Citizenship and the New Constitutional Order

by Alan Cairns

This article argues that when we talk about the Canadian constitutional order as a network of institutions we should not talk just of the elite institutions of executive federalism and parliamentary government. We should also include an increasingly crucial institution of the way in which we govern ourselves, namely, the institution of citizenship. The article is based on testimony to the Senate Standing Committee on Social Affairs, Science and Technology on April 28, 1992.

Among the many reasons I might suggest to illustrate the growing importance of citizenship, we have to look no further than the Meech Lake episode. One could claim that the Meech Lake affair was a dramatic revelation of the conflict between a traditional way of viewing Canada in terms of institutions, namely, executive federalism, and a newer, emergent but still uncrystallized and incompletely comprehended, citizen role. One could say that the result of the *1982 Constitution Act* was to bring citizens into the constitutional order in a way that was a marked departure from our past, and that the first ministers who tried to orchestrate Meech Lake drastically misunderstood the profound transformation in Canadian constitutional culture generated by an evolving citizenship consciousness of the rights of citizens to have a role in constitutional change. As a result the Meech Lake attempt to return Quebec to the constitutional family was brought to a halt.

I would like to look at this whole matter of citizenship and the constitution with a bit of recent contemporary history to underline what I view as a number of important developments of the last quarter of a century.

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I argue that we must rethink where we are going in terms of citizenship.

By way of background we have to go back to 1969 and the White Paper of the federal government of the day on status Indians. Some of you will recall the major attempt by the new Liberal government of Prime Minister Trudeau to end what it thought was the negative consequences that flowed from the separate status that Indians had — and its theorizing that that status had been fundamentally negative and damaging to the Indians who were under the administration of the Indian Affairs branch. The attempt was to remove their separate status and to incorporate them into the general mass of the citizenry. I will return to this point later.

Then, in 1982, with respect to the Charter, there clearly was an attempt, espousing the same philosophy, to create via the Charter a single uniform rights-bearing Canadian citizenship which would incorporate the total citizen body into the constitutional order as bearers of rights enforceable by the courts with, of course as we all know, the section 33 notwithstanding clause.

Then, again, in 1982, especially with respect to the amending formula, we must remember that the equality of position of the provinces to which the 1982 amending formula gave sustenance had for long been a strongly-held view by then Prime Minister Trudeau who consistently opposed special status for Quebec.

Behind these three attempts to have the constitutional order stimulate egalitarian definitions of who we

are—namely, equality in terms of citizenship with respect, first, to the status Indian issue in 1969, second, with respect to the Charter and an equal citizenship and, third, with respect to equality of the provinces—it seems to me there was a basic desire to transcend or overcome difference by these three equalities. The historic constitutional distinctiveness of the status Indian people, and the psychological identifications flowing from it, the Quebec French-Canadian majority sense of itself as a national community linked to the Canadian nation with only weak emotional ties, and the variegated senses of provincialism stimulated by federalism - these were all to be submerged behind the three equalities previously noted. Or, if not submerged, relatively weakened.

The goal was really a symmetrical citizenry, existing in a symmetrical federalism. I think that was a powerful tendency of the last 25 years. What has happened? The point, of course, is that the objectives have not been fully met and the failure to meet the objectives is sufficiently important that we have to reconceptualize what is possible. That requires us to rethink what citizenship will mean in a future that I believe we cannot evade, a future in which both a symmetrical citizenship and a symmetrical federalism will have to be sacrificed.

First, let us go back for a moment and think of what has happened since the 1969 actions of the government of that period which, for good and honourable reasons attempted to bring Indians into the basic Canadian community of citizens with honour and enthusiasm as part of the general citizen body, and with what were then viewed as damaging distinctions eliminated. Of course, it turned out that the status Indians – since these were the only ones to whom it applied—did not find that a desirable development at all and fought back very successfully. The policy was stymied and, ultimately, dropped. Thus, an attempt to end a differentiated status failed. But more than that, not only did it fail but through section 35 of the *Constitution Act*, an extremely important development took place, the significance of which we are now beginning to understand. A new phrase was introduced with a new definition. The new phrase was "aboriginal peoples of Canada" and a content was attributed to that phrase, i.e. it said, "Aboriginal peoples of Canada includes the Indian, Inuit and Métis people".

