NATIONS, MINORITIES AND AUTHORITY

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I. Introduction

It is a considerable honour to be asked to deliver the Viscount Bennett Memorial Lecture, to join the company of wise and eloquent Bennett Lecturers and to be able to speak to the law students, law teachers and legal professionals of this beautiful, historic and important province of Canada.

It is also, for me, a great pleasure to be back in New Brunswick and, in particular, the Saint John River Valley. As a young man I spent two summers in this valley, engaged on something called an archaeological survey for the then National Museum of Canada. We were, for the most part, above Fredericton near Woodstock where we were guided and honoured by the remarkable doctor, naturalist and antiquarian George Frederick Clarke. As a result of those visits I have a deep sense of the charms of this city and of the valley that holds it.

Let me pay homage to another memory of New Brunswick. That is the 1960 book by Professor S. Morris Engel, at one time an Assistant Professor of Philosophy at this University. It was published by Brunswick Press of Fredericton and entitled *The Problem of Tragedy*.[1] I mention this book because it meant a great deal to me. I recall it as my first brush with the excitement of intellectual connection – the linking of events to explaining ideas. I read it in a tent in fields near this city and felt the pleasure of recognition in that reading that I have spent my life recreating – at least from time to time. I feel I owe a lot of my sense of the value of intellectual enquiry to the University of New Brunswick for nurturing that gem of a book.

In his work, Dr. Engel explored the competing human strategies for meeting disorder and incomprehensibility: religion and tragedy. Religion offers ritual and authority to tame the irrational; tragedy offers, as the reward for awful anguish, the bliss of intelligibility – of new insight. However, in tragedy the intelligibility that is offered is neither genuine nor enduring. The only promise is a cruel one – that in time the new understanding will also fail to bring order to the chaos of human experience. Nevertheless, we are left with a choice – a choice between despair over human suffering, or celebration over the brief moments of

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[1]S. Engel, *The Problem of Tragedy* (Fredericton: Brunswick Press, 1960).

illumination that our suffering produces.[2]

For Professor Engel the genuine heart of tragedy is the collapse of a culture, a structure, or intellectual scheme, represented in drama as the death of the hero, but representing, in fact, the death of an entire tradition or an entire system of values. Those themes explored by Professor Engel – the confounding nature of experience, the transitory nature of satisfaction in human order and human understanding, and the inevitable failure of our political and cultural artifacts in taming reality – seem to me to be suitable ideas with which to leave my recollections of New Brunswick and begin an examination of Canadian constitutionalism. These themes applied to the Canadian nation – confusion about its essence (or its unintelligibility), the call for rapid revision of our sense of nation, the transitory nature of political accommodation, and the possibility of national tragedy – seem all too fitting to the future that we face, not only in the period following the failure to implement the 1987 Constitution Accord but, also, for some time to come.

The concepts to be explored here – nations, minorities and authority – are traditional. They both shape political resolution and are at the root of political tension. In a rough way they track Professor Engel's ideas about the fissiparous quality of present structures and about the redeeming possibilities of new understandings and reform.

At the heart of this enquiry into the Canadian state is the twin belief that, while the old intelligibility cannot be clung to, the new intelligibility must be rooted in the traditions of our political community. As Jaroslav Pelikan has written, "Knowledge of the traditions that have shaped us, for good or ill or some of both, is not a sufficient preparation for the kind of future that will face our children and our grandchildren... not a sufficient preparation, but a necessary preparation."[3] In particular, I want to focus on the concept of the changing nation and the place and role of minorities in that change. My aim is to demonstrate that while our history is, at least, partially rooted in the liberal conception of justice (one system of law and one administration of justice for all members of the nation), this historical paradigm need not lead us to an inevitable, tragic end as a nation – in particular, it need not lead to the separation from the rest of Canada of that minority interest represented by the province of Quebec. On the contrary, there is in our history, despite its commitment to liberalism, another commitment to the preservation of distinct communities. We can see this from two sources. The first being the history we derive from our dominant metaphor, that it is the history of community as expressed in the Bible, and the second being the lessons we derive

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[2]*Ibid.* at 60, 75-81.

[3]J. Pelikan, *The Vindication of Tradition* (New Haven: Yale University Press, 1984) at 20.

from Canadian confederation and the protection of minority rights. The overall message is that while accommodating minority communities within a traditionally liberal state is a complex and often divisive matter, there is also room for hope to emerge from more subtle understandings of our history and our practices.

II. Nations

Nevertheless, as I have thought about this lecture on Canada and its future over the past months, the dominant sense I have had is not hope but loss. I do not mean the loss of a nation; it is too soon to move from lamentation to despair. The loss that I have felt is the loss of wisdom and it is this sense, as much as my returning to New Brunswick, that has reminded me of Professor Engel's work.

It will not be terribly surprising if, having joined lack of understanding with a debilitated spirit, I now allude to the Book of Job, a book which is at pains to point out (perhaps comfortingly) that success and defeat are not to be connected to virtue and sin but are attributable to the humbleness of human enterprise and feebleness of human understanding, at least when compared to the mysteries of the universe – God's universe, that is.

