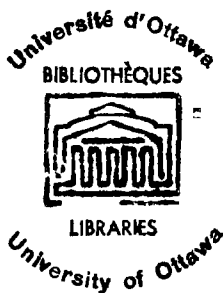


THE CONSTITUTIONAL CONFERENCE  
(1968 - 1971)  
AND THE INSTITUTIONALIZATION OF THE  
CANADIAN FEDERAL BARGAINING PROCESS

by Valerie Dufour

Thesis presented to the School of  
Graduate Studies of the University  
of Ottawa as partial fulfillment  
of the requirements for the degree  
of Master of Arts (Political Science)



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## ACKNOWLEDGMENTS

This thesis was prepared under the supervision of Professor James R. Hurley of the Department of Political Science in the Faculty of Social Sciences of the University of Ottawa.

## CURRICULUM STUDIORUM

Valerie Dufour was born September 9, 1943 in Montreal, Quebec. She received an Honours Bachelor of Social Sciences (Political Science) degree from the Faculty of Social Sciences of the University of Ottawa in May 1964.

## TABLE OF CONTENTS

### Chapter

|                                                                    | <u>Page</u> |
|--------------------------------------------------------------------|-------------|
| INTRODUCTION                                                       |             |
| I. A THEORETICAL FRAMEWORK                                         |             |
| 1. Riker's definition of federalism                                | 1           |
| i. The original bargain                                            | 2           |
| ii. The conditions for survival<br>of the bargain                  | 3           |
| iii. A critique                                                    | 8           |
| 2. The dimensions which should be added                            | 10          |
| i. Federalism is not static                                        | 10          |
| ii. The concept of persistence                                     | 13          |
| iii. David Easton's model of a<br>political system                 | 15          |
| iv. Bargaining in the Easton model                                 | 19          |
| v. Conclusion and hypothesis                                       | 22          |
| II. THE HISTORICAL CONTEXT                                         |             |
| 1. The initial bargain in Canada                                   | 26          |
| 2. The finality of the Confederation<br>bargain                    | 32          |
| 3. Cracks in the wall                                              | 37          |
| 4. The development of the<br>intergovernmental meeting             | 39          |
| 5. The context of bargaining today                                 | 51          |
| III. THE CONSTITUTIONAL CONFERENCE - 1                             |             |
| 1. Its origin and on-going nature                                  | 53          |
| 2. The structures through which the<br>bargaining took place       | 56          |
| i. The Constitutional Conference<br>itself - the political masters | 57          |
| ii. The Continuing Committee of<br>Officials                       | 60          |
| iii. The Sub-Committees                                            | 60          |
| iv. The Committees of Ministers                                    | 61          |
| v. Ad hoc arrangements                                             | 62          |
| vi. The Secretariat                                                | 63          |
| 3. The function - Constitutional Review                            | 64          |

## TABLE OF CONTENTS

|                                                                                              | <u>Page</u> |
|----------------------------------------------------------------------------------------------|-------------|
| IV. THE CONSTITUTIONAL CONFERENCE - 2                                                        |             |
| 1. Planning the review                                                                       | 65          |
| 2. The priority subjects for the period<br>February 1968 to September 1970                   | 69          |
| i. Official Languages                                                                        | 70          |
| ii. Fundamental Rights                                                                       | 73          |
| iii. The Reform of Institutions<br>Linked to Federalism                                      | 76          |
| a) The Judiciary                                                                             | 76          |
| b) The Senate                                                                                | 78          |
| c) The National Capital                                                                      | 79          |
| iv. The Distribution of Powers                                                               | 79          |
| a) The taxing powers                                                                         | 81          |
| b) The spending power                                                                        | 82          |
| c) Income security and<br>social services                                                    | 82          |
| d) Capital markets and<br>financial institutions                                             | 83          |
| e) Environmental management                                                                  | 84          |
| f) Canadian interprovincial<br>marketing                                                     | 84          |
| g) Other items                                                                               | 85          |
| v. Regional Disparities                                                                      | 86          |
| vi. The Amending Formula and<br>Provision Arrangements                                       | 88          |
| vii. Mechanisms of Federal-<br>Provincial Relations                                          | 89          |
| 3. The Drive for Early Constitutional<br>Changes                                             | 91          |
| V. AN ANALYSIS OF THE BARGAINING PROCESS                                                     | 97          |
| SUMMARY AND CONCLUSIONS                                                                      | 110         |
| BIBLIOGRAPHY                                                                                 | 113         |
| Appendix                                                                                     |             |
| 1. CONCLUSIONS OF THE CONSTITUTIONAL<br>CONFERENCES                                          | 123         |
| 2. EXTRACT FROM COMMUNIQUE, FEDERAL-<br>PROVINCIAL CONFERENCE, OTTAWA,<br>MAY 23 TO 25, 1973 | 170         |

## TABLE OF CONTENTS

|                                                                                                                                                         | <u>Page</u> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 3. <u>ABSTRACT OF THE CONSTITUTIONAL<br/>CONFERENCE (1968-1971) AND THE<br/>INSTITUTIONALIZATION OF THE<br/>CANADIAN FEDERAL BARGAINING<br/>PROCESS</u> | 171         |

## LIST OF DIAGRAMS

## Diagram

|                                                                                                                                                                                      |    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| 1. A Dynamic Response Model of a<br>Political System                                                                                                                                 | 16 |
| 2. A Dynamic Response Model of a<br>Political System Modified to<br>Illustrate the Process leading<br>to the Authoritative Allocation<br>of Values in the Canadian<br>Federal System | 20 |
| 3. The Structure of the Constitutional<br>Review Process                                                                                                                             | 58 |

## INTRODUCTION

The general object of this study is to provide a theoretical and conceptual overview of the process of intergovernmental consultation and bargaining and how it has permitted the Canadian federal political system to adapt and persist. The specific object of the paper will be to demonstrate why and how the Constitutional Conference, in its work between 1968 and 1971, marks the turning point in 100 years of structural evolution and bargaining in the Canadian federation.

David Easton in his book, A Framework for Political Analysis, says that "the task of theory is to extend the frontiers of knowledge and not simply to codify what we already know"<sup>1</sup>. It is in this spirit that this study is being undertaken.

In embarking on a study such as this, one must recognize that a wide variety of approaches to the examination of federalism have been put forward. K.C. Wheare approached the subject in institutional terms<sup>2</sup>;

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1 David Easton, A Framework for Political Analysis, Englewood Cliffs, N.J., Prentice-Hall Inc., 1965, p. 91., hereinafter Framework.

2 K.C. Wheare, Federal Government, 4th Edition, New York, Oxford University Press, 1964, 266 pp.



## INTRODUCTION

W.S. Livingston's "instrumentalities" were part of a more sociological approach<sup>3</sup>; K.W. Deutsch and his colleagues advanced nine essential conditions<sup>4</sup>; C.J. Freidrich saw federalism as a process<sup>5</sup>; and W.H. Riker introduced the concept of a political bargain<sup>6</sup>.

The aim of this paper is to borrow from these authors the elements of a new definition of federalism, and concentrating on the interrelationships between the two main orders of government, to analyse "structural regulators" as a major factor in the evolution of Canadian federalism.

Starting from K. C. Wheare's classical definition of federalism<sup>7</sup>, Canadian federalism will be viewed as an

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3 W.S. Livingston, Federalism and Constitutional Change, Oxford, Clarendon Press, 1956.

4 K.W. Deutsch et al, Political Community and the North Atlantic Area, Princeton, Princeton University Press, 1957, p. 58.

5 C.J. Freidrich, Trends of Federalism in Theory and Practice, New York, Praeger, 1968.

6 W.H. Riker, Federalism, Origin, Operation, Significance, Boston, Little, Brown and Company, 1964, pp. XVII - 169.

7 Wheare, Op. cit., p. 10: "By the federal principle I mean the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent".

## INTRODUCTION

open-ended bargain, originally struck in 1867 which has evolved and changed since then, largely by extra-constitutional bargaining processes.

The concept of federalism as a bargain is taken from W.H. Riker in his book, Federalism, Origin, Operation, Significance<sup>8</sup>. His definition will be outlined and criticized in the first chapter. The concept of inter-governmental consultation will also be measured against the theory of the political system developed by David Easton in his books, A Framework for Political Analysis<sup>9</sup> and A Systems Analysis of Political Life<sup>10</sup>, with particular reference to his theories regarding "persistence", "structural regulators", "gatekeepers" and "communications channels".

Chapter two will related the theory in Chapter one to the Canadian situation and trace briefly the evolution of intergovernmental consultation from 1867 when formal exchanges between the central government and the provinces were channeled through the Lieutenant-Governor up to the Constitutional Conference established in 1968.

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8 See footnote 6 of this Chapter.

9 See footnote 1 of this Chapter.

10 David Easton, A Systems Analysis of Political Life, New York, John Wiley & Sons, 1965, hereinafter Systems.

## INTRODUCTION

A two-pronged description of the Constitutional Conference will occupy Chapters three and four. In the former the origin, structure, and on-going nature of the Conference will be outlined. The latter chapter will describe the substance of the review of the Constitution and the approach to this study adopted by the participants on the basis of the documents made public during the review.

Chapter five will be an analysis of the process of bargaining as it applies to the Conference. What status does bargaining have in the federal political system? Is it a legitimate process in a federation? Is it a proper response to overloading of demands on the political system? Can it be institutionalized as a structural regulator or as a channel between the total external environment and the political decision-making and decision-implementing system? The object of this last question will be clearer once David Easton's systems model of political life has been laid out.

A number of terms have become popularized in the Canadian political setting. To avoid misunderstanding in this paper, the meaning of certain terms will be as follows: federal government means central government or Government of Canada; the Canadian political system

## INTRODUCTION

means the federal government and the ten provincial governments taken together; the leader of the federal government and the leaders of the ten provincial governments will be referred to collectively as the First Ministers or the Prime Minister and Premiers.

## CHAPTER I

### A THEORETICAL FRAMEWORK

#### 1. Riker's definition of federalism

W.H. Riker in his book Federalism, Origin, Operation, Significance<sup>1</sup> is basically concerned with identifying how federations are achieved and maintained. In his view federation is the main alternative to empire as a means for consolidating large territories. To him, the essential institutions of federalism are a government of the federation and one for each of the constituent units, in which each kind of government has the authority to make one or more decisions independently of the other. Federations will be centralized or peripheralized according to the degree to which the decision-making power is allocated to one or the other order of government.

In Mr. Riker's view, a federation is centralized if the government of the federation has and is understood to have greater influence over the affairs of the country and the people as a whole than do all the member governments. If it has this influence, it tends to acquire more; but because of the guarantees to the constituent units, this tendency does not lead inevitably to unitary government. Riker places Canada in this general class of

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1 Riker, Op. cit.

## A THEORETICAL FRAMEWORK

centralized federalism.

The first part of Mr. Riker's book deals with why or when federations are created; the second with what maintains such systems afterwards. In his early chapters, the author adds a new definition of federalism to the many which exist. Claiming to be primarily concerned with the political aspects of federalism he describes it as

a bargain between prospective national leaders and officials of constituent governments for the purpose of aggregating territory, the better to lay taxes and raise armies<sup>2</sup>.

### i. The original bargain

Assuming that bargains are only struck when the parties are willing to make them, Mr. Riker suggests that certain conditions must be present which predispose the parties to favour the creation of a federation. He refers to two predispositions and hypothesizes that they are always present in the federal bargain and that each is a necessary condition for the creation of a federation.

The first of these is the expansion condition whereby the politicians offering the bargain desire to expand their territorial control but are unwilling to do so by the use of force. Instead, they offer concessions

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2 Ibid., p. 11

## A THEORETICAL FRAMEWORK

to the leaders of other prospective constituent units, proposing federation as the only feasible means to achieve their mutual ends. The politicians accepting the proposal are prepared to give up some of their independence for the benefits of union and the expansion of territory.

The second condition, the military one, is at the root of these gestures because federation is usually offered in response to an external military-diplomatic threat or opportunity to which the politicians offering union are unwilling or unable to respond alone. The desire for protection and participation by the politicians accepting the proposal of federation outweighs their desire for complete independence<sup>3</sup>.

Different motives lead all the parties concerned to being predisposed to strike the federal bargain. But the key to the bargain and its essence is that, to achieve federation, national leaders must offer concessions to prospective constituent units which will make federation attractive. The application to Canada of these conditions will form the first part of Chapter two.

- ii. The conditions for the survival of the bargain
- K.C. Wheare in Federal Government maintains that

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3 Ibid., p. 12

## A THEORETICAL FRAMEWORK

federal government is not appropriate unless the communities concerned have the capacity as well as the desire to form an independent general government and to form independent regional governments. In addition to proper motivation, what produces best the capacity for union is similarity of social, and particularly, political institutions. Some dissimilarity or divergence is allowable, but the capacity of states to form and work a federal union depends on an agreement to differ but not to differ too much<sup>4</sup>.

Taking a different approach, Riker declares that the conditions which led to the original bargain are not those which will ensure the survival of the bargain.

Survival, he points out, has two features:

- (1) centralization which allows the central government to exploit the advantages of a larger base for taxes and armies, and
- (2) maintenance of guarantees to the constituent units, which prevents the transformation of federalism to a unitary government<sup>5</sup>.

He suggests that it is the sum and spirit of the political institutions which provide for the keeping or the breaking of the bargain. Concentrating on centralized

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4 Wheare, Op. cit., p. 36-52.

5 Riker, Op. cit., p. 50.



## A THEORETICAL FRAMEWORK

federalism, he sees these as the "devices for overawing and overruling and the devices for moderating the overawing"<sup>6</sup>.

The four main institutions he examines are the United States Senate, the federal executive and judiciary which he calls "consciously constructed"<sup>7</sup> and the system of political parties and the direction and degrees of patriotism which he describes as "immutable constants"<sup>8</sup>.

Having surveyed their performance, he concludes that

- (1) administrative centralization and sharing have little to do with keeping the bargain;
- (2) the operation of political institutions, both those in the formal Constitution and those which have grown up outside of it, is what immediately maintains the bargain; and
- (3) standing behind these institutions is the popular sentiment of loyalty to (different levels of) government, which sentiment serves as a channel for development of centralizing or peripheralizing institutions<sup>9</sup>.

Their order of importance is (3), (2) and (1).

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6 Loc. cit., To Riker, centralized federalism exists when the central government cannot completely overawe the constituents, but it can keep them from overruling its own decisions. (See p. 86).

7 Ibid., p. 87 "those planned in the Constitution whether they worked out as planned or not".

8 Loc. cit.

9 Ibid. p. 111.

### A THEORETICAL FRAMEWORK

His main conclusion is that it is the decentralized structure of the political party systems which maintains federalisms, and protects the integrity of the constituent units.

The federal relationship is centralized according to the degree to which the parties organized to operate the central government control the parties organized to operate the constituent governments. This amounts to the assertion that the proximate cause of variations in the degree of centralization (or peripheralization) in the constitutional structure of a federalism is the variation in degree of party centralization.

There are strong a priori arguments for the validity of this assertion of a causal connection. Suppose the officials of the central government wish to centralize to a degree greater than the formal constitution of the federalism contemplates (i.e., suppose these officials wish to break the federal bargain in their favor). Suppose further that these officials are the leaders of a party that also operates constituent governments through subordinate leaders. That is, suppose the parties are highly centralized. Then, it would seem that all the constitutional and institutional prohibitions guaranteeing constituent governments against revision of the federal bargain would be ineffectual. If, on the other hand, the officials of the central government do not have partisan supporters operating the constituent governments, they may expect some opposition to their breaking of the guarantees. Whether or not the opposition is strong enough to maintain the bargain depends of course on a variety of institutional circumstances. But whether or not the opposition occurs at all seems to depend initially on a partisan difference between the central and constituent leadership.

There is even some empirical evidence supporting the notion that the degree of partisan unity between the constituent and central governments is closely related to changes in the federal relationship<sup>10</sup>.

## A THEORETICAL FRAMEWORK

In measuring Canada against his theory on the conditions for survival of the federal bargain, he says that Canadian federalism is less centralized than the U.S.A. because there exist identifiable regional and/or provincial loyalties, i.e., French-Canadians, the West, Newfoundland, which affect the nature of Canadian patriotism.

Having looked at the nature of the Canadian Senate, which he describes as never having counted for much, and the allocation of residual power to the central government, he states that the B.N.A. Act appears to make Canada a highly centralized federalism. Paradoxically, the reason it is not as centralized as the U.S.A. is because there exist some highly peripheralizing extra-constitutional institutions. He refers specifically to only two, the now abolished appeals to the Judicial Committee of the Privy Council in Great Britain and the structure of the political party system.

With respect to the appeals to the Judicial Committee, Riker maintains that its long dominance in the interpretation of the B.N.A. Act has left a number of powers, performed in the U.S.A. by the central government, in the hands of the provinces. As for the structure of the party system, he takes his cue from Steven Muller's

## A THEORETICAL FRAMEWORK

paper entitled "Federalism and the Party System in Canada"<sup>11</sup> and sees Canada as having a double system in which the national party in control of the central government cannot rely on the majority of provincial governments under the control of provincial parties to follow its lead. This is in part because the federal-provincial fiscal relationship requires continuous negotiation and the provincial governments, regardless of whether they are controlled by local or national parties, seek to obtain bargaining concessions. On this basis, he concludes that the practice of having a different party in power at each level is what chiefly peripheralizes the Canadian system.

Finally, Canada is more peripheralized than the U.S.A. because the "regions", especially Quebec, have been given more leeway than any dissident states and the guarantees to the member units have been more faithfully respect.

## iii. A Critique

Mr. Riker's attempt to remain strictly on the "political" level has left him in extremely shallow water. This may be the result of his restricted view of what can

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<sup>11</sup> Steven Muller, "Federalism and the Party System in Canada", in Meekison, J. Peter, Canadian Federalism: Myth or Reality, Methuen, Toronto, 1968, pp. 119-132.

## A THEORETICAL FRAMEWORK

be identified as political and what forms the process of bargaining can take. It may also be the result of his over-preoccupation with the degree of centralization in a federation, while avoiding a serious look at the issue of equilibrium between the powers and functions of the two orders of government. In addition, he has committed the common and unfortunate error of assuming that all other federations should be measured against the American model. This leads him to explain away real differences in order to make all such countries fit his theories.

Politics is not confined to those aspects of federalism which have been covered in Riker's book. Today, politics means more than the chain of command in political parties and the attempt to implement party ideologies. In federal systems, politics is also linked to the exercise of the powers and functions both divided and shared in the Constitution. Having rejected what he calls the administrative theory of federalism, Mr. Riker has left himself no way to establish the relationship between politics and powers, between bargaining and decision-making.

Whether or not one accepts the need for the existence of the military and expansion conditions for a federation to come into being, Mr. Riker's definition of federalism as a bargain deserves attention. It conjures

## A THEORETICAL FRAMEWORK

up a whole new view of what goes on between central and regional leaders. With respect to the original agreement to federate, Mr. Riker's description may hold true.

However, his explanation of what maintains the federation over time merely assumes a limited form of bargaining, more within the structure of the political parties than between two separate and independent orders of government.

### 2. The dimensions which should be added

Having determined that the most relevant aspect of Riker's theory is his concept of federalism as a bargain struck between various parties at a given moment, and having rejected Riker's theory of what maintains federalism this study will concentrate on developing the notion of bargaining as a process that perpetuates itself long after the original bargain (the federal constitution) has been accepted.

#### i. Federalism is not static

Although the drafters of federal constitutions attempt to distribute all powers and functions between the two orders of government, it has rarely been possible to provide for all eventualities. Over time, public pressure is brought to bear on governments for them to enter fields of activity which earlier had not been considered to be their responsibility. Housing and

## A THEORETICAL FRAMEWORK

pollution control are two recent examples. In federations, this raises a constitutional question as to which order of government should be allocated the authority to legislate in these new areas. Because such problems are likely to be of equal concern at both levels, there is a tendency not to conclude automatically that the order of government with the residual power shall have the power to legislate. In reality, the appropriate leaders at both levels are likely to meet to bargain over how a new power shall be allocated. Sometimes, the solution is sought within the bounds of the Constitution. One approach is to assume that it automatically belongs to the government with the residual power. Another approach is to have the judiciary examine the problem and declare the power in question to belong to one or the other order of government on the basis of principles they feel already exist in the Constitution. Recent examples of this approach in Canada, as with the case of off-shore mineral rights<sup>12</sup>, have shown it to be a procedure which does not have much support, particularly in provincial circles.

Another approach is to agree to an amendment of the Constitution which would have the effect of trans-

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12 Reference re Off-shore Mineral Rights of B.C., 1967, Supreme Court Reports, 792.

## A THEORETICAL FRAMEWORK

ferring all or part of the substance of a legislative power from one order of government to the other. Examples of this in Canada would be the amendments of the B.N.A. Act with respect to old age pensions and unemployment insurance.

Sometimes the new areas of responsibility do not fit so easily into the old mold. Often these problems are of equal concern to both levels of government and, as a result, the leaders are likely to meet to bargain over how a new power should be allocated.

Similarly, some bargaining must take place in the case of shared or concurrent powers. In Canada, for example, the central government and the provincial governments must meet to determine how best to legislate regarding agriculture and immigration which were made concurrent by Section 95 of the B.N.A. Act. Here, practical considerations of properly serving the citizenry and avoiding duplication lead to bargaining. The advent of shared-cost programmes has also led to a substantial increase in bargaining in Canada. The federal assessment of the need for it to enter, in the national interest, areas constitutionally allocated to the provinces has resulted in a shift of administrative power away from the provinces and led to some points of irritation.



### A THEORETICAL FRAMEWORK

These examples are to show that while the basic forms of a particular federation may not appear to change, the degree of autonomy and power may shift through the process of bargaining. This should also partially refute Riker's categorical rejection of the administrative theory of federalism. It does not invalidate Riker's preoccupation with politics, but transfers it to a level where party politics are subordinated to the practical exercise of the distribution of power and functions.