That was an important change. We know that in 1939, the Supreme Court decided that Inuit, (then called "Eskimo"), were included under federal government responsibility of section 91(24), but they did not become subject to the *Indian Act*. It is also fair to say that for the next 20 years after that constitutional case, Eskimos still remained very much in the background as shadowy figures in Canadian political and constitutional existence.

The 1982 section 35 of the *Constitution Act* added Métis. So, we now have a different indigenous category in the Constitution than we formerly had.

Whereas in 1969 the attempt was made to eliminate the separate status of one indigenous category, Indians, now, in 1992, we find we have three named indigenous peoples in the Constitution. We find that they all use the language of nationalism to apply to themselves. We find that far from assimilation, which had really been the goal for status Indians of the 1969 policy, we have four separate aboriginal seats now at the constitutional bargaining table attempting to fashion a response to Quebec. Political leaders of the four major aboriginal organizations describe their peoples as nations, and claim the right to bargain, nation to nation, with the federal government in coming up with a constitutional package.

More generally, we have recently seen a tremendous explosion of proposals, all of which recommend in different ways a differentiated status for aboriginal peoples in this country. I do not wish to suggest that these proposals for differentiated status go entirely unchallenged. Nevertheless, the momentum is extraordinarily powerful.

Just to give a brief and non-exhaustive indication, first there is the recommendation coming from a number of arenas now for separate aboriginal representation in the Senate. Further the Royal Commission on Electoral Reform and Senator Len Marchand's committee have advocated separate representation in the House of Commons.

You also know that there has been considerable pressure, and it has been given some degree of support by the Law Reform Commission of Canada, for a separate aboriginal justice system. You will recall also that that was recommended by the Manitoba inquiry into the aboriginal justice system. More significantly, it is now becoming almost conventional wisdom to assume that there will be a third order of aboriginal governments in this country that will have constitutional status.

Finally, there is a prestigious and high-powered Royal commission with unbelievably ambitious terms of reference now under way looking into aboriginal affairs. In two or three years we will receive a report which, in anticipation, looks like it may have for the aboriginal peoples the significance and retrospective importance that the B&B Commission had for relations between French and English peoples in Canada. To put it at a minimum, we are heading toward a situation—and numbers are a little bit vague—where up to one million Canadians, and possibly somewhat more than that, will exist in Canada with some status somewhat different from the rest of us.

Second, let us go on to the later developments in 1982 where the purpose of the Charter as I conceive it in the minds of its main creator, Prime Minister Trudeau and his allies, has to be thought of in political terms. The idea that the Charter was instituted just to protect Canadians from their governments is a mythology. We would not have a Charter had Prime Minister Trudeau not thought that it was to be a fundamental instrument of national unity and national integration. Therefore, he had a political, social theory of how rights could unite us and strengthen our conception of ourselves as belonging to a pan-Canadian community.

The Charter was designed clearly to weaken our provincialism, which is why most of the provinces opposed it. They opposed it because they opposed its anti-provincial thrust. More explicitly, the Charter was a weapon to constrain Quebec nationalism by keeping alive a conception of French Canada outside Quebec, and by keeping alive a non-Francophone minority—the English-speaking community—within Quebec. That was the goal. What has happened?

Clearly, there is some degree of significant difference in positive support for, and psychological identification with, the Charter between Quebec and the rest of Canada. In the rest of Canada, the Trudeau goal of transforming the psyche of Canadians by giving them a different identity as citizens has caught on remarkably. That was obvious in the demeanour of the various groups who appeared before the many Meech Lake committees. They think of themselves as Charter Canadians. That is their way of talking about the constitutional identity they now have because of the Charter.

On the other hand, in Quebec it is clear that development has not taken place. It may have developed, perhaps even more strongly in some sense, in the anglophone and allophone communities but not to the same extent in the French Canadian majority, and specifically not amongst the Quebec nationalist elite.

Unfortunately, I do not have the hold on it to be as precise as I would like, but at a minimum, the reception of the Charter in Quebec lacks the emotional, positive support that one so frequently finds in the many groups from the rest of Canada who appeared before Meech Lake committees. If one wishes to find strong anti-Charter statements amongst the scholarly community or the political intellectuals of the country, go and look at the statements of some of the nationalist intellectuals in Quebec. They oppose the Charter with vigour on the grounds that its political purposes are antithetical to their political purposes. When we think of the Charter as having political purposes, it is extremely comprehensible that those who have competing political purposes see the Charter as being on the other side. That is exactly the way it was seen by then Prime Minister Trudeau.