This sense of inadequacy is conveyed in this particularly Canadian passage from Job in which Job answers his deeply moralising "comforters" ("moralizing comforter" being, of course, a pure example of the oxymoronic form). This is what Job says:

> There are mines for silver and places where men refine gold; where iron is torn from the earth and copper smelted from the ore; the end of the seam lies in darkness, and it is followed to its farthest limit... . While corn is springing from the earth above, what lies beneath is raked over like a fire, and out of its rocks comes lapis lazuli, dusted with flecks of gold... . Man sets his hand to the granite rock and lays bare the roots of mountains; he cuts galleries in the rocks, and gems of every kind meet his eye; he dams up the sources of the streams and brings the hidden riches of the earth to light. But where can wisdom be found? And where is the source of understanding?[4]

Where is the source of understanding? I think the answer suggested by Job (the source of understanding is not to be found in the everyday world but in reverence for God) is, above all, an expression of human modesty. For Job, human efforts to tame the unknown and capture the glories of creation are doomed to failure. Therefore, our human endeavours of comprehension, and even of nation-building, are at liberty to be modest, tentative, non-dispositive and contingent on the moment and the place. I accept this stricture from Job and, therefore, seek to start modestly.

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[4]*The Book of Job*, c. 28, vs. 1–12 (New English Bible, Oxford: 1972).

I want to start by starting here – in the Saint John River Valley, in late October, in 1990. What most arrests me about this place and time is the colour and scent of autumn. There are two elements of poignancy to coming into this valley and this city at this time of year – one derives from the colour – the sensate experience – and the other from the fact of change – the emotional experience. We need to attempt to grasp the meaning of what we experience. There is a meaning to this faded beauty and there is meaning to this dynamism of nature. The change of green leaves to yellow and red and brown and the brilliant array of this colour on the avenues and in the hills is attendant on their dramatic fall and a quick rush into another experience, another sense of the world – in short, another season. The colouring of leaves is a transformation that signals another transformation. It is the manifestation of a cycle of change. The change of colour just as the budding of leaves is the sign for anticipation and preparation. Fall and spring tell us to change our lives, to re-order our priorities and to shift our pre-occupations. In fall and spring one anticipates new worlds, the winter and summer to live through.

Fall and spring have a powerfully evocative effect because they are symbols of our perennial transformations. They mark a moving on and there is no moving on without regret and sadness. In Canada, autumn tells us graphically that there is a past and a future and our lives are falling through these cycles like leaves to the ground.

We no longer butcher the pig (and so have lost our sense of debt to, and community with, the animals that feed us) and we no longer array our shelves with apple butter and gooseberry jam. But we nevertheless know that the purpose of life is to prepare for the transformations that must come; we can be grateful for an existence in which days are shortened, the air grows cold, the rain's lash, the snow surrounds and in which there is, then, another greening.

This sense of being tied to natural cycles is not, of course, unique to this valley. There are other valleys, other trees and other changes. For instance, read Wallace Stegner's *Wolf Willow*, a wonderfully evocative account of his life on the Frenchman River in southwestern Saskatchewan. It too carries the theme of finding memory – and identity – in flux.

> It is wolf willow, and not the town or anyone in it, that brings me home. For a few minutes, with a handful of leaves to my nose, I look across the clay bank and the hills beyond where the river loops back on itself, ... and the present and all the years between are shed like a boy's clothes dumped on a bath-house bench.
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> Later, looking... across my restored town, I can see the river where it shallows and crawls southeastward across the prairie..., and toy with the notion that a man is like

> the river or the clouds, that he can be constantly moving and yet steadily renewed.[5]

I am moved to start my quest at these simple physical things for several reasons. First, the claim is now made in Canada that "English Canada" – what a denial of rich identity is captured in that phrase – must pull its act together. It is said that Canadians outside Quebec must articulate and demonstrate Canada's essence and its value, otherwise we shall have no answer for the centrifugal forces – British Columbia's remoteness, Western alienation, Quebec nationalism and Atlantic resentment. We must hurry to justify our nation because, unless justified, it will not persist.

I want to resist the grand scale of this demand. It does not sit well with the stance of Job-like modesty that we need adopt. I suggest that we can start best by simply stating what we are. I do not believe that we can be wholly self-defining, nor even more so, wholly self-redefining. Nor should we feel forced to articulate new conceptions of our community. Leonard Cohen sings "I was born like this, I have no choice. I was born with the gift of a golden voice."[6] This delightfully ironic exercise in self–location contains an important truth. We are born to our place, our geography, our family, our identity and, for many of us, our nation. We may not be blessed with the gifts that our community needs but we have no choice but to act as if we are. We are born into past commitments and inherit them. We should serve them and not dedicate ourselves to wondering whether those commitments, and the community formed by those commitments, are good enough for us or whether there are wholly new commitments we should now embrace. A strong community is one whose members remember its needs rather than wonder about its worth. Members of the Canadian aboriginal community could be said to have reasons to question the state of aboriginal society but that is not the starting point of aboriginal politics. The starting point is the unequivocal assertion of membership and proud adoption of the elementary and simple attributes.

There is a second reason for preferring to begin by acknowledging our place of the natural world and our sense of its power over our lives and our identity. It is our capacity to adapt to changes outside our control that provides the core of the Canadian myth; we are a sparsely populated nation in which the irreducible reality is not our conquering of the wilderness but the forces of nature.

There may be a more general reason for this focus. It may be that the real end of any human community – or any nation – comes with the loss of the natural world – the world in which humankind fits but does not completely appropriate.

