HOWARD LEESON
Developing a Strong Constitution

PATRICIA W. ELLIOTT
Stripped Down Federalism: Questions for Al O'Brien

JOHN D. WHYTE AND ANDREW D. IRVINE
National Security and the Rule of Law

HER MAJESTY QUEEN ELIZABETH II WITH PRIME MINISTER THE Rt. HON. PIERRE ELLIOTT TRUDEAU
SIGNING THE CONSTITUTION, APRIL 17, 1982

GREGORY P. MARCHILDON
Tommy Shoyama: A Life

KEN LARSEN
Ideological Purity and Real World Pragmatism: The CWB Debate

JIM MARSHALL
The 2007 Federal Budget and Saskatchewan

MALREDDY PAVAN KUMAR - New Sites of Transformation in Aboriginal People's Post-Secondary Education
NELSON WISEMAN - The People's House of Commons: A Book Review
FRED BURCH - Amending Dangerous Offender Legislation
PAUL CHARTRAND - Treaties and Their Development in Canada
Welcome to the latest issue of SIPP’s Policy Dialogue. We have always sought to foster public policy debate on a variety of issues and I am pleased that, in the case of two of our articles, that dialogue is happening within the pages of our newsletter. Such interaction is a part of our mandate we take very seriously at the Institute, so I would encourage all of our readers to think about contributing thoughtful articles on issues that interest you to future Policy Dialogues. After all, if it interests you, it likely interests others as well.

For SIPP, the major event this spring is our latest national conference. Entitled “A Living Tree: The Legacy of 1982 in Canada’s Political Evolution”, it is a chance for policy-makers, scholars, and citizens to reflect on the many ways that the Constitution Act, 1982 has influenced the course of Canadian politics over the last 25 years. SIPP has developed a reputation for putting on top-notch national conferences and, with three former Premiers, including a former Governor-General, senior government officials past and present, and scholars from across Canada, the United States, and Europe presenting, we are looking forward to an intellectually stimulating and enjoyable 2 ½ days in Regina between May 23 and 25. For details, go to www.uregina.ca/sipp and click on the link to “SIPP National Conference, 2007”.

While on the topic of the Constitution, we should recognize the passing of an important contributor to the interpretation of the Canadian Charter of Rights and Freedoms, the Honourable Bertha Wilson. Appointed to the Supreme Court of Canada in the spring of 1982, just weeks prior to the Constitution Act, 1982 coming into force, Madame Justice Wilson was the first woman appointed to our highest court. She was influential in giving meaning to the new Charter and ensuring that it became the modern, progressive rights document of which Canadians are justly proud. The Honourable Bertha Wilson passed away on April 28 of this year.

TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Title</th>
<th>Author</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Director’s Notes</td>
<td>Ian Peach</td>
<td>2</td>
</tr>
<tr>
<td>Developing a Strong Constitution</td>
<td>Howard Leeson</td>
<td>3</td>
</tr>
<tr>
<td>The 2007 Federal Budget and Saskatchewan</td>
<td>Jim Marshall</td>
<td>5</td>
</tr>
<tr>
<td>Stripped Down Federalism</td>
<td>Patricia W. Elliott</td>
<td>6</td>
</tr>
<tr>
<td>The Constitution Act, 1982: A Rough Guide</td>
<td>Ian Peach</td>
<td>10</td>
</tr>
<tr>
<td>Tommy Shoyama: A Life</td>
<td>Gregory Marchildon</td>
<td>11</td>
</tr>
<tr>
<td>Ideological Purity and Real World Pragmatism</td>
<td>Ken Larsen</td>
<td>12</td>
</tr>
<tr>
<td>National Security and the Rule of Law</td>
<td>John D. Whyte &amp; Andrew D. Irvine</td>
<td>14</td>
</tr>
<tr>
<td>Amending Dangerous Offender Legislation</td>
<td>Fred Burch</td>
<td>16</td>
</tr>
<tr>
<td>New Sites of Transformation in Aboriginal</td>
<td>Mahredy Pavan Kumar</td>
<td>18</td>
</tr>
<tr>
<td>People’s Post-Secondary Education</td>
<td>Nelson Wiseman</td>
<td>21</td>
</tr>
<tr>
<td>The People’s House of Commons</td>
<td>Paul Chartrand</td>
<td>22</td>
</tr>
<tr>
<td>Treaties and Their Development in Canada</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
On April 17, 1982, during a blustery rainstorm in Ottawa, Queen Elizabeth II signed a proclamation to end what many scholars have called Canada’s constitutional odyssey. While Canadians would henceforth have full legal control of their constitution, the political circumstances leading up to the agreement meant that discussions would continue for some time. The 1982 agreement did not bring constitutional change to an end. Instead, it was the beginning of another and even more complex evolution.

When a nation state is formed, it generally adopts its own constitution. While written constitutions were relatively rare prior to the twentieth century, the United States stood as an example of an independent state with its own written constitution. Canada, by contrast, lacking the revolutionary change that occurred in the United States, achieved independence from Great Britain through a long evolutionary process. After Britain’s parliament passed the Statute of Westminster in 1931, the only legal impediment to full independence was a lack of agreement on an amending formula for the domestic constitution. However, discussions on the amending formula would prove difficult, continuing until the early 1980s.

After World War II, the main stumbling block to achieving constitutional independence went beyond a lack of agreement on an amending formula. Our inability to accommodate regional differences—economic and ethnic—in the country proved to be even more intractable. With the growth of the Quebec sovereigntist movement during the 1960s and 1970s, divisions became very acute. Thus, the constitutional agenda involved not only constitutional provisions, but also the challenge of defining a vision of the whole country that would be acceptable to all regions.

The first ministers’ negotiations led by Pierre Elliott Trudeau in 1980–1981 resulted in the patriation agreement (otherwise known as “bringing home” the constitution), which passed into law despite the objections of Quebec premier René Lévesque, who wanted to take Quebec out of Confederation. However, discussions over the constitution involved not only Quebec, but all other regions in Canada, further splintering the debate. In particular, there was a strong push among western provinces to obtain provincial control over their natural resources. Added to these factions, Aboriginal peoples expected more control over their own destiny and to be included in the discussions. Lastly, Trudeau wanted a written Charter of Rights and Freedoms, the centrepiece of which would
be the protection of language rights. With so much at stake, the first ministers had to find a compromise. At an important conference in September 1980, the first ministers could not agree on a new constitution. The Trudeau government decided to proceed unilaterally, without the support of a majority of the provinces, so it should have come as no surprise when eight of the ten provinces challenged this action—taking it all the way to the Supreme Court of Canada and the Parliament of Great Britain. The federal government’s unilateral move was found, ironically, to be legal but conventionally unconstitutional. This led to a meeting of the first ministers in November 1981, where nine of the provinces and the federal government came to a compromise, with only Quebec rejecting the provisions.

The new constitutional provisions signed into law by the Queen in April 1982 were grafted onto the earlier constitutional provisions of the British North America Act, compiling what we now call the Constitution Act of Canada. There were some remarkable and far-reaching changes. First, Canada adopted its own amending formula requiring provincial consent—in some cases, unanimous consent—for most constitutional changes. As well, the Charter of Rights and Freedoms guaranteed fundamental freedoms, democratic rights, and legal rights, along with nondiscrimination provisions, language rights, and the controversial notwithstanding clause. Among other unique provisions outside the Charter was section 35, guaranteeing Aboriginal rights.

As comprehensive as the document was, political division did not end there. Since Quebec had not agreed to sign the new constitution, there was lingering resentment, which was aggravated when a pro-federalist Liberal, Quebec premier Robert Bourassa, was elected in 1985. Once again, all ten provinces and the Mulroney government came to an agreement about further constitutional change. Embodied in the Meech Lake Accord, the agreement was designed to persuade Quebec to endorse the Canada Act (i.e., severing ties between Canada and Great Britain). But it was never fully ratified. Another attempt was made for broader constitutional change in 1992 with the Charlottetown Accord. Put to a national referendum, Canadians voted it down. Thus, the 1982 amendments remain the last major changes to the constitution.

