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Keynote Address: Law and Politics in the Canadian Constitutional Tradition

Michael Ignatieff*

Being neither a lawyer nor a Constitutional expert, I feel like an amateur brain surgeon at a conference of neurologists. But I thank you for asking me to speak to you. My subject is the intersection of law and politics in the Canadian Constitutional tradition.

I suspect you love the discipline of constitutional law because of its relative autonomy from politics: the game has its own rules, its precedents, traditions of interpretation. While constitutional law is the most political of all branches of law, its autonomy from politics is important, both in principle and in practice. We want to live in democratic orders where constitutions set clear limits on what is possible politically, and we do not want our constitutional law to become a plaything of political forces, even as we recognize that our current constitutional settlement is the result of laborious and precarious — and highly political — compromise. So the current situation has to worry those who want to keep politics and law separate. Once again, we are approaching one of those moments in Canada in which constitutional law becomes central to our politics. Though you lawyers may welcome these moments, most Canadians regard constitutional crisis with dread. They are existential crisis, challenges to our viability as a country, and we rightly long for moments when our politics is not about constitutional law, but about bread, butter and welfare. But constitutional crisis is where we may be, once again, before too long.

The fundamental cost of the current political crisis is its impact on the national unity of our country. A doomsday scenario has begun to loom over our day-to-day politics: whenever the next election comes, it might result in the failure of any of the federal parties to secure national representation in all of our regions, particularly in Quebec. This will

* Carr Professor of Human Rights Practice, Kennedy School of Government, Harvard University.

weaken the federal ideal. Success for Quebec nationalist parties, at both the provincial and federal level, will build support for separation. The defeat of a federalist provincial party and the election of a separatist government is a possibility within the next three years. Thanks to the 1998 Separation reference and the 2000 Clarity Bill, clear procedures and clear questions open up the further possibility that this time a referendum to separate might yield an unequivocally clear result — in favour of separation. Then we might all find ourselves unwilling participants in an experiment unprecedented in the annals of political history: not the break-up of a failed state, but the dissolution of a mighty, successful and admired G-8 country.

Nothing is inevitable about this scenario of dissolution. Leadership, even at this late hour, can make a difference. Politicians contemplating whether to force a rapid election in the weeks ahead ought to consider not just the fate of their parties and their careers, but the future of their country. Do they actually want to play into the hands of the separatists? Needless to say, they all say they do not want to endanger the unity of the country. But it requires saintly restraint to put country ahead of party, and while it may be reasonable to expect saintliness of popes, we would be naïve to expect it of politicians. They are, after all, just like us.

Fortunately, the survival of countries is not just up to politicians. It is up to the citizens as well. We all have leadership roles, and those of you who think about constitutional law have larger leadership responsibilities — as academics, commentators, public intellectuals — than other people. Our domain as intellectuals is the realm of ideas, and ideas turn out to be the sinews of what keeps a country like Canada together. Intellectuals, as Isaiah Berlin once said, are not always the best people to handle national ideas, because unlike sensible, practical people, we like our ideas to be interesting, and interesting ideas are not necessarily true. So we need ideas that meet two tests: our fellow citizens must understand their relevance — which means that more ingenious and highly technical Constitutional pipe-work will probably fail that test. The besetting sin of our constitutional discourse in Canada has been the mistaken belief that just because the devil is in the detail, it is only the details that matter. Sometimes, the big picture matters more, because it is the big picture — the larger vision — that conjures up the national will to work out the details properly. The second test of good ideas is that they need to be more than interesting. They just need to be true. The test of truth in politics is not the test of truth in science, but more like the test of truth in art: whether ideas catch the heart, hold the mind and

capture the lived reality of those who hear them. Political ideas are moral ideas, visions of how the world should be, but they have no chance of securing allegiance in a democratic arena unless ordinary citizens also believe that these ideals are within measurable distance of actual, lived reality. Thus, in a regionalized federation, dreams of a united Canada, that seek unity through the centralization of power in Ottawa, will fail the test of truth. Our citizens — whose primary allegiances may often be to their regions — will not recognize this vision of Canada as either desirable or true.