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[5]W. Stegner, *Wolf Willow* (1955), (Toronto: Macmillan (Laurentian Library 59), 1977) at 19.

[6]L. Cohen, lyrics to "Tower of Song", from *I'm Your Man* (Columbia Records, 1988).

It is fitting (I think) for a nationalist (of any sort) to confess to a marked hostility to technology, to believe that in technological development the benign and the destructive ultimately cannot be separated. Science fiction has it right – the domination of technology is not utopian but hellish. Human ascendancy over nature destroys nations because it destroys imagination. The imagination of humans is fed by wonder at the inexplicable and the transcendently powerful. When all is taken over and altered it will matter not where we live, or whether our neighbours are joined with us in survival, or whether our political choices fit our needs and experiences because, after all, these can all be altered to conform to policies the state has promulgated. In a sense the death of nature is the death of the relevance of human community.

So, if we wish to care about the nation Canada we should begin, here, in the Saint John River Valley on a day like today.

But this reference to place and the nature of the place is, you will sense, too slight to carry the load of legitimating the Canadian state and it is important to acknowledge this. A state is a moral challenge. The coercive authority of the state over its inhabitants is not inherently a matter of social virtue. Legitimacy for state authority must be rooted in other ideas – social contract, public order, divine will, or whatever. The moral problem becomes acute when we know, as we know now in Canada, that there are people, and peoples, trapped within our country. Where is moral authority for this sort of political authority? Appeals to our common experience and to past romantic visions of a distinct nationhood will not likely answer the clamour for liberation.

Furthermore, there is the lesson from Professor Engel. Our historic commitments and historic visions can become spent, loose their relevance and produce tragedy. The words of the Italian political activist Nicola Chiaromonte repeat Engel's insight:

> The first step is to free oneself of belief in the present world and its idols which, no matter how far one's mind may soar, makes one an accomplice and a prisoner. The second is to reject the most perverted of current ideas, to wit, that the course of things must have a single meaning or that events can be contained in a single narrative... .[7]

When defending the idea of nation we find ourselves in a conundrum. The Book of Job reminds us to be modest – to be appropriate to our mortal state. Yet if we are modest and make only those claims we can stand up for – common experience, past commitments, a romantic hope for a nation that is a dim shadow of our original hopes – we may not have made claims strong enough to bind.

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[7]N. Chiaromonte, *The Paradox of History* (1970), (Philadelphia: University of Pennsylvania Press, 1985) at 148.

III. Minorities

Minorities – distinct cultural communities seeking political rights, separate people with claims for recognition and self-determination – are always a challenge to a nation and are likely to be increasingly so as globalization simultaneously induces structures of interdependency and awakens the human quest for distinct cultural and political identity. Statecraft has been the art that has been dedicated to meeting this challenge of conflicting needs and it has been a lively art, producing federalism, entrenched group rights, special majorities, membership in legislative chambers based on specially identified groups and an array of multi–state councils. In addition there has been the special art of the Meech Lake Accord – interpretive clauses, opt-outs from public programs and opt-outs from future constitutional reform – the latter two being, I suppose, the constitutional analogue to surrealism with its images of discordant and unnatural fit.

Yet these artful instruments hardly capture the complexity of the problem. They depend on assumptions that cannot be guaranteed – such assumptions as geographic discreteness, constant social groupings and the view that minority populations can be satisfied through the mere granting of a voice and are not, at heart, seeking liberation.

There is one other deep conflict not answered by the inventions of statecraft and that is the conflict between the claims of liberalism and the needs of a communitarian constitution. It would be perverse not to recognize the ground breaking work of the Canadian political philosopher, Will Kymlicka, in showing how liberal theory can accommodate group rights[8] but at this point I want merely to make what I consider to be the uncontroversial point that constitutions that are constructed around the value of promoting pluralism in society – around promoting a society in which groups identified by nationality, language or aboriginality, are encouraged to exercise political authority – are constitutions that permit illiberalism, that is, the imposition by state sanctioned bodies of particular conceptions of the good life on individuals. This description of a constitutional outcome is not, of course, a *per se* condemnation of minoritarianism. Rather it is a recognition that the holding to a constant theme in the design of a state ignores the reality of deeply conflicting values. To choose communitarianism or liberalism as the constitutional principle under which minorities are to be accommodated (or not accommodated) runs the risk of producing what any fixed vision of social ordering is, according to Professor Engel, likely to produce; that is, tragedy.

We are, however, left with the question of how we might appropriately entertain the claims of minorities in our constitutional arrangements. We might

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[8]W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989), especially chapters 7-10.

gain wisdom about this matter by looking at history, recognizing, first, that the lesson from tragedy is that history cannot be taken as dispositive and, second, of course, that the selection of what comprises "our" history is more a matter of value than fact. As has already been suggested, we can look to two sources to gain an understanding of ourselves – the history of our dominant metaphor, that is the history of community of the Bible and the history of political value in the Canadian confederation.

