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THE UNIVERSITY OF ALBERTA

THE CONSTITUTIONAL REFORM PROCESS 1980-1982

BY

DAVID R. MERNER

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 POLITICAL SCIENCE

EDMONTON, ALBERTA

FALL 1987

ISBN 0-315-41132-5

THE UNIVERSITY OF ALBERTA

RELEASE FORM

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The Constitutional Reform Process 1980-1982

Master of Arts

1987

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July 10, 1987

All government, indeed every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter.

Edmund Burke

THE UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled

The Constitutional Reform Process 1980-1982

submitted by David R. Merner

in partial fulfilment of the requirements for the degree of

Master of Arts

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Supervisor

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July 8, 1987

DEDICATION

This thesis is dedicated to my grandfather

Morley G. Merner

who did not live to see its completion. He will live on through the example he set for his offspring.

ABSTRACT

This thesis assesses the constitutional reform process in Canada between the Quebec referendum of 1980 and the patriation of the constitution in 1982. Constitutional negotiations held a salient and controversial place on Canada's political agenda during those two years and will continue to play an important part in the nation's political life in decades to come. Thus, this thesis' argument that the 1980-1982 constitutional reform process was flawed leads to the conclusion that the lessons of the past must inform constitutional negotiations in the future.

The analysis in Chapter One indicates that many of the underlying political tensions in Canada and many of the issues discussed during the 1980-1982 round of negotiations remain unresolved. The performance of the Continuing Committee of Ministers on the Constitution is favorably assessed in Chapter Two. However, Chapter Three points to the significant problems associated with the performance of First Ministers' Conference and the bureaucracies of executive federalism. The crucial and generally positive roles played by Parliament and the Supreme Court in the constitutional reform process of 1980-1982 are examined in Chapters Four and Five.

This work concludes that although the 1980-1982 round of constitutional reform was unique it holds several important lessons for future constitutional negotiations, including the need for a greater diversity in the fora of constitutional negotiation and a more effective integration of such fora. Those lessons are elaborated upon in Chapter Six in the hope that they will help future negotiators in the process of constitutional compromise.

ACKNOWLEDGEMENTS

Many people contributed to the preparation of this thesis through their comments, guidance or support. I would like to thank every one of them. In particular, I would like to thank Dr. J.P. Meekison whose generosity, insight and patience as my thesis supervisor were immensely appreciated.

Several busy individuals shared their valuable time and ideas with me as I conducted the background research for this thesis. Mr. Justice Barry Strayer; Messrs. Roy Romanow and John Roberts; Professors Paul Weiler, William Lederman and John Whyte; and Senator Michael Kirby were notably generous in helping an inquisitive graduate student to understand the complexities of the constitutional negotiation process.

Professors Engelmann, Tupper, Stevenson and Gall of the University of Alberta broadened my understanding of Canadian politics and helped to make my education in Edmonton an excellent and most enjoyable learning experience. Ms. Alice Lau of the Law and Political Science Library was very helpful in guiding me to even the most obscure research material. Ms. Dorothy Gamble from the office of the Vice-President (Academic) was also very patient and helpful in dealing with my stream of telephone calls and queries.

My studies at the University of Alberta were made possible by my parents, Mr. Robert D. Merner and Mrs. Darlene A. Merner -- without whom this work would never have begun, let alone been completed. Last, but certainly not least, I thank my grandparents, Mr. Morley G. Merner and Mrs. Helen W. Merner of Wetaskiwin. Their kindness and patience during the preparation of this thesis were lasting gifts that I will always treasure.

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CHAPTER ONE

An Introduction to the Constitutional Reform Process

Canada's most important constitutional document lay in Westminster, England from March 1867 until April 1982. On 17 April 1982, Queen Elizabeth II proclaimed the Constitution Act and Canada gained de jure independence from the United Kingdom Parliament: no longer would Ottawa need Westminster's approval for the formal amendment of Canada's constitution. The Queen's signature also ended seemingly endless patriation negotiations between the federal and provincial governments that began in 1927 and lasted ten often controversial rounds.[1] The subject of this thesis is the crucial 1980-1982 round of negotiations that resulted in a compromise between the federal government and nine provincial governments. The compromise agreement over the long-delayed patriation of Canada's constitution brought a short-lived truce to federal-provincial constitutional bargaining and ushered in a new era in Canadian constitutional history.

The final round of patriation negotiations began immediately after the Quebec Referendum of May 20, 1980 in which 59.6 per cent of the voters denied Rene Levesque's separatist Parti Quebecois the mandate to negotiate sovereignty-association with Canada. Out of that spring-time vote grew a revived commitment to a "renewed

federalism," through constitutional reform, on the part of the federal government and the nine other provincial governments. The First Ministers met in Ottawa on June 9, 1980 to set an agenda for their ministers and officials to discuss over the summer in the Continuing Committee of Ministers on the Constitution. These meetings did not bear fruit in the fall as the September First Ministers' Conference ended in acrimony and the federal government promised to proceed to Westminster without provincial support.

The battle in Parliament and the decision of the Supreme Court on the constitutional validity of the federal government's initiative forced Prime Minister Trudeau to delay his unilateral attempt to patriate the constitution in favor of a "one last try" constitutional conference in November 1981. While that conference came close to failure, key actors at the conference managed to forge a consensus that eventually included Ottawa and nine of the ten provincial governments. Sadly, the government of the province that had largely inspired this latest round of negotiations refused to sign the accord.

The failure to include Quebec was the agreement's most egregious deficiency. From Smiley's "A Dangerous Deed: The Constitution Act 1982" to Latouche's "The Constitutional Misfire of 1982," the scholarly studies of the 1980-1982 round of constitutional reform are permeated by a sense of dissatisfaction and disapointment. While

some scholars suggested that "a restrained half cheer may be . . . the appropriate response to the new Canadian constitution," others were less charitable, describing the constitutional reform process as "undemocratic" and likening the Constitution Act to a "constitutional hijacking."[2]

Disappointment at the outcome of the constitutional negotiations was partly due to the high expections of academic observers: the 1980-1982 round ostensibly began as an attempt to address the perceived crisis in Canadian federalism involving both the Parti Quebecois' demands and the demands from other provincial governments. Indeed, constitutional negotiations were perceived as crucial to addressing the types of issue Cairns describes in his 1979 essay entitled "The Other Crisis of Canadian Federalism." According to Cairns,

> We have now reached a stage where the necessity of intergovernmental coordination and collaboration is not matched with an equivalent capacity for its attainment. We are approaching a condition of federal-provincial paralysis if existing trends continue. . . . [Such a trend] is a constitutional crisis in the sense that the working constitution of Canadian federalism can no longer control and channel the activities of governments in order to minimize their self-defeating competition with each other.[3]

Prime Minister Trudeau's promise of a "renewed federalism" during the referendum campaign signalled, for many, a promise to defuse this perceived crisis.

However, much of the initial reaction to the constitutional accord suggested that the agreement failed in that task. As Gibbins wrote of the agreement,

> Canadians face an intensifying institutional crisis that threatens to dismember the Canadian federal state. . . . the Constitution must be seen as a lost opportunity, perhaps tragically so, to re-vitalize national institutions and political life in Canada.[4]

The quest for a constitutional solution to the competition between the federal and provincial governments was thus not over in April 1982. As Smiley suggests, "The Constitution Act 1982 does nothing to resolve Cairns' `other crisis'. . . . the reform of 1982 is at best irrelevant."[5]

Given the June 3, 1987 agreement on the Meech Lake accord, it appears likely that Quebec will now join a constitutional accord. Yet, these scholars' criticisms point to the fact that many issues on the constitutional reform agenda remain unresolved. Further negotiations over these issues are likely to continue to appear at the top of the nation's political agenda for the remainder of this century. It is therefore important for the conduct of negotiations in the future to understand why constitutional reform in Canada has been so controversial and divisive.

This thesis seeks to explain that divisiveness in order to point to the stresses on the constitutional negotiation process. Indeed, one of the central arguments in this thesis is that the process of constitutional reform in Canada during the 1980-1982 round was flawed. These flaws are partly responsible for the difficulties encountered in the constitutional negotiations and they deserve careful examination. Suggestions for future negotiating approaches emerge from this examination.

In sum, the 1980-1982 round of constitutional reform brought about a historic breakthrough. Patriation of the constitution left future constitutional amendments solely in the hands of Canadian governments and the "crisis atmosphere" of the late 1970s and early 1980s was somewhat defused. However, many of the underlying political tensions in Canada remain unresolved in spite of the constitutional compromise wrought between 1980 and 1982. While the outstanding weakness of the agreement -- its failure to include Quebec - appears to have been resolved, many other issues such as the future of the Senate and the recognition of aboriginal rights have been left on the negotiating table. This thesis focusses mainly on the procedural side of the 1980-1982 negotiations; however, the following pages will introduce the political tensions that underlay those negotiations and created such difficulty in the reform process.

Political Pressures in Constitutional Negotiations:

The institutional focus of this thesis is a somewhat narrow focus for it tends to underemphasize the crucial political tensions between the parties at the bargaining table. This thesis examines the benefits and drawbacks of the various institutions involved in the patriation process for, as Sabetti argues, the principal task of the political scientist is to assess the performance of political

systems.[6] However, the willingness of the parties to compromise or their toughness in debate depended not so much on the nature of the constitutional bargaining process on the various sides' complex political calculations and aspirations. This thesis will not ignore the underlying political motivations of the parties at the conference table: this section introduces the major political frictions between the parties as a preface to the next section's more detailed consideration of the fundamental differences over the issues on the negotiating table.

In assessing the difficulty of constitutional negotiations, one can point to three basic inter-related tensions in Canadian federalism and Canadian constitutional negotiations. Each of these tensions appears at various points in the 1980-1982 round of negotiations and throughout this thesis. First, the perennial issue of Canada's duality affects the negotiation process. Finding a consensus that is simultaneously acceptable to Quebec and to the rest of Canada has proven to be a major stumbling-block in constitutional negotiations. The principal objection to the 1982 accord was the absence of the province of Quebec from the final agreement. This absence was partly due to political factors: many observers suggest that Premier Levesque could never have signed a constitutional agreement that was also agreeable to the federal government.[7] However, caricaturing Quebec's refusal to join the accord as merely a "party-political"

issue between the separatists and federalists at the bargaining table would be inaccurate, for long-standing principled differences between Ottawa and Quebec over divergent conceptions of the French fact in Canada have, until recently, prevented the two sides from finding sufficient common ground to make a national consensus possible. The stresses from Canada's dual nature pre-date the Parti Quebecois and are likely to survive the P.Q..

Second, the rise of "province-building" premiers concerned with the protection and accretion of provincial constitutional powers acted as both a catalyst and a source of friction in the 1980-1982 round of negotiations.[8] For example, Saskatchewan's constitutional reform goals included the protection of its prerogative to regulate resource production and the enhancement of its natural resources taxation powers in the face of Supreme Court rulings relating to those issues;[9] Newfoundland sought a devolution of powers from the federal government over fisheries and offshore resources; and Alberta, in addition to these and other demands, suggested that the provinces should gain new powers of indirect taxation and argued that forty per cent of the members of designated national boards and agencies should be appointed by the provinces.[10] Premier Lougheed of Alberta expressed this desire for greater provincial powers in his opening statement at the September 1980 First Ministers' Conference:

> Albertans believe, and believe very strongly in my judgment, that the level of government which is closer to the people, more in tune with the people,

> is the provincial government and that in a constitutional process of renewal, the provincial governments should be strengthened.[11]

Although Ottawa agreed to a limited devolution of powers in 1979, by the spring of 1980 the provinces' proposals were perceived by the federal government as a dangerous attack on Canadian federalism by the forces of "regionalism" and "provincialism." In September 1980, Prime Minister Trudeau was no longer prepared to make the concessions of the pre-referendmum era and indeed sought a strengthening of the federal government's ability to manage the economy:

> In spite of the number of times we have heard the plea to respect diversity in Canada, the plea to permit the government closer to the people to have the right to respond to people's desires, we know that in Canada we are living in the most decentralized federation in the world. . . . What we are fighting for here is a renewed federalism, an improved division of powers and a few other things, but we are not basically trying to create a federal form of government where the provinces have [more] power -- the provinces have enormous power now.[12]

Thus, Trudeau was unwilling to meet the devolutionary demands of the premiers. As is indicated by the more detailed analysis of the constitutional issues in the next section of this chapter, almost every major issue relating to the division of powers caused disagreement between Ottawa and most provincial governments.

Third, one of the principal stumbling-blocks to agreement was a political-procedural one: without an amending formula, the question of "who speaks for Canada" remained unanswered. Negotiators at past conferences had

pursued a policy of seeking agreement from all governments at the table. Twice before, in January 1966 and June 1971, the government of Quebec withdrew from and thus scuttled provisional patriation agreements. Not only did the requirement of unanimity give the final provincial "hold-outs" great negotiating power[13] but, in Ottawa's view, that tradition also implicitly supported the compact theory of federalism wherein Canada is seen as merely an agglomeration and creation of independent provinces. By the 1980-1982 round of negotiations, the federal government's assessment of its leading role in Canadian federalism, of the "tyranny of unanimity" and of the political consequences from proceeding unilaterally led it to two conclusions: Ottawa is the government that speaks for all Canadians and unilateralism was the only course likely to avoid the apparently insuperable barriers to agreement presented by the forces of dualism and provincialism.

The Supreme Court eventually steered the federal government away from its unilateral course, but the Court also ruled that the consent of only a "substantial number" of provinces was necessary for a constitutional agreement. Premier Lougheed's answer to the question of who speaks for Canada -- "we all do" -- had thus been over-ruled. Thanks to the Supreme Court decision, by November 1981 the costs of failing to agree were substantial for both sides: the federal government would face a battle in Westminster as

well as domestic political consequences in patriating the constitution without the provinces' support, while the provinces faced the real possibility of the federal government proceeding without their input unless they showed flexibilty.

In summary, by November 1981 the partial resolution of the political battle over one of the basic questions of Canadian federalism -- who speaks for Canada -- resulted in unprecedented pressure on the negotiators to resolve the fundamental political divergences emerging from Canada's duality and the nation's federal nature. This circumstantial pressure, combined with most participants' sense of the public's desire for agreement, resulted in a much greater willingness to compromise than had existed at the ill-fated September 1980 First Ministers' Conference. Perhaps significantly, even these pressures were not enough to affect Quebec's special political calculations. However, the debate over a new division of powers sponsored by the "province builders" was suspended in favour of the pursuit of consensus -- Prime Minister Trudeau limited the agenda in November 1981 to the patriation of the constitution with an amending formula and the Charter of Rights and Freedoms. Ten governments were able to fashion a historic agreement where none had previously seemed possible. The magnitude of the compromises wrought during the 1981 conference can best be understood by an examination of the huge differences that separated the

parties during the failed 1980 meeting of first ministers. Those differences are examined below.

Political Differences and the Constitutional Agenda:

Two basic factors undermined the 1980 First Minsters' Conference: the political will to compromise did not exist and deep, principled and seemingly insurmountable political differences separated the eleven governments once they left the relatively harmonious environs of the Continuing Committee of Ministers on the Constitution and appeared before the harsh television lights of the First Minsters' Conference. Turning first to the lack of political will, shortly before the FMC meetings began Quebec circulated a controversial secret federal briefing document -- the infamous "Kirby Memorandum" -- referring to the possibility of Ottawa proceeding unilaterally to Westminster if the conference failed. This plan outraged the provincial governments and sapped much of the good will and political will to compromise built up over the summer of 1980.

Further, the sense of urgency that braced the parties' political will at the November 1981 meeting did not exist prior to the September 1980 meeting. At one point, Prince Edward Island's Premier MacLean suggested that "we are making a serious error by trying to cramp the long vistas of our Canadian evolving history into the narrow horizons of our own transitory political

careers."[14] When these circumstances and outlooks were combined with the principled differences between the governments, the depth of those differences and the fragmented nature of the provincial arguments at the bargaining table, it was not surprising that the September 1980 conference failed.

A typical example of the nature of the debate lies in the question of jurisdiction over fisheries. The federal government argued that Ottawa was the best government to administer the ocean fishery as it was in the nature of fish to swim around without paying heed to possible provincial boundaries -- a unified jurisdiction was therefore logical. Ottawa also made a strong, principled stand over maintaining its jurisdiction over kelp.[15] However, the federal government was willing to make some concessions: it would entrench a consultation clause in the constitution and jurisdiction over oysters and clams, as well as over the inland fishery, could go to the provinces.

Newfoundland's Premier Peckford pointed out that these concessions amounted to "one ten-thousandth of one per cent" of his province's fishery[16] -- a sector of the provincial economy that is at least as important to Newfoundland as forestry is to British Columbia or the petroleum industry is to Alberta. He also pointed to the support of Quebec, Alberta and Saskatchewan for a "Best Efforts Draft" drawn up over the summer of 1980 suggesting that the fishery become an area of concurrent jurisdiction

under the constitution. However, provinces with a more direct interest in the fishery than the prairie provinces -- Nova Scotia and New Brunswick -- described that draft as "impractical" and supported Ottawa's arguments.

In sum, the fisheries issue exemplifies the impasses at the negotiating table in relation to re-balancing the division of powers between the federal and provincial governments. Negotiators faced difficulties in what was a very technical matter. The issue was also a divisive one: the two sides took apparently irreconcilable positions based on careful, principled arguments that left little room for compromise. Provincial opinion on the issue was itself divided and even if it were possible to find a mutually-acceptable solution to the clear-cut differences between the two sides, the political will for seeking common ground was lacking as neither side recognized its counterpart's concessions.

The participants' tendency to minimize the concessions made by other governments was a common theme of the conference. With only one day of debate held in private, the first ministers all seemed concerned that the television audience perceive them as tough negotiators who were making their best efforts but would not be duped by the machinations of the other side. For example, in relation to the issue of communications jurisdiction, the federal government's offer of concessions on its powers relating to cable television licensing, tariffs, and local

programming, as well as its devolution of certain powers relating to Bell Canada and the establishment of concurrent jurisdiction over interprovincial telecommunications were met by Premier Levesque's comment that "ce qu'on appelle des concessions entre guilements du gouvernement fédéral, ça va pas très loin, et qu'en réalité dans certains cas, ça peut compliquer les choses plûtot que de les simplifier."[17] Ottawa's agreement to make concessions on its exclusive right to tax indirectly, on its exclusive jurisdiction over interprovincial trade and on the strengthening of provincial jurisdiction over resources were characterized by Premier Lougheed as "nominal and modest and relatively insignificant to us."[18]

Even on issues where concessions were accepted with some grace and agreement in principle seemed possible, differences in detail between various provinces presented difficulties. For example, the federal government was prepared to make significant concessions over its role in appointing Supreme Court justices,[19] but the provinces differed on the question of the number of judges to be appointed. Quebec argued that the Court should be expanded to include eleven judges, five of whom would come from the Civil Law bar in order to reflect Canada's legal duality. Ontario agreed with the idea of increasing the size of the Supreme Court, but argued for a seven/four division. British Columbia argued for a six/three division, while Saskatchewan and Alberta preferred a six/three division but

would settle for seven/four division. Alberta also suggested the creation of a constitutional court -- a proposal Nova Scotia agreed to on condition that it be drawn from sitting justices of the Supreme Court. In brief, even the superficially simple and less controversial issues required a great deal of compromising from all sides if unanimous agreement was to be found.

The matters that did not relate directly to the division of powers -- the constitutional preamble, the Charter, and the amending formula -- perhaps involved the most clear-cut differences in principle between the parties. On the question of the preamble, Quebec argued for the recognition of "le caractère distinct du peuple québecois qui, avec sa majorité francophone, constitue l'une des assises de la dualité Canadienne."[20] Such a definition of the French fact in Canada was the antithesis of Ottawa's version of the French fact which defined francophone culture as a pan-Canadian phenomenon. On the other hand, Premier Levesque objected to the preamble containing the concept of a Canadian "people" and suggested that Canada be described as a free association of provinces since each province should have the recognized right to "self-determination."[21] After h referendum victory four months earlier, Trudeau was unwilling to accept such a proposition and suggested that "we think that Canada is more than a union of provinces."[22]

Fundamental differences in principle also divided the parties on the question of the Charter. Premier Lyon of Manitoba argued against the entrenchment of the Charter, an act he likened to a "constitutional revolution," on three related grounds: the Charter would undermine the tradition of parliamentary supremacy, politicians are more competent arbiters of rights than judges, and a Charter would politicize and undermine the independence of the judiciary. Such was his opposition to the concept of the Charter that he opposed the recognition of even the Democratic Rights proposed by the federal government for entrenchment. Opposition to the Charter from several other provinces was only slightly more moderate[23] and the federal government would clearly be unable to find common ground for agreement if it was hoping to gain unanimous approval of its proposal.