How do we assess the development of our constitution? Initially, patriation was designed to deal with a number of specific problems. Chief among them was the question of national unity. But the referendum in 1995 over Quebec sovereignty graphically demonstrated how tenuous the link between the province of Quebec and the rest of Canada continues to be. Another challenge to national unity has involved the western provinces, specifically Alberta and Saskatchewan. “Western alienation” had reached a peak in 1981. Today, changes to the natural resources section of the constitution, coupled with shifting economic circumstances, seem to have mitigated the degree of perceived alienation. Patriots, together with an amending formula, was meant to strengthen national unity. Is Canada a stronger, more united country as a result of the 1982 agreement? Many would argue that Quebec did not agree to agree, leaving the country weaker and more fragmented. Others might point out that changes involving the Charter of Rights and Freedoms, natural resources, and native rights strengthen Canadian unity in important ways. Most constitutional scholars believe that we are only at the beginning of a process that requires ongoing tinkering. For example, court decisions based on the Charter of Rights and Freedoms regarding gender and sexual equality are generally perceived in a positive light. But courts have also expanded the rights of corporations, such as tobacco and private health corporations, which could prove detrimental for the social and physical health of Canadians. The jury is still out (no pun intended) on whether certain court decisions will be harmful or beneficial over the long term. For now, what we do know is that the 1982 changes—and court decisions based upon them—continue to reverberate in all aspects of Canadian life, acting, at times, like a thermometer gauging the social and political health of our country.

BIO

Howard Leeson is a professor of political science at the University of Regina. During the constitutional negotiations of 1978 to 1981 he was the deputy minister of Intergovernmental Affairs for the province of Saskatchewan.
THE 2007 FEDERAL BUDGET AND SASKATCHEWAN

Measures of Significance to the Province

BY JIM MARSHALL, CHIEF ECONOMIST, SIPP

The recent federal budget contains a number of measures that may be of significance to Saskatchewan over the next few years. Of particular significance are two changes to federal transfer programs that will be of consequence to the provincial government and, potentially, its ability to provide services to Saskatchewan people: Equalization and the transfers offered under the Canada Health and Social Transfers (CHT/CST).

The recent federal budget contains a number of measures that may be of significance to Saskatchewan over the next few years. Some of these will affect Saskatchewan individuals and businesses. Of particular significance are two changes to federal transfer programs that will be of consequence to the provincial government and, potentially, its ability to provide services to Saskatchewan people.

There are two major transfer programs operated by the federal government which provide unconditional, or largely unconditional, funding to the provinces: Equalization and the transfers offered under the Canada Health and Social Transfers (individually, the Canada Health Transfer and the Canada Social Transfer or CHT/CST).

Equalization
The first of these, Equalization, was set up to ensure that federal funding was provided to provinces which had less ability to generate tax revenue (because of lower economic activity) so they could better match the services provided by provinces with larger tax bases. The program identifies those provinces with less ability to tax and compensates them for that shortfall up to an established standard.

From 1982 to 2004-05, that standard for Equalization payments was the average tax capacity (or fiscal capacity) of five provinces (British Columbia, Saskatchewan, Manitoba, Ontario and Quebec). The Atlantic Provinces and Alberta (the poorest and the richest economies, respectively) were excluded in calculating the standard, effectively leaving out the province with the largest resource base, Alberta, from the standard to which other provinces would be “equalized”. This approach saved the federal treasury from having to equalize the provinces up to a level that included wealthy Alberta, but it did cause a lot of other problems.

In March 2005, the federal government set up the Expert Panel on Equalization and Territorial Formula Financing, chaired by Al O’Brien, to examine the funding formulae for Equalization and the Territories’ funding. This Panel reported in May 2006 and made eighteen recommendations for changing Equalization.

These eighteen included recommendations that the system return to a ten-province standard, that resources (renewable and non-renewable) be included at a rate of fifty per cent in determining the standard but that a recipient province’s entitlement should be capped if it gave them a fiscal capacity (including all of their resource revenue) in excess of any non-recipient province. These recommendations were accepted by the federal government and the 2007 Budget announced that they would be implemented, beginning this fiscal year.

The first of these recommendations has the effect of raising the standard for Equalization by including the high level of economic activity of Alberta in the calculation of the standard. This effect is partially offset by the inclusion of the Atlantic Provinces and the reduced rate of inclusion of resource revenue at fifty per cent of total provincial revenue, but it still leaves the standard for Equalization at a higher level than would have been the case under the old five-province standard.

The third recommendation (cap on fiscal capacity) ensures that provinces cannot end up with more fiscal capacity after Equalization than provinces which are not receiving Equalization. But, to calculate this fiscal capacity, one hundred per cent of resource revenues are included. In effect, this changes the fifty per cent inclusion rate for resource revenues to one hundred per cent for some provinces, specifically, recipient provinces that receive a high proportion of their revenue from resources—provinces like Saskatchewan.

The impact of changes on Saskatchewan’s receipts is very difficult to ascertain without the raw data behind the federal
STRIPPED DOWN FEDERALISM

Questions for Al O’Brien

BY PATRICIA W. ELLIOTT, ASSISTANT PROFESSOR, UNIVERSITY OF REGINA SCHOOL OF JOURNALISM

As chair of the Expert Panel on Equalization and Territorial Formula Financing, Al O’Brien spent eighteen months unpacking and repacking Canada’s most complex national program. Al O’Brien is a fellow of the Institute for Public Economics, University of Alberta, and a Senior Fellow of the C.D. Howe Institute. He was Alberta’s Deputy Treasurer until 1999.

You’ve said Canadians have become confused about Equalization’s purpose.
I think over time, with some of the one-off arrangements made between the federal government and individual provinces, people lost track of the basic notion of Equalization and began to confuse it with economic development objectives. Certainly, we heard comments that Equalization isn’t working because the recipient provinces’ economies aren’t as robust as Ontario and Alberta’s. Well, that isn’t the point.

What is the point?
To ensure that, given the inevitable disparities in a large federation like Canada, we can still have a decentralized form of government in which provinces have the capacity to deliver important public services for which they’re constitutionally responsible.

Did the emotion typically surrounding this topic present a challenge for the panel?
I certainly was surprised at how strongly held the views were, and how narrowly focused they were. People were examining it from a parochial perspective, looking not to the underlying principles but simply to the financial results in their own jurisdiction. Having said that, we also heard very thoughtful, helpful presentations.

Was there support for the concept?
We heard very few arguments that Equalization should be abandoned, that it was broken and couldn’t be fixed and served no useful national purpose. We were struck by how important this program is to the country.

Did that surprise you?
I’d spent 35 years in the Alberta public service and during that period Alberta hadn’t qualified for Equalization —so it was probably less at the front of our planning than in many provinces. After eighteen months talking with people, my understanding of the role Equalization plays—and how important it is to achieving quality public services throughout Canada—was expanded. I came to a much deeper appreciation of the program’s importance.

You were created by one government, and reported to another. Did that present challenges?
No. We were appointed by Ralph Goodale in 2005 and reported to Jim Flaherty in 2006. Both ministers seemed exclusively concerned with finding the best solution to get this program back on track. Our only mandate was to examine the program and consult Canadians, and develop the best recommendations we could.

Coordinating cross-country input and sifting through all the presentations must have been a huge undertaking.
It was difficult. We were fortunately supported by an experienced secretariat in Ottawa, and the officials of all governments were very willing to provide information. We also received support from the academic community. I think—and SIPP is an example—Canada has quite a strong public policy focus in its academic institutions. That was helpful. But there’s no question the issues are complex.
What was your starting point?
We needed to start from the basic constitutional provision from 1982 and think about what it meant. Then we set out what we thought the key principles were. Clearly the most important thing is how fiscal capacity and disparities should be measured, and what the standard for receiving payments should be. The program had become in our view excessively complex. It was a challenge to find a handle for addressing it.

So what became your handle?
We concluded the most intuitive, sensible standard was a national average that included all ten provinces. Then we recommended five measuring tools, instead of thirty-three. We thought this would simplify the program without any meaningful sacrifice of accuracy and fairness.

Can you explain the panel’s thinking on resource revenues?
We concluded fifty per cent of resource revenue should be considered rather than one hundred per cent. This recognizes provincial ownership of resources and a principle we thought important: provinces that own resources should receive a net fiscal benefit from their development.