Community in the Bible is a people called from bondage to liberation – called from enslavement to alien kings and false gods to worship and redemptive participation. Community is to become rooted in God's redemptive mission for the world. There are specifics to this sort of community, such as equality of members and righteousness (or, in other words, the raising up of those who have previously been excluded from privileges). But there are three qualities that relate specifically to the question of the condition of minorities. First, the biblical community has been liberated through revolution, second the biblical community is dynamic and third it is a remnant, a status that allows the community to maintain the integrity of its covenantal relationship with God.[9]

The process of becoming a liberated people (when the liberation is not the accomplishment of a temporal leader but the result of God's initiative) creates a sense of special grace. The specialness comes, first, from the radical raising up from degradation so that the lives of the people are seen as blessed, as well as stamped with the obligation to provide blessing for others. It also comes from the thoroughness with which the raised up people are set outside the restraining structures. It is the twin idea of being specially blessed and being torn away from repressive powers that has made, as Michael Walzer has pointed out, the Exodus story the universal symbol for those engaged in liberation struggles.[10] The lesson of the Exodus story is not the improvement of a people – not simply the removal of apartheid, bad housing, early death, suicide and joblessness, but the removal of ties that do not belong. The Exodus story is not initially, in any event, about accommodation but escape and it has had an impact on the way minorities within nations express their aspiration for autonomy.

The second condition of dynamism comes from the conception of an immanent God who, in our world, is calling believers to express their faithfulness in specific, and changing, contexts. There is no form of relationship with authority that is intrinsically apt. A covenantal community is one in which God has reached out to humanity – has reached out to specific people in a specific place and formed a covenant. In the case of the particular story told in the Bible, it is Israel that has

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[9]These observations about the theology of community are drawn from P. Hanson, *The People Called: The Growth of Community in the Bible* (New York: Harper and Row, 1986).

[10]See, M. Walzer, *Exodus and Revolution* (New York: Basic Books, 1985).

formed a Covenant with God and this has made Israel blessed. It has also made Israel responsible for reflecting that blessing, for reflecting God's purpose and God's blessing whatever their condition in the world. The specialness of a people called to act as agent of God's vision is not contingent on convenient arrangements. It cannot be compromised by lack of authority or official sanction. There is no uniquely appropriate, or fixed, way to be within the wider community.

Finally, the idea of remnant is an idea that promotes resistance to secularism, pluralism and nationalization. The people of the covenantal community are a people who can be identified. As Paul Hanson has written, "... God's election of a people was believed to be carried by the remnant that remained faithful to the covenant in the midst of a largely apostate nation. Within the faithful remnant, the righteousness and compassion and true worship that were the unmistakable marks of the people of God could be preserved... ."[11]

The biblical lessons for community, then, are uncompromising. The people of God are cut free in the initial act of liberation, they retain their specialness, regardless of the actual structure or condition of the public order, and they retain the marks of identification without compromise. The constant political setting for Ancient Israel is first, the condition of specialness under pharaonic tyranny, then ascendancy to power in Canaan while in conflict with other minorities, and finally a decline into successive foreign dominations. These elements of the narrative are no less laden with meaning (or revelation) than any other elements of the Bible. The Hebrew Bible is the story of a distinct people in complex political relationships and among its other lessons is contained a theology of minorities. What that theology tells us, to put it in anticlimactic terms, is that we cannot count on either the fungibility of identity or the disposability of those beliefs and practices around which identity is constructed. Furthermore, we must see our attempts to strip away conditions of specialness as contrary to God's plan or, to put it in more secular terms, as a form of social evil.

On the other hand, theology is the enquiry by which people get in touch with the meaning for them, in their *actual* place, of the divine plan. It would be wrong to see, as the consistent theme of the theology of community, a strident claim for separateness. Instead, the themes are specialness and faithfulness. God's plan is redemptive in a general sense and accordingly the faithful community is both liberated from the wide community and responsible for it. The Hebrew Bible presents the vision of human wholeness while being a part of the principalities of the world. It may provide a model of minoritarianism that permits, at some level, the authority of nation and the duty to be bound by the interests of other communities. The question is whether the nation can be structured on the basis of unconditionally accepting the specialness and faithfulness of the minority

[11] *Supra*, note 9 at 474.

peoples.

Canada, too, has a history of ideas and, in particular, ideas of political philosophy. It is a controversial history, its controversy involving the question of Canada's historic and current commitment to liberalism. There is a sense that whatever the level of liberal ideology present at the formation of Canada, the Charter of Rights found resonance in a liberalized world – a world that, as a result of the Second World War, learned to be sceptical of state conceptions of the morally correct. There was a desperate sense that state power cannot be counted on to reflect virtue and that it is individual moral claims that provide the check to state power. This produced in Canada a yearning for constitutionalized rights that was captured in the voices of John Diefenbaker and Pierre Trudeau and then seemingly realized in the enactment in 1982 of the *Canadian Charter of Rights and Freedoms*.

Of course, at one level, both liberalism and communitarianism strive for a similar goal – opposition to state imposed conceptions of the good on a pluralist society. It is at the level of deciding who, if not the nation state, should determine what interests should be served, that conflict arises.[12] In Canada this conflict can also be seen as being played out in the field of federal/provincial relations in the following way. Federalism is an attempt to permit distinct ordering regimes for distinct communities. The greater the focus on provincial capitals for the vindication of political interests, the more distinct the various provincial communities are likely to be and the less likely that the whole population will subscribe to a nationalist political ethic. If there is no strong national political identification then differences in the treatment of, programs for, and regulation of, different populations will be regarded as normal and acceptable. A low presence of national values and a low sense of national commitment are connected, therefore, with a pattern of different legal fates for individuals who find themselves in radically different political communities. In this way, the development of strong sub-national communities is another form of illiberalism and, correspondingly, the development of a national political sensibility can be seen as threatening the continuing role for, and legitimacy of, distinct province-based polities.

