

Speech by Gil Rémillard, Minister for Canadian Intergovernmental Affairs, given at the Symposium on “Rebuilding the Relationship: Québec and its Confederation Partners,” Mont-Gabriel, May 9, 1986.

“Nothing less than Québec’s dignity is at stake in future constitutional discussions.” (*Mastering the future*, p. 49)

To begin with I would like to thank the Institute of Intergovernmental Relations and the École de l’administration publique for having invited me to this seminar and for having given me the opportunity to participate in your work. It is certainly promising to see the Institute of Intergovernmental Relations of Queen’s University at Kingston and the École de l’administration publique of Québec associate to organize such a seminar. This association is entirely to the credit of these two teaching and research establishments and I congratulate their respective directors, Mr. Peter Leslie and Mr. Jocelyn Jacques.

The theme of the seminar “Rebuilding the Relationship: Québec and its Confederation Partners” could not be more apt. As constitutional talks resume between Québec, Ottawa and the other provinces, this type of forum can prove very useful. Therefore, I am pleased as minister responsible for constitutional matters to share with you the overall orientation the Québec Government intends to promote in its talks with its partners in the Canadian federation.

April 17, 1982 is a historic date for Canada. It was on this day that Elizabeth II, Queen of Canada, proclaimed the *Constitution Act of 1982* on Parliament Hill in Ottawa. After more than 55 years of difficult discussions which, on some occasions, even plunged Canadian federalism into profound crises, Canada cut its

last colonial tie with London. It also took advantage of the opportunity to substantially amend its constitution by adding a charter of rights and freedoms, an amending formula, aboriginal peoples’ rights, an equalization principle, and a modification in the distribution of power in matters concerning natural resources.

Little remains to be said on the fact that the *Constitution Act of 1982* marked the end of the last vestige of Canada’s colonial status. Canada has been a sovereign country since the Statute of Westminster of 1931. However, since the British North America Act of 1867 did not include an amending formula and since, at the time, Ottawa and the nine provinces disagreed about how to fill this very important gap, it was agreed that London would act as trustee for certain parts of the Canadian Constitution. As we know, this role was really very much a matter of form. Westminster always acted at the request and according to the specifications of Canada. This role was also temporary since the provinces and Ottawa anticipated soon agreeing on an amending formula.

Many Canadians would certainly be surprised to learn that, from a strictly legal point of view, London could renege on its decision and once again make Canada a colony by amending the Statute of Westminster of 1931 and the “*Canada Bill*” of 1982. However, as Lord Denning put it in his famous obiter dictum in the *Blackburn* Affair, “legal theory does not always coincide with political reality”. This is clearly a utopian consideration which is nevertheless possible in law strictly construed since a choice was made to proceed via Westminster rather than acting by Canadian Proclamation.

As we know, nothing obliged Canada to ask Westminster to put an end to the last vestige of its colonial status. The Canadian Parliament and the provinces

could have unilaterally proclaimed their independence and the changes they intended to make sovereignly to the compromise of 1867. Resorting one last time to the old colonial mechanism, facilitated the possibility of Ottawa acting without the provinces' agreement since the Canadian Parliament had the power to act alone to amend the Canadian Constitution legally, if not legitimately, as clarified by the Supreme Court of Canada in its famous September 28, 1981 patriation reference.

We should also mention that resorting to the old colonial mechanism made it all the easier for Ottawa and the other nine provinces to disregard Québec despite its refusal to accept these fundamental changes to the Canadian Constitution. This refusal has no judicial consequence since the Constitution was patriated legally. The *Constitution Act of 1982* applies to Québec despite its disagreement, however, the political consequences are very real. Since it does not accept the *Constitution Act of 1982*, Québec refuses to vote on any constitutional amendment. For instance, we refuse to vote on any amendment proposal dealing with the Senate, entrenching property rights in the charter, or making changes to the rights of aboriginal peoples, with whom we sympathize greatly.

Clearly, Québec does not object to the fact that Canada recovered full jurisdiction over its own constitution from London. What we do object to is that patriation was used as a pretext for substantially modifying the Canadian Constitution without taking Québec's historic rights into consideration.

Four years after the proclamation of the *Constitution Act of 1982*, Québec, headed by a new government, still does not adhere to this act. No Québec Government, regardless of its political tendencies, could sign the *Constitution Act of 1982* in its present form. However, if certain modifications were made, it could be acceptable to Québec.

The Québec Government therefore hopes that constitutional talks will be resumed. However, conditions have not been satisfied for beginning serious, formal constitutional negotiations. Certain points must be clarified first. For instance, Ottawa must indicate what, in its words, might be meant by signing a constitutional agreement "with honor and enthusiasm", as stated by the Prime Minister of Canada, Mr. Mulroney.

It should be stressed that it is not only up to Québec to act. Our federal partners must not sit back idly; we expect concrete action on their part, action that is likely to steer the talks in the right direction. The ball is not only in Québec's Court but also in that of the federation that isolated one of the main partners that created it in 1867. We wish to talk with partners, who must begin by showing concrete proof of their desire to make good the injustice that the *Constitution Act of 1982* represents for Québec.