In addition, it is clear that the attitude of the aboriginal peoples of Canada towards the Charter lacks the broad base of support which exists in the rest of Canada. At the moment, we are seeing an interesting and important conflict being played out amongst the aboriginal peoples of Canada as to whether the Charter should or should not apply to self-governing aboriginal communities of the future.

Thus far, the federal government supports the application of the Charter to future aboriginal self-government. However, it is noticeable that there is some male-female difference on this issue with the Native Women's Association of Canada very strongly advocating the application of the Charter. The Assembly of First Nations under Ovide Mercredi is opposed either to its application or, at a minimum, is insisting that the present or some different notwithstanding clause be available to aboriginal governments. It is entirely plausible that, down the road, we could have a Charter whose application to aboriginal peoples is different from its application to the rest of Canadians. Who knows whether they will succeed, but a number of aboriginal organizations are proposing that they have their own charters outside the Canadian Charter, although there might be elements in common.

The creation of a single, uniform, rights-bearing definition of all Canadians has run into road blocks in two communities, the two other communities who think of themselves in national terms, the Quebec French Canadian majority and the aboriginal peoples, although the aboriginal peoples are really many nations and it is misleading to speak of an aboriginal nation.

There is another indicator related to the shortfall in meeting the original political purposes of the Charter. That is the differential support for the notwithstanding clause. The notwithstanding clause is the legacy of parliamentary supremacy brought in to placate the opponents of the Charter in the Gang of 8 in 1982. It seems the clause is under serious attack outside of Quebec. Patrick Monahan, former advisor to the Ontario government and Osgoode Hall law professor, has recently argued that it is obsolete in English Canada. That may be a somewhat premature judgment but he is on the right track.

One recalls Prime Minister Mulroney saying that the fact that we had a notwithstanding clause meant that the Constitution was not worth the paper it was written on. Rather an extreme statement, if I may say, but one which indicates the antipathy towards the notwithstanding

clause existing in general in the country although, again, not in any widespread sense in Quebec.

The most devoted defenders of the notwithstanding clause in Quebec are the nationalist elites and the political parties. The notwithstanding clause is viewed as an absolutely essential minimum defence against those Charter clauses allowed to be bypassed by the use of section 33. Clearly, the aboriginal male leadership appears to wish, at a minimum, that if they cannot have their own Charter or if they cannot be exempted from the existing Charter, that they at least have their own notwithstanding clause.

The third equality which I said is under attack as a legacy of the 1982 settlement is the equality of the provinces. This is clearly challenged by Quebec. It is challenged at a minimum by the distinct society proposal both in the Meech Lake accord and in the various proposals that have circulated from the federal government's September paper on the renewal of Canada and the Beaudoin-Dobbie committee. At minimum, there is the idea that Quebec, to some extent, will not be a province like the others either because, as Meech Lake suggested, the whole Constitution should be interpreted in the light of Quebec being a distinct society, or, as suggested in more recent proposals, the Charter should at least be so interpreted.

That is the minimum. The maximum, staying within federalism, would be the Allaire report, which could lead to a dramatically asymmetrical federalism. I still think we are speaking of minority intellectual and political tendencies, but I draw your attention to the fact that there is probably now more support—perhaps grudging, but more support than ever before—for thinking of our future as being asymmetrical, with Quebec having a distinct status that is not available to other provinces. That was the admittedly ambiguous message from the public Halifax conference. Speaking of the traditional provincial units of federalism, there is great pressure by Quebec to break out of the standard provincehood mould. So it is not clear that the equality of the provinces can withstand that pressure.

A more basic challenge comes by the side door or the back door. That is the pretty high likelihood that, down the road, we will have a third order of aboriginal government. Here, we are getting an opt-out from federalism, a separate category of self-governing aboriginal peoples who, if one believes some of the literature put out by the Penner committee and others, could have a very remarkable panoply of powers. As Penner suggested those aboriginal peoples covered by section 91.24 could have an assemblage of powers drawn from both orders of government. At least the larger units in this aboriginal third order of government could therefore withdraw their people from significant participation in the provincial or federal order of government, many of whose functions would be performed by aboriginal governments. The whole idea of provinces being the fundamental sub-state containers within which Canadians group themselves would no longer be the case. There is also a very good likelihood that we will have an Inuit semi-province in Nunavut in the near future.