This linkage between a strong federalist regime and communitarianism may, however, be seen as suspect in the Canadian context. Professor Robert Vipond, of the University of Toronto, has argued that all those lawyers, political scientists and philosophers who have arranged Canadian history into the conflict between the competing ideas of community and decentralized democratic participation, on the one hand, and atomistic liberalism rooted in the rights of national citizenship, on the other hand, have missed an important truth about Canadian federal theory.

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[12]See, e.g., M. Sandel, "Justice and Good" in M. Sandel, *Liberalism and its Critics* (New York: New York University Press, 1984) at 159-176. But, see, W. Kymlicka, *supra*, note 8 at 206-219.

What they have missed is the strong connection that has historically been made between provincial rights (strong provincial authorities) and the traditions of legal liberalism.[13] In his account, Vipond suggests that the important element in weakening national government was the delegitimation of the federal government's overarching power to reserve and disallow provincial legislation. This occurred through a steady resort by promoters of provincial rights to the liberal ideas of legalism and equality. Vipond observes:

> Beneath the important superficial differences there is actually a deep affinity between the claim for provincial autonomy mediated by the rule of law and [the] "rights model." At the level of political rhetoric, for instance, it is useful to remember that provincial governments still couch their claims to power in terms of rights, and they still reinforce these claims by comparing provincial rights to individual rights.[14]

This version of Canadian intergovernmental history may cast doubt on the fit of the traditional dichotomies but it does serve to support the claim that liberal values are deeply embedded in Canadian political consciousness. Again, this historical paradigm should raise concerns about the centrality within Canada of the role of minorities.

The claim for the influence of liberalism in the development of the Canadian nation is reinforced by other scholars. George Grant, in his 1974 Josiah Wood Lecture, *English-Speaking Justice*, maintained that the English speaking world, including most of Canada, has been dominated by liberalism simply because we, and our institutions, are the product of eighteenth and nineteenth century English political thought. Grant pointed out that for a considerable time, certainly since the mid-point of the nineteenth century, "liberalism is the only political language that can sound a convincing moral note in our public realms"[15] and "it is the only political thought which can summon forth widespread public action for the purposes of human good."[16] In other words, it has been the unexplained, unexplored and unjustified political philosophy of the English-speaking world, including Canada.

On the other hand, writers like Gerald Vano, have argued that such a derivative form of ascendancy for liberalism in Canada is a weak argument easily swept aside by the consistent non-liberalism and non-autonomy of the Canadian

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[13]R. Vipond, "Alternative Pasts: Legal Liberalism and the Demise of the Disallowance Power" (1990) 39 U.N.B. L.J. 126.

[14]*Ibid.* at 156.

[15]G. Grant, *English-Speaking Justice* (Sackville: Mount Allison University, 1974) at 5.

[16]*Ibid.* at 13.

state.[17] Canada, from its inception as a political unit, adopted feudalistic European thinking in which there is no real social dynamism. People are located by estate, status and function. Canada was designed with a highly fragmented state structure and there has been no appreciable movement or single organizing authority at either a political or philosophical plane. This failure can be blamed in part on the rejection of nationhood by the Judicial Committee of the Privy Council in terms of the phenomenon of its being willing to by-pass the national court for nearly three quarters of a century, and by its assertion of continuing authority (against Canadian preferences to the contrary) for the last quarter century of its role, and, finally, by the actual decisions that it made with respect to national powers.

Under this analysis, elements of continuing extraterritorial constitutional structure facilitated the ascendancy of community interests which, in Gerald Vano's words, means exclusive and divisive ethnicity and its prevalence over integrating liberal principles such as individual merit and freedom.

The pattern in Canada of preserving local authority, either as a matter of imperial policy, or domestic illiberal policy, or equally plausibly, as an expression of un-Americanness guaranteed, for some time, the dominance of social pluralism – discrete centres of power dominated by special limited and non-national interests.

Although this thesis is appealing, at least in terms of clinging to hope for the continuation of a nation which accommodates both liberal values and the need for dynamic minority communities, we must still grapple with the fact that the most convincing argument for those who claim that ours is a history of liberalism is to be found in the passing of the 1982 Charter. The Charter did not so much create a liberal vision as reflect a changing sensibility. Constitutional values in a nation cannot be constitutionalized by text alone, but by the matching of text with the ethical perceptions of the population. In the case of the entrenchment of rights such a constituting was given force in the Charter. However, the Charter is not purely a liberal document; instead it expresses a high level of ambivalence about the relative ranking of universal, inherent and personal rights and rights which are based on actual historical claims. The Charter, after all, grants both group rights (based on language, religion, ethnicity and nativeness) and individual human rights. Although the text of the Charter supports the claim of ambivalence, the history of the past eight years tells us that what has been constituted as basic are individual rights. Through the words of Canadian courts, they are granted a higher place than group rights which have been seen as contingent, bargained for, and

[17]G. Vano, *Neo-Feudalism: The Canadian Dilemma* (Toronto: Anansi, 1981).

ultimately trumpable.[18]

Having said this, however, (and in so doing perhaps making national tragedy through minority alienation look even more inevitable) we do need to note that although there is no denying the power of Lockian contractarianism in the rise of parliamentary democracy or in heightened legalism of Canadian constitutionalism, this may be a theoretical overlay under which an intense spirit of pluralism has played out and has shaped genuine loyalties. For example, it should be remembered that the explaining account of how Canadian courts are vested with constitutional authority to preserve the legality of governmental action was not offered until W.R. Lederman's ground-breaking article on judicial independence in 1955;[19] and the theory was not actually applied until less than a decade ago in a case named after your University of New Brunswick colleague, John McEvoy[20] and in the *Crevier* decision.[21] These touchstones of judicial development perhaps prove little, except that the theoretical understanding of one of the underlying conditions for liberalism – the use of legalism to locate the legitimacy of public authority – has come into our consciousness very late in the day.