Finally, irreconcilable differences separated the parties on the longest-standing issue before them: the question of patriation with an amending formula. Without an agreement on this issue, even a limited solution to the constitutional impasse, wherein the constitution would be patriated and outstanding issues would be left to future conferences governed by a new amending formula, was impossible. This ultimate disagreement was perhaps the most fundamental one from the federal government's perspective. In closing the failed September 1980 First Ministers' Conference, Trudeau suggested that the

premiers supporting the "Vancouver consensus" were also supporting Quebec's conception of a Canada in which the provinces had a right to separate by increments through the provisions for opting-out of future constitutional amendments.[24] In opposing the creation of a "checkerboard Canada," he addressed the television cameras and argued that Canadians

> have a desire that there be national institutions, and a national government capable of acting on behalf of all of them. You see, provincial governments are not constituted to do that. That is not what they are elected for. I don't say they don't have concern for the national common good, but their first job and purpose, quite properly, is to represent provincial, or perhaps at most, regional interests. . . . Therefore, the national government will have to assume its national responsibilities and . . . I will shortly be recommending a course of action to Parliament.[25]

Summary and Conclusion:

The quest for constitutional reform and a renewed federalism that began so hopefully after the Quebec referendum in May, ended in recriminations on September 13, 1980. Once again the primal stresses between the federal and provincial governments, between Ottawa and Quebec, and over the question of who speaks for Canada prevented the governments from resolving the long-running debate over the patriation of the constitution. The September First Ministers' Conference was filled with history lessons and arguments over matters of principle: there seemed to be

little room for the conciliation of what Premier Lougheed referred to as "two fundamentally different views about Canada" and Prime Minister Trudeau called "a Canada torn by two different conceptions."[26]

Once again the different conceptions of Canada were expressed and defended without quarter. For Premier Levesque, the reason for the failure of the conference was Ottawa's centralizing tendencies:

> la conception de monsieur Trudeau après treize ans de pouvoir me semble très claire. C'est celle de la centralisation, d'un gouvernement central dont l'attitude en soi est dominatrice . . . qui va même jusqu'à l'autoritarisme. . . . We hit against a wall, the wall of a rigid, even in some ways authoritarian conception of federalism.[27]

For Prime Minister Trudeau, the Premiers' call for devolution was unacceptable:

> there is one view which holds that national Canadian policies on the national Canadian common good . . . ought to be the results from each province acting independently to maximize its own self-interest and that is why Premiers, naturally, if they hold that view, demand more and more powers from Ottawa and reject any strengthening of the powers of the national government.[28]

Trudeau rejected this view and rejected calls for a decentralization of powers, thus sealing the fate of the conference.

The debate over the division of powers was not the only difference in the conceptions of Canada that caused the constitutional stalemate. As Premier Blakeney suggested, the perennial failure to determine Quebec's requirements for constitutional reform played a large part in the conference's failure:

> We misjudged the impetus for renewal provided by the Quebec referendum. As a result, and I don't want to be thought to be abrasive when I say this, but as a result there were two agendas before us, one constitutional renewal for Canada and the other the continuing contest for the hearts and minds of the people of Quebec. In that latter contest, it seemed to some of us that nothing offered was enough and everything being demanded was too much. Until there is some resolution of this contest I am very much afraid that success will continue to elude us.[29]

For Blakeney, one of the most intractable differences at the constitutional bargaining table lay in the Ottawa/Quebec divide.

Prime Minister Trudeau offered a further explanation for the conference's failure in his closing remarks:

> nous devons constater à la fin de cette semaine qu'aucun progrès n'a été fait en ce sens que nous ne sommes d'accord sur aucun amendement constitutionnel . . . . Et pourquoi? Parce que nous avons toujours, depuis mille neuf cent vingt-sept (1927), en tout cas, dit qu'il fallait l'unanimité pour proceder . . . mais dès qu'une province ne veut pas, on ne peut pas faire d'amendement constitutionnel, on ne peut pas renouveler le fédéralisme.[30]

The political-procedural impasse, in Trudeau's view, blocked the renewal of Canadian federalism and was thus counter to the national interest. From this analysis, it was but a small step to the conclusion that the federal government should fight the tyranny of unanimity by appealing to Westminster alone.

This stern, unilateral conclusion was the turning point of the intractable political battle over constitutional reform and was also, ironically, the first step toward the partial reconciliation of November 1981. The political divergences outlined in this chapter were

notfully resolved by the constitutional accord and it would be very difficult to argue that they ever will be fully resolved through constitutional reform. Yet, constitutional reform is an important process. From the political scientist's perspective, the ideal constitution would be a political blueprint for the society it governs, mapping out the limits placed on governments, groups and individuals and outlining their prerogatives. Ideally, the constitution would provide for an expression of the timeless values that unite Canadians, while also proving itself capable of flexibility as Canadian society changes. In order to fulfill these ideals, an understanding of the constitutional reform process is crucial.

The recent negotiations over the Constitution Amendment, 1987 at Meech Lake and at the Langevin Block in Ottawa are examples of the importance of the bargaining process itself in encouraging the parties to constitutional negotiations to reach a consensus. Prime Minister Mulroney chose to adopt a new approach -- modelled, perhaps, on labour relations negotiations -- in this latest round of constitutional bargaining. The very nature of these intense, closed and extremely long-running sessions between first ministers was seen by participants as essential to the creation of a final compromise. The two meetings dealt mainly with one very specific matter -- gaining Quebec's approval for the Constitution Act -- and a narrow range of related issues at the bargaining table. These

changes from the 1980-1982 bargaining process, when combined with the political will to compromise and the change in personalities at the table, produced a new dynamic and the type of consensus that had eluded the First Ministers in that earlier, more confrontational era.

Thus, the process of constitutional reform can be important to the final outcome of negotiations. The following thesis examines the operation of the constitutional negotiation process between 1980 and 1982. This introductory chapter has shown that the pressures of Canadian federalism make constitutional reform a very difficult undertaking and this thesis examines how those pressures are addressed by the principal institutions directly or indirectly involved in the constitutional negotiation process. The Continuing Committee of Ministers on the Constitution, discussed in Chapter Two, contributed signally to the first phase of the 1980 negotiations and the CCMC's indirect impact on the final agreement was particularly important. On the other hand, Chapter Three indicates that the First Ministers' Conference and the bureaucracies of executive federalism reflected most clearly the divisiveness of the constitutional debate and the difficulty of finding a balanced compromise. Finally, Parliament -- through the Special Joint Committee of the Senate and House of Commons on the Constitution -- and the Supreme Court assumed crucial and positive new roles in addressing the political tensions outlined in Chapter One.

These institutions are considered in Chapters Four and Five.

In conclusion, the basic political pressures in Canadian federalism found expression in the 1980-1982 round of constitutional negotiations. These forces drove the parties through the highs and lows of the Quebec referendum, through the circus atmosphere of the 1980 "summer roadshow," through acrimonious first ministers meetings, bitter Parliamentary debates and tense court cases. The passengers on this roller-coaster ride set off with trepidation, managed almost miraculously to sieze a compromise constitution along the way, but noticed as the ride came to a temporaray halt that they had also lost one of their fellow-passengers.

CHAPTER TWO

The Continuing Committee of Ministers on the Constitution: an examination of cooperative approaches to constitutional reform

The day after the May 20, 1980 Quebec referendum, Justice Minister Jean Chretien set off on a tour of the provincial capitals to discuss the issue of constitutional reform.[1] On June 9, the First Ministers assembled in Ottawa and agreed on the agenda for a new round of constitutional negotiations. Ministers and officials on the revived Continuing Committee of Ministers on the Constitution were to study the twelve issues on this agenda[2] during the summer of 1980. The CCMC meetings were a crucial first stage in the patriation negotiations and were supposed to form the foundation for a final agreement by the First Ministers at the end of the summer. Once again, the constitutional reform process was in motion.

Chapter two examines the first stage of the 1980-1982 patriation negotiations: that taking place between the First Ministers' Conferences of June 9 and September 8-13, 1980. During that period the Continuing Committee of Ministers on the Constitution (CCMC) brought together ministers and officials from across the country to engage

in negotiations which one participant described as "the most intellectually stimulating period of my political life."[3] While this chapter is concerned more with the CCMC process than with substantive issues, the difficulty of accommodating conflicting perspectives on very political issues within a cooperative forum proved to be one of the principal challenges for the CCMC process.

The theme of this chapter is that the CCMC played an important role in reaching the final compromise and the chapter's conclusion is that cooperative approaches to constitutional reform hold important lessons for future constitutional negotiations. After a general introduction and definition of cooperative federalism, the chapter focuses on three issues: (1) the benefits of cooperative approaches to constitutional negotiations such as the CCMC; (2) a critical analysis of the CCMC process; and (3) an examination of the argument that, given the competitiveness of constitutional negotiations, the CCMC is an obsolete bargaining forum.

The analysis in this chapter points to two conclusions. First, the CCMC discussions were crucial to the final outcome of the constitutional negotiations for, among other contributions, they fostered important personal relationships and clarified the federal and provincial governments' positions and sticking points. Second, the negotiations during the "summer roadshow," as it came to be known by participants, point to lessons in constitutional

negotiations from the bygone era of cooperative federalism -- lessons that are important for future bargaining over the constitution.

Cooperative Federalism: Definition and Historical Background

It is notably difficult to define cooperative federalism.[4] One can define the concept as the accommodation of federal and provincial governments' interests through extensive formal and informal consultation or negotiation at all levels of government. As Simeon suggests in Federal-Provincial Diplomacy, cooperative federalism was based on the ideas that collaboration between federal and provincial governments is necessary and inevitable in a federal state and that both levels of government have a legitimate voice in the joint determination of public policy in certain policy fields. Coordinate as opposed to unilateral approaches to government were thus the hallmark of cooperative federalism. The following section looks back on the institutions involved in negotiations over the constitution during the era of cooperative federalism, for these bodies were the precursors of the 1980 Continuing Committee of Ministers on the Constitution.

While it is misleading to place precise dates on the era of cooperative federalism, for some of the practices associated with it have been passed on and adapted to executive federalism, cooperative federalism's heyday is generally considered to have lasted from the late 1950s to the mid 1960s. In those years, negotiations and consultation through such bodies as the Tax Structure Committee with its Continuing Committee on Financial and Economic Matters both played an important role in policy making and served as models for federal-provincial diplomacy in other fields. Thus, during the 1968-1971 constitutional discussions, bodies such as Committees of Ministers, the Continuing Committee of Officials and the constitutional secretariat were modelled on their counterparts in the field of federal-provincial financial relations. Such bodies sought to somewhat defuse and subsume open political confrontation through "behind the scenes" consultation and negotiation between specialists.

The establishment of a constitutional secretariat at the February 1968 first ministers' conference was potentially the most ambitious attempt to employ the cooperative approach in constitutional negotiations. The secretariat was established to solicit and report on propositions for constitutional reform from the federal and provincial governments. The head of the secretariat, Edgar Gallant, saw its role as "a source of communication and interpretation to facilitate the development of

understanding between governments."[5] He also spoke of the secretariat building on its contacts within the federal and provincial governments in order to take on the role of an "honest broker."[6]

The secretariat was not a great success: it suffered from a lack of interest on the part of many provincial governments, a lack of expertise among the officials involved and unproductive general discussions that ranged too widely.[7] More importantly, provincial governments (with the possible exception of Ontario) did not trust the secretariat to perform its duties in a neutral fashion and were leery of the secretariat assuming duties that went beyond the secretarial. Such distrust severely limited the contribution of the constitutional secretariat and its functions did not develop beyond the merely secretarial ones in its original terms of reference.[8]

A truly "continuing," full-time joint committee of constitutional experts seconded from the federal and provincial governments to engage in a permanent consultation process over constitutional reform is one of the cooperative approaches that might have contributed to greater trust in the past, and could prove especially fruitful in the relatively trustful negotiation environment of the post Meech Lake era. Such a constitutional secretariat would have the advantages associated with permanence that the ad hoc, "on again off again" CCMC -- first formed in 1978 and then revived in 1980 -- lacks.

While governments would likely be unwilling to delegate any negotiating power to such a body, a consultative forum allowing for such ongoing, long-term activities as exchanges of ideas and the examination of governments' and other interested parties' positions and interests in the various constitutional issues might lead to more effective and less politicized intergovernmental communication. The expertise, experience and interest generated since 1968 could be harnessed through such a forum to help in addressing the unfinished business on the constitutional reform agenda.

Two fora that were also born in the years preceding the Victoria Conference and survived the era of cooperative federalism in a modified form, were the Committees of Ministers and the Continuing Committee of Officials. The former committees were struck in 1969 to examine four areas of constitutional reform: the judiciary, official languages, fundamental rights and the Senate.[9] The Continuing Committee of Officials enabled constitutional experts from the federal and provincial governments to engage in preparatory negotiations and research.

These committees were the inspiration for the creation of the Continuing Committee of Ministers on the Constitution in 1978. Following roughly the same format as its 1978 predecessor, the 1980 CCMC met four times for week-long sessions in Montreal, Toronto, Vancouver and Ottawa. The mandate of the CCMC was to discuss the twelve

agenda items assigned to it by the First Ministers and devise "best efforts" drafts on each issue for further debate and -- it was hoped -- ratification by the First Ministers at the end of the summer.

The advantages and disadvantages of such consultative fora are considered in the following sections. Critics contend that cooperative approaches to constitutional reform involve several real difficulties, as the final pages of this chapter indicate. They argue that it is inappropriate to deal with constitutional issues through quiet "behind-the-scenes" federal-provincial diplomacy. Negotiating a matter that is so fundamental to the Canadian polity must be left to the nation's highest political leaders and ought to be performed before the eyes of the nation, according to this perspective.

This thesis argues in favour of a more "quiet" federal-provincial diplomacy. One can distinguish between the process of drafting constitutional texts and the process of debating the value of those texts. In closed sessions officials are acting on behalf of and under the direction of ministers who are the elected representatives of the people. Thus, both ministers and officials have a legitimate and important role to play in negotiations. Further, Chapter Three points to the drawbacks of relying on public, politicized first ministers' meetings in the search for constitutional compromise. Bodies like the CCMC provide an important forum for the quiet diplomacy that is

so important in identifying problem areas and in seeking federal-provincial consensus. Indeed, this chapter concludes that the substantial benefits to employing the techniques of cooperative federalism in constitutional negotiations outweigh the costs associated with those techniques.

The Benefits of Cooperative Approaches to Constitutional Negotiations:

Analyses of cooperative federalism frequently emphasize the sense of common purpose and common interest that arises out of close consultation over extended periods between officials and ministers -- Simeon refers to it as a "sense of community."[10] This sense developed over the course of the CCMC's deliberations. Roy McMurtry, Ontario's Attorney-General during the 1980-1982 negotiations, points out that participants in the summer roadshow became

> a fairly tightly knit group. Despite our differences we had become quite close friends over the many months of travel and deliberations. The human dynamic that develops when any group of individuals work together and socialize over a period of time usually produces a positive chemistry.[11]

Writing in near-mystical terms he adds that "at times the constitutional process was so shaped by its own 'life force' that it virtually defied rational theorizing."[12] Yet students of cooperative federalism[13] have identified

several reasons for the effectiveness of cooperative bargaining fora and the following section examines four of these as they relate to the work of the CCMC.

First, the individuals involved in the intensive consultation and negotiation processes often come to know each other on a personal basis and are thus better able to trust each other, exchange information more readily and assess each other's positions more clearly. The personal "chemistry" that is both a cause and effect of successful negotiations is a crucial part of the process. Second, as Smiley points out in regard to shared-cost programs, the ministers and, especially, the officials involved in cooperat fora often share "common standards . . . body of knowledge, and techniques"[14] relating to their fields of expertise. These common bonds help tight-knit committees to form an esprit de corps.[15] Third, intensive work on a problem in a cooperative environment often generates a sense of commitment to the successful resolution of differences, as well as a commitment to the process itself, by those who are caught up in that process.[16]

Finally, the nature of the issue being negotiated affects the effectiveness of cooperative fora. Because of the two preceding points, cooperative approaches are most effective in the more technical aspects of federal-provincial cooperation, as opposed to more general and political aspects. Issues relating to forestry,

agriculture or tax sharing are more likely to involve commonly agreed-upon, technical solutions based on professional norms than are constitutional matters involving inherently political considerations.[17] One would thus expect the CCMC to address the less politicized agenda issues more effectively than the politically-charged issues.

Each of these observations is confirmed by the experiences of the participants in the CCMC and will be examined below. Turning to the first of the observations on the conflict-reducing elements in the cooperative negotiating processes, participants confirm both the formation of close personal connections and the important sense of common purpose during the summer of 1980. McMurtry suggests that the most important result of the summer roadshow was that "a number of lasting friendships were forged which would provide vital links between the . . . respective Premiers when the search for a consensus was renewed in the fall of 1981."[18] Indeed, the personal connections between Chretien, McMurtry and Roy Romanow, then Saskatchewan's Attorney-General, appear to have played an important role in the formulation of the final compromise.[19] By the end of the summer of 1980, Sheppard and Valpy report that participants in the CCMC process "became a fairly tight crew."[20]

Through this close personal contact, ministers and officials were able to gain a better understanding of their

counterparts' positions and interests. Much of this occurred outside the formal meetings of the CCMC in more relaxed, "after hours" circumstances.[21] Even in the context of formal sessions, Romanow reports that

> the ministers attempted to break out of the mould of structured responses through a series of private ministerial meetings, which were akin to constitutional group therapy sessions. The objective was to encourage the ministers to exchange freely their own perceptions of the issues, to predict the likely responses of their premiers, and to amend or overrule, if necessary. the positions taken by officials in the technical sessions.[22]

In sum, the summer roadshow not only helped to create the contacts and personal chemistry that proved to be so important for the final outcome, but it also enabled the parties to look behind each other's formal negotiating positions. As McMurtry observes, "in retrospect the major value of the summer of 1980 was that the representatives of each province gained a much better understanding of the concerns of their sister provinces."[23]

Second, Smiley's point relating to the common backgrounds and common values of participants in the administration of cooperative federalism is also generally confirmed by the evidence from the summer roadshow. For example, Sheppard and Valpy argue that

> at the heart of the interpersonal relations emanating from the roadshow were `the lads,' Romanow and McMurtry, little Roy and big Roy. . . . . Their friendship went back to the mid-1970s, when they would rib each other about violence in sport and about who, as attorney general, was getting the most national publicity for prosecuting hockey goons.[24]

It is perhaps a little simplistic to emphasize the common professional background of the participants, for these individuals came from many different cultural backgrounds and represented provincial governments with differing agendas, interests, positions and political parties. Nevertheless, many of the officials involved had negotiated with each other over constitutional matters since the late 1960s. Mel Smith of B.C. and Peter Meekison from Alberta participated in the Victoria round of negotiations as officials. Quebec's Claude Morin had been a constitutional advisor to governments in Quebec since the early 1960s before entering electoral politics. These individuals and many of their colleagues understood the "rules of the game" and had been playing with or against each other for many years. The degree of commitment to a successful settlement and the degree of cooperation between these indidviduals is hardly surprising: they had already been through so many years of failure together.

Perhaps in part because of the personal understanding, commitment and the cooperative orientation of the discussions, the CCMC's deliberations, as well as those of the CCMC's sub-committees, tended to be more oriented toward problem-solving than toward gaining political ground. The participants, according to Romanow "generally endeavoured to submerge their political and ideological differences while engaged in the federal-provincial discussions at the CCMC level."[25] For

example, none of the provincial participants had a mandate to discuss an entrenched Charter of Rights yet, with the exception of Manitoba and Quebec, they set aside their objections to the principle of entrenchment and agreed to participate in the discussions over what provisions should be included in the Charter as this item was a part of the general negotiating agenda. These provinces benefitted from participation in the cooperative processes of the CCMC and it was in their interest to protect that cooperative process even when participation involved a compromise on principles.

This point lends support to the third observation on cooperative federalism -- the tendency of those involved in consultative arrangements to become committed both to the negotiation process and to a successful outcome. This powerful sense of commitment was, in the words of one participant "perhaps more than was good for us psychologically"[26] in view of the subsequent failure of the September First Minister's Conference: the good-will and high expectations generated during the summer roadshow seemed to be all for nought. Several participants believed that agreement was possible on certain agenda items as the CCMC made substantial progress on negotiations over the reform of the Supreme Court, family law and equalization payments,[27] but as McMurtry notes

> we had had the benefit of a personal interaction all summer long that the premiers had not enjoyed. Our commitment to making the political process work was not to be shared by many of the first ministers. The unresolved "gut" issues would overwhelm everything

else on the agenda.[28]

This evidence supports the final observation relating to the difficulty of finding a consensus on general, as opposed to "technical," policy issues through the processes associated with cooperative federalism. The areas involving the least disagreement in principle were dealt with much more effectively than the more politically-charged agenda items. Indeed, officials felt that whenever negotiations became politically controversial at the ministerial level, the issue would be referred to the officials for further study. One notes that the CCMC failed to create a consensus on any of the more "political" matters on the agenda. For example, one meeting of officials put forward twenty-seven different proposals as to what might or might not be included in the preamble to the constitution.[29] Despite this brain-storming, the Committee failed to find a compromise, foundering on the difficult issue of recognizing the French-English duality in Canada.

Indeed, basic differences over the principle of minority language rights led to a disheartening close to the summer's negotiations:

> the stress of the roadshow's final hours led to a tempestuous three-way debate on the issue which many felt underlay the whole proceedings -- minority language rights. Nearly shouting, their faces contorted with rage, Chretien, Morin, and McMurtry assailed each other's assumptions and positions from their various solitudes.[30]

Contrasting a picture of friendly personal relations and

sincere problem-solving discussions at the level of the CCMC with a picture of perverse political obstinacy at the level of the FMC is thus somewhat misleading. One can also question the willingness or the ability of the parties to reveal their bottom lines in preliminary negotiations such as the CCMC. The CCMC process provided information for important preliminary soundings of the parties' positions and sticking points. It was also most useful in dealing with the less political matters on the bargaining table. Nevertheless, bargaining over broad constitutional reform involves inherent political trade-offs: even the most cooperative of processes could not overcome or disguise the real political differences between the parties to the summer negotiations.