#### ii. The concept of persistence

The reasons for the survival of the federal bargain can also be examined in its wider context as a political system.

David Easton in his book A Framework for Political Analysis<sup>13</sup> suggests that there are reasons why political systems persist even in times of rapid change. He views all political systems as open, self-regulating and self-transforming systems which have a built-in repertoire of means for responding to the stresses placed on them.

The cost of survival of some means for dealing with otherwise unresolved differences in a society may at times require the acceptance of change in one or all of the significant aspects of a political system, depending on the circumstances. The members must be capable of modifying their political system, as circumstances dictate, with respect to its scope,

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13 Easton, Op. cit.

## A THEORETICAL FRAMEWORK

membership, structure and processes, goals, or rules of behaviour; or they must be able to manipulate their environment so as to relieve the stress. Only where in some way they can entirely fend off the effects of environment change or where change is negligible might we expect a system to persist even though it were not endowed with this capacity to adapt through self-transformation or manipulation of the environment. Otherwise, persistence of patterns of interaction capable of meeting the fundamental political functions requires that the members engaging in this activity be able to adapt, correct, readjust, control or modify the system or its parameters to cope with the problems created by internal or external stress<sup>14</sup>.

Naturally in a federal system the concept of persistence will be more complicated because stresses will come not only from the intra-societal environment but also from conflict between the two orders of government, each of which is a legitimate authority for the allocation of values<sup>15</sup>. Demands on and support for the allocation of values may be addressed to either or both orders of government in the hybrid federal political system. To respond to these conflicting demands, both orders of government have to consult and agree on how to proceed if the system is to persist and adapt itself.

In modern federations, demands will often cut across the jurisdictional boundaries of existing consti-

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14 Framework, p. 87.

15 The authoritative allocation of values is the making of decisions by the authorities with which there is compliance and response.

## A THEORETICAL FRAMEWORK

tutional arrangements. The normal response of governments would be to attempt to seek a solution within the existing boundaries. Recognizing that this is not always possible leads to a tacit understanding that the original arrangements may be changed to meet changing needs. Bilateral consultations, federal-provincial conferences and the Constitutional Conference, in particular, are some of the ways by which Canada has responded to stress in its political system. However, before going into the details of this response, some additional insights can be gained by a brief look at David Easton's model of a political system.

### iii. David Easton's model of a political system

David Easton in his book A Framework for Political Analysis describes a political system as

Those patterns of interaction through which values are allocated for a society and these allocations are accepted as authoritative by most persons in the society most of the time<sup>16</sup>.

He illustrates his idea of the continuous flow pattern between the political system and its environment in Diagram No. 1<sup>17</sup> which follows on page 16. In the

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16 Framework, p. 96.

17 Systems, page 30,                      The "gatekeepers" and "withinputs" have been added by the writer.

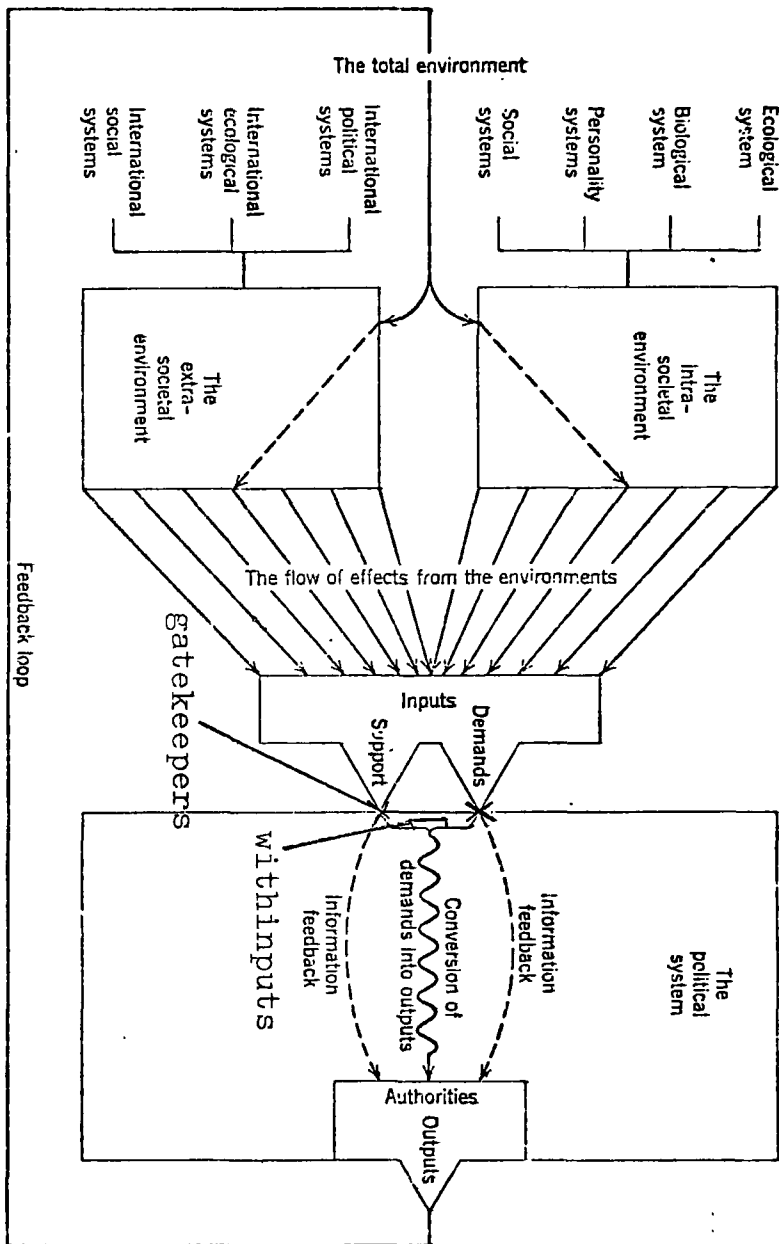


DIAGRAM 1 A DYNAMIC RESPONSE MODEL OF A POLITICAL SYSTEM

## A THEORETICAL FRAMEWORK

area between inputs and outputs, it is possible to identify the demands and supports and outputs (authoritative allocation of values) mentioned earlier. Of particular interest here, is the wavy line representing the conversion of demands into outputs. In the federal political system, there are two legitimate authorities for the allocation of values, and the Easton model seems to provide only one formal and rigid structure in which to fit. He imposes a strict discipline.

Systems analysis impels us to direct attention to the very life processes of political systems rather than to the specific structures or processes that make a particular kind of regime viable<sup>18</sup>.

The challenge is therefore to find a way of illustrating the problem posed by the dual authorities of the federal system within his general model. How can it provide for cases of intergovernmental conflict, the developing of new areas of jurisdiction or areas of overlapping jurisdiction?

Working from the Easton model, one must imagine that both the federal and provincial structures are encompassed. Both the federal and provincial systems operate simultaneously along the same feedback loop.

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18 Framework, pp. 78-79.

## A THEORETICAL FRAMEWORK

They carry out the same functions for different purposes; but the very concurrency of many of their activities brings them into direct contact and possible conflict with each other. They will meet at the boundaries of the system and in activities related to the processing of demands.

Interest groups, parties, opinion leaders, legislators representing either both the federal or the provincial level will be found on the boundary between the environment and the political system regulating the volume and variety of demands which attempt to enter the system. "They are gatekeepers who stand athwart the admission channels to a system<sup>19</sup>". They may accept the demands as articulated or reduce the number of demands by combining two or more of them into one which will enter the system. Demands are then put into the system along the limited number of "channels" which carry them to the point where they become outputs.

Stress can develop when there is an overload of demands and insufficient communications channels to handle them. The typical response has been to increase the

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19 Ibid., p. 122.

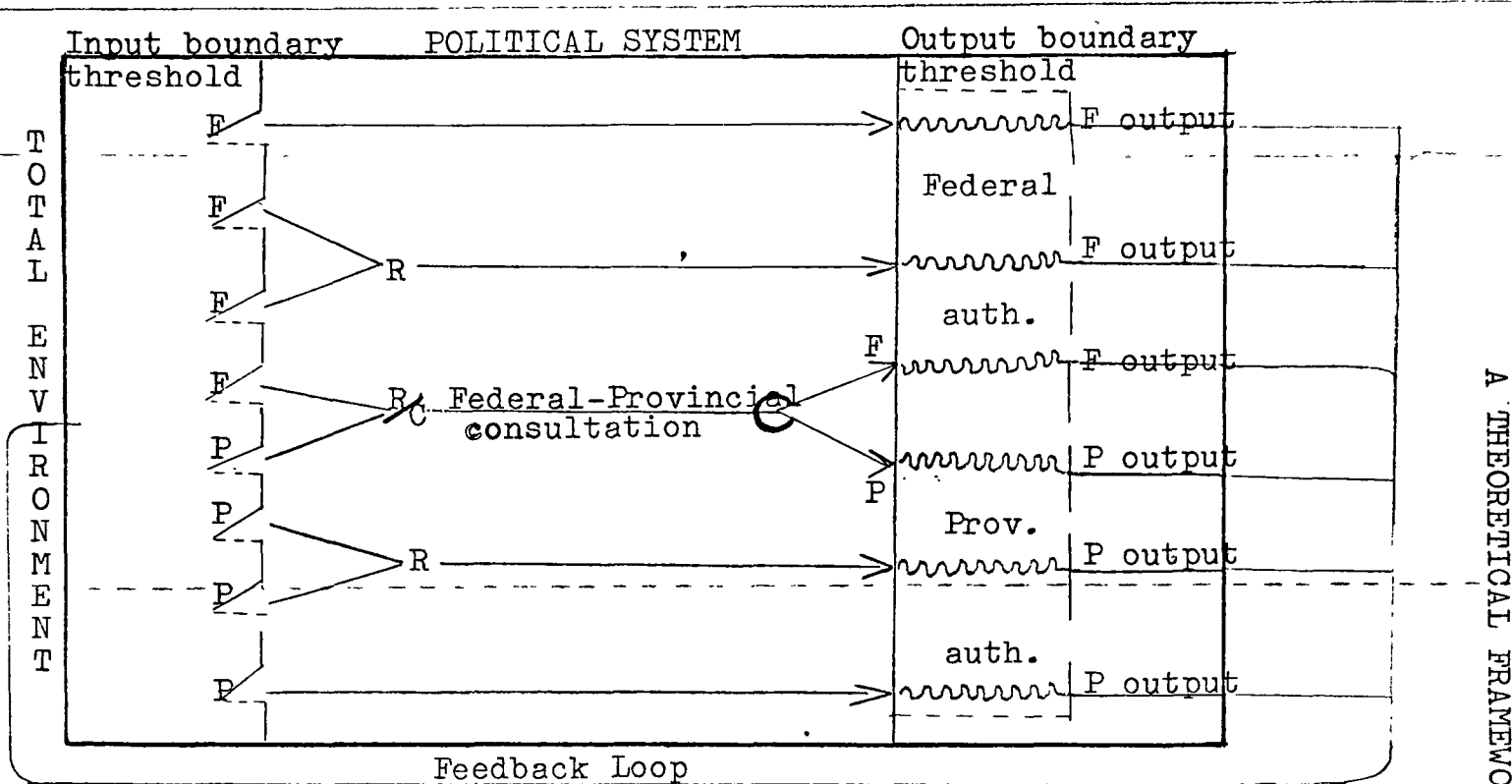
### A THEORETICAL FRAMEWORK

number of channels. Specifically the multiplication of political structures means the creation of more channels through which demands can be processed. With increasing structural differentiation and the accompanying specialization, more channels are open for longer periods of time and consequently can handle a greater volume of demands.

#### iv. Bargaining in the Easton model

With this brief outline, it is now possible to show how federal-provincial bargaining both bilateral and multilateral can be fitted to the Easton model. Diagram No. 2 on page 20 illustrates where federal-provincial activity would take place in a modified model. It would be located between the reduction and combination of demands and the output boundary threshold when the agreements are redirected to the federal and provincial authorities for decision and implementation. The diagram illustrates how demands put to the federal and provincial authorities separately are reduced and combined for discussion between them and then, once discussions completed, are returned to each level for action.

In Eastonian terms, the convening of federal-provincial conferences can be regarded either as a response to potential demand input overload or as a



