which meant Westernization, for the missionaries were very confident in the superiority of their own culture.²⁰

As an inferior race...we believe...[the Indians] must give way in order to make room for a race more enlightened, and by nature and habits better fitted to perform the task of converting what is now a wilderness into productive fields and happy homes.²¹

Nor was the sensitivity extended to the arriving immigrants which Canada so desperately needed in order to realize its plans of economic and territorial expansion.

²⁰ Robin Fisher, Contact and Conflict (Vancouver: University of British Columbia Press, 1977) 120.

²¹ Fisher, *supra* note 20, at 124-5.

Indeed, Canada's immigration policy, the responsibility of central government, was a reflection of the racism of the day and its ideological foundations. A quote from Mrs. Jessie Saxby, writing in 1888, in West Nor'West, is indicative of prevailing notions of ethnicity:

When Britain fully comprehends her mission on earth ["that of a dominating race"] she will undertake this noble business of emigration in a very different spirit from heretofore and the world as well as Britain herself will go forward on broader lines, and on the more enduring basis of religious duty.²²

White Anglo-Saxon, Protestants were seen as the "dominating race" which stood as the ideal to which all other races should conform. It was the duty of the "naturally" morally and physically superior British to take on the reform of inferior "races" and in Canada, that task was met mainly by attempting to have "strangers" adopt British/Canadian culture and Christianity. However, this project of assimilation was considered to be unworkable with some groups and as such, Canada's immigration policy would work to impede their immigration.

During the Laurier (Liberal) Ministry from 1896 to 1911, under the initiative of Sir Clifford Sifton, Minister of the Interior from 1896 to 1905, there began an aggressive

²² Jessie Saxby, West Nor'West (London: James Nisbet & Co., 1890) in A Flannel Shirt and Liberty, Susan Jackel, ed. (Vancouver: University of British Columbia Press, 1982) 67.

immigration campaign aimed at attracting settlers to the West. This was largely due to a rise in demand for farm goods, especially wheat, which had developed during this period. Between 1896 and 1912, owing to a great extent to this recruitment campaign, over two and a half million immigrants entered Canada.²³

This need for immigrants was tempered by the prevailing race ideology; thus government actively sought settlers from certain areas. Sifton, in an article he published in MacLean's Magazine, discussed his experience as Minister of the Interior denying that his immigration policy was more concerned with quantity and not quality.²⁴ Sifton recruited immigrants of good quality from primarily three areas: America, Northern England and Scotland, and Hamburg. Sifton was recruiting white immigrants of good "stock" which in his definition was, "a stalwart peasant in a sheep skin coat, born on the soil, whose forefathers have been farmers for ten generation, with a stout wife and a half-dozen children is quality."²⁵

The means to secure various economic objectives and thus prosperity of the state, was inextricably tied up with

²³ James J. Talman, "The Sifton Immigration Policy 1904" in Basic Documents in Canadian History, (Toronto: D. Van Nostrand Company, Inc., 1959) 122-3.

²⁴ Clifford Sifton, "The Immigrants Canada Wants" in MacLean's Magazine April 1, 1922, 16.

²⁵ Sifton, *supra* note 24, at 17.

religious moral codes and later in the 19th century, by the developing "sciences." By the beginning of the 20th century, sex was being linked to the politics of population. Central to this was the increasing belief that the health, hygiene and composition of the population were the keys to progress and power. Sex was the link between the health and moral status of the individual and the future of the population as a whole.²⁶

Women were thus not forgotten in the establishment of the Canadian state for, as Georgina Binnie-Clark stated, "In the present phase of the development of Canada, the immigration of English women is a matter of vital importance to the race and bound to affect Canada in her future career among nations."²⁷ Reproduction and sexuality were not simply individual choices, they were collective issues and at the turn of the century reproduction was tied to racial and imperial politics.²⁸

The relationship between the family and the state was changing in accordance with prevailing ideologies.

²⁶ Jeffrey Weeks, Sex, Politics and Society, 2nd ed. (England: Longman Group, 1989)

²⁷ Georgina Binnie-Clark, "Conditions of Life for Women in Canada." Reprinted in A Flannel Shirt and Liberty, Susan Jackel, ed. (Vancouver: University of British Columbia, 1982) 170.

²⁸ Mariana Valverde, "'When the Mother of the Race is Free' Race, Reproduction and Sexuality in First Wave Feminism" in Gender Conflicts, Franca Iacovetta and Mariana Valverde, eds. (Toronto: University of Toronto Press, 1992) 5.

Reproduction and child rearing were no longer seen as an individual moral duty, it became a national duty.²⁹ Women were not simply having babies they were reproducing the "race"³⁰ and were responsible for the moral development of these children. This responsibility for the care of the morality of the family was extended to setting the moral tone of society. Women, not men, were responsible for civilizing the new Canadian society. In A View to the Art of Colonization, Wakefield, the colonist, states that it is women that raise the moral tone of the colony and as such it should be religious women who are persuaded to come to the colonies.

You might persuade religious men to emigrate and yet in time have a colony of which the morals and manners would be detestable; but if you persuade religious women to emigrate, the whole colony will be comparatively virtuous and polite. As respects to morals and manners, its is of little importance what colonial fathers are, in comparison with what the mothers are.³¹

Wakefield believed that without making provisions for the religion of a colony, you would get a class of immigrants composed of "paupers, vagabonds, and sluts", the morality of

²⁹ Weeks, supra note 26, at 127.

³⁰ Valverde, supra note 28, at 4.

³¹ Edward Gibbon Wakefield, A View to the Art of Colonization (London: John W. Parker, 1849) 157.

which would lead to the downfall of the enterprise.³²

Female suffragists were equally committed to the regeneration of the Anglo-Saxon race which placed a premium on women's traditional duties and virtues. They hoped to create a better society in Canada and government intervention provided the means to do just that. Thus, the suffragists wanted the political means to impose their desires upon the legislature.³³

The influx of immigrants to Canada provided a powerful rhetoric for women in pursuing female enfranchisement. It was argued that women needed the vote to offset the increased numbers of "illiterate immigrants," insisting that good Christian women could perform better than foreign men.³⁴ In the end, women received the federal franchise largely because as a group, they had embraced the war movement, and would thus help assure the re-election of the pro-conscription Borden Government.³⁵

The women who were involved with the suffrage movement thus were attempting to carve out positions of power and respect for themselves. However, they subscribed to an ideology that restricted the role options available to other

³² Wakefield, *supra* note 31, at 157.

³³ Carol Lee Bacchi, Liberation Deferred?: The Ideas of the English-Canadian Suffragists, 1877-1918. (Toronto: University of Toronto Press, 1983) 46.

³⁴ Bacchi, *supra* note 33, at 54.

³⁵ Bacchi, *supra* note 33, at 143.

women, reaffirming the identity of women as being that of wife and mother.

Over time, there were alterations in perceptions on the role of the state, society, and the identities that existed within and these changes affected their relationships to each other. While some shifts could be accommodated within the existing structures, some would be frustrated creating tensions that would call for adjustments in the basic framework that supported the existing organization.

A Dilemma of the Post Industrial Canadian State

In capitalist liberal democracies, the state is required to maintain both conditions for accumulation and to secure social integration and cohesion. There is an inherent struggle here in that a contradiction exists as capitalist economic processes generate inequalities among citizens while political processes require equality among citizens.

In post-industrial Canada, the liberal democratic state became charged by society with supplying the conditions and processes which would provide the recognition of both individual and collective identities and their equality. At the same time, the federal state is charged with the

creation and maintenance of internal order. There thus exists a structural tension created by the existence of dual pressures to provide mechanisms for both, the integration of the larger Canadian community which contributes to the maintenance of the state and accumulation conditions, and the recognition of various individual and collective identities which appear to threaten the unity of the larger community. Paradoxically, some of these cleavages are reinforced and favoured by the existing federal system.

After WWII, the socio-economic impact of federalism drastically increased as "big government" emerged and the policy output of the state grew³⁶, translating private interests formed in civil society into public policy and public institutions. The post war centralizing push of the federal government lasted until the late 1950s, at which time the provinces became more aggressive in their province building initiatives, ushering in a more combative era of federal provincial relations, using more frequently, the Supreme Court as its battleground.

Increased policy output of governments, combined with the government's attempts to shape the national and local identities and communities, had the effect of politicizing

³⁶ The shifting balance between public and private can be seen in the ratio of total government expenditure to gross national product which increased from 5.6% in 1867 to 22.1% in 1950 to 47.4% in 1982. Alan Cairns, "The Embedded State: State-Society Relations in Canada" in State and Society: Canada in Comparative Perspective, Keith Banting, ed. (Toronto: University of Toronto Press, 1986) 61.

both. The state became the arbiter of competing conceptions of social justice, thus it became enmeshed in the search for equality. Increasingly, identity groups pursued their objectives through political means, devoting more resources to manipulate the state.³⁷ This has had the effect of increasing the structural tensions of the state in pursuing its dual objectives.

The tension has increased since the sixties with the Quiet Revolution in Quebec and with the province building initiatives of the regions. These territorial and cultural identities within the Canadian state and society and their centrifugal forces, have threatened national unity prompting the federal government to invoke nationalizing/centralizing strategies and policies to strengthen the national identity. The use of the state to modify national identity served to further politicize the state's existing cleavages and other emerging identities, encouraging them to pursue their identity objectives through the various levels of government for it became clear that the state is intimately involved with the "ubiquitous societal process of constant renegotiation of the status of the members of society."³⁸ The symbolic order of the state was politically created and the ethnic distribution of power, income and status was

³⁷ Cairns, *supra* note 36, at 57.

³⁸ William J. Goode, quoted in Alan Cairns, *supra* note 36, at 71.

subject to political modification.

Overlapping jurisdictions and interventionist government cause shifts in perceived power of the levels of government which in turn influence the importance of organization and defining of identities according to federal and provincial terms. This is not to say that differentiated identities are entirely derived from the state. Although the state plays a key role in defining and or reinforcing the identity(ies) of society, the state's identity is in turn contested by societal forces attempting to redefine the state so that it is a better reflection of and allows for better representation of that society. This does mean that the processes involved are institutionally structured by the forms of federalism.

Recognition and Support of Identity:
Federalism as Organizational Mechanism

Canadian federalism is an institution that supports regional identities. Federalism was established to accommodate the regional and cultural differences of the "provinces" entering confederation and it continues to entrench and reinforce provincial identities. The structure of governmental federalism is replicated on the social level in terms of negotiations and patterns of influence;

³⁹ the national and provincial boundaries delimit the activities not only of governments but also of a very large number of institutions.⁴⁰ However, in terms of political salience this form of organization is ineffective for some identities.

This accommodation of territory frustrates and/or weakens other bases of identity. Regional and French identities are aligned with and readily access, governmental institutions and other resources whose authority has its basis in the constitution. Other identities such as women, aboriginals, gay and lesbian, which lack this spatial privilege must depend on the establishing of organizations that can penetrate the federal system to find sympathetic representation.

While society can be broken down into countless different groupings, all of which cannot be reproduced in existing state institutions, only those identities which become organized and politicized will potentially impact on the state structures. The success of these groups depends largely on such factors as: organizational continuity and cohesion to allow for efficiency in carrying out the functions of the groups and to ensure long term implementation; extensive knowledge of government and its

³⁹ Donald Smiley, Canada in Question: Federalism in the Seventies, 2nd ed. (Toronto: McGraw-Hill Ryerson, 1976) 5.

⁴⁰ Stevenson, *supra* note 10, at 2.

workings in order to access the most appropriate officials; and stable membership to secure resources need to carry out political objectives.⁴¹

Further, they must coordinate these internal conditions with the realities of the federal system which imposes certain impediments. The federal system of government encourages the adoption of parallel structures so that groups must operate on the federal and provincial levels in order to deal with respective problems of jurisdiction especially in those areas where it is shared between the two levels of government. This is a problem for groups lacking in financial resources.⁴² Writing pre-Charter, Dawson states that one of the most frustrating political outcomes of the Canadian constitutional structure, is that both federal and provincial governments often justify their inaction by each citing lack of jurisdiction.⁴³

As Simeon and Robinson say, "Federalism does tend to "organize" territorial issues into Canadian politics and to organize other issues out. Constitutional rules certainly provide resources to particular actors in particular

⁴¹ Paul Pross, "Pressure Groups: Adaptive Instruments of Political Communication" in Pressure Group Behaviour in Canadian Politics, Paul Pross, ed. (Toronto: McGraw-Hill Ryerson Ltd, 1975) 10.