Having seen the benefits of cooperative approaches such as the CCMC process to constitutional negotiation, one can suggest that the cooperative era in Canadian government holds certain lessons for present and future bargaining. The CCMC fostered close personal connections that proved to be crucial in reaching the final agreement, an <u>esprit de corps</u> built on the common experience of past failure, a commitment among the participants to the success of the negotiations, and a better understanding of both the technical issues on the bargaining table and the political differences separating the parties. In sum, the CCMC's cooperative but tough bargaining was a crucial contribution to the entire constitutional negotiation process.

A Critical Analysis of the CCMC:

In addition to examining the benefits of the CCMC process, one must examine the criticisms aimed at that process in order to answer the question of whether the CCMC was a success or a failure. Some might argue that the subsequent debacle at the September First Ministers' Conference indicate that the summer negotiations were a failure. Many observers, including some of the participants, have suggested that the CCMC's efforts were wasted, citing the first ministers' failure to ratify any of their ministers' and officials' proposals. Sheppard and Valpy conclude their commentary on the Continuing Committee by stating that

> the work itself was of no consequence. When the first ministers stepped back into the spotlight in September, the proceedings stopped dead; the fruits of the summer's labour were gathered into tidy piles and mulched.[31]

However, the success or failure of the CCMC should be judged not on the basis of the first ministers' failure, but on broader grounds: this chapter concludes that the summer roadshow provided both the seeds of the eventual settlement and fertile ground for the negotiations in 1981. The following sections examine the critiques of the CCMC process.

Although the CCMC participants felt that a general consensus on several agenda issues had been attained during the summer of negotiations, any final decision on the agenda items would be a political one. One can defend the CCMC process by emphasizing that meaningful dialogue must involve the clear expression of differences as well as the discovery of areas of agreement -- this principle was reflected in the use of "best efforts drafts" as a tool for seeking consensus and defining differences. Understanding the divergent interests that underlie the parties' positions is a prerequisite to finding the means of reconciling the opposing sides. The CCMC fostered this understanding -- Romanow concludes his analysis of the summer roadshow by stating that "the 1980 CCMC was successful in one regard: it identified the differences among the governments on all the issues assigned to it. To this extent, it fulfilled its mandate."[32]

Unfortunately, Romanow weakens his assessment of the CCMC by going on to make two claims: "It failed... to bridge the wide gulfs between governments on contentious issues; in fact, the summer-long process only exaggerated the differences."[33] Both criticisms of the summer negotiations bear examination. First, Romanow's charge that the CCMC exaggerated the differences between the governments is inadequately supported and open to question. One might ask if the gulf could have been narrowed through the CCMC for Romanow himself admits in

other writings that two fundamentally opposing views of Canadian federalism existed throughout the constitutional reform process, as indicated in Chapter One.[34] Far from exaggerating the differences between the parties, the CCMC arguably did nothing more than reveal that wide ideological gulf and clarify the governments' "bottom lines" -- both of which already existed before negotiations began.

Each of the elements Romanow cites to buttress his case relates only indirectly to the CCMC process. When Romanow concludes that there were

> a number of irritants to the process, such as the Pitfield memorandum, the continuing designation of matters as either `people' or `government power' concerns, and the retreat by the federal government from several of its 1979 best efforts positions [which] served to sharpen the differences between the two groups,[35]

he is alluding to, respectively, a federal government strategy document, leaked in August, examining the possibility of unilateral patriation; the federal government's bargaining strategy for controlling the trade-offs made during the constitutional negotiations; and to the tougher bargaining stance of the federal government in the 1980 negotiations. Each of these factors stems from discussions and decisions at the highest level of the federal government and were not a product of the CCMC process, but were merely influences upon that process. Thus the sources of acrimony described by Romanow came not from the CCMC process itself, but largely from the federal government's broader strategy for patriating the

constitution. Unlike in 1979 when it was a lame-duck administration desperately trying to survive, after its phoenix-like rise from the ashes of defeat in May 1980 the Trudeau government was driven by a mission to renew Canadian federalism and to save the country through strong leadership: it was not in a mood to compromise on that mission. It is therefore incorrect to attribute, on Romanow's grounds, any exaggeration of the differences between the parties to the CCMC for, as chapter one indicates, the differences between the two sides were very great.

Second, Romanow's criticism of the CCMC process for failing "to bridge the wide gulfs between the governments on contentious issues"[36] is also somewhat unfair. The mandate of the CCMC was not to build the very long bridge that might span those gulfs -- its mandate was to lay the foundations and erect the abutments for the first ministers to build upon. Agenda items such as the Charter of Rights and the amending formula could therefore not fruitfully be discussed in isolation from each other. Major political compromises and trade-offs on a broad "package deal" were to be crucial in reaching the final settlement. Given the political importance and the complexity of these decisions, it is not surprising that such trade-offs should be left for the first ministers so that those with the final responsibility for such major political decisions would be directly involved. The CCMC appeared to be

relatively successful -- certainly in contrast to the September 1980 First Minister's Conference which followed -- at reconciling differences over the less "political" agenda items, as was indicated above. It was thus successful at carrying out its limited role in the negotiations.

Romanow admits that "when there is a conflict of values, as that created by the idea of entrenching rights and the importance of various rights, political bargaining is inevitable and even desirable."[37] Bridging the gulfs between the governments was a political matter than a technical-administrative matter and thus was unlikely to have been achieved through the work of the continuing committee, given the role of that committee. Taking another perspective on the CCMC process, the "failure" Romanow ascribes to that process might also be seen as resulting from one of the crucial strengths of the CCMC: its history of seeking to avoid politically-based confrontation and of resolving matters on a pragmatic basis.

The answer to the question of whether the CCMC process was a success depends on one's measure of success. For Romanow, the achievement of a compromise over all the matters on the constitutional agenda appears to be the criterion for success. This criterion is inconsistent with the CCMC's original mandate. That mandate provided for the CCMC to clarify the parties' positions and draw up "best

efforts drafts" in the hope that remaining differences might be resolved in a broad package deal by the first ministers. In sum, the CCMC had neither the mandate, nor the capability to make the complex political trade-offs necessary for reaching a final agreement.

Measuring the CCMC's performance against this mandate, one concludes that the CCMC was a success. The evidence presented above relating to the important friendships, the compromises over the more technical agenda issues and the commitment to reform fostered by the CCMC supports this conclusion. A foundation for agreement was in place prior to the September 1980 FMC, but the First Ministers failed to build on that foundation.

Although one can conclude that on its own terms the CCMC was a success, Romanow's criticism contains important lessons regarding the weaknesses in the CCMC process and the cooperative approach to federal-provincial negotiations. Before drawing final conclusions about the value of the CCMC in the constitutional negotiation process, one must consider the arguments regarding the obsolescence of cooperative approaches to bargaining over the constitution. The following section examines this broad critique of the CCMC process.

The Obsolescence of the CCMC:

Critics of the CCMC and of cooperative approaches to constitutional negotiation would argue that the nature of the nation's political agenda, of the demands for constitutional reform, of the nation's political leadership and of new demands for "openness" in government have rendered cooperative bargaining processes such as the CCMC obsolete. These critics would trace the first steps from cooperation to unilateralism to the new political demands of the mid-1960s. With the Quiet Revolution came the end of ad hoc, piecemeal adjustments to the working relations between the federal and provincial governments.[38] With the Confederation of Tomorrow Conference of 1967 and the Constitutional Conference of 1968 came the realization that constitutional reform was to become a protracted, public and highly politicized exercise. The constitution now appeared on the political agenda at the highest levels of the executive branch of government. The nature of the new constitutional demands was inherently very political and was thus thrust into the hands of the nation's highest political leadership: cooperative approaches became less relevant when demands for constitutional reform involved basic political issues. Thus, the inability of the ministers and officials participating in the CCMC to bridge the political gulf between their governments is arguably symptomatic of the growing politicization of the

constitutional review process and the renewed importance of constitutional reform on the nation's political agenda.

A second, closely-related, argument suggests that the nature of the issues on the constitutional agenda in 1980 was antithetical to cooperative bargaining approaches like the CCMC. The negotiations in the early 1980s contained many issues such as the allocation of powers over offshore resources, fisheries, and powers over the economy that were perceived as zero-sum issues where one side's gain was the other's loss. The negotiations therefore took place in a competitive political environment as governments competed to arrogate power to themselves.

As Smiley points out, cooperative approaches to bargaining are more likely to succeed "if the participants are more committed to the substantive results of particular policies than to enhancing the influence of their respective governments."[39] The nature of the negotiation process is affected by the nature of the issue to be negotiated: it is difficult to negotiate distributive political issues in cooperative fora. In sum, cooperative approaches became increasingly suspect as the parties to the negotiations brought more divisive issues to the bargaining table -- most provinces were not in the least interested in carrying out close, cooperative negotiations on giving the federal government new powers over the economy and the federal government had little interest in finding a solution to negotiations on devolving its powers

over the fisheries, for example. The evidence from the summer roadshow indicates that cooperative processes are least effective for addressing divisive issues requiring political trade-offs such as those on the CCMC agenda.

Third, personalities perhaps played a part in the decline of the cooperative approach to constitutional negotiations. While first ministers have often acted in competitive and confrontational manners at other points in Canadian history, the maturing of a generation of political leaders incubated under television lights and reared on federal-provincial conflict perhaps contributed to the shift toward more confrontational and public bargaining fora. Justice Minister Trudeau's Liberal party leadership aspirations benefitted immensely from the hard-line approach he took with Quebec during the 1968 conference. Premiers elected on provincialist platforms benefitted from the public exposure gained in taking tough stances against the federal government. The FMC thus became a favorite forum for prime ministers and premiers who appeared to delight in attacking each other's policies and positions publicly. While it would be an oversimplification to attribute the decline of cooperative approaches in constitutional negotiations to the replacement of individuals such as Prime Minister Pearson and Premiers Strom, Bourassa and Smallwood with the more combative Prime Minister Trudeau and Premiers Lougheed, Levesque and Peckford, a congruence between these two developments may

be noted.

Fourth, this leadership has re-structured the executive branch in Ottawa and in several provincial capitals so that government has become increasingly centralized since the era of cooperative federalism. Adie and Thomas point to the new "rationalism" in government: motivated by

> a desire to re-establish political control and to achieve the horizontal coordination of program activities of departments . . . functional collaboration and incremental adjustments among program specialists sharing similar outlooks . . . was replaced by the clash of grand policy designs, conceived often by new-style "political administrators" in the central agencies.[40]

This point is somewhat less applicable to the case of constitutional issues as constitutional reform, at least since the Quiet Revolution, has been at the center of "the clash of grand policy designs." Nevertheless, constitutional issues can no longer simply be addressed on their individual merits by members of line departments: each issue forms a part in the larger plan orchestrated by central agency strategists. It is thus no longer possible for Justice Ministers like Guy Favreau quietly to shop around the provinces in search of an amending formula. In sum, the perceived need to gain greater political control over officials and, indeed, over ministers, has reduced the opportunity for reaching ad hoc, functional compromises in cooperative fashion at a non-political level. For this reason, no true "agreements" could be concluded in the CCMC -- even the best efforts drafts were merely tentative

positions taken pending both the resolution of negotiations over other issues on the agenda and the confirmation of each delegation's first minister.

Finally, a desire for greater openness in government grew into a political issue during the late 1960s.[41] A sense that federal-provincial negotiations represented a third level of government contributed to the desire for greater openness in those relations. The political nature of the constitutional agenda and the personalities involved in the negotiations both lent a more public profile to the constitutional reform process. This was arguably a healthy development, for one of the criticisms of the cooperative approach to constitutional reform lies in the secrecy associated with parts of that process. According to this argument, executive federalism, with its public debates and publicized FMCs is a more open approach to federal-provincial negotiation. In Smiley's view, cooperative processes have declined in importance as

> federal-provincial relations have dealt increasingly with policy matters of the most fundamental kind, matters which a democratic community has a disposition to settle by the processes of free and open debate and political competition.[42]

In sum, given the nature of the new constitutional demands made in the wake of the Quiet Revolution and the promises for a "renewed federalism" made after the Quebec Referendum, the nature of the difficult issues on the constitutional reform agenda, the rise of new personalities with more confrontational approaches to federal-provincial

negotiation, the greater political control over ministers and officials, and the desire to address fundamental constitutional matters in public fora, one can understand why the CCMC appeared to play a somewhat secondary role in the negotiation of constitutional reform. However, as the concluding section of this chapter suggests, it is an oversimplification to argue that the CCMC is an obsolete mechanism and that the First Ministers' Conference is the only appropriate body for constitutional negotiations. The CCMC was crucial to the attainment of a final accord in November 1981 and a similar mechanism could play a very important role in future constitutional negotiations under the new amending formula.

Summary and Conclusion:

Negotiation is based on trust and one of the most important contributions of the CCMC to the constitutional reform process lay in its fostering of the mutual understanding and trust without which compromise over controversial political matters would have been impossible. Although the CCMC fulfilled its mandate by developing draft texts of amendments and thus pointing the way to agreement in 1980, only after the political will to compromise developed could the key participants in the CCMC lead the first ministers toward a consensus in November

1981. In spite of the weaknesses noted above, the CCMC was a crucial cog in the machinery of constitutional reform.

The CCMC helped the parties to understand the issues and differences between them, fostered a commitment among its participants to a successful compromise and created the personal contact necessary for agreement. By eschewing the political posturing apparently endemic to the first ministers' meetings and by negotiating in closed, problem-solving sessions, the participants were able to make real progress -- particularly on the less politically sensitive reform issues. As Smiley has suggested in relation to federal-provincial bargaining, "the success of the governments concerned in reaching tolerable settlements requires a considerable degree of insulation from publicity and from certain varieties of partisan political pressures."[43] The CCMC was one of the few fora in the constitutional negotiation process with such insulation.

Indeed, in the post-Meech Lake era of constitutional reform, a body like the CCMC may have even greater relevance than in the 1980-1982 round of negotiations. While fundamental, principled differences on many issues still remain, with the inclusion of Quebec and the spirit of compromise that was evident in the April 30, 1987 accord it may be possible to return to a less confrontational approach to constitutional negotiations. Matters such as the question of fisheries jurisdiction or the analysis of senate reform or perhaps even the description and

recognition of aboriginal rights will require more intensive and longer-running negotiations than the issues involved in the remarkably brief mulitlateral stages of the Meech Lake negotiations. Such complex, technical negotiations are well-suited to a forum like the CCMC.

The ongoing importance of the CCMC is particularly relevant in view of the difficulties often associated with the First Minsters' Conferences. It would not be a exaggeration to claim that during the 1980-1982 round of negotiations an agreement between Ottawa and nine provincial governments was reached in spite of the difficulties presented by the first ministers' meetings. That argument is developed in chapter three.

CHAPTER THREE

The First Ministers' Conferences: An examination of the failure of executive federalism

Constitutional reform has traditionally been a matter negotiated through conferences involving the federal Prime Minister and provincial first ministers. Chapter three examines the proposition that the First Ministers' Conference (FMC) is a bargaining forum marked by serious drawbacks. The disastrous September 1980 conference was a failure that exacerbated tensions between governments and dissipated the goodwill generated by the CCMC -- as Jean Chretien has suggested in relation to the CCMC

> the rapport was so good, in fact, that I often wonder what might have happened if we had been left to negotiate the conclusion. Instead, as was necessary, everything was passed up to the First Ministers' Conference, which immediately degenerated into disaster.[1]

Even the successful 1981 conference was headed for disaster before being piloted to safe waters by key participants in the CCMC. These failures and difficulties cannot be attributed solely to the nature of the institution itself, as chapter one indicated, but this chapter concludes that the FMC is at least partly responsible for the difficulty in finding a constitutional consensus.

This chapter does not focus narrowly on the FMC, but examines the FMC within the context of the development of executive federalism. After defining and introducing these

terms, the chapter examines the performance of the FMC as an institution involved in the search for a constitutional compromise and concludes that both the FMC and executive federalism hindered the search for a renewed constitution.

Definition and General Introduction:

In his study of federal-provincial bargaining, Simeon suggests "one process stands out as a distinctive characteristic of the Canadian federal system... This is a process of direct negotiation between the executives of different governments, which D.V. Smiley has termed 'executive federalism'."[2] Executive federalism is the term that has most often been used to describe the management of federal-provincial relations in the late 1960s and the 1970s -- the period following the era of cooperative federalism. Stevenson suggests that the "most characteristic institutional manifestation" of executive federalism is the FMC.[3] Executive federalism meant not just that federal-provincial relations were conducted largely by the prime minister and premiers, but also that these relations were conducted in an increasingly conflict-ridden forum: the First Ministers' Conference.

Federal-provincial relations throughout the 1970s and early 1980s were marked by bitterness and acrimony. It is difficult to determine whether the FMC exacerbated this

acrimony or if it was merely the site poisoned by the discord between governments over very controversial issues such as those outlined in chapter one. Nonetheless, the following chapter indicates that the FMC is a flawed institution.

Before examining the drawbacks of the FMC, one can recognize its advantages. First, the Conference is the most important decision-making body for federal-provincial negotiations and is thus, quite properly, the ultimate forum for making definitive decisions on constitutional matters. At the time of the patriation negotiations in 1980 and 1981 (and, arguably, even after the creation of an amending formula), no other single forum could examine constitutional reform with the authority of the First Ministers' Conference. Second, it provides a public and relatively open forum for the federal government and the provinces to explain or defend their positions. Third, the FMC ensures that politicians, as opposed to bureaucrats, control the most important aspects of federal-provincial relations. Nonetheless, both the FMC and executive federalism contain serious weaknesses as means of resolving conflicts over the constitution.

A more critical perspective on the FMC would recognize the difficulty of reaching compromises in that forum. While significant agreements have been made through the FMC in the past and a significant accord was wrought in the 1981 conference, one student of constitutional reform

described the first ministers' meetings on the constitution as a "half century and more of failure."[4] Each of the positive aspects of the FMC cited in the previous paragraph is accompanied by negative effects on the likelihood of reaching agreement through negotiations among first ministers. Paradoxically, the strengths of the FMC are also its weaknesses. The following pages examine each of these strengths -- the power of the forum, its openness and the political control it exerts over federal-provincial relations -- in detail, contrasting the FMC process with that of the CCMC.

A Critical Analysis of the First Ministers' Conference:

Turning first to the powerful nature of that body as the ultimate arbiter in federal-provincial matters, the importance itself of the FMC fosters a tendency in the first ministers to protect their bargaining position and to avoid straying from the safety of those prepared positions. It is difficult for first ministers to show flexibility when they are concentrating on defending their political principles from fellow negotiators who are in turn intent on standing by their often incompatible principles. Not only are important political principles on the table during constitutional conferences, but political careers are also made and perhaps lost before the

television cameras. Thus, it becomes very difficult for first ministers to compromise, let alone to "back down," on important political issues debated in the nation's highest federal-provincial forum before a nationwide television audience. Smiley points out that in the FMC "the capacity to reach agreement is very much circumscribed by the divergent policy and partisan political interests of its members."[5]

Given such differences, the high stakes and the publicity at each new conference, the FMC tends to encourage negotiation based on carefully-prepared, fixed positions rather than on the orientation toward flexibility and joint problem-solving found in the CCMC. During the 1980 conference, the political costs of appearing to be too conciliatory and the incentives in the bargaining process for governments who "held out" meant that a certain amount of political posturing was endemic to the parties' fixed positions and prepared texts. Thus even when the weight of public opinion was firmly on the side of finding a compromise and patriating the constitution, the first ministers had to proceed cautiously. In sum, by pushing the first ministers to juggle with their principles and political fortunes, the "high-powered" nature of the forum fosters caution over compromise and timidity over flexibility.

Such difficulties exacerbated the personal tensions between the first ministers during the 1980-1982 constitutional negotiations. Referring to premiers in the Gang of Eight, Sheppard and Valpy have noted "the intense personal dislike many in the group felt for Pierre Trudeau," adding that "whenever spirits sagged, Trudeau's name was all it took to get the bile secreting."[6] First ministers' reunions provided an outlet and stimulus for this type of animosity. For example, the September 1980 pre-conference dinner played an important part in undoing the hard work and optimism generated by the CCMC meetings of the summer. Following that disastrous dinner, in which "the obvious animosity between some of the English-speaking premiers and Mr. Trudeau was witnessed by a gleeful Rene Levesque," Roy McMurtry telephoned his wife to say that "the meeting of first minsters had for all practical purposes ended before it had begun."[7]

No matter how powerful the actors involved, placing the constitutional negotiations in a forum marked by such political competition and personal animosity clearly reduced the likelihood of agreement between the parties. The contrast between the first ministers' outlooks and the ministers' approach is remarkable. As McMurtry explains, the ministers

> had had the benefit of a personal interaction all summer long that the premiers had not enjoyed. Our commitment to making the political process work was not to be shared by many of the first ministers. The unresolved 'gut' issues would overwhelm everything else on the agenda.[8]

In spite of the efforts of the CCMC and the participants' high hopes on several agenda items, when it was faced with the differences described in chapter one, the September 1980 FMC resulted in yet another failure.