/ = Gatekeepers      F = federal      P = provincial      → = Communications channels  
 R & R/C = Demand reduction & combination  
 ⊗ = point where F-P channel must be redirected to separate F & P Channels  
 ~~~~ = the decision-making process/conversion to outputs

Diagram 2 A Dynamic Response Model of a Political System Modified to Illustrate the Authoritative Allocation of Values in the Canadian Federal System.



## A THEORETICAL FRAMEWORK

response to conflicting demands between two legitimate authorities where no ultimate "legitimate" authority exists to adjudicate between them. Since such conferences are convened to deal with matters in which there is a mutuality of authority or interest they can be seen as devices to abort stress before it arises or to adapt the system once stress has arisen. Federal-provincial conferences can also be viewed as input channels which are not continuously open.

The Constitutional Conference can be viewed as having been established as a response of the type just described. A number of demands and issues had built up which it did not appear could be handled through the existing channels. So a new one was created to relieve the stress. It differed from other federal-provincial conferences because it was understood to have a continuing existence<sup>20</sup> or, in Eastonian terms, to be permanently open as a channel. It also differed from other such conferences in that it provided itself with the back-up structures to keep it open, that is a continuing committee of senior officials and a permanent secretariat. As the subjects assigned to it for review expanded, specializa-

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20 Appendix I-A, Conclusions of Constitutional Conference, February 1968, p. 124.

## A THEORETICAL FRAMEWORK

tion was added in the form of committees of ministers and sub-committees of experts<sup>21</sup>.

Like its predecessors, the Constitutional Conference was an extra-constitutional process or device for responding to stress in and on the system. Having this in mind, the Conference gave itself the task of examining the mechanisms of federal-provincial relations with the aim of finding an acceptable way of formally institutionalizing the bargaining process. This has not yet been accomplished but the Conference itself, as a mechanism, is the subject of Chapters three and four.

## v. Conclusion and hypothesis

The object of the presentation up to now has been to provide an introduction to the ideas which were the source of a new hypothesis regarding federalism. To recapitulate, William Riker contributed the proposal that federalism is a bargain which will survive if the political institutions have popular support. David Easton contributed a model of system analysis in which it is possible to locate the federal-provincial bargaining process.

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21 Appendix I-B, Conclusions of the Constitutional Conference, February 1969, para 2(b)(i),(iii) and (iv), p. 125-126.

## A THEORETICAL FRAMEWORK

The thesis of this paper is that federalism is initially a bargain between central and regional leaders which, to survive, must be open-ended, that is subject to change or modification, and that the necessary process of federal-provincial bargaining tends to become institutionalized.

The history of federal-provincial consultations in Canada will support the hypothesis that for the bargain to survive, the bargaining process must be institutionalized. From the early stages patterns have been set which characterize Canadian federal-provincial conferences. In fact, however informal we may regard these encounters, they have nevertheless become an important institution of Canadian federalism. The federal and provincial governments do not feel that they can properly process demands which cut across jurisdictional lines without consulting each other. If any further institutionalization were required it would be in the area of formal recognition or identification of the role which bargaining plays in the maintenance and persistence of federalism.

Whether or not governments were to choose to formalize in the Constitution the process of bargaining, in real terms, federal-provincial consultations, though

## A THEORETICAL FRAMEWORK

only an intermediate step in the decision-making process, are an important and identifiable regulatory communications channel. In David Easton's terms, they are legitimate structural regulators of demands and stress. He put the whole thing very nicely when he wrote,

Although any division of political labor will set in motion many cleavages and other centrifugal political forces, the facts of sharing political processes, participating in inter-dependent political roles, and partaking in the same communication network will in themselves contribute to perpetuating the need to do so. The growth of an administrative staff, of an orientation to the same sets of leadership cadres even if they are in partisan conflict over day-to-day policy, the assimilation of similar kinds of political techniques, styles and general know-how within the context of a given group of people, and sensitivity to each other's cultural cues in various roles, help to predispose members of a system to seek to continue the group within which these interactions have taken place and continue to be possible. The resulting learned patterns of political interaction and habits of communication within a group are not easily or lightly abandoned <sup>22</sup>.

The constitutional review was an attempt to find the modifications necessary to ensure that the federal political system will persist and adapt to stress and changing conditions. Although aspects of the Constitution had been examined before, never had there been a commitment to a total review of the bargain with all governments committed to participate. Never before had

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22 Systems, p. 327.

## A THEORETICAL FRAMEWORK

there been such an elaborate structural regulator or communications channel opened to respond to stress.

## CHAPTER II

### THE HISTORICAL CONTEXT

Before proceeding to an examination of the Constitutional Conference as an example of a structural regulator or communications channel in the ongoing process of bargaining, it seems appropriate to verify whether Canada does fit the Riker definition of federalism and to trace briefly the history of federal-provincial conferences in Canada up to the establishment of the continuing Constitutional Conference.

#### 1. The initial bargain in Canada

The essence of Mr. Riker's definition is that federalism is a bargain between prospective national leaders and leaders of constituent governments for the purpose of aggregating territory, the better to lay taxes and raise armies, and that there are two preconditions to federation, the military and the expansion conditions.

A cursory glance at Canadian history in the period preceding Confederation will show that both conditions were present. With respect to the expansion condition, the desire of Canada to expand westward into the rich territory of the Hudson's Bay Company had been subject of much talk in the period between 1857 and 1867. Compounded with this was the general desire to expand markets and to consolidate the status of British North

## THE HISTORICAL CONTEXT

America on the continent.

The military condition, whether real or imagined, revolved around the fact that relations with the United States of America had become strained over such questions as the loss of reciprocity and the adverse effects on the economy and the fact that some American Republican leaders were talking about annexing the territory north of them. More specifically, the leaders of Canada were drafting their ideas for Confederation even as the American Civil War raged.

When the Civil War ended in the spring of 1866 there was great fear that the United States would turn around and try to take British America at a time when England seemed to be pulling back from her commitment to defend the colony. Creighton writes

There was an enormous accumulation of resentment against Great Britain and British America stored up in the Republic. It might yet find satisfaction in diplomatic pressure or military aggression<sup>1</sup>.

This general sense of threat from a border state in the process of disbanding its battle ready troops was compounded by the Fenian scare in the Maritimes in April and the raid on Canada West in June 1866 which seemed to have at least the tacit support of American politicians.

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1 Donald Creighton, The Road of Confederation, Toronto, MacMillan of Canada, 1964, p. 304

## THE HISTORICAL CONTEXT

Fear and detestation of the Fenians, which were general throughout British North America, had an important effect upon the movement for confederation. The desire to unite grew out of the will to survive; survival was threatened by the marked hostility of the Americans; and dislike and distrust of the United States became a potent force in the growth of the new British American nationalism<sup>2</sup>.

Given their expansionist ambitions and this military threat, it is fair to say that the provinces of Canada were disposed to negotiate a bargain of the kind described by Riker.

Filling out the historical picture a little more, it should be recalled that the Union of Canada of 1840, which had been recommended by the Durham Report of 1839, had not solved the problems of Upper and Lower Canada as had been hoped.

Questions of fiscal imbalance and the differences of language, religion and laws strained the legislative union almost from the beginning. Sectional differences were also helping to frustrate the attempts to unite the Maritime provinces.

Confederation had been talked about in British North America as early as 1856<sup>3</sup>, not only in the Union of Canada but also in Nova Scotia. It was put forward

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2 Ibid., p. 385.

3 P.B. Waite, The Life and Times of Confederation 1864-1867, Toronto University of Toronto Press, p. 35.



## THE HISTORICAL CONTEXT

as a solution to Canada's political differences and as a means of enhancing the credit of British North America as a whole. There was considerable discussion of Maritime Union in this period but its failure was inevitable when, in the autumn of 1864, the Colonial Office withdrew its support of the idea in favour of the larger scheme.

In June of 1864, a select committee of the legislature of Canada, having met several times in the course of preceding months, recommended federation of Canada and the Maritime provinces. At approximately the same time the paralysis of the Canadian government provided the chance and the incentive to form a coalition through which a new political system could be achieved.

So it was the Macdonald/Cartier/Brown/Galt coalition, taking on the cloak of national leadership and armed with Canada's scheme for union, which sought an invitation to attend the Conference on Maritime Union, "to ascertain whether the proposed Union may not be made to embrace the whole of the British North American Provinces<sup>4</sup>". The reply, from Charles Tupper who organized

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4 Waite, Op. cit., suggested that until the Canadian request came, no conference on Maritime Union had been called. But given their desire, one was hastily called for September 1, in Charlottetown, pp. 60, 61.

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THE HISTORICAL CONTEXT

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the Conference, was favourable but with the proviso that theirs be an informal participation.

However, when the conference did convene, in September 1864, the time was taken up largely by addresses from the leading Canadian delegates on various aspects of the Confederation scheme. The plan put forward included the assumption by the central government of the provincial debts existing at Confederation and the payment of yearly sums for the support of their governments and legislatures. It also included the obligation to build the intercolonial railroad which was considered essential to the consolidation of British North America. On the matter of the distribution of powers and functions, the matters of education and local matters would be left to the provinces, which would also retain their property and assets. With respect to political institutions, a parliamentary system was proposed which would include a House of Commons with "rep. by pop." and an Upper House with "equal" representation.

The result of the Charlottetown Conference was that the representatives of the Maritime provinces agreed to abandon Maritime Union and opt for Confederation. They also accepted the Canadian invitation to attend a formal conference in Quebec City in October. It was at

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## THE HISTORICAL CONTEXT

this second encounter that formal bargaining took place. Later in London further bargaining resulted in the 72 resolutions which were presented to the British government for formal drafting into a Bill to be put before the British Parliament. At each of these stages in the process the delegates from Canada and the Maritime provinces gave their consent on behalf of the constituent units they represented.

Bargaining over confederation took place at two levels. Firstly, a number of thorny points were thrashed out within Canada before a plan was presented to the Maritimes. In this category would be placed negotiations over the guarantees to the French language and to the Protestant and Roman Catholic minorities with respect to education in Canada East and West. Secondly, there were the questions to be settled with the Maritimes such as financing and representation in Parliament.

P.B. Waite writes that the distribution of powers between the central and local (provincial) governments which bulks so large in any modern analysis of federation was of no particular difficulty. "That the division of powers is the heart of the federal system is a modern proposition, not a nineteenth-century one<sup>5</sup>". In fact,

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5 Ibid., p. 111.

### THE HISTORICAL CONTEXT

the Quebec resolutions did not even include a definition of federalism. There was far more debate over the composition of the Senate and House of Commons. Waite put it this way, in reporting George Brown's views

British North American union had to be federal because federation was the only basis upon which Lower Canada would concede "rep. by pop.". For this concession, Lower Canada had been given equality in the Upper House. "On no other condition could we have advanced a step<sup>6</sup>".

The brief outline of the achievement of Confederation should serve to confirm that Canada fits the Riker definition. Bargaining took place between prospective national leaders, mostly from the Union of Canada, and the potential constituent units in the Maritimes. And the bargain was indeed struck for the purposes of aggregating territory, the better to lay taxes, or perhaps in Canada's case to improve her credit, and raise armies for defence against increasing threats from the United States.

#### 2. The finality of the Confederation bargain

There are a number of characteristics of the Confederation bargain which should be understood because of their impact on federal-provincial relations in ensuing years.

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6 Ibid., p. 127.

## THE HISTORICAL CONTEXT

In the first place, the fathers of Confederation failed to include a general amendment clause in the British North America Act. Provision was made only for the amendment of the constitutions of the provinces (s. 92. 1.) while amendment of the federal constitution was left in the hands of the British Parliament. Despite considerable effort in later years to find an appropriate and formal means of amending the BNA Act in Canada, the original arrangements remain essentially unchanged, although section 91. 1., added in 1949, now permits the federal government to modify the Constitution of Canada except as regards certain specified classes of subjects.

Secondly, the financial terms of Confederation were considered to be fixed and non-negotiable. Embodied in Chapter VIII of the BNA Act, they were the subject of protracted debate in Quebec and later in London. It was a committee of finance ministers of the provinces, meeting separately to discuss the proposals put forward by Alexander Galt, which negotiated these terms. J.A. Maxwell in the book Federal Subsidies to the Provincial Governments in Canada<sup>7</sup> described the financial considerations in some detail.

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7 J.A. Maxwell, Federal Subsidies to the Provincial Governments in Canada, Harvard Economic Studies, Vol. ZVI, Harvard University Press (Cambridge 1937), p. 6.

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### THE HISTORICAL CONTEXT

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He explains that the need for the new federal government to control external trade made it clear they should have the sole right to levy import duties. But the general effect of this was to remove from the provinces their major source of income. The other consideration was that under the new arrangements, the provinces would have less extensive functions to perform and hence require less revenue. The problem was that there was great disparity between the tasks performed by the Maritime provinces which were heavily financing their localities, and Canada, where a municipal system was already handling similar tasks itself. To ensure that all provincial governments would have reasonably balanced budgets, the scheme of subsidies and debt allowances was worked out and consented to, Maxwell says, with great reluctance.

The provinces were left the dubious right to direct taxation but instead of any power with respect to indirect taxes, they would receive financial assistance of three kinds: first, a yearly grant of 80 cents per capita based on the census of 1861 with no provision for increase or decrease with changes in population; second, the federal government would assume all provincial debt, but if the debt exceeded an allowance of approximately

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# THE HISTORICAL CONTEXT

\$25 per capita, that province would pay the federal government annual interest at 5% on the surplus, or if its debt was less than the allowance, the province would receive interest on the deficiency; third, some exceptional grants were recommended for New Brunswick for 10 years because of its peculiarly unfavourable financial situation, and to Newfoundland and Prince Edward Island which were ultimately not taken up in 1867.

Two significant alterations were made to the financial bargain worked out at Quebec, when the fathers of Confederation reconvened in London. In order to reduce provincial duties even further, the federal government was given the right to take out of provincial jurisdiction such works as, although wholly situated within the province, are before or after their execution, declared by Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more provinces<sup>8</sup>.

The second set of changes affected the subsidy provisions in two respects. First, the calculation of per capita subsidies for Nova Scotia and New Brunswick were changed so that they would not be based on the 1861 census but on actual population up to a maximum limit of 400,000 persons. Second, a new set of annual grants for

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<sup>8</sup> BNA Act s. 92. 10. (c)

## THE HISTORICAL CONTEXT

the support of governments and legislatures was added<sup>9</sup>.

In order to ensure that these modifications would not lead to further requests for changes, there was written into the BNA Act, s. 118, "Such grants shall be in full settlement of all future demands on Canada..." This declaration embodied the principle of finality expressed originally by Galt when he introduced his plans in 1864 and which was agreed to at Quebec.

Although these matters were bargained over most assiduously by the representatives of the provinces, it should be remembered that the resolutions framed at London were not submitted to the people of the provinces or even to their legislatures. Rather they were incorporated into a bill which was passed by the British Parliament and assented to by the Queen. From the accounts of the period, it is clear that Ontario, Quebec and New Brunswick (after an initial repudiation) considered the terms acceptable. Nova Scotia, however, was legislated into Confederation over the strenuous opposition of Joseph Howe who was extremely unhappy with the financial terms of entry of the province. His efforts in the legislature against Confederation represent the first assault on the Constitution of Canada.

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<sup>9</sup> Ibid., S. 118.



## THE HISTORICAL CONTEXT

### 3. Cracks in the Wall

In the first elections following Confederation, the anti-confederates came to power in Nova Scotia. Having tried unsuccessfully to have some changes made in London, Joseph Howe chose to negotiate possible new terms with the new federal government. In the meetings which were held between Nova Scotia and the federal Minister of Finance, the province argued how the original terms of federation had put them in an unfortunate financial position whereby 90% of its sources of revenue but only 55% of its expenditures had been taken over, leaving a gap which the original subsidies did not cover.

Having recognized the validity of the province's claim for better terms, the federal minister was faced with the problem of negotiating a solution which would not create a precedent and open the door to other claims by other provinces. So his proposal was to adjust Nova Scotia's debt allowance and give her a special annual subsidy of \$82,698 for ten years from July 1, 1967. This date is the key to this bargain. The federal minister, applying the formula used earlier in New Brunswick, proposed a solution which would appear simply to be a rectification of an original mistake.

This first post-confederation bargain is interesting in a number of ways. Instead of forwarding the

### THE HISTORICAL CONTEXT

agreement to London as a formal amendment to the BNA Act, it was passed as an Act of the federal Parliament.

During the debate in the House of Commons, strong opposition was voiced to the changing of the Constitution, but Sir John A. Macdonald argued successfully that this was a legitimate way for the government to exercise its spending power, an approach which later was supported by the "Law Officers of the Crown" in London. Having conceded this point, an attempt was made by Ontario to have the principle of finality reaffirmed. And although this was done, an undesired precedent was set and a breach made in the Constitution which was never closed.

As Maxwell points out:

We have, therefore, the anomaly that this portion of the Constitution which was meant to be inflexible has been amazingly flexible; and that this flexibility has been achieved not through the ordinary process of address to the Crown but by action of the Parliament of Canada<sup>10</sup>.

This flexibility was proven twice in the early years after Confederation. In both 1873 and 1884, there was a general adjustment upwards in debt allowances. Again, the financial terms of Confederation were tampered with by federal acts. With respect to the 1884 changes,

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<sup>10</sup> Maxwell, Op. cit., p. 30.

## THE HISTORICAL CONTEXT

Maxwell explains

... the effect of this ... legislation was, ..., to make the act of 1884 retroactive to 1867. The Dominion assumed that in 1867 the provincial debt allowances had been set too low, and it proceeded to compensate the provincial governments for this mistake. But this assumption, which underlays the legislation of 1873 and 1884, was without the least factual or historical foundation<sup>11</sup>.

For the first 20 years of Confederation, federal-provincial discussions revolved almost exclusively around financial matters. Bargaining took place, but only on a bilateral basis. Even at the time of the general adjustments in grants there were no multilateral negotiations.

All during this period, communications between the provinces and the central government were through the Lieutenant Governors to the federal Secretary of State for the Provinces and vice versa, which permitted Sir John A. Macdonald to keep a strong hold on provincial affairs as well. Not unexpectedly there was some provincial discontent over this arrangement, especially in Ontario. However it was not until 1887 that attempts to modify these arrangements came to a head, with the calling of the first interprovincial conference.

4. The development of the intergovernmental meeting

Beginning in 1887 there are a number of over-

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<sup>11</sup> Ibid., p. 63.

## THE HISTORICAL CONTEXT

lapping phases in the development of federal-provincial meetings. These are described in some detail in the book of Mr. Gérard Veilleux entitled Les Relations Intergouvernementales au Canada 1867-1967 - Ses mécanismes de coopération<sup>12</sup>. The breakdown used by Mr. Veilleux was most helpful in preparing this section.

In the period between 1887 and 1926 five inter-provincial conferences took place during which the provincial governments expressed their discontent over a variety of aspects of the federal bargain. In 1887, discussions were held on the financial arrangements and more importantly a number of constitutional reforms were approved on such questions as Senate reform, the removal of disallowance and the role of the Lieutenant Governor, all intended to enhance provincial autonomy and to improve the means of communicating with the central authorities. Unfortunately the results of this conference were slim for two reasons, first because Prince Edward Island and British Columbia declined to attend<sup>13</sup> and second, because

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12 Gérard Veilleux, Les Relations Intergouvernementales au Canada 1867-1967 - Ses mécanismes de coopération, Les Presses Universitaires du Québec, (Montréal 1971) 142 pages.

13 The Conference was attended by the Liberal governments of Quebec, Ontario, New Brunswick, Nova Scotia and Manitoba. At the time PEI and B.C. were headed by Conservative governments.

## THE HISTORICAL CONTEXT

Sir John A. Macdonald also declined to attend and later ignored the conclusions of the conference. There was some bargaining at the conference, but it became clear that without the support and participation of the federal government little could be accomplished.

Interprovincial meetings were also held in 1902 on financial arrangements, in 1910 on the representation of the Maritime provinces in the House of Commons, in 1913 again on representation plus federal subsidies and postal charges, and in 1926 on taxes and subsidies. Although all the meetings had the approval of the federal authorities, only that of 1913 was attended by all provinces. Moreover they had not proven to be a very effective instrument for bargaining with the federal government. For example, it was not until 1906 that the federal authorities were prepared to take up the recommendations of the interprovincial conference of 1902, which were basically the same as those of 1887.

Although both the conferences of 1913 and 1926 passed resolutions calling for regular or even annual meetings of provincial leaders, no such conferences were called for over thirty years. In fact the next interprovincial conference was not called until 1960. Since that time they have been held at least annually. While

## THE HISTORICAL CONTEXT

a useful communications channel, the conferences have not been used to any extent as an instrument of bargaining or a structural regulator. Provincial leaders have frequently pointed out that the object of these encounters has not been to "gang up" on the federal government.

Federal-provincial conferences have been held sporadically since the first one was convened by Sir Wilfrid Laurier in 1906. Mr. Veilleux's Appendice C, *Fréquence des réunions des principales conférences*<sup>14</sup>, indicates that between 1906 and 1967, twenty-five such meetings took place between premiers and prime ministers. Although all were called by the federal leader, there are two distinctive eras to these consultations. Initially the conferences were dominated by provincial views and the provinces often met separately within the framework of a meeting to adopt a common approach to be presented to the federal government. This was the case with the meetings of 1906 and 1918, of 1931 when the provinces asked Ottawa for an opportunity to express their views on the impact of the proposed Statute of Westminster and of 1941 when certain provinces refused to consider the Rowell-Sirois Report.

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14 Veilleux, Op. cit., p. 129

## THE HISTORICAL CONTEXT

In the second era which dates from the Second World War, most conferences were dominated by federal views and proposals. Some fifteen plenary conferences were called by the federal government between 1941 and 1967 and the largest portion of these dealt with fiscal matters, such as taxation arrangements and the financing of provincial governments. A brief look at the history of these meetings will show that while there was often resistance to federal proposals, they would prevail and be implemented. In this era the concept of unanimity disappeared, as certain provinces refused to participate in federal schemes, e.g., Ontario and Quebec refused to enter the tax rental agreements proposed in 1947. Bargaining continued to take place, but it was essentially one-sided and bilateral negotiations were often necessary to bring programmes into effect.

Since 1957 there has been a steady expansion of federal-provincial conferences at both the official and ministerial levels. Mr. Veilleux records that in 1957 there existed a total of 64 conferences and committees of which 5 were at the ministerial level and 59 at the officials level<sup>15</sup>. In September 1971, Mr. Gordon

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15 Ibid., p. 54.

## THE HISTORICAL CONTEXT

Robertson, Clerk of the Privy Council and Secretary to the Cabinet reported to the 23rd Annual Meeting of the Institute of Public Administration of Canada that as of June 1970 there existed a total of 57 formal committees at the ministerial or deputy ministerial level as well as an additional 260 multilateral committees and sub-committees involving officials, plus another 150 bilateral committees of the same type<sup>16</sup>.