An analysis of these conflicting histories suggests two competing ideas: first, that the homogenizing and nationalizing effect of liberalism would appear to represent the dominant organizing idea of the Canadian political make-up. This is troubling in that it would seem to paint a grim picture for the accommodation of minority communities like Quebec and native peoples, in that it would seem to require us to deviate from the liberal ideas of one Parliament and one Charter of Rights for all Canadians. On the other hand, however, in examining the lessons to be derived from the history of community in the Bible, and in reviewing those bits of evidence outlined above which seem to indicate that in reality, the practical effect of liberalism has not been long at work, it might be said that we have occasionally seen in Canada the maintenance of centres of power which have been

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[18]See, eg., *Quebec Association of Protestant School Boards* v. *A.G. Quebec* (1982), 140 D.L.R. (3d) 34 (Que. S.C.) in which Deschenes, C.J., at 61-65 conflates collective rights to individual rights and asserts that the denial of a right to a single individual represents the defeat of the collective right. See, also, *Société des Acadiens du Nouveau-Brunswick* v. *Association of Parents* (1986), 27 D.L.R. (4th) 406 (S.C.C.) in which Beetz, J., in speaking for the majority, stated that legal rights are seminal in nature while language rights are based on political compromise. The significance of this distinction for Beetz, J. was that although the latter rights are not immune from judicial interpretation, "the courts should approach them with more restraint than they would in construing legal rights" (at 415). See, however, *Ford* v. *Quebec (A.G.)* (1988), 54 D.L.R. (4th) 577 (S.C.C.) in which section 1 was used to allow recognition of the "visage linguistique" of Quebec's francophone society, although it was not allowed to be used to justify the particular measures that had been adopted to prevent that social condition from erosion.

[19]W.R. Lederman, "The Independence of the Judiciary" in (1956) 34 Can. Bar Rev. 769.

[20]*McEvoy* v. *A.G. New Brunswick and A.G. Canada* (1983), 148 D.L.R. (3d) 25 (S.C.C.).

[21]*Crevier* v. *A.G. Quebec* (1981), 127 D.L.R. (3d) 1 (S.C.C.).

ethnic, language based and religion based. If this is the case, then we might argue that our historical evolution has not always been hostile to the role of national minorities.

In conclusion both the Biblical tradition and our historical tradition have not suggested secularism (using the phrase widely) or nationalism and this has, I think, created a reality that can be acknowledged as we now strive to find moral authority for Canadian nationhood.

IV. Authority

You will appreciate, I am sure, that only frail claims for a national ethos have been advanced and perhaps no moral claims at all for Canadian nationalism. The claims of our national minorities are, on the other hand, strong. Furthermore, the forces for identification with the nation are being trumped by the voices of international identity – north/south trade, transnational mobility of capital and the world wide influence of corporatism. They are also being trumped by the voices of regional alienation, ethnic pride and special interests within Canada.

Finally, throughout the world the claims for self-determination are receiving greater understanding and support than the claims for national integrity. Nations that have been formed through coercion (no matter how accommodating to subservient communities the exercise of power has been) do not, it seems, enjoy legitimacy in attempting to keep their current structures intact.

In other words, when we seek to understand the forces at work at this moment of constitutional concern we must recall the fluidity of political arrangements throughout the course of history, but more particularly, throughout the course of the past decade – and the current year. What is not inconceivable, I'm afraid, is that the political arrangements which hold people together in this nation will not endure. We must not engage in sustained willing suspension of disbelief in radical change. We must confront our actual challenges. The question that challenges all Canadians who say Canada has not run its course – who wish there to continue to be a Canada that includes all the people from the Atlantic to the Pacific – is where can authority be found to sustain the nation that we now have?

We cannot hide from such questions behind arguments from tradition. We cannot say that what we now have is what must be right for us. Professor Engel reminds us that this is the attitude that produces tragedy. On the other hand, to declare that Canada has run its course and must now be reconstructed from the ground up is to ignore the lesson of Job; we have only modest capacities to understand the source of our failings, to discern which of our traditions no longer serve us and to devise new understandings of community needs and community structures.

Perhaps it is time to remind you that I am a lawyer and so, when I search for the basis of political authority I turn for guidance to the perennial challenge in law to justify the political authority of legal regimes. This, of course, may be the same question: nations are normative regimes which, in part at least, take the form of legal regimes. If we can discover what grounds fidelity to legal order we might find a starting place in our search for the moral authority of a nation. There are, I believe, lessons to be learned about authority from the somewhat bizarre social practice of judge-made law, or the common law. Common law possesses three qualities which give it authentic authority and which I see as relevant to our present dilemma. First, common law is careful to be careful; that is, it is careful to be ambivalent. Second, it is granular – it is comprised of the merest grains of sand and, finally, it is jurisgeneric; that is, it is encouraging of, and facilitative of, new ordering regimes. It is useful to examine all three of these qualities in attempting to understand how the Canadian nation will evolve.

