University of Winnipeg/University of Manitoba

Human Rights and the State:
Changing Roles in a Liberal Economy

A Thesis in Partial Completion of
A Master's Degree in Public Administration

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0-612-53099-X

Canada

THE UNIVERSITY OF MANITOBA

FACULTY OF GRADUATE STUDIES
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Human Rights and the State:

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A Thesis/Practicum submitted to the Faculty of Graduate Studies of The University

of Manitoba in partial fulfillment of the requirements of the degree

of

Master of Public Administration

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Abstract

The role of the federal state in Canada has always been one of change and adaptation. This is particularly true of the state's role as it pertains to human rights based issues; those aspects of Canadian life which are most influenced by political, social and economic factors. Canada, in a neo-liberal economy, is trying to achieve a balance of power which provides appropriate representation of, and protection for its citizens. This paper follows both the state's efforts to regain power at regional, national and international levels and the expectations Canadians have of the federal government. The two concepts meet in a discussion of the potential benefits of a joint partnership between the federal government and the Third Sector. It is the premise of this thesis that such a partnership will, in fact, meet many of the expressed and implied needs for both the state and for Canadians. However, the preliminary nature of the partnership movement leaves many issues unaddressed.

ACKNOWLEDGMENTS

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Chapter

Introduction

The year 1998 marked the 50th anniversary of the Universal Declaration of Human Rights. It seems appropriate that this milestone date is being met with new considerations and challenges in the pursuit of human rights. An overview of these considerations and challenges include various elements such as the changing language of human rights and the changes to the world's economic and political environment. Democracy itself is being debated by groups who represent a Wilsonian approach of ensuring one's own national security through the promotion of democratic development abroad and by those who see the economic freedom of a nation (particularly a developing nation) as separate from democratic freedom.[1] There is sufficient evidence to suggest that the perceived natural link between human rights and democracy seems somewhat weaker now than it was fifty years ago.

Within already existing democratic states, the tension between liberalism and democracy is reaching a critical point. The ability of the state to ensure the full participation of citizens in all economic and social aspects of society requires interaction and intervention in the market. The globalization of the market has significant impacts on any single state's ability to influence commerce, either domestically or internationally. While international issues are not new and have, in fact, always been an aspect of state

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[1] Robert D. Kaplan. "Was Democracy Just a Moment?" *The Atlantic Monthly* December, 1997.

policy, the scope of economic and social globalization has produced new challenges. The recourse available to states is for the most part limited to legal and legislative actions within the state. At the same time, the international nature of social and economic development has indeed had the effect of pushing the arenas of power and influence upward to international levels and conversely downward to local and regional jurisdictions.[2]

Given the context described above, it is not surprising that the role of the state as the primary focus of human rights issues appears to be declining and Canada is certainly not immune to this changing role of the state. However, it is to be argued, through its recent actions, that Canada is attempting to re-establish itself as a leader in human rights causes both domestically and internationally. There have been several recent examples of actions taken by the federal government which support this argument, and these include: 1) the introduction by the federal government of new employment equity programs; 2) at the most recent APEC meetings, Canada introduced human rights discussions as part of international trade negotiations with member nations, and; 3) the federal government has publicly acknowledged the negative impacts that previous policies have had on aboriginal people and has offered funding to provide programs which would allow aboriginal people to heal and to work towards undoing systemic barriers to full participation in Canadian

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[2] This idea is presented in several chapters of the following book: Bruce G. Doern, Leslie A. Pal and Brian W. Tomlin, Eds. *Border Crossings: the Internationalization of Canadian Public Policy* Toronto, Oxford University Press, 1996.

society.

The first and third examples noted above illustrate two points. Both are policy statements which have associated actions intended to redress human rights issues by improving the opportunity of Canada's citizens in achieving full participation. They are examples of how a liberal state is supposed to behave. The second example indicates a willingness by Canada to use alternative means in securing human rights agreements. All three examples may be characterized as positive statements of the government's intentions in its role as a facilitator of human rights issues. However, other very recent examples of government action may also be cited which contradict, if not the role of the state necessarily, then certainly the direction of the current government.