In recent years there has been a growing amount of criticism of federal dominance of federal-provincial consultations and bargaining. The first response to this was the convening in 1960 of the first interprovincial conference in 30 years by Premier Jean Lesage of Quebec. By 1965 the situation in the distribution of powers and functions had become so clouded that Mr. Lesage's successor, Daniel Johnson, called, in 1965 for a constitutional conference to clear the air, a desire echoed by Mr. Robarts at the federal-provincial conference of October 1966. When the federal government proved reticent Premier John Robarts announced by way of the Ontario Speech from the Throne, January 25, 1967, his intention

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16 Gordon Robertson, The Changing Role of the Privy Council Office, Paper presented to the 23rd Annual Meeting of the Institute of Public Administration of Canada, Regina, September 8, 1971, pp. 16-17  
Information Canada.



## THE HISTORICAL CONTEXT

to convene a federal-provincial Confederation of Tomorrow Conference in the fall of 1967 and such a resolution was debated and passed by the Ontario Legislature in May 1967.

Reaction by Ottawa to Mr. Robarts' initiative was both rapid and critical. In a letter, despatched the day after the Throne Speech and later tabled in both the House of Commons<sup>17</sup> and the Ontario Legislature, Mr. Pearson suggested that there was no precedent for a federal-provincial conference being called by a provincial government and that the normal practice was that when a province wished to have a subject discussed at such a conference, a proposal to that effect was put to the Prime Minister of Canada, who, after consultation with all Premiers, would call a conference or place an item on the agenda. On this basis he suggested to Premier Robarts that either he adopt this procedure or plan the conference as an interprovincial one. In his reply (also tabled)<sup>18</sup> Premier Robarts defended his plans saying that his conference was not intended to infringe on the

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17 Journals of the House of Commons of Canada, No. 201, February 6, 1971. Copies of letters dated January 26 and February 1 exchanged between the Prime Minister of Canada and the Premier of Ontario with reference to a proposed conference on the future of Confederation, Sessional Paper No. 197A.

18 Loc. cit.

## THE HISTORICAL CONTEXT

jurisdictional authority of the federal government and was not envisaged as a federal-provincial conference "as we have come to know them". "It is not to be a forum for decision-making".

In what could be seen as a move to regain the upper hand, Mr. Pearson invited his provincial colleagues to a meeting on July 5, 1967 at the time of their being sworn in as Privy Councillors by the Queen. The press release issued at that time reports that the Confederation of Tomorrow Conference was discussed. It would appear that by this time Mr. Robarts had retreated from his original position which he repeated during the debate in the Legislature in May<sup>19</sup> for the Communiqué states "The Prime Minister said the federal government would be represented by observers at the proposed interprovincial conference". The general importance of this meeting on future discussions is also reflected in the Communiqué for it goes on,

It was agreed that such a conference, which would permit a free exchange of views among the provinces on a number of problems, could form a useful first step toward consideration of the working of the Canadian federal structure.

The Prime Minister discussed with the Premiers an invitation he would shortly be sending to them to attend a federal-provincial conference early in 1968

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19 Legislature of Ontario, Debates 1967, Vol. III, p.3566

## THE HISTORICAL CONTEXT

to examine the possibility of adopting a common constitutional bill of rights, binding upon both the federal and provincial governments. The Prime Minister expressed the view that the study of a bill of rights, while in no way preventing a review of other constitutional matters as might later be required, would provide the opportunity to begin an examination of the constitution in relation to the fundamental rights and freedoms that should form the basis of Canadian federalism<sup>20</sup>.

And so when the Confederation of Tomorrow Conference convened before press, radio and television on November 27 the participants were well aware of what the immediate future held for them in the way of constitutional talks. Nevertheless the provinces took full advantage of the Toronto opportunity to express their views.

Mr. Robarts set the tone of the Conference when, in his opening remarks, he suggested that Centennial year was a fitting point at which to launch a thorough examination of Confederation.

For a number of years we have been aware of, and concerned about, the developing tensions within Canada and, more particularly, about the direction in which we were headed. It seemed to us that not only were we tending to ignore the implications of the cultural complexity of this country, but we were also making a series of decisions that subtly, but nonetheless forcibly, were changing the political and economic character of Canada. I refer to decisions which were largely of a fiscal nature which were being made not in the democratic glare of our legislatures

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20 Press Release, Office of the Prime Minister (mimeo), July 5, 1967.

## THE HISTORICAL CONTEXT

but in the closed-door sessions of many federal-provincial conferences. These decisions were often in response to short-term, specific, and very important problems, rather than the result of a set of commonly-agreed principles and a knowledge and awareness of clearly-defined purposes<sup>21</sup>.

He characterized the conference as a forum for discussion and as the first of a series of meetings. Consequently, he hoped the participants would not become too embroiled in fiscal matters or specific constitutional changes, but concentrate on exploring the subjects on the agenda, that is, the goals of Canadians, the role of the English and French languages in Canada, ways in which the federal system can be improved and the machinery and structure of federal-provincial and interprovincial relationships in Canada.

In terms of this paper, the Confederation of Tomorrow Conference is interesting in a number of ways. First, in the historical context, this was the first interprovincial conference on major constitutional issues to be convened since 1887. Federalism and the Constitution had been discussed several times over the years but never at the insistence of a province, and never since the early days of Confederation had the federal government refused to participate as an official delegation.

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21 The Confederation of Tomorrow Conference, Proceedings, p. 1.

## THE HISTORICAL CONTEXT

Second, as in the past, provincial premiers agreed that discussions of this magnitude required the participation of the federal government. Third, a number of delegations argued strongly in favour of greater institutionalization of the federal-provincial consultative process. Fourth, the conference did not draw any specific conclusions and cannot be classified as a conference at which bargaining took place. In the constitutional field, this would have to wait until the federal-provincial conference of February 1968.

In the beginning there was only one item proposed for the agenda of the federal-provincial conference, that is, a constitutional bill of rights. However, by the time it met there were two other items on the agenda, the recommendations of the Royal Commission on Bilingualism and Biculturalism, and questions of regional disparities (proposed by Nova Scotia) but also discussed at length at the Confederation of Tomorrow Conference. More significantly by the time it adjourned, the First Ministers of Canada had not only come to a consensus on language rights<sup>22</sup>, but had also agreed to establish themselves as a continuing Constitutional Conference of

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22 Appendix 1-A, p. 123.

## THE HISTORICAL CONTEXT

First Ministers, supported by a Continuing Committee of Officials and a permanent secretariat<sup>23</sup>. Moreover they had agreed on seven questions to be examined on a priority basis, although these specific choices were not intended to limit the process of constitutional review. The seven subjects were official languages, fundamental rights, distribution of powers, reform of institutions linked with federalism, including the Senate and the Supreme Court of Canada, regional disparities, amending procedure and provisional arrangements and mechanisms of federal-provincial relations<sup>24</sup>.

The essence of this agreement is that the First Ministers agreed to re-open the whole confederation bargain for negotiation. The sincerity of their agreement is borne out by the fact that between this conference and June 1971 when the Province of Quebec turned down the Victoria Charter, the First Ministers met a total of seven times on constitutional questions<sup>25</sup>. They had also met twice on non-constitutional questions<sup>26</sup>, all of which

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23 Ibid., p. 124.

24 Loc. cit.

25 February 1968, February 1969, June 1969, December 1969, September 1970, February 1971, June 1971.

26 February 1970, September 1970

## THE HISTORICAL CONTEXT

represents a dramatic increase in the frequency of their meetings. There was also a corresponding increase in the number of meetings of officials in support of their work.

5. The context of bargaining today

What must be remembered about all these types of conferences, interprovincial, federal-provincial and constitutional, at both the political and officials' level, is that they are essentially informal arrangements with no constitutional foundation and few are authorized by Statute. However this does not diminish their importance. Especially in the federal-provincial context bargaining is a method and a process of achieving practical flexibility within the rigidities of the formal constitution. Currently the act of bargaining seems to consist of reaching agreement on the facts, assessment of situations and proposals, mutual persuasion and sometimes agreement (consensus) on a mutually determined solution. Richard Simeon describes the process as "dynamic and fluid"<sup>27</sup>. But it is not of itself the decision-making process. That remains the proper function of governments, of Parliament and the provincial Legislatures. This

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27 Richard Simeon Federal-Provincial Diplomacy, The Making of Recent Policy in Canada, University of Toronto Press, Toronto 1972, p. 43.

## THE HISTORICAL CONTEXT

point is illustrated in Diagram No. 2, page 20 of Chapter one.

Bargaining in the Constitutional Conference is of a different kind because it is concerned with examining and assessing the original bargain and the modifications affected over the years, rather than seeking one more accommodation within that initial definition of powers and resources.



### CHAPTER III

#### THE CONSTITUTIONAL CONFERENCE - 1.

##### 1. Its origin and on-going nature

The review of the constitution between 1968 and 1971 can be described in Eastonian terms as a response to overload factors affecting the political system. Demands had been building during the preceding two years which were beginning to cause acute stress. The seriousness of the stress can be measured by the fact that within the Canadian political system itself two important provincial authorities began to articulate in forceful terms the specific demands which had been pressing at the input boundary. Specifically Daniel Johnson of Quebec had responded to the increasing demands for protection of the rights of French-speaking Quebecers and had reduced and combined them into a clear and forceful call for new constitutional guarantees<sup>1</sup>. Premier Robarts became the spokesman for those who were demanding new fiscal arrangements which would be more satisfactory to the provinces and municipalities<sup>2</sup>.

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1 The Government of Quebec and the Constitution, L'Office d'Information et de Publicité du Québec, 1968. This is a collection of Mr. Johnson's statements from September 1966 to February 1968.

2 Premier Robarts' views were best articulated at the Federal-Provincial Conference, October 24 to 28, 1966, p. 65 to 67.

## THE CONSTITUTIONAL CONFERENCE - 1.

From 1965 there were increasing demands for a major meeting to examine the constitution with a view to making changes. The overloading can be seen in the fact that initially the federal government seemed reluctant to respond to the point where Premier Robarts grew impatient and called the Confederation of Tomorrow Conference of November 27 to 30, 1967.

Although the federal government had no doubt begun to organize itself before January 1967 when Mr. Robarts "called its bluff" so to speak, it was not until after the Premier's announcement that Prime Minister Pearson and his government began to systematically plan to recapture the initiative. The story of his actions as well as an outline of the Federal-Provincial Conference of February 1968 have been outlined in Chapter two.

For the purposes of this chapter it is necessary only to restate two basic points. First the February 1968 conference gave the provincial premiers and the Prime Minister an opportunity to present to each other and to agree on a number of areas of demand stress which could be reduced through constitutional change. Second they could agree that it would take more than one meeting and more than themselves to bring about outputs which would be sufficient to reduce the overloading of

## THE CONSTITUTIONAL CONFERENCE - 1.

demands.

The verbatim records of the open Conferences show up the nuances in the degree of commitment of individual premiers, and hence their varying views on the extent to which the political system was being stressed. At one end of the spectrum were those premiers who felt that a new amending formula and patriation of the constitution would be sufficient to reduce the stress i.e. Premier Bennett of B.C. At the other end were those who felt nothing less than a brand new constitution with a new distribution of powers would meet their needs i.e. Quebec. All other governments can be placed somewhere between the two extremes. The degree of involvement in the review process, taking into account the imbalance in available resources of individual governments, can also be seen in the volume and content of the "propositions" put forward for consideration.

Despite the quantitative and qualitative disparity of inputs by various governments, all First Ministers were prepared to participate for as long as was required to bring about some acceptable constitutional changes.

From the outset there was tacit agreement to try and move forward on the basis of consensus rather

## THE CONSTITUTIONAL CONFERENCE - 1.

than some form of head counting. Consequently the published conclusions of the seven meetings of the Constitutional Conference are the clearest expression of the collective view of the on-going nature of the process and the role of First Ministers in it. Although other published documents lend insight into the substance of the discussions, none outweigh the importance of the conclusions in telling the story of the constitutional review. They will form the basis for the rest of the presentation in this chapter and the next, and are included as Appendices 1A to 1G of this paper.

2. The structures through which the bargaining took place

The constitutional bargaining took place within a framework which was decided upon and controlled by the First Ministers themselves. And during the course of the review exercise several variations on the basic approach were tried in order to accelerate the process and to precipitate the taking of some decisions.

In previous efforts at constitutional change in Canada, the orthodox practice was to have the First Ministers meet, agree on a basic work plan and leave their Attorneys General to meet and then to report back to them. In this exercise that approach does not seem to have been given much consideration. In fact

THE CONSTITUTIONAL CONFERENCE - 1.

committees of ministers of any kind were not established by the First Ministers until their second Conference, a year after the exercise was underway. Instead the most active and most influential group working under the First Ministers was a continuing committee of senior officials. The table which appears on page 58 graphically illustrates the review structures. A brief description of each element follows. Although the Secretariat does not appear on the diagram, it was created by the first Conference and went on to serve not only the First Ministers but all other committees and sub-committees as they were created.

- i. The Constitutional Conference itself -  
The political masters

The initial structures of the constitutional review were set out very clearly in the Conclusions of the First Meeting<sup>3</sup>. The Prime Minister and Premiers declared their intention to give continuing supervision to the process of constitutional review. The Continuing Committee of Officials was set up to assist in the task, and while this CCO was authorized to set up sub-committees on specific questions, this too would require the approval of the First Ministers.

In structural terms the First Ministers were

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3 Appendix 1A - p. 124.

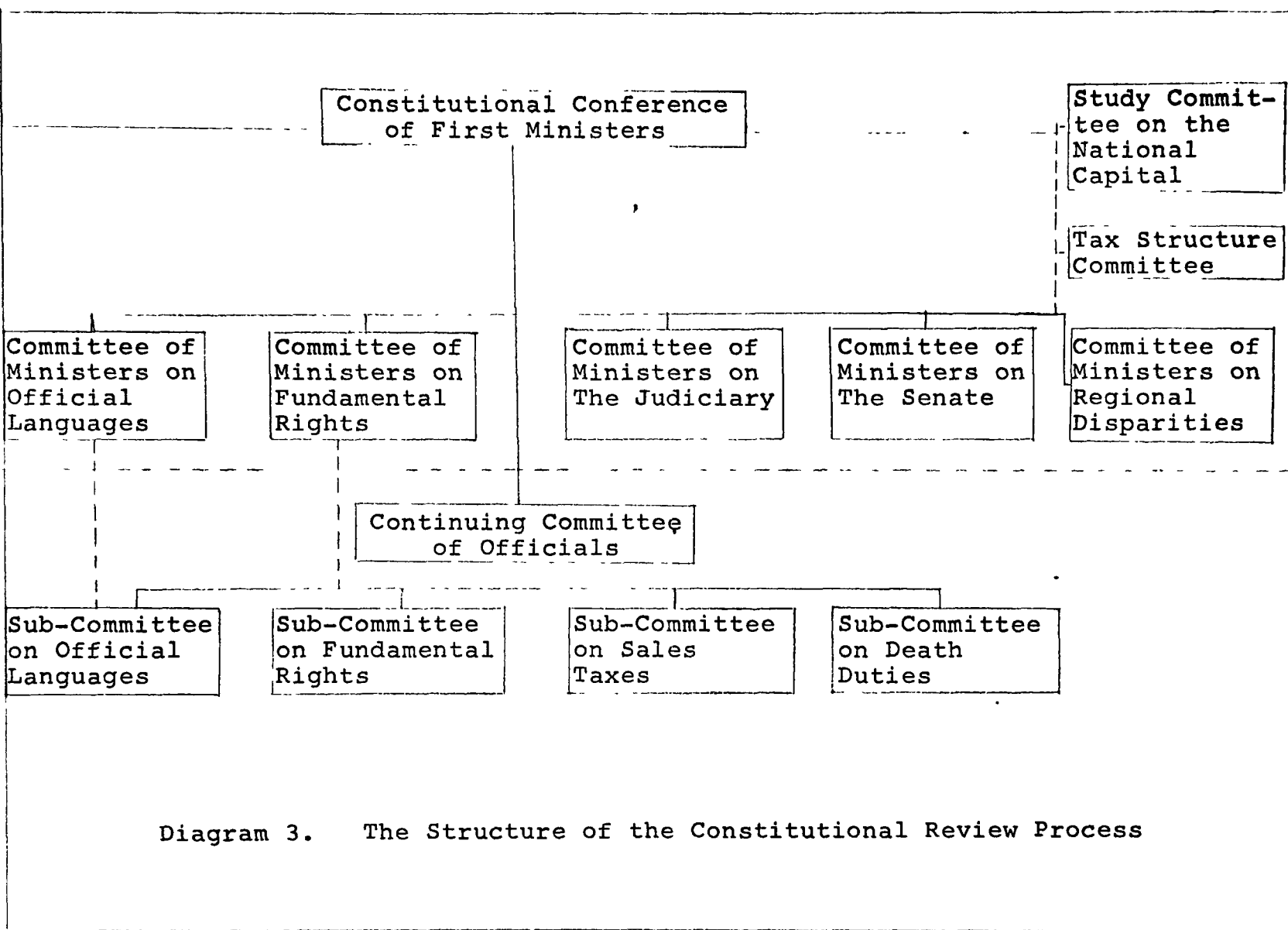


Diagram 3. The Structure of the Constitutional Review Process

## THE CONSTITUTIONAL CONFERENCE - 1.

responsible only to their respective governments and legislatures and it was clear that any binding decisions would require their acceptance. Within the review exercise the First Ministers were at the top and it appears that even the ministers in subsequent meetings recognized them as their "political masters".

In the period February 1968 to June 1971, the Constitutional Conference met seven times. Three of these meetings were "open", that is to say they were televised from beginning to end<sup>4</sup>. The others were held "in camera" and were entitled "working sessions"<sup>5</sup>. The final conference at Victoria, B.C. was partly open (the first session was televised) and partly closed. The reason for closed meetings was to reduce the time spent on opening statements and political posturing and to permit a more expeditious handling of more technically complex subjects. In addition the First Ministers had a number of private meetings, sometimes called "executive sessions", some of which were attended by the Secretary. These took place at the time of the Conferences and took such forms as pre-Conference meetings over dinner at

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4 February 1968, February 1969, December 1969

5 June 1969, September 1970, February 1971

# THE CONSTITUTIONAL CONFERENCE - 1.

24 Sussex or were decided on an ad hoc basis when plenary meetings seemed to be stalemated.

## ii. The Continuing Committee of Officials

The group of senior officials established as the CCO in February 1968 was the mainstay of the review and remained intensely active until early 1971 when its role was supplanted by a series of bilateral consultations aimed at achieving a firmer accord faster. In all the CCO must have met over a dozen times<sup>6</sup> in response to the mandates handed to it by the successive Conferences. It examined every question which was raised in the review either by the federal government or the provinces and presented its findings to the First Ministers not only by way of reports but also by intensive briefing of each government leader by his representation on the CCO.

## iii. The Sub-Committees

In all four Sub-Committees of experts were established. Of these, two, on Sales Tax, and Succession Duties, worked directly under the CCO and terminated their work within a short space of time. The Sub-Committee on Official Languages was created by the CCO at

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6 Reports prepared by the Conference Secretariat indicate that nine meetings of the CCO took place between February 1968 and December 1969. Since there were three Conferences after that, at least three more meetings of the CCO can be assumed.



## THE CONSTITUTIONAL CONFERENCE - 1.

its very first meeting. However when the Committee of Ministers on Official Languages was established in February 1969 it came under its jurisdiction as a working group. The Sub-Committee on Fundamental Rights was established after the creation of the Committee of Ministers on Fundamental Rights in February 1969.

Few Sub-Committees needed to be created because of the high level of expertise residing in the CCO. The Sub-Committees on Official Languages and Fundamental Rights seem to have come into being more because of the heavy volume of work in those fields rather than the inability of the CCO to deal with the subject matter. However the complexity of the questions of sales tax and death duties called for small committees of technical experts who could examine and report on all aspects of the questions.

## iv. The Committees of Ministers

Five Committees of Ministers were created at the second Constitutional Conference in February 1969. Four of them, on Official Languages, Fundamental Rights, the Judiciary and the Senate became part of the structure of the review. (The first of these met three times, the second two each met twice and the Committee on the Senate met once.) The fifth Committee on questions

## THE CONSTITUTIONAL CONFERENCE - 1.

of regional disparity was considered to be dealing essentially with the non-constitutional aspects of the issue and was allowed to drift out of existence after having made one report to the June 1969 Conference. Because the Tax Structure Committee was asked to do some work by the Conference and because the Tri-partite Committee on the National Capital was created at the December 1969 Conference, they are included in the diagram. They are shown with a broken line because they produced no inputs for the constitutional review.

The Committees of Ministers were created to raise the level of studies prior to decision making. They did add the political component. However they turned out to be incapable of bringing any decisions closer in time. Rather they imitated the CCO and presented reports not recommendations to the Conference.

## v. Ad Hoc Arrangements

As the third year of the review drew to a close, there developed a new burst of demands for rapid decisions on some questions, such as an amendment formula and patriation of the Constitution. Feeling that its established structures did not provide an adequate vehicle for rapid progress the First Ministers decided that in addition to the meetings of the Conference and

## THE CONSTITUTIONAL CONFERENCE - 1.

Committees, there should be more bilateral consultations between governments to examine specific constitutional questions<sup>7</sup>. On the basis of this agreement, the federal government suggested that the federal Minister of Justice draft some constitutional provisions and present them to the provinces individually. Such bilateral consultations took place in January and May 1971 before each of the last two Constitutional Conferences. In addition two "briefings", one for officials and one for ministers, were also given by the federal government, instead of formal meetings of the CCO or any Committee of ministers.

## vi. The Secretariat

The Secretariat, was created at the conclusion of the first Conference and it was to serve all aspects of the review structure for the duration of the exercise. Although administrative responsibility for the Secretariat was assumed by the federal government, it was accepted by all eleven governments as an independent and intergovernmental secretariat<sup>8</sup>. In this context the Secretary was directly responsible to the Prime Minister

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7 See Appendix 1E, para 8, p. 144.

8 Testimony of Henry F. Davis before the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada. Minutes of Proceedings and Evidence, No. 1, May 28, 1970, p. 77.

## THE CONSTITUTIONAL CONFERENCE - 1.

of Canada in his capacity as Chairman of the Conference. The Secretariat provided all the physical and technical services required to ensure properly run meetings. However it had no role in policy development or research. The closest it got to substantive input was to prepare analytical summaries of the verbatim records of the meetings and draft reports for the approval of and forwarding by various Committees. Of particular significance are the two reports signed by the Secretary and reporting on the work of the CCO<sup>9</sup>.

## 3. The Function - Constitutional Review

The structures described above were established and evolved for only one purpose, to provide vehicles by which the vast substance of constitutional change could be reduced to manageable proportions. The next chapter will attempt to summarize the work which was accomplished within it.

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9 A Briefing Paper on Discussions within the Continuing Committee of Officials, prepared by the Secretariat of the Constitutional Conference, December 12, 1968, mimeo document no. 75 and A Briefing Paper on Constitutional Review Activities and Discussions within the Continuing Committee of Officials, December 1969, mimeo document no. 174 (1).

## CHAPTER IV

### THE CONSTITUTIONAL CONFERENCE - 2.

#### 1. Planning the Review

When the first Constitutional Conference got under way on February 5, 1968, three items made up the agenda along with the question of further constitutional review<sup>1</sup>. By the end of the meeting, the First Ministers had not only committed themselves to the process of constitutional review, but had also agreed to begin with an examination of seven major questions:

- a) official languages;
- b) fundamental rights;
- c) distribution of powers;
- d) reform of institutions linked with federalism, including the Sénate and the Supreme Court of Canada;
- e) regional disparities;
- f) amending procedure and provisional arrangements;
- g) mechanisms of federal-provincial relations<sup>2</sup>.

The Continuing Committee of Officials (CCO) would be expected to consider these questions in some manner with a view to reporting back to First Ministers at their next meeting. Thus the work was shifted to officials who would have to devise methods of examining the subjects in a way which would be most helpful to First Ministers.

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1 See Chapter II, p. 49.

2 Appendix 1A, p. 124.

## THE CONSTITUTIONAL CONFERENCE - 2.

Between February 1968 and February 1969 the CCO met five times. At the outset all the members of the Committee did not agree on the nature of the constitutional review which could be implied from the Conclusions of the First Conference. Some felt they were expected to work towards a comprehensive review of the total Constitution, written and unwritten, others felt that an examination of the BNA Act with a view to possible amendments was all that was required. In the end it was agreed to proceed on the assumption that the First Ministers expected to be engaged in a total review and to plan the work of the CCO accordingly.

The process of total review was seen to involve a number of stages: (1) examination of propositions submitted by governments and development of concepts on what should be reflected in Canada's new constitutional arrangements; (2) special study of more complex issues or problem areas; (3) examination of the existing constitutional arrangements in the light of the ideas developed in stages 1 and 2; (4) legal drafting and the definition of the means by which the constitution could be promulgated and amended; (5) final acceptance of the wording of the written constitution and the method of promulgation and amendment; (6) and promulgation itself

## THE CONSTITUTIONAL CONFERENCE - 2.

by whatever political process had been agreed upon<sup>3</sup>.

The process of submitting the "propositions" mentioned in (1) was quite an elaborate undertaking. Given that the seven subjects listed by the first Conference could not of themselves provide for a total review of the constitution, and given the need to find a systematic approach to lay out the whole gamut of items which might need to be considered, the CCO agreed that governments would submit "propositions" which were to be tentative suggestions that, in their judgement, should guide the examination of the different aspects of the constitutional arrangements of the country. They were

not to be taken to represent at this stage firm or final positions of the governments concerned, nor were they to be regarded as comprehensive, but they were intended to give an indication of the thinking within the several governments concerning the views, needs and aspirations of Canadians across the country which should be taken into account during the review<sup>4</sup>.

The CCO also reported to First Ministers that the examination of such propositions could lead to a common identification of differences and similarities in the views of governments concerning these concepts and

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3 Report of the Continuing Committee of Officials to the Constitutional Conference February 1969. Mimeo Document No. 87 - p. 4

4 Loc. cit.

THE CONSTITUTIONAL CONFERENCE - 2.

principles, and could help the Conference to focus on the questions which would require the attention of First Ministers.

During the months which followed propositions were received from all governments and grouped by the Secretariat under the following titles:

- Object of the review
- Objectives of Confederation
- General Principles to be reflected in the Constitution
- Specific elements to be provided for in the Constitution
- Fundamental Rights
- The Constitution of the Central Government
- The Constitution of the Provincial Governments
- The Constitution of the Judicial System
- The Distribution of Legislative Powers
- Intergovernmental Relations
- External Relations
- Amendment Procedures
- General Provisions

Transitional Provisions  
Adoption of the Constitution<sup>5</sup>.