But you recommended capping that net benefit?
While only fifty per cent of revenue should be included, that shouldn’t result in a province receiving entitlements to the point where they’d end up with greater fiscal capacity than non-receiving provinces. That would defeat the basic purpose of the program.

What other recommendations strike you as key?
We made other recommendations that I think address historic Saskatchewan concerns. First, we recommended using actual resource revenues rather than the very elaborate proxy measures that had historically been used. The cost of exploration and development is very different in each province, so this will improve the program’s fairness.

Second, we included hydro profits for the first time. We felt hydro revenues were indeed resource revenues, although historically their profits had been treated as though they were simply corporate profits like any private company generates.

Did you look at how the program would be overseen?
One of the questions we were asked to examine was whether the government of Canada should create an independent advisory body. We concluded that that wouldn’t be helpful and wasn’t necessary. We felt it was more useful to try to strengthen the historic intergovernmental mechanisms for consultations about the program, and to encourage continuing research in the academic community and so on. We came to the conclusion that a permanent independent commission wouldn’t in fact add a lot to the robustness of the program.

How do you feel the federal budget reflected your recommendations?
The budget accepted the notion that the program must be based on clear principles and put back on a formula-driven basis. That was our first and most important recommendation. In general, the budget accepted our recommendations in their entirety.

Including the sticky issue of resource revenues?
They developed a variation: they said there would be a dual calculation of resource revenue entitlements, one based on our fifty per cent recommendation, and the other on zero per cent, as had been advocated. We concluded fifty per cent was the best balance, but I think the alternative—where no resource revenues are included either in the determination of the standard or in the measurement of an individual province’s capacity—is consistent, and doesn’t violate the key principles in any way.
Since the budget, there’s been a call for a Saskatchewan Accord. This is part of what’s developed over time. Some people call it “treaty federalism”. I know Saskatchewan will claim they’re basing their arguments on principle. We acknowledged in our report that one principle is that provinces should receive the entire benefit of their resource development. The other principle, though, says if you’re going to have a program that’s critical to delivering services on a decentralized model, to ignore resource revenues just isn’t realistic.

The issue seems quite inflamed. What are the key problems to avoid from a policy perspective?
I don’t think Canada can function on a centralized basis, and I don’t think a federation with the kind of fiscal disparities we have in Canada can function without an Equalization program. So I’m very hopeful the government sticks with principles and clearly enunciates how the payments are determined and doesn’t try to do one-off deals that are inconsistent.

Do you foresee that happening?
I would hope the program will get back onto some clear rules and away from individual bargaining and what has almost become a win-lose attitude. The measure of whether the program is doing a good job or not seems to have become: Does my province get more or get less? In my mind, that’s a poisonous approach to assessing the success of an important national program. Clearly this program, which is meant to deal with fiscal disparities that vary over time, cannot always give everyone more.

What do you hear back in Alberta?
I think one of the things this kind of very strident bargaining has done is undermine the confidence of Canadians in the program. Certainly we hear voices in Alberta that say: Why do we have this program at all? Albertans need to understand that if we don’t find ways of supporting the delivery of social programs by provinces, then inevitably Canadians are going to demand that Ottawa intervene more directly to ensure quality services for all Canadians. And I don’t think that’s a formula for success in a large, geographically disparate country like Canada.

In Saskatchewan, we are given very different messages from our federal and our provincial representatives. How can the public make sense of it?
Coming from Alberta, I understand the historic sensitivity about resource revenues, but I think Saskatchewan people need to kind of look at what the basic nature of this program is. They shouldn’t judge the program’s effectiveness on whether it sends money to Regina or not. Over the years, Saskatchewan has been a strong supporter of a national Equalization program, and has historically recognized that in good times they would get less or no Equalization payments, and in bad times they would get greater payments.

Are you satisfied the panel’s thinking will prevail?
At the end of the day all five panel members were in complete agreement, which surprised us—being five economists. We felt confident we’d come to the best recommendations we could based on all the input we’d received. Our hope was to get to a formula that stuck to some basic principles and could be applied nationally. I’m really hopeful that will be the result.

I’m not a political scientist by any means. I think this program is important. I think the governments are committed to trying to make the program work fairly for all Canadians. And I’m confident they’ll be successful over time.
calculations. The budget does contain a comparison of entitlements under the proposed fifty per cent exclusion rule as compared to a full exclusion of resource revenue and notes that the entitlement would be the same for Saskatchewan in each case. But, both calculations include the “fiscal capacity cap” using one hundred per cent of resource revenue, resulting in the same outcome for Saskatchewan in either choice—fifty per cent exclusion with a one hundred per cent cap is the same as one hundred per cent exclusion with a one hundred per cent cap, since the cap is the operative constraint in only Saskatchewan’s case.

**CHT/CST**

The second set of programs (CHT/CST) was set up to encourage provinces to spend more on health care, education and other social programs. These programs began life in 1977 as Established Programs Financing (EPF) and the Canada Assistance Plan (CAP). The EPF portion was aimed at funding health care and post-secondary education and was largely unconditional funding, although provinces were obliged to meet the minimum service requirements of the Canada Health Act.

While these programs have changed several times over the years, they have retained one feature of EPF that was intended to increase the “fairness” of the funding formula. When the program was initially set up, the overall funding provided was equal for all provinces—provincial total entitlements were equal. But the program made payments in two forms. First, the federal government reduced its tax rate to allow the provinces to raise their own tax rates accordingly—they “transferred tax points” to the provinces. The value of these tax points was subtracted from the total entitlement to determine the remainder which was paid in cash—the “cash transfer”.

Even though the total entitlements were the same for all provinces, the cash transfers were different because, for provinces with very active economies, the value of the tax points transferred was larger than for other less-endowed provinces. In effect, the provinces with the healthier economies received more of their transfers in the form of tax points (because one percentage point of tax was worth more in their provinces) and the provinces with the poorer economies received more of their transfers in the form of cash. This process has continued for both the CHT and the CST up until now.

The 2007 federal budget announced that the payments for CST will now consist of equal per capita cash payments from the pool and that CHT will follow in 2014-15. This new approach divides the remaining cash pool on an equal per capita basis, effectively raising the cash payments to provinces which have large tax bases (like Alberta and Ontario) by reducing the cash payment to all others. The province that received the largest per capita cash transfer in 2006-07, before this change, was Saskatchewan, because its tax points had a lower value than other provinces, partly due to Saskatchewan’s non-recipient status in Equalization. Saskatchewan is therefore the province most affected by the reallocation of the cash transfer towards the wealthier provinces.

**While the federal government has provided for transitional compensation to provinces that will lose cash payments under these changes, the compensation is only for one year.**

While the federal government has provided for transitional compensation to provinces that will lose cash payments under these changes, the compensation is only for one year. Saskatchewan, as the most affected province, will receive $139 million of the total $225.6 million of this one-time funding in 2007-08 while it adjusts to the loss of continuing funding under the CST and the return to a ten-province standard in Equalization.

**Conclusion**

These are fairly significant changes to the two biggest federal transfer programs announced in the 2007-08 federal budget. These changes will have significant consequences for the Saskatchewan government, especially as they are fully implemented over the next few years and as the temporary offsets are removed over time.

**ENDNOTES**


THE CONSTITUTION ACT, 1982
A Rough Guide
BY IAN PEACH, DIRECTOR, SIPP

In this article, the author provides a short sketch of the factors influencing the creation of the Constitution Act, 1982, and an outline of the various sections in Canada’s Charter.

When most people think about the Constitution Act, 1982 (to the extent they think about it at all), their minds likely go immediately to the Canadian Charter of Rights and Freedoms. While this is without a doubt the part of the 1982 amendments to the Constitution that has the most impact on most people’s lives, it is far from the entirety of the 1982 Constitution. The Constitution Act, 1982, also addressed questions of the federal-provincial division of powers, the process to amend the Constitution in the future, and the rights of the Aboriginal peoples of Canada.

Its impact is this extensive because the Constitution Act, 1982, was the product of a negotiation process and different governments and stakeholders entered the negotiations with different agendas. For example, Prime Minister Trudeau was a devotee of constitutional rights, but he was also committed to providing Canada with a purely domestic formula for amending its Constitution, so we would no longer have to seek the concurrence of the British Parliament for amendments to the Canadian Constitution. The Government of Canada also sought greater powers over the economy, so that it could ensure that Canada functioned as a single economic union (though, in the end, this agenda was abandoned).