During the same time period as the above, Canada was one of many countries involved in discussions regarding the Multilateral Agreement on Investment (MAI). Concern has been expressed by trade groups and human rights activists that the MAI, if agreed to, will seriously erode a country's ability to protect workers at either a domestic or international level. The move toward a global trading system carries with it, among many other considerations, an increased role for international corporations in determining the conditions of labour and a decreasing role for the state in securing human rights

domestically.[3] Canada's participation in these negotiations seems at odds with the

previously mentioned APEC example.[4]

Central also to this discussion is the position of human rights groups themselves.

The effects of internationalism and the heightened tension in liberal economic states have

caused human rights groups to consider the merits of pragmatism particularly in the face

of increased fragmentation[5]. On the other hand, the technological advances that have

accompanied the globalization movement allow human rights groups to exchange

information easily and to work internationally as well as locally. This cohesiveness has

resulted in a power base for change that is referred to as the "Third Sector"[6]. This new

sector, separate from the market and from government, is comprised of voluntary, non-

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[3] Michelle Sforza-Roderick, Scott Nova and Mark Wesbro. "Writing the Constitution of a Single Global Economy: A Concise Guide to the Multilateral Agreement on Investment - Supporters' and Opponents Views" in http//www.flora.org/mai-info/maioverv.htm, 11/14/97.

[4] Indeed, the subsequent APEC meeting hosted by Canada in 1999 where the treatment of protestors resulted in an official inquiry may also be considered indicative of the inconsistencies of Canada's approach.

[5] Fragmentation among human rights groups is both a cause and an effect of the current liberal economic structures and their response to human rights issues. Small (pragmatic) gains are made while larger more comprehensive issues remain unaddressed. Selective gains offer just enough encouragement to groups without the perceived danger of a systemic change to the liberal economy.

[6] Paul Leduc Browne. "The Two Faces of Social Economy" presented at The Eighth Conference on Canadian Social Welfare Policy, University of Regina, Regina, Saskatchewan. June, 1997.

profit and cooperative systems and organizations.[7] Activities undertaken by this system may be local or global. In either instance the role of the state may indeed be a factor in determining their success and future direction. At the same time, it may be possible that the success of the government in regaining, at least partially, its role in human rights causes is dependent on the work of the third sector. An exploration of this relationship is central to the purpose of this thesis.

Thesis Statement

This thesis will explore the traditional role of the state in a liberal economy with respect to the democratic value of human rights. This role will be compared to the current position of the federal government in Canada. It will be demonstrated that this role has diminished significantly over the last fifty years and that the state's attempt at resurgence is closely connected to the growing social economy movement. The potential success of this collaboration will be considered in light of Canada's political structure, external and internal economic forces and the changing vision Canadians have of the role of the federal government.

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[7] The discussion in this thesis on the Third Sector will concentrate on the movement in the last thirty years. There are many other examples of the crucial role that non-state actors have played in securing human rights prior to this period: the labour movement; the social reform movement; and the early women's suffrage movement, to name just a few.

Methodology

In defense of this thesis statement, this paper will present a brief overview of the philosophy of human organization: the mechanics of the Canadian government (with an emphasis on federal/provincial jurisdictional issues); Canada's approach to human rights issues both nationally and internationally; the rise of the voluntary (third) sector; and, the attitude and expectations Canadians have toward the federal government.

A traditional literature review will be used to provide the historical context for the paper as well as for the critical analysis of the global aspects of democracy and the economy. A compilation of government documents will provide supporting evidence in defining the Canadian Government's position on human rights. Current research findings and opinion polls will be cited to illustrate the changing mood of Canadians towards established decision making structures.

Chapter Organization

Chapter One

In this section the political, social and economic roots of democratic society will be presented in order to establish their interrelationship. The concept of democracy will be considered from the perspective of the individual entering into a social contract and from the perspective of the state's requirement to unite a diverse population. The focus of the discussion will be on the works of John Stuart Mill and Jeremy Bentham followed by an

examination of the rise of civic nationalism in England. The selection of England as a focal point will be made clear in later chapters which will outline the way in which Canada has adapted the British parliamentary system. The paradox of individualism and homogeneity will be discussed briefly as a background to the next chapter on the formation of Canada as a state and some of the inherent challenges of federal states in general.

Completing the first chapter will be a contemporary analysis of the individual's participation in a democratic society particularly as it relates to decision making and access to levels of influence within the state.