The seven subjects listed by the Conference were considered to be fully covered by these categories. Moreover the identification of categories was not intended to establish any order of priority for detailed examination as this was the exclusive prerogative of the First Ministers.

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5 Ibid., p. 5.



## THE CONSTITUTIONAL CONFERENCE - 2.

During the first year of the review, the examination of propositions was begun, but never completed. The CCO had covered just over half the categories by the time of the second Conference in February 1969. At this meeting the First Ministers identified some very specific subjects for consideration. They agreed that as a matter of priority the CCO should give immediate attention to the distribution of powers, in particular the taxing and spending powers<sup>6</sup>. At each of their subsequent meetings the First Ministers gave the CCO and the various Committees specific work to do. In order to deal adequately with these specialized subjects, the propositions, which were only brief statements of principle followed by a short explanation of why they were being put forward, were replaced by elaborate and comprehensive working papers, many of which were made public during the course of the review.

2. The priority subjects for the period February 1968 to September 1970

For close to three years the Conference and the CCO worked their way through a wide range of constitutional issues, but arrived at firm conclusions on very few. What follows is a brief description of the progress

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6 Appendix 1B, para 5, p. 127.

## THE CONSTITUTIONAL CONFERENCE - 2.

made on each of the seven subjects originally outlined. Part three of this chapter will cover the second phase of the review which began sometime between September 1970 and February 1971 and culminated with the presentation and negotiation of the Constitutional Charter in Victoria B.C. in June 1971.

## i. Official Languages

The discussions on Official Languages began around the 14 recommendations in Book I of the Report of the Royal Commission on Bilingualism and Biculturalism (B & B Report). First Ministers grappled with the question for a large part of the first Constitutional Conference and reached a shaky consensus that

as a matter of equity, French speaking Canadians outside of Quebec should have the same rights as English speaking Canadians in Quebec<sup>7</sup>.

In addition, they agreed that some government action should be taken "in ways most appropriate in each province and without diminishing existing rights, recognized by law or usage<sup>8</sup>". Finally they called for a special committee to examine the B & B Report and

the views expressed at this Conference on the Report, and on other matters relating to language rights and their effective provision in practice

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7 Appendix 1A, para 1, p. 123.

8 Ibid., para 2.

## THE CONSTITUTIONAL CONFERENCE - 2.

and to consult on methods of implementation, including the nature of possible federal assistance and on the form and method of constitutional amendment<sup>9</sup>.

The CCO at its first meeting created the Sub-Committee on Official Languages and passed on to it the mandate implicit in the Consensus. Although the Sub-Committee had some preliminary discussions on the constitutional aspects of both the questions of official languages and linguistic rights, including examination of the relevant propositions, most of its time, as well as that of the Committee of Ministers created in February 1969, was taken up with questions arising out of the B & B Report and the federal official languages bill. Initially discussions were concentrated on the financial and technical problems related to implementation of the recommendations in Book I of the Report. When the Royal Commission made public Book II dealing with education in the spring of 1969, these more specific recommendations were examined in depth.

In November 1969 the federal government offered the provinces a programme of financial and technical aid with respect to bilingualism in the field of education with an initial offer of \$50 million. The proposal

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9 Ibid., para 3.

## THE CONSTITUTIONAL CONFERENCE - 2.

having been met with mixed reactions, the federal government carried out a series of bilateral consultations which resulted in the development of plans by a number of provinces which could be financed under this new federal-provincial formula during an initial period of 18 months beginning January 1970.

Following the last of its three meetings in May 1970, the Committee of Ministers also made public, by way of a press release, the fact that it had agreed on the importance of achieving, two objectives:

to ensure in so far as it is feasible, that all Canadians have the opportunity to educate their children in the official languages of their choice;

to ensure in so far as it is feasible, that school children in Canada are given the opportunity to learn, as a second language, the other official language of Canada<sup>10</sup>.

Eighteen months later, the Sub-Committee met again to discuss the financial implications of other recommendations in Book II of the B & B Report. However the questions of constitutional guarantees for language rights and the official languages, set aside while practical language policies were given priority, were never taken up again. The September 1970 Constitutional Conference

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10    Communiqué, Committee of Ministers on Official Languages, May 25, 1970, mimeographed Document No. 242.

## THE CONSTITUTIONAL CONFERENCE - 2.

did conclude that "there had been substantial progress made toward accomplishing the objectives expressed in the original "Consensus on Language Rights"<sup>11</sup>". Although First Ministers wanted the Committee of Ministers to get back to constitutional questions, events in the months which followed led to the direct inclusion of a section on language rights in the constitutional package which became the Victoria Charter.

## ii. Fundamental Rights

In contrast to the question of official languages, the Committee of Ministers on Fundamental Rights, its Sub-Committee and the CCO dealt almost exclusively with the constitutional aspects of fundamental rights. Since the entrenching of a Charter of human rights had been the initial reason put forward by Lester Pearson for convening a Constitutional Conference, there was ample material to work with from the start. In February 1968 his government presented two documents, Federalism for the Future<sup>12</sup>

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11 Appendix 1E, para 22, p. 147.

12 The Right Honourable L. B. Pearson, Federalism for the Future, A Statement of Policy, presented to the Constitutional Conference, Ottawa, Queen's Printer, 1968.

## THE CONSTITUTIONAL CONFERENCE - 2.

and A Canadian Charter for Human Rights<sup>13</sup> dealing with the subject. Moreover a major statement on the subject was made by the then Minister of Justice, Pierre Elliott Trudeau in which he expressed the federal government's hope to obtain agreement on a bill of rights. Although specific proposals were not made until the second Conference by way of the federal book of propositions The Constitution and the People of Canada<sup>14</sup>, the First Ministers and the CCO had plenty to talk about, as most of the provinces put forward propositions on the subject during 1968. There was wide diversity in the views expressed by the participating governments which ranged from full support (some with reservations depending on the distribution of powers and the amending formula), to limited and/or partial support, to strong opposition. In particular the western provinces were strongly opposed to the entrenching of rights and, even at the end, accepted the few rights to be included in the Victoria

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13 The Honourable Pierre Elliott Trudeau, Minister of Justice, A Canadian Charter for Human Rights, Proposal by the Government of Canada, Ottawa, Queen's Printer, 1968.

14 The Right Honourable Pierre Elliott Trudeau, The Constitution and the People of Canada, An Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government, Ottawa, Queen's Printer, 1969.

## THE CONSTITUTIONAL CONFERENCE - 2.

Charter with reluctance. Others were not prepared to support more than the entrenchment of the traditional political rights and possibly some legal rights.

The CCO looked at the question of fundamental rights during its first five meetings. The matter was then taken up by the Committee of Ministers on Fundamental Rights which held two meetings and discussed entrenchment and political and legal rights. It then passed on the specific detailed work to its Sub-Committee which met five times between February and September 1970. The report which it prepared outlining its work was never officially taken up by the Committee of Ministers which did not meet again. However this report no doubt proved invaluable to the federal government in preparing the texts to be proposed for inclusion in the constitutional package.

The Committee of Ministers itself did reach agreement that there should be a constitutional requirement for free and regular elections at maximum intervals<sup>15</sup>. Agreement on other rights would have to be left to the First Ministers.

At both the officials level and the ministerial

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15 Progress Report of the Committee of Ministers on Fundamental Rights to the Constitutional Conference, Mimeo, Document No. 180.

## THE CONSTITUTIONAL CONFERENCE - 2.

level discussions were bedevilled by a number of recurring themes which were held too strongly by opposing provinces. The question of entrenchment and its effect on legislative supremacy was dominant. Other problems included were the effect caused by shifting the emphasis for protection from the legislatures to the courts; the fear that entrenchment might result in a transfer of power from one order of government to the other; and the jurisdictional aspects of the administration and enforcement of such rights. It was during the bilateral negotiations preceding the February 1971 Conference and the Victoria Conference that the fears were sufficiently dissipated so that the basic political rights could be included in the Charter, at least with a clause describing the limits of their application.

iii. The Reform of Institutions linked to  
Federalism

a) The Judiciary

Closely linked to the work of the Committee of Ministers on Fundamental Rights was that of the Committee of Ministers on the Judiciary. In fact both Committees were composed of the same men, chaired by the Minister of Justice, and they met in tandem. The only additional feature was that at the time of its creation, the Constitutional Conference had also agreed that the



## THE CONSTITUTIONAL CONFERENCE - 2.

Constitution should provide for the independence of the Judiciary<sup>16</sup>.

Three basic questions made up the bulk of discussions first by the CCO and later the Committee of Ministers. These were the proposition that appointments to the Supreme Court be approved by a modified Senate, that the Supreme Court be provided for in the Constitution, and that there be a separate Constitutional Court to adjudicate questions concerning the interpretation of the constitution and that a proportion of the judges on the this Court be appointed by the provinces.

With respect to the first of these, a range of alternatives was suggested and it was agreed that the provinces should be consulted more systematically when new appointments were required. To deal with the second there was agreement that existing constitutional guarantees with respect to the courts should be extended to include the Supreme Court and that further guarantees for the entire Judicial system should be examined.

Initially the other delegations expressed interest in studying in depth Quebec's proposal for a separate Constitutional Court. It was agreed that observations and propositions on the proposal would form the basis

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<sup>16</sup> Appendix 1B, para 8(a), p. 129.

## THE CONSTITUTIONAL CONFERENCE - 2.

for a third meeting of the Committee of Ministers. However a failure of responses resulted in its cancellation. Overall officials and ministers made little progress in developing the institution of the Judiciary. However the First Ministers did develop a quite elaborate section for inclusion in the Victoria Charter.

## b) The Senate

The Continuing Committee looked at the question of the Senate in the context of their propositions under the heading, The Constitution of the central government. Most provinces agreed that the second chamber should continue but several suggested changes in the appointment procedure. The question of better regional representation was also raised as well as the possibility of additional powers, including the approval of federal appointments such as judges of the Supreme Court and ambassadors.

The CCO reported its discussions to the Conference, which in turn created a Committee of Ministers to examine reform of the Senate and to look specifically at the question of making it more directly representative of the provinces and regions, possibly by changes in the selection procedures and length of tenure. The Senate might also be given certain special powers to make it a

## THE CONSTITUTIONAL CONFERENCE - 2.

more effective instrument of federalism. However, the federal Cabinet should continue to be responsible only to the House of Commons.

## c) The National Capital

The chart in Chapter three shows the creation of a tri-partite Committee on the development of the capital region. This was put forward by Mr. Pearson in February 1968 and, although agreement was reached with Quebec and Ontario, it was not part of the conclusions. In February 1969 Mr. Trudeau solicited the involvement of the eight other provinces and the Conference reached a five part Conclusion of principle and action<sup>17</sup>. The question was never again raised in the constitutional review.

## iv. The Distribution of Powers

It was clear from the start that the distribution of powers would represent a large part of the constitutional review. Although few of the propositions which were received by the CCO in 1968 dealt with the distribution of powers, (Quebec was the exception and presented an elaborate proposal) the Committee engaged in general but preliminary discussion in order to gain some insight into the kind of issues which might arise in a detailed

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17 Appendix 1B, para 9, (a) - (e) (ii), p. 129-130.

## THE CONSTITUTIONAL CONFERENCE - 2.

review. The CCO's report to the second Constitutional Conference outlines a wide range of considerations under five specific headings: general nature of the federation, fiscal and economic considerations, residual powers, allocation of sources of revenue, and flexibility in the exercise of powers<sup>18</sup>. As well there were included some alternatives on how examination of the subject might proceed.

Having taken note of this report, the First Ministers concluded that the distribution of powers should be given priority and asked the CCO to give its immediate attention to the taxing and spending powers. From this time on no meeting of the CCO or of the First Ministers was held in which some aspect of the distribution of powers was not discussed.

A paper of this length cannot do justice to the substantive discussions on the distribution of powers. One important reason is that major parts of the discussions which took place were held in camera (June 1969, September 1970 and February 1971). Consequently, what follows is a brief listing of items covered, based on the Conclusions of successive conference both open and closed.

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18 A Briefing Paper on Discussions within the Continuing Committee of Officials, Mimeo, Document No. 75, pp. 43-56.

## THE CONSTITUTIONAL CONFERENCE - 2.

## a) The Taxing Powers

The Conclusions of the June 1969 Working Session record that, with one unnamed exception, the First Ministers agreed

that Parliament and the provincial legislatures should generally have access to all tax fields, the power of the Parliament of Canada applying across the country and the power of each provincial legislature applying within that province<sup>19</sup>.

In addition to accepting a number of objectives to be met in applying the principle of general access, it was also recognized that Parliament should have the explicit power to make equalization grants to provincial governments.

The CCO was asked to examine how these principles, if formally accepted, might be applied in a revised constitution and to consider the alternative method of their application to the taxation of estates, transactions and real property. To deal with the first two of these, the CCO set up two specialized sub-committees, one to deal with death duties and the other to handle sales tax matters. Their work was reported to the September 1970 Working Session and left to be taken into account at an appropriate later stage.

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19 Appendix 1C, Item 1 (a), p. 132.

## THE CONSTITUTIONAL CONFERENCE - 2.

## b) The Spending Power

Following some general discussions by the CCO, the First Ministers, at the end of their Working Session in June 1969, recorded general agreement that there should be no constitutional restrictions on the present power of Parliament to make (i) payments to individuals or to institutions, and (ii) unconditional grants to provincial governments. Moreover Parliament should continue to have the power to make conditional grants to provincial governments provided that an acceptable formula for determining when there existed a national consensus favouring a proposed program could be developed and provided that people in non-participating provinces would not suffer a fiscal penalty<sup>20</sup>. The CCO was asked to look at the question of alternative formulae and the concept of compensation for non-participating provinces. Although the CCO examined the questions in depth and reported to the December 1969 Conference, First Ministers were unable to agree conclusively on either matter and the items were left in abeyance.

## c) Income Security and Social Services

The subject of income security and social services

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20 Ibid., Item (1b), p. 133-134.

THE CONSTITUTIONAL CONFERENCE - 2.

was discussed by First Ministers in December 1969 and was largely based on a published federal working paper of the same name<sup>21</sup>. The discussion and the conclusions which were issued were inconclusive. Three categories of substance, income support, income insurance and social services, were examined. In the end the only work which went forward was that carried out by the CCO on the application of the concept of paramourty, federal or provincial, in the field of public retirement insurance.

It should be noted that these discussions preceded and were separate from the discussions initiated by Quebec at the February 1971 Conference on social policy in general. This phase culminated in a special item which was included in the Victoria Charter.

d) Capital Markets and Financial Institutions

First Ministers had a preliminary discussion of the subject of capital markets and financial institutions at their Working Session in September 1970. There was general agreement that Parliament should continue to have responsibility for the chartered banks and that the Constitution should provide for concurrent federal

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<sup>21</sup> The Right Honourable Pierre Elliott Trudeau, Income Security and Social Services, Working Paper on the Constitution, Ottawa, Queen's Printer, 1969.

## THE CONSTITUTIONAL CONFERENCE - 2.

and provincial jurisdiction over credit<sup>22</sup>. They also dealt inconclusively with the regulation of financial institutions other than banks and the allocation of powers in relation to the securities market. Although study by the Ministers of Finance and the CCO was called for, it never took place.

## e) Environmental Management

The problem of pollution was also considered, in a most preliminary way in September 1970, and was identified not only as a matter for the constitutional review, but also for cooperative efforts under existing constitutional arrangements. In February 1971 First Ministers looked at a federal proposal regarding concurrent jurisdiction over the control of pollution of the air and water. Some interest was expressed but it was agreed that the study of various constitutional approaches was called for.

## f) Canadian Interprovincial Marketing

During their one-day meeting on non-constitutional matters on September 16, 1970 the First Ministers discussed current interprovincial marketing problems, in particular that which was called "the chicken and egg war".

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22 Appendix 1E, para 12-18, in particular paras 13 and 15, p. 145-147.



## THE CONSTITUTIONAL CONFERENCE - 2.

The jurisdictional problem involved seemed serious enough to have the matter placed on the agenda of a constitutional conference. The resulting discussion nonetheless revolved around current problems and the only conclusion of constitutional significance was that interprovincial trade should be examined at a future meeting.

### g) Other items

The only other item which merits mention is the question of external relations. This was an issue troubling Ottawa and Quebec in 1967 and, at the end of the first Conference, the Prime Minister tabled a federal paper entitled Federalism and International Relations<sup>23</sup>. It was followed in May 1968 by an addendum entitled Federalism and International Conferences on Education<sup>24</sup>. At the second Constitutional Conference the Premier of Quebec tabled a Working Paper on Foreign Relations<sup>25</sup>. Although several First Ministers had referred to the need for exclusive federal jurisdiction over external relations

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23 The Honourable Paul Martin, Federalism and International Relations, Ottawa, Queen's Printer, 1968.

24 The Honourable Mitchell Sharp, Federalism and International Conferences on Education, Ottawa, Queen's Printer, 1968.

25 Working Paper on Foreign Relations, Notes prepared by the Quebec delegation, February 1969, Conference Document No. 107.

## THE CONSTITUTIONAL CONFERENCE - 2.

in their remarks in February 1968, the question did not come up again until February 1971 when the possibility of a relevant provision was included in the federal proposals for early constitutional reform. The text proposed was not agreeable to Quebec and it was agreed that the item would go forward to Victoria only if an appropriate text was found. That does not appear to have been the case, as it is not a part of the Victoria Charter.

## v. Regional Disparities

One of the subjects given the most elaborate treatment during the review was that of regional disparities. It had emerged as a major theme at the Confederation of Tomorrow Conference and was carried over into the initial Constitutional Conference at the request of Nova Scotia. Regional disparities were seen as a current problem as well as one for constitutional reform. Even as early as this first meeting it was agreed that an objective of federalism and a responsibility of the federal government was to provide an adequate standard of living for all Canadians, equality of opportunity and relatively equal standards of national public services.

The question was looked at by the CCO and taken up again in February 1969. At the end of this meeting it was agreed that

THE CONSTITUTIONAL CONFERENCE - 2.

the promotion of the full development of all parts of Canada is an essential objective of Confederation<sup>26</sup>.

It was also agreed that a Committee of Ministers should take up the question of ways to reduce disparities immediately and the CCO should give special attention to the constitutional aspects.

The Conclusions of the June 1969 Working Session report agreement that

the objective of reducing disparities across the country should be written into the preamble of a revised constitution as a basic goal of the Canadian people<sup>27</sup>.

The December 1969 report of the CCO also records that it was asked to consider "the implications of spelling out in the Constitution a specific obligation to combat regional disparities<sup>28</sup>". At the December meeting there was some support for putting a specific provision in the Constitution in addition to a reference in the preamble, but further study of the legal questions raised was called for.

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26 Appendix 1B, para 6 (a), p. 128.

27 Appendix 1C, Agenda Item 2, p. 134.

28 A Briefing Paper on Constitutional Review Activities and Discussions within the CC), mimeo Document No. 174 (1), p. 20

## THE CONSTITUTIONAL CONFERENCE - 2.

After some more work by the CCO, the September 1970 Working Session concluded that First Ministers had completed their examination of this item and that their conclusions would now await the drafting stages of the review. They had agreed on an objective, a preambular reference, an additional statement in the Constitution of a moral obligation on the part of both orders of government and to keep this objective in mind in examining the distribution of powers<sup>29</sup>.

There was reference to a preamble in the February 1971 Conclusions<sup>30</sup>, however one did not emerge from the negotiations at Victoria. Instead there was a separate Part VII on Regional Disparities.

vi. The Amending Formula and Provisional Arrangements

Although there had been a few references to the amending formula early in the review, and some provinces felt it should be the first item discussed, it was not until September 1970 that the Conference asked the CCO to carry out a detailed investigation of ways to amend the Constitution<sup>31</sup>. The Conclusions also record that a

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29 Appendix 1E, paras 25 to 29, p. 148-149.

30 Ibid., para 7, p. 144.

31 Ibid., para 8c, p. 144

## THE CONSTITUTIONAL CONFERENCE - 2.

number of First Ministers were of the view that

"certain urgent amendments might be required before the full review had been completed and that it would be important to have an appropriate method of making such amendments<sup>32</sup>".

Much work was done in the intervening months, because the Conclusions of the February 1971 Working Session included the following formula as a feasible approach: consent at the federal level plus consent of the majority of the provinces including any with 25% of the population and at least two of the four Western provinces with 50% of their populations and two of the four Atlantic provinces<sup>33</sup>. This agreement was formalized in the Victoria Charter, Part IX in 9 articles.

vii. Mechanisms of Federal-Provincial Relations

The CCO looked at the question of mechanisms of federal-provincial relations during its review of propositions in 1968 including the propositions that inter-governmental liaison and an annual meeting of First Ministers should be provided for in the Constitution. At that time it was also known that a report entitled Intergovernmental Liaison on Fiscal and Economic Matters

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32 Ibid., para 6, p. 143.

33 Appendix 1F, para 3, p. 156-158.

## THE CONSTITUTIONAL CONFERENCE - 2.

(the Burns' Report)<sup>34</sup> was under way and it was agreed the matter could be held in abeyance. When the Burns' Report was ready in early 1969, there was some pressure to reopen the subject. However it does not seem to have been discussed again until September 1970 as a result of the presentation of an Ontario working paper The Machinery of Intergovernmental Liaison in Canada<sup>35</sup>. This document suggested constitutional provisions for (1) an annual conference of First Ministers; (2) an annual conference of Ministers of Finance; (3) the right of the federal government or any five provinces to call additional meetings of First Ministers or Ministers of Finance; and (4) the convening of other types of conferences which governments might wish to call. The paper also called for a permanent intergovernmental affairs secretariat. The importance of developing effective mechanisms for intergovernmental relations was expressed in the September 1970 Conclusions and the subject was placed on the agenda

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34 Report: Intergovernmental Liaison on Fiscal and Economic Matters, Institute of Intergovernmental Relations, Queen's University, Queen's Printer, October 1968, iii - 389, hereinafter Burn's Report. (It was prepared for the federal Department of Finance.)

35 The Machinery of Intergovernmental Liaison in Canada Draft Working Paper, submitted by the Ontario delegation: Document No. 274.

## THE CONSTITUTIONAL CONFERENCE - 2.

of the next Conference. In February 1971 it was agreed that

the revised Constitution should contain a provision, probably in the preamble, recognizing the important role of intergovernmental consultation and cooperation in the effective working of Canadian federalism. Also, in order to provide for the basic mechanisms of federal-provincial consultation, there should be a specific provision that the Government of Canada shall at least once a year consult with provincial governments about the desirability of holding a Conference of First Ministers<sup>36</sup>.

The second part of this conclusion found its way into the Victoria Charter, Part VIII, but the failure to agree on a preamble meant that the first part did not appear.

3. The Drive for Early Constitutional Changes

After September 1970 the constitutional review process seems to have changed gears. In planning their future work the First Ministers emphasized the need for further full meetings "with ample opportunity between meetings for consultations between individual governments<sup>37</sup>". This meant that bilateral negotiations could be conducted even while the CCO was carrying on its work.

Since the closed Conference in September 1970 was followed by another in camera meeting in February

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36 Appendix 1F, para 8, p. 161-162.

37 Appendix 1E, para 8, p. 144.

## THE CONSTITUTIONAL CONFERENCE - 2.

1971, one can only speculate on what bilateral and multilateral meetings took place in the intervening months. The opening paragraph of the February 1971 meeting indicates much had been accomplished, when it said