⁴² Helen Jones Dawson, "National Pressure Groups and the Federal Government" in Pressure Group Behaviour in Canadian Politics Paul Pross, ed. (Toronto: McGraw-Hill Ryerson, 1975) 30.

⁴³ Dawson, *supra* note 43, at 32.

circumstances."⁴⁴ Because of this not all social cleavages find political expression; in the absence of either effective leadership or receptive institutional arrangements, many lines of social segmentation remain politically latent. The dynamics inherent in Canadian federal structures have given ample articulation to the regionalized nature of Canadian society.⁴⁵ According to David Smith's dictum - "representation" in Canada "almost always means the representation of interests which are territorially based."⁴⁶

Both federal and electoral systems encourage people to act along regional lines, they institutionalize regionalism. However, the parliamentary system frustrates it, thus there also exists problems of representation for the traditional cleavages of French and regionalism. The crisis of Canadian federalism is a crisis of a political system with a declining capacity for the effective use of the authority of

⁴⁴ Richard Simeon and Ian Robinson, Royal Commission on the Economic Union and Development Prospects for Canada. State, Society, and the Development of Canadian Federalism. (Toronto: University of Toronto Press, 1990) 16.

⁴⁵ Ian Stewart, "No Quick Fixes: The Canadian Central Government and the Problems of Representation" in Canada and the United States: Representation and Policy Formation in Federal Systems David M. Olson and C.E.S. Franks, eds. (U.S.A.: Institute of Government Studies Press, 1993) 33.

⁴⁶ David Smith, "Party Government, Representation and National Integration in Canada", in Party Government and Regional Representation in Canada Peter Aucoin, ed. (Toronto: University of Toronto Press, 1987) 33.

government for the attainment of public goals.⁴⁷ This is a constitutional crisis in the sense that the working constitution of Canadian federalism can not adequately manage the cleavages existing in society. Canadian identities are no longer adequately accommodated by the provincial and national identities natural to a federal people.⁴⁸

The following is a brief overview of how electoral and institutional representation is inadequate to demarcated identities.

House Of Commons

The Canadian members of parliament are not a demographically representative of Canadian Society. There is an over representation of aged, well educated middle to upper class male lawyers or businessmen.⁴⁹ If a Prime Minister was so inclined to make their cabinets representative of major social interests it would be close to impossible. Only with respect to the territorial and bicultural diversity of Canadian society does the

⁴⁷ Alan Cairns, "The Other Crisis of Canadian Federalism," Canadian Public Administration, Vol 22 (Summer, 1979), 175-95.

⁴⁸ Cairns, supra note 47, 180-6.

⁴⁹ Stewart, supra note 45, at 36. Similar demographic and socioeconomic characteristic apply to provincial legislators. See Kornberg, et al. Representative Democracy in the Canadian Provinces, (Scarborough: Prentice-Hall Canada Inc., 1982) Table 6.1, 175.

representative principle seem to have applied to the House of Commons and to national cabinets. From the outset it was assumed that all regions would have a proportionate distribution of Cabinet seats: John A. Macdonald planned it this way. It is now a firmly established constitutional convention that all provinces with the exception of P.E.I. must have at least one cabinet minister.

Even in terms of regions, representation has limits or frustrations to its responsiveness due to the single-member plurality system. Parties become over-represented in regions where they are successful and under-represented when they are weak; for example, in 1980, the Liberal Party received two thirds of the popular vote in Quebec and got seventy-four of seventy-five seats. In the same year, the Liberals received over one-fifth of the popular vote in Saskatchewan, Alberta and British Columbia but won none of the 63 seats.

Minor parties are generally disadvantaged by this electoral method unless they are parties of regional protest in which case they prosper from it. Thus, the use of political parties, formed to represent an identity issue would be frustrated by political boundaries that favour geographic or regional bases of support. Further, most of the major parties' electoral resources are concentrated on those areas of the country where a significant number of seats exist: in Canada this means Ontario.

Senate

The composition of the Senate is very similar to the House of Commons; the privileged are over-represented.⁵⁰ The existing Senate was originally created to serve the needs of regional representation; specifically, the concerns of the Maritime provinces that their representatives might be overwhelmed in the lower house by the representatives from the central Canadian provinces.

The Senate was established with twenty-four representatives each from Ontario, Quebec, the Maritimes and the West. The manipulation of the concept of region is heavily skewed towards representation by population instead of reflecting the federal nature of the country. Most upper chambers in federations are based on the principle that the smaller units should receive some special protection, that simple majority decision rules are not entirely appropriate for federal systems. The representation breaks down as follows: Quebec and Ontario, 46% ; Newfoundland, Prince Edward Island, Nova Scotia, and New Brunswick, 28.8% ; Manitoba, Saskatchewan, Alberta, and British Columbia, 23.2% ; and the Yukon and Northwest Territories, 2%.⁵¹

Generally, the Senate acts as the silent partner to the House. When it does react "it is frequently to challenge

⁵⁰ Stewart, *supra* note 45, at 39.

⁵¹ McCormick, Manning and Gibson, Regional Representation: The Canadian Partnership, (Alberta: Canada West Foundation, 1981) 28.

provisions considered harmful to business."⁵² For the most part, it lacks the credibility to stand up to the House of Commons. The nature of this political institution is one where appointments are made to those who are ending their political careers. There lacks incentive to keep in touch with the political opinion in the region they represent and consequentially there is rarely an incentive for pressure groups to attempt to use the senator as a regular channel to the decision making process.⁵³

Overall, demographic profiles on these political state institutions are very similar. There exists distortions with women, minorities, First Nations, and also in respect to age and social class.⁵⁴ Though not always reflected perfectly, regions do consistently get represented. The backgrounds of those who occupy authoritative positions in Ottawa are far more representative of Canada's territorial and bicultural diversity than of other political and social cleavages.

However, for those who have come to occupy authoritative positions institutional socialization stands out as a significant intervening variable between pre-entry

⁵² Robert Jackson and Michael Atkinson, The Canadian Legislative System (Toronto: Macmillan, 1974) 85.

⁵³ McCormick, Manning and Gibson, *supra* note 51, at 27.

⁵⁴ Stewart, *supra* note 45, at 45-6.

backgrounds and post entry values.⁵⁵ Another block that serves to undercut notions of regional agency is that MP's also have internalized loyalty to the party. Only social issues that are embraced by the party will have their views articulated. Therefore, Canadians have five potential avenues (number of parties) rather than two hundred and ninety-five which is the number of MP's. "Regardless of the Role MP's claim to adopt, for the purposes of role enactment when voting on the floor of the House all are party delegates."⁵⁶

The combining of federalism with parliamentary institutions has proved to be less than adequate in dealing with regional issues. A Parliamentary system which would concern itself with national politics could not avoid regional issues for federalism, based on the distinction between national and local spheres of jurisdiction, in its Canadian form, has always had to contend with overlap of jurisdiction which has led to conflict between both levels of government.⁵⁷

⁵⁵ Stewart, *supra* note 45, at 48. See Donald Smiley and Reginald Watts, Intrastate Federalism in Canada, Royal Commission on the Economic Union and Development Prospects for Canada. (Ottawa: Supply and Services Canada, 1985.)

⁵⁶ Jackson and Atkinson, *supra* note 52, at 145-8.

⁵⁷ Rainer Knopff and F.L. Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms" in Constitutionalism, Citizenship and Society in Canada, Alan Cairns and Cynthia Williams, eds. (Toronto: University of Toronto Press, 1985) 134-5.

The type of reform sought for this problem depends on whether or not one believes that the national and local spheres can be separated. If so, then there is usually advocated a reform in the divisions of powers. This solution is tenuous, for it would be a very tedious job to even attempt to list definitively governmental powers so as to ensure clashes over jurisdiction will come to a definite end. This is problematic in Canada where the relationship between the various levels of state and society are complex and interdependent. Government performs several functions for several people in a society that continually seeks the assistance of the state to manage its affairs. Further, changing circumstances of state and/or society may require different means to achieve various goals which is something the delineating of powers frustrates.⁵⁸

If one believes that there can not be a separation between national and local jurisdiction, then reform that makes the national policy making arena more responsive to regional concerns and thus reducing conflict between governments, is advocated. This usually means modifications to the parliamentary system where discipline and unity are largely responsible for the insensitivity to regions however, this amounts to an abandonment of what

⁵⁸ McCormick, Manning and Gibson, *supra* note 51, at 34-6.

distinguishes this system.⁵⁹

Conclusion

The Canadian state, whose origins supported, reflected and encouraged privilege, is now charged with the modification of the socio-economic order of society in order to alter the imbalances of power which are related to the recognition and status of identities. In the Canadian federal system, French identity as represented by Quebec, has the powers of a province as granted by the BNA Act 1867 as do the regions. The various identities of Aboriginal Nations, women, and other minority groups, attempt to reach the government through other points of access. They are dependant on the governments of federalism to achieve their constitutional objectives that could potentially transform Canadian government as it is known. This is problematic, for the state, being responsible for its territorial integrity and internal cohesiveness, is likely to only recognize and sustain cleavages if they are to its advantage.⁶⁰

⁵⁹ Knopff and Morton, *supra* note 57, at 133.

⁶⁰ Alan Cairns, "The Embedded State: State-Society Relations in Canada" in State and Society: Canada in Comparative Perspective, Keith Banting, ed. (Toronto: University of Toronto Press, 1986) 77.

The following chapter, focusing on the patriation round, is a chronicle of the attempt by the federal government, through constitutional reform, to negotiate the centrifugal forces of federalism, fragmenting further with the emerging of alternate identities, and to remedy the inadequacies of the parliamentary system in providing adequate democratic representation, while at the same time, maintaining the coherence of the whole.

CHAPTER TWO

State Builders at Work

*The Canadian constitution is not concerned with timeless abstractions, but still remains - as it always was - a vehicle for the attainment of very practical ends. It cannot long stand if, instead of fostering those ends, it obstructs their attainment.*⁶¹

On November 15, 1976, the Parti Québécois, led by Rene Levesque, was elected to power in Quebec on a platform espousing the principle of 'self-determination.' The Party's constitutional ambition was separation from Canada but with the maintenance of an economic association. However, the Quebec government promised its people it would not proceed with independence until a referendum was held to secure approval. This effectively threw the country into its next round of constitutional debate which had been relatively silent since the rejection by Quebec of the Victoria Charter in 1971.⁶² The French-English question was not the only

⁶¹ J.R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1976) 192.

⁶² In the early 1960's, Quebec had also rejected the procedures for amending the constitution known as the Fulton-Favreau formula. During both rounds, it was felt that unanimity of the provinces was necessary for constitutional amendment and the Fulton-Favreau formula would have written this into the constitution.

issue that would find a place on the constitutional agenda; events of the 1960s and 1970s had altered the traditional debate bringing competing interests to the table.

The Constitution Act, 1982, was an attempt to alleviate various existing tensions that had grown out of the primary cleavages in the Canadian federal system of dualism and of regionalism. Further, the constitutional debate, which historically was dominated with these questions of federalism, came to encompass discussion on the basic rules of a democratic political system; the issues of both Canadian democracy and the quality of rights were injected, largely due to the influence of the Liberals⁶³ and of Trudeau's proposed Charter of Rights and Freedoms that appeared in 1978 in the draft of Bill C-60. Still, in the 1970s, constitutional politics was very elitist, and it was the objectives of governments, rather than its people, that were most significant to the process and outcome of this Act.⁶⁴

⁶³ The Pearson Liberal government took the position in the 1968 Constitutional Conference, that a charter of rights should be first priority in any constitutional reform agenda. See the Pearson Government policy statement, *Federalism for the Future* (1968) 8.

⁶⁴ See Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed. (Toronto: University of Toronto Press, 1993) Russell traces the shift from parliamentary sovereignty to popular sovereignty as he feels it has occurred in Canada, by examining the various constitutional rounds and identifying the major actors involved in the process.

FEDERAL AGENDA

From the beginning of confederation, emphasis has been placed on the maintenance of a strong central government in order to sustain the dominion. This task of maintenance was given to the federal government who, in order to realize this project, would have to link the political allegiance of the Canadian people to the country as a whole rather than to its constituent parts.