Several definitions of human rights will be presented in a progressive way which concludes in an expanded understanding of human dignity which encompasses civic, political, social and economic rights. This is the definition against which Canada as a state will be considered.

Chapter Two

This chapter will provide an historic overview of the Canadian Constitution and the theory and practice of human rights within Canada. Major themes within this chapter include the division of powers between the federal and provincial governments and the creation of the Charter of Rights. These two documents are the framework for human

rights considerations. The division of power is an essential point of discussion for this thesis as it addresses the suggestion that human rights issues may be considered more at the local level than the national level.

Chapter Three

Chapter three will examine the evidence of the loss of the leadership role by Canada. This evidence will be presented in the context of the internationalization of the economy and the move towards a global trading system. Issues such as competitive liberalization and the future of democracy will be considered. Examples such as the work of the International Centre for Democratic Development will be compared to Robert Kaplan's suggestion that democracy as we understand it may not survive. This chapter will begin the discussion of the forces which may affect such a change and some of the potential outcomes.

Chapter Four

This chapter will define Canada's apparent response to its loss of leadership in human rights through an examination of the third sector nationally and internationally. Further evidence will be provided that Canadians have lost confidence in the federal government (and other formal institutions) while at the same maintaining certain expectations of the government in certain areas.

This chapter also examines the government's new relationship with the voluntary sector through its comments in the Speech from the Throne, the work of the Clerk of the Privy Council and the establishment of the Voluntary Sector Round Table.

Chapter Five - Conclusion

The conclusion to the discussion will be presented which indicates the changing roles of both the human rights movement and the federal government, and in light of the thesis, what reciprocal role exists between the government and the third sector. From this conclusion, the potential benefit for Canadians will be considered as will the likelihood of a sustained and truly collaborative partnership between the Third Sector and the state.

Chapter One

Democracy: Individuals and Nations

The relationship between an individual and a nation may be described by comparing the development of two European countries. England began developing as a democratic nation in the sixteenth century at the same time as the capitalist system was emerging. For the British, the concept of a nation represented the elevation of lower classes to participants with cultural and political authority based not on birth but on economic accomplishment. The people created the state.[8] In contrast, the French elite recognized the threat individual communities posed to their wealth and authority. By "freeing" individuals from feudal allegiances and convincing them they shared a common political history, the state created a nation.[9] Indeed the French experience went one step further than the British. The population which formed the new nation of France demanded more power than had been intended by the elite.

Each process relied on common elements that temporarily presented an image of the homogeneity of the individuals in order to establish nations and national identities; for

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[8] Leah Greenfield, "Is Nationalism Legitimate: A Sociological Perspective on a Philosophic Question" Rethinking Nationalism, Jocelyn Couture, Kai Nelson and Michel Seymour eds. Calgary, University of Calgary Press, 1998, p 95.

[9] "After being constituted by the kings, the nation completed its emancipation by demanding a nation-state, control of the government, and the right to determine its own fate" Andre Van de Putte "Democracy and Nationalism" in Couture et al. p 163.

the British it was economic status, in France the common elements were language and culture. While not disputing the basic common ground that citizens of both countries share, the concept of the population completely united in their beliefs has always been weak. Further along in the developmental process of each nation, the diversity of the population became an issue for the state. The balance between forming representational political systems and respecting the individuals who comprise it is the basic theme of this thesis.

This chapter will consider the historic and philosophic development of democracy in England from two perspectives: that of the individual's move toward a social contract; and from the perspective of the state as it engages in nation building.[10] The role of the state in balancing the need for homogeneity and the recognition of diversity will be examined in light of this discussion. The concepts of "nation"and "nationalism" and their relationship to the democratic state will be discussed. Particular emphasis will be given to the ways in which individuals participate in the decision making process of the state.

This chapter will also serve to define the relevant terms of discussion for this paper. The topic of " human rights, diversity and the state" is complex and open to wide debate. Rather than outlining the breadth of this debate, a path will be provided which

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[10] England has been selected as it represents the first liberal democracy and, as will be shown in chapter two, Canada adopted and adapted many of the same governing definition and practices.

links several major works together in support of a discussion regarding the future of the state's support of its diverse population.

