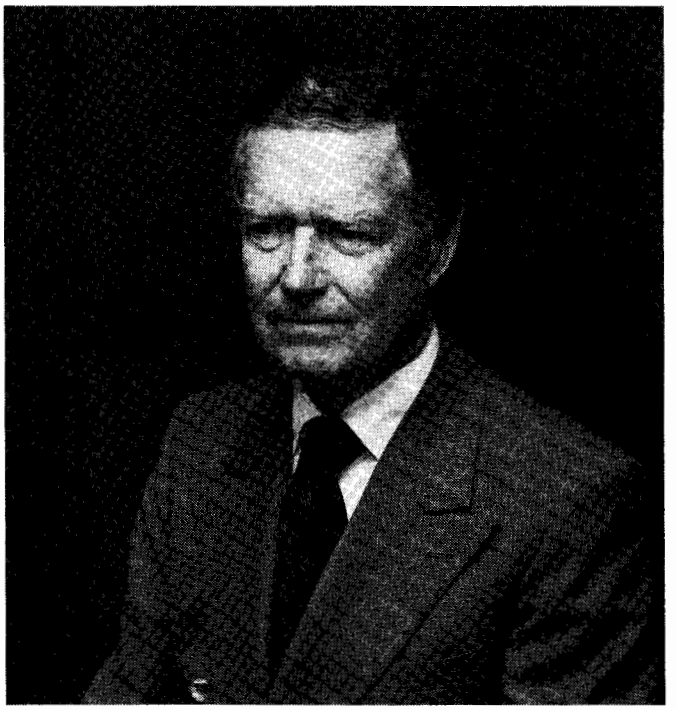
Quebec and Canadian Federalism

by Edward McWhinney, MP

This article, written before the Quebec election of September 12, is intended to provide Commonwealth parliamentarians visiting Canada for the CPA conference in October 1994 an overview of recent developments in Canadian federalism. These include the impact of the 1982 Charter of Rights, the failure of two proposed constitutional amendments, and the strategy of the new federal government elected in October 1993 toward the argument for sovereignty or self-determination proposed by some in Quebec.

Some general reflections are germane to the discussion of the continuing constitutional debate in Canada. It began with the political-intellectual "Quiet Revolution" of French-speaking Quebecers at the opening of the 1960s, over the *rôle* of Quebec in Canadian federalism as a whole and demands, in particular, for a Special Constitutional Status for Quebec or, failing that a relation of Sovereignty-Association with the rest of Canada. Self-determination of peoples is an imperative principle of contemporary International Law, with historical roots going back to the French Revolution. But there is nothing in its development throughout the 19th and early 20th century requiring its application through breakaway and fission of an already existing multi-ethnic state. The decolonisation experiences of the immediate post-World War II period are the exception to the general practice, and limited to the special circumstances of the separation of indigenous non-European native peoples from faraway European colonial masters. In most of the other situations, the claims of self-determination can be fully met by flexibility and imagination in the devising of new federal, plural-constitutional institutions and processes or in the modifying of already existing ones, providing only that sufficient wit and pragmatism is present in the political leadership of the main ethnic groups. It is important, of course, to remember the lesson



of the Sibylline Books, that the art of problem-solving consists in offering solutions when they are still timely, and before a situation has become pathological and politically out-of-hand. Some of the more spectacular examples of ethnic conflict in Europe today, involving the break-up of pre-existing multi-ethnic states and then political conflict, – sometimes armed conflict – between the succession states, seem evidence of the "Too little, too late!" syndrome, and reflect unfavourably on the

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problem-solving capacity of the political elites involved, including outside, non-regional sponsoring or protecting powers.

The concept of Sovereignty Association, – an escalation from earlier, politically more modest claims by Quebec nationalists which were viewed in Quebec as too tardily acknowledged, and then only grudgingly, by the rest of Canada, – was submitted by the then Quebec Government to a Quebec-wide referendum vote in May 1980. It was defeated, by a 60% to 40% margin, this in spite of a consciously ambiguous or, "soft" question which had been thought, by its drafters, to facilitate a favourable vote. The follow-up by Prime Minister Trudeau, promised during the Quebec referendum campaign in which he had actively participated, of a "renewal" of Canadian federalism which would better accommodate Quebec's special societal (ethno-cultural) facts, yielded in 1982 a long-overdue constitutionally-entrenched Bill of Rights for Canada (the *Canadian Charter of Rights and Freedoms*); but it did not, by reason of political conflicts with the Premiers of the English-speaking Provinces, respond directly to any of the main political demands stemming from Quebec's Quiet Revolution. The successor government at the federal level, the Mulroney Conservatives, held a large bloc of Quebec seats in the House of Commons and became preoccupied, from their election in 1984 onwards, with seeking special constitutional accommodations for Quebec in the federal system. This led successively to the politically abortive Meech Lake Accord of 1987-1990, which was killed when several Premiers of English-speaking Provinces who had originally supported it, had second thoughts and delayed in ratification. This was followed, in a further attempt at retrieval, by the Charlottetown Accord of 1992, which was defeated after being submitted to a nation-wide referendum that had been expected to approve it. It was overwhelmingly rejected in all regions of the country, including Quebec (though, perhaps, for different reasons from the rest of the country).