The November 1981 conference might have followed the same path as its unsuccessful predecessor if it had not been for certain CCMC ministers who played a key role in helping the first ministers to overcome their mutual mistrust. In the moments before the final kitchen compromise with Chretien, Romanow avoided contact with any first ministers and consulted instead with the Attorney-Generals from Nova Scotia and British Columbia to confirm the possibility of making a trade-off between a modified amending formula and the modified Charter. Only after gaining their support did he raise the matter with Premier Blakeney and ask Blakeney to discuss the compromise with Premier Lougheed.[9] Without the CCMC ministers' intervention, the compromise would never have been struck.[10] It may only be a slight exaggeration to claim that a final agreement emerged in spite of the first ministers.

Such were the sensitivities of the first ministers that a rigid chain of communication developed whereby Blakeney, thanks to his contact with Lougheed, served as the link between the Gang of Eight and Ontario, which in turn was the only province with meaningful access to Trudeau. In sum, if it weren't for the activities of

Chretien, Romanow and later McMurtry, the final conference would also have been likely to have ended in failure -- the battles of conflicting principles, political positions and personalities engendered in the constitutional conference would have precluded agreement. Failure during the "one last chance" conference would have meant the end of constitutional negotiations and either a federally-sponsored national referendum or a unilateral appeal by the federal government to Westminster -- either course would have involved an all-out battle between the federal government and the Gang of Eight.

The second alleged advantage of the First Ministers' Conferences lies in their openness to public scrutiny. However, the academic literature on the subject is unanimous in pointing to the two levels at which the conference operates: the public and the private. Participants in the FMCs "now distinguish clearly between `discussion' meetings -- which can be public -- and `decision-making' meetings which, like the working sessions of the constitutional conference, will remain private," according to Simeon.[11] Although Simeon was writing in the early 1970s and even the "private" meetings of the 1980 and 1981 FMCs involved teams of ministers and phalanxes of advisors, this description of the dual nature of such conferences still applies. On one hand, most of the real negotiation takes place behind the scenes where the parties have room to discuss each other's formal positions more

frankly and more concisely. On the other hand, the public meetings are often aimed more at the television audience and the nightly news than at the other participants around the conference table.

While recognizing the importance of openness in constitutional negotiations, the public sessions may be criticized for undermining progress in the private sessions. In the words of one editorial page writer commenting on the 1986 annual FMC,

> . . . . the process is proving counter-productive to good government. As the recent conference in Vancouver brutally demonstrated, it sharpens confrontations, encourages posturing and incites adversarial strategies. . . . Showmanship takes priority when the television lights are constant reminders that the players are not exactly alone. . . . The scene is set for grandstanding and hotdogging of a kind that is as irresistable as it is destructive of negotiated, compromise solutions.[12]

One can accept the need for the public to know about the activities of their political leaders in the debate over matters as fundamental as constitutional reform, but a high price is paid for such openness. Indeed, one of the critical differences between the failed 1980 FMC and the successful 1981 conference was that the former was open to the television cameras on all but the penultimate day, while the latter was a closed forum.

Once again, one can contrast the activities of the CCMC with those of the FMC. In the former forum, the participants were able to discuss matters relatively frankly, examining not just each other's formal negotiating positions but also the potential for compromise. While the

summer roadshow has been likened to a circus with over 300 journalists and advisors in the troupe,[13] the ministers and officials participating in the CCMC had frequent opportunities to discuss matters in informal and relaxed circumstances. This contrasts to the short-lived, highly-structured and oft-times televised first ministers' meetings. Commenting on the September 1980 FMC, McMurtry suggests,

> there had been little opportunity for informal gatherings and much opportunity for public posturing and acrimonious debate. Many of the ministers had privately agreed that the only way a consensus could be reached would be to lock up all of the first ministers until the white smoke appeared as in the election of a pope by the College of Cardinals.[14]

The first ministers did not have this luxury in September 1980 and instead spent almost all their time in public, confrontational meetings that added to the personal rancour between many of them.

The confrontation and posturing in the public meetings also affected the effectiveness of the crucial private sessions. Writing in the happier era of the late 1960s and early 1970s, Simeon suggested that

> much of the important work of the conference is done outside the formal session, at dinner, in the lobbies of hotels, and so on. Formal dinners hosted by the federal prime minister may give the first ministers a chance to get down to brass tacks alone.[15]

Yet, by 1980 even these informal periods were marked by distrust and antagonism. The pre-Conference dinner in September 1980, referred to above, ended with the Prime Minister storming out before desert in the face of the

Premiers' demands for co-chairmanship in the public sessions of the Conference: even at the informal level, the first ministers could not seem to converse calmly and rationally. By November 1981, however, the public pressure on the participants and the increased flexibility of key governments (referred to in chapter one) increased the effectiveness of the private sessions: the "kitchen compromise," formulated by the CCMC's leaders, thus became possibile.

Not only did the public nature of the 1980 FMC undermine the ability of the parties to reach an agreement in private, but one can argue that the putative "openness" of this process is of limited value. The FMC process does not allow for any input from groups outside of the executive branches of the federal and provincial governments. Even the nation's elected legislators have little input into the outcome of the negotiations among first ministers -- only Parliament and the Alberta legislature held votes on the patriation package in those pre-amending formula days. The emphasis on the FMC as the sole bargaining forum for constitutional reform lends credibility to Whitaker's assertion that "the constitution of Canada has been, from 1867 onward, an arrangement between elites, particularly between political elites."[16]

The openness of the process is in one direction only: the first ministers have direct access to the public, but the public does not have real input into the FMC. This is

not simply a problem associated with the FMC as a forum for at a more general level, as Simeon suggests,

> the Canadian pattern of "executive federalism" in which relations between governments are conducted primarily through the negotiations of political executives limits citizen participation and effectiveness in many ways.[17]

In sum, most serious negotiating during the FMCs takes place outside the formal televised meetings and "openness" does not include external input into the negotiating process. On the other hand, the publicity and political posturing associated with even this limited openness undermines the ability of the governments involved to find compromise.

The third ostensible advantage of the First Minister's Conference is that it is proper for the final decision-making in federal-provincial relations to be carried out by the nation's most senior politicians as opposed to federal-provincial bureaucrats. Such a goal may be a worthy one, but it is difficult to argue that the constitutional agenda has ever been "captured" by the bureaucracy or that constitutional matters have ever been decided by any persons other than the first ministers.

On the contrary, placing such emphasis on the FMC gives disproportionate power to administrators close to the first ministers and reduces the opportunities for finding consensus through other levels in the negotiating process. This power of central administrators is most apparent at the federal level, where Prime Minister Trudeau's advisors

are alleged to have held more power over the federal government's negotiation strategy than even Justice Minister Chretien.[18] Their power was derived from the prime minister's ultimate control over the negotiations and the fact that the prime minister divulged his intentions only to his closest advisors -- even Chretien, the minister ostensibly in charge of the negotiations, reportedly had only a rather general sense of the prime minister's "bottom line" in the negotiations.

Michael Kirby, secretary for federal-provincial relations to the Cabinet, and Michael Pitfield, clerk of the Privy Council, were Trudeau's key constitutional advisors. Both played important and at times disruptive roles in the planning of the constitutional negotiations. During the annual Premiers' meeting in August 1980 and prior to the final meeting of the CCMC, a memorandum written by Pitfield alluding to the federal government's constitutional strategy following the anticipated failure of the September 1980 conference appeared in the Ottawa Citizen. In the final session of the CCMC, the provinces accused Chretien of negotiating in bad faith over the course of the summer and of preparing to patriate the constitution unilaterally. It is unclear if Chretien knew of the existence of Pitfield's memorandum prior to its publication, but the memorandum was a disruptive force in the ministers' final CCMC meetings.[19]

On the eve of the September conference, Quebec released copies of a memorandum prepared by Federal-Provincial Relations Office and Department of Justice officials that became known as the Kirby memorandum. It stated that the federal government would not take the failure of the conference as a severe set-back, but would proceed unilaterally. This information had a profound impact on the course of the conference: as Romanow reports,

> when the premiers read the Kirby memorandum, most of them privately conceded that their worst suspicions had been proven and that the First Ministers' Conference would inevitably end badly. The conference was a failure before it started.[20]

Thus the prime minister's advisors' memoranda had a negative impact on the progress of the CCMC and FMC negotiations.

Yet the personal understanding between ministers developed during the CCMC helped offset the power of these advisors. Despite the influence of these non-elected individuals over the federal government's bargaining strategy, it appears that Chretien was able to apply substantial pressure to both the prime minister and his advisors during the final conference thanks to his connection with his provincial CCMC colleagues. Trudeau, Kirby and Pitfield were all committed to the idea of a referendum, not only to settle the patriation dispute but also as part of the amending formula. Chretien, however, had been one of the leaders in the "non" side of the

sovereignty-association referendum and disliked the idea of a referendum as much as his provincial counterparts. At Chretien's insistence, the "kitchen compromise" did not include any mention of a referendum in the amending formula and the referendum was one of the last casualties of the provinces' late-night drafting session that preceded the final agreement.

One incident during the final FMC illustrates the divisions within the federal negotiating team and, perhaps, the rivalry for control over the negotiating process between the minister ostensibly in charge of constitutional reform and officials close to the prime minsiter. On the final afternoon of the November 1981 conference, a B.C. official, having heard of the kitchen compromise, approached Kirby and Pitfield to ask about the recently arranged deal. These federal officials -- without knowing that the compromise had been made, let alone its contents -- answered that they did not think it would succeed.[21] This incident is an example of the deleterious effect of divisions within governments that create uncertainty and send mixed signals to the other parties at the bargaining table.

More importantly, the incident also points to the tendency under executive federalism of placing power in the hands of high-level officials who are not members of line departments and are oriented more toward defending the position of the first minister they represent than toward

discovering common solutions. As Adie and Thomas point out,

> `process specialists' in federal-provincial units may define their role exclusively in terms of enhancing the reputation of their government, and may approach all federal-provincial negotiations with the objective of `winning,' rather than trying to identify a compromise solution.[22]

Such an approach tends to turn constitutional negotiations into zero-sum games in which joint problem-solving and compromise become impossible.

The orientation toward "winning" as opposed to seeking consensus is linked to another characteristic of executive federalism: the tendency to centralize power within the executive branch itself. The centralization associated with the creation of independent agencies such as the federal government's Federal-Provincial Relations Office (FPRO) tends to focus both decision-making power and conflict at the highest political level. Negotiations in widely-diverging policy fields tend to become linked, such that compromise in constitutional matters may depend, for example, on concessions over energy pricing. For this reason, Smiley argues that "intergovernmental affairs agencies appear to contribute to federal-provincial conflict rather than accommodation."[23]

These agencies, like the First Ministers' Conferences, place issues of constitutional reform in the hands of politicians and officials with the tendency to "emphasize the power and prestige of their government in relation to other governments rather than to give priority

to programmatic objectives or the avoidance of intergovernmental conflict."[24] The previous chapter indicated that program specialists preferred to resolve conflict "all in the family" rather than pushing issues to higher (and political) levels. As control over constitutional negotiations moved away from line departments -- the Attorney-Generals' offices and the Ministry of Justice -- into central agencies such as the provincial intergovernmental affairs offices and Ottawa's FPRO, the ability of negotiators to make limited trade-offs along the lines of the Fulton-Favreau initiative becomes constrained by linkages to other matters on the bargaining table and by the broad guidelines and prepared position papers drawn up prior to federal-provincial meetings.

The actors in the 1980-1982 negotiations tended "to link narrower purposes with broader and more political ones, and in respect to these latter it is less likely that federal and provincial governments will agree."[25] Instead of focusing on a limited range of issues as Trudeau suggested in 1976-1977, the negotiations centered on "the clash of grand policy designs,"[26] which were much less likely to be resolved. The broad "package" approach to the constitutional negotiations was perceived as necessary for agreement as it would provide "something for everyone." Yet, this premise proved to be the undoing of the 1980 conference and was partly set aside in the 1981 conference for a more limited and more pragmatic agreement which

involved significant compromises over matters of principle and "policy." Indeed, by 1981 it was too late to introduce extraneous new issues to the bargaining agenda and debate centered on the crucial issues of the amending formula and the Charter of Rights. In sum, the shift toward centralized control over constitutional negotiations coincided with the relative decline of the pragmatic flexibility one associates with the era of cooperative federalism and the rise of "winning" negotiation strategies under the direction of more politicized agencies such as the FPRO under Michael Kirby.

Upon the advice of the FPRO and the PCO, Ottawa decided not to consult further with the provinces after the 1980 FMC and to proceed unilaterally. This unilateralism fits closely with the federal government's approach to other issues in federal-provincial relations. Doerr notes that matters such as the National Energy Program, the renegotiation of the federal-provincial five-year financial arrangements and the patriation of the constitution all "constituted a form of unilateral federal action which represented the `national interest' as advocated by the federal government."[27]

Instead of dealing with these matters -- especially the first two -- in collaborative fora involving technical experts as might have been done in the era of cooperative federalism or in the early years of the Trudeau regime, each of these issues became highly politicized. "Process

experts" such as Kirby and Pitfield with a primary interest in protecting their government's position and only a secondary interest in finding a consensus, contributed to this trend by planning and implementing a strategy of unilateralism that would by-pass the provinces. The federal government took the ultimate step away from cooperative federalism when it declared that it would seek to patriate the constitution unilaterally.

As chapter one indicated, it is an oversimplification to attribute the degeneration of federal-provincial relations to weaknesses in the bargaining forum most responsible for directing those relations. The federal government's turn toward unilateralism was due more to political impasse than to the failures of the FMC. Yet, Chapters Two and Three have argued that executive federalism and the approaches to government associated with executive federalism undermined the ability of governments to find compromise solutions to their differences.

In summary, the political differences and personal antagonisms dividing the first ministers could not be resolved through the FMC in September 1980 -- if anything, these differences and antagonisms were sharpened during the 1980 conference. Even the very limited openness of that forum to public scrutiny proved counter-productive as first ministers vied for attention and political advantage with "winning" negotiation strategies at the despite the public's desire for compromise. The centralization of

power around the principal actors and their closest administrators was accompanied by a centralization of federal-provincial conflict at the highest levels such that federal-provincial relations became overloaded by inter-governmental competition. These trends led to the course dictated by the logic of executive federalism: the prime minister, as Canada's chief political executive, claimed that he had the legitimacy and the legal authority through Parliament to set aside provincial participation and procede unilaterally with the patriation of the constitution. This decision was the direct consequence of the pattern of failure to resolve outstanding constitutional issues through first ministers' conferences and was largely due to Ottawa's perception that finding a consensus through further meetings of first ministers would be unlikely.

Summary and Conclusion

Given the drawbacks of the FMC and executive federalism cited in the preceding pages, one can support Smiley's conclusion that "the institutions and processes of executive federalism are disposed towards conflict rather than harmony."[28] If it weren't for the fact that the FMC has proven to be the traditional forum for final, authoritative constitutional negotiations in Canada, one

might go so far as to suggest that constitutional reform is too important a project to be left to the first ministers. While the final decision on constitutional matters must of course rest at the highest levels in the federal and provincial governments, under the new amending formula the principal negotiations need not depend solely on the humour and abilities of first ministers meeting together in conference. Arguably, such negotiations can be carried out with success and integrity at the ministerial level as the experiences of the CCMC and the 1981 FMC suggest. Yet, chapter two indicates that certain drawbacks also exist with this approach and it would appear, on the basis of the 1981 conference (and, perhaps, the recent Meech Lake first minsiters' accord), that real lasting compromise among first ministers is not impossible.

Thus, in spite of the evidence that the weaknesses of the FMC as a forum for constitutional negotiation in the 1980-1982 round of negotiations, it is difficult to put forward a credible alternative to that forum. This difficulty arises in large part because of the failure of Canada's central institutions to mediate federal-provincial matters in a competent manner. As Smiley points out,

> the ineffectualness of the apparatus of the central government is overwhelming and palpable to any person exposed to Ottawa even briefly. . . . (I)nterests which are territorially delimited have ceased to find an effective outlet through the institutions and processes of the federal government.[29]

Simeon claims that Parliament "has failed" to accommodate local or provincial interests; the cabinet's role in the accommodation process is "unprofessional, sporadic, overlain by personal and partisan differences"; and finally, the Senate "has been primarily a retirement home for party warhorses, with little policy-making significance and even less function in federal-provincial relations."[30] Smiley adds to the indictment by pointing out that the federal bureaucracy has become less representative "on provincial or cultural lines" and by, perhaps most importantly, stating that party discipline and "prime ministerial government" are "incompatible with the effective representation of territorially bounded interests."[31] The relative importance of the flawed FMC process has arisen in part because of the inability of other fora to address provincial constitutional demands.

Without any effective mean of incorporating the complex and diverse constitutional positions of the provinces into its own constitutional agenda, the federal government relied on counter-productive solutions such as those suggested by the Federal-Provincial Relations Office. Given the weaknesses of the FMC, new negotiating fora with the power to address constitutional matters on a more permanent basis might provide the supplement that is so necessary. The short-lived constitutional secretariat or the relatively successful CCMC process while remaining subject to the first ministers' strict supervision and

control, might be examples of new fora for extended consultation and negotiation. Under the new amending formula, the role of Parliamentary or legislature-based committees could be enhanced. Putting such new fora to work on a long-term basis, whether in multilateral or bilateral form, might have a direct impact on the level of conflict involved in constitutional negotiations for as Simeon points out, "the inadequacy of the institutions at the national level is one reason why intergovernmental negotiations have taken the form of direct confrontations between governments."[32]

In conclusion, the practices and attitudes associated with executive federalism, together with the institution that epitomizes it -- the First Ministers' Conference -- presented real difficulties for constitutional negotiators between 1980 and 1982. Given these difficulties, the negotiation of any agreement at all must stand as a remarkable achievement. In the fall of 1981, Prime Minister Trudeau appeared to be committed to taking the ultimate step in the evolution of executive federalism by deciding to act unilaterally on the strength only of the federal cabinet's support and Parliament's acquiescence; however, a "minor miracle"[33] in the November 1981 negotiations created a compromise patriation package.

Two federal institutions played a key role in making that final compromise possible: the contents of the patriation package were heavily influenced by the hearings

of the Joint Committee of the House and Senate and a resumption of negotiations might never have taken place without the intervention of the Supreme Court of Canada. These institutions are the subject of Chapters Four and Five.

CHAPTER FOUR

Parliament and the Special Joint Committee of the House and Senate on the Constitution

The failure of the 1980 First Ministers' Conference arose not only from difficulties associated with the FMC process, but also from critical divergences between the governments over fundamental principles of Canadian federalism. The federal government saw constitutional reform as fulfilling its promise of "renewed federalism" made during the Quebec referendum. Yet in seeking to fulfill that promise, the federal government pursued a language policy that alienated the government of Quebec; adopted a bargaining stance based on a view of federalism that also antagonized seven other provinces; and relied on a process that, in the view of the those eight provinces and the official opposition, contravened fundamental elements of Canada's federal constitution. These differences underlay the failure of the 1980 FMC and the acrimonious constitutional debate in Parliament. However, two federal bodies -- Parliament, through the Special Joint Committee of the Senate and House of Commons on the Constitution, and the Supreme Court of Canada -- played important roles in making a compromise possible.

The first of these two institutions is the subject of this chapter and the latter is the subject of Chapter Five. As a preface to the examination of these two bodies' roles in the patriation process, the main differences in principle referred to in Chapter One deserve closer inspection. In general terms, the positions of the parties to the negotiations are relatively clear. The federal government's dogged commitment to constitutional renewal rested on the idea that a powerful re-assertion of federal leadership was crucial to the renewed federalism promised to Quebecers during the Quebec referendum. However, the provinces who were to form the Gang of Eight argued that a proper recognition of provincial autonomy and self-sufficiency was a prerequisite for federal-provincial harmony.

Arguably, the most intractable difference in the entire constitutional negotiation process was that between Ottawa and Quebec over language rights. The Trudeau-Levesque conflict in the 1980 FMC was referred to in Chapter One while the irreconcilable positions held by Quebec and Ottawa over language issues during the CCMC process were addressed in Chapter Two. These differences also emerged in the Special Joint Committee of the House and Senate on the Constitution (SJC). Underlying these differences lay two diametrically-opposed visions of Canada.

On one hand, the federal government felt it had a duty to protect the language rights of francophone Canadians across the entire nation. Connected to this commitment was the federal government's concern for the language rights of the English minority in Quebec and, at a practical level, its desire to weaken the separatist appeal of the Parti Quebecois. On the other hand, the Parti Quebecois argued that the protection of francophones depended on an autonomous Quebec with the power to protect all Quebecois. According to this perspective, language and cultural issues could only be entrusted to the government of Quebec and were not matters for the federal government to decide through a Charter of Rights.[1] These divergent views could not be reconciled through the CCMC or the FMC and, ironically, one of the principal reasons for undertaking the quest for a renewed federalism proved to be one of the principal reasons for Quebec's refusal to join the final agreement.