The battle of ideas, the battle for the hearts and minds of our fellow citizens, across the country, and especially in Quebec, is not over. Indeed it has barely begun. We have spent 20 years believing that politics does not need ideas, only to discover that advertising slogans, embossed golf balls and money under the table were less effective ways to secure allegiance to Canada than clear ideas and good arguments. And that battle of ideas — let us affirm — can be won. Canada is not an accident, a mistake, a romantic illusion, maintained in the face of hard realities. It is, on the contrary, the most successful and enduring multi-national, multi-lingual liberal democratic federation on earth. The ties of memory, love and interest that bind us together are not weak. They are very strong. Our constitutional tradition has been the necessary condition for the renaissance of the French fact in North America, just as our federation provides the institutional framework that makes possible the enduring strength of our five regions. The paradox of our identity is that these divisions — regionalism, linguistic differences, Aboriginal heritage — are a source of strength, not weakness. Because we manage these differences peacefully, because we reconcile decentralized power with unity of citizenship, our country is one of the most original and important experiments in liberal democracy in the world today. A critical source of our success has been that we do not make a civil religion of our identity. We seek to distinguish citizenship from identity, and allow individuals to rank their identities as they choose, whether to privilege regional over national, ethnic over constitutional ones, provided that we guarantee, indeed insist upon, the unity and equality of citizenship, even, as we shall see, at the price of insisting that collective political preferences must sometimes trump individual rights.

But let's face facts. We are heading into another moment of existential challenge. Despite all the vital ties that bind — flag, currency, the Charter, common social programs and common economic prosperity — we are aware that one vital institution that binds us together, the federal

political party — is failing us. The *raison d'être* of our parties is to create national coalitions, from coast to coast, of Canadians united around a common, if competing visions. The current capacity of all of our federal parties to do this has been weakened for 20 years. The reasons why are complex: failures of leadership, indifference to ideas, the belief that problems of national unity go away if you ignore them, a hollowing out of the parties themselves, their slow decline from vehicles of policy and coalition forming to professional election machines. Whatever the reasons, each of our national parties is now at risk of becoming merely a regional or sectional interest group, rather than a national coalition. If none of the federal parties prove capable of creating coast to coast coalitions, if none of them prove capable of representing Quebec, Quebecers may begin to wonder why Canada represents them. Their political support may go to those parties whose loyalty is not to Canada but to Quebec. Other regions, if they become convinced that fiscal imbalances or regional disparities, are not being justly managed by our federation — through the brokerage function of our national party system — may begin to turn alienation and discontent into something much more serious.

So if that is where we are, if that is where we may be headed, if we do not get a grip on ourselves, what must be done? We need to do something simple, relatively obvious and quite basic. Agile constitutional thinking is required, but new constitutional pipe-work will not save us. This is, as usual, too big a problem for constitutional experts. Politics trumps law. We need, once again, to rediscover what our country is for. We need to re-articulate what it is we stand for. Make no mistake, what we stand for is about to be tested. In preparation for what seems certain to be a battle of wills — and ideas — let us marshal our arguments once again.

The argument that we are likely to face, if not now, then within the next five years is one we have encountered since the 1960s: the claim that the Constitutional arrangements of our country stand in the way of the full development of French Canada. The classic case argues as follows: Quebec is a nation, and a nation requires a state in order to enjoy full rights of self-determination. Federalists have wasted a good deal of time contesting the idea that Quebec is a nation. I have never had difficulty conceiving Quebec as a nation. My objection is to the idea that it is necessary for every nation to have a state. There are nations that require states: but only when discrimination, oppression, violence require it, when a national group cannot protect itself, except through the pow-

ers of state sovereignty. It is torturing the plain meaning of the word “survival” to claim that Quebec’s survival is at risk in Canada. The reverse is true. Canadian federalism has been the institutional condition for the transformation of Quebec. Since 1940, Quebec has undergone a demographic, economic, social and cultural revolution — and the Canadian federation has evolved to make way for it, protecting the French language, re-allocating powers over immigration and culture to guarantee “la survivance.”