After World War II, the federal government's dominance had been sustained by Keynesian economic management and by its leadership in building the Canadian welfare state. However, by the 1970s this dominance was waning with the provinces taking aggressive roles in their own development. The Liberals, perceiving that this shift was occurring, proceeded with a strong defence of the federal government after their return to power in 1980. Their convictions were strengthened by the defeat of the Quebec sovereignty referendum in May, 1980, as the Liberal government took the "no" vote to the Parti Québécois and sovereignty association as a "yes" vote to the Liberals and renewed federalism.⁶⁵

The Liberal government went ahead to patriate the

⁶⁵ Keith Banting and Richard Simeon, "Federalism, Democracy and the Constitution" in *And No One Cheered*, Banting and Simeon, eds. (Toronto: Methuen, 1983) 6.

constitution, which was one project⁶⁶ in its set of initiatives which were directed towards alleviating the strains in the federal system while shifting both the power of the provinces and the perceived allegiance of Canadians to the provinces, back to the federal government. As the federal government stated, the power of the provinces "has increased, is increasing and ought to be diminished."⁶⁷

The original federal proposal would have patriated the constitution, adopted the Victoria amending formula⁶⁸ providing for the use of referenda to bypass provincial assent. It would have entrenched a charter of rights, within which Trudeau's personal agenda of guaranteeing language rights would be realized. Language was extremely important to Trudeau who, while discussing with Premier Bill

⁶⁶ Bruce Doern has detailed the five elements of this strategy, which emerged in 1980-81: constitutional change, the National Energy Policy, a new and more rationalized approach to economic development, western economic development and new measure to improve relations with the West, and the re-structuring of fiscal relations with the provinces in both their equalization and social program dimensions." In "Liberal Priorities 1982: The Limits of Scheming Virtuously," in *How Ottawa Spends Your Tax Dollars: National Policy and Economic Development, 1982* (Toronto: James Lorimer & Co., 1982) 1-2.

⁶⁷ Donald Smiley, "A Dangerous Deed: The Constitution Act, 1982", in *And No One Cheered*, K. Banting and R. Simeon, eds. (Toronto: Methuen, 1983) 74.

⁶⁸ This formula was based on a regional concept. Parliament and any province having or once having had twenty-five per cent of the national population (a perpetual veto for Ontario and Quebec), along with any two provinces from the Atlantic and any two from the West, with the latter two having at least fifty percent of the population of that region.

Bennett what each considered essential for a constitutional deal, said, "You have to give me language. It's my existence."⁶⁹ Further, there was no general affirmation or entrenchment of aboriginal rights in the initial document, rather, an interpretive clause was added to ensure that a strongly individualistic reading of the Charter could not be used to erode the distinctive status of aboriginal peoples.⁷⁰

The main objective of Trudeau's federal political strategy was patriation of the constitution and entrenchment of a charter of rights which would symbolize the common political values of Canadians, and combat the stresses of regionalism and dangers of French nationalism.⁷¹ Trudeau believed that the Charter would stand as a symbol that Canadians could transfer their allegiance to. This embodied a common symbolism that would give the Supreme court the power to declare and enforce other common values and practices in a diverse federation, in effect, it sought to limit the policy making role of the provinces, something

⁶⁹ Robert Sheppard and Michael Valpy, The National Deal: The Fight for a Canadian Constitution (Toronto: Fleet Books, 1982) 6.

⁷⁰ Jeremy Webber, Reimagining Canada: Language, Culture, Community and the Canadian Constitution (McGill-Queen's University Press, 1994) 108.

⁷¹ For a discussion of Trudeau's views on nationalism and the use of symbolism, see, Pierre Trudeau, "Federalism, Nationalism and Reason", in Federalism and French Canadians (New York: St. Martin's Press, 1968) 182-203.

which the provinces were specifically seeking to expand within the realm of constitutional amendment.⁷²

A First Ministers' Conference was called for September 1980 and ended with no agreement. The competing federalist and provincialist visions led to the federal government responding with threats that if they could not come to an agreement, it would move to unilaterally patriate the constitution.

The patriation resolution, along with the proposed charter, was sent to a special committee of Parliament, which held televised public hearings on these issues, and found that there was immense public support for the idea of a charter. It was here that interest groups were able to influence the federal government, for the government had to incorporate some of the more adamant demands being put forward by some interested organizations as it was dependant on public support to counteract the provinces who were opposing unilateral patriation. To further increase its appeal, the federal government began selling the Charter as a net gain in power to the people:

Constitutional entrenchment of the Charter of Rights and Freedoms limits the power of both provincial and federal governments in favour of the rights of individual citizens. It gives

⁷² David Milne, The New Canadian Constitution (Toronto: James Lorimer & Company, 1982) 32. Also, see Rainer Knopff and F.L. Morton, Charter Politics (Scarborough: Nelson Canada, 1992) 374-384.

people the power to appeal to the courts if they feel their rights have been infringed or denied. The Charter does not transfer any powers or authority from the provincial governments to the federal governments - rather it transfers power to all Canadians.⁷³

This accomplished two things: first, it allowed the federal government to somewhat discredit the provinces who they said were bargaining their own legislative powers for human rights. Second, it necessitated opening the process of constitutional reform, if only to a limited degree, bringing new players into the debate. However, creating public interest and support in the Charter served the federal officials well as this ensured that it would find a place in the new constitution. It did not mean that the interests of groups such as First Nations and women were fully realized.

On September 28, 1981, the move to unilaterally patriate was declared by the Supreme Court to be beyond the powers of the federal government thus they were forced to re-enter negotiations with the provinces.⁷⁴ What follows

⁷³ The Constitution and You. Ottawa: Government of Canada. 12-13. Emphasis in original. Quoted in Michael Mandel, The Charter of Rights and the Legalization of Politics in Canada, (Toronto: Wall & Thompson, 1989) 35.

⁷⁴ The Court actually stated that in terms of the letter of the law, there was no requirement of provincial consent but terms of constitutional convention there was a requirement of a "substantial degree" of provincial consent. This would make any further unilateral action politically disastrous.

is a look at the main issues that were put forward by the various actors in the constitutional round, looking at the sources of discontent, the demands put forward in the constitutional framework, and what was ultimately realized in the Constitution Act 1982.

COMPETING AGENDAS

DUALISM

In the century following Confederation, the British North America Act, 1867, served the French Canadian interests of maintenance of culture. The French fathers of Confederation gave legislative jurisdiction to the provinces over areas they felt were of importance in maintaining the French culture. Clerical leadership, provincial autonomy and religious, linguistic, and social barriers, gave French-speaking Quebecers the ability to maintain their way of life and their group identity.⁷⁵

However, by the 1950s the traditional institutions of Quebec had become progressively less relevant to the circumstances of an industrialized community exposed to a

⁷⁵ Dale Thomson, Quebec Society and Politics: Views from the Inside, (Toronto: McClelland and Stewart Limited, 1973) 12.

modernizing world, for forces of secularization and urbanization had altered the traditional face of Quebec. French Canadians realized that their cultural isolation had put them at an economic disadvantage. In the 1960s, the Quiet Revolution brought a transformation to Quebec society shifting its nationalism of survival, which required a limited role for government beyond the maintenance of the existing division of powers, to a nationalism of expansion and development.⁷⁶ The Lesage government of the 60's and its successors defined the survival and integrity of the Francophone community in Quebec largely in terms of the control by the province of its own economic development and this brought about a challenge to federal powers.⁷⁷

In 1976, the Parti Québécois, with its separatist ideology, achieved a provincial electoral victory. The threat to the Canadian union threw the country into a new round of constitutional discussion, pushing the federal government to search for a renewed constitution. However, the extent to which the federal government had to accommodate the political leaders of Quebec was diminished by two events, allowing the federal government to move ahead

⁷⁶ Russell, *supra* note 6, at 73.

⁷⁷ Smiley, *supra* note 39, at 166. The Trudeau government resisted Quebec's demands for he saw this emerging French nationalism as being dangerous to the stability of the federation. Trudeau hoped that he would be able to appease Quebec somewhat and potentially inspire French loyalties to Ottawa, by introducing bilingualism.

with its own agenda of reform. This did not mean that the interests of Quebec as a province were neglected only that they were addressed according to the vision that Trudeau had of Quebec within Canada.

First, Rene Levesque promised the people of Quebec that he would hold a referendum on the question of sovereignty-association, a concept designed to reassure those who were sympathetic to independence in principle but apprehensive about its economic consequences. However, the Quebec people were not reassured for when the referendum took place in May 1980, the voters rejected sovereignty-association by a margin of 60:40.

Second, on April 13 1981, the Parti Québécois defeated the Quebec Liberal Party led by Claude Ryan in a provincial election. Ryan had offered Quebecers an alternative plan to Levesque's sovereignty association but it also proposed radical reform within the federal system. With sovereignty association rejected and Claude Ryan's Liberals defeated, the constitutional bargaining power of the government of Quebec was diminished and the federal Liberals seized their opportunity to proceed with their agenda of shifting allegiance of the constituent parts of the country to the union as a whole.⁷⁸

REGIONALISM

⁷⁸ Banting and Simeon, *supra* note 65, at 3-5.

The BNA Act, 1867, recognized the existence of regional identities, or at least differences, through the establishment of a federal system of government. The West has its own unique culture and exists as a regional unit with its own needs and interests. Its distinctiveness has fostered a unique regional political consciousness which David Elton and Roger Gibbins have defined and labelled "western alienation." This political and partisan alienation has a long history that in the 1970s was sustained by contemporary issues, the three main ones being the (lack of) control of its economic resources, the Western composition in national government, and the attention paid to Quebec.⁷⁹ Due to this growing conflict, the West began to demand constitutional change.

First, throughout the history of the West there has existed the belief that they and their resources have been exploited by business interests in central Canada, aided by the federal government. In the 1970s conflicts with Ottawa and national institutions were growing. Saskatchewan had come into conflict with the Supreme Court, over its development of the potash and petroleum industry.⁸⁰ The

⁷⁹ David Elton and Roger Gibbons, "Western Alienation and Political Culture", in Richard Schultz, Orest M. Kruhlak, and John C. Terry, eds., The Canadian Political Process, 3rd ed. (Toronto: Holt, Rinehart & Winston 1979), 82.

⁸⁰ Supreme Court Cases that decided that provincial schemes to tax and regulate resource industries were beyond the provinces' constitutional powers.

Supreme Court ruled that the province was acting ultra vires in its plans to tax and regulate resource industries thereby thwarting Saskatchewan's plans for economic development.

The relationship between Alberta and Ottawa was also extremely tense due to various actions of central government in reaction to the OPEC oil crisis. The dramatic rise in the world price of oil left the oil producing western provinces holding a great source of wealth. However, the federal government reacted to the crisis by protecting Canadian oil consumers, keeping Canadian domestic price of oil well below world levels. They introduced an export tax that had the effect of subsidizing consumers at the expense of the western provinces. Further, Ottawa, to reap some of the rewards of the provinces' new found wealth, moved to disallow oil companies from deducting royalties paid to the province, from their federal income tax.⁸¹ This left the western provinces believing that the constitution as was could not protect them or their interests from the desires of the federal government and central Canada.

Secondly, Western Canadians' ability to affect the policies or partisan composition of the national government was a source of frustration. During the, 70s, the Trudeau Liberals failed to elect members from the western provinces.

C.I.G.O.L Ltd. v. Saskatchewan [1978] S.C.R. 545
Central Canada Potash Co. Ltd. v. Saskatchewan [1979] 1 S.C.R. 42

⁸¹ Russell, supra note 6, at 96.

The West's traditional support for the Conservative party was insufficient to propel that party into national office where major decisions are made on public policy in such matters as international trade, tariffs, and transportation, which are significant to the West's economic development.⁸²

Third, there existed the sentiment that Quebec and its concerns were playing too large a role in national politics and that this was being done at the expense of western Canada. In some ways, sentiment regarding the federal government was similar between the West and Quebec; they were both concerned with federal government's intrusions into provincial areas of jurisdiction, and were pushing for greater provincial autonomy. However, Western Canadians, "feel deep economic concern with, and strong emotional ties toward, the modern Canada they did so much to create."⁸³ They were seeking a greater inclusion in Canadian society as opposed to Quebec's threatened separation from it.