> ***The political lessons drawn from the twin constitutional debacles of the Conservative government over the Meech Lake Accord and the Charlottetown Accord are clear and compelling.***

Canadians as a whole are tired of the seemingly unending constitutional debate of the last three and a half decades which has pre-empted consideration by Ottawa of other, deemed more pressing, economic problems. The country, (including even Quebec, on some views) now has other priorities: ending the economic recession and reducing the huge (and increasing) external debt. Adding to the constitutional fatigue, Canadians as a whole reject any notion of a Special Constitutional Status, involving special institutional arrangements and processes for any one Province or region of Canada that is not available at the same time to all other Provinces or regions. It is a notion of constitutional equality, whose increasing popular acceptance as a ground rule of Canadian federalism may owe something also to the public educational *rôle* played by Prime Minister Trudeau's 1982 Charter of Rights, in which equality before the law is enshrined as a key or motor principle.

Since his election in October, 1993, Prime Minister Chrétien, who gave priority to economic issues and promised, at the same time, an end to debates over the "Constitution", has refused to be drawn into public discussions over what his government might or might not do or promise in regard to constitutional change, if a separatist government should be elected in the 1994 Quebec Provincial elections. President Franklin Roosevelt always refused to answer what he called "iffy" questions. A separatist government has first to be elected; it has then to decide whether or not to launch another referendum, and when; it has further to decide on a referendum question. Even if it should win a referendum vote, it would then have to decide whether the majority was convincing enough politically for it to attempt to negotiate with the federal government, and, if so, on what basis.

From the federal government's viewpoint, Canada has plenary powers and competence, under the constitution, to decide whether or not to allow a Quebec government-sponsored referendum on separation. Prime Minister Trudeau, in 1980, decided to permit the Quebec "sovereignty-association" referendum, on the political gamble that he could fight and win the referendum vote, and of course that is what happened. The federal government today retains its full constitutional options to allow or not to allow a referendum vote and, perhaps even more importantly, legally to control the content and wording of any referendum question (to ensure that it is an honest and unambiguous question, in contrast to 1980), and also to control the actual timing of any vote including the possibility of a second, follow-up referendum in the event of a "hung" vote in a first one. The federal government could always, if it wished, cut the constitutional Gordian Knot and launch its own, pre-emptive, nation-wide referendum, with its own question, legally superseding any Quebec vote.

Mention of the federal constitutional armoury is relevant in response to any charge that the federal government may be acting supinely in response to a mounting campaign in Quebec for a further Quebec referendum on separation, or sovereignty-association, or some other constitutional euphemism. The federal government's silence should not obscure the fact that the applicable legal rules – Constitutional Law and International Law – for any one of the various contingencies that might conceivably arise in the future are clear and unequivocal and also well-known and easily available. It is a prudent exercise in economy in the use of power at the federal level not to enter, at this stage, into yet another abstract debate over how many angels can sit on the point of a needle.

Looking to the sociological base of Canadian federalism today, many Canadians (and many Quebecers) would feel that at the level of Constitutional Law-in-action, substantial accommodations have been made that respect and concretely implement the principle of ethno-cultural self-determination for Quebec. It is not simply measures, like the federal *Official Languages Act* that implement French and English bilingualism in federal government institutions and agencies throughout Canada. It is the sustained federal government policy, over the past two decades, of constitutionally tolerating Quebec government legislative measures designed to preserve the "French fact" in Quebec by establishing French as the Official Language of Quebec, and also as the priority language in labour and industry and commerce and also in education, within Quebec. Initially doubtful or constitutionally contestable laws like the Bourassa Government's Bill 22 of 1974 and the Levesque Government's Bill 101 of 1977 have become, in the absence of federal government or federal government-assisted Court challenge, accepted in the general Canadian constitutional system as part of the basic premises (Grundnorm) of Canadian federalism. The principle of territoriality of language, involving, here, the primacy of the French language fact in Quebec, thus has come to coexist constitutionally with an official bilingual policy at the federal level; with an increasing and well-needed element of pragmatism and common-sense and humanity in the practical reconciliation of the two.

And so Canadian federalism has changed in response to the Quiet Revolution. If the conclusion should be now that other demands stemming from the Quiet Revolution, – Special Constitutional Status, and the like – are historically dated and, in any case, politically unacceptable in the new, multi-ethnic Canada, the federal government's belief remains that the top priorities for all Canadians today are economic ones, and that constitutional difficulties will be resolved easily enough, and quickly, when the programme for economic recovery and ending the recession is fully under way.❖