Within the last month, we have had a stunning demonstration of the practical way in which federal institutions protect, rather than inhibit, a vital interest of the Francophone population in Quebec. I refer to the trio of rulings by the Supreme Court of Canada on language in Quebec. These were cases involving Francophone Quebecers seeking the right to English language instruction at public expense. The plaintiffs claimed that their equality rights were violated if they could not enjoy English language instruction at public expense. The Supreme Court ruled that safeguarding the French language as the majority language should prevail over the rights of individuals, and that individual equality rights could not trump collective rights to majority language protection. In one of the rulings, the Court said,

. . . what are intended as schools for the minority language community should not operate to undermine the desire of the majority to protect and enhance French as the majority language in Quebec, knowing that it will remain the minority language in the broader context of Canada as a whole.

It would be hard to think of a better example of federal institutions doing their job in protecting essential interests of the Francophone majority in Quebec. Certainly, a sovereign Quebec Supreme Court could be expected to make exactly the same ruling, but if so, why go to the trouble of independence, if existing institutions do the job? And can we be sure that a sovereign Quebec Supreme Court would do an equivalent job protecting the linguistic and cultural rights of non-Francophone minorities? Thus far, Quebec has guaranteed English minority language rights with impeccable correctness. Would such guarantees remain in an independent country? Federalism, as a system of minority rights, is a double process of adversarial invigilation. Federal courts look out for minorities in every provincial jurisdiction. Provincial courts are charged to look out to balance majority and minority interest, and the ensemble of the system protects us all as individuals.

At this point, I suspect you are feeling the very special fatigue that overcomes clever people when they hear over-familiar and wearisome arguments that they thought had been rebutted long ago. I do want to stress that our constitutional weariness is the chief danger to the national unity of our country. Every Canadian who went through Meech, Charlottetown, repatriation, the notwithstanding clause, and the referenda, is tired, tired of the process, tired of these arguments. We federalists thought we won these arguments long ago. We thought we were done with this.

We are never done with this. Canada just happens to be one of those countries that is committed, as a condition of its survival, to engage in a constant act of self-justification and self-invention. If we are tired of the arguments, we are tired of our country, and if we are tired of our country, we are done for.

It is highly significant that our nationalist opponents in Quebec have battered on to the argument from fatigue. They are exploiting our mutual fatigue to argue, in fact, that the transaction costs of maintaining a federal union among five regions is becoming so high, and obtaining meaningful — and consensual — constitutional change has become so difficult, that it would be better to apply the sword of separation to the Gordian knot of our constitutional impasse.

This is the new — and especially dangerous — form of justification for separation. It exploits federalist fatigue with a dubious claim of good faith. The argument from Quebec runs as follows: we showed good faith, we participated in efforts to reform the federation from the 1960s onwards. We all tried, but we failed. Let us cut the Gordian knot. Let us free ourselves from the interminable travails of constitution making — five regions, Aboriginal peoples, two language groups. It has become too hard. Let us live apart, rather than face the interminable trouble of constitutional renewal.

What is dangerous about the case for separation — it could be called the case from exhaustion — is that it rings true for many Canadians across the country, for those who feel too many compromises have already been made, to those who believe that Quebec's problems have diverted the country from appropriate attention to their problems, to those, finally, who put their faith in Meech and Charlottetown, only to see their hopes dashed.

To the argument from exhaustion, two rebuttals can be made. The first — I have already alluded to it — is that Constitutional difficulty is simply the price of being Canadian. We need to understand this: Consti-

tutional dialogue among regions and languages is the very condition of our collective survival. To repeat, to be tired of this is to be tired of Canadian life. We are one of those countries — there are very few — that lives the truth of Ernest Renan's remark about democracy: that it is *une plebiscite de tous les jours*. We are a unique country, one that has always accorded full democratic rights to those who question the *raison d'être* of our country's existence, provided they do so peacefully. As such we are an example: democratic toleration has rarely been pushed so far, but our form of toleration has to mean something more than pinched and reluctant acceptance of another's right to contest our existence. It must mean a continued willingness to engage, to argue, to persuade — and above all, to listen. To listen to a competing account of our national history, a competing account of our national priorities, a competing account of our central disagreement. Few countries take on this burden of managing difference. We should do so with something better than resigned fatigue.