The constitutional restlessness stirring the western provinces was not confined to that region. To a great

⁸² In the 1974 national election, for example, the liberal party had secured 128 seats, just five short of a majority - before ballots were even counted west of the Great Lakes. If the prairie provinces had failed to elect a single Liberal MP the liberal party would still have enjoyed a comfortable majority. Elton and Gibbons, *supra* note 79, at 83.

⁸³ J.A. Archer, "The Prairie Perspective," in One Country or Two? R.M. Burns ed. (Montreal: McGill Queen's University Press, 1971, P 231. Quoted in Elton and Gibbins, 94.

extent these conflicts involved constitutional questions and, as a result, these struggles were turned into court actions in order to clarify existing constitutional authority in areas such as taxation, jurisdiction over interprovincial and international trade, and ownership of public land and natural resources. Between 1975 and 1982, the Supreme Court of Canada decided eighty constitutional cases, almost all of them dealing with the federal division of powers. This was only two more cases than it heard in its first quarter-century as Canada's final court of appeal.⁸⁴ Through the 1970s, virtually all of the provincial governments, no matter how economically dependent some of them were on Ottawa, began to seek expanded jurisdiction in some areas.⁸⁵

THE "GANG OF EIGHT" AND "THE CANADIAN WAY"

Regional disputes increasingly turned into demands for constitutional change of two varieties. First, some governments argued for greater control over the taxing and marketing of natural resources, implying legislative decentralization. Extensive decentralization was not the objective (with the exception of Alberta and perhaps British

⁸⁴ See Peter H. Russell, "The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources," Canadian Public Policy 11 (1985):161-70.

⁸⁵ Russell, *supra* note 6, at 96-7.

Columbia) of the provinces. For the most part, they remained committed to a significant role for the federal government, especially Saskatchewan, Newfoundland, and Manitoba, who had fragile economies that depended on federally administered programs or equalization payments. The second kind of constitutional demand pertained to the reform of federal institutions, especially the Senate which may be used to give greater weight to the voices of the Atlantic and western provinces, allowing them to figure more prominently in Ottawa's decision making.⁸⁶ However, the West did not formulate a coherent plan for institutional reform and as such, it did not become a main focus of debate within constitutional discussions.

The 'gang of eight' (the provincial premiers less Ontario and New Brunswick) were opposed to the federal initiative though the chief source of their grievance was the federal government's threat of unilateral action. Their response to this threat was to launch an action against the federal government and to stall the package until the Supreme Court could rule on the legality of unilateral action.

The Charter of Rights and Freedoms and the amending formula received the greatest amount of criticism from the opposing eight. Alberta strongly objected to the proposal that only Ontario and Quebec would be guaranteed a veto,

⁸⁶ Webber, supra note 70, at 103.

treating the notion of equality of the provinces with notions of sameness in treatment. British Columbia agreed with the idea of regional vetoes but asserted that British Columbia should be treated as a region in its own right.

The provinces developed a counter-proposal in April 1981, which was a package that would have allowed patriation. The amending formula would have been altered so that most amendments would have been submitted to the Vancouver formula, which required the approval of two-thirds of the provinces representing 50 per cent of the Canadian population. This meant that although large provinces might well carry more weight in the decision, no provinces would have a veto. Any province would be able to opt out of amendments that transferred jurisdiction from the provinces to the federal government. The package also excluded the Charter.⁸⁷

⁸⁷ Webber, *supra* note 70, at 110-1.

DEMOCRACY AND THE IMPLEMENTATION OF THE CHARTER

"Thanks But No Thanks"⁸⁸

Democracy was injected into the debate first by the federal government, which had argued that a Charter of Rights should logically come prior to an analysis of power and institutions. For many non-governmental participants, the constitution was too important to be decided by politicians alone and they believed that public groups should be included in the process. Many called for greater public involvement and a broadening of the issues on the constitutional table. When the constitutional proposal went to the special Parliament hearings, the public interest in the Charter was found to be substantial. This would be beneficial to the objectives of the federal government and would allow for the entry of First Nations and women's issues, on to the constitutional agenda.

First Nations and the Charter

The constitutional round that led to the 1982 Act was the first of the constitutional rounds to deal with

⁸⁸ The response of the Canadian Civil Liberties Association to the newly unveiled proposed charter of rights and freedoms. See Sheppard and Valpy, 135.

Aboriginal rights. In 1973, the Judicial branch of government began the recognition of the collective rights of Canada's Aboriginal peoples. In that year, the Supreme Court of Canada in the Calder Case⁸⁹, brought down a landmark decision giving clear recognition to the existence of the Aboriginal title in Canadian law. Prior to this, Trudeau's attitude towards aboriginal rights was stated in 1969, "We can't recognize aboriginal rights because no society can be built on historical 'might have beens'".⁹⁰ After the Supreme court handed down its decision, the federal government was forced to deal with aboriginal issues. This provided an opening and a legitimacy⁹¹ for First Nations issues to be addressed during the constitutional rounds in 1980.

The original federal proposal did not include a clause pertaining to aboriginal rights. Instead, it had an interpretive clause to provide for the non-derogation of Aboriginal rights which could occur due to the individualist nature and readings of the Charter. However, various additions were later made. There now existed three which pertained to First Nations. First, the aforementioned

⁸⁹ Calder v. Attorney-General of British Columbia [1973] S.C.R. 313.

⁹⁰ Thomas R. Berger, Fragile Freedoms: Human Rights and Dissent in Canada (Toronto: Clarke, Irwin, 1981) 243.

⁹¹ This is not to imply that an inherent right did not exist prior to 1973 but that legitimacy was acquired in terms of the machinations of the government.

interpretive clause, which appeared as Section 25 which would provide for the non-derogation of Aboriginal rights with respect to the Charter of Rights and Freedoms. Second, a proposed Section 34 would entrench aboriginal and treaty rights and third, a Section 37 provided for one further meeting of First Ministers and Aboriginal leaders on constitutional matters.⁹²

However, in the last minute agreements that were negotiated on the "night of the long knives" and presented on November 5, 1981, removed from the federal constitutional package were its guarantee of aboriginal rights in order to accommodate the wishes of the Alberta government. Organizations representing First Nations lobbied strenuously for the restoration of these sections. By the end of November, all provinces (except for Quebec) accepted the clauses which "recognized and affirmed" the aboriginal and treaty rights of the "aboriginal peoples of Canada" but with one serious qualification - the word "existing" was added."⁹³

Women and the Charter

Women saw the movement to patriate and renew the

⁹² David C. Hawkes, Aboriginal Peoples and Constitutional Reform: What have we learned? Institute of Intergovernmental Relations (Ontario: 1989) 3-8.

⁹³ Stevenson, *supra* note 10, at 256.

constitution as an opportunity to shape the law on equality. The existing equality protections found in the Canadian Bill of Rights were inadequate to realize the claims that were being put forward by women. As Gwen Brodsky and Shelagh Day point out, two cases handed down in the 70s were significant in forming women's constitutional agenda: A.G. Canada v. Lavell⁹⁴ and Bliss v. A.G. Canada.⁹⁵ In Lavell, equality before the law was protected but equality under the law was not. As long as all Indian women were treated in the same discriminatory manner, there was no violation of the Canadian Bill of Rights.

In Bliss v. A.G. Canada there involved a challenge to the Unemployment Insurance Act. The Supreme Court of Canada ruled that Stella Bliss' right to equality before the law was not violated because the qualifications for entitlement to benefits were involved and not the imposition of a penalty. Further, discrimination on the basis of pregnancy is not discrimination on the basis of sex, since the distinction being made is not between male and female persons, but between pregnant and non-pregnant persons.⁹⁶

These two cases told women that the language of the

⁹⁴ (1973), [1974] S.C.R. 1349

⁹⁵ (1978), [1979] 1 S.C.R. 183

⁹⁶ Gwen Brodsky and Shelagh Day, Canadian Charter, Equality Rights for Women: One step forward or Two steps Back? Canadian Advisory Council of the Status of Women (1989) 14.

Bill of Rights was problematic for it provided equality only with respect to procedures and penalties and could not assist women where laws themselves were discriminatory. New language and stronger guarantees would be required in an entrenched Charter if it was to avoid past problems and to direct judges to new interpretations. The proposed text of the Canadian Charter of Rights and Freedoms that was tabled in 1980, was thus problematic for the language it contained was almost identical to that of the Canadian Bill of Rights.⁹⁷

Women lobbied to strengthen the Charter's guarantees of equality, working for changes to the language of Section 15 and 15(2)⁹⁸, insisting that equality under the law, which is what the Supreme Court said was missing in Lavell, and equal benefit of the law, which is what was apparently needed in Bliss, were included in 15(1). Women unsuccessfully sought the inclusion of marital status, sexual orientation, and political belief in the list of named grounds of discrimination and supported open-ended protection from discrimination so that grounds other than those named could be covered.⁹⁹

⁹⁷ Brodsky and Day, *supra* note 96, at 15.

⁹⁸ The proposed 1980 text read
15 (2) The section does not preclude any program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.

⁹⁹ Brodsky and Day, *supra* note 96, at 16-7.

Women also lobbied to obtain a specific women's equality rights section. It was originally proposed that a statement of purpose guaranteeing the rights and freedoms in the Charter to men and women equally should be included in Section 1. This guarantee did not become part of Section 1 but came to be in Section 28. Women also wished to ensure that Section 1's limitations would not be used to limit one's right to equality. Women did not want Section 33 included in the Constitution but were not successful in having it removed but they did win the concession that it would not apply to Section 28.¹⁰⁰

"The Night of the Long Knives"

On the night of November 4th, the all the premiers except for Levesque, who was unaware as to what was taking place, met to hammer out an agreement that was suitable to all the remaining parties. Levesque had lost in his strategy to halt the process of constitutional reform which would thwart the federal government's promise to Canadians, particularly to Quebec, of constitutional renewal. Levesque had formed a common front against the federal government with some of the other provinces by agreeing to accept a

¹⁰⁰ Brodsky and Day, supra note 96, at 17. For a detailed history of s.28, see Penney Kome in The Taking of Twenty-Eight: Women Challenge the Constitution (Toronto: Women's Press, 1983).

proposal for amending the constitution which would make Quebec a province just like the others meaning Quebec would have no veto.¹⁰¹

Levesque ultimately destroyed the alliance when he accepted a challenge by Prime Minister Trudeau who proposed that the constitutional issue be put to a referendum. This was a proposal the other premiers did not want to accept and it left the other provinces with the realization that Levesque had never wanted constitutional agreement at all. They then moved to work out a compromise agreement which was acceptable to the federal government and every provincial government except Quebec, a compromise that left Quebec without the veto it would have had under the original federal proposal.¹⁰²

An agreement was put forward on November 5th. The first of its elements was the addition of Section 33, the "notwithstanding" clause to the Charter of Rights which was a proposal put forward by British Columbia. This section allows legislatures to remove a law from the application of some (but not all) of the provisions of the Charter by enacting a declaration that the law applied

¹⁰¹ This agreement contrasted with the federal proposal under which Quebec and any other province, or group of provinces with twenty-five percent of the population would have a veto over constitutional change.

¹⁰² Ramsay Cook, "Has the Quiet Revolution Finally Ended?" in A Passion for Identity, Eli Mandel and David Taras eds. (Toronto: Methuen Publications, 1987) 289-99.

"notwithstanding" the Canadian Charter of Rights and Freedoms. Also, the exemption would last for five years after which time the legislature would have to act to renew it.

The clause represented a compromise between a fully entrenched charter of rights that was the cornerstone of Trudeau's personal agenda, and the principles of democratic accountability. Among the Charter provisions exempted from its reach were (at Ottawa's insistence) democratic, mobility and language rights.¹⁰³ Trudeau would modify the language guarantee so it read that the right to English language education in Quebec would depend on whether at least one of the child's parents had been educated in English in Canada.

The second element was a revised version of the Vancouver amending formula, the formula originally proposed by the Gang of Eight. At the November conference, the federal government was in favour of the Victoria formula, under which Quebec and Ontario would obtain a veto over constitutional change. It relinquished this position during negotiations, agreeing to the new formula where most amendments would require the approval of seven provinces representing 50 per cent of the population, with no province possessing a veto. Provinces would still be able to opt out of amendments transferring jurisdiction to Ottawa, but under the agreement there was again at Ottawa's insistence no

¹⁰³ Webber, *supra* note 70, at 113-5.

provision for financial compensation.¹⁰⁴ This also would be later modified with the federal government offering to provide some compensation to a province opting out of a transfer of jurisdiction.