The divergent conceptions of Canadian federalism separating the Gang of Eight from Ottawa, Ontario and New Brunswick was perhaps of broader interest than what was at times perceived by the provinces as an intramural dispute between Prime Minister Trudeau and Premier Levesque over the language issue. While the eight dissenting provinces were united more by their opposition to the federal government than by a common view of Canadian federalism, these provinces generally subscribed to the idea that

constitutional renewal meant a recognition by the federal government of the trend toward provincial autonomy. These governments believed that when the Trudeau government put forward a package of constitutional concessions as it faced electoral defeat in 1979, it was merely recognizing the rightful autonomy of provincial governments.

However, by the summer of 1980, fresh from their victory in the Quebec referendum and having risen from the ashes of defeat to form a majority government in the February 18 general election, the federal Liberals concluded that strong leadership and a reversal of the pendulum swing toward provincial power were the key to a renewed federalism. As Cairns suggests, "from the perspective of the federal government under Trudeau. . . the purpose of constitutional change was to strengthen Ottawa by giving it new resources to overcome the centrifugal tendencies threatening to break up the country."[2] This contrasts with the "pervasive assumption, verging on a new conventional wisdom" among the provinces that "constitutional renewal was designed to make the federal system more congruent with the underlying realities of a politically assertive Quebec and a provincialized English Canada."[3] In sum, these two divergent perspectives on the future of Canadian federalism were the two solitudes that contributed to the failure of the September 1980 FMC.

Three weeks after that failure, the federal government acted on its threat to patriate the constitution unilaterally and introduced the patriation resolution to the House of Commons, creating a furore regarding the legitimacy of such an approach to constitutional reform. Described by one observer as "a unilateral program of rebalancing the federation,"[4] Prime Minister Trudeau's patriation package was placed before Parliament and unilateralism became the new focus of the constitutional debate. In explaining his decision to proceed unilaterally, Trudeau said,

> we have tried governing through consensus, we have tried governing by being generous to the provinces. . . . I thought we could build a strong Canada through co-operation. I have been disillusioned.[5]

Arguing that unilateralism was a legitimate and necessary means of breaking the constitutional deadlock, Trudeau pointed to what he considered to be the likelihood of continued provincial intransigence and argued in Parliament that

> we have been failing for 54 years by following precedents. . . . We are the only group of men and women in this country who can speak for every Canadian. We are the only group, the only assembly in this country, which can speak for the whole nation, which can express the national will and the national interest.[6]

This argument was opposed by the official opposition as well as by the provinces who formed the Gang of Eight. Premier Blakeney of Saskatchewan perhaps put those provinces' argument most clearly, stating that Canada

> is something more than a collection of citizens and, accordingly, the national interest cannot be stated by the majority view of the House of Commons. That is the view of a unitary state and under those circumstances one does not really need a constitution. . . . The essence of Canada is that it is a federation. The essence of Canada is therefore that on major matters we need a double majority. We need a majority of citizens as expressed by the popular will in the House of Commons and we need the majority, however defined, of the regional will. That is the essence of a federal state.[7]

While implicitly conceding that unanimous provincial consent was not a necessity for amending the constitution, Blakeney thus insisted that unilateral action is inconsistent with the principles of Canadian federalism. Ultimately, this debate over the nature of Canadian federalism and the legality or constitutionality of unilateralism was left to the Supreme Court for resolution.

The debate over procedure united all the opponents of the federal government's initiative. Opposition to unilateralism became the rallying point not only for the Gang of Eight but also for Joe Clark and his opposition caucus. Having forsaken multilateral negotiations with the provinces, the federal government entered a new battleground: the House of Commons. The Progressive Conservative opposition mounted a successful campaign of harrassment and delay in the House. This insurgency led to the holding of public hearings of the Special Joint Committee of the Senate and House of Commons on the Constitution and eventually forced the government to turn to the Supreme Court.

Parliament and the Reform of the Constitution:

On October 2, 1980 the Prime Minister announced his government's patriation package -- containing a Charter of Rights and an amending formula that included provision for a national referendum -- to the people of Canada. The federal government strategy was to push this resolution quickly through Parliament in order to present a fait accompli to Parliamentarians in Britain. The federal government invoked closure on October 23, sending the bill to the Special Joint Commitee of the House and Senate on the Constitution for consideration and requesting that the Committee conclude its deliberations by December 9. However, in the face of Progressive Conservative opposition and an awakening interest among the general public and various interest groups, this accelerated approach failed. The SJC provided the first opportunity for people other than politicians or officials to contribute directly to the constitutional reform process and the government found that while this participation slowed down the progress of its legislation, it also provided much-needed support for what became the main focus of the SJC: the Charter of Rights and Freedoms.

During the fall of 1980, the Liberal government operated under constraints on its Parliamentary schedule as it wrestled with a budget addressing federal-provincial

financing arrangements and an energy program that one observer described as "a more complex, sweeping and breathtaking policy initiative than any ever placed before Parliament."[8] This full slate of legislation gave the Progressive Conservatives and New Democrats leverage over proceedings: threats of delay forced the government to both televise and hold public hearings in the SJC -- two demands Trudeau originally adamantly opposed.

Indeed, unswerving opposition to the Prime Minister appeared to be one of the principal binding elements in a divided Conservative caucus. All Consevatives could agree on opposing unilateralism and on giving the SJC an important role in proceedings. However, at the beginning of debate in the House of Commons, Western Conservative M.P.s generally differed with their Ontario colleagues on the entrenchment of the Charter and on provisions encouraging a more efficient economic union. The Conservative leadership masterfully "blended" these two factions of caucus by opposing unilateralism while participating in the SJC -- simultaneously giving the "Red Tories" on the SJC pride of authorship and making the Charter more attractive to Western M.P.s who opposed it on principle.[9]

The New Democratic Party was also divided over Trudeau's unilateral initiative. Ed Broadbent was prepared to accept the initiative over the objections of many western voices in his caucus. However Premier Blakeney,

after a brief and very shy dalliance with federal negotiators, eventually spurned Ottawa's feverish wooing. Broadbent's support for the intiative in his televised address to the nation on October 2 was qualified by demands for the strengthening of the Charter in key areas and for guarantees of greater provincial control over natural resources. The eventual addition of aboriginal rights and women's equality provisions, as well as the insertion of s. 92A, met these demands and eased the principal concerns raised in the N.D.P. caucus.

While the N.D.P. dealt with its internal divisions, the Conservatives were successfully working toward their basic goal during the debate over the patriation package: they delayed passage of the bill long enough for provincial and public opposition to the bill to become organized. The SJC hearings were extended from the original deadline of December 9 to February 6 and then to February 17.

After the close of the hearings, Jake Epp -- one of the principal planners of the Conservatives' constitutional strategy -- suggested that the federal government patriate the constitution with an amending formula acceptable to the provinces and without a Charter of Rights. He also moved an amendment that would eliminate the national referendum from the federal government's amending formula.[11] The House debated this single amendment for over a month. On March 24 the Liberals proposed to limit debate by permitting only two days of debate per motion and

restricting the length of members' speeches to 20 minutes. Rising on points of order or privilege, the Conservatives managed to prevent the Liberals' motion from coming to a vote. Despite the Liberals' and N.D.P.'s denunciation of their delaying tactics, the Conservatives thus effectively closed down the House of Commons.

The acrimony in the House reached new levels as the Conservatives, buoyed by the Newfoundland Court of Appeal's unanimous decision against unilateralism, rose on a stream of points of order and privilege in order to pressure the government into deferring a House vote on the patriation package. The filibuster ended in a Conservative victory as the Liberals, in exchange for a Conservative commitment to voting on amendments relating to the inclusion of God, women's equality rights and aboriginal rights, agreed to await the decision of the Supreme Court of Canada on the appeals from the Manitoba, Newfoundland and Quebec Courts of Appeal before bringing the patriation resolution to a final vote in the House of Commons.

While these delaying tactics were successful, it is inaccurate to portray the Special Joint Committee of the House and Senate merely as the outcome of Conservative attempts to delay passage of the government's legislation. Indeed, the Liberals had considered the possibility of the issue being sent to a Joint Committee in the previously-mentioned Kirby memorandum. According to that memorandum, three advantages lay in proceeding to a Joint Committee: it

would take contentious legislation out of the House; press coverage and debate over the patriation package could more easily be controlled in committee; and finally, the public would be able to participate in the patriation process.[12] However, the Liberals were fully cognizant of the potential delays associated with such a process and a Joint Committee. As Kirby warned,

> in committee the government's position is likely to suffer. Attackers would be louder and more numerous than defenders. Careful choice of government members would be essential, and careful orchestration of hearings would be needed to ensure effective presentation of the government's position."[13]

As the parliamentary committee hearings developed, this prediction proved to be one of the only errors in the Kirby memorandum's masterful analysis of the government's patriation options. The pressure brought by the Conservatives through procedural delaying tactics in the House forced the government to hold public and televised hearings. Yet, rather than weakening the federal government's position and allowing for counter-productive grandstanding on the part of SJC members or participants as the cabinet feared, television spread a message nation-wide that the Charter of Rights was a long-overdue and eagerly-sought statement in the minds of the great majority of SJC participants. As Senator Austin, the Liberal Committee leader suggested,

> The television eye raised the stature of the whole proceedings . . . . All of us began to feel that with the country watching, truly watching, at a level that was serious and intimate, we had to be better than we ever had been before in bringing forth our own view of things. . . . So TV turned out to be the best discipline

Thus a process which began with reluctance on one hand and the hope of scoring political points on the other, developed into a consciousness-raising forum. The SJC was the only forum that enabled the public to participate directly in the patriation process. It was to change the course of the constitutional negotiations.

Sitting for a total of 267 hours in 106 meetings on 56 days, the SJC heard 294 groups, 914 individuals and received over 1200 submissions and letters.[15] One hundred and thirty two members served on the Committee and the three parties put forward 123 amendments to the Charter alone during the life of the SJC. Over half of the amendments were incorporated by Justice Minister Chretien into his final proposal.[16] The impact of the hearings on the final outcome exceeded all calculations -- perhaps because for the first time ever direct public participation in the drafting process became a reality.

Some critics suggest that Liberal committee members were able to control who appeared before the committee. For example, the appearance of Quebec nationalist groups appears to have been restricted.[17] Romanow, Whyte and Leeson suggest that

> there was no doubt that the nature of the testimony which the committee heard was orchestrated by the government in order to isolate provincial opposition and to create a movement for an even more extensive charter than the one contained in the resolution. The plan was successful.[18]

While eight provincial premiers made submissions to the committee -- four of the premiers appeared in person -- the provincial voices were overwhelmed by those groups seeking protection under the Charter of Rights.[19] Focusing on the strengthening of the Charter, these groups were generally not interested in complaints about federal unilateralism or the nature of Canadian federalism.

The arguments of the women's groups, aboriginal spokesmen, handicapped peoples, ethnic and racial minorities, gay representatives, bar associations, civil liberties unions and other groups focussed on their groups' needs, rather than on the proper process for entrenching the protections they sought. This approach contrasts markedly with the intergovernmental negotiations where politicians focussed on the impact of an entrenched Charter on their legislative power or on possible shifts in the balance of power between federal and provincial governments. In light of these two different approaches, the criticism[20] heaped upon Prime Minister Trudeau for his allegedly artifical separation of "peoples' issues" -- the Charter of Rights, a preamble an amending formula, equalization and regional development -- from "government issues" such as fisheries and natural resources jusrisdiction appears unjustified. As Trudeau suggested, the public did seem to be more interested in the aspects of the patriation package that affected it most directly. The SJC provided the public with the only forum through which

they could contribute directly to the constitutional debate and the subject of public presentations was overwhelmingly in favour of a stronger Charter. Only a few voices in this public forum protested the federal government's unilateralism.[20]

One of the crucial effects of the SJC hearings was thus to provide legitimacy to both the Charter of Rights and the federal government's unilateralism. Without the federal government's decision to proceed unilaterally, a public forum such as the SJC hearings would not have existed. Without the SJC hearings, the direct expression of popular support for an entrenched Charter would never have found an outlet. Without this resounding expression of popular support for a strengthened Charter, the federal government would have had far less legitimacy in pursuing its constitutional plans unilaterally. As Cairns points out,

> the Charter and unilateralism were like Siamese twins. . . . the vulneralbility of Ottawa in the area of procedure was counterbalanced by the vulnerability of the dissenting premiers who, however much they proclaimed their defence of the federal principle, could not claim to be representing the majority wish of their provincial electorates for a Charter.[21]

The hearings were thus crucial both to the credibility of the federal government's unilateralism and, more importantly, to the creation of a stronger Charter of Rights.

The SJC spent over 90 hours considering each of the clauses in the Charter of Rights. The vast majority of participants argued for a strengthening of the Charter. Maxwell Yalden, the federal official languages commissioner, argued that language rights should be broadened such that French and English minorities across Canada would have complete freedom of choice in selecting their language of education. Many women's groups argued for tougher protection of women's equality rights, seeking an absolute prohibition of sex-based discrimination in legislation. The aboriginal peoples, profoundly dissatisfied with their access to the patriation process until this point, organized a "constitution express" protest train to travel from Vancouver to Ottawa in order to demand broader Charter rights -- the SJC eventually agreed unanimously to entrench such rights in ss. 25 and 34.1 of the federal government's resolution.[23] Civil liberties groups argued against the breadth of the Charter's s.1 limitation clause, for tougher provisions protecting the accused's right to counsel without delay and in favour of giving the courts more power to exclude improperly obtained evidence -- all three requests were acted upon by the SJC. Thus, the principal debate before the SJC was not over the entrenchment of the Charter but over what it should contain: thanks to the hearings, entrenchment of the Charter became a motherhood issue.[24]

Summary and Conclusion

The Special Joint Committee of the Senate and the House of Commons on the Constitution played an important part in both forming and changing perceptions on the Charter of Rights and Freedoms. While it was unable fully to answer the language question or to resolve the fundamental differences between the Gang of Eight and the federal government over the direction of Canadian federalism, the SJC did provide the only outlet for the expression of non-governmental interests in the constitutional negotiation process. This expression of popular and interest group opinion had a crucial effect on the contents of the Charter of Rights as well as on the political will for including a Charter in the patriated constitution.

The differences in principle outlined at the beginning of this chapter were not all resolved or even addressed by the Committee. For example, it was unable to resolve the difficult language question to the satisfaction of all committee members. Like the other fora involved in constitutional negotiations, the SJC was bound by political and strategic considerations. Such proposals as guaranteeing minority language education rights to francophones in Ontario were thus doomed to failure. Yet, the Joint Committee provided a forum for the expression of

popular and interest group opinion on matters that politicians and officials had ignored or glossed over in previous negotiations. Indeed, the public outcry over the federal and provincial governments' excision of certain aboriginal and women's rights from the Charter during the November 1981 FMC led to the restoration of those rights, albeit in an altered form.[25]

A committee that was born partly out of the Conservatives' successful strategy of delay and partly out of the Liberals' desire to undermine opposition to unilateralism provided a new outlet for public opinion in the constitutional negotiation process and pointed to the potential value of such fora in future constitutional negotiations. Its openness to direct public participation inspired one of the committee participants, Lorne Nystrom to suggest that

> future conference participants must include multi-party delegations selected by Parliament and each of the provincial legislatures. Additionally, there must be direct participation of delegates representing the aboriginal peoples, women and the territories, all of whom suffer the prejudice of the present political system. It would be this body which would propose constitutional amendments to Parliaments and legislatures.[26]

While the SJC did not succeed in addressing what the federal government termed the "Package on Government Powers and Institutions," its ability to deal with matters from the federal government's "People's Package" such as the Charter indicate that more open participation could aid the negotiation process. Indeed, allowing aboriginal leaders

access to the negotiating tab[redacted]s been a sine qua non for recent negotiations over aboriginal rights.

In sum, the Special Joint Committee's main contribution to the constitutional reform process lay in its opening of the process to public participation. For the first time [redacted]ians stepped out of the limelight, leaving room [redacted] players: the committee heard testimony from over 900 individuals in the public hearings and received well over 1200 written submissions. The committee's hearings were televised across the nation and this publicity, together with the appeals of participants in the committee's hearings, played an important role in reflecting and mobilizing public support for a Charter of Rights and Freedoms.

Despite its relevance to future negotiations and its impact on the final outcome of the 1980-1982 round of negotiations, the SJC was designed neither to resolve the major differences between the governments in Canada over the direction of Canadian federalism, nor to address the legitimacy of unilateral partriation referred to at the beginning of this chapter. By the spring of 1981, it was clear that the debates over the legitimacy of the federal government's language policy, over that government's conception of Canadian federalism and over the constitutionality of its unilateral approach to the patriation of the constitution could not be resolved through the standard procedures of constitutional

amendment: first ministers' and ministerial negotiations had failed to reach a consensus; thanks to the official opposition, the patriation package could not be forced through Parliament in Ottawa; there was even doubt as to the willingness of British parliamentarians to follow Prime Minister Trudeau's suggestion that they "hold their noses" and pass the patriation package in Westminster. Faced with this deadlock, the politicians turned as a final recourse to the courts.

CHAPTER FIVE

The Role of the Supreme Court:

When the Supreme Court of Canada handed down its decision in Reference Re Amendment of the Constitution of Canada[1] (the Patriation Case), it resolved what has been called "the most momentous case in the Court's history."[2] With the September 28 1981 decision, the Court both decided on the legitimacy of the federal government's attempt to patriate the constitution unilaterally and enunciated a vision of Canadian federalism. Cutting the Gordian knot that entangled the federal and provincial governments in irreconcilable arguments over the nature and direction of Canadian federalism, the Court guided the two sides back to the bargaining table for the "one last try" conference of November 1981. The Supreme Court's view of Canadian federalism, wherein no single province could veto a constitutional amendment and the federal government was obliged by constitutional convention to gain the support of a "substantial number" of provinces in pursuing its patriation package, not only made another conference a political necessity but also fostered a will to compromise at that conference. Without the Supreme Court's compromise resolution of the parties' divergent views of Canadian federalism, the impasse between governments would likely

have been carried, unilaterally and unresolved, to the United Kingdom.

This chapter of the thesis examines the courts' answers to the fundamental questions about Canadian federalism raised in the Patriation Case. The Courts - the Manitoba, Quebec and Newfoundland Courts of Appeal as well as the Supreme Court of Canada -- faced two central questions. The first related to the legality of the federal government's attempt to patriate the constitution without the support of the provinces. The second centered on the question of whether or not a constitutional convention existed that required the federal government to secure provincial agreement on patriation. After examining the courts' response to these questions, the criticism of the Supreme Court's decision and its activist role in the Canadian polity is considered and refuted.

Federalism and Unilateralism in the Patriation Case:

No Canadian court had previously dealt with such an important, clean-cut divergence over fundamental concepts of Canadian federalism as that contained in the Patriation Case. On one hand, the Gang of Eight (with the exception of Saskatchewan) contended that Confederation was a compact between the provinces. According to this perspective, the two levels of government are equal, balanced parts of the

Canadian federation -- the original compact could not be altered without the consent of the parties to the contract. On the other hand, the federal government effectively argued that provincial governments are subordinate to the central government, reflecting what Wheare called the "quasi-federal" nature of the Canadian constitution.[3]

In the opinions of the Manitoba, Newfoundland and Quebec Courts of Appeal, both sides received support for their divergent perspectives. The Newfoundland Court of Appeal, drawing from the Statute of Westminster, agreed with the provinces' view of Confederation as a compact and decided unanimously that provincial consent to patriation was necessary. Essentially stating that the ten provinces and the federal government are equal partners in Confederation, the Court recognized a "division of power among the constituent parts that make up the Dominion of Canada by which each is autonomous, in no way subordinate to the other."[4]

In both the Manitoba Court of Appeal and the Quebec Court of Appeal, however, these provinces' arguments were strongly criticized. Chief Justice Freedman of the Manitoba Court of Appeal led his court's 3-2 majority, attributing paramountcy in constitutional matters to the federal govenment and concluding that the compact theory is "supported neither by history nor by subsequent usage."[5] Questioning the relevance of the arguments, Mr. Justice

Turgeon of the Quebec Court of Appeal sided with that court's 4-1 majority and raised a second objection, pointing out that "the compact theory is a purely political argument that hasn't any juridical base."[6]

The Supreme Court, in its 7-2 decision on the legality question, agreed with both of these objections, stating that

> the law knows nothing of any requirement of provincial consent, either to a resolution of the federal Houses or a condition of the exercise of United Kingdom legislative power. . . . What is central here is the untrammelled authority at law of the two federal Houses to proceed as they wish in the management of their own procedures and hence to adopt the Resolution which is intended for action by the United Kingdom Parliament.[7]

In supporting the second objection, the majority stated:

> theories, whether of a full compact theory (which even factually, cannot be sustained having regard to the federal power to create new Provinces out of federal territories, which was exercised in the creation of Alberta and Saskatchewan) or of a modified compact theory as urged by some of the Provinces, operate in the political realm, in political science studies. They do not engage the law, save as they might have some peripheral relevance to actual provisions of the British North America Act and its interpretation and application.[8]

In sum the Court both rejected the compact theory and appeared to recognize the primacy of the federal government's role in Canadian federalism through its decision that the federal government had every legal right to proceed to the United Kingdom without further consultation with the provinces.