Therefore the issue which we must face, and the real focus of my paper, is the nature of citizenship in a multinational Canada which contains more than one set of peoples who think of themselves as being nations. When you use the word "nations" certain psychological consequences tend to flow from it.

It seems that one line of development has come to a partial end. It has not ended, but again it has not triumphed. That is the line of development that presupposed we could successfully proceed on the goal of uniformity and sameness. If Gertrude Stein were writing on Canadian citizenship, she would say it meant that a citizen was to be a citizen was to be a citizen, and a province was to be a province was to be a province. I think neither of those tautologies will hold in the future.

> ***We are about to confront a multinational future in this country which will be made up of a citizenry possessed of diverse status which does not relate in a single way to the future three orders of government. In terms of citizenship, that poses immensely complicating, practical, normative and theoretical problems.***

I will close with one general problem and then one specific observation about that general problem. The general concern raised is, what sense of community and what sense of sharing can survive or will survive a situation in which we have a fragmented citizenship, fragmented along the lines of different nationhood ways of thinking of ourselves? Admittedly, these different ways will be incorporated, one still assumes, in some over-arching pan-Canadian constitutional order. However, the pan-Canadian constitutional order may not have the same emotional significance for many Canadians as was hoped for ten years ago. That, then, is the first big question. What kind of a nation state that wishes to care for all of us will survive, if I have outlined the future correctly?

The specific issue upon which I wish to close, because I do not think it is addressed frequently enough in the present political debate, is the issue of the application of the Charter to aboriginal peoples. This is unquestionably a citizenship issue because the Charter has become, particularly in the rest of Canada, a fundamental way of thinking about citizenship. It is the Charter which has created the demand for citizen participation in constitutional change.

I have indicated that we do not know quite how the debate will resolve itself in the aboriginal community with respect to the Charter. One could say the issue is one of cultural imperialism. That is how some aboriginal legal scholars define it. The Charter is your Charter; it reflects your culture; we do not wish it to apply to our culture which has a different set of human relations and citizen/political authority relations. Your Charter is an imperialist attempt to transform the way we think and the way we are. We therefore oppose it for those reasons.

I wish to make a point that, in the future, aboriginal peoples will continue to be very dependent upon the rest of Canadians, meaning therefore upon the rest of the governments of Canada, for extensive fiscal resources. It is inconceivable that, in any short-term future, more than a very small percentage of the total aboriginal population will have any capacity to mount the kinds of services to which aboriginal peoples feel entitled.

My argument is that the willingness of the rest of us to make these particular kinds of regional development grants or equalization payments, perhaps we could call them, to aboriginal peoples, will depend to an important extent upon whether we think of them as being one of us. Do we think of them as a part of our community, of a common citizenry, and therefore to whom we owe the obligations of sharing. It seems to me, if the Charter applies, that greatly increases the likelihood that we will say, yes, they are one of us; yes, they are a part of our community; yes, they share a similar allegiance to this 1982 constitutional instrument which has come to be very important to our civic identity as Canadians.

On the other hand, if the Charter does not apply, to put it in its most extreme version, we are then tempted—and I speak not of a psychological temptation but of an inducement which automatically flows from the non-application of the Charter—to think of them, to some extent, as strangers within the same country. Therefore, our sense of obligation to them moves in a direction like that sense of obligation we have to citizens of other countries. We almost begin thinking in terms of foreign aid because, by removing themselves from the Charter, they remove themselves from that "we" community which otherwise one would hope feels a strong obligation to them. If they remove themselves, I do not say they become like people who do not live in Canada, but they do not then have the same capacity to tug at our civic heart strings in terms of supporting the kinds of funds they will require if they are to develop in the way they would like.

My concluding point, then, is that the discussion of the application of the Charter to aboriginal peoples should not be left at the level of philosophical generalities and cultural differences but should also include a serious debate about some of the major practical consequences which will be affected by the decision that is made.✦