The agreement also included other modifications. One of these was the elimination of the clause affirming aboriginal rights. Some provinces had never liked this clause and wanted its exclusion and during the private discussions of November 1981, the other governments acquiesced. Aboriginals branded the governments' decision as yet another betrayal of aboriginal peoples. However, public criticism forced the government to re-instate the clause, although this time the word "existing" was added limiting its scope.

The November meeting also ousted from the Charter Section 28, the super-guarantee of women's equality. Equality remained protected by Section 15 of the Charter, the general provision forbidding discrimination on the basis of such grounds as race or ethnic origin. However, because it had taken forceful presentations by women's organizations to secure the additional clause gender equality clause, s.28, its sudden deletion provoked outrage from women's organizations and soon it was back in the Charter.¹⁰⁵

The two houses of the Canadian Parliament approved the

¹⁰⁴ Stevenson, *supra* note 10, at 257.

¹⁰⁵ Brodsky and Day, *supra* note 96, 17.

constitutional package in December 1981 and the following March, the Parliament of the United Kingdom passed it into law. On April, 17, 1982 the new constitution was proclaimed in force as the supreme law of Canada.

The Constitution Act of 1982 was the result of a long history of Canada moving itself towards greater autonomy. It was a package that patriated the Canadian Constitution, enacted a Charter of Rights and Freedoms, committed the governments and legislative bodies of Canada to the principles of equalization and the reduction of regional disparities, it extended provincial jurisdiction, and it contained a supremacy clause 52 (1), that declared the Constitution of Canada as the supreme law of that nation. It contained a guarantee of Aboriginal and treaty rights, promising a set of constitutional conferences on Aboriginal right to follow patriation. Equality provisions were secured that were an improvement over those that were contained in the Bill of Rights.

However, the final product fell short of the original purpose and may have exacerbated and fractured those tensions, making further attempts at reform more problematic.

There is no feeling of historic
breakthrough in collective
accomplishment, no conviction that
Canadians have renewed their federation.
None of the underlying conflicts that
gave rise to the constitutional debate

in the first place have been resolved, and no new framework has been put in place to manage them more effectively in the decades to come. There was no creative reconciliation among the competing visions of Canada. Dreams for the future were denied or compromised.¹⁰⁶

Indeed, Quebec was not party to the patriation agreement. In a public letter, dated 25 November 1981, Prime Minister Trudeau had reminded the Quebec premier of an uncomfortable truth: "Between the year 1971 and November 5, 1981 every government that I have presided over has favoured an amending formula which would have assured a veto to Quebec."¹⁰⁷ In retrospect, Levesque's decision to support the Vancouver formula had been fateful: not only had Quebec lost its claim to a veto, it had now lost the condition it had demanded when agreeing to the Vancouver formula, the right to opt out with full compensation.¹⁰⁸

The act of changing the elements of the constitution embodying the powers of the provinces was a betrayal of the commitments made to the Quebec electorate in 1980 and would create new obstacles in Quebec's further relations between the federal and provincial governments and also with the wider Canadian community.

The patriation of the constitution with the

¹⁰⁶ Banting and Simeon, *supra* note 65, at 348.

¹⁰⁷ Cook, *supra* note 102, at 289-99.

¹⁰⁸ Webber, *supra* note 70, at 114.

entrenchment of the Charter of Rights also changed the structure of constitutional debate in Canada. The addition of a Charter of Rights and Freedoms to the constitution widens the focus of judicial review from a preoccupation with the powers of government to a concern for the rights of citizens. Section 52 of the Constitution Act, transfers power to the judiciary as it establishes an explicit basis for the judicial veto of unconstitutional laws. The Constitution of Canada is "the supreme law of Canada" and that "any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect."¹⁰⁹

The fight for section 28, the super-guarantee of gender equality, was considered a triumph of Canadian women, one that consolidated a tendency to pursue women's political agenda through constitutional means. Further, Aboriginal peoples would continue to seek their unfinished agenda for self-government at the conferences promised by the 1982 Act and in subsequent constitutional rounds.

The constitutional reform process brought to light that there was widespread criticism of Canadian political institutions and processes; the package that was realized was a compromise arrangement mainly between governments, challenging notions of democracy. The agendas of Quebec,

¹⁰⁹ Peter Russell, Rainer Knopff, and Ted Morton, Federalism and The Charter: Leading Constitutional Decisions (Ottawa: Carleton University Press, 1990) 4.

First Nations and women, which could not be adequately addressed within the pre-1982 governmental framework, were left unfinished with the "gains" made in document proving in time, to be inadequate or problematic.

The alterations, concessions, and deletions of the federal and provincial agendas culminated in a document that has entrenched various paradoxes that would significantly affect the subsequent constitutional rounds proving the Constitution Act of 1982, to be an impediment to constitutional change of the "mega-constitutional"¹¹⁰ reform variety. The next chapter will examine these paradoxes, why they exist, why they frustrate some types of social reform, and why they themselves resist alteration.

¹¹⁰ Peter Russell defines this type of constitutional politics as "[M]ega constitutional politics goes beyond disputing the merits of specific constitutional proposals and addresses the very nature of the political community on which the constitution is based...[it] is concerned with reaching agreement on the identity and fundamental principles of the body politic.

Chapter Three

Identity Complex

It is crucial that we not ignore the self nor the longing people have to transform the self, that we make the conditions for wholeness such that they are mirrored both in our own beings and in social and political reality.¹¹¹

As discussed earlier, the Canadian state is charged with both the maintenance of unity which contributes to providing stable accumulation conditions and with the recognition of individual and collective identities, some of which are reinforced and favoured by the existing federal system. The constitutional round of 1982 was meant to deal with these dual mandates of the state which had come into conflict as tensions with the primary identities of regionalism and dualism increased, threatening the unity of the larger community, as Canada sought to establish its own national autonomy through patriation.

The resulting Constitution Act 1982, did little to assuage these tensions and instead, exacerbated the

¹¹¹ bell hooks, Sisters of the Yam. Quoted in Craig Calhoun, ed., Social Theory and the Politics of Identity (Oxford: Blackwell, 1994) 1.

French\English cleavage. During the round, dissatisfaction with the political structure of the state was brought to light as various identities sought to alter or add to the Constitution so that it would allow for better access to mechanisms which could be used to transfer power to marginalized groups. Their limited success galvanized them to continue to pursue recognition claims through constitutional litigation and reform processes. Many of the issues that were put forward during the round regarding institutions were left untouched and there was only a slight change to the division of powers. Further, although Canada had legally separated itself from Britain, it had not defined itself in a way that was clearly consented to by all sections of Canadian people.

This unfinished agenda would bring Canada to two more constitutional rounds, neither of which would realize any proposed reform. Although there are differing reasons for these failures, what follows is a look at what the Constitution Act 1982 did accomplish so that it stands as both agitator for alterations to the Constitution and as impediment to that alteration.

As earlier stated, "Federalism does tend to 'organize' territorial issues into Canadian politics and to organize other issues out."¹¹² The constitution of Canadian federalism which supports provincial and a national

¹¹² Simeon and Robinson, *supra* note 44, at 16.

territorial identities, cannot manage the cleavages created by emerging identities seeking social and political recognition. The 1982 Act, did little to alter the existing federal institutions to allow for improved representation and recognition of non-traditional identities. Instead, it provided the Charter which has come to challenge the traditional organizing mechanisms of federalism as it,

allows individuals and groups that are indifferent to federalism to resist the latter's organizing imperative and to take issues directly to court, where the 'crosscutting ideological formulation of such issues will be emphasized at the expense of any territorial dimension they may have.'¹¹³

The Charter, however, did not simply provide an alternate venue for recognition. Canadians were stimulated to view themselves as "rights-holders, thereby transforming the language of political discourse in Canada."¹¹⁴ Rights discourse does not contain itself to the judicial arena nor is it employed solely by the oppressed. As such it has altered the political culture of Canada where public issues such as air service, fishing stocks, and even smoking become articulated and framed in rights discourse. Its transformative potential is questionable but because of its impact it can't be ignored by those who wish to attempt to

¹¹³ Aian Cairns, Charter Versus Federalism (Montreal: McGill-Queen's University Press, 1992) 84.

¹¹⁴ Cairns, *supra* note 113, at 84.

have identity recognized through political or legal venues which impact on the state.

The Charter, its symbolism, content and discourse have reified incongruencies in the evolution and logic of legal, political and social theory as constructed in western democratic thought, as it stands as a liberalist document charged with managing the issues of the post-modern era. Although the Charter contains provisions that could be understood as giving powers to collectivities, the theme that appears to be dominant in public consciousness is that of the Charter as protector of the rights of individuals and guarantor of equal treatment of citizens and provinces. The universalism inherent in liberalism denies the recognition of difference that post-modernism is most concerned with.

Also, significant is the constitutionalized amending formula which was based on the principle of the equality of the provinces and is reinforced by Charter conceptions of equality. This affects the discussion of differential status and the possibilities of asymmetrical federalism as remedy to regional difference. This formula also represents a preference of governments for the maintenance of consociational democracy. This however, is in conflict with the idea sold to Canadians during the 1982 round that there was a transfer of power to the people and this idea was embraced by the public. As such, the three constitutional rounds saw shifts in perceptions of who should be involved

in the process of constitutional reform. The decline of public support for consociational democracy was accentuated by the arrival of the Charter, which provided support for the principle of popular sovereignty. The Charter was the document of the people and as such, any alterations to it would be accompanied by a "right" of the public to be involved.

Given the above, the Constitution Act 1982, now stands as an impediment to further constitutional reform unless we can reconceptualize prevailing notions of unity and equality. This will require both an understanding of what is meant by each; what are the conditions that must be attained before "unity" or "equality" can be said to have been reached and further, what sort of mechanisms are required to attain them. If Canada and its diverse identities are to approximate these stated goals with or without constitutional reform, it will require an understanding that different identities may require varying forms and forums of articulation before they can be represented in social and political reality.

Unity - Disunity

Universality, Citizenship, and Difference

When Canada was officially known as British North America, it gave British Canadians a sense of who they were though this was to the exclusion of others. In 1963, as a response to the Quiet Revolution in Quebec, the liberal government under Lester Pearson established a committee that would be responsible for developing objectives for bilingualism in the federal administration. In the same year, he appointed the Bilingualism and Biculturalism Commission to study what could be done in the public and private sectors to better reflect the bicultural nature of Canada.¹¹⁵

In 1969, Trudeau implemented an Official Languages Act based on one of the recommendations of the Bilingualism and Biculturalism Commission. Soon after, multiculturalism emerged to challenge biculturalism. Canadians of other cultural origins insisted that their identities be recognized as an emphasis on biculturalism tied to the Canadian national identity relegated them to a lesser status threatening their treatment as full members of Canadian society.

¹¹⁵ Webber, supra note 70, at 51.

Faced with these objections the Trudeau government dropped biculturalism and focused solely on bilingualism. There would be no official cultures; all would have equal access. The separation of bilingualism from biculturalism was reinforced by Trudeau's formal adoption of the policy of multiculturalism in 1971. Under this policy, the government provided financial support to cultural events, organizations, publications that would reflect the cultural diversity of Canada.¹¹⁶

Interestingly, as Leslie Pal points out, funding for these non-profit multicultural organizations has been explicitly framed in terms of citizen development and national unity. For these groups "...the whole field of their endeavour may be seen to involve a discourse on identity, its formation, preservation, and articulation within a national vision."¹¹⁷ The concern for national unity has become tied up with the articulation of a national identity; it is a search for what symbolically draws and holds citizens together in our political community.

In the classic sense, nations are particular communities of people of the same descent, sharing a common language, culture, history and are located geographically but who are not yet politically integrated in the form of a

¹¹⁶ Webber, *supra* note 70, at 62-6.

¹¹⁷ Leslie A. Pal, Interests of State: The Politics of Language Multiculturalism, and Feminism in Canada (Montreal: McGill-Queen's University Press, 1993) 250.

state organization. The formation of Canada as a state has been the reverse of this process and as such identification based commitment to the nation is problematic simply because the collective experience, uniting symbols and histories of Canada's peoples greatly varies across the country. Building distinctions based on identity into the conception of the Canadian nation can become an exercise in exclusion.