Several provinces, especially those in the West, sought greater powers over natural resources. A number of Premiers also opposed the idea of constitutionally-protected rights, as they saw these as taking away from the paramountcy of Parliament and Legislatures, a position which led to the addition of the “notwithstanding clause” to the Canadian Charter of Rights and Freedoms.

For their part, Aboriginal peoples sought a clear recognition of the rights that the courts were beginning to recognize in cases such as 1973’s Calder decision. As well, women’s groups and those representing other “equality-seeking” groups also effectively used Parliament’s public consultations on the draft Charter to add in additional protections for gender equality and to add substance to the equality rights protection in the Charter.

Women’s groups and those representing other “equality-seeking” groups also effectively used Parliament’s public consultations on the draft Charter to add in additional protections for gender equality and to add substance to the equality rights protection in the Charter.

The outcome of all of these negotiations is the Constitution we see today. There was one amendment to the Constitution Act, 1867, to clarify provincial jurisdiction over natural resources (Section 92A). In the Constitution Act, 1982, Part I is the Canadian Charter of Rights and Freedoms. In the Charter are several sets of rights. It begins with what might seem an odd statement for a constitutional document designed to protect rights, the statement that the rights and freedoms set out in the Charter are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (Section 1). Having begun with the assertion that rights in Canada are not absolute, it then goes on to define those rights that are constitutionally protected. The first group are the “fundamental freedoms” of conscience and religion, thought, belief, opinion and expression, peaceful assembly, and association (Section 2). Next are the democratic rights that govern voting and the length of time allowed between elections for the House of Commons and legislatures (Sections 3 to 5). The third group of rights is mobility rights, which guarantee Canadians the right to move freely within the country (Section 6). The fourth group is the legal rights, such as the right to life, liberty and security of the person and
the right to be presumed innocent until proven guilty (Sections 7 to 14). Next comes equality rights (Section 15) and, after that, language rights (Sections 16 to 22) and minority language educational rights (Section 23). The rest of the Charter is taken up by enforcement provisions (Section 24), general provisions on interpreting the Charter, including the additional guarantee of gender equality in Section 28, the provision limiting the application of the Charter to governments (Section 32), and the notwithstanding clause (Section 33).

Part II of the Constitution Act, 1982, is the rights of the Aboriginal peoples of Canada, a group that includes the Indian, Inuit, and Métis peoples. Part III is the commitment to promoting regional equality and the commitment of the Government of Canada to the principle of making equalization payments. The last Part of importance is Part V, which contains the “procedure” for amending the Constitution (which is really six separate procedures for different types of amendment).

In the 25 years since the Constitution Act, 1982, became part of our fundamental law, all of these provisions have affected our lives as citizens of Canada. 1982 was a significant time in Canadian politics and its legacy continues to influence the development of the “living tree” of Canadian law and politics.

Thomas Kunito Shoyama
A Life

By Gregory P. Marchildon

Thomas K. Shoyama was born in Kamloops, and graduated from the University of British Columbia with BA and BComm degrees in 1938. From 1939–45, “Tommy” served as editor of the New Canadian, a weekly civil rights newspaper, which he continued to publish from an internment camp in Kaslo, BC. In 1946, after a brief stint in the Canadian Army Intelligence Corps, he was encouraged to join the government of Saskatchewan by George Tamaki, an old university friend and fellow Japanese-Canadian. Working for George Cadbury and T.H. McLeod, Shoyama was hired as a research economist within the newly established Economic and Planning Board (EAPB). His first tasks included working on a new system of public hospital insurance, developing a system for administering diverse Crown corporations, and working out an economic development plan based on the province’s undeveloped natural resources. In 1950, he became Cabinet’s chief economic advisor, secretary to the EAPB, and T.C. Douglas’ closest policy advisor. Shortly after the election of 1964, Shoyama became a senior research economist with the newly established Economic Council of Canada. In 1968, he became Assistant Deputy Minister of Finance, and by 1975, after a brief term as Deputy Minister of Energy, Mines and Resources, he was appointed Deputy Minister of Finance.

During these years in Ottawa, Shoyama was recognized as one of the most senior members of the “Saskatchewan Mafia.” Retiring in 1979, Shoyama moved to Victoria, where he joined the public administration faculty at the University of Victoria.

Shoyama’s profound and abiding commitment to public service was recognized through several national awards, including Officer of the Order of Canada (1978), the Outstanding Achievement Award in the Public Service of Canada (1978) and the Vanier Medal in Public Administration (1982). In 1992, the government of Japan awarded Mr. Shoyama the Order of the Sacred Treasure in recognition of his many contributions to the Japanese-Canadian community. Shoyama died in December, 2006.

Dr. Marchildon holds a Canada Research Chair in Public Policy and Economic History in the Graduate School of Public Policy at the University of Regina. This article was originally published in “The Encyclopedia of Saskatchewan” (Canadian Plains Research Centre, 2005).
IDEIOLOGICAL PURITY AND REAL WORLD PRAGMATISM

The CWB Debate

BY KEN LARSEN

In this article, Mr. Larsen analyzes the benefits to farmers of having a collective grain marketing and sales board: the Canadian Wheat Board. He highlights the market challenges of competing in the food industry, both as a collective and as an individual farmer trading grain privately. Mr. Larsen provides an analysis of the globalized food marketplace and the arguments of market fundamentalists who argue that something which functions well for farmers in the real world, collective marketing, can be supplanted by their own private services.

Decades ago, the British author C. P. Snow wrote a seminal essay on what he described as the “two cultures” in western society. On the one side of this cultural divide, the humanities, he saw people who lived in a world of theory and ideas: artists, politicians, theoreticians, bureaucrats of many sorts, promoters and their apologists in academe. On the other side of that cultural divide, he saw people who worked in the physical world: scientists, engineers, farmers, medical doctors and other skilled trades people. Snow saw the fundamental difference between the two camps as one of data flow. In the former, data flowed from the person into the real world; ideology formed the organizing principle for thought. In the latter, data from the real world informed thought and action. He hoped for some sort of synthesis between these two cultures.

This cultural division is apparent in the current debate surrounding the Canadian Wheat Board (CWB). Created by farmers to meet the real world problems of extracting the maximum return for themselves from a globalized market place, the CWB continues to have strong support in the farm community for the very simple reason that, while not ideologically pure, it works.

That strong farmer support comes from the physical reality of the globalized market place farmers have dealt with for decades. Only four large private grain companies control about 75% of the world grain trade. Their market share is increasing. Just two railways transport prairie grain to export position, and the inland grain terminals to which farmers deliver their grain are entirely captive to one or the other of those railways. On behalf of farmers, the CWB collectively negotiates freight and handling on 350,000 or so rail cars a year of Board grain, and on occasion extracts significant civil damages from the railways for poor performance.

Farmers also have long experience with the less than adequate alternatives to the collective bargaining the CWB provides. In non-Board grains each “million dollar rain” offers short speculators ample opportunity to take advantage of the elasticity of grain prices. In the real world, non-Board grain floods the market at the start of each harvest season, with even the most market astute farmers somewhat behind the curve. In contrast, the collective marketing structure of the CWB assures farmers their bursting bins will be carefully metered into the market to avoid the boom and bust cycle so beloved by margin traders. Overall, the CWB sells roughly 20% of the wheat and barley that trades in the global market place. In specific commodities like durum wheat our global share ranges between 50 and 75% depending on global weather conditions. The CWB also markets a significant portion of the world’s malt barley. Consequently, the orderly marketing of the CWB has a significant financial benefit to western Canada’s farmers, large or small.

Lentils provide a graphic real-world example of how the anarchic marketing of the private trade fails farmers. According to a study commissioned by the Saskatchewan Pulse Growers Association, we produce nearly one-third of the world’s lentils. Canada commands 75 to 80% of the world trade in green lentils. In spite of this, without orderly
collective marketing, Canada generally achieves lower prices than other sellers of the same product. The resulting boom and bust in prices has led to unstable production and marginal farm returns in many years. The same boom and bust in canola prices and production has plagued that sector as well, creating a long history of failed crushing plants, processors and export failures.

