FOREWORD

I

The Canadian Federalism Symposium

The fundamental text of the Canadian Constitution is the British North America (BNA) Act through which the Canadian federation was established in 1867. The Fathers of Confederation did not include an amending procedure in the BNA Act. As an Act of the British Parliament, subject to the normal provisions for altering legislation, no amending process was thought necessary. This omission 115 years ago has left Canada as the only sovereign nation in the world which must request the assistance of the government of another country in order to amend its own constitution.

Patriation, "bringing home" the Constitution, has long been the objective of both the federal and provincial governments. Yet, despite many reconciliation attempts, the federal and provincial governments have never been able to agree to an amending formula. This lack of agreement has rendered patriation unobtainable for over fifty years.

The initial search for a constitutional amending formula in Canada dates back to the first federal-provincial Constitutional Conference in 1927. In 1931, the British Parliament recognized the independence of the self-governing countries of the Commonwealth and officially disclaimed any right to legislate for them without their consent in the Statute of Westminster. At Canada's express request, the BNA Act was specifically exempted from the provisions of the Statute of Westminster. The purpose was to retain the status quo until agreement on methods of constitutional amendment could be reached in Canada.

The tenth, and most recent, attempt to find an amending formula acceptable to both federal and provincial governments began with the defeat of the Progressive Conservative government of Joe Clark in December of 1979. Clark's government was ousted when he lost a vote of confidence on his proposed budget, thus obligating new elections. Former Prime Minister Pierre Elliott Trudeau was persuaded to repudiate his decision to retire—announced just a few weeks before—to head the Liberal party list. In the February 1980 election, Mr. Trudeau and his fellow Liberals were returned to power in Ottawa. However, the Liberals failed to win a seat west of Winnipeg, Manitoba—the geographical center of the country. The natural western alienation that followed from the election of this "eastern" government helped set the stage for the present constitutional confrontation.

Prime Minister Trudeau has long been interested in codifying the Canadian Constitution and entrenching a Charter of Rights and Freedoms within the Constitution. At the Victoria Conference called by Trudeau in June of 1971, all first ministers of the ten provinces reached agreement on an amending formula. However, when the Government of Quebec decided not to proceed with the full

constitutional package after the completion of the conference, the consensus disintegrated.

In May of 1980, the separatist Parti Québécois, led by Quebec Premier René Lévesque brought a referendum to the people of Quebec. Essentially, the referendum addressed the question whether Quebec should have wide powers to establish its own relations with foreign nations and levy its own taxes, while maintaining an economic union with the rest of Canada. Agreement to the proposal would have begun a process of separation from the other provinces leading to a new status of "Sovereignty-Association."

The federalists and Prime Minister Trudeau recognized the danger of Canadian disintegration. Trudeau decisively entered the rhetorical battle for Quebec in the last months before the vote. He promised the Quebecers a new status *within* the federation and a more attractive federal system. His efforts were rewarded as nearly 60 percent of the voters of Quebec rejected the Parti Québécois proposal.

Prime Minister Trudeau immediately responded to the vote with a call for renewed efforts to patriate the Constitution and to come to agreement on an amending process. A meeting of the provincial Premiers was held in June, at which time it was agreed that the Ministers would continue to meet throughout the summer. By September, the Committee of Ministers had failed to report any significant progress toward a compromise. The eleven Ministers then met for six days of intensive negotiations before admitting failure.

Prime Minister Trudeau reacted to this disappointing setback with an announcement on national television that the federal government would relinquish its dream of provincial unanimity and proceed with its own drafts of a new constitution. Mindful of his party's substantial majority in Parliament, Trudeau proposed that a reform request be made by both the Senate and the House of Commons to the Queen. After passage of this Joint Address, the package was to be presented to the British Parliament for the necessary ratification. In addition, Trudeau proposed that an extensive, binding, Charter of Rights and Freedoms, with both language and human rights guarantees, be entrenched in the Constitution.

Predictably, the provincial response to this "unilateral Constitution-making" was quick and vehement. Though two provinces—Ontario and New Brunswick—supported the federal proposal, six provinces immediately challenged the Prime Minister's package and announced their intention to contest its legality. The objections to the constitutional patriation package was focused on three distinct areas: the entrenchment of the Charter with its language rights and civil liberties gurantees, the control of natural resources, and the amending procedure. The Quebec government objected to the provisions concerning minority language rights and mobility guarantees which would allow a Canadian to move anywhere and work anywhere in Canada. Western provinces—British Columbia, Alberta, and Manitoba—and Newfoundland were particularly concerned about the resource ownership provisions of the resolution. These six provinces argued that, based on the country's origins, history, and regional differences, no amendment to

the Constitution was feasible without the consultation and approval of the provinces. The federal government argued that an amending formula which required unanimity would lead to the stalemate and constitutional stagnation.

A special Parliamentary Committee was established to investigate the implications of the proposed changes. This Committee met repeatedly from November 1980 to February 1981 and heard testimony from almost 100 witnesses. Most of those who appeared before the Committee advocated a broadening of individual rights and freedoms through constitutional reform. As a result, the amendments to the package proposed by the Committee extended the scope and protections in the Charter.