(a) Ambivalence

Judge made law by virtue of the very process of hearing cases is born from rich contrariety. There are two sides to the facts, two sides to the precedents and two competing conceptions of equity behind each suit. Judgments are dispositive and winners and losers are declared. But I think the genius of common law is the recognition that the prevailing view – the normative conclusion of a particular case – has only limited validity. Common law is not a white knight. It is not moral relativism either but it is very close to that. In common law there is scrupulous care not to declare results that cannot later be hedged, limited, trumped by other values and, ultimately, overridden.

Common law lawyers, like artists and theologians, know that wisdom, aestheticism and faithfulness do not come from recognizing good and evil but, rather, from the interplay of conflicting virtues. Law is a process designed to leave open the question of the ultimate issues of justice.

Nations can learn from this. The makers of the 1867 Constitution did not know whether to create a new nation or a consociation. They did both. Over the past century and a quarter, interpreters of the Constitution Act have not known whether to give scope to strong national authorities or to maintain a strict version of federal theory. Courts have done both, being slow to resolve finally the enduring tensions of Canada. The courts applying the 1867 Act have avoided adopting grounds for decision that would destroy that tension, or tip the balance towards overarching national authority.[22]

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[22]This view is developed more fully in J. Whyte, "Constitutional Aspects of Economic Development Policy" in R. Simeon (ed.) *Division of Powers and Public Policy* (Toronto: University of Toronto Press, 1985) at 34–39.

The making of the Meech Lake Accord, the process that helped produce the situation we have today, can be faulted for not having learned about the need to construct ordering regimes on the basis of leaving conflict unreconciled. First, from the perspective of process, the Meech Lake Accord did not honour the tension between an amending formula based on executive federalism and a growing constitutional practice of citizen participation through the actions of the Charter communities – women, the handicapped, aboriginals, the poor. The constitutional amending process created in 1982 is, even as it is written, dissonant with reality. As acted out in the spring of 1987 and, again, in June of 1990, it is appalling – not simply because bargaining through hostage-taking is evil (although it certainly is) – but because it ignored a vital part of the newly constituted reality pertaining to national consent. The process was not careful to honour the contrary values (represented by leaders on the one hand and the people on the other) that have come to have a place in constitutional politics.[23]

Likewise, Meech Lake failed to recognize the very limited degree to which cultural establishmentarianism or cultural fundamentalism is consonant with an increasingly imbedded sense of liberalism. The power given to Quebec to establish a single cultural ambience was, to my mind, unequivocal. It confronted far too starkly the growing liberal resistance to state cultures. The bilingualism policies of Prime Minister Trudeau promoted diverse attributes of citizenship. The "distinct society" clause of the Meech Lake Accord promoted cultural authority – the exact opposite of enriched citizenship.

Finally, Meech Lake ignored the tension between strong regionalism and effective national self-determination. Part of the fabric of this country is belief in the national role, through a central institution, over the welfare of citizens and over the shaping of the constitutional future. The tension between the role of national development, on the one hand, and regional authority, on the other, was, I believe, ignored.

The lesson for the constitutional future is that we must remember the virtue of internal contradiction. The present debate is too often put in terms of a conflict of certainties. This makes inevitable a tragic ending; as one of the certainties loses place to the other, the nation is forced to abandon loyalty to an idea that is part of our experience and that reflects some portion of our political commitments. For example, if we are to make a constitutional response to current regional alienation, the text that results must contain, in some recess, the contrary idea: that at some point, in some context, a strong national voice will be needed and clamoured for. Good constitutions, like good art, result from their makers

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[23]See, eg., A. Cairns, "The Limited Constitutional Vision of Meech Lake" in K. Swinton and C. Rogerson, *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) at 247.

realizing they are not sure that today's vision or today's answer is right. This constant denial of certainty in one's own views is what gives authority to common law. A similar carefulness is what could also contribute to the authority of our Constitution.

(b) Granular

As Professor Joseph Vining says, lawyers do much that is odd and the oddness of doing law is what spurs so many people to enquire at length into its method.[24] Professor Vining writes:

> If what lawyers did seemed more natural, methodological inquiry might be put aside for a rainy day, and everyone could turn to the harvest.
>
> ...
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> Asked by others what to do, what the law would want a person to do, American lawyers will go off and find what a few old men scattered about the country thirty, fifty, a hundred years ago, sitting on intermediate appellate courts in Pennsylvania or in a town in the mountains of Kentucky [or by a river in New Brunswick] said they thought the law was at the time they spoke. They come back, put it all together and say, "That is the law. That you ought to obey." They expect to be paid for producing such an answer and do not expect their enquirer to exclaim "Ridiculous!" and turn on his heel and stalk away.[25]

In other words, there is less behind the mask of law than we might think and the voice of the law we hear is a strained voice indeed. The process of law is a process of minuscule increments that only sometimes produce a full and coherent theme. In fact, lawyers know that there is not nothing behind the mask. There is something but it is tentative and it is contingent. The voices of the law are often very thin and very reedy.