The CWB is one of our comparative advantages over other grain producing areas. The customers farmers must sell to are industrial in scale. The concept of the mom and pop grain processing plant is as absurd as Chairman Mao’s notion that China could produce steel in millions of backyard foundries. These industrial scale food processing plants demand uniform product, reliably delivered. For many decades the Friday afternoon grain ship of Canadian wheat arriving in San Paulo, Brazil, meant there would be no bread riots on Monday. Current outrage over rail delivery problems have their roots in the danger of losing customers.

This reliability of supply is a large part of the reason durum wheat sales into the United States are so successful. Rather than letting their factories stand idle, either to re-calibrate or to await supply, manufactures pay a premium simply to have a reliable and high quality supply of raw material. For decades both the Canadian and Australian wheat boards have branded and differentiated grain on the basis of quality. The private trade, with its demonstrated failure to do so in non-Board grains, claims it is willing to try. However, any financial bonuses for quality and reliability, in the absence of the CWB, would stay with the private trade, or be frittered away in a multi-seller environment. Not unreasonably, farmers would prefer to retain those premiums for themselves.

In the real world, a free marketplace, as Adam Smith posited, has never truly existed. Its ideological cheerleaders amongst the business class can only be described as disingenuous when they claim such a goal is even possible, let alone attainable. Market fundamentalists wish to impose their philosophic view onto an intractable and contradictory reality, and see their friends and fellows prosper, even at the expense of farmers. To do so they are bending their efforts to convince farmers and others that something which functions well for farmers in the real world, collective marketing, can be supplanted by their own private services.

Unfortunately, the real world of the global grain trade is a zero-sum game, and with the loss of the collective marketing authority of the CWB, the private trade will take the premiums that now go to farmers. Numerous independent academic studies and even the redoubtable private firm of Price Waterhouse Cooper have shown that the CWB’s single desk contributes billions more for western Canada’s farmers than would a multiple-selling system. None the less, some farmers, bedazzled by the dotcom buzz words of business school vicars, are willing to leave that money on the table in the hope that the private trade will share some crumbs. Others, mostly in the cattle industry, see the demise of the CWB as an opportunity to acquire cheaper feed stocks in the face of rising competition from ethanol production. However, in each CWB election, grain farmers have consistently supported keeping the single-desk marketing authority of the CWB. When asked in unbiased public opinion surveys, farmers have supported the CWB with a solid majority, when given the real choice between collective and individual marketing.

The current arguments to eliminate the collective marketing authority of the CWB can be seen to come from the other side of Snow’s cultural divide: those for whom ideology must always triumph over reality. For several decades this camp of market fundamentalists and true believers has been successful in persuading many people that the nostrums of open markets and free trade will bring universal prosperity. For those who work in the real world, this universalism has been tested, and failed. For people impoverished in the Russian, South American or Asian financial meltdowns, the increasing numbers of the impoverished in our own society, or those for whom an ever greater portion of their retirement funds are devoted to private management fees, claims to market perfectibility are mere fantasies. Those prospering under the managed capitalism now dominating the world outside of the waning American hegemony, on bitter experience, no longer accept such claims at all. Grain farmers in western Canada recognized this structurally defective market system decades ago. Until the iron laws of economics change, western farmers would be well advised to ignore the siren calls of the cult of the free market and continue to support their own humane answer to the realities of globalization. The CWB is a synthesis between the pragmatic and the ideal that Snow would have applauded.

BIO
Ken Larsen is a graduate of the University of Alberta. For the past 31 years he has raised grains, forage and cattle on his farm west of Red Deer, Alberta.
Tension between national security and legal and political accountability is inevitable in any democracy. National security requires state secrecy. Public accountability requires exactly the opposite. Usual mechanisms of accountability central to the rule of law—public criminal trials, rigorous legislative review of a state’s security apparatus, effective freedom of information laws, an active and independent fourth estate, suits against the government for state-induced injuries and losses—become effective only with full and honest disclosure. But, as advocates of national security repeatedly remind us, for these mechanisms to be effective, knowledge of security risks, as well as the identity of persons the state relies on for information and of persons it suspects of impairing security, would have to become public far in advance of the timelines dictated by strategic needs of national security.

Taking seriously the need to avoid this consequence has the potential to play havoc with ordinary democratic commitments to the rule of law and access to information. The logic of national security requires that those who manage it should not be required to follow procedures—no matter how just—that would guarantee their inefficacy. In contrast, those who insist on greater fidelity to core democratic values (for example, trials based solely on publicly presented evidence) appear to threaten the very security regime that helps keep governments secure. Even so, this line of reasoning, when pursued without restraint, quickly leads to the kind of state practices that are themselves detrimental to the very system of government they are intended to protect. Recent policies in the United States that allow concerns over national security to trump basic civil liberties—such as prohibitions on indefinite detention, the right to consult a lawyer, and the right to timely and meaningful review procedures—are all cases in point. This level of abridgment of state principles represents a defeat of the very regime they strive to protect. Despite this, the existential clash over which side more seriously threatens the loss of basic state purposes cannot be resolved simply on the basis that one set of interests is more fundamental than another.

In the last seven months two decisions have made important contributions to this debate. Both have restrained Canada’s national security apparatus in the name of preserving our constitutional order. Although initially they may not appear to be far-reaching decisions (for example, they hardly dismantle the instruments of national security being reviewed), they are nevertheless meaningful—and brave. They unequivocally establish that national security does not give government license to act without constitutional constraint.

On October 24, 2006, Justice Rutherford of the Ontario Superior Court in R. v. Khawaja struck down provisions of the Anti-Terrorism Act that define terrorist activity as acts committed “in whole or in part for a political, religious or ideological purpose” and that lead to a range of consequences from death to disruption of services. Mr. Khawaja had been subject to a number of charges, including the possession of explosives, financing terrorism, instructing on behalf of a terrorist group and facilitating terrorism (whether or not he knew that he was doing so). His counsel argued that at least some of the charges violated the Charter of Rights and Freedoms because they were vague and, therefore, provided no notice of what exactly constitutes a crime. Simply put, without clear definitions of terms such as “facilitating” and “terrorist organization” it becomes difficult, and perhaps impossible, to enforce the law fairly and consistently. Mr. Khawaja’s counsel also argued that the definitions used were overbroad and included activities that are innocuous.

Justice Rutherford, however, upheld the validity of these open-ended offences, stating that they gave fair notice to persons of what was forbidden. Statutory precision, he said, was not an achievable goal. On this point we disagree. Perfect precision of course may not be achievable. Even so,
significant improvements are clearly both possible and desirable.

Justice Rutherford’s concern for the liberty of Canadian citizens grew sharper when he stated that basing the concept of terrorism on pursuance of religious or political purposes unconstitutionally impairs both religious freedom and freedom of speech when the offence involves non-violent activities. In his words, “… the focus on the essential ingredient of religious, political or ideological motive will chill protected speech, religion, thought, belief, expression and association, and therefore, democratic life; and will promote fear and suspicion of targeted political or religious groups …”. His chief concern was that this definition would serve to make guilty by association whole classes of believers and political activists. This part of his judgment is clearly sensitive to the cultural repression that flows from overly wide definitions of suspect practices and branded communities.

Four months later, on February 23, 2007, the Supreme Court of Canada issued a unanimous decision in Charkaoui v. Canada (Citizenship and Immigration) striking down elements of the detention regime found in Canada’s immigration and refugee legislation. That legislation permitted holding and deporting non-citizens who are believed to pose a security threat to Canada. The decision pitted the Court’s ideas about fair procedures against Parliament’s choice to grant complete secrecy to any information relating to national security risks.

Since both activism in applying the Charter and placing limits on governmental strategies for protecting national security are controversial, the Court was bold in stating that the legislated process for non-citizens who are thought to represent security risks violated constitutional ideas about fair treatment that is due to any person in Canada. The decision represents a clear stand in favour of constitutional principles, rather than untrammeled state power, to ensure the safety of the nation.