When faced with this competing account of our national history and our national disagreement, we should be unafraid to challenge the premise of two solitudes, the supposed history of mutual incomprehension, and occasionally of condescension and outright racism. As John Ralston Saul has convincingly argued, the story of Baldwin and Lafontaine in the 1840s and 1850s shows that the co-operation of the Upper Canada and Lower Canada reformers in the attainment of responsible government was a vital stage in the joint acquisition of our national independence. To the history of mutually incomprehensible solitudes, so dear to nationalists, we need to articulate a competing truth: that our democratic experiment has also been a history of political co-operation in the defence of freedom and self-government.

It is also dear to nationalists to pretend that when they speak for Quebec, they speak for all of Quebec. The reality — the truth — is otherwise. The central argument against separation is that it divides Quebecers against themselves, Francophone federalist against Francophone separatist, Francophones versus Anglophones and Allophones. In the service of a nationalist ideology that meets the political aspirations of one group of Quebecers, all other Quebecers will have to choose between Quebec and Canada. For at least 40 per cent of the Quebec population, that is a choice they do not want to make. They do not want to be forced to choose between one citizenship and another, one set of borders and another. They want to remain what they are: Quebecers and Canadians, in a balance of identities that is best left to each individual to

decide for themselves. The fundamental case for federalism in Quebec is that it leaves that choice, that balancing of federal and provincial identities to the different communities of Quebec to decide as they see fit. The separatist case cuts the Gordian knot of our Constitutional difficulties at the price of forcing all Quebecers onto the Procrustean bed of an independent identity.

But let us not leave matters there, as if all that a convinced federalist had to do was to argue a case *against*. As if Quebec's is the only case a federalist has to argue. Pierre Trudeau clearly understood that every successfully met challenge to our country, every successfully met encounter with separatism, is also a moment to renew our federation. Federalism survives not merely by rebutting calls for its destruction, but by re-inventing itself in the face of challenge.

What makes the current situation serious is not just the inability of our federal party system either to represent Quebec or to adequately engage in the coming battle with separatism. Our constitutional crisis is systemic: Atlantic provinces discovering new energy wealth are seeking to patriate this wealth for their own development alone. Hard-pressed Ontario is asking how it can meet the steadily escalating costs of its commitments in health and education and is raising fundamental questions about its historic role in equalization. Alberta has its own concerns with equalization. Strapped municipalities are asking where they fit into a fiscal federalism constructed primarily to distribute taxation and revenue between federal and provincial governments.

Thus far, we have tried to deal with all of these issues separately, region by region, issue by issue. But there is something systemic about the fiscal controversies that our constitutional settlement is now engendering, and there may be a case for a systemic approach to it. For example a Royal Commission to re-think fiscal federalism might be the best way to approach the systemic nature of the financial imbalances affecting all levels of Canadian government, municipal, provincial and federal. Every red-blooded Canadian groans at the prospect of yet another Royal Commission, yet we know, from Rowell Sirois to the MacDonald Commission that prepared the way for free trade, that these bipartisan inquiries have produced some of the most profound — and because well-prepared — some of the wisest changes in our federation. Perhaps the time has come to do something similar in relation to the fiscal problems besetting our federation. Nothing would do more to address the risk of complacency and fatigue that besets the federalist cause, nothing would engage other regions in a national dialogue about

our country's future, than a commission, with a targeted mandate to report, and a genuinely bipartisan, federal, provincial and municipal membership, to think long and hard about how to renew our federation's finances in the 21st century. What it should say, what it should conclude is another matter. This is where the amateur brain surgeon feels most clearly that he must defer to the real brain surgeons among you. But that we need, not merely to defend our federation, but renew it and reform it — and above all fiscally — I am profoundly convinced. Thank you for your attention.