This is not the time for listing the errors committed by one side or the other. Instead, it is time for cooperation and understanding. Québec will tackle these constitutional talks determinedly and firmly but also with an open mind, as dictated by the higher interests of Québec and Canada. However, you will agree with me that Québec's isolation cannot continue much longer without jeopardizing the very foundation of true federalism.

Nor is it time for giving a backhand sweep and starting all over again. Absolutely not. Not everything contained in the *Constitution Act of 1982* is negative. After four years of being interpreted by our courts, the Charter of Rights and Freedoms, for instance, is, on the whole, a document which we, as Quebecers and Canadians, can be proud of. Its greatest merit no doubt lies in gradually giving us a new outlook on the respect of human

rights. This is why our first decision as the new government last December was to stop systematically using, as the former government had done, the “notwithstanding” clause in Québec statutes, to depart from sections 2 and 7 to 15 of the Canadian Charter. We want the fundamental rights of Quebecers to be as well protected as those of other Canadians.

The only valid reason for systematically using the departure clause could be as a symbol, a symbol of Québec's disputing the *Constitution Act of 1982*. We feel that this symbol is empty of meaning. We do not have the right to take Quebecers hostage for the purposes of constitutional talks. As Québec's Government, we refuse to deprive our people of such fundamental constitutional rights as: the right to life, liberty and security of the person, the right to a just, fair trial and equality rights. Without in any manner accepting the *Constitution Act of 1982*, we wanted to be fair to Quebecers, who are also full-fledged Canadians.

If the Canadian Charter poses few problems for being acceptable to Québec, the same is not true for other aspects of the *Constitution Act of 1982* which, in many respects, opposes Québec's historic rights.

On December 2, 1985, the population of Québec clearly gave us the mandate of carrying out our electoral program, which states the main conditions that could persuade Québec to support the *Constitution Act of 1982*.

These conditions are:

- Explicit recognition of Québec as a distinct society;
- Guarantee of increased powers in matters of immigration;
- Limitation of the federal spending power;
- Recognition of a right of *veto*;
- Québec's participation in appointing judges to the Supreme Court of Canada.

As far as we are concerned, recognition of Québec's specificity is a pre-requisite to any talks likely to persuade Québec to support the *Constitution Act of 1982*. Québec's identity is the culmination of a slow social and political evolution. At the time of the conquest of 1760, a unique francophone community existed with its own customs, mentality, lifestyle and civil, religious and military institutions. These were the true Canadians whereas the conquerors were Englishmen. The Québec Act of 1774 and the Constitution Act of 1791, which created Lower Canada, confirm the French Canadian's unique character by giving them their first legal bases of existence and expression by permitting them to conserve their civil law and their religion and by establishing a parliamentary system. Then came the Act of Union of 1840, which followed the Durham Report drafted after the unrest of 1837-1838. In guise of retaliation, this Act united Upper and Lower Canada into a single political entity. This was the birth of the two designations, “French Canadians” and “English Canadians”, that the British North America Act sanctioned in 1867 both in letter and in spirit.

More than a century would go by before a national Québec character emerged from this French Canadian people. During the one hundred years of federation, Quebecers would increasingly become aware of their identity in terms of their provincial government and in terms of a common good which was increasingly identified with their society.

This identity must not in any way be jeopardized. We must therefore be assured that the Canadian Constitution will explicitly recognize the unique character of Québec society and guarantee us the means necessary to ensure its full development within the framework of Canadian federalism.

Recognition of the unique nature of Québec gives rise to the need for obtaining

real guarantees for our cultural safety. This safety is translated notably by the sole power to plan our immigration, in order to maintain our francophone character by countering or even reversing demographic trends that forecast a decrease in Québec's relative size within Canada.

Cultural safety and security also signifies the possibility of Québec acting alone in its fields of jurisdiction without interference from the federal government through its spending power. You are no doubt aware that this power allows Ottawa to spend sums of money in any area it wishes whether it falls under federal jurisdiction or not. This situation has become intolerable. For all provinces it has become a type of "sword of Damocles" hanging menacingly over all planned policies of social, cultural or economic development. Bill C-96 dealing with the financing of health and post-secondary education, which is before the Canadian Parliament, is a good example of this situation. This bill is clearly unjust and discriminatory as far as Québec is concerned. It represents a lack of earning totalling \$82 000 000 in 1986-1987. It would be desirable for the Federal Government to remove itself from the areas which are not within its jurisdiction. However, it would be unacceptable for the Federal Government not to consequently give these financial resources to the provinces. It appears increasingly necessary to subject the exercise of the spending power to the provinces' approval. Doing so would contribute greatly to improving the functioning of the present federal system.

Should Bill C-96 be passed by the Canadian Parliament, the result would certainly have a severe impact on the progress of constitutional talks.