The Conference agreed that the Government of Canada and the provinces should proceed as quickly as possible to patriate the Constitution, with an appropriate amending formula applicable entirely within Canada and with such other changes as can be agreed upon quickly<sup>38</sup>.

The meaning of this sentence should not be underestimated. The First Ministers, while not abandoning the overall review, were going to concentrate for the moment on achieving sufficient agreement on a number of matters which could be changed or added to the Constitution at an early date. As of February 1971 this would include not only patriation and an amending formula, but it also would include articles dealing with fundamental rights (basic political rights only), language rights, the Supreme Court, regional disparities, mechanisms of federal-provincial relations and modernization of the constitution including development of a preamble and the deletion of spent or irrelevant provisions in the existing Constitution. The only cloud on the horizon

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38 Appendix 1F, para 1, p. 155.



## THE CONSTITUTIONAL CONFERENCE - 2.

was Quebec's veiled indication that early agreement on the question of social policy would make the acceptance of the developing constitutional package more palatable in that province. It was understood that bilateral negotiations between Ottawa and Quebec on the constitutional implications would take place before June. In addition the Ministers of Welfare, who had also been presented with Quebec's proposals, were asked to report to the June Conference.

Between February and June the constitutional texts based on the February agreement were drafted and discussed with the provinces on a bilateral basis. It was announced by way of a communiqué<sup>39</sup> on May 31 that the bilateral round was followed by a meeting of Ministers under the chairmanship of the Minister of Justice to review the draft proposals which were to be submitted to the First Ministers in Victoria.

Apart from social policy which was formally on the agenda, nothing other than the draft constitutional changes were discussed at Victoria. Since the entire meeting, except for the opening and largely ceremonial session, was held in camera, one can only speculate on

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39    Communiqué, Meeting of federal and provincial Ministers in preparation for Victoria's Constitutional Conference, May 31, June 1, Doc. No. 347.

## THE CONSTITUTIONAL CONFERENCE - 2.

the nature and intensity of the debate which took place. The only insights can be derived from the lengthy press conference which Prime Minister Trudeau gave late on the evening of June 16th when the Canadian Constitutional Charter was about to be unveiled<sup>40</sup>.

The Conclusions of the Victoria Conference reported that discussions had been extensive and far reaching<sup>41</sup>. More importantly it had been decided that the Charter, as a whole, would have to be accepted by all governments by Monday June 28, after which, given unanimity, governments would recommend the Charter to their respective legislatures. Parliamentary acceptance would lead to the measures to patriate to Constitution. The Charter contains 61 articles and a schedule. It is divided into ten parts as follows: Political Rights, Language Rights, Provinces and Territories, Supreme Court of Canada, Courts of Canada, Revised Section 94A, Regional Disparities, Federal-Provincial Consultation, Amendments to the Constitution, and Modernization of the Constitution. The schedule of repeal includes the repeal of reservation and disallowance and the renaming of a number of acts

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40 Prime Minister's Press Conference Following Conclusion of the Constitutional Conference in Victoria, B.C., June 16, 1971, mimeo, 17 pages

41 Appendix 1G, para 2, p. 168.

## THE CONSTITUTIONAL CONFERENCE - 2.

and the list of spent and irrelevant provisions to be deleted<sup>42</sup>.

Ultimately the Charter failed to receive unanimous approval. Quebec rejected it because, in the end, it was not satisfied with the compromise article on social policy. The Saskatchewan government was defeated on June 23 and the new Premier did not respond by the 28th of June.

So after three years of intense activity on a wide range of fronts, the constitutional review came to a dead stop. Occasionally since that time there have been a few references to its revival, but there seems to be little enthusiasm for the possibility. The sense of urgency which animated the discussions has faded.

There is no crisis on the horizon which seems important enough for First Ministers to seek the solution in a revised Constitution. This does not, however, mean that federal-provincial consultation and bargaining have come to an end. Since June 1971 there have been several meetings of First Ministers on non-constitutional issues. Moreover both officials and Ministers of all eleven governments have spent a great deal of time in a

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42 Canadian Constitutional Charter, 1971, Schedule

## THE CONSTITUTIONAL CONFERENCE - 2.

comprehensive review of the social security system for the purpose of making reforms which could lead to a more integrated system of social security.

In addition the Secretariat of the Constitutional Conference was not disbanded. It was retained as the Secretariat for Conferences of First Ministers, and in May 1973 was given authority to serve other intergovernmental meetings<sup>43</sup>. Since no constitutional changes came out of the review, the retention of the Secretariat and its conversion into the Canadian Intergovernmental Conference Secretariat was the only direct forward step towards the formalization of the consultative process.

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43 Appendix 2, p. 170.

## CHAPTER V

### AN ANALYSIS OF THE BARGAINING PROCESS

The Constitutional Conferences from 1968 to 1971 were similar in form to previous meetings of First Ministers. The major difference occurs in the fact that, from the start, the First Ministers considered the Constitutional Conference to have at least a semi-permanent existence, lasting for the time it would take to reach their constitutional objectives<sup>1</sup>. Having decided this, the other differences can be seen in the sophistication of the support structures which were created, and more importantly, in the scope of the subjects examined.

One of the recurring concerns of First Ministers at previous conferences has been the desirability of finding an acceptable amending formula to be added to the British North America Act without necessarily proposing any major changes in the substance of the Act. In contrast the Constitutional Conferences had the objective not only of devising an amending formula but also of making extensive changes and additions to the Constitution and of taking a number of steps to bring the

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1 This theme was repeated by several First Ministers during the afternoon session of the last day of the first Constitutional Conference.

## AN ANALYSIS OF THE BARGAINING PROCESS

Constitution up to date including the renaming of certain enactments and the deletion of any spent or irrelevant clauses<sup>2</sup>.

This meant that, while not questioning the basic concept of federalism, great portions of the original bargain as expressed in the BNA Act would be looked at again. Even agreement on the changes proposed in the Victoria Charter would have represented a significant adjustment of the Confederation bargain. Moreover there is no doubt that if the Victoria Charter had been successfully implemented, there would have been great pressure to continue the review with the object of negotiating comprehensive changes, modifications and additions to the existing distribution of powers.

However as a bargaining process, the Constitutional Conferences differed little from any other negotiations at the highest level. First Ministers would reach agreement amongst themselves and submit their accord to their respective governments and perhaps legislatures for approval. The general effect, in the constitutional context, is to substitute a political process of bargaining and compromise for judicial review. Instead of

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2 See Appendix 1G, para 4, p.169 and Schedule of Repeal in the Canadian Constitutional Charter 1971

## AN ANALYSIS OF THE BARGAINING PROCESS

turning to the judiciary for an interpretation of existing constitutional phraseology, the political masters meet and reach a political accommodation. When this large a portion of the Constitution (original bargain) is under review, the questions go beyond that of judicial interpretation to renegotiation.

The achievement of constitutional change by political rather than judicial processes seems to be unanimously acceptable to the federal and provincial governments, and is one of the significant ways in which Canadian federalism differs from the American approach. There has never been any serious questioning of the capacity of government leaders to effect changes by way of bargaining in the federal-provincial arena. However the new feature since 1967 is the pressure to have these negotiations take place in public, that is to say carried live on national radio and television. The Canadian people seem to want to see their parliamentary leaders facing each other across the bargaining table. The politicians use this forum as one more in which to try to gain political support for their particular goals.

Despite the validity of the principle of openness, the basic result tends to be a slowing down of the bargaining process itself. The participants can

## AN ANALYSIS OF THE BARGAINING PROCESS

never forget that they are politicians and in open sessions tend to play to their constituents, reducing their capacity for give and take which is essential to successful bargaining. It was for this reason that the First Ministers invented the "informal working session"<sup>3</sup> during the constitutional review. For similar reasons, the First Ministers turned to their private sessions so that they could face each other on a one-to-one basis, without the pressure of advice from ministerial colleagues or officials. The success of these smallest of meetings reflects the First Ministers' view of their right and duty to reach the final agreements by themselves.

The main point, however, is that both the politicians and the electorate believe that intergovernmental bargaining is a legitimate process in the Canadian federation. While bargaining in the context of the constitutional review was different because it called into question parts of the original bargain, in the day-to-day setting, it is the constitution itself which provides the context in which bargaining takes place. As Dean Lederman points out,

there must be initial definition of the powers and resources of each government in the federation

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3. Appendix 1B, para 2a, p. 125.



## AN ANALYSIS OF THE BARGAINING PROCESS

before there can be bargains or agreements among them about what each government is to do or refrain from doing within its respective powers and resources<sup>4</sup>.

Since it is impossible to distribute perfectly the powers in a federation, the existence of the imperfections is at the root of many federal-provincial consultations.

Once the original bargain is struck, subsequent bargaining is a method and a process of providing practical flexibility within the rigidities of the formal constitution. It permits the Canadian federal system to achieve agreement on ways to adapt itself to meet stress and new demands and hence to persist. As

Richard Simeon says

Federal-provincial relations are often attempts to get around constitutional structures, and in doing so they may result in de facto constitutional changes<sup>5</sup>.

As mentioned earlier in Chapter two, the act of bargaining between Ottawa and the provinces has come to consist of reaching agreement on the facts, assessment of situations and proposals, mutual persuasion and, sometimes agreement (consensus). Once agreement has been reached at a federal-provincial meeting, the next step is

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4 W.R. Lederman "Some Forms and Limitations of Cooperative Federalism" in The Canadian Bar Review, Volume XLV, No. 3, September 1967, p. 409.

5 Simeon, Op. cit., p. 41.

## AN ANALYSIS OF THE BARGAINING PROCESS

to submit the agreement to all governments for approval.

The actual decisions are made by governments and sometimes ratified by the legislatures and Parliament<sup>6</sup>.

(Where unanimous agreement could not be achieved, as was the case on a number of questions in the 1950s and up to 1967, the concept of opting out was conceived as one more device for assuring persistence of the political system.)

The value of meetings at the highest level is strongly supported by Simeon's research and in particular his interviews with government officials. He writes

But most respondents felt the plenary conferences are the central arenas for federal-provincial policy-making. 'They provide a forum where 'the principals meet with the principals' to influence, bargain with, and persuade each other. They can discuss the fundamentally political questions which can be discussed at no other level. The purpose is not to make 'executive decisions' but rather 'to influence and enlighten each other and develop common knowledge'. And, while it is not a place where formal decisions are made very often, 'it is a place where I think the stuff of decisions is put forward and digested'. Decisions may be made effectively there, even if the actual decision is made somewhere else<sup>7</sup>.

Canadian federal-provincial machinery seems also

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6 This point is illustrated clearly in the chart on page 20, where agreements made at a federal-provincial conference are shown to be redirected to the federal and provincial authorities for final decision and output.

7 Simeon, Op. cit., p. 132.

## AN ANALYSIS OF THE BARGAINING PROCESS

to be governed by centralizing forces. Although meetings take place at many various levels of governmental activity, most policy questions considered to be important are dealt with at the political level, often by the respective ministers concerned and then First Ministers. What this really means is that the settlement of basic disagreements tends to be directed to the political level, precisely because they are basic and cannot be diffused through the rest of the system. The effect is often to define the conflict more sharply and to force politicians to see many problems in their constitutional setting and to make the consequent decision in this context.

Federal-provincial bargaining has increased significantly in Canada since the Second World War. Responding to economic, social and political pressures, and the problems of new technology, the federal and provincial governments have expanded their areas of activity. In an attempt to coordinate their efforts and/or clarify their jurisdictional authority in inter-dependent spheres, the two orders of government have been forced into almost continuous contact at both the ministerial and officials levels. Responding to demand stress either from the environment or from within the

## AN ANALYSIS OF THE BARGAINING PROCESS

system a series of extra-constitutional structural regulators were and have developed at both the political and operational levels. By classing every federal-provincial meeting as a structural regulator or at least a communications channel, one can illustrate the extent of the capacity of the political system to find techniques for persistence and adaptation.

There is still no constitutional foundation for federal-provincial meetings, although the Victoria Charter did include at least three references to federal-provincial consultation including not only a special part dealing with annual meetings of First Ministers (Part VIII), but also the requirement for the federal government to consult the provinces regarding nominations to the Supreme Court (Part IV) and in relation to revised section 94A regarding old age pensions (Part VI).

The informality of the arrangements does not, however, diminish their practical importance and significance. The Report on Intergovernmental Liaison on Fiscal and Economic Matters attributes this situation more to

the relative success of the "ad hoc" approach to the events of the times and a disinclination to superimpose formal structures upon the existing systems of parliamentary government than to any lack

## AN ANALYSIS OF THE BARGAINING PROCESS

of consideration of the problems and possible solutions<sup>8</sup>.

This 1968 report does not reflect the very strong desire on the part of certain provincial governments, notably Ontario, to formalize consultations. The feeling is that the present informal arrangements leave too much of the power and initiative to consult at the federal level and there are no instruments of leverage for the provinces to use. As Richard Simeon says

the institutions developed for the federal-provincial interaction affect the influence of the various governments, since the procedures typically give advantage to one or other government<sup>9</sup>.

This, in a sense, is one of the serious inadequacies of the federal-provincial consultative system as it now exists. Things remain essentially where they were when Mr. Pearson chastized Mr. Robarts, a mere provincial premier, for trying to convene a federal-provincial conference<sup>10</sup>. The federal government appears to feel that the convening of all federal-provincial conferences is a federal prerogative. There are still few automatic

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8 Burns Report, p. 8. A good idea of federal-provincial activity can be found in Appendix D, Inventory of Intergovernmental Machinery, 1967.

9 Simeon, Op. cit., p. 305.

10 See p. 45 of this Thesis.

## AN ANALYSIS OF THE BARGAINING PROCESS

meetings. Even those described as "annual" are held at a time and place suggested by Ottawa. And until the creation of the Constitutional Conference Secretariat, which later in 1973 became the Canadian Intergovernmental Conference Secretariat, all such conferences were also administered by the federal government. With this concentration of control, it is no wonder that the provinces are often of the view that the system is not adequately geared to respond to overload factors and demand stress as seen by them.

In the end though, the system will respond when the stress is great enough. The First Ministers' Conference on energy questions in January 1974 is proof of that. The only basic question which remains is whether the system would have improved to any degree if the constitutional provision included in the Victoria Charter had come into effect. A constitutionally guaranteed annual meeting of First Ministers would certainly tend to reduce the overall demand stress on the federal-provincial system, and become the linchpin for the formalization of a whole range of other key meetings (Ministers of Finance, Justice, Agriculture, Health and Welfare, etc.). But the institutionalization of annual meetings can also have a retarding or stifling effect,

## AN ANALYSIS OF THE BARGAINING PROCESS

providing the excuse to put off dealing with serious and immediate questions until the "usual" time fixed each year for such encounters.

Even without the formalization represented by the Victoria Charter, federal-provincial bargaining in Canada has become increasingly institutionalized. Not only First Ministers recognize the need for regular encounters, the same is now true of most ministers and deputy ministers. Appendix B of Gerard Veilleux's book<sup>11</sup> shows the scope of consultation in 1967 and illustrates the multiplicity and complexity of the interrelationships of the two orders of government in a federal system. The distribution of powers in the constitution is just the starting point.

And this is precisely why Riker's theory of bargaining does not hold up in the Canadian context. It does not provide for the inevitable confrontation between the two orders of governments, as governments, long after the original bargain has been struck, because the distribution of powers, as negotiated originally, might no longer be suitable or might no longer be given an interpretation wide enough to satisfy both powers.

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11 Veilleux, Op. cit., p. 129.

## AN ANALYSIS OF THE BARGAINING PROCESS

Disagreement on the distribution of powers should not threaten the basis of the federation. Instead the process of modifying it should be recognized as an on-going one. The very notion of federalism implies an interplay between governments, and calls for the acceptance of processes whereby the federation may respond to stress, by changing but not destroying the original bargain.

Herein lies the basis of the thesis that the original bargain, to survive must be open-ended. In addition the complexities of the interplay between the central and regional governments are such that the necessary process of federal-provincial bargaining tends to become institutionalized. The situation in Canada would support this hypothesis.

In Eastonian terms, there has developed an extensive network of structural regulators and communications channels to reduce demands from the environment and to respond to stress especially the kinds which cut across the jurisdictional lines. They may not be recognized in the Constitution, but they still represent devices for ensuring the maintenance and persistence of the Canadian federal political system.

The Constitutional Conference was the most elaborate channel opened and its specific task of finding



## AN ANALYSIS OF THE BARGAINING PROCESS

means of self-transformation comes closest to Easton's definition of the extent of changes which may be contemplated in order to ensure the survival of the political system. Although the constitutional review channel is now closed, the decision to create a permanent inter-governmental conference secretariat of the Constitutional Conference Secretariat represents the first concrete step towards formal, if not constitutional, recognition of structural regulators in the federal system. This is the turning point in the institutionalization of the bargaining process. All eleven governments have created for themselves a legitimate institution to serve their meetings of First Ministers and to be available to serve other meetings at the ministerial and officials levels.

This will not mean that the political stress will be diminished. It does, however, represent the notion of keeping a channel between the two orders of government permanently open, for the Secretariat is the first Eastonian structural regulator which is truly inter-governmental in principle.

## SUMMARY AND CONCLUSIONS

By an examination of the creation of the Canadian federation, the subsequent development of federal-provincial negotiations and the form and substance of the Constitutional Conferences from 1968 to 1971, proof was provided for the thesis that federalism is, at its origin, a bargain between central and regional leaders which to survive, must be open-ended, that is, subject to change or modification, and that the necessary process of federal-provincial bargaining tends to become institutionalized.

The facts show that federalism is more than the original bargain as described by William H. Riker and that the nature of the federal bargain is controlled by institutional elements other than the party system. It is concluded that the constitution of the federation has within itself the characteristics, in particular its distribution of powers, which force it to be an open-ended bargain. The extent of the interplay between the orders of government seems to be determined by the precision or lack of it in the distribution of powers and the related distribution of revenues.

Looking at the concept of federalism from a systems point of view, it has been illustrated where federal-provincial bargaining fits in the political

## SUMMARY AND CONCLUSIONS

system conceived by David Easton. Elaborating on his unitary model of the political system, a new model has been drawn up which shows the points in the system where the two orders of government can interact and how they must operate independently for the actual authoritative allocation of values.

The examination of the results of the Constitutional Conferences has shown that the Canadian Prime Minister and premiers, after working more closely together than ever before, were prepared, in spite of the failure to accept the Victoria Charter, to establish for themselves a "mutual" intergovernmental secretariat to serve their future meetings of a non-constitutional nature. This decision to establish a permanent channel and structural regulator between their governments is the first, and so far, only step towards the formal institutionalization of the bargaining process. It does, nevertheless, mark the turning point in one hundred years of ad hoc bargaining.

Finally it can be concluded that it is the very process of bargaining, of adjusting the federal bargain to suit changing times and demands, which has permitted the Canadian federal system to adapt and persist. Moreover this process of continuous bargaining between the

## SUMMARY AND CONCLUSIONS

two orders of government tends to become institutionalized even though this possibility is not provided for in the Constitution.

It should be noted however, that this process of intergovernmental bargaining takes place in a system of parliamentary democracy, where each order of government is responsible to its respective legislature. Therefore, one of the important problems of the future will be to determine the role which Parliament, provincial Legislatures, and parliamentarians can and will play in the maintenance and evolution of the Canadian federal system.

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## CONSTITUTIONAL CONFERENCE

## FIRST MEETING

FEBRUARY 1968

CONSENSUS ON LANGUAGE RIGHTS

1. Recognition by this Conference that, as proposed by the Royal Commission on Bilingualism and Biculturalism and as a matter of equity, French-speaking Canadians outside of Quebec should have the same rights as English-speaking Canadians in Quebec.
2. Recognition, as the Royal Commission on Bilingualism and Biculturalism has recommended, of the desirability of proceeding by governmental action as speedily as possible, in ways most appropriate in each province and without diminishing existing rights, recognized by law or usage.
3. Establishment of a special committee to examine the Report of the Royal Commission on Bilingualism and Biculturalism and the views expressed at this Conference on the Report, and on other matters relating to language rights and their effective provision in practice, and to consult on methods of implementation, including the nature of possible federal assistance, and on the form and the method of constitutional amendment.

CONCLUSIONS OF THE MEETING

THAT a continuing Constitutional Conference be set up, composed of the Prime Ministers and Premiers or their delegates, to supervise the process of constitutional review;

THAT a Continuing Committee of officials be set up to assist the Constitutional Conference in its task;

THAT a secretariat be formed by the federal government, after consultation with the provinces, to serve both the Constitutional Conference and the Continuing Committee of officials;

THAT the Continuing Committee of officials be allowed to set up sub-committees on specific questions; with the approbation of the Prime Ministers;

THAT, without limiting the above terms of reference, and taking into account the agreements as to principle and action reached at this Conference, the following questions be examined by the Constitutional Conference and the Continuing Committee of officials:

- a) official languages;
- b) fundamental rights;
- c) distribution of powers;
- d) reform of institutions linked with federalism, including the Senate and the Supreme Court of Canada;
- e) regional disparities;
- f) amending procedure and provisional arrangements;
- g) mechanisms of federal-provincial relations.



## CONSTITUTIONAL CONFERENCE

## SECOND MEETING

FEBRUARY 1969

CONCLUSIONS OF THE MEETING

1. General objectives of the Constitutional Conference  
(Agenda item 2(a))

The Constitutional Conference reaffirms its intent to complete a comprehensive review of the Constitution of Canada, to assess its adequacy for present and future requirements, and to determine the extent to which constitutional change is desirable either through amendment of the existing Constitution or through promulgation of an entirely new Constitution.

2. Procedure for constitutional review  
(Agenda item 2(c))

- (a) The Constitutional Conference expresses its intent that the review should proceed at an accelerated pace, now that the basic organizational and background work has been carried out. In this connection, the First Ministers will endeavour to hold more frequent sessions of the Constitutional Conference and, in addition, to have informal working sessions with the Continuing Committee of Officials, to provide more continuous direction to the process of constitutional review.
- (b) In order to maintain effective co-ordination of the constitutional review, the Conference agrees that:
- (i) all special committees of ministers set up by the Constitutional Conference should report to the Constitutional Conference;

- (ii) the Continuing Committee of Officials should assist other ministerial committees, as required;
- (iii) all special committees of officials should be constituted as sub-committees of the Continuing Committee of Officials;
- (iv) the Continuing Committee of Officials is authorized to establish such sub-committees, working groups or task forces as seem to be required for its purpose;
- (v) the Secretariat of the Conference should also serve all such ministerial committees and committees of officials.

3. Official Languages  
(Agenda item 4(a))

The Constitutional Conference recognizes that important steps have been taken by governments in the past year to encourage a fuller role for the French language throughout Canada, and it affirms that study of linguistic matters should be continued. In particular, the First Ministers agree that:

- (a) The recommendations of the Royal Commission on Bilingualism and Biculturalism, together with reports on linguistic matters from the Continuing Committee of Officials and the Sub-Committee on Official Languages, should be referred to a Committee of Ministers which should consider both the constitutional aspects of linguistic matters and the methods of implementation of language policies, including the nature of possible federal assistance for this purpose.
- (b) The Royal Commission's reports, together with other aspects of the subject of official languages, should receive such further consideration by the Continuing Committee of Officials and its Sub-Committee on Official Languages as may be required to assist the Committee of Ministers in its task.

Fundamental Rights  
(Agenda item 4(b))

The Constitutional Conference noting the various views and the general interest that have been expressed with regard to guarantees of human rights, including those views brought before the Continuing Committee of Officials, agrees that a Committee of Ministers should be established to study all matters relating to fundamental rights, including the question of entrenchment of such rights in a constitutional charter.

Distribution of Powers  
(Agenda item 4(c))

- a) The Constitutional Conference recognizes as a matter of priority the study of the distribution of powers, in particular the taxing and spending powers, and directs the Continuing Committee of Officials to give its immediate attention to this aspect of the Constitution.
- b) The Constitutional Conference, recognizing the urgency of the matter, agrees that the Tax Structure Committee should be convened for the purpose of examining, and reporting at the earliest opportunity to First Ministers, on:
  - (i) the occupancy of available tax fields by each of the provincial governments and the Government of Canada, and
  - (ii) federal-provincial shared-cost programme arrangements.

To this end the Tax Structure Committee would consider the aggregate of government expenditures and their rate of growth; the tax sources available for financing these expenditures and the potential of the total tax system; the level of borrowing by governments and its effect upon the Canadian economy; and the balance of fiscal responsibilities and resources within each of the provinces and the Government of Canada.

6. Regional Disparities  
(Agenda item 4(e))

The Constitutional Conference agrees that:

- (a) the promotion of the full development of all parts of Canada is an essential objective of Confederation;
- (b) a Committee of Ministers should, taking into account the views and proposals of the various governments, consider the administrative, financial and consultative arrangements for policies and programmes required immediately to reduce regional disparities;
- (c) the Continuing Committee of Officials should give special attention to the constitutional aspects of regional disparities, with a view to reporting to a Committee of Ministers as soon as possible.

7. Reform of institutions linked with federalism -  
The Senate  
(Agenda item 4(d))

The Constitutional Conference while recognizing that the reform of the Senate must be considered in the context of other matters related to the basic principles, structure and powers of Government in Canada agree that a Committee of Ministers should study possible constitutional provisions relating to the reform of the Senate and should take account in particular of the following considerations:

- (a) The Senate could represent in a more direct and effective manner than at present, the interests of the provinces and regions of Canada;
- (b) One of the ways in which this could be achieved is through appropriate changes in the method of selecting Senators, and another could be by altering the tenure of office of Senators;
- (c) It might be appropriate for the Senate to be provided with certain special powers in order to make it a more effective instrument of federalism, while at the same time adjusting its role in relation to legislation generally;

- (d) The distribution of membership should reflect in an equitable manner the provinces and regions of Canada;
- (e) The Government of Canada should continue to be responsible only to the House of Commons.

8. Reform of institutions linked with federalism -  
The Judiciary  
(Agenda item 4(d))

The Constitutional Conference agrees that:

- (a) The Constitution should provide for the independence of the Judiciary;
- (b) A Committee of Ministers should, taking into account the views and proposals of the various governments, consider further provisions concerning the Supreme Court and the Judiciary.

9. Reform of institutions linked with federalism -  
The National Capital  
(Agenda item 4(d))

The Constitutional Conference, subject to any comments that may be submitted, agrees that:

- (a) The cities of Ottawa and Hull and their surrounding areas shall be the Canadian Capital area;
- (b) No changes be made to provincial boundaries or to the constitutional responsibilities of the governments concerned;
- (c) The boundaries of the Canadian Capital area are to be established by agreement of the governments concerned;
- (d) In line with the aforementioned objectives, steps must be taken so that the two official languages and the cultural values common to all Canadians are recognized by all governments concerned in these two cities and in the Capital Region in general, so that all Canadians may have a feeling of pride and participation in, and attachment to their Capital;

- (e) That the study committee on the Canadian Capital continue its work, giving particular importance to the following:
  - (i) the definition of adjacent areas which would eventually constitute, along with the cities of Ottawa and Hull, and their surrounding areas, the Canadian Capital Region.
  - (ii) the study of the administration and the financing of a tripartite organization.

## CONSTITUTIONAL CONFERENCE

### FIRST WORKING SESSION

JUNE 11-12, 1969

### CONCLUSIONS OF THE MEETING

The Prime Ministers and Premiers held their First Working Session in Ottawa on June 11 and 12, 1969.

The agenda of the meeting was as follows:

1. Distribution of Powers in the Constitution:
  - a) The Taxing Powers
  - b) The Spending Powers
2. Constitutional Aspects of Regional Disparities
3. Progress Reports from Committees of Ministers
4. Programme of Work for the Constitutional Review
5. Other Business

#### Item 1 - General

In the consideration of this item, all governments noted that the present discussions about the taxing and spending powers were subject to a satisfactory division of powers being developed. The Government of Canada and several provinces were concerned that any agreement on the taxing and spending powers was subject to a distribution of legislative powers which would ensure a strong central government. Some provinces made the point that federalism also meant strong provincial governments.

Agenda Item 1 a) -

With one exception, the First Ministers agreed that Parliament and the provincial legislatures should generally have access to all tax fields, the power of the Parliament of Canada applying across the country and the power of each provincial legislature applying within that province. In applying this principle, the following objectives were accepted:

- (i) The "within the province" limitation of provincial taxing powers should generally be applied with respect both to direct and indirect taxes, so as to protect the taxpayer against the taxation of his income, property or purchases by more than one province.
- (ii) The taxing powers of both Parliament and the provincial legislatures should be limited so as to avoid the erection of "tax barriers" to interprovincial trade, and the power to impose customs duties should continue to be confined to Parliament alone.
- (iii) Considering that both Parliament and the provincial legislatures would have access in general to the same sources of tax revenue, there should be more regular and adequate federal-provincial consultations.

It was recognized that the principle of general access to all tax fields would not enable all provincial governments equally to discharge their constitutional responsibilities, and therefore Parliament should have the explicit power to make equalization grants to provincial governments. One province advocated that, instead of equalization grants to governments, there be established a basic income for all Canadians.



While some differences of views were expressed, the First Ministers agreed that the Continuing Committee of federal and provincial officials be instructed to consider further how these principles, if formally accepted, might be applied in a revised constitution and, in particular, to consider the alternative method of their application to the taxation of estates, transactions and real property. Certain provinces expressed the view that death duties and real property taxes should be excepted from the principle of access.

The Conference recognized that the discussions on the use by Parliament and the legislatures of their taxing powers should proceed concurrently with the constitutional discussions, and that such discussions would be of continuing importance in relation to the discharge by governments of their constitutional responsibilities.

Agenda Item 1 b) -

The second major item of discussion concerned the exercise of the spending power of the Parliament of Canada. Most delegations agreed that the present power of Parliament to make payments to individuals or to institutions should not be subjected to any constitutional limitation; one province, however, reserved its position until the question of the distribution of powers had been dealt with, while some other provinces expressed the view that this federal power should in practice be exercised in consultation with the provinces. It was also noted that some differentiation of institutions might be required before this principle could be finally accepted.

There was general agreement that there should be no constitutional restriction on the power of the Parliament of Canada to make unconditional grants to provincial governments; one province, however, expressed the view that the establishment of a negative income tax plan, administered by the Government of Canada, would make such payments unnecessary.

It was generally agreed that the Parliament of Canada should continue to have the power to make conditional grants to provincial governments, provided there is a satisfactory formula for determining a national consensus in favour of particular programmes, and provided there is a satisfactory formula for compensation in non-participating provinces.

With respect to the formula for determining the consensus, there was agreement that the Parliament of Canada and the provincial legislatures would be the appropriate bodies to determine whether a consensus exists, and there was general agreement that the formula should reflect the regional character of the country. However, one province stated that while it agreed with the principle of establishing a consensus, it considered that the formula for amending the Constitution might well provide the basis for reaching consensus. It was further agreed that the Continuing Committee of Officials should look again at alternative formulae.

There was general agreement that there should be no fiscal penalty upon the people of the non-participating provinces and that the ways of achieving this would be discussed at future meetings.

#### Agenda Item 2 -

The First Ministers agreed that the objective of reducing disparities across the country should be written into the preamble of a revised constitution as a basic goal of the Canadian people. Some provinces argued further that the Constitution should impose on the Federal Government a specific obligation to alleviate disparities. First Ministers agreed that at future discussions on the division of powers, it will be important to ensure that the federal and the provincial governments have appropriate powers to work toward this objective.

Agenda Item 3 -

The Working Session was advised of the progress which had been made by Committees of Ministers on the following matters:

Official Languages  
Fundamental Rights  
The Judiciary  
The Senate

The First Ministers took note of the progress to date and agreed that all the Committees should endeavour to meet again and report further to the Constitutional Conference before its next meeting.

Agenda Item 4 -

The Prime Ministers and Premiers agreed to meet again before the end of the year.

## CONSTITUTIONAL CONFERENCE

## THIRD MEETING

DECEMBER 1969

CONCLUSIONS OF THE MEETING1. Progress and Procedure in the Constitutional Review

The Prime Ministers and Premiers noted that progress had been achieved in the course of 1969 in the "comprehensive review of the Constitution of Canada" that had been agreed upon at the Second Meeting. The procedure adopted in February 1969 provided for working by means of "more frequent sessions of the Constitutional Conference", interspersed with "informal working sessions", together with the reference of particular problems to special Committees of Ministers, the Continuing Committee of Officials and Sub-Committees of Officials. The Conference affirmed its intention to continue this procedure in 1970 and agreed, subject to further discussion at the Federal-Provincial Conference of Prime Ministers and Premiers to be held in February 1970, that a Working Session would be planned for June 1970, and the Fourth Session of the Conference for the autumn.

2. Income Security and Social Services  
(Agenda Item 1(a))

The Constitutional Conference considered the distribution of powers in relation to the fields of income security and social services to try to determine what would be most appropriate to meet the needs of Canadians in the future.

The Conference recognized that there were many complex considerations arising out of the various proposals for distribution of powers related to income security and social services and that the views of governments were necessarily tentative until these considerations could be fully assessed. While there was not full agreement on the definitions, the discussion was carried out under the following categories suggested in the federal proposal, namely,

- (i) Income Support;
- (ii) Income Insurance;
- (iii) Social Services.

(i) Income Support

Quebec maintained the position that the provinces should have exclusive jurisdiction in the field of income support. Other First Ministers accepted the principle that Parliament and the provincial legislatures have and should continue to have powers to make general income support payments to persons. Some provinces expressed the view generally that the basic income support payments could logically be made by the Federal Government.

(ii) Income Insurance

The Conference considered the Federal proposal that Parliament and provincial legislatures ought to have concurrent powers in respect of income insurance matters, with the exceptions that:

- unemployment insurance should continue to be a matter of exclusive federal jurisdiction;
- workmen's compensation should continue to be a matter of exclusive provincial jurisdiction;
- retirement insurance should continue to be a matter of concurrent jurisdiction, but with federal powers becoming paramount.

Doubt was expressed by some that federal paramountcy in the matter of retirement insurance was required or desirable. It was apparent that there were different views concerning the meaning of paramountcy and the implications of providing for federal paramountcy in the case of retirement insurance. It was agreed that the Continuing Committee of Officials should undertake a detailed examination of the application of the concept of paramountcy, federal or provincial, in the field of public retirement insurance.

(iii) Social Services

It was generally agreed that provincial legislatures ought to continue to have exclusive jurisdiction over social services. Several provinces proposed that concurrent jurisdiction in this field should be considered. It was recognized that the federal government could, for the purpose of achieving national objectives, continue to use its spending power, subject to conditions to be defined, to make conditional grants to provincial governments in respect of those services.

There was a question whether federal manpower programmes had components which were essentially social services. The view was put forward notably by the federal government that manpower services were an essential part of the general economic powers and should be considered further when the subject of economic powers came up. In addition, it was agreed, however, that the appropriate federal and provincial ministers should examine the question whether the needs of the country could be more effectively met if the social aspects of manpower services were carried out by the provinces.

3. The Spending Power: Federal Grants to  
Provincial Governments  
(Agenda Item 1(b))

The Conference considered two questions raised in the federal proposals: the determination as to when there was a sufficient consensus favouring the introduction of new shared-cost programmes in fields of exclusive provincial jurisdiction, and the method which might be adopted for avoiding a fiscal penalty on the people of the provinces which decided not to participate in the programmes.

(i) Consensus - Most First Ministers agreed that the Constitution ought to require the determination of a consensus, on a regional basis, before the Parliament of Canada could enact new and general shared-cost programmes in areas of provincial jurisdiction. The principal suggestions were that the legislatures of three out of four, or three out of five regions of Canada having a majority of the population, ought to be required to agree to any proposal from Parliament for a new federal-provincial programme before it could become effective. (Where a region contained three or four provinces the approval of two legislatures would be required.)

The governments of Manitoba and New Brunswick were of the view that no formal requirement should exist as to how many provinces must agree before Parliament could undertake a new general shared-cost programme. Rather the Constitution should impose an obligation upon the federal government to consult all provinces before initiating such programmes.

(ii) Compensation in Non-Participating Provinces -

It was recalled that the Constitutional Conference had agreed in June that there should be no fiscal penalty upon the people of the provinces whose provincial legislatures had decided against participating in a particular federal-provincial programme.

Three views were expressed as to how a fiscal penalty could be avoided. The first was that the people in such provinces themselves ought to be compensated in an amount which in the aggregate would equal the per capita federal payments to participating provinces. The second view was that the governments of the non-participating provinces ought to receive unconditional grants equal to the conditional grants, they would have received had they agreed to participate in the federal-provincial programme. The third view was that taxes imposed by the federal government for the purpose of financing a particular shared-cost programme should not be levied in a non-participating province. It was agreed to defer discussion of this question until further aspects of the distribution of powers had been considered.

4. Taxation  
(Agenda Item 1(c))

The Constitutional Conference agreed that the Continuing Committee of Officials and its Sub-Committees should continue with the work in progress on the alternative ways of handling sales taxes and death duties in a new or revised Constitution.

5. Regional Disparities  
(Agenda Item 2)

The Conference reiterated the earlier agreement that the objective of reducing disparities across the country should be written into the preamble of a revised Constitution as a basic goal of the Canadian people.

It was recognized that both levels of government had responsibility for the achievement of this goal and that each should have appropriate powers for this purpose. Eight provinces and the federal government agreed that the federal government should have the power to alleviate regional disparities in relation to the income of individuals, inequality of economic development and standards of public services. British Columbia and Alberta advanced the view that, instead, a guaranteed annual income would remove disparities between individuals wherever they might be in Canada and therefore the effect would be to lessen regional disparities.



There was some support for the inclusion of a substantive provision in the body of the Constitution which would set forth the obligation, not subject to judicial review, of the federal and provincial governments related to regional disparities.

Because of the significance of the legal questions raised in the discussion, the Conference agreed that the Continuing Committee of Officials should give further study to the implications of placing specific clauses in the Constitution.

6. Reports from Committees of Ministers  
(Agenda Item 3)

- (a) The Constitutional Conference received the Progress Report of the Committee of Ministers on Fundamental Rights, and agreed that the Committee should be asked to proceed as quickly as possible with the programme of work proposed in the Report.
- (b) The Constitutional Conference received the Progress Report of the Committee of Ministers on the Judiciary, and requested the Committee to carry out the work programme it had proposed in its Report.
- (c) The Constitutional Conference received the Progress Report of the Committee of Ministers on Official Languages. It was agreed that bilateral discussions should proceed as quickly as possible between the federal government and the provinces concerning the federal proposal for financial and technical co-operation in implementing the recommendations of the Royal Commission on Bilingualism and Biculturalism. It was agreed, also, that the Sub-Committee on Official Languages and, if it were desired, the Committee of Ministers, should meet again after the bilateral consultations had been completed.

7. Future Programme of Work  
(Agenda Item 4)

First Ministers agreed to meet in camera in Ottawa on the 16th of February to discuss non-constitutional matters, essentially the economic situation, pollution and the report of the Tax Structure Committee.

## CONSTITUTIONAL CONFERENCE

## SECOND WORKING SESSION

SEPTEMBER 14-15, 1970

CONCLUSIONS OF THE MEETING

1. The Constitutional Conference met in Ottawa on September 14th and 15th, 1970. In keeping with the conclusion at the February 1969 meeting of the Conference that there was a need for occasional informal working sessions, this meeting was held in private. There have so far been three public meetings of the Constitutional Conference - in February 1968, February 1969 and December 1969 - and one other private working session in June 1969.
2. The agenda for the meeting was as follows:
  - (1) The Constitutional Review Process.
  - (2) Environmental Management.
  - (3) Capital Market and Financial Institutions.
  - (4) Report from the Committee of Ministers on Official Languages.
  - (5) Reports from the Continuing Committee of Officials:
    - (a) Taxing Power - Sales Taxes.
    - (b) Taxing Power - Death Duties.
    - (c) Regional Disparities - Constitutional Obligation.
    - (d) Paramountcy as applied to Public Retirement Insurance.
  - (6) Other Business.

3. The Constitutional Review Process

The Conference proceeded to a detailed examination of the constitutional review process in the light of the experience and progress to date. First Ministers emphasized the importance of the extensive work already done, which makes for a better understanding of the varied implications of the complex issues raised; also it enables each First Minister to have a full appreciation of the views, interests and concerns of the others. An indication of the progress made to date on individual subjects thus far considered in the constitutional review is set out in the appendix to this statement.

4. The Conference concluded that it was important for the federal and provincial governments to continue and complete the task which they had undertaken in 1968 and to determine what changes are required to provide constitutional arrangements in Canada that are adequate for current and future needs. It was agreed, also, that this task should be completed as quickly as was practicable. It was nevertheless recognized that it would be unrealistic to expect an early completion of the task, since the thoroughness of the review should not be sacrificed and, of course, current problems must continue to be dealt with in the normal way while the constitutional review is carried on.
5. The First Ministers considered the nature of the review, and it was agreed that it must continue as basically a political process, involving consultations between governments. At the same time, an essential part of the review was seen to be the preparatory and background work carried out by the existing committees of ministers, officials and consultants and by the Secretariat. It was recognized also that it was important to keep the public involved and fully informed of progress.
6. The Conference agreed that the examination of the question of amending procedures should now be given attention. A number of First Ministers thought that certain urgent amendments might be required before

the full review could be completed and that it would be important to have an appropriate method of making such amendments. It was the view of some that the ways of amending the constitution could best be examined in the light of discussions concerning specific provisions.

7. Several First Ministers stressed the importance of developing effective mechanisms for intergovernmental relations in meeting the problems faced by all governments today. It was agreed that this subject should be studied at an early date and be placed on the agenda of the next meeting of the Conference.
8. The First Ministers agreed that to expedite the review process they would plan on further full meetings of the Constitutional Conference, with ample opportunity between meetings for consultations between individual governments. In particular it was agreed that (except for Saskatchewan which favoured one meeting a year):
  - (a) First Ministers should plan on two meetings of the Conference a year, on the understanding that this would not prevent them from giving the necessary attention to pressing current issues which might arise. It was agreed that the nature of any particular meeting would be decided according to the circumstances, since both open and closed meetings were recognized to have value;
  - (b) in addition to the meetings of the Conference and committees, consultations between individual governments would be used, as appropriate, to examine specific constitutional questions;
  - (c) the Continuing Committee of Officials would be given more specific direction by the Conference, including, in particular, a request to carry out detailed investigation of the ways of amending the Constitution, to advance the examination of the subject of the intergovernmental consultative process and to continue with the study of the distribution of powers.

### Environmental Management

9. The problem of pollution was identified as one of the most pressing and serious issues facing the people and governments of Canada today and one that will assume increasing dimensions in the future. The Constitutional Conference considered the subject of environmental management.
10. The First Ministers explored the many dimensions of this subject, and concluded that effective management of the environment in future would involve all jurisdictions. In particular, it was suggested by some governments that the federal government would have a role in respect of international matters, interprovincial matters, and in supporting research into standards and technology. They agreed that governments should continue to study the constitutional aspects of this subject with a view to presenting proposals for possible constitutional changes in jurisdiction which would be discussed at the next meeting of the Conference.
11. The First Ministers made it clear that during these constitutional discussions of the problems of environmental management, the federal and provincial governments would continue to act cooperatively and to implement coordinated programmes of environmental management under the present constitutional arrangements.

### The Capital Market and Financial Institutions

12. The First Ministers had a preliminary discussion concerning the subject of the Capital Market and Financial Institutions and examined constitutional aspects of currency and banking, credit control, creation and regulation of financial institutions, trading and issuing of securities.
13. It was generally agreed that the chartered banks continue as a responsibility of the Parliament of Canada. British Columbia suggested and Alberta agreed that there be constitutional provision for the central

bank and a proposed intergovernmental fiscal and monetary council with some provincial responsibility for appointment of members to the Board of Directors of the central bank and members of the council. Quebec also thought that consideration should be given to decentralization of the operation of the central bank.

14. A number of provinces expressed the view that present banking institutions were not sensitive enough to the needs of various regions of Canada, and it was agreed that there should be discussions of ways, under the present Constitution, of making these institutions more responsive to regional needs.
15. It was generally agreed that the Constitution should provide for concurrent federal and provincial jurisdiction over credit. It was recognized that there should be more detailed study of any paramountcy, federal or provincial, which might be desirable in this field.
16. The Conference also considered the question of constitutional authority over financial institutions, other than banks, and various possibilities for constitutional change were put forward for study. Some provinces felt that intergovernmental arrangements could be relied upon to ensure any necessary uniformity in the regulation of institutions. It was agreed that the implications of alternatives for constitutional change should be fully explored.
17. The Conference also examined possibilities for the allocation of powers in relation to the securities market. Some First Ministers were of the view that a greater federal presence in this field was called for. Some provinces expressed the view that there was no need for a federal presence in a field that was being satisfactorily administered at the provincial level. A suggestion was made that a joint federal-provincial agency could be established to ensure uniformity in the regulation of securities. It was agreed, however, that the implications of constitutional and other alternatives should be examined in detail.