However, the Charter was an attempt to embody such a symbol of unity. It established equality as a constitutional principle; we were all equal citizens regardless of our ethnicity, race, gender, language, and afforded equal protection of the law that this citizenship entails. This universal citizenship defined by a commitment to individual rights which transcended difference, was the objective of Trudeau in trying to combat Quebec Nationalism. However, attempts to transcend difference are problematic in a nation that is simultaneously committed to the recognition of diversity; it is in direct contrast to other policies the federal government established in response to the movement for recognition of diverse cultural identities within Canada. The 1982 round with its implementation of a liberal-democratic document, was strangely an affirmation and denial of difference.

The conception of universal citizenship that was embodied in the Charter was meant to transcend particularity and difference giving the appearance that citizenship status

would give peer status in the political public sphere, despite economic and social difference. However, as Iris Young points out, there are problems with this model of citizenship:

The ideal of the public realm of citizenship as expressing a general will, a point of view and interest that citizens have in common and that transcends their differences, has operated in fact as a demand for homogeneity among citizens.¹¹⁸

Modernity sought to extend citizenship rights to protect society's marginalized identities. However, paradoxically, these very ideals resulted in the breakdown of distinctness with the establishment of equality as sameness causing minorities to become grow more estranged. Identities require differences and the recognition of others of that difference in order to be. Thus the existence and maintenance of various identities depend on the ability to define for themselves and others their difference in both public and private capacities. An attempt to establish one universal identity is an exercise in power held by the privileged which results in the adoption of characteristics, needs, and wants of the dominant group as being definitive

¹¹⁸ Iris Marion Young, "Polity and Group Difference: A Critique of Universal Citizenship" in Theorizing Citizenship, Ronald Beiner, ed. (Albany: State University of New York Press, 1995) 178. Young is referring to the meaning of universality as generality which is embedded in modern political thought.

of all.

Further, as Craig Calhoun points out, the bracketing of differences in identity in order to participate as a citizen in the political sphere, has caused theories to underestimate the struggle involved in forging identities and makes it almost impossible to thematize them as "the objects of politics instead of as obstacles to be overcome before rational political formation of the collective will."¹¹⁹

People's understanding of public issues, public policy and their consequences are influenced by their situated experience as possessors of various identities. As well, because of their positions, they may have different political needs which require sensitivity to the histories, culture, etc., of that group, in order to provide a substantive remedy.

The Charter's presentation of a unitary conception of Canadian citizenship was also reflected and supported in the amending formula which established the equality of the provinces. This was embraced in further constitutional rounds where the idea of granting "distinct society" status to Quebec was heatedly debated and contested. Underlying many of the arguments that opposed distinct society was the claim that all Canadian citizens and provinces had to be

¹¹⁹ Craig Calhoun, Social Theory and the Politics of Identity (Oxford: Blackwell, 1994) 4.

treated the same. Whether or not the distinct society designation would translate into Quebec having greater autonomy in its own internal provincial affairs or if it meant more power to Quebec in Canadian issues became irrelevant. It was believed that distinct society for Quebec meant an elevated status over the rest of the provinces. This would not be acceptable to other provinces who felt that they too had unique identities within Canada, nor was it acceptable to those provinces who believed that Quebec already had too much influence with the federal government dominating much of the federal agenda. Equality was thus established as sameness and this notion has frustrated progression on questions of identity recognition and support.

Canadians are thus left with two contrasting political tendencies. One, in establishing a national identity in the name of unity, it is demanded that we all have same representation within the state. The second tendency demands that we recognize and support our different identities; however, this may necessitate a difference in treatment to allow for such an accommodation. The Charter has helped to hide the reality of marginalization and has made unacceptable recognition of status that is not universally shared.

Equality - Hierarchy

The existing models of political accommodation could not adequately allow for the representation of "new" identities. The Charter, with its clauses directed at some of these groups became an instrument through which they were affirmed as distinct and equal members in the Canadian polity. As such the impact of the Charter is significant for it sits somewhere between being a supplement or surrogate to the traditional political institutions. However, this is not without its problems and the degree to which it functions more as surrogate rather than supplement can produce negative results in the pursuit of "unity" and "equality."

Though the Charter has been used successfully by some oppressed groups, results have been less than what was hoped for. Though the Charter gives constitutional status to the principle of equality, as has already been noted, that notion is equated with sameness which frustrates a move from formal equality to substantive equality and as such a real challenge to the existing hierarchy is limited. Further, the Charter's sections themselves contain what has been described as a hierarchy of rights.

The Charter has endorsed equality to be a widely held community value however we continue to live in a society characterized by group based patterns of social economic and

political inequality. Formal equality prescribes the equal treatment of all individuals regardless of their actual circumstances thus, legal guarantees of equality are satisfied provided all are treated equally even if this formula for equality results in the actual accentuation of social inequalities.¹²⁰

In order to move towards eradicating inequality there must be an acknowledgment of the deeply embedded institutional and systemic dimensions of inequality and as such society must overcome the belief that simply providing individual equality without providing the context of histories of exclusion and denial of resources will provide remedy to a society plagued with deep group-based inequities. Without this understanding the result will be to provide legal justification for continued patterns of group based inequality for liberal law fails to acknowledge that bias is built into what appears to be a neutral standard applied to all individuals and these standards are shaped by the need of socially privileged groups.¹²¹

Interesting is society's perception of how this formal extension of individual rights as embodied in the Charter, has impacted on the existence of inequality. In a November 1991 Focus Canada survey by Environics Research of Toronto,

¹²⁰ Colleen Sheppard, Study Paper on Litigating the Relationship Between Equity and Equality. (Ontario Law Reform Commission, 1992) 9.

¹²¹ Sheppard, *supra* note 120, at 10.

it was found that eighty-nine percent of respondents were aware of the Charter, seven out of ten considering it a "very important" part of the Canadian identity.¹²² Only twenty-eight percent believed that their personal rights had improved, eighteen percent said they deteriorated, and fifty-three percent said they had seen no change. When questioned about the effects on the "rights of the average citizen," thirty-nine percent believed they had improved, sixteen thought they deteriorated, and thirty-eight thought there had been no change. However, when respondents were asked whether minorities rights had improved, fifty-six percent said yes, nine percent said no, and twenty-six percent believed that there had been no effect.¹²³

While most people feel that the entrenchment of formal equality has not significantly impacted on their political and social realities, there exists the perception that it has improved for minorities. These sorts of perceptions may not be supportive of alterations that would provide substantive change as it is felt that improved status and social conditions have already been achieved. Further, as Carol Smart has pointed out in the case of women using

¹²² Jeffrey Simpson, "Rights Talk: The Effect of the Charter on Canadian Political Discourse" in Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life, Bryden, Davis and Russell, eds. (Toronto: University of Toronto Press, 1994) 52.

¹²³ Simpson, *supra* note 122, at 53.

rights strategies, the continuation of the demand for legal rights past the acquisition of the formal rights that men enjoy may be detrimental especially if the demand is for a right for which there is no "masculine equivalent."¹²⁴ The notion that a group is being afforded a "special right" is unacceptable as can be seen by public reactions to attempts by gay and lesbian groups to alter the definition of "spouse" so as to extend "rights" now enjoyed by heterosexual couples, to same sex relationships. This can have the very unfortunate response of a backlash that can result in increased intolerance or even violence. Ultimately, the overall result of the preceding discussion is a resistance to proposed constitutional reform that identity groups put forward that for them, would provide substantial equality.

In an essay titled, "The Meech Lake Accord: Entrenching a Pecking Order of Minority Rights," Evelyn Kallen outlines how the already dominant identities in Canada replicated their status in the Charter and reattempted this in the proposed Meech Lake agreement. The privileged status of the "two founding peoples" is reconfirmed and strengthened through Charter provisions protecting their language and education rights. Sections 16-21 and s.23 outline positive specified protections for clearly defined English and French

¹²⁴ Carol Smart, Feminism and the Power of Law (London: Routledge, 1989) 139.

language and educational rights. Section 29, provides positive specified protections for the enumerated religious denominational education rights of Protestant and Catholic religious collectivities throughout Canada but there are no parallel protections for the collective linguistic and religious rights of multicultural or aboriginal minorities. Charter s.22 provides only a vague negative protection for non-official language minorities by allowing but neither specifying nor defining their linguistic rights.

Indeed in the original proposed Charter there was no mention of multicultural rights. Section 27 was only added in response to extensive lobbying by representatives of a large number of ethnic minorities towards the end of negotiations. Charter s.27 makes reference to the multicultural heritage of Canadians but it does not afford positive protections to minority rights nor does it specify or define the nature of the rights alluded to leaving its interpretation in the hands of the courts.¹²⁵

Constitutional amendment s.35 and Charter s.25 represent a move to improve the constitutionally entrenched status of Canada's aboriginal peoples by recognizing their collective aboriginal rights. Yet, these provisions afford only negative protection for the aboriginal and treaty rights of Indian, Inuit and Métis minorities. The nature

¹²⁵ Evelyn Kallen, "The Meech Lake Accord: Entrenching a Pecking Order of Minority Rights" in Canadian Public Policy 1988 14 supplement, 107-119.

and content of collective, aboriginal rights remains undefined after constitutional conferences convened for that purpose were unsuccessful.¹²⁶

Charter s.15 provides the basis to make individual and categorical rights claims based upon the notion of equal status. The section enumerates minorities specified on the grounds of race, national or ethnic origin, colour religion, sex, age or mental or physical disability. Among these enumerated a hierarchy can be found as aboriginals, multicultural minorities and women have specified human rights protection under other provisions, Sections 25, 27 and 28 respectively which are also beyond the reach of Section 33, whereas s.15 of the Charter is subject to the possibility of provincial government override.

Section 33 in effect creates a hierarchy of rights which would leave one to conclude that some of these rights are so important that governments are not allowed to override them. Others are regarded as potentially "dispensable and contingent." As Radha Jhappan, asserts, "Although it is possible to think of valid grounds for legislatures to suspend certain rights, it is not immediately apparent why equality rights and fundamental freedoms are any less important than language, mobility, or

¹²⁶ Kallen, *supra* note 125, at 107-19.

democratic rights."¹²⁷

In the Charlottetown round, there was an explicit attempt to define the Canadian identity which would be encapsulated in the "Canada Clause" which would guide the courts in their interpretation of the Constitution including the Charter. This section caused much commotion as several attempts were made to be inclusive. After much debate over the resulting clause, it was still argued that the drafters had established a hierarchy of rights as the words "their governments" were excluded, at Bourassa's insistence, from sections pertaining to the commitment to the equality of men and women, ethnic groups, and the provinces. Thus the only clause that read, "Canadians and their governments are committed to. " was the clause that pertained to the development of official language communities throughout Canada.¹²⁸

Engaging in such an analysis that enumerates position, number and possession, threatens the employment of equality as sameness. However, as the Meech Lake and Charlottetown rounds illustrated, some identities are competing with each other for recognition and the mechanisms to realize one identity may be at odds with those that would enable the recognition of another group. For example, many criticisms

¹²⁷ Radha Jhappan, "The Charter and The Courts" in Canadian Politics in the 1990's, 4th ed., Whittington and Williams, eds. (Toronto: Nelson Canada, 1995) 344-5.

¹²⁸ Russell, *supra* note 6, at 217, 240.

focused on the distinct society clause in reference to the effect the clause had on the Charter of Rights. The argument was that with the clause, Quebec would be able to restrict individual rights in the interest of a culturally defined collectivity. Taking culture into account when interpreting the Charter would, many believed, inevitably imperil individual rights.¹²⁹

Advocates of this kind of Charter defence were members of the women's movement in English speaking Canada for whom the achieving of s.28 had special significance. One of the reasons for insisting on s.28 in the Charter had been the worry that cultural differences might be used to undermine women's equality. During Meech, they felt this section was in danger as they believed "distinct society" was reintroducing the cultural variables s.28 sought to exclude. However, french feminists in Quebec disagreed and were largely in support of "distinct society."