However, in deciding the question of constitional convention, the Supreme Court undid much of what it had

done in answering the first question. Only the dissenting judges, Chief Justice Laskin and Justices Estey and McIntyre consistently supported Ottawa's argument that provincial governments are subordinate to the federal government. The minority opinion on the convention question emphasized the quasi-federal nature of Canadian federalism and, in a classic summary of the centralist position, argued that

> the BNA Act has not created a perfect or ideal federal state. Its provisions have accorded a measure of paramountcy to the federal Parliament . . . . For example, one need only look to the power of reservation and disallowance of provincial enactments; the power to declare works in a province to be for the benefit of all Canada and to place them under federal regulatory control; the wide powers to legislate generally for the peace, order and good government of Canada as a whole; the power to enact the criminal law of the entire country; the power to create and admit provinces out of existing territories and, as well, the paramountcy accorded federal legislation. It is the special nature of Canadian federalism which deprives the federalism argument described [in the majority opinion] of its force. . . . We therefore reject the argument that the preservation of the principles of Canadian federalism requires the recognition of the convention asserted before us . . . .[9]

In contrast to the minority's view of Canadian federalism, the six-man majority would not take such an uncompromisingly centralist stand. While denying that the unanimity rule was a binding one, and thus once again rejecting the compact theory, the Court did support the provinces' view of a balanced federalism:

> the federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. . . . It is true that Canada would remain a federation if the proposed amendments became law. But it would be

> a different federation made different at the instance of a majority of the Houses of the federal Parliament acting alone. It is this process itself which offends the federal principle.[10]

Unless the federal government gained "a substantial degree of provincial consent," the federal government's "Proposed Resolution for a joint Address to Her Majesty respecting the Constitution of Canada . . . would be unconstitutional in the conventional sense."[11] Despite its rejection of the compact theory, the Court had handed the provinces important political leverage through this interpretation of the "federal principle."

The majority on the question of convention went beyond the strict, written word of the law to put forward its view of Canadian federalism. K.C. Wheare perhaps best summarizes the crux of the decision on the convention issue facing the Court: Canada's "constitution is, as a matter of law, not completely federal; it is quasi-federal. But its constitution in practice, its system of government, is federal predominantly."[12] The majority was willing to go beyond mere legalisms to measure the political reality of federalism in Canada -- in McWhinney's words, they were willing to "venture where legal-positivist angels normally fear to tread."[13] Once they began to deal with these non-legal matters, the majority left behind its more positivist (and perhaps more centralist) brethren and created a counter-weight evenly to balance the Court's verdict on the divergent views of Canadian federalism.[14]

In sum, the Court produced a remarkably balanced judgement on the nature of Canadian federalism. While it affirmed the legality of the federal government's unilateral initiative, the Court suggested that the government was obliged by convention to gain the support of a "substantial number" of provinces. The practical implications of this balanced judgement were to force the parties back to the bargaining table. On one hand the federal government would face difficult questions in Westminster and more controversy in Parliament if it decided to ignore constitutional convention and proceed unilaterally. On the other hand, the Court's affirmation of the legality of unilateralism placed the provinces in the position of choosing between compromise and legally-sanctioned federal government unilateralism.

A critical analysis of the Patriation Case decision:

Although the decision apppeared to be a brilliant compromise, a complete analysis of the Supreme Court's decision must go beyond the results of what Russell condemns as "result-oriented" jurisprudence.[15] The Patriation Case raises several closely related-questions concerning law and polities. First, critics of an activist judiciary argue that in a parliamentary system the legislature should be supreme and appointed judges should

not be able to undermine the decisions of elected politicians. Second, the policy-making, political role of the judiciary in cases such as the patriation reference is open to question. Third, the Court's ability adequately to address political cases might be questioned. Finally, legal positivists would question the legitimacy of the Court's foray into the nebulous realm of convention in the Patriation Case.

The first of these four objections to the power of the judiciary is the most easily addressed for even in the pre-Charter era the existence of a written federal constitution, protected and interpreted by the judiciary meant that judicial review was an integral part of Canada's polity. Under ss. 91 and 92, the constitution divided legislative powers between the federal and provincial government, delimiting the scope of each legislature. One of the judiciary's functions is to determine when one level of government is trespassing on the other level's powers. It might therefore be possible in the Canadian context to refer to the supremacy of the judicially-interpreted constitution as opposed to the supremacy of the Canadian Parliament.[16]

The argument that the judiciary does not have the legitimacy to over-rule elected decision-makers may also be countered for pragmatic reasons. As Stevenson argues,

> the 'political process,' which is really a euphemism for bargains arrived at in esoteric negotiations among officials and ministers, is neither more democratic nor more rational, and certainly less dignified, than the process of decision by the courts.[17]

Thus, not only does the judiciary have the authority to judge the validity of legislation in a federal state, but it may also appear to be the proper and legitimate arbitrator in resolving many types of intergovernmental disputes between the self-interested parties to those disputes. The intervention of an impartial umpire is an important part of a properly-functioning federal state. In sum, the judiciary in Canada has the right, the legitimacy and the obligation to review legislation that is presented before it through reference cases or through questions raised as to the constitutionality of a government's actions.

The second criticism of the courts raised by the Patriation Case goes beyond the question of the legitimacy of the judiciary in reviewing legislation to question the policy-making or political role assumed by judges. In McWhinney's view, the Supreme Court's "primary responsibility" lies in

> providing a clear and logically reasoned judicial argument as an authoritative statement to the parties actually before the Court, and also as an educational guide to lower courts, the legal profession and the general public.[18]

This argument underestimates the importance of the Court as an institution of the state. From the political scientist's perspective, the primary responsibility of the Court arguably lies in its duties as an institution within the federal state. The survival of the just state should take priority over the educational function of the courts

emphasized by McWhinney. Extending this argument to its logical, if potentially dangerous limits, the utilitarian would argue that the parties actually before the Court are of secondary importance and are subordinate to matters of state importance. When federal-provincial conflict reaches the point of creating a political deadlock of monumental consequences, it is no longer relevant to condemn the Court for "having ventured where legal positivist angels normally fear to tread" in making bold, activist decisions on largely political issues such as those presented by the Patriation Case.[19] One might argue that the Court's decisions in these instances reflect the crucial importance of the judiciary's role as a political institution with an obligation to protect the polity.

This obligation is particulary important when no other institution of state is able play such a role. Thus the judiciary's role as an umpire of last resort is crucial, if at times controversial. In the United States, the Warren Court's decisions on the desegregation of schools and reapportionment in state legislatures are examples of a Supreme Court making activist decisions of this type.[20] While such decisions may, as some argue, depend on "the political predilections of the judges,"[21] the judiciary must nonetheless continue to exercise a "political" role if the polity is to conform to its own constitution. Through its decision in the Patriation Case, the Court fulfilled its obligation to interpret the constitution.

In sum, the argument that the Court assumed an overly political role in the Patriation Case by going beyond legal interpretation and entering the realm of political mediation, perhaps underestimates the importance of the judiciary as the balance in Canadian federalism. As J.R. Mallory has stated in regard to the relations between the federal and provincial governments, "some agency, external to both legislatures, must hold the balance between them."[22] From the political scientist's perspective, the judiciary not only has the right to go beyond the letter of the law in holding that balance, but it has the obligation to fulfill its function as a balancing institution in the political system.

A third objection to the judiciary's role in constitutional-political cases concerns its ability to judge such cases effectively. The Court's critics argue that disputes over the nature of Canadian federalism should be confined to the political arena as the judiciary is incapable of effectively resolving conflict of this nature. Many scholars question the ability of the courts to render judicious judgements in complicated cases pitting government against government and centering on issues that could significantly affect the balance of power between the parties in the case.[23]

In Paul Weiler's view, effective decision-making in political cases requires a comprehensive knowlege of all the information relevant to the case and the expertise to

analyze that information. He believes that "the judicial process as we know it in Canada places road-blocks in the way of both of these."[24] The limitations of the judicial process emphasized by Weiler are reflected in the decisions handed down by the courts, according to this argument. As Black and Cairns point out:

> lacking the expertise in assessing modern society with which political decision-makers are furnished, the courts exhibit great difficulty in giving shaded responses in complex problem areas, and in Canada they have been largely restricted to the black and white approach of ruling legislation either intra vires or ultra vires.[25]

Such clear-cut decisions leave little room for mutually agreed-upon compromises which would leave two relatively satisfied parties, as opposed to a clear winner and a clear loser. This would appear to be especially true for cases involving divergent federal/provincial interpretations of constitutional matters.

Countering this criticism, one can argue that "black and white" decisions provide the most clear-cut solutions to intractable federal-provincial differences. For example, Stevenson argues that

> disputes over the regulatory powers of the state require a precise determination over who has the legal authority. If one level of government can regulate a particular activity, the other cannot and should be discouraged from attempting to do so.[26]

In addition to this added clarity, the Court's decisions can serve as the basis for the revival of negotiations under a new set of judicially-imposed conditions. For example, the Court's decision on the Chicken and Egg

Reference[27] provided the basis for a federal-provincial meeting of agriculture ministers that enabled provincial marketing boards to assume the responsibility for setting provincial quotas. The 1937 Privy Council decision allocating control over unemployment insurance to the provinces was followed by a series of federal-provincial meetings leading to the 1940 constitutional amendment giving the federal government those powers.[28] More recently, Section 92A of the Constitution Act 1982 overturned Supreme Court decisions in the Central Canada Potash and Canadian Industrial Gas and Oil cases.[29] Thus even when the judiciary makes a "black and white" decision that is politically inconvenient, the decision can serve as a 'spring-board for future negotiations: such decisions push politicians toward finding political solutions' to constitutional problems.

The Court's decision on the patriation reference further refutes arguments relating to the "black and white" nature of judicial decisions. All parties in the case claimed their positions were vindicated; the Court had struck a near-perfect balance in its decision. Even more remarkable was the impact of the decision on the negotiation process: the Court managed to create the political necessity for another conference and it significantly affected the ground-rules of the negotiations in relation to the unanimity issue. It would not be an exaggeration to claim that the Court checked the unilateral

approach of the federal government and created the conditions for the ultimate constitutional compromise. Thus, the Court showed that it was able to admit a broad range of evidence, interpreting it with expertise and political finesse. The Court found a balanced compromise judgement that produced neither gloating victors nor humiliated losers while also creating a firm ground for future compromise.

Finally, another criticism of the courts' performance in judging "political" cases and of the judiciary's forays into policy-making relates to the problems associated with cases involving federal-provincial conflict over non-legal matters such as questions relating to the existence of a constitutional convention in the Patriation Case. In answering the question regarding the existence of a convention that would require the federal government to obtain the support of a "substantial number" of provinces, the Court stepped beyond strict legal interpretations to dabble in matters it had itself described as "in the political realm, in political science studies."[30] As Russell has wondered: "If in the Court's view constitutional conventions are entirely political and not at all legal in nature, what, it might be asked, was a court of law doing rendering a decision on a non-legal subject?"[31]

For the Court's critics, the answer to that question would be that the Court was exceeding the boundaries of its competence: non-legal matters should be left for political actors. As Livingston wrote, "Legal answers are of value only in the solution of legal problems. And federalism is concerned with many other problems than those of a legal nature."[32] According to this perspective, such problems are too complex for the judiciary and are best left to the poltical arena. Paul Weiler states:

> federalism cases involve essentially non-legal conflicts which will not be dealt with very successfully in the judicial process, and that courts should avoid the area unless intervention is absolutely vital. . . . Constitutional conflict is not always so bad and, even when it is I doubt that judicial review can make a durable contribution to its resolution.[33]

The judiciary's role in resolving the impasse over the patriation of the constitution negates these arguments. The Supreme Court's decision was of value not only in its resolution of the legal dispute between the parties, but principally because its contibution to the resolution of a political dispute. The constitution includes not only a black letter component, but also an unwritten and "understood" conventional component. Addressing this latter aspect of the constitution proved to be an invaluable exercise.

The Court was presented with and ruled on a wide range of "political" evidence and argument, including arguments relating to the compact theory and the "crystalization" of convention into law. Indeed, Weiler

admits that its decision on the convention issue proved the Court's ability to go beyond the mere letter of the law: by accepting and interpreting Saskatchewan's somewhat speculative and political view of the amendment process, the Court broke new constitutional ground. In recognizing the political reality of the federal principle in Canada, the Court was able to transcend narrow definitions of relevant evidence to make its decision. Thus one can argue that one need not praise the decision in the Patriation Case solely on the "result-oriented" grounds of its positive impact on the political process: the Court also took a courageous step by answering an important constitutional question -- that of the existence of a constitutional convention -- in a difficult grey area that lies beyond the strict letter of the law.

The patriation reference provides a powerful example of the Court's ability to resolve difficult political cases. The importance of this judicious decision and the consequences of the decision reflect the importance of the courts as mediators of last resort between the federal and provincial governments. Because of the crucial nature of this role Weiler admits that "My views require rethinking. The degree of federal-provincial conflict and the inability to resolve conflict has increased substantially."[34] In addition to these changes in the political environment, Weiler points to changes within the judiciary, as the Supreme Court, facing a constitutional case load that is

both heavier and more "difficult" has become "more aggressive. . . . The judges are more willing to rethink and change previous decisions."[35]

In sum, the Court's decision on the delicate question of convention, its handling of a difficult political case and its performance as a mediator between parties with opposing visions of Canadian federalism resulted in the parties' return to the bargaining table with a new desire to find a compromise solution to their differences. Going beyond this results-based analysis, one can argue that the Supreme Court made an activist and balanced decision that fulfilled the judiciary's important role as the final mediator in federal/provincial constitutional disputes.

Summary and Conclusion:

Faced with the incapacity of the federal and provincial governments to find compromises in the other institutions mediating federal-provincial conflict and challenged by the federal government's pursuit of a unilateral policy of constitutional amendment, the justices of the Supreme Court assumed their role as a mediator of last resort by tackling the political issues in the Patriation Case. The Court sent the parties back to the bargaining table armed with a clearer picture of the conventional requirements for constitutional amendment and,

more importantly, a new political will to find agreement. Judging from the patriation reference, the judiciary is capable of performing its role as a mediator of last resort remarkably well.

Thus the Supreme Court played a critical role in the 1980-1982 constitutional negotiations. The Court was asked to resolve firmly held differences over the nature of Canadian federalism and the legitimacy of the federal government's attempt to patriate the constitution unilaterally -- issues which Parliament and the Special Joint Committee could not resolve. In addressing these differences, the Court paved the way for a final agreement.

Of all the institutions examined in this thesis, the Supreme Court's performance appears to be the most remarkable for it was able to find a mutually agreeable middle ground for the opposing governments. Not only were the results of the Court's decision the best possible outcome, but the decision itself was -- from the political scientist's perspective -- a courageous one that dared to step into the legal grey area of constitutional convention. The Supreme Court's decision ended the period of unilateralism and forced the federal government to return to the negotiating table with the provinces. While it did not completely rule out the federal government's option of turning unilaterally to Westminster, the decision raised the political cost of so doing and thus paved the way for the politicians to try to find agreement over the

thorny questions of languange rights and the direction of Canadian federalism one more time.

CHAPTER SIX

Conclusion:

Beyond the 1980-1982 Constitutional Negotiations

The Constitution Act 1982 embodied an elusive and historic compromise over issues that had stymied political leaders in Canada for over fifty years. That compromise left many constitutional questions unanswered, including eight of the twelve items on the bargaining agenda agreed to in 1980.[1] While the authors of the Constitution Act failed to answer all the questions on the original constitutional reform agenda, they did create a constitutional amending formula -- a task that began formally in 1927 and had eluded past generations of politicians and constitutional experts. It will be the task of future generations to answer, through that formula, the questions this generation of political leaders fails to resolve.

The November 1981 accord left several groups of Canadians with the feeling that their political leaders had failed them. Ironically, this sentiment was most clearly expressed in Quebec -- the province that was the catalyst for constitutional reform in 1980. While the demands of the other provinces were crucial to the negotiations, it was the threat of separatism and the desire to fulfill the promises made during the Quebec referendum campaign that

underlay the 1980-1982 round of negotiations. Yet, Quebec was left out of the final agreement on November 5, 1981 and the government of Quebec was outraged at having been "shamelessly betrayed" on a "night of treachery" by "this stab with a dagger" from the "thieves of our rights."[2] Although the November accord was hailed by many observers and participants as an almost miraculous compromise, it left a sense of grievance in Quebec about the process and the content of the November accord. As Claude Morin said in the National Assembly,

> with what happened in the course of the constitutional conference, with the trickery and lying which accompanies all these negotiations, with the fact also that Quebec, at the crucial moment, was systematically excluded, the result was that Quebec suffered, for the moment, the theft of its rights.[3]

The Parti Quebecois thus suggested that the November Accord had exacerbated, not defused, Quebec's grievances in Confederation.

The final deal-making at the November FMC also left out special provisions for aboriginal and women's rights. Women's groups and native leaders were appalled by the fact that sections relating to their rights were removed from the Charter on the final night of negotiations. The native rights section in question was opposed by the three westernmost provinces, led by British Columbia, partly for the reason that s. 35 of the Special Joint Committee on the House and Senate's proposed resolution was opposed by a majority of aboriginal groups. (However, these groups

believed s. 35 did not go far enough, not that the recognition of aboriginal rights should be left out entirely.)

The women's rights section (s. 28) was opposed most intensely by Premier Blakeney because it contains a "notwithstanding clause" that would free that section from the provinces' ability to pass legislation notwithstanding the Charter's provisions for women's equality -- this might prevent affirmative action programs. However, in the face of great political pressure and what Romanow refers to as an "unsettling period of bilateral negotiations over long-distance telephone," the first amendments to the November accord were agreed upon.[4]

Native leaders were not satisfied with the original 1981 concessions and pinned their hopes on section 37 of the Constitution Act which provided for a First Ministers' Conference within a year of the Act's proclamation to identify and define aboriginal rights. No agreement was reached in that meeting or the subsequent annual meetings. In 1987 time ran out for the aboriginal leaders as the three westernmost provinces and Newfoundland and continued to fight against the broad recognition of natives' rights and argued for a detailed definition of those rights. No plans for a further conference have been developed.

While Banting and Simeon's suggestion that the Consitution Act 1982 was an "unreformed constitution"[5] may be rather harsh, dissatisfaction with the final

agreement went beyond the groups mentioned above and would suggest that in spite of the Constitution Act 1982, bargaining over constitutional reform and dissatisfaction with the constitutional status quo will continue to play an important part in federal-provincial relations in the years to come. Thus one can understand this thesis' primary goal: that of seeking more harmonious approaches to constitutional bargaining. Future bargaining over the constitution is inevitable and lessons from the past must inform those who will bargain in the future.

Although the effective operation of the constitutional amendment process in the future depends, to a degree, on the participants' ability to learn from the lessons of the past, the lessons of the preceding chapters must be treated carefully for two reasons. First, the 1980-1982 constitutional amendment process was unique. The federal government can never again threaten to patriate the constitution unilaterally; the Supreme Court is unlikely to be required to pass judgement on constitutional amendment procedures again; and the public pressure for wide-ranging constitutional reform may never reach the same levels as those preceding the November 1981 FMC.

The federal government's decision to proceed unilaterally was a turning point in the patriation process. Prior to that decision, there were few signs of movement as the pressure behind the constitutional log jam built steadily. Traditional approaches to relieving this

pressure appeared to have failed: despite the promise shown by the CCMC, the first ministers were unable to find a consensus in September 1980.

However, after the October 2 announcement of unilateralism, the log jam gradually began to break. The hearings of the SJC, the battle in Parliament and decisions in the courts -- all of which sprung directly or indirectly from the federal government's unilateral strategy -- were the first signs of that break-up. Each of these factors played an important role in pushing the parties to the final outcome and one can plausibly argue that without Trudeau's recourse to unilateralism, the constitution might still reside in Westminster. Paradoxically, unilateralism hardened positions on all sides but also made possible the development of the elusive political will to compromise. In sum, the federal government's unilateralism created a new dynamic in the patriation process and ultimately that dynamic led the parties back to the bargaining table and, ultimately, to an agreement.

It would be misleading to claim that this dynamic was planned or even foreseen by strategists in Ottawa or by other participants in the patriation process. As Cairns suggests,

> the particular outcome of the Constitution Act, . . . was underdetermined. Slight or major differences in one or more of dozens of prior events or political decisions could have nudged the constitutional process onto a different path, which would have led to another constitutional destination. The retention of power by the Clark government, a Parti Quebecois referendum victory . . . a different Supreme Court decision . . . any one of these or various other

> plausible happenings could have [changed the outcome.][6]

Circumstance and chance were thus central to the final outcome.

The most subjective aspect of the 1980-1982 constitutional negotiations lies in the nature of the personalities around the bargaining table. Without the fraternity of Chretien, Romanow and McMurtry, the toughness of Lougheed and, most importantly, Trudeau's single-mindedness, the final consensus would not have taken the form it did and might never have developed at all. As Simeon argues, "the smooth operation of the decision process depends more on the attitudes and perspectives of the participants than on the existence of formal machinery."[7]

In sum, the lessons in the concluding sections of this thesis relating to the strengths and weaknesses of the institutions in the patriation process are put forward with three caveats: (1) once the federal government embarked on its unilateral course, the process was unique; (2) chance and circumstances played an important role in shaping the negotiations; and (3) the special personalities involved in the constitutional bargaining sessions played a crucial role in making a final agreement possible.