Much of the first part of this chapter will be drawn from the work of Jerome J. Shestack who emphasizes the need for clarity and consistency of terminology when he states "...in the international sphere where diverse cultures are involved, where positivist underpinnings are shaky, and where implementation mechanisms are fragile, definitions are crucial"[11]. Shestack's work provides an outline which is intended to offer a clear path connecting several philosophic interpretations of human rights and includes the rights of the individual, the development of the community and the relationship between the individual and the government. Other definitions and interpretations from different sources will be presented, but at the conclusion of this chapter a standard set of references will be used in the remainder of this paper.

The Individual

The starting point for this discussion is a reference to a small group of radicals who, during the short period of 1645 - 49, developed concepts which led to their being considered the first democrats.[12] The philosophy of this group contains many of the

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[11] Ibid. p 202.

[12] David Wooton, "The Levellers" *Democracy: The Unfinished Journey 508 BC - AD 1993,* John Dunn ed., Oxford, University of Oxford Press, 1992.

concepts that are still in discussion today. First and foremost is the vision of a representational government within a nation-state. They wanted a written constitution to protect the rights of the individual; such rights as the right to vote, the right to equality before the law and the right to freedom of conscience and debate. Wooton describes the goals of this group as the first ever to seek the construction of a liberal state.[13] The contribution of the Levellers[14], as this groups was known, lies not only in their articulation of basic rights but in the response of others to their quest for political equality. In works by Harrington and Petty[15] the term "democracy" changed meaning from Aristotle's concept of lawlessness to good popular government as a result of the debates which the Levellers began and which continue today .

The period of time in which the Levellers were active coincided with the civil war in England. Wooton suggests that the Levellers existed in a political vacuum and their movement ended with assumption of power by Cromwell.[16] In the remainder of this chapter, beginning with Thomas Hobbes, and in the next chapter on the Canadian Constitution and the Charter of Rights and Freedoms, ideas presented by the Levellers

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[13] Ibid p. 71.

[14] The name illustrates the group's desire to level the social and political hierarchies which denied rights to all individuals.

[15] Ibid p 73.

[16] Ibid p 72.

will be further defined.

A very basic summary of Hobbes' work illustrates the extent to which the perception of human nature, and the need and kind of authority required to ensure survival, has changed. This is of particular significance to the arguments put forward by later British philosophers such as Bentham and Mill, arguments which still have credence in the twentieth century.

Briefly, Hobbes' premise, as set out in *Leviathan*[17], is that essentially all humans are motivated by greed and personal gain. Countries made up of these individuals would therefore also have the same motivations and would constantly be at war with each other. The concept of government rule would, in Hobbes' opinion, only further entrench the selfish characteristics of the individuals involved. Hobbes' solution was to ensure the country was ruled by a monarchy. Presumably, the advantage would be that monarchies are more predictable in action if not necessarily less evil in motivation.

His concession to the population was to allow a representation of group interests to the monarch as a means of checks and balances against the possibility of a cruel and unfair ruler. The concepts of the greed of individuals and the need to contain actions in

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[17] Thomas Hobbes, *Leviathan*, reprint with an essay by W. G Pogson Smith, Oxford, Claredon Press, 1909.

order for society to function set the tone for the development of other opinions of human

nature. Hobbes' acquiescence to public representation is motivated by the need to control

the ruler rather than by any perceived benefit of a collective consideration of political or

economic issues.

The following section will outline other major philosophic themes building on

some of Hobbes' work but also providing differing opinions on the motivations of

individuals to form collectives. In post-feudal Europe, the natural law theorists were the

first to separate religion from secular law. Natural law theory was further developed

during the Age of Enlightenment into natural rights theory which, in turn, most closely

resembles the modern human rights discussions. John Locke is perhaps the best known

proponent of the natural rights theory and provides us with a definition of basic human

rights; freedom, self determination and equality. Locke also introduces the concept of the

"social contract" through which men and women agree to enter into a community and set

up an authoritative body which is responsible, within limits, for ensuring these basic rights.