Categories of socially privileged and socially disadvantaged are relative and shift depending on the specific social context and further, individuals are members of many different groups. These complexities necessitate the development of equality analysis that takes into consideration group identity and status recognizing the asymmetry of privilege. Because of the relative and shifting nature of identities over time and place it appears

¹²⁹ Webber, *supra* note 70, at 236.

that an ongoing dialogue is required to maintain the recognition of difference which is in contrast to the fixing of identities and their boundaries that explicit constitutional recognition could result in.

The discourse that the Charter has inspired is also questionable in its ability to promote unity, which was the ultimate purpose of the Charter. Drawing on the American experience of rights discourse, Mary Ann Glendon argues:

[T]he language of rights is the language of no compromise. By indulging in excessively simple forms of rights talk in our pluralistic society, we needlessly multiply occasions for civil discord. We make it difficult for person and groups with conflicting interests and view to build coalitions and achieve compromise, or even to acquire that minimal degree of mutual forbearance and understanding that promotes peaceful coexistence and keeps the door open to further communication."¹³⁰

From this perspective, the Charter is inherently a fragmenting as opposed to a unifying document. "While one may make some rhetorical mileage by asserting that the Charter binds Canadians together in their common possession of certain rights, the defence of rights centres on conflict rather than co-operation."¹³¹

The Charter has encouraged the legalization of the

¹³⁰ Quoted in Simpson, supra note 122, at 57.

¹³¹ Donald Smiley, "A Dangerous Deed: The Constitution Act, 1982" in No One Cheered Banting and Simeon, eds. (Toronto: Methuen, 1983) 80-1.

quest for improvement in status for under-represented identities. Questions which were previously the object of political struggle have been redirected into the judicial arena where challenges are settled in arenas which are somewhat removed from the public and which are structured by a formal discourse. This has the effect of translating social issues into legalistic terms in order to permit these issues to be put before the courts. As Lise Gotell states in regards to the women's movement, "In conforming to the customs and legalistic discourse of the courts, feminist litigants distance themselves from the terrain of woman's everyday lives. Where debate begins to focus on what's the most appropriate legal language or interpretation and the concrete demands and results fade into the background."¹³²

The extent to which the Charter comes to act as surrogate to the traditional areas of struggle will increase the chances for potentially negative consequences on identities vying for status and recognition. Besides engaging in an adversarial discourse which frustrates the concept of unity, the discourse undermines the conceptualization of the issues removing them from the social and economic histories in which identity is grounded. Explicit recognition in the formulation of a right can demand conformity in order to claim its use, locking

¹³² Lise Gotell, The Canadian Women's Movement, Equality Rights and the Charter (Ottawa: Canadian Research Institute for the Advancement of Women, 1990) 39.

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identity that can be relative and shifting and as such, needs a forum that permits re-articulation.

Strengthening Democracy - Strengthening Judicial Review

The Charter was sold to Canadians as a tool that would strengthened democracy; it was a transfer of power to the people. However, the extent to which a transfer of power took place is questionable. The process that gave Canada its Constitution Act, 1982, undermined the document's legitimacy for some Canadians. It was a document negotiated in large part by eleven white men and at one point, the federal government threatened unilateral action if the provinces could not reach an agreement. There was a also recognition that the public input into the Special Joint Committee hearings was largely the result of the federal governments need for allies against the dissenting provinces. Most significantly, the impetus behind constitutional renewal, Quebec, did not sign.

This transfer of power was not without its conditions, exemptions and conflicts which were not fully in accordance with the evolving conception of democracy in Canada from parliamentary sovereignty to popular sovereignty. The

judiciary was given substantial position as the Constitution Act significantly broadened the basis of judicial review as the enforcement of the Charter of Rights is allocated to the judiciary by Section 24. This explicit recognition of the potential role of the courts in protecting identity, combined with Section 52 which states that the constitution is the supreme law of the Canada, greatly expands the role and power of the courts and also provides an alternate political arena. However there were qualifications to this in the form of s.1 and s.33 of the Charter which afford power back to the traditional parliamentary institutions. Second, provincial governments retain formal control of the amending formula, keeping them as the legitimate actors in the constitutional reform.

Constitution making in Canada has always been an elite process. The BNA Act was a product of negotiations between political and economic leaders that was never put forward for ratification by the public. Parliament was sovereign, not the people. As a letter from George-Etienne Cartier, Alexander Galt and John Ross, three founding fathers of Confederation states:

It will be observed that the basis of Confederation now proposed differs from that of the United States in several important particulars. It does not profess to be derived from the people but would be the constitution provided by the imperial parliament, thus

remedying any defect.¹³³

They attempted to distance their constitutional proposal from the Constitution of the American federal republic, disavowing the heretical idea that a constitution should be derived from the people. They were not interested in entrenching a bill of rights nor in submitting the Act to public approval through election or referendum. Leading politicians of the day dismissed such ideas, "a general election on such an issue, they argued, would be nothing more or less than a plebiscite; and a plebiscite was a dreadful republican heresy, French or American in origin, which would violate all the principles of parliamentary government, without the slightest beneficial result."¹³⁴

Canadian democracy developed into what has been called 'consociational democracy'. This type of democracy has been credited to some degree for enabling regionally and culturally fragmented systems to function successfully. Basically, consociational democracy amounts to a pattern of elite accommodation which is consistent with the major themes of the traditional Canadian political culture such as the elitist nature of its parliamentary structure, the deferential attitudes towards authority that lends legitimacy to this practice and the quasi-participation of

¹³³ Russell, *supra* note 6, at 3.

¹³⁴ Quoted in Russell, *supra* note 6, at 27.

the public which restricts its ability to upset the settlements made by elites.

Decision making-power is given to elites so that they can successfully accommodate and mediate among various social, economic and political interests formulating pragmatic policies that allow for the conciliation between political subcultures. In this form of democracy society must be willing to delegate authority to the elite, refraining from interfering in the conciliation process, accepting the deals arranged by political leaders. This limits mass participation which is mostly confined to voting in elections.¹³⁵

The arrival of the Charter of Rights and Freedoms signifies and reinforces a shift in the Canadian conception of democracy helping to further the decline of consociational democracy and thus challenging who are the legitimate actors in constitutional reform. However, this shift was paradoxical in respect to the provisions of the Canada Act.

The Charter modifies the practice of parliamentary government by the constraints that it imposes on legislatures and executives whose behaviour and policies are subjected to judicially enforced Charter rights. The main organizing principles of parliamentary government and

¹³⁵ Ronald Landes, The Canadian Polity 4th ed. (Scarborough: Prentice Hall, Inc. 1993) 309-11.

federalism have been joined by the Constitution whose status was elevated by s.52(1). Rather than provide alterations to the traditional institutions of Canadian government which were perceived as not being adequately representational of Canada's diverse identities, the Charter was grafted on to the existing structure to give this recognition.

The widening of the scope of judicial review due to the Charter of Rights and its protection of individuals freedoms shifts the perception that the constitution is primarily an instrument that regulates the affairs of government and as such governments are the proper participants in constitutional reform. Women, First Nations, and multicultural groups were given constitutional identities and the Charter being the instrument that raised their status has become the possession of these identity groups and as such they believe they should be participants in constitution making.¹³⁶

However, the governments' desire to maintain the form of consociational democracy can be seen in the 1982 amending formula which maintains that sovereignty still resides in governments as they are charged with amending the constitution though subject to legislative ratification. It appears that the governmental constitutional actors of 1982 underestimated the impact that the Charter would have on society's perception of their new relationship with the

¹³⁶ Cairns, supra note 113, at 68.

constitution and their subsequent roles as constitutional actors. This miscalculation turned into a huge criticism of the Meech Lake Accord and it necessitated the opening of the Charlottetown round to a referendum. It is unlikely that future constitutional reform can take place without some form of input by the public to the content of the amending document nor without submitting it to some form of public ratification.

Practicing constitutional reform as an exercise in consociational democracy, ie. elite accommodation, does not appear to be feasible or desirable in the Charter era. Constitutional deals of the past have been strategically negotiated documents where the removal of one provision could result in the collapse of the entire deal. This does not invite or welcome public input into the amending process which is demanded by constitutional identities who do not possess deferential attitudes granting legitimacy to political leaders and their agreements.

The higher status of the constitution necessarily adds responsibilities and status to the judiciary, most notably the Supreme Court. This has resulted in debate regarding the democratic nature of the Charter. While judicial review is a positive element of liberal democracies as it provides protection to individual rights by limiting legislative and executive power, it has also been criticized for its potential to go too far in nullifying or altering policies

enacted by a democratically accountable decision-makers. Traditional concerns about its composition, the appointment process, and the jurisprudence that should govern its decisions have become intensified.

What is of concern to this discussion is the question of legitimacy which underlies the various arguments put forward in these debates. As earlier stated the crisis that brought Canada to the constitutional round of 1982 was a dissatisfaction with perceived representation within the existing political structures. This can be seen as a crisis in legitimacy of the political system. Adding the Charter of Rights was seen as the remedy to the most pressing problems in the federal system. However, its legitimacy is questioned in several ways starting with Quebec's refusal to sign, its content, and its contribution to democracy. This questioning encompasses the judiciary that administers it and the decisions that are derived from it.

Legitimacy is derived from perceived representation and consensus. What this means, the standards that have to be met, who is represented, are all subject to alteration over time and place as we have seen with the evolving conceptions of democracy. The most significant problem thus, may not be that non-elected judges will impose their views on the democratic majority, but that legitimacy formation on political and social issues is impeded when they are transferred to the judicial arena that denies consensus

building and its transformative capacities.

Conclusion

Canadian society is continually in the process of transformation, the direction of which is affected by internal and external forces. Likewise, its identities are social constructions that can shift in response to and can be a reflection of the changing dynamics of such interrelated bodies as law, politics, society, state and economy. Identities are not however, without agency and depending on the ability of identities to organize, they can have an impact on the above institutions. Collective expression of identities that are frustrated by a lack of or misrecognition within state and society, can pose a challenge to institutional legitimacy.

Exercising political power in order to effectively influence the cultural and economic life of the state is historically linked in a fundamental way to the ethnic origin of those in authority. The access to effective political, social and economic power is determined by the groups' ethnic standing that is related to their influence in the establishment of state. Therefore, any discussion of the relationship of ethnicity and political power in Canada needs to consider historical reality.

The resulting institutional structures that comprised the Canadian state at the time of confederation, were an

embodiment of the beliefs, interests, and experience of the confederation politicians and their attempt to accommodate capitalist and societal interests. Even at this early stage, the state was involved in identity recognition, although it was limited and the basis for doing so was due to pragmatic considerations rather than to any philosophical underpinnings such as the dignity and moral worth of all persons.

The BNA settlement recognized two main linguistic and religious communities, British/Protestant and French/Catholic but it was the British Crown and British parliamentary institutions that would afford French Canadians those rights necessary for their cultural survival. This national government was responsible for establishing a collective political identity that would inspire the loyalty of Canadians to its political institutions which were aligned with British identity. Canadian central government would thus represent internally and externally this transplanted British identity.

The constitution of Canadian federalism which supports provincial and national identities could not successfully manage the cleavages created by emerging identities seeking social and political recognition. Over time, the state's involvement with modifying national identity and the status of members of society, politicized the state's existing cleavages and other emerging identities, encouraging them to

pursue their identity objectives through the various levels of government. The symbolic order of the state was politically created and the distribution of power income and status, relative to identity, was subject to political modification.

Differential identities are not entirely derived from the state. While it does play a key role in defining and or reinforcing the identity of society, the state's identity is in turn contested by societal forces attempting to redefine the state so that it is a better reflection of and allows for better representation of that society. The processes involved are institutionally structured by the forms of federalism.

Canadian federalism is an institution that supports regional identities and this accommodation of territory frustrates and or weakens other basis of identity lacking this spatial privilege. Regional and french identities are aligned with and more readily access governmental institutions and their resources whose authority has its basis in the constitution. Other identities must depend on the establishing of organizations that can penetrate the federal system to find sympathetic representation.

There is a crisis in the Canadian political system with its government experiencing a declining capacity to effectively attain public goals. Its a constitutional crisis in that the constitution of Canadian federalism can

not adequately manage the cleavages existing in society. There exists a structural tension created by the existence of dual pressures to provide mechanisms for both the integration of the larger Canadian community which contributes to the maintenance of the state and accumulation conditions, and the recognition of various individual and collective identities which appear to threaten the unity of the larger community.