The second principal reason for treating the conclusions of the earlier chapters with care lies in the very existence of the amending formula. Five years after the enactment of that formula, it is still difficult to

determine its impact. Nonetheless, key differences exist between the pre-amendimg formula era and the post-1982 era of constitutional bargaining. The support of seven of Canada's ten provincial legislatures representing 50 per cent of Canada's population is necessary for most constitutional amendments. It is now constitutionally entrenched that an agreement by the first ministers is no longer sufficient for constitutional amendment -- legislative assemblies must be given the chance to debate and vote on constitutional amendment resolutions.

Although a new amending formula now governs constitutional bargaining and the 1980-1982 patriation process was in many ways unique, the underlying tensions that pervaded negotiations during that period will continue to exist long into Canada's future. The question of how to recognize the French fact in Canada is currently a matter of public debate -- more so now than at any time since the Quebec referendum; demands for the decentralization of powers and for major reform of central institutions are also on the bargaining table. These demands are very likely to continue to be heard in the 1990s and beyond. While the authors of the Constitution Act resolved one crucial tension in Canada -- the question of who speaks for Canada -- through the amending formula, they did not and could not resolve the most fundamental tensions in Canadian federalism outlined in chapter one and recurring throughout the negotiations described in the preceding pages. A

constitutional solution may never resolve such fundamental tensions, but constitutional reform is one important way of easing the strains in Canadian federalism. Without the prospect of meeting the challenges in Canadian federalism through constitutional reform, one of the critical dynamic forces that keeps Canada whole would be lost. The following section examines the fora that might help to meet the challenges ahead.

Lessons from the 1980-1982 patriation process:

The four central chapters of this thesis examined the performance of the Continuing Committee of Ministers on the Constitution, the First Ministers' Conference, the Special Joint Committee of the Senate and House of Commons on the Constitution, and the Supreme Court in the patriation process and in addressing the fundamental tensions of Canadian federalism. The assessment in these chapters pointed to the benefits and draw-backs of each forum: for example, the CCMC fostered trust and a remarkable cooperative spirit but dealt with the more political agenda items ineffectually while the FMC was the most authoritative forum for discussing constitutional reform but suffered from its very importance. This section summarizes and draws conclusions from that earlier analysis with a view to foreseeing the possible contributions of

these bodies in the quest for constitutional reform under the new amending formula.

The Continuing Commitee of Ministers on the Constitution: As chapter two indicated, the CCMC's closed, problem-solving meetings were crucial to the parties' assessments of each others' positions, interests and personalities. The formal and, perhaps even more importantly, the informal meetings provided participants with the opportunity to develop the personal contacts that created mutual trust and understanding during the summer of 1980. On the other hand, the CCMC's consciously non-political approach meant that it had no capacity for finding solutions to the difficult political decisions on the bargaining table: without clear political guidance from higher authority, or indeed with the advice to avoid consensus on these issues, such political decisions were constantly being shuffled from ministers to officials and back in an impossible quest for consensus over political issues where the political will for consensus did not exist.

However, in the post-Meech Lake era, the weaknesses of the CCMC approach to constitutional negotiations may be less onerous and the benefits flowing from that approach may prove to be even more important than in the 1980-1982 round of negotiations for three reasons. First, considering the willingness to compromise that developed during the CCMC meetings in 1980 when political tensions were relatively high, when many provinces did not trust the

federal government and when some provinces did not even trust each other, the effectiveness of a forum that both fosters and depends on trust is likely to be enhanced under a more cooperative and flexible regime of federal-provincial relations such as that emerging from an accord reached at Meech Lake.

Second, if the political will displayed at Meech Lake is carried through to negotiations on other constitutional questions, a drawback of the CCMC -- its inability to resolve politically-sensitive issues -- would be removed by the first ministers before the CCMC begins work. Given a clear mandate by the first ministers to find a compromise within certain clearly-defined and pre-negotiated political guidelines, CCMC-style negotiators will be able to operate freely in their area of expertise: that of finding compromise solutions. For example, if the federal government made the difficult political decision of giving up its exclusive jurisdiction over the fishery and agreed to the principle of concurrent management of the Atlantic fishery with federal paramountcy in the case of federal-provincial or inter-provincial disputes, then a CCMC-type body (perhaps supplemented by a sub-committee of federal and provincial fisheries ministers and/or officials) would be very well-suited both to decide on the nature of the agency implementing this management scheme and to draw up alternative plans that would meet the various federal and provincial interests at stake.

Third, if the political climate is such that the CCMC can operate with clear guidelines, then the nature of the issues on the bargaining table is also amenable to consideration by a body such as the CCMC. Once the difficult political decisions are made partially to devolve jurisdiction over the fishery or to agree to the principle of an elected senate with equal representation from all provinces, then the detailed work of building a compromise around the framework of these political decisions can be left to the expertise of the CCMC.

In brief, the post-Meech Lake era may see an increased role for fora such as the CCMC. It is highly unlikely that governments would devolve any final decision-making powers to such a body, but if the mandate of a CCMC-type organization were such that

> the committee members agree on facts, clarify problems, discuss memoranda submitted by members, but make no independent decisions, take no votes, exercise no executive powers as a committee, do not lobby as a body and do not bind their principals in any way,

then first ministers' authority would not be undermined and a cooperative forum would exist to develop consensual options. In such a era of greater cooperation where some contentious issues have been removed from the constitutional agenda, the possibilities for an effective, cooperative forum such as the CCMC are exciting.

The First Ministers' Conference: Chapters one and three pointed to the problems associated with the public, televised and highly politicized 1986 conference as well as

to the difficulties encountered in the 1981 FMC. The FMC is the most authoritative forum for constitutional negotiations and the forum where the fundamental political compromises must be made. It is, quite properly, very likely to remain so even under the new amending formula. Nevertheless, the draw-backs of relying too heavily on the FMC for finding answers to Canada's unanswered constitutional questions are several. Each of these draw-backs points to the need for fora that will supplement the FMC in order to make the constitutional reform process more effective and more open.

First, if the constitutional reform process is to move onto a second stage where the senate, fisheries, and the other concerns of various provinces and interest groups are addressed, bargaining fora with the time and energy required by these issues must be found. First ministers cannot devote themselves solely to the constitution as they have other, perhaps more pressing, responsibilities. Therefore, alternative fora acting under the direction and guidance of the first ministers must address negotiations over the specifics of constitutional reform if effective, informed negotiations are to be held and progress is to be made on the many outstanding items on the constitutional agenda.

Second, chapter three pointed to the limited access of outside groups to constitutional negotiations dominated by the FMC. As is indicated below in relation to the

Special Joint Committee of the House and Senate, calls for public participation are likely to be an inherent part of future constitutional reform, for it is difficult to justify the arbitrary limitation of public debate on constitutional matters when public hearings on matters ranging from ambulance services to labour legislation to securites regulation are a staple of legislative planning at the federal and provincial level. The SJC provided invaluable public input prior to the crucial November 1981 FMC, but public hearings following constitutional FMCs would at least provide the public with some forum to express its views directly regarding decisions that have already been made and thus would add some measure of legitimacy to what was described above as an elitist bargaining process. While chapter three argues that closed FMCs shielded from the glare of the television cameras are crucial to the free exchange of ideas, the avoidance of political posturing, and the ability of first ministers to compromise, the constitutional bargaining process must also be open and must appear to be open to public input. Thus, open fora that supplement the FMC are crucial to the quality and legitimacy of future negotiations.

Third, the 1982 amending formula requires the federal and provincial legislatures to ratify constitutional amendments. No longer is the mere agreement of the first ministers sufficient for constitutional reform. The incorporation of the views of caucus chairmen and even

opposition leaders may now, under certain conditions, become a consideration for first ministers. Such a broadening of the advice and the fora involved in supporting the first ministers' constitutional reform efforts—need not undermine the power of the first ministers in that process. Indeed, the integrity of the first ministers' meetings can best be maintained by encouraging the development of these trends. With broader sources of advice and the capability of closely directing subordinates as they draw up specific options with the benefit of public input, the first ministers will have the time and the privacy in conference to devote themselves fully to the difficult political compromises that are the foundation to any constitutional agreement. Indeed, the effectiveness of the First Ministers' Conference as the hub of the constitutional reform process may well be enhanced through the use of these supplementary fora in addressing the complex options available to the political decision-makers.

The Special Joint Committee of the Senate and House of Commons on the Constitution: The only forum providing for the direct participation of the public in the 1980-1982 patriation process was the Special Joint Committee. As chapter four indicated, the SJC had an important political and substantive impact on the patriation process for it not only focussed public attention on the wide-ranging support for the Charter, but the committee also heard appeals from a broad range of groups incorporating the suggestions of

many of those groups into significant substantive amendments to the Charter. Although its impact was immense and the Committee illustrates the important role interested groups can play in constitutional reform, these groups dealt almost exclusively with the "People's Package" of constitutional reform issues and did not address matters relating to the division of powers. Yet, this focus ought not to preclude the use of SJC-like hearings on matters such as fisheries jurisdiction and even senate reform. Each of these issues (and especially the first two) involves complicated claims that will directly affect individuals' rights and representation.

Given the need under the constitutional amending formula for the approval of the legislatures in constitution reform, committees of the legislature are likely to play an important role in examining proposed amendments and in soliciting direct public input on those matters in at least some, if not all, legislatures. One can envisage such committees as forming the much-needed public supplement to the closed FMCs described above. In sum, the future role of legislative committees in providing much-needed public access to the constitutional reform debate is a potentially important one under the new amending formula.

The Judiciary: Ironically, the least politicized and least "open" forum involved in the patriation process was also the most effective in resolving the disputes before it and

in laying the groundwork for compromise. If one regards constitutional reform as a conflict resolution process, then an independent and relatively apolitical body is crucial when the parties reach a bargaining impasse. In Canadian federalism the Supreme Court of Canada is that body. While this role may irk those who believe that the Court must stay out of the political decision-making process or it will lose its appearance of impartiality, Chapter Five points out that the judiciary can play a crucial role in Canadian federalism as the balancing mechanism in federal-provincial disputes. Its decision in the Patriation Case served as the perfect balance between Ottawa's view of Canadian federalism and that of the Gang of Eight. Critics note that the Court's decision went beyond a strict view of the law and entered the realm of convention, but the Court's supporters suggest that this brave decision-making was necessary if the judiciary was to fulfill its role as the balance of Canadian federalism.

Although the judiciary has received a great deal of attention in relation to its performance in interpreting the Charter, the impact of the new amending formula on the judiciary remains unclear and unexamined -- indeed, the Supreme Court is unlikely to ever again face a reference such as the Patriation Case. If the judicial branch of government is affected at all by the new amending formula, one might suggest that the formula clarifies the controversial area of constitutional law that led to the

Patriation Case and governments will have little need to appeal to the judiciary in regard to this or to related matters. Admittedly, Quebec's reference to the Quebec Court of Appeal and to the Supreme Court regarding its "historic" veto indicates that provinces dissatisfied with the amending formula and its operation in future amendments might conceivably appeal to the judiciary for the redress or public airing of their political grievances. Yet, the Supreme Court's remarkable decision in the Patriation Case succeeded in sending the parties back to the bargaining table to work out a political framework for the future resolution of their constitutional differences. By pointing the way to an amending formula, the Supreme Court probably made its job as the arbiter of disputes over the process of constitutional amendment redundant -- that may be the most meaningful compliment one can pay to its decision.

Summary: The institutional analysis above points to the need for a greater diversity in the fora that underpin the constitutional reform process. Given the challenges ahead, the need for institutions capable of supplementing the First Ministers' Conference is apparent. Fora modelled on the CCMC, but including when necessary the participation of "line departments" such as federal and provincial fisheries ministries or ministries dealing in native affairs, would harness the expertise of ministers and officials in the cooperative search for compromise solutions.

The role of the legislative branch of government is also crucial, as the SJC demonstrated. Providing direct access to the public may become an increasingly important function of legislative committees at the federal and provincial levels. It is not beyond the realm of imagination to envisage the formation of travelling legislative sub-committees on the constitution that would include interested M.P.s or M.L.A.s. Such committees would enrich the reform process immensely, if the 1980-1982 experience is a valid guide.

The organization of a more fully-developed constitutional hearings process is a matter that deserves greater study. The proliferation of committees and agencies supported in this concluding chapter must be subject to careful coordination so that the information and the proposals emerging from the reformed reform process are put to optimum use. The idea of a coordinating constitutional secretariat raised in chapter two might serve this purpose. As Maxwell Yalden suggested during the final days of the SJC's hearings

> we are long overdue for a federal-provincial permanent secretariat where you would have some of the best civil servants you can get full-time devoted to the particular problems that are coming across the federal-provincial desks of each government and developing as far as they can a consensus on the facts to send to their political masters.[11]

Most important, however, to the future success of the constitutional reform process is the political will demonstrated by the first ministers. No institutional

structures facilitating constitutional negotiations will overcome political deadlock at the level of the FMC -- the first ministers will continue to play a predominant role in constitutional negotiations. Yet, if the spirit of compromise apparent in the Meech Lake accord survives, the first ministers will benefit immensely from the support of a more fully developed constitutional reform process that harnesses the abilities of ministers, legislators and officials to the cause of constitutional reform.

Conclusion:

Despite the remarkable achievements of the Constitution Act 1982, the fundamental issues of Canada's duality and the yin/yang tension between centralization and decentralization remain with us and will remain with future generations of Canadians. Those tensions are a crucial part of what makes Canadian federalism such a challenging and special experiment. This thesis examined one campaign in the ongoing struggle to keep Canada whole.

Chapter One examined the principal schisms that divided the Canadian polity and the debate over constitutional reform. That analysis suggested the political will to compromise was missing in the early stages of the 1980-1982 patriation process. (Indeed, it arguably never existed for the government of Quebec.)

later chapters examined the process of constitutional reform, concluding that crucial aspects of the constitutional reform process themselves bear reforming, for the search for consensus was hindered by a flawed process that at times seemed to dissipate the political will to compromise. This concluding chapter has pointed out that while the lessons of the 1980-1982 constitutional negotiations are quite unique, constitutional reform through the traditional processes outlined above will continue to find a prominent place on the nation's political agenda. If future constitutional negotiators are to avoid the procedural difficulties of the 1980-1982 round of bargaining, the subject of this thesis deserves close examination.

Arthur Lower has suggested that "in every generation Canadians have had to rework the miracle of their political existence."[12] During the 1980-1982 constitutional negotiations, one generation of political leaders did battle and significantly reworked Canada's constitution. As this these words are printed, a new guard is carrying on those battles. If future generations are to find constitutional peace by putting an end to the battles of the past, if they are to bind up the wounds from those long constitutional campaigns and calmly "rework the miracle" of the peaceable kingdom that is Canada, they must learn from the mistakes and the successes of past engagements.

NOTES: CHAPTER ONE

1. Canada's most important constitutional document is the Constitution Act 1982. The British North America Act 1867 remains in Westminster, for what was once Canada's constitution is an act of the British Parliament. The Canada Act 1982, another Act of the British Parliament, severed Canada's constitutional ties to the United Kingdom and received royal assent on March 29, 1982. On April 17, 1982 the Queen proclaimed the Constitution Act in a ceremony on Parliament Hill and this Act (an Act of Canada's Parliament) contains Canada's principal constitutional documents. [See Appendix A for a chronology of the 1980-1982 round of constitutional reform.]
   The ten rounds of constitutional negotiation cited by the Supreme Court in the Patriation Case took place in 1927, 1931, 1935, 1950, 1960, 1964, 1971, 1978, 1979 and 1980. (Reference Re Amendment of the Constitution of Canada, 125 D.L.R. (3d) 103.)

2. Cairns (1983), p. 55; Whitaker (1983), p. 252; and Latouche (1983), p. 97.

3. Cairns (1979), pp. 176-177.

4. Gibbins (1983), p. 119.

5. Smiley (1983), p. 82.

6. Sabetti (1984), p. 32.

7. Former Minister of Justice Jean Chretien felt that Quebec's "only goal was to make our work fail" and he reports a conversation with Quebec's Claude Charron in which Charron reportedly said to Chretien "Jean, you know we are separatists. So how can we sign up for a new Confederation?" (Chretien, 1985: 174).
   Former Ontario Attorney-General Roy McMurtry has written that prior to the 1980 referendum "the Quebec government had its own agenda which clearly did not include any agreement on the Constitution."(McMurtry, 1982: 39). As for the period after the referendum, McMurtry argues that "it was inconceivable that Quebec could be a party to any compromise. The Referendum had been lost but the goal of an independent Quebec remained."(1982: 60). He suggests that the only reason Quebec joined the "April Accord" of the Gang of Eight was that "the Quebec government was quite convinced that it could never be accepted by Mr. Trudeau and therefore was a viable political risk."(1982: 61).

Former Saskatchewan Attorney-General Roy Romanow argues that "in the final analysis, the difference between Quebec's actions and those of the majority were their goals. Quebec's sole objective at this stage of the negotiations [the Novemeber 1981 conference] was to wreck Ottawa's plan for patriation."(1984: 265).
There are some -- including Rene Levesque in his Memoirs -- who claim that Quebec's profession of its intention to bargain in good faith was sincere.

8. See Richards and Pratt (1979) for an exposition of the concept of province-building and especially Chapter 11 for the constitutional implications of province-building policies in Sasktchewan and Alberta. (This book was one of the reasons for my decision to study political science at the University of Alberta.)

9. Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan et al., S.C.C., (1977) 6 W.W.R. and Central Canada Potash Ltd. et al. v. Government of Saskatchewan et al., S.C.C., (1978) 6 W.W.R..

10 See Government of Alberta (1978), pp. 7 and 12.

11 Canadian Intergovernmental Conference Secretariat (1980), p. 78.

12 Ibid., p. 94.

13 See Sabetti (1984), p. 32, for further development of the idea that the constitutional negotiation process encouraged governments to "hold-out." One can plausibly argue that in the September 1980 conference several delegations were structuring their negotiating positions so that they would have a "hold-out issue" with which to hold up the conference's search for unanimity. The two clearest examples of this approach were the manner in which Newfoundland demanded increased powers over offshore resources and British Columbia demanded senate reform. Given such tactics and the thrust of the federal government's Kirby memorandum, one might also argue that the federal government had already decided before the 1980 conference that the political-procedural difficulties of amendment in 1980 were such that unilateralism was the only realistic course if patriation was to become a reality.

14 Canadian Intergovernmental Conference Secretariat (1980), p. 762.

15 Ibid., p. 325. As Trudeau commented, "I am told that herring lay their eggs on kelp and you can't manage the herring without having a say in the kelp." He also stated that on this serious matter "some compromise may be possible, but we don't see it at the outset."

16 Ibid., p. 361.

17 Ibid, p. 201. "What we're calling concessions, in quotes, on the part of the federal government, does not go very far and in reality it may complicate matters rather than simplifying them."

18 Ibid., p. 150.

19 The federal government agreed that provisions relating to the Supreme Court be entrenched in the constitution; that an alternation between Chief Justices from the Civil Law system and the Common Law system be entrenched; that provincial agreement be constiutionally required before the Minister of Justice appoints a Supreme Court Justice; and that provinces receive the entrenched right to submit references directly to the Supreme Court. (Canadian Intergovernmental Conference Secretariat, 1980: 229-230.)

20 Ibid., pp. 905-906. Levesque was noting ". . . the distinct character of the people of Quebec which, with its French majority, constitutes one of the centers of the Canadian duality."

21 Ibid., p. 906 and p. 898.

22 The Trudeau/Levesque controversy was not the only issue dividing the parties on the preamble. For British Columbia's Garde Gardom, the legalistic nature of the draft preamble was unappealing: "it reads more like a warranty for a household commodity than a preamble to the constitution of one of the greatest nations in the world. . . . What we have today would be a very, very difficult thing, Mr. Prime Minister, to take into a High school and get the team up, I would be frank with you." Ontario agreed that the preamble should be more inspirational and argued for the inclusion of God in the text.

23 Quebec objected to the Charter's language provisions and pointed to the dangers of "government by judges;" Ontario argued against the application of s. 133 language provisions and sought a "where numbers warrant" provision to limit its obligations to its French minority population; Premier Blakeney made an eloquent argument that "Canadians ought not to have taken away from them the fundamental right to

participate in political choices" as Canada was founded on the resolution of conflict through legislated compromise, not through an adversarial rights system; and British Columbia endorsed Manitoba's stand. (Canadian Intergovernmental Conference Secretariat, 1980: 473-692).

24 Ibid, p. 1076-1077.

25 Ibid, p. 1080.

26 Ibid, p. 1053 and p. 1086.

27 Ibid, p. 1001. "Mr. Trudeau's conception after thirteen years of power seems very clear to me. It is that of centralization, of a central government whose attitude itself is one of domination . . . and even goes so far as to be authoritarian."

28 Ibid, p. 1073.

29 Ibid, p. 1045.

30 Ibid, p. 1083.

CHAPTER TWO

1. Chretien flew to Toronto for dinner with Premier Davis on May 21. He met Premier Lyon for breakfast on May 22, joined Premier Blakeney for lunch, Premier Lougheed for tea and supped with Premier Bennett. On May 23 he flew from Victoria to take tea with Premier MacLean and he dined with Premier Buchanan. On the final day of his trip he visited Premiers Peckford and Hatfield. Premier Levesque refused to meet with Chretien.