Yet the result of the case (the answer to the question "What is the law?") is and must be full-bodied and complete. Legal suits must end in judgment – /judgment which is as confident as it can be. We need to be confident that the law speaks and does not hedge. We need to know that law has not disappeared and will not accept being postponed. In short, law speaks fully and sufficiently for the issue before it.

There is a lesson here and it is this. Our sense of nation is, I think, weak and evidence of its content is spotty. But if this is the moment for Constitutional disposition – if this is the moment in which we must create a new constitutional arrangement that reflects our true social commitments – we must proceed and we must proceed on a basis that is sufficiently self-confident to satisfy the moment.

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[24] J. Vining, *The Authoritative and the Authoritarian* (Chicago: University of Chicago Press, 1986) c.11, "Dilemma" at 145–160.

[25] *Ibid.* at 150.

In constitution making, like law, authority comes from doing – from simply acting in response to the need for action. The achievement of gaining authority comes from balancing a sufficient self-confidence with recognition of the granular quality of what we do. Our authority comes from our being sufficient, but no more. We can respond to our needs for change so long as we confine ourselves to needs for change and, to that end, we must be guided by modesty, compromise and recognition of our distance from final truths.

(c) Jurisgeneric

The common law emerges from the growing social imperative that promises be honoured. Albert O. Hirschman has observed that promises, their enforceability and the resultant growth in commercial law were devices adopted in order to civilize greed – to contain the unruly passion of avarice.[26] Theologians, on the other hand, might say promises are what allow persons to adopt the image of god. They give humans the autonomy of God and this enables them to construct redemptive worlds.

The common law, therefore, honours and guarantees special arrangements and, thus, it is marked by a tolerance for specialness. Although the common law's claim for recognition and respect was based on it offering a regime of order that was common throughout the kingdom, its central tenet was not the imposition of state control but, rather, the liberation of individuals. It permitted the escape of individuals from serfdom and tutelage and allowed people to construct enforceable arrangements by which they ceased to be beholden to lord, canon or bishop. It allowed the breakdown of the fully organized society. In short, common law enabled the formation of new communities.

Of course, the communities that the common law honoured were communities of contractors, or corporate communities. But there is a lesson in this that pertains to issues of statecraft. The commitment of the common law is to the instruments of liberation, not to the forms of liberation. Perhaps our nation could afford this form of libertarianism. Perhaps our state could say to groups – to provinces, to aboriginals, to Quebec – that the country is less dedicated to a sense of a right political arrangement than it is to a sense that communities have the right to form an arrangement that fits diverse conceptions of need. This is a conception of our political society that, at the same time, is both liberal and communitarian.

In the dying days of the Kanesatake standoff the Minister of Justice, Kim Campbell, was asked if she believed the provincial administration of criminal

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[26]A. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph* (Princeton: Princeton University Press, 1977).

justice was the most suitable form of justice for the accused warriors. She said, "I know the answer to that because I was a native policy advisor to the Premier of B.C. and neither treaty rights, nor Aboriginal rights, nor international law change the basic legal fact that all Canadians must be tried under the same system."[27] She is notably wrong about this. Our constitutional order has already begun to say that aboriginal people are not bound by a common system of justice. Aboriginal communities are separate communities for some purposes and have special regulatory regimes. The Supreme Court of Canada has recognized this form of liberty within a national constitutional scheme.[28]

I know there are dangers in this: who guarantees the citizen rights of individuals within an aboriginal justice system or who protects individuals within Quebec if it turns out that people of Quebec seek cultural salvation through political autocracy? These are not easy questions and I do not believe they can be ignored by either blind trust or bowing to the dominance of the value of independence. I believe, however, that there are systems of integration under which fundamental national values can interrupt the flow of the exercise of self-government.

The important lesson to draw from the common law is that we must be a fully jurisgeneric nation. Quebec, as well as aboriginal societies, must be allowed to liberate themselves into separate societies and these acts of liberation can change the structure of government we know. They can, for instance, change Parliament. We can, I think, find authority to be Canada by allowing those who want a different place, the right to find that place. I do not think that this means separation in either case. It means separation if insisted upon but first and foremost it means recognition of the right to form a new basis for membership.

The one concrete suggestion is this: when it is time to re-configure Canada in light of different authorities for Quebec and aboriginal peoples we shall either be threatened or positive about change. We will be positive about change if we are positive about what we have: resources, a tradition of redistribution, democratic values, skilled and healthy human resources and most important, a sense of common purpose even if it is just the traditional common purpose of cooperating together in the cycle of nature.

This view of ourselves is possible but only if it arises here in this valley and in Cypress Hills and in Alberni Inlet. Regional senses of our constitutional selves is vital. This constitutional self cannot be made in Ottawa, at least not now. As a result, I do not hesitate in saying that our salvation will not be found in new

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[27]Canada, Parliament, *House of Common Debates* at 13390 (25 September 1990).

[28]*R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.).

national commissions designed to pull us together and designed to locate a common purpose and common vision. We need no national commission. Our commission must come from our heart and hearts. It is provinces – and communities we live in – that must confirm widespread popular participation and affirm Canadian membership. In that way Western Canada, for example, will be ready to let Quebec re-affirm its sense of distinct society and Ontario will recognize Alberta's sense of vulnerability to the politics that comes from the centre.

In the end, I return to this valley hoping for a sense of dynamism, change, a sense of positive opportunity and a sense of newness that will forestall tragedy.