The Constitution Act of 1982 was an attempt to reconstruct society and the Canadian identity(ies) through the altering of symbols of identification. The constitution is one medium through which we can continue to re-invent society as it provides the foundations of our political structure, and helps define our state apparatus. It reflects who we are as a society, defining what constitutes us as a sovereign political body. Although we shape the constitution to embody who we are as a nation, the constitution as an institution defines both the parameters for further reflection and the form of discourse used to articulate that vision. However, in the 1970s constitutional politics was very elitist and it was the objectives of governments, rather than its people, that were most significant to the process and the outcome of this Act.

Patriation was the result of a long history of Canada moving itself towards greater autonomy. However, the final product fell short of the original purpose and may have

exacerbated and fractured those tensions, making further attempts at reform more problematic. We are a multicultural nation whose individual identities were granted legitimacy when the Charter declared equality as a constitutional principle. The conceptions of democracy has evolved over time in Canada and has now taken the form of demands for equal status of group and individual identities. The alterations, concessions, and deletions of the federal and provincial agendas cumulated into a document that has entrenched various paradoxes that would significantly affect the subsequent constitutional rounds proving the constitution Act of 1982 to be an impediment to constitutional change of the mega constitutional variety.

The 1982 Act, did little to alter the existing federal institutions to allow for improved representation and recognition of non-traditional identities. Instead, it provided the Charter which has come to challenge the traditional organizing mechanisms of federalism by allowing non-territorial identities to bring their issues directly to court. As such the impact of the Charter is significant for it sits somewhere between being a supplement or surrogate to the traditional political institutions. The Charter did not simply provide an alternate venue for recognition, Canadians were stimulated to view themselves as "rights-holders" thereby transforming the language of political discourse in Canada. As such it has altered the political culture of

Canada where public issues become increasingly articulated and framed in rights language. The transformative potential of rights is questionable but because of its impact it can not be ignored by those who wish to attempt to have identity recognized through political or legal venues which impact on the state.

Although the Charter contains provisions that could be understood as protecting collectivities, the theme that appears to be dominant in public consciousness is that of the Charter as protector of the rights of individuals and guarantees equal treatment of citizens and provinces. The Charter was an attempt to embody a symbol of unity. It established equality as a constitutional principle; we were all equal citizens regardless of our ethnicity, race, gender, language, and afforded equal protection of the law that this citizenship entails. This amounts to both an affirmation and a denial of difference. This unitary conception of Canadian citizenship was embraced in further constitutional rounds where the idea of granting "distinct society" status to Quebec was heatedly debated and contested. Underlying many of the arguments that opposed distinct society was the claim that all Canadian citizens and provinces had to be treated the same. Equality was established as sameness and this notion has frustrated progression on question of identity recognition and support.

Canadians are dealing with two competing tendencies.

One, in establishing a national identity in the name of unity, it is demanded that we all have the same representation within the state. The second tendency demands that we recognize and support our different identities, ie. the Canadian mosaic, multiculturalism policy. However, this may necessitate a difference in treatment to allow for such an accommodation.

The discourse that the Charter has inspired is also questionable in its ability to promote unity, which was the ultimate purpose of the Charter. Situating issues in rights discourse undermines the potential to build coalitions and reach compromise. Questions which were previously the object of political struggle have been redirected into the judicial arena where challenges are settled in arenas which are somewhat removed from the public and which are structured by a formal discourse. This has the effect of translating social issues into legalistic terms in order to permit these issues to be put before the courts. The extent to which the Charter comes to act as surrogate to the traditional areas of struggle will increase the chances for potentially negative consequences on identities vying for status and recognition. Besides engaging in an adversarial discourse which frustrates the concept of unity, the discourse undermines the conceptualization of the issues removing them from the social and economic histories in which identity is grounded. Explicit recognition in the

formulation of a right can demand conformity in order to claim its use. locking identity that can be relative and shifting and as such, needs a forum that permits re-articulation.

The Charter was sold to Canadians as being a tool that strengthened democracy as it was a transfer of power to the people. The arrival of the Charter of Rights and Freedoms signifies and reinforces a shift in the Canadian conception of democracy helping to further the decline of consociational democracy and thus challenging who are the legitimate actors in constitutional reform. However, this shift was paradoxical in respect to the provision of the Canada Act.

The constitutionalized amending formula is based on the principle of the equality of the provinces and is reinforced by Charter conceptions of equality. This effects the discussion of differential status and the possibilities of asymmetrical federalism as remedy to regional difference. This formula also represents a preference of governments for the maintenance of consociational democracy. This is in conflict with the idea sold to Canadians during the 1982 round that there was a transfer of power to the people and this idea was embraced by the public. As such, the three constitutional rounds saw shifts in perceptions of who should be involved in the process of constitutional reform. The Charter was the document of the people and as such, any

alterations to it would be accompanied by a 'right' of the public to be involved.

Practicing constitutional reform as an exercise in consociational democracy, ie. elite accommodation, does not appear to be feasible or desirable in the Charter era. Constitutional deals of the past have been strategically negotiated documents where the removal of one provision could result in the collapse of the entire deal. This does not invite or welcome public input into the amending process which is demanded by constitutional identities who do not possess deferential attitudes granting legitimacy to political leaders and their agreements.

The elevated status of the constitution necessarily adds responsibilities, and status to the judiciary, most notably the Supreme Court. This has resulted in debate regarding the democratic nature of the Charter. What is of concern to this discussion is the question of legitimacy which underlies the various arguments put forward in these debates. The crisis that brought Canada to the constitutional round of 1982 was a dissatisfaction with perceived representation within the existing political structures. This can be seen as a crisis in legitimacy of the political system. Adding the Charter of Rights as seen as the remedy to the most pressing problems in the federal system. However, its legitimacy was in turn questioned in several ways starting with Quebec's refusal to sign, its

content and its contribution to democracy. Legitimacy is derived from perceived representation and consensus. What this means, the standards that have to be met, who is represented, are all subject to alteration over time and place as we have seen with the evolving conceptions of democracy. The most significant problem may not be that non-elected judges will impose their views on the democratic majority, but that legitimacy formation on political and social issues is impeded when they are transferred to the judicial arena that denies consensus building and its transformative capacities.

There now stands constitutionally generated impediments to further constitutional reform unless we can reconceptualize prevailing notions of unity and equality; what are the conditions that must be attained before 'unity' or 'equality' can be said to have been reached and further, what sort of mechanisms are required to attain them. If Canada and its diverse identities are to approximate these stated goals with or without constitutional reform, it will require an understanding that different identities may require varying forms and forums of articulation before they can be represented in social and political reality.

While for the most part, I have used the word "identity" to include several diverse groups it is not to be taken that a singular remedy for these groups should or even could be found. As identities are grounded in their

specific social, political and economic histories, so too must their strategies for reform or recognition. Individual analysis needs to take into account group histories, its goals, the mechanisms available to reach those goals, and what the results and impact using certain methods may have on that identity and also other groups and society as a whole for they all combine to influence the success or failure of a project.

For example, the histories of Quebec, Aborigines and women affect their status position in Canada and while all may use the rhetoric of the pursuit of equality as motivating their individual projects, what that means, the mechanisms they have to obtain that stated goal, and how alternate identities perceive these groups, varies. French identity as embodied in the province of Quebec has the powers of a provincial government. Not only can it use provincial resources in the maintenance of culture, it can and has used the history and symbolism of the "Two Founding Nations" on which Canada was built. While there is a dispute over whether confederation was a pact between two nations or whether it was an accommodation of the French fact, what is significant is that Quebec sees itself as an equal partner in confederation and for it, equality does not mean equality of provinces, it means the equality of Quebec with our national government. For the most part, the rest of Canada, and the federal government presently sees Quebec

as a province, and unless its present belief in the same treatment of the provinces can be altered the likelihood of affording Quebec the powers it demands to function as a "distinct society" is remote.

For Aborigines, their history within confederation is one of attempted forced assimilation with the denial of the status that should accord their position as the First Nations to exist in Canada. The establishment of the Canadian nation was forced on and replaced their own societal and governmental structures thus equality may not be found by becoming more involved in the existing Canadian government but by establishing their own order of government.

For women, their history in Canada shows shifts in both their own and society's conceptions of the role of women. Generally speaking, equality for woman today appears to take the form of demands for substantive equality in education, employment, income levels, political power, and protection and benefits of the law. This seems to amount to better access to the existing political and societal structures rather than challenging their foundations.

The state as it is involved in identity formation is multifaceted. Its form and/or symbolism can privilege or limit an identity, it can be a site of struggle for politicized identities or it can be a tool of change. Its relevance to an identity is significant to take into

consideration for while it can serve the above purposes, it is also charged with the mandate of maintaining conditions conducive to accumulation and securing social cohesion which contributes to that accumulation. The state as such is involved in the maintenance both of territorial integrity and in unity, the meanings of which seem to be conflated at the present time. Quebec's demands could necessitate a significant alteration to the state apparatus. Aboriginals may want to exist to some degree outside the existing state. Women may be seeking better access through the removal of barriers. Thus the extent which identity recognition and formation effect the roles of the state needs to be considered when assessing the probabilities for success of that enterprise.

Identity and the privileges and disadvantages that accompany that identity shift over time and are dependant on social context. For example, the identity of woman that was embraced by maternal feminists was that of wife and mother. Overcoming this narrow conception of woman is a project of some of today's feminist movements that seeks to expand role choices for women.

Likewise, the means used to maintain an identity can also shift as can be seen in the instance of Quebec. Initially, the legislative jurisdiction granted to the provinces at confederation, along with the involvement of the Catholic church, was sufficient for the maintenance of

French identity. This required a limited role for government beyond maintaining the existing division of powers. After the Quiet Revolution, maintenance of the French identity became the project of an actively interventionist state as the nationalism in Quebec shifted from one of survival to one of expansion and development.

Further, the processes on which legitimacy formation was based has also altered over time. At Confederation, with the adoption of parliamentary sovereignty, the BNA Act was not presented to Canadians for ratification. Canada's political system evolved into what is classified as consociational democracy or elite rule, the legitimacy of which is declining as Canadians adopt the American principle of popular sovereignty. The legitimacy of any further constitutional reforms is now dependant on the involvement of society in both the development of amendments and in their ratification.

What identity formation, equality, legitimacy, unity and mechanisms for attainment all share with each other is a spatiotemporality that requires forums which allow for ongoing dialogue that enables re-articulation and redefinition. Identity needs difference and the ability to define difference in order to be; equality requires standards and indicators so that it can be said to be achieved; legitimacy requires consensus building; and unity needs the espousing of alternate visions and ways it can be

achieved. Further, all of the above concepts whose attainment is significant to Canadian society, possess a complex interrelatedness that cannot be articulated in one forum which would permit the realization of these projects. Each forum provides its own potential for furthering certain pursuits.

This brings me back to the use of the constitution and constitutional reform for identity recognition. When the constitution is used as a forum for articulation, the dialogue becomes structured by the parameters of the constitution and the discourse it inspires. There are limits to the forms of recognition that the constitution can provide. There could also be further limitations to an identity within the form of its expression. For example, obtaining a "right" could be one form of expression for an identity. In establishing a right, it is reasonable to expect that they would confront the same limitations experienced by groups using rights claims such as formal possession will not necessarily not equate into substantive equality.

Even providing a positive right may not prove to be adequate. Kallen, in her article referred to in chapter three, feels that the privileged status of English and French identities is bolstered because of the Charter provisions that provide positive protection for such clearly defined rights pertaining to language and education. While

there are advantages to obtaining a positive right that clearly established what the right entails, there could potentially be a negative aspect to this in terms of identity formation. When the right is clearly defined, it establishes criteria that the identity must conform to in order to use that right. Further, there exists the potential that the right may fix an aspect of the identity that alters or is no longer adequate in maintaining that identity.

In this context, it may be the case that abstract negative rights against the state are more beneficial to identity formation as opposed to positive rights. It may be more useful for identities to access less rigid and alternate forums for discourse existing in society which would better allow for the defining of the co-evolving and interrelated processes of identity formation, equality, legitimacy, and unity. Constitutional reform could thus be more beneficial when it alters those institutions which it supports, that deny or impede access to forums of discussion or do not provide adequate mechanisms for the articulation of societies various projects.

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