18. The Ministers of Finance and other Ministers, as appropriate, as well as the Continuing Committee of Officials, were asked to continue to study in detail

the implications of various constitutional approaches to the general field of the capital market and financial institutions, in preparation for a fuller discussion by the Constitutional Conference at its next meeting.

#### Official Languages

19. The Constitutional Conference received a Progress Report from the Committee of Ministers on Official Languages.
20. The Ministers reported on their consultations concerning a federal-provincial programme of cooperation with respect to bilingualism in the field of education. They also reported that the Committee had devised a formula for federal financial assistance which would encourage progress in this field without infringing upon provincial jurisdiction in matters of education, and they had recommended to governments that this formula should be adopted for a trial period of 18 months. The Conference noted that this recommendation was accepted by all governments.
21. It was agreed further that federal-provincial consultations on this programme should be continued and be concerned, in particular, with the nature and financing of possible "catch-up" projects within certain provinces.
22. The Constitutional Conference recorded its view that, taking into account the formula which had been worked out by the Committee of Ministers and the various steps which had been taken within governments in the past two years, there had been substantial progress made toward accomplishing the objectives expressed in the original "Consensus on Language Rights" which had been agreed upon by the Constitutional Conference at its initial meeting in February 1968.

The Conference complimented the Committee of Ministers on their work and agreed that they should continue to meet to review progress in the implementation of the new programme and to consider other recommendations of the Royal Commission on Bilingualism and Biculturalism. In particular, the Committee of Ministers was asked to turn its attention to the constitutional aspects of language rights.

### The Taxing Powers

The Constitutional Conference received reports from the Continuing Committee of Officials and its technical sub-committees concerning sales taxes and death duties. These reports had been prepared in the light of the principles which were identified by the Conference during its discussion of the taxing powers in June 1969, and in accordance with the direction from the Conference that officials should consider the alternative methods for the application of these principles to the taxation of transactions and estates. It was agreed that these reports would be taken into account at an appropriate later stage in the review.

### Regional Disparities

The Constitutional Conference has completed the main phase of its examination of the constitutional aspects of one of its major subject areas - regional disparities. This subject was one of the original list of seven main areas of enquiry which were designated by the First Ministers at the founding meeting of the Constitutional Conference in February 1968. The following conclusions were placed on record and are ready to be dealt with when the drafting stages of the review are reached.

The Constitutional Conference unanimously agreed that it is one of the foremost purposes of the country to ensure that disparities in the well-being and in the economic, social and cultural opportunity of individuals in all regions throughout Canada should be alleviated.



27. To this end, the First Ministers reaffirmed their agreement that the objective of reducing such disparities across the country should be written into the preamble of a revised Constitution as a basic goal of the Canadian people.
28. The Conference agreed, further, British Columbia dissenting, that the Constitution should contain, in addition, a statement of the moral obligation of both the federal and provincial governments to take appropriate action for the purpose of realizing this objective. British Columbia reiterated the view it had recorded in December 1969 that the best means of achieving the goal of alleviating regional disparities would be by alleviating the disparities among individuals.
29. The Conference agreed, also, that in its continuing study of the distribution of powers, the requirements of this major objective would be borne in mind, so that both the federal and the provincial governments would have the constitutional powers they need to meet their responsibilities in alleviating disparities.

#### Paramountcy as applied to Public Retirement Insurance

30. The Conference received a progress report from the Continuing Committee of Officials on the matter of paramountcy as applied to public retirement insurance. The First Ministers agreed that the goal to be achieved was that portability of the benefits of public retirement insurance plans would be ensured. The Conference therefore agreed that the Continuing Committee should continue to study the question of paramountcy, along with other alternatives for ensuring portability, with a view to submitting a final report at the next meeting of the Constitutional Conference.

#### Conclusion

31. The Constitutional Conference agreed that it would meet again in a working session next February. It was agreed also, that the Conference would plan to meet again in June of 1971, at which time they would accept the invitation of the Prime Minister of British Columbia to meet in Victoria.

Appendix to Statement of Conclusions

CONSTITUTIONAL REVIEW

LIST OF SUBJECTS APPROVED IN FEBRUARY 1968

- (a) Official Languages
- (b) Fundamental Rights
- (c) Distribution of Powers
- (d) Reform of Institutions Linked with Federalism,  
including the Senate and the Supreme Court of Canada
- (e) Regional Disparities
- (f) Amending Procedure and Provisional Arrangements
- (g) Mechanisms of Federal-Provincial Relations

DETAILED LISTING OF SUBJECTS WITH  
INDICATION OF WORK DONE TO DATE

subject - Stage Reached

a) Official Languages

Discussions at all levels; referred to Ministerial Committee and Sub-Committee, considerable progress made on non-constitutional aspects.

b) Fundamental Rights

Discussions at all levels; referred to Ministerial Committee and Sub-Committee, considerable progress made on political rights.

c) Distribution of Powers

(i) Spending Power

Discussions by both First Ministers and the Continuing Committee of Officials; work at an advanced stage, to be reviewed later.

(ii) Taxing Power

Discussions by both First Ministers and the Continuing Committee of Officials referred to technical sub-committees; technical work near completion, subject to review later.

(iii) Income Security and Social Services

Major discussions by both First Ministers and the Continuing Committee of Officials.

(iv) External Affairs

Some papers submitted, preliminary discussions early in the review.

(v) Economic Growth

General discussion by the Continuing Committee of Officials; future work to focus on individual components of the subject.

(vi) Capital Markets and Financial Institutions

Recent preliminary discussion by the Continuing Committee of Officials.

(vii) Environmental Management

Preliminary discussions by the Continuing Committee of Officials.

(viii) Additional subjects

There are a large number of additional subjects falling under the distribution of powers which have not to date been examined in any detail.

(d) Reform of Institutions Linked with Federalism

(1) The Judiciary

Referred to a Ministerial Committee; work generally at a preliminary stage, with progress on some aspects.

(ii) The Senate

Referred to a Ministerial Committee; work at preliminary stage.

(e) Regional Disparities

Extensive discussions by First Ministers and the Continuing Committee of Officials; may be considered to have reached an advanced stage.

(f) Amendment Procedure

Examination not yet started.

(g) Mechanisms of Federal-Provincial Relations

Preliminary discussion by the Continuing Committee of Officials.

(h) Subject Areas not Specifically Listed in February 1968

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(i) Objectives of Confederation

Preliminary examination.

(ii) General Principles to be Reflected in the Constitution

Preliminary examination.

(iii) Constitution of the Central Government

- Head of State ) Preliminary
- Executive ) discussion by the
- Parliament ) Continuing Committee
- House of ) of Officials of
- Commons ) related propositions.
  
- Senate (treated under institutions of federalism)

(iv) Constitutions of the Provincial Governments

Preliminary discussion by the Continuing  
Committee of Officials of related propositions.

## CONSTITUTIONAL CONFERENCE

## THIRD WORKING SESSION

FEBRUARY 8-9, 1971

CONCLUSIONS OF THE MEETINGPART IGeneral

1. In accordance with the conclusions of their working session last September, the First Ministers gave priority to the questions of an amending formula and an early patriation of the Canadian Constitution. The Conference agreed that the Government of Canada and the provinces should proceed as quickly as possible to patriate the Constitution, with an appropriate amending formula applicable entirely within Canada, and with such other changes as can be agreed upon quickly. This approach would permit a substantial degree of progress to be made quickly, while work on other aspects of constitutional revision continues. The First Ministers considered that such action might incorporate the elements set forth in the following paragraphs. However, the First Ministers reserved their right to further analyze all the juridical and other implications.

Patriation of the Constitution

2. The Constitutional Conference agreed on a procedure to be undertaken in Canada at a very early date in order to bring home the Constitution and to transfer to the people of Canada, through their elected representatives, the exclusive power to amend and to enact constitutional provisions affecting Canada. This procedure would involve:

- a) Agreement among the governments as to changes and procedure.
- b) Approval of a resolution in the usual way, by legislatures plus the two Houses of Parliament, authorizing the issuance of a proclamation by the Governor General to contain the amendment formula and whatever changes are agreed upon.
- c) Recommendation that the British Parliament legislate to:
  - i) recognize the legal validity of the Canadian proclamation and its provisions;
  - ii) provide that no future British law should have application to Canada; and
  - iii) make any consequential repeal or amendment of British statutes affecting the Canadian Constitution.
- d) Issuance of the proclamation by the Governor General on a date to coincide with the effective date of the British law.

#### The Amending Formula

3. The Constitutional Conference has considered the nature of the formula which should be adopted to permit the Canadian Constitution to be amended wholly within Canada. The First Ministers agreed that the following formula was a feasible approach.



## I. General Procedure

All constitutional amendments in future, except those covered in II and III, would require a resolution of consent at the federal level plus consent of the legislatures of a majority of the provinces of Canada including:

- a) the legislature of any province now containing at least 25% of the population of Canada, and of any other province that hereafter contains 25% of the population of Canada; and
- b) the legislatures of at least two provinces west of Ontario providing that the consenting provinces comprise 50% of the population of the provinces west of Ontario and the legislatures of at least two provinces east of Quebec.

## II. Federal and Provincial Constitutions

Sections 91(1) and 92(1) would be repealed and replaced by a section giving the Parliament of Canada and the legislatures of the provinces power to amend their respective Constitutions except with regard to the following matters when the general procedure set out in I would apply:

- a) the functions of the Queen, Governor General and Lieutenant Governors;
- b) need for annual sessions;
- c) maximum period between elections;

(The above three would apply to the legislatures as well as to Parliament; the following would apply to Parliament only.)

- d) principle of proportionate and minimum representation of members of Parliament from the provinces in the House of Commons;
- e) the number and residence qualification of Senators representing each province, and the powers of the Senate.

III. Amendments of Concern to Canada plus One or More but not All Provinces

Such changes would require a resolution of consent at the federal level plus the consent of the legislatures of the provinces concerned.

Fundamental Rights

It was agreed to entrench in the Constitution the following basic political rights:

- a) universal suffrage and free democratic elections at least every five years;
- b) freedom of thought, conscience and religion;
- c) freedom of opinion and expression; and
- d) freedom of peaceful assembly and association.

The exercise of these freedoms may be subject only to such limitations as are prescribed by law and as are reasonably justifiable in a democratic society in the interests of national security, public safety, health or morals or the fundamental rights and freedoms of others.

Language Rights

It was agreed that English and French should be declared the official languages of Canada, with the following provisions that would have equal application in all parts of Canada and to both languages:

- a) Any person may use English or French:
  - i) in the debates of Parliament and, with reservations expressed by some provinces, in the legislatures;
  - ii) in any pleading or process in federal courts;
  - iii) in communication with the federal administration.
- b) Federal statutes and instruments shall be in both languages.
- c) The individual shall have the right to have English or French as his main language of instruction in publicly supported schools in areas where the language of instruction of his choice is chosen by a sufficient number of persons to justify the provision of the necessary facilities. It was recognized that some further consideration will have to be given by various governments in order to determine appropriate administrative arrangements to implement the provision, what constitutes a "sufficient number", and what should be the percentage of instruction in the main language. Quebec lodged a general reservation with respect to this subparagraph pending an examination of all its implications.

- d) Parliament or a legislature may accord further recognition to the two languages.

#### Supreme Court

It was agreed that the existence and the independence of the Supreme Court of Canada should be entrenched in the Constitution, which should also provide for its basic structure. Its jurisdiction would continue to be that of a court of final appeal for the country. It was also agreed that while the Federal Government should retain the power of appointment to the Court, the Constitution should recognize the importance of provincial participation in the process of selection of suitable candidates for appointment. It was also concluded that study should be given to the means of assuring the availability on the Court of civil law judges to hear civil law appeals. It was agreed, in addition, that there should be discussion of the jurisdiction of the Supreme Court to hear appeals in matters of strictly provincial law.

#### Regional Disparities

Recalling their conclusion on the subject of regional disparities at the working session in September, the First Ministers agreed that the Constitution should include a recognition of the importance of equality of opportunity for all Canadians. It was therefore concluded that the reduction of regional disparities should be referred to both in a new preamble and in the body of the Constitution.

- a) The preamble should state that one objective of Confederation is the social, economic, and cultural development, and the general welfare and equality of opportunity for all citizens in whatever region they may live;
- b) In the body of the Constitution there should be a statement of obligation on all governments, federal and provincial.
  - i) to promote equality of opportunity and well-being for all individuals;
  - ii) to ensure, as nearly as possible, that essential public services of reasonable quality will be available to individual citizens,
  - iii) to promote economic development which will reduce disparities in the social and economic opportunities of individual Canadians in whatever region they may live.

This obligation would not be enforceable by the Courts and would not have the effect of altering the distribution of legislative powers.

#### Mechanisms of Federal-Provincial Relations

It was agreed that the revised Constitution should contain a provision, probably in the preamble, recognizing the important role of intergovernmental consultation and cooperation in the effective working of Canadian federalism. Also, in order to provide for the basic mechanisms of federal-provincial consultation, there should be a specific provision

that the Government of Canada shall at least once a year consult with provincial governments about the desirability of holding a Conference of First Ministers.

#### Modernization of the Constitution

- 9., Finally, the First Ministers agreed that work will be undertaken between now and the next meeting of the Constitutional Conference in June to propose specific alterations in the Constitution such as a new preamble and the deletion of spent and irrelevant provisions. Specific proposals in this respect will be brought forward for consideration by the Conference in June.

#### Next Step

10. It was recognized that the next steps would include further bilateral discussions leading up to the next meeting of First Ministers, and in addition as required, the on-going coordinating work of the Continuing Committee of Officials.

PART IISocial Policy

1. The Conference heard the views of the Government of Quebec on social policy in general and income security in particular. Quebec emphasized a broad conception of social policy and the importance of fitting income security measures into a global integrated policy with the objective of meeting effectively the problem of poverty. The Conference expressed its sympathy for this basic social objective. Quebec emphasized the fact that the existing distribution of legislative powers cannot be maintained if it impedes the realization of that objective. In addition, Quebec considers that the question of social policy is a fundamental element of the constitutional revision as a whole.
2. The federal government, for its part, expressed its desire to coordinate its income security measures with the social policies of the provinces, in order that each provincial government as well as the federal government may best realize its social objectives. There is and should continue to be room for different social policies in different provinces.
3. In regard to the Quebec proposals in particular, the federal government noted that what was suggested in regard to family allowances was very similar to the proposed federal Family Income Security Plan. The

Quebec statement also indicated that the Old Age Security Pension and Guaranteed Income Supplement would fit into its plans. Similar improvements in the Quebec and Canada Pension Plans have also been proposed.

Already decisions have been made to modify certain features of the proposals for amending the Unemployment Insurance Act on the basis of the information and arguments advanced by Quebec Ministers. Only in the case of the General Social Allowance Plan does there appear to be the necessity for further time and study to ascertain what is practicable during the near future.

The Conference was informed that bilateral discussions had already been planned between provincial and federal ministers and officials on these matters and their possible constitutional implications, and a further meeting of the Ministers of Welfare on income security was scheduled several months from now. The First Ministers asked that this work be accelerated and that the Ministers of Welfare report to the meeting of the First Ministers in June.

#### Canadian Interprovincial Marketing

Reference was made to current problems being encountered in connection with interprovincial marketing of certain agricultural products. The view was expressed that the problem had still not been solved, since the last discussion in September, and some provinces suggested that the Federal Government should exercise existing constitutional powers



to deal with the matter. A further suggestion by some provinces was that provincial marketing boards should retract certain regulations that affect the freedom of movement of goods, but another view was that this could not be done unless other action were taken to replace such regulations and avoid harm to local agricultural industries. In this connection, it was suggested that the Farm Products Marketing Agencies Bill, now before Parliament, 'could facilitate a satisfactory resolution of the problem.

It was also observed that the question of inter-provincial trade was a fundamental constitutional question which should be examined at a later meeting of the Conference.

#### Environmental Management - Pollution

The Constitutional Conference examined proposals for constitutional changes in jurisdiction related to the control of pollution.

In particular, the First Ministers considered a federal proposal that there should be a new concurrent power for Parliament and the provincial legislatures to make laws in relation to the control of pollution of air and water. Under this proposal, if there were a conflict between a federal law made under this power and a provincial law made under it, the federal law would prevail when it applies to control pollution which has, or if permitted would have, significant international or interprovincial effects, but in other circumstances the provincial law would prevail over the federal law.

Some First Ministers expressed interest in this proposal. Another view, however, was that new provisions could better be considered after there has been more experience in dealing with pollution; in the meantime, it would be preferable to rely on improved arrangements for coordination and cooperation between governments based upon existing constitutional provisions. A further view was that areas of exclusive federal and provincial jurisdiction would be preferable to the general concurrency which has been proposed.

It was agreed that the implications of various constitutional approaches should be given further study.

#### Other Business

The Conference received a report from the Continuing Committee of Officials on Paramountcy as Applied to Public Retirement Insurance, and accepted the recommendations regarding additional study.

#### Next Meeting

The Constitutional Conference confirmed that it would meet next on June 14-16 in Victoria, and that the meeting would be public, at least in part.

PART IIINON-CONSTITUTIONAL MATTERSUnemployment

The First Ministers discussed the unemployment situation across Canada, and expressed their concern for the problems being encountered by many Canadians this winter. Several First Ministers urged the Government of Canada to take additional action to alleviate the problem.

The Minister of Finance of Canada outlined the policies of the Government of Canada to combat unemployment, and stated that present indicators point to increasing economic growth and declining unemployment as the year progresses. He stressed that over-reaction would aggravate the problem by causing a resurgence of the inflationary spiral.

It was generally agreed that the federal and provincial governments should consult together concerning any possible additional steps which might be taken to alleviate the present situation.

## CONSTITUTIONAL CONFERENCE

## VICTORIA

JUNE 14-16, 1971

CONCLUSIONS OF THE MEETING

1. The 7th meeting of the Constitutional Conference was held in Victoria on June 14-16, 1971, on the occasion of the 100th anniversary of the entry of British Columbia into Confederation.
2. The Conference discussions dealt with constitutional provisions as set forth in a Charter which is based on the consensus arrived at in the Working Session of the Constitutional Conference in February 1971. While that consensus was the starting point, the negotiations at the Victoria Conference have been extensive and far-reaching. The First Ministers have agreed that the texts as drafted are of such importance that they should be reported to all governments for consideration. If the Charter, which is to be treated as a whole, is accepted, and this acceptance is communicated to the Secretary of the Constitutional Conference by Monday, June 28th, 1971, governments will recommend the Charter to their Legislative Assemblies and, in the case of the federal government, to both Houses of Parliament.
3. The acceptance of the Charter by both Houses of Parliament and by the Legislative Assemblies would enable the necessary action to be taken to patriate the Canadian Constitution, so that the power to amend and to enact constitutional provisions will rest exclusively with the Canadian people.

The proposed Charter also contains the terms of a formula for amending the Constitution entirely within Canada, and a number of other provisions to be incorporated into the Constitution at the time of patriation. These provisions are concerned with certain basic political and language rights, regional disparities, the Supreme Court of Canada, federal-provincial consultation, and the repeal of reservation and disallowance. In addition, a number of steps would be taken to bring the language of the Constitution up to date, including the renaming of certain enactments, and the deletion of spent and irrelevant provisions.

The Constitutional Conference also discussed the subject of social policy. It agreed to include in the proposed Charter an amendment to Section 94A of the B.N.A. Act by adding to its provisions family, youth and occupational training allowances. In addition, a new sub-section is to be added requiring consultation by the Government of Canada with provinces on any proposed legislation in relation to a matter covered by the revised section.

An early meeting of First Ministers will be held to discuss all aspects of federal-provincial fiscal arrangements, including tax reform, shared-cost programs, equalization and tax sharing.

First Ministers expressed their appreciation to the Prime Minister of British Columbia for his hospitality in receiving the Conference in Victoria in his province's centennial year.

## EXTRACT

from

Communiqué

Federal-Provincial Conference

Ottawa, May 23-25, 1973

## Agenda Item 7

The Future of the Constitutional Conference  
Secretariat

First Ministers agreed that the Secretariat to the Constitutional Conference should be continued in operation under the present Secretary to serve all future meetings of First Ministers as well as other intergovernmental meetings wishing to make use of its services; that the resources of the Secretariat should be built up as required in the light of practical experience with these functions; and that in view of the changing emphasis of its role the Secretariat should in future be called the Canadian Intergovernmental Conference Secretariat.

The Prime Minister will be communicating with Provincial First Ministers concerning suggestions which some of them have made about the Secretariat's mode of functioning, terms of reference and financing.

ABSTRACT OF  
THE CONSTITUTIONAL CONFERENCE (1968-1971) AND  
THE INSTITUTIONALIZATION OF THE CANADIAN  
FEDERAL BARGAINING PROCESS<sup>1</sup>

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This paper presents a theoretical and conceptual overview of the process of intergovernmental consultation and bargaining and how it has permitted the Canadian federal political system to adapt and persist. Specifically, it examines how and why the results of the work of the Constitutional Conference between 1968 and 1971 mark the turning point in 100 years of structural evolution and bargaining in the Canadian federation. From the works of the leading authors on federalism, this paper develops the elements of a new definition of federalism. It also presents a dynamic response model of a political system illustrating the concept of federalism and the federal-provincial bargaining process and how the authoritative allocation of values is carried out in the Canadian federal system.

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1 Valerie Dufour, Master's thesis presented to the School of Graduate Studies of the University of Ottawa, Ontario, December 1974, X-173, p.

## ABSTRACT

Having suggested that federalism is a bargain which is open-ended, the paper relates the theory to the Canadian situation and traces briefly the evolution of intergovernmental bargaining between Ottawa and the provinces from 1867 to 1973. This is followed by a two-part study of the Constitutional Conference: first an outline of the origin, structure, and on-going nature of the Conference; and second a description of the substance of the constitutional review. There is then an analysis of the process of bargaining as it applies to the Conference. It is shown that, although the Canadian Constitutional Charter of 1971 was not ultimately adopted, the decision of the Prime Minister and Premiers to turn their Constitutional Conference Secretariat into a permanent intergovernmental conference secretariat, to serve not only the meetings of First Ministers but also meetings of other ministers and officials, is the first real move towards the formal institutionalization of the Canadian intergovernmental bargaining process. This Secretariat is described as a permanent open channel and structural regulator between the two orders of government. It is concluded that it is the very process of political bargaining, to find ways of adjusting the federal bargain to changing times and demands, which has



## ABSTRACT

permitted the Canadian federal system to adapt and persist. Moreover this process of continuous bargaining between the two orders of government tends to become institutionalized. In Canada, this process takes place in a parliamentary democracy, and a problem for the future will be the determination of the role which Parliament, the provincial Legislatures can and will play in the maintenance and evolution of the Canadian federal system.