Two claims of constitutional violation were made in Charkaoui. First, certificates of detention and deportation issued by the ministers responsible for immigration and public safety are based on evidence that is never revealed to the person detained, or to his or her legal representative. Each certificate is reviewed by a Federal Court judge, but in a hearing without participation by a representative of the person being detained. While the certificate can be challenged by the reviewing judge, that judge has no power to gather contradictory evidence, to talk to the detained person, or conduct any investigation to discover if the evidence is fair, complete, comes from dubious sources, or has been presented out of context. The Supreme Court held that a process that deprives a person who is to be jailed, or deported to a place where life and freedom are threatened, of the opportunity to know the case against him, and which gives no opportunity to challenge that evidence, violates Canada’s constitutional guarantee of due process. It also means that the likelihood of a reliable verdict being reached has been greatly diminished.

The second claim was that, because Canadian law does not permit the return of detained non-citizens to nations where they will be subjected to death or torture, the certificate authorizing detention and deportation is, in effect, an order of indefinite detention. It is clear that indefinite detention is a form of cruel and unusual punishment that is forbidden under the Charter. The Court, however, did not fully strike down this feature of the certificate regime. It would seem that it hoped that with new, more liberal rules for challenging evidence, and with more active use of the judicial power to release persons on conditions that allow strict control of activities, endless detentions will disappear.

On this point, however, the court may be guilty of wishful thinking. Much more effective would be for Parliament to re-think the legislation in three respects. First, a concerted effort needs to be made to sharpen or redefine the wide range of terms associated with national security. The greater the ambiguity of key terms, the greater the opportunity for political discretion; the greater the discretion, the greater the potential for abuse and for loss of confidence in Canada’s judicial system.

Second, strict statutory timelines need to be introduced governing both the detention of persons without review and the release of even the most sensitive of information. Such timelines would fully recognize the importance of national security, but also the eventual necessity of public accountability. They would allow governments time to make changes in operations prior to disclosure, but they would also remind governments of the inevitable and necessary need for public accountability.

Third, some system other than the court’s recommended adoption of special advocates (such as that used in the U.K., in which special advocates are appointed to represent detained persons, but under terms of complete secrecy) needs to be developed. For sheer efficiency at discovering the truth, nothing can replace full disclosure in open court. Once again, a system of statutory timelines may be desirable, giving governments sufficient but not unlimited time in which to re-organize operations and take appropriate precautions.

Notwithstanding these recent interventions in Canada’s national security administration, it is a pity that the constitutional validity of limitless detention will not be settled until, after some years, the matter comes back before the courts. The courts’ defence of due process, on the other hand, should be celebrated. 🎉
AMENDING DANGEROUS OFFENDER LEGISLATION
Are Provincial Correctional Facilities Ready?

BY FRED BURCH, GOVERNMENT OF SASKATCHEWAN SIPP SENIOR POLICY FELLOW, 2006-07

A number of Criminal Justice bills introduced by the Conservative government are close to becoming law. One that is currently at second reading, Bill C-27 An Act to Amend the Criminal Code (dangerous offenders and recognizance to keep the peace), will impact provincial as well as federal correctional facilities.

There are few issues that evoke extreme emotional responses more than the topic of violence and sexual assault, especially when such incidents involve children. Bill C-27 An Act to Amend the Criminal Code (dangerous offenders and recognizance to keep the peace), attempts to improve the ability of the Criminal Justice System to respond to cases involving extreme violence, with an emphasis on sexual violence, and to enhance the ability to monitor those who target children (the recognizance sections).

Changes to dangerous offender legislation become particularly important for Saskatchewan Corrections and Public Safety, as federal inmates released on Day Parole or with a Long Term Supervision Order, are housed in the Regina CCC.

Given first reading in the House of Commons on October 17, 2006, second reading debates on Bill C-27 occurred on October 30, 31, and November 9, 2006. The most recent second reading debate, February 14, 2007, begins with a statement that the proposed amendments were introduced as a response “to a very real problem … how to ensure that we are safe from violent and sexual offenders.” This Bill, along with seven others, comprises the Conservative government’s “Get Tough on Crime” platform. The introduction of each Bill during first reading appears to be correlated with issues that made national news. For example, frequent mention of news articles appear at various stages during the first reading of Bill C-9. A significant spike in handgun usage in certain major urban centres resulted in Bill C-10. Tragic street racing incidents in other urban centers prompted Bill C-19, and horrific child abduction and sexual assaults led to Bill C-22 and Bill C-27.

The second reading debates on Bill C-27 contain multiple opposition party comments suggesting the amendments are merely political posturing, but the debates also provide an interesting summary of potential impacts of the proposed changes. The primary concerns raised to date in the House of Commons center on:

- the potential violation of the constitutional rights of offenders subject to the new presumption of dangerousness once convicted of a third specific or violent offence;
- the impact on the workload of court officials by increasing the number of offenders who plead not guilty for fear of a third conviction;
- a corresponding increase in prison populations without adequate resources;
- comparison between the proposed amendment and the “three strikes” legislation in specific United States jurisdictions; and, among others,
- the impact on marginalized populations in society and those who suffer from Fetal Alcohol Spectrum Disorder (FASD).

Others, specifically Bloc Quebecois members, express concern with Bill C-27 based on a belief that crime prevention models should be followed not the American “Three Strikes” approach. The Bloc also suggests the government should concentrate on the current process of releasing offenders, not future initiatives to detain offenders longer. Specifically, the Bloc suggests a review of the Parole system may bear more fruit.

Seemingly in response to the Bloc’s suggested change of focus, on April 20, 2007, the Minister of Public Safety
announced a six month independent review “to assess the operational priorities, strategies and business plans of the Correctional Service of Canada...”. The estimated $3.5 million cost of the independent panel review, appears to be part of the $102 million allocated for an overall review of the CSC announced March 19, 2007, as part of the federal budget. The website for “Public Safety Canada” includes the terms of reference for the independent review; it is a healthy list of tasks that will be difficult to complete in six months but one that may shed light on a number of the issues that arose during the February 14th House of Commons debate. The review includes an assessment of CSC services for Aboriginal offenders and those with mental health issues (which includes FASD). While these two issues are of significant interest, an area that does not appear to be in the Terms of Reference is the impact of the proposed amendments (Bill C-27 or any of the other previously mentioned Bills) on provincial correctional facilities. And changes to criminal law—or to Correctional Service of Canada policies—do impact the provinces.

As the federal government does not operate a Community Correctional Center (CCC is commonly referred to as a “half-way” house) in Alberta, offenders in the Prairie Region (Alberta, Saskatchewan and Manitoba) must be sent to the CCCs located in Regina or Winnipeg. As a result, the Regina CCC receives federal offenders from Alberta as well as from the Saskatchewan Penitentiary in Prince Albert. Changes to dangerous offender legislation become particularly important for Saskatchewan Corrections and Public Safety, as federal inmates released on Day Parole or with a Long Term Supervision Order, are housed in the Regina CCC. Those who subsequently violate the conditions of their release or commit new offences in or around Regina are placed in the Regina Provincial Correctional Centre, either with a new remand warrant or on the strength of a Parole Suspension warrant for a condition violation.

Bed spaces (cells) needed to accommodate the continuing increase of inmates remanded to custody (a trend evident across Canada) are already exhausted, in part due to federal parole suspensions. If these federal parole suspensions are the result of criminal code offences (rather than straight condition violations such as curfew or abstinence) they—as do “ordinary” remand inmates—often stay for lengthy periods of time, possibly because it will count as double time when sentenced (often triple in some provinces such as British Columbia and Ontario).

Bill C-27 is a potential concern for provincial as well as federal correctional administrators—the resource issues are real. Coupled with the impact of other crime Bills currently before the House of Commons, federal and provincial correctional facilities could experience sudden and significant increases in prison populations. Section 91 of the Constitution Act, 1982, gives the federal government jurisdiction over criminal law and Penitentiaries while Section 92 gives the provinces jurisdiction over the administration of justice and “public and reformatory prisons”. Significant changes in criminal law can, and will, have an impact on provincial as well as federal correctional facilities. Proper consultation is essential if changes are to be effectively implemented and a crisis in our provincial (and federal) correctional systems avoided.

ENDNOTES

1 An Act to amend the Criminal Code (conditional sentence of imprisonment).

2 An Act to amend the Criminal Code (offences involving firearms).

3 An Act to amend the Criminal Code (street racing) and to make a consequential amendment to the Corrections and Conditional Release Act.