In return for this protection, individuals agree to relinquish certain rights or to refrain from

certain activities. A critical assessment of this theory will not be provided here as this

theory is presented only to show the formation of the relationship between basic rights of

the individual and the formation of community and the development of a polity to protect

itself against the rule of an individual and the chaos of anarchy[18]. Shestack does point out that this theory forms the basis of the French Declaration of the Rights of Man and the United States' Declaration of Independence.[19]

In the section entitled "Rules Based on the Value of Utility" Shestack presents Jeremy Bentham's utilitarian theory as well as some critiques and revisions. In contrast to natural rights theory, utilitarianism concerns itself with the collective good as opposed to the rights of the individual. However, the collective good is in this view a transference of the assumption that individuals make decisions based on maximizing pleasure and minimizing pain and therefore groups of individuals will react in much the same way. It is Bentham's statement that "Everyone counts for one, nobody counts for more"[20], which is often cited in literature regarding the development of the democratic state. Taking this statement along with his opinion that every law is evil because it is a violation of liberty, therefore every action of government is a choice among evils[21], sets a foundation for the role of state in securing human rights for the individual. This is in contrast to the notion of

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[18] The theory of a "social contract" is only one of many which seek to explain the ways in which individuals form communities. One of the many criticisms of this theory is that it discusses individuals in the abstract, devoid of characteristics such as gender or ethnicity.

[19] Shestack, p 206.

[20] James Steinrager, *Bentham*, Ithaca ,New York, Cornell University Press, 1977.

[21] Jeremy Bentham, *An Introduction to the Morals and Principles of Legislation*, Oxford, Claredon Press, 1996.

a social contract which recognizes the agreement of individuals to participate in a

collective which will, on occasion, override an individual's rights if they are perceived to

be interfering with the rights of another.[22]

Further statements drawn from Bentham's Principles of Morals and Legislation tie

the concept of utility to the role of the individual and the extension of individual

characteristics in form of government:

> By the principle of utility is meant that principle which approves or disapproves of
> every action whatsoever, according to the tendency which it appears to have to
> augment or diminish the happiness of the party whose interest is in question: or,
> what is the same thing in other words, to promote or oppose that happiness. I say
> of every action whatsoever; and therefore not, only of every action of a private
> individual, but of every measure of government. The interest of the community is
> one of the most general expressions that can occur in the phraseology of morals:
> no wonder that the meaning of it is often lost. When it has meaning, it is this. The
> community is a fictitious *body*, composed of the individual persons who are
> considered as constituting as it were its *members*. The interest of the community is
> then, what? The sum of the interests of the several members who compose
> it. A measure of government (which is but a particular kind of action, performed
> by a particular person or persons) may be said to conformable to or dictated by the
> principle of utility, when in like manner the tendency which it has to augment the
> happiness of the community is greater than any which it has to diminish it.[23]

By these principles Bentham identifies and quantifies the measure of government

and further expands the "calculus" of utilitarian theory by defining community as the sum

of the interests of individuals. The last line of the second principle also presents the issue

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[22] Michael Freedman, *Rights*, Minneapolis, University of Minneapolis Press, 1991.

[23] Ibid. p 1.

to which critics of Bentham's work quickly pointed, that is that the community or government which represents the interests of the "several members" who comprise it. It was quite conceivable that the interests of the few would differ, or possibly supercede, the rights of an individual in order to gain maximum happiness for the whole. Bentham's response was to hope that the few (legislators) would consider long term impacts of their actions, but he became quite disillusioned in this regard. There is no mention of the possible collective action which necessarily contradicts the rights of an individual but which protects the both the individual and the whole.[24]

Further, utilitarian theory, although seemingly based on the principle of equality, did not respect the worth of the individual. Nor did it recognize the heterogeneity of the population. Bentham's approach to utilitarianism is considered to be ahistorical and static in its consideration of human nature. Freeden concludes "The test of Benthamite utility was one of the moment, accepting individual wants and desires at their face value and ignoring the developmental character of human beings".[25]

On the other hand, John Stuart Mill did recognize that people did not share the same attitudes and preferences. Indeed, Mill's response to the critics of utilitarianism was

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[24] For example, an individual's right to yell "fire" in a crowded place when there is no cause is overridden by the need for the safety of others.

[25] Freeden, p 19.

that they had taken much too simple an approach to the concepts of pleasure and pain.[26]

Mill wrote "It is quite compatible with the principles of utility to recognize the fact that some kinds of pleasure are more desirable and more valuable than others"[27] Unlike Bentham, Mill believed that humans were quite capable of discerning their own happiness and that of the community and sacrificing the former for the latter. In this sense, Mill had more confidence in the ability of "several members" to make appropriate choices and that these choices would be far more acceptable to the general population.