2. The 1980 CCMC was a revived version of the 1978-1979 CCMC. As Chapter two indicates, both the original and the 1980 versions of the CCMC were modelled on the Continuing Committee on Financial and Economic Matters. However, unlike their model, the CCMCs were not designed to become a permanent body -- they were ad hoc committees established to examine specified constitutional issues. The twelve agenda items discussed during the summer of 1980 concerned: resource ownership and interprovincial trade; offshore resources; equalization and regional disparities; powers over the economy; communications; family law; the senate; the Supreme Court; patriation and the amending formula; the Charter of Rights; the statement of principles; and fisheries.

3. Roy Romanow quoted in Shepherd and Valpy, p. 42.

4. Simeon (1972) and Adie and Thomas both refer to cooperative federalism as a "cliche." Simeon writes that the concept "is vague and open to many interpretations," preferring the term "collaborative." (1972: p. 173) Black argues that cooperative federalism's "connotations . . . are too many and ambiguous to be helpful in analytic discussion far removed from the campaign platform."(1975: 64) He prefers to call cooperative federalism "administrative federalism" and pragmatically associates it with such things as the development of tax hamonization and conditional grant programs.(1975: 63-112)
Pepin, on the other hand, emphasizes the more idealistic qualties associated with cooperative federalism, stating that cooperative federalism

> calls on the virtues which have given birth to civilizations, the sense of human brotherhood, Christian charity, the spirit of tolerance, the art of compromise, the desire to build collectively great works, the hope of making a better world where peace and justice shall prevail.(Quoted in Meekison, 1968: 322)

Smiley prefers to call cooperative federalism "joint federalism", or "consultative federalism" (Smiley, 1964: 373) and states that "cooperative federalism is in essence a series of pragmatic and piecemeal responses by the federal and provincial governments to the circumstances of their mutual interdependence."(Smiley, 1971: 320) In sum, the concept of cooperative federalism is a complex one that includes both pragmatic and idealistic connotations. The definition used in this thesis centers on the idea that cooperative federalism involves extensive consultation between both levels of government in formal and informal settings primarily at the ministerial and officials' level.

5. Quoted in Simeon (1972), p. 140.

6 Ibid.

7. Ibid.

8. The Secretariat of the Constitutional Conference lived on through The Canadian Intergovernmental Conferences Secretariat, established in 1973. (See Kenneth Kernaghan, "Federal-Provincial Administrative Liason," in Public Administration in Canada, Kenneth Kernaghan (ed) (Toronto: Methuen, 1977).)

9. Meekison (1971), p. 241.

10 Simeon (1972), p. 135.

11 McMurtry, p. 61.

12 Ibid., p. 30.

13 See Smiley (1964) and Adie and Thomas, p. 234.

14 Smiley (1964), p. 378.

15 Simeon (1972), p. 135.

16 Adie and Thomas, p. 235.

17 Ibid.

18 McMurtry, p.42. Sheppard and Valpy confirm that

> genuine friendships grew out of that summer -- Dick Johnstons's daughter spent a few weeks with Tom Wells's family in Toronto and with the Chretiens in Shawinigan learning French... But the friendships were also based on a shrewd assessment that the connection would be useful eventually.(Sheppard and Valpy, p. 45.)

19 The personal relationship established between Chretien and Romanow, the joint chairmen of the CCMC, was central to the final consitutional agreement of November 1982. The night of the Supreme Court's patriation reference, Chretien invited Romanow and McMurtry to his home in Ottawa for a beer and the three discussed the need to continue negotiations as well as potential area of compromise. (Shepherd and Valpy, p. 252) They had held similar discussions, also "over a few beers" in Cambridge, England earlier in the year.(McMurtry, p. 51.) The afternoon before the final agreement, Romanow and Chretien held the "kitchen meeting" that provided the framework for the final breakthrough in the constitutional negotiations. Not surprisingly, in view of their shared experiences during the summer of 1980, they called McMurtry into the kitchen pantry to help "sell" their proposal. This trio had clearly formed a working relationship that lasted beyond the summer roadshow.

20 Shepherd and Valpy, p. 44.

21 Ibid., p. 44.

22 Romanow et al. (1984), p. 23.

23 McMurtry, p. 42.

24 Shepherd and Valpy, p. 44.

25 Romanow (1982-1983), p. 54.

26 Ibid., p. 44.

27 One might note that these issues are less political than the other issues on the agenda for reform. Fisheries jurisdiction, resource ownership, powers over the economy, communications, the amending formula, the Charter, and the statement of principles were all matters involving the redistribution of power from one level of government to the other or requiring the articulation of a political consensus.

28 McMurtry, p.42.

29 Romanow et al. (1984), p. 84.

30 Sheppard and Valpy, p. 53.

31 Shepherd and Valpy, p.42.

32 Romanow et al. (1984), p. 94.

33 Ibid.

34 See Romanow (1982-1983).

35 Romanow et al. (1984), p. 94.

36 Ibid., p. 237.

37 Ibid.

38 See Meekison (1971), p. 238 and Simeon (1972), p. 88-89.

39 Smiley in Meekison (1971), p. 323.

40 Adie and Thomas, p. 242

41 Trudeau's espousal of "participatory democracy" during the 1968 federal election is perhaps indicative of this demand.

42 Smiley in Meekison (1971), p. 325.

43 Ibid.

CHAPTER THREE

1 Chretien (1985), p. 175.

2 Simeon (1972), p. 5.

3 Stevenson, p. 190.

4 Edward McWhinney, Canada and the Constitution 1979-1982, (Toronto: University of Toronto Press, 1982).

5 Smiley (1980), p. 98.

6 Sheppard and Valpy, p. 180.

7 McMurtry, p. 43.

8 Ibid., p. 42.

9 Sheppard and Valpy, p. 288.

10 This conclusion does not necessarily rule out the possibility of a different compromise -- Premier Peckford was prepared to put forward another proposal when the conference appeared to be on the brink of failure. Yet, one wonders if such a proposal would have met with the success of the Chretien-Romanow proposal. This doubt is based on the important role played by the CCMC ministers in convincing their reluctant and suspicious principals to moderate their positions. According to Chretien's account of proceedings on the penultimate day, Roy Romanow had difficulty in convincing Premier Blakeney to accept "the kitchen compromise" and the latter therefore failed to present a "Saskatchewan proposal" that afternoon -- the conference was adjourned with "a mood of failure and gloom in the air." (Chretien, 1985: 184). Most notably, Jean Chretien struggled to sell his compromise to Prime Minister Trudeau and a doubtful inner cabinet of senior ministers at 24 Sussex Drive on the eve of the conference's final day. While Premier Peckford was prepared to put forward another proposal before the end of the conference, the difficulty encountered by the CCMC ministers in selling a proposal that they had themselves created indicates the difficulties Peckford would have encountered in selling a deal to the federal government.

11 Simeon (1972), p. 131.

12 Gerald Caplan, "Openness Can Defeat Productivity" in The Financial Post, December 22 1986, p. 6.

13 Sheppard and Valpy, p. 42.

14 McMurtry, p. 61.

15 Simeon (1972), p. 129.

16 Whitaker (1983), p. 240.

17 Simeon (1982), p. 152.

18 This effect may have been intentional for it is easily conceivable that these memoranda were leaked with the prime minister's approval in order to convince the provinces that the September 1980 First Ministers' Conference was the "last chance" conference of the consitutional negotiations.

19 This impression was gained from an interview with Michael Kirby, June 1984. Jean Chretien's modus operandi was to seek possible areas of compromise from the provinces and then "sell" the Prime Minister on those compromises. Thus, Chretien suggested to the provinces that the federal government's referendum proposals were inappropriate because of his own opposition to the FPRO and PCO -sponsored idea. The provinces agreed with Chretien and thus strengthened Chretien's hand in the federal government's internal discussions on the constitution.

20 Romanow et al., p. 95.

21 Sheppard and Valpy, p. 290

22 Adie and Thomas, p. 247.

23 Smiley (1980), p. 113.

24 Stevenson (1982), p. 193.

25 Smiley (1980), p. 113.

26 Adie and Thomas, p. 242.

27 Audrey Doerr, "Public Administration: federalism and intergovernmental relations" in Kernaghan (ed.) Canadian Public Administration: Discipline and Profession, (Toronto: Butterworths, 1983), p. 133.

28 Smiley (1980), p. 274.

29 Ibid., p. 274.

30 Simeon (1972), p. 26-30.

31 Smiley (1980), p. 276-277.

32 Simeon (1972), p. 31.

33 Romanow (1981), p. 88.

CHAPTER FOUR

1. This paragraph is partly based on Cairns' analysis in Cairns (1983), p. 34. Other provinces, notably Ontario, were concerned at the prospect of the federal government imposing duties relating to the education of francophone minorities.

2. Ibid., p. 32.

3 Ibid., p. 31-32.

4. Milne (1986), p. 40.

5. Prime Minister Trudeau, quoted in Milne (1986), p. 27.

6. House of Commons Debates, April 15, 1980 and April 2, 1981 (Vol. 124, 1st Session, 32nd Parliament, p. 8880).

7. Quoted in Romanow et al, p. 177.

8. Milne (1986), p. 70.

9. See Sheppard and Valpy, pp. 102 and 120. Romanow et al report that "of a total of twenty-two amendments proposed by the members of the Progressive Conservative caucus, seven were accepted by the government members and were reflected in the final report, while only two of the forty-three moved by the NDP members were accepted. The chronicle of the constitutional debate is replete with ironies and contradictions of which one is that the party which so adamantly and forcefully opposed the resolution played such an important part in shaping its formation."(p. 113).

11 Another ironic situation for the Progressive Conservatives: after successfully arguing for popular participation in the SJC, the party argued against the referendum mechanism in the amending formula.

12 Milne (1982), p. 224.

13 Ibid., p. 225.

14 Quoted in Sheppard and Valpy, p. 142.

16 Sheppard and Valpy, p. 138.

17 Ibid., p. 158.

18 Romanow et al, p. 248.

19 See Cairns (1982), p. 41.

20 See for example Romanow et al, p. 65.

21 See Milne (1982), p. 87 for more detailed development of this idea.

23 "Constitution Express" leaders eventually boycotted the committee hearings as did the National Indian Brotherhood. Nonetheless, the Native Council of Canada and the Inuit Committee on National Issues did make presentations which led to the committee's strengthening of s. 25 and the addition of s. 34 recognizing and affirming "aboriginal and treaty rights of the aboriginal people of Canada." The latter section became s. 35.1 of the final Charter after public pressure helped to restore a slightly altered section (recognizing and affirming "existing" rights) one week after the original section failed to survive the final night of federal-provincial bargaining.

24 Sheppard and Valpy, p. 138. This phenomenon arose in spite of the failure of the Charter to recognize the requests from a British Columbia interest group that the right to consume hallucinogenic mushrooms be enshrined in the Charter; the request by two University of Toronto professors for the enshrinement of trees' rights so that Canada would be protected from deforestation; the suggestion that the prime minister's term be limited to five years; and a series of other requests ranging from a ban on capital punishment to the right to bear arms. (See Sheppard and Valpy, pp. 137-138).

25 According to Chretien, women's rights provisions were dropped at Blakeney's insistence while aboriginal rights provisions were dropped at Alberta, British Columbia, and Saskatchewan's request. Section 34.1 became s. 35.1 and was changed to guarantee "existing" aboriginal and treaty rights. Section 15 equality rights became subject to the s. 33 over-ride clause and s. 28 of the federal government's draft proposals was restored in the face of public protest after being dropped in the final evening of the November 1981 negotiations.

26 House of Commons Debates, March 21, 1981, (Vol. 124, 1st Session, 32nd Parliament.)

CHAPTER FIVE

1 Reference Re Amendment of the Constitution of Canada, (Nos. 1, 2 and 3), (1982) 125 D.L.R.(3d) 437.

2 Stevenson (1982), p. 185.

3 Wheare (1966), p. 26.

4 Quoted in McWhinney (1982), p. 70.

5 Reference Re Amendment of the Constitution of Canada, (No. 1), (1981) 117 D.L.R.(3d) 22.

6 Reference Re Amendment of the Constitution of Canada, (No. 3), (1981) 120 D.L.R.(3d) 437.

7 Reference Re Amendment of the Constitution of Canada, (Nos. 1, 2 and 3), (1982), 125 D.L.R.(3d) 45 and 48.

8 Ibid., p. 45.

9 Ibid., p. 125-126.

10 Ibid., p. 104 and 108.

11 Ibid., p. 106.

12 Wheare (1961), p. 22.

13 McWhinney (1982), p. 88.

14 Judging from the various governments' responses, the Court's decision was perfectly balanced. Both sides claimed victory: the federal government emphasized its legal right to proceed unilaterally while the provincial governments pointed to the "unconstitutionality" of unilateralism and claimed that at least one more conference was inevitable. The Court's decision may also have reflected a desire to favour neither the federal nor the provincial side of the question. Snell and Vaughan argue that after a string of cases in favour of the federal government's arguments, from the Anti-Inflation case to Saskatchewan's defeats in the Central Canada Potash and Canadian Industrial Gas and Oil cases, "members of the Court were conscious of the invidious position in which they had been placed, and their judgment was a reflection of the clarity of that understanding."(Snell and Vaughan, 1985, p. 249.)

15 Russell (1982), p. 4.

16 An argument for the supremacy of the judiciary in Canada might grow out of this proposition: as Mr.

Justice Hall once said, "We are under a constitution, but the Constitution is what the judges say it is." (Quoted in Weiler (1974), p. 155.) Indeed, judicial review has been accepted in Canada since Confederation. The concept of judicial review in Great Britain originated in the early 1600s. As Sir Edward Coke reminded James II, even the King stands "under God and the Law." (Quoted in McWhinney (1981), p. 167.) This power eventually extended to Britain's colonies through the power of the Judicial Committee of the Privy Council. The JCPC's interepretation of ss. 91 and 92 of the then British North America Act had significant consequences for the division of powers and the shape of Canada's federal system: it is an obvious example of the long-standing importance of judicial review in Canadian federalism.

17 Stevenson (1982), p. 185.

18 McWhinney (1982), p. 87.

19 Ibid., p. 88.

20 In Brown v. Board of Education (1954) 347 U.S. 483, the Court interpreted the fourteenth amendment of the U.S. Bill of Rights broadly to enforce a lower court decision regarding the desegregation of schools. In order to enforce this decision against the obstructionism of the local school board, the Court imposed a detailed and controversial busing program. In Baker V. Carr (1962) 369 U.S. 186 and Reynolds v. Sims (1964) 377 U.S. 533 the Court required, in the face of obstruction by rural legislators, that state legislatures be fairly apportioned between rural and urban representation.

21 Hogg (1985), p. 655.

22 Mallory (1965) in Meekison (1977), p 1.

23 This definition of "polticial cases" may be too narrow as it sets aside certain cases that significantly affect the political balance between the federal and provincial governments without involving direct confrontation in the courts. Cases involving language rights in Manitoba and Quebec, for example, have strengthened the federal government's position but have proceeded without Ottawa's direct intervention.

24 Weiler (1974), p. 170. Weiler would have perhaps been surprised by the participation of an elected politician, Ontario Attorney-General Roy McMurtry, in arguments before the Supreme Court. This gave the Court the opportunity to question a politician about

delicate matters directly, and Justice Martland took the opportunity to ask McMurtry if his arguments would give the federal government the power to impose bilingualism on Ontario or abolish a province altogether. McMurtry agreed that if his argument in favour of unilateralism were "carried to its ultimate conclusion," the federal government "would be able to wipe out a province." [Wood (1985), p. 216.]

25 Black and Cairns (1966) in Meekison (1968), p. 32.

26 Stevenson (1982), p. 185.

27 A-G. Manitoba v. Manitoba Egg and Poultry Association et al., (1971) S.C.R 689.

28 A-G. for Canada v. A-G. for Ontario, (1937) A.C. 355.

29 Canadian Industrial Gas and Oil v. Saskatchewan, (1978) 2 S.C.R. 545; and Central Canada Potash Co. v. Saskatchewan, (1978) 1 S.C.R. 42.

30 See footnote 32.

31 Russell (1982), p. 4.

32 Quoted in Black and Cairns (1966), p. 32.

33 Weiler (1974), pp. 174 and 175.

34 Interview, Harvard Law School, 19 July 1984.

35 Ibid. One might note that this chapter is not arguing for the role of the judiciary as the sole umpire in Canadian federalism. (Indeed, during the 1981 FMC Prime Minister Trudeau suggested that a referendum be held on the two proposed constitutional packages in order to break the deadlock between the Gang of Eight and those supporting the federal government's constitutional position. Such a device might be another approach to breaking a political deadlock.) Rather, this chapter argues that the courts have an important obligation as the branch of government charged with resolving disputes over Canada's federal constitution.

CHAPTER SIX

1. The unresolved issues on the 1980 bargaining agenda were: offshore resources, powers over the economy, communications, family law, the senate, the Supreme Court, the statement of principles and fisheries. Two outstanding issues from the 1980 constitutional agenda are currently at the top of the nation's

constitutional reform agenda: on April 30, 1987 the provinces and the federal government tentatively agreed to examine questions relating to senate reform and to jurisdiction over the fishery in the coming year. Another unanswered constitutional question is the difficult question of how to recognize aboriginal rights.

2. Scott (1986), p..105.

3. Ibid. Former Prime Minister Trudeau has a different perspective on Quebec's exclusion, saying in an interview on CBC's Morningside that "Levesque gambled that he could stop the whole thing" during the 1981 First Ministers' Conference and lost his gamble. (Morningside, first hour, May 29, 1986.) See Note 7, Chapter One.

4. Romanow (1984), p. 214. Alberta proposed a slightly modified s. 35 that included a recognition of only the "existing" aboriginal rights, as noted in Note 23, Chapter Four. Two other sections were added shortly after the November agreement -- sections 40 and 59 -- in an fruitless attempt to gain Quebec's support for the accord.

5. Banting and Simeon (1983b), p. 349.

6. Cairns (1983), p. 46.

7. Simeon (1972), p. 145.

8. This describes the mandate of the Continuing Committee of Ministers on Fiscal and Economic Matters. See Kear (1968), pp. 311-312.

9. Re Objection by Quebec to Resolution to Amend the Consitution, [1982] 2. S.C.R. 793.

10 Cairns (1983), p. 47.

11 Special Joint Committee of the House and Senate on the Constitution, No. 34, pp. 74-75.

12 Lower (1946), p. 98, quoted in Romanow (1982), p.98.

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The following individuals agreed to be interviewed for this thesis and their insights proved to be most valuable, even if those insights were not quoted directly in the text of this work:

Mr. Justice Barry Strayer
Mr. Roy Romanow
Mr. John Roberts
Professor Paul Weiler
Professor William Lederman
Professor John Whyte
Senator Michael Kirby

APPENDIX A

Chronology of 1980-1982 Constitutional Negotiations

1980

May 20 — Quebecers vote by a margin of 59.6 per cent to 39.4 per cent to deny the separatist Parti Quebecois the mandate to negotiate sovereignty-association.

May 21 — Jean Chretien, Minister of Justice and one of the leading voices in the "Non" campaign in Quebec, sets off on a cross-Canada tour to meet with provincial premiers and begin the process of renewing federalism as promised by the federalists in the referendum campaign.

June 9 — The first ministers meet and establish the agenda for the Continuing Committee of Ministers on the Constitution to consider over the summer in preparation for a First Ministers' Conference in September.

June 17 — Preparatory CCMC meeting.
July 8-11 — Montreal CCMC meeting.
15-18 — Toronto CCMC meeting.
22-24 — Vancouver CCMC meeting.

Aug. 20 — "Pitfield memorandum" referring to the possibility of federal government unilateralism leaked during the annual Premers' conference.

Aug. 26-29 — Ottawa CCMC meeting.

Sept. 8-13 — The First Ministers' Conference begins; Quebec circulates copies of the "Kirby memorandum" detailing, among other matters, further plans for unilateralism. Friday 12 September is spent in closed session, but no agreement emerges from the FMC and Trudeau states that the federal government will exert its leadership.

Oct. 2 — Prime Minister Trudeau announces that the federal government will proceed unilaterally with a patriation package his government presents to Parliament.

Nov. 6 — The Special Joint Committee of the Senate and House of Commons on the Constitution opens its deliberations.

Dec. 2 — Hearings extended until February 6, 1981.

1981

Jan. 12 Clause by clause analysis of Charter in SJC hearings with Chretien.

Feb. 13 SJC submits its report to Parliament.

April 8 End to Conservatives' filibuster agreed to -- in exchange for awaiting the decision of the Supreme Court on the patriation case, the Liberals gain an end to the filibuster and an agreement to limit debate following the Court's decision.

April 16 The "Gang of Eight" -- Alberta, B.C., Manitoba, Newfoundland, Nova Scotia, Prince Edward Island, Quebec, and Saskatchewan -- sign an accord which, among other things, includes an amending formula that removes Qeubec's traditional veto.

Sept. 28 Supreme Court judgment handed down: unilateralism is legal but breaches convention and in that sense is unconstitutional. Substantial consent, not unanimity, is the conventional requirement for this type of constitutional amendment.

Nov. 2-5 First Ministers' Conference: concludes with the agreement of nine provinces and the federal government to a patriation package.

Dec. 2 House of Commons approves patriation bill that includes the re-insertion of clauses on aboriginal and women's rights.

1982

March 29 Royal assent given to the Canada Act -- an Act of the United Kingdom Parliament.

April 17 The Queen proclaims the Constitution Act, 1982.

See the Chronology in Sheppard and Valpy's The National Deal for greater detail.

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