The provinces opposed to the patriation package countered the federal government's plans to dispatch the proposal to Britain by pressing their legal argument in three provincial courts. Because provincial governments lack the authority to take a case directly to the Supreme Court of Canada, the provinces brought their case to the Manitoba, Newfoundland, and Quebec Courts of Appeals. This resort to litigation eloquently demonstrates the extent of the federal-provincial divisions. Both the Manitoba court and the Quebec court upheld the legality of the federal proposal, holding that there was no requirement of federal-provincial agreement. The Newfoundland court held that the federal proposal was illegal. On April 28, 1981, the Supreme Court of Canada decided to consider the provincial appeal from the Court of Appeals in Manitoba. The Trudeau government then halted its attempt to speed the proposal to Westminster, thus sparing the British Parliament the embarrassing specter of eight Canadian provinces lobbying it to vote against a bill passed by the Canadian Parliament.

Both sides hoped for a clear victory in the supreme court interpretation of their grievances. Those hopes were dashed by the supreme court's convoluted decision on September 28 which satisfied neither side. The court held that, as a matter of *law*, agreement of the provinces was not required for amending the Constitution. However, the court found that the past practice of obtaining the consent of the provinces when changes in federal-provincial relations and powers were made had ripened into a constitutional *convention*. Unfortunately, the parameters of the convention requiring provincial consent were left undefined in the voluminous opinion.

The ambiguous holding was subject to different interpretations. Prime Minister Trudeau embraced the decision as his mandate to press forward with his patriation and constitutional reform package. To those who supported the Prime Minister, the decision indicated that there were no *legal* barriers to prohibit the British Parliament from acting on their resolution. Opponents of Trudeau's package relied on the proposition that the government's proposal, while not technically illegal, contravened long-established customs and practices in Canada. In short, the supreme court decision had the effect of moving the constitutional debate back into the political arena.

The court's decision gave no guidance on the question of how many provinces the federal government had to enlist to meet conventional standards. The

unexpected ambiguity of the holding caused all parties to the debate to reevaluate their positions to determine just how far they were willing to go in the game of "constitutional chicken." While none of the rejectionist provinces wanted to break rank and submit to the federal government's proposal, none wanted to be left out of a compromise agreement. Though Trudeau's origional timetable called for the submission of his proposal shortly after the Canadian Parliament reconvened on October 14, the prospect of a national consensus prompted the Prime Minister to accede to the demands from the provincial Premiers not to proceed immediately. The delay gave the provincial leaders time to meet together in Montreal to prepare for one final negotiating session with Trudeau.

On November 2, Trudeau and the ten provincial Premiers met in Ottawa and began a series of closed sessions characterized by hard bargaining and compromise. Ninety hours later, the consensus between the federal government and nine of the ten provinces was announced. Though Trudeau had made significant concessions from his origional position, René Lévesque of Quebec was unwilling to agree to the final package.

To reach the consensus, Trudeau was forced to accept a divisive amending procedure and a reduced and qualified Charter. The agreement included an amending process which would give each province the authority to enact legislation "notwithstanding" the Charter of Rights and Freedoms. Lévesque refused to join the agreement without a guarantee of compensation if the nonapplication—provincial "opting out"—included financial cost. Trudeau's nightmare scenario was the prospect of a "checkerboard Canada" with geographical boundaries defining the extent and breadth of rights and obligations. In return for federal compromises, the nine anglophone premiers agreed to give Trudeau his cherished minority education provisions in the Charter. Lévesque, however, would not compromise his position on this provision.

The Italian political theorist Machiavelli said "[t]here is nothing more difficult to arrange, more doubtful of success, and more dangerous" than initiating changes in a nation's constitution. The consensus reached in Ottawa raised several potential problems. Minority groups and civil rights activists have already expressed their disapproval of the provision that allows the provinces to choose not to participate in constitutional rights which would otherwise be guaranteed. The "notwithstanding" clause is an extraordinary grant of power to the provinces.

Prime Minister Trudeau did not rush to implement the Ottawa Agreement in hopes that further compromises could be made to bring Quebec into the consensus. The Prime Minister recognized that Quebec's isolation feeds separatist sentiment, while bringing the constitutional reform process back to its origional battleground. When the House of Commons overwhelmingly approved the reform package in early December, Quebec Premier Lévesque lowered the provincial flag to half-staff. The inability of the federal government to bring Quebec into its consensus agreement with the nine anglophone provinces is an unpleasant reminder of the divisions which remain unresolved in Canada.

II

THE DUKE INTERNATIONAL & COMPARATIVE LAW INSTITUTE

The Canadian Federalism contribution to this issue of Law & Comtemporary Problems is a product of the Duke International & Comparative Law Institute. The Institute advances studies in international law and Canadian-American legal relations at Duke through its publications and conferences. Professor Richard Leach and the Duke Canadian Studies Program assisted in the formation of the Institute. With the assistance of Professor Morris Litman, of the Law Center of the University of Alberta, who was visiting at Duke during 1980-81, the Institute selected "Canadian Federalism" as the topic for its inaugural publication.

The Institute held a "Conference on Canadian Federalism" on November 8, 1981, at Duke University. Participants in the Conference included Walter S. Tarnopolsky of the University of Ottawa, J.F. Mallory of McGill University in Montreal, and W.H. McConnell of the University of Saskatchewan in Saskatoon. Professor William Van Alstyne commented on Professor Tarnopolsky's paper, Professor Donald Horowitz addressed the issues in Professor McConnell's presentation, and Professor Deil Wright of the University of North Carolina responded to Professor Mallory's article.

The Institute expresses its appreciation for the significant contributions—in time and energy—of Dick Danner and Claire Germain of the Duke Law Library, and also to Professor Horace Robertson of the Duke University School of Law.

MICHAEL LIEBERMAN