4 An Act to amend the Criminal Code (age of protection) and to make consequential amendments to the Criminal Records Act.


NEW SITES OF TRANSFORMATION IN ABORIGINAL PEOPLE’S POST-SECONDARY EDUCATION

BY MALREDDY PAVAN KUMAR

This article looks at Aboriginal people’s post-secondary level educational attainments in Saskatchewan and the impacts of these attainments on their social and economic transformation. Instead of reducing Aboriginal peoples’ post-secondary education to a numerical category, the author looks at the role of the post-secondary education in the emergence of an urban-based Aboriginal “new middle class” and a “new intellectual class”.

A recent policy report by the Caledon Institute states that “Saskatchewan is usually among the worst in most indicators” when it comes to Aboriginal peoples’ labour market issues, but perhaps Saskatchewan’s better performance in Aboriginal education is “due to the more ready availability of Aboriginal-targeted university level education through the First Nations University of Canada and the Gabriel Dumont Institute”. Indeed, such an ambiguous perspective is not surprising given that most of the available research on Aboriginal peoples’ economic prospects unduly emphasizes the problems confronting their completion rates at the secondary school level. It is only recently that the importance of Aboriginal post-secondary education (PSE) has come to be recognized, particularly since the release of Canada’s Innovation Strategy documents in 2002. Yet the research on Saskatchewan’s Aboriginal communities has not made satisfactory progress in taking account of their post-secondary level educational attainments and, more importantly, the impacts of these attainments on their social and economic transformation. Regardless, various studies based on the 2001 Census figures forecast that the Aboriginal unemployment rate in Saskatchewan is at least two times higher than it was in 1996 and that it will double by 2045.5 In contrast, a less intimidating interpretation of the Census data by Saskatchewan Learning reveals a sharp decline in Aboriginal peoples’ unemployment rate, with a projection that the size of the Aboriginal labour force may overtake the province’s total labour force by 2018.1

Notwithstanding the inconsistencies of these empirical renditions, perhaps a proper consideration of Aboriginal peoples’ post-secondary education implies that it should not be reduced to being just another numerical category or an empirical background to the analysis of their overall socio-economic prospects. Instead, the more nuanced aspects of its importance, some of which are often irreducible into empirical facts, such as the role of the post-secondary education in the emergence of (1) an urban-based Aboriginal “new middle class”, and (2) the emergence of a “new intellectual class” must be taken into consideration.

II

Between 1996 and 2001, the educational attainments of Aboriginal people with a university degree or certificate had increased by 2%, as well as over 6% at the non-university level PSE. In 2001, 22% of Aboriginal people had obtained a non-university PSE as compared to 28% of the total population. Various studies conducted by Saskatchewan Learning and the Gabriel Dumont Technical Institute (GDI) enlist wholesale and retail trade, entrepreneurship, information technology, food production, hospitality management, and transportation as the leading fields of study in which Aboriginal students received a PSE diploma or certificate.

As a response to these educational attainments, from 1996 to 2001 the labour force participation of Aboriginal people increased from 51.1% to 54.4%, while the unemployment rate fell from 26% to 23%.5
sector, and information technologies. Likewise, a number of regional level surveys report that these fields account for more than half of Aboriginal peoples' employment in Saskatoon and Regina.\(^6\) In particular, Eric Howe's study identifies entrepreneurship, service sector jobs (“hairdressers, painters”, etc.), motels, and casino chains as the prosperous employment fields for Saskatchewan's Aboriginal youth.\(^7\)

Interestingly, most of these occupational categories resemble the ones that sociologists typically associate with the “new middle class”. Unlike the “old middle class” occupations, such as industrial supervision, engineering, public bureaucracy, etc., in the production-driven economy, the “new middle class” occupations are not only “consumption” based, but they are predominantly urban.

Corresponding to these characteristics, sociologist Terry Wotherspoon has identified an emergence of the new Aboriginal middle class in Saskatchewan, as well as in Canada's major cities since the 1990s.\(^8\) Saskatchewan, however, features a great potential for urban middle class because nearly one-third of Aboriginal graduates with post-secondary education live in Saskatoon and Regina. Perhaps the most promising indicator of this emerging new middle class is that, between 1996 and 2001, the average annual income of the province's Aboriginal population increased by 5% which is slightly higher than the average income of the non-Aboriginal population—3.8%.\(^9\) According to Eric Howe's study, the growth of Aboriginal entrepreneurship exceeded non-Aboriginal by 800% during the same period.\(^10\)

In spite of its economic purchase, the urbanization of Aboriginal people does not lead to the displacement of their non-urban culture. Instead, it is a culture which involves changing social and economic positions that foster a variety of fragmented life choices and orientations. Contrary to populist assumptions that urban Aboriginal people are “ghettoized” because they are “incompatible” with urban life, scholars such as Evelyn Peters and David Newhouse contend that the new wave of urban Aboriginal people are effectively reformulating “western institutions and practices” in order to maintain community ties as well as their distinct cultural identities.\(^11\)

In Saskatchewan, even a cursory look at the figures of university educational attainments reveals that in 2001 the gap between the Aboriginal and the total population's university degree attainment rate was a record 6%, one of the lowest in the country.\(^12\) An internal survey conducted in 2000 by the First Nations' University of Canada (FNUC) found that 65% of its graduates were employed in education, in First Nations' governance, and in social services. While the University of Regina, as the degree-granting authority for the FNUC, follows a similar trend, recent figures from the University of Saskatchewan (U of S) indicate that over 35% of Aboriginal students are enrolled in the fields of Education and Arts & Science combined.\(^13\)
Aboriginal Education Cont’d from PAGE 19

Although the proportion of university graduates is smaller compared to the non-university PSE graduates across the province, the high level of concentration in the Humanities and Aboriginal governance related areas at the university level is a decisive indicator of Aboriginal students’ career choices in community-based political advocacy. On the other hand, the presence of the U of S based research institutions such as the Native Law Center of Canada, the Aboriginal Educational Research Centre, and public and business advocacy groups such as the Women’s Council of Saskatchewan, the Saskatchewan Aboriginal Literacy Network Inc., and the Saskatchewan Indian Equity Foundation unlock the true potential for the new Aboriginal intellectual class in configuring political strategies for educational and economic transformation with distinct cultural interests.

Case in point, at a recent national-level convention on Aboriginal education and learning in Edmonton, U of S based Aboriginal scholars, educators, and theorists such as Marie Battiste, Danny Musqua, and Youngblood (sákéj) Henderson placed a strong emphasis on recognizing the new sites of cultural transformations in Aboriginal education and learning. They maintained that although the educational policies in Canada focus on institutions, socialization, and other important aspects of knowledge transfer, they must also recognize the intrinsic link between learning and the much broader aspects of identity, motivation, life-long passions, and purposes.

Henderson, in particular, asserted that “educational” and “professional” achievements for Aboriginal people gain value only when their meanings are redefined from an Aboriginal point of view. Although Aboriginal people, whether in Saskatchewan or Canada, have not gone all the way in redefining the very meaning(s) of education and economic change, they have certainly gone a long way in questioning, debating and reinterpreting their relevance and context in the past few decades. Thus, while numbers may draw a fairly accurate picture of Aboriginal peoples’ (non)achievements in the province, a slightly different approach is required to fully uncover these new sociological and anthropological sites within which Aboriginal people’s social and economic transformations are taking place.

ENDNOTES

The third in David Smith’s trilogy—on the crown, the Senate, and now the House of Commons—The People’s House is a worthy successor to C. E. S. Franks’s The Parliament of Canada (1987) and a useful companion to David Docherty’s Mr. Smith Goes to Ottawa: Life in the House of Commons (1997). Smith, thoughtful and tempered, casts his research net widely to draw on a wide range of meticulously documented sources. They run from Bagehot and Bourinot to Elections Canada and Fair Vote Canada, from Dawson to Democracy Watch, and from Jeffery Simpson to (surprise) Susan Sontag. Smith serves up a triad of competing conceptions of democracy—parliamentary, constitutional, and electoral—as prisms through which to assess the Commons. He thinks the three are reconcilable, but the challenge is in going from where we are to where we want to be. This study is particularly welcome in light of the relative lack of professional curiosity among contemporary political scientists regarding responsible government, the first and oldest of Canada’s constitutional pillars. Treatment of the House pales in comparison to the attention paid to the other two pedestals, federalism and the Charter of Rights and Freedoms.