Spending power related to the principle of equalization is much more acceptable. However, once again, the current situation

is completely unfair to Québec. My colleague, the minister of Finance, Mr. Gerard D. Levesque, was right in denouncing Ottawa's attitude in his recent budget. Ottawa unilaterally changed the rules for applying equalization. It is unacceptable for Ottawa to have acted unilaterally to change the rules for the application of the principle of equalization, which is entrenched in section 36 of the *Constitution Act of 1982*. The general parameters for applying this principle, which is fundamental to our federal system, must be written into the Constitution. In this way, modifying these parameters would mean resorting to the amending formula. This provides a further reason for demanding revision of the amending formula hereby protecting Québec from any changes likely to affect its rights.

The current amending formula is unacceptable to Québec because it does not make provision for financial compensation in case of withdrawal, and because it permits changing federal institutions or accepting a new province into the federation despite Québec's objection. We therefore demand a right of *veto* able to protect us adequately against any constitutional amendment which goes against Québec's interests.

The Constitution is not always changed formally using the amending formula. The Supreme Court of Canada, the Highest Court in the land, can, for all intents and purposes, impose constitutional amendments upon us through its interpretation of the Constitution.

The role of our Supreme Court is also significant for the respect of certain values that are essential to Québec's specificity such as: civil law and, from certain points of view, fundamental rights and freedoms. We must therefore be entitled to participate in the process of selecting and appointing the Supreme Court judges.

We also wish to point out a very important question left hanging since the

proclamation of the *Constitution Act of 1982*, namely, since sections 41 and 42 refer to the Supreme Court, is the latter, by this very fact, constitutionalized?

The question is important since, if the answer is positive, the composition of the Supreme Court is constitutionalized and unanimity is required to change it. In this way, Québec sees itself ensuring the fact that 3 Supreme Court judges must come from the Québec Bar or magistrature. We consider this the required minimum. However, if the answer is negative, this guarantee no longer exists and the Federal Government remains the sole master of our Supreme Court in general. This is clearly unacceptable in a federation like ours, given the essential role played by the Supreme Court in its very evolution.

In short, our stipulations for supporting the *Constitution Act of 1982* are based on three main objectives: making the Act acceptable to Québec, improving it to the benefit of the entire Canadian federation and improving the situation of francophones living outside the province of Québec.

This last point is especially important to us. In fact, the situation of francophones outside of Québec will be one of our major concerns during the upcoming constitutional talks. Their situation could be greatly improved, for example, by specifying in paragraph 3B of section 23 that the expression "minority-language educational facilities" includes the right to management. There has already been a ruling to this effect by the Ontario Court of Appeal. However, the case, which was a reference for an opinion by the Ontario Government, did not go to the Supreme Court.

Why not take advantage of these constitutional talks to clarify this point which is so important for the survival of francophones outside Québec? It would perhaps also be timely to question the well-known concept of "where numbers warrant." Is limiting

the right to instruction in its mother tongue for one of the two national minorities always appropriate? We want to discuss these issues and many others with the Federal Government and the other provinces in an attempt to improve the situation of francophones outside Québec.

Furthermore, these improvements to section 23 could only benefit Québec's anglophone minority. Clearly, the problems encountered by francophones outside Québec and anglophones within Québec are not identical. However, we wish to ensure Québec's anglophones of their language rights. These rights must naturally fall within the context of Québec society's francophone character and the government's firm desire to ensure its full development.

Québec's future is within Canada. This is the heartfelt conviction of the huge majority of Quebecers just as it is the prime, fundamental commitment of this government. We believe in Canadian federalism because, within the federal system, Québec can be faithful to its history and its unique identity while enjoying favorable conditions for its full economic, social and cultural development.

Stating our full, complete belonging to Québec and to Canada involves stating as significantly as possible our keen regret and feeling of helplessness about what occurred at the time of the patriation of the Constitution.

As Quebecers and as Canadians, we cannot accept the fact that important amendments to our country's Constitution were made without us and, in some respects, contrary to Québec's historic rights. This is why Québec's new government and the population of Québec, in the interests of Québec and Canada, would like matters to be corrected. Mention has been made of signing "with honor." Certainly, since what we are asking for is

the respect of the dignity and pride of the people of Québec and respect of the province's historic rights. "With enthusiasm"—this too is possible if Québec is once again made the major partner in the Canadian federation that it had always been.

The election of a Liberal government in Québec last December signifies a new era for federal-provincial and interprovincial relations. Faithful to our federalist commitment, we want to guarantee Québec its rights as a distinct society and major partner in the Canadian federation.

Québec nationalism is not dead, far from it. It is thriving more than ever but in a different form. It is no longer synonymous

with "isolationism" or "xenophobia" but rather with "excellence." More than ever, we, Quebecers, we, French Canadians, must recall our history and remember that we owe our survival to the dangers that aroused the sense of daring and excellence in our ancestors.

Our existence as a people and our belonging to the Canadian federation is a challenge to history. Faithful to our history and confident in our future, Québec intends to devote its efforts to continuing to meet this challenge and, within Canada, make Québec a modern, just and dynamic society. We must remember that our present is a token of our future.

Source: Text of the speech.