Smith is a fine scholarly craftsman despite the occasional factual error (e.g. the assertion on p. 47 that the Aboriginal rights in Section 35 of the Constitution Act are part of the Charter), and lapses of redundancy (e.g. repeating on p. 39 what p. 38 tells us of Bill C-3’s provisions regarding the definition of a party). The attention he devotes to Preston Manning (and the inattention to J. R. Mallory who gets but a passing reference and is absent from both the notes and bibliography) speaks to the rise of electoral democracy and the eclipse of parliamentary democracy. Smith explores the changing nature of “the people” and its implications for parliament. He scrutinizes the Reform party’s radical parliamentary reform proposals but, to this reader, those proposals have been jettisoned and now appear as rhetorical fluffiness in light of the quite conventional operation of the House under the prime ministership of that original Reformer, Stephen Harper.

Among many insights, Smith notes that constitutional democracy (i.e. court decisions) is elevating the importance of the participation of individuals at the expense of parties.
TREATIES AND THEIR DEVELOPMENT IN CANADA

A Response to Tony Penikett’s Article British Columbia’s “New Relationship”

BY PAUL CHARTRAND, PROFESSOR OF LAW, UNIVERSITY OF SASKATCHEWAN

Author Paul Chartrand reflects on many complex and significant matters of public policy, history, legal and political theory in response to Tony Penikett’s comments on the role of treaties and the processes leading to their creation in Canada.

In an interesting and valuable article in the Winter 2007 issue of Policy Dialogue, Tony Penikett focuses his attention on British Columbia’s “New Relationship” Accord entered into in 2005 between the government of Gordon Campbell and ‘First Nations’ leaders. His comments on the role of treaties and the processes leading to them invite reflection on many complex and significant matters of public policy, as well as history and legal and political theory.

Penikett correctly views the prevailing government approach to Aboriginal policy in Canada as being designed to “manage” Aboriginal issues. This Smokey-the-Bear ‘stamping out fires’ approach is reactionary and directed at dealing with crises that provide the political imperative to act. The approach has been expressly admitted by government representatives, and it should cause no surprise. Aboriginal policy does not win political majorities and is essentially a political liability in light of the lack of influence of Aboriginal people on political or economic affairs in Canada. Political mantras aimed at a receptive electorate or at interested powerful interests will always trump the morally persuasive pleas of indigenous peoples in this country as they do everywhere else.

After arguing that the British Columbia (B.C.) process seems to be stalling actual treaty agreements and using interim measures and economic agreements as alternatives to treaties, Penikett suggests that reaching treaty agreements is essential “in resolving the big questions of Aboriginal lands and governance.” He queries whether the Accord reflects the “attitudinal shift” that worked in the Yukon in the 1980s when the government argued that the government represented all Yukoners, Aboriginal and non-Aboriginal, and negotiators were instructed to “advance the broad public interest and settling treaties was not just in the aboriginal interest but also for the common good.”

Perhaps this was a good approach to take in the Yukon in the 1980s, but a closer look cautions against viewing this as a formula for application everywhere in Canada. If treaty negotiations are to recognize the legitimacy of claims to self-government, they must be linked to the norms behind the right of self-determination, which posit that each ‘treaty nation’ must be free to determine for itself what is its vision of the good society, or its ‘public interest’. It is true that government negotiators must view treaties as beneficial for all Canadians. All Canadians have a stake in ensuring that Canada abides by its international law obligations to respect and promote the human right of self-determination and the rule of law. Furthermore, there are many common interests shared between all Canadian citizens, whether Aboriginal or not. But an essential aim of a treaty purporting to recognize and respect a right of “self-government” is to agree on the institutional relationships that will allow the representatives of an Aboriginal nation to make political decisions to decide what is the nature and scope of the nation’s own ‘public interest’ and to negotiate, on a continuing basis, the accommodation of those interests with the ‘public interest’ of all Canadians. Certainly, the latter includes aspects of the former, but it is dangerous to suggest that governments come to treaty tables prepared to argue what constitutes the ‘common good’ because the government represents all citizens, Aboriginal or not. This is simply not true, at least not in the democratic sense. Aboriginal people have never occupied positions of influence in any federal government and rarely in provincial governments. Penikett must be taken to know very well the proposition that treaties are meant to deal with “shared rule” and “self-rule” and I suspect that he does not intend to dispute any of this.

The terminology he adopts however, leans towards confusion between individual ‘citizenship rights’ and collective “aboriginal rights”, a distinction which dogs all debates about the rights of Aboriginal peoples, whether in Canada or in relation to the United Nations, or the Organisation of American States’ Declaration on the Rights...
of Indigenous Peoples. In this regard, Penikett refers to “a first citizen’s right to fish” in the Sparrow case, which actually involved the Musquam’s collective Aboriginal right and not a right enjoyed by virtue of Canadian citizenship. Not to be too harsh, the Supreme Court of Canada itself seems to have been confused. In dealing with the rights of the Musquam, the Musquam were not invited to come to court to articulate and defend their right. Adding to the interpretation that he has the legal relationship between all individuals and the state in mind when using the term “citizenship”, he refers to “aboriginal citizens” who boycotted a B.C. referendum on treaties.

There are many common interests shared between all Canadian citizens, whether Aboriginal or not. But an essential aim of a treaty purporting to recognize and respect a right of “self-government” is to agree on the institutional relationships that will allow the representatives of an Aboriginal nation to make political decisions to decide what is the nature and scope of the nation’s own ‘public interest’ and to negotiate, on a continuing basis, the accommodation of those interests with the ‘public interest’ of all Canadians.

Supposing these points to be more semantic than real, other eyebrow-raising assertions invite comment. One is the fact-defying opinion that Pontiac, who assuredly deserves other credits, was a “father of confederation”. Even more surprising is Penikett’s characterization of Section 35 of the Constitution Act, 1982 as “the world’s first aboriginal clause”. One need not go beyond the terms of Canada’s Constitution to see earlier “aboriginal clauses”, including not only certain terms of the Royal Proclamation of 1763 which Penikett noticed in his own article, but post-Confederation constitutional provisions such as Section 31 of the Manitoba Act 1870 (recognition of Metis aboriginal title)1 and the “game laws paragraph” on Indian hunting and fishing in the Natural Resources Transfer Agreements of the three prairie provinces, constitutionalised in the terms of the Constitution Act, 1930. The assertion also overlooks much older “aboriginal clauses” in the Constitutions of other states, such as Mexico’s, which dates back to 1917, and our own American neighbours’ Constitution, which was drafted in 1787. In Article 1, Section 8, Clause 3, Congress is delegated the authority to legislate to “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” I share Penikett’s fondness for historical background, but the facts seem to get in the way of agreement here.

Returning to the subject of the B.C. treaty process, Penikett’s commentary reminds us to view with cautious circumspection their two apparently contradictory but essential functions as “settlements” and as “living agreements”. Too much enthusiasm for the former runs the danger of overlooking their long-term role as an institution for resolving conflicting goals and interests between the treaty parties. The importance of such institutions runs deep in the history of the evolution of Parliament, the British and Canadian ‘talking place’ where the same familiar function is played out.

Another significant factor in the B.C. treaty process, not mentioned in the article, is the issue of ‘size’ of ‘nations’ with which the governments propose to enter into “self-government” treaties. The economic and political ‘economies of scale’ dictate that large aggregations of communities are much more likely to develop feasible governance models than the relatively small groups currently at the negotiating tables. In this regard, both theoretical and practical ideas have been advanced that deserve consideration. In the realm of ideas, the European concept of ‘subsidiarity’ may hold promise for designing models that respect local interests and also provide for aggregated and more effective governance models. At the practical level, the analysis and recommendations of the Royal Commission on Aboriginal Peoples in its 1996 final report on both process and models has yet to be shoved aside by any better ideas of which I am aware.2

These respectful comments, I trust, will be viewed as more than a demonstration of the art of the didactic twit.

ENDNOTES
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