However, according to an article by J. H. Burns[28], Mill was never completely able to accept the democratic notion that the majority rules. This is based on Mill's belief that not all persons are endowed with the necessary qualities to make sound political judgements. He also believed that "A being of higher faculties requires more to make him happy, is capable probably of more acute suffering, and certainly accessible to it at more points than one of an inferior type"[29] Therefore it may be concluded that Mill held certain concerns regarding the ability of the majority to respond to the needs of those with "higher faculties". To address these concerns Mill supported the use of institutional devices, a

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[26] Samual Gorovtiz, ed., *Utilitarianism with Critical Essays*, New York, The Bobbs-Merril Company, 1977.

[27] Ibid. p 19.

[28] "Utilitarianism and Democracy" Ibid. p 270.

[29] Gorovitz p 19.

professionally trained administration and a system of personal representation[30] in any

deliberative assembly. These devices were further supported by a secondary system which

included the establishment of an expert legislative committee (or second chamber) and the

rejection of voting by ballot. Most significant to this discussion was Mill's proposal of

"plural voting" which he recommended because of his belief that voting was a trust,

not a right, and therefore a vote should have the proportionate value of the individual who

uses it. That voting is not considered by Mill to be a right will be discussed further in the

context of an individual's ability to participate in political and economic decision making.

In summary, Mill believed that there were certain tasks to which some people are

more suited than others, and therefore will have the required reasonableness to ensure that

the greatest happiness is achieved for all while still respecting the rights of the individual.[31]

Within this statement are further indications of Mill's sense of equality and the protective

nature of the state toward the individual.

The Nation

This chapter opened with two scenarios regarding the establishment of nations. A

further definition of "nation" is required to test Mill's concept of the role of the nation-

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[30] The representational system would allow those more "able", in Mill's opinion, to speak
on behalf of others.

[31] Burns p 272.

state in protecting the rights of the individual. It is also necessary to distinguish the

"nation" from nationalism. According to Miller[32] there are five characteristics which

define a nation. A nation is community which is:

1) constituted by a shared belief and mutual commitment
2) extended in history
3) active in character
4) connected to particular territory, and
5) marked off from other communities by its
   distinct public culture.

Presumably, the characteristics need not be present in equal portions. The common

element for the British was economic while the French responded to territory and culture.

The defining commonalities, however they are chosen, lead to the individual's sense of

belonging - their nationalism.

There are two traditional definitions of nationalism[33]: the first, the concept of civic

nationalism, is attributed to the work of Ernest Renan. Civic nationalism is based on the

idea that a nation is a voluntary association of individuals. People give themselves a state

and the state holds them together. It is considered to be subjective because the state

expresses the will of individuals. On the other hand, ethnic nationalism is based on

language, culture and tradition. It is considered to be objective, as it reflects our social

lives. It is also seen as predating the state and is a collective view which supercedes the

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[32] David Miller "On Nationality" *Nations and Nationalism* Vol 2 (3) November, 1996, pp
409 - 421.

[33] Couture et al., op. cit. pp 2 - 3.

individual. Germany, during the period of Romanticism, is used as an example of ethnic nationalism.[34] England would more easily fit the definition of civic nationalism.[35]

These two definitions are often seen as an "either-or" dichotomy. However, there is at least one commonality of the two definitions. Even in theory, and certainly in practice, both have elements of exclusion. For the ethnic nationalists, those who do not share the common traits are not represented by the state. Civic nationalism, although stating that the people are sovereign, is ruled by the elite within the nation. In the former case the exclusion is clear while in the latter it can be somewhat more subtle. In the first instance, citizenship is denied altogether while in the second case citizenship may be granted but not necessarily a full set of rights. As has been stated previously, Mill suggested that some individuals are more capable than others of representing the concerns of the nation. Contemporary analysis shows that Western countries are still ruled by elites despite the gains made by the previously unrepresented portions of the population.[36]

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[34] Ibid. p 3.

[35] These definitions, and the accompanying examples, are limited to a theoretical starting point in the establishment of a state. The voluntary nature of association may perhaps be tested as individuals are born into a country and its administrative system but may or may not have the option of remaining in that state. Further, neither of these definitions immediately account for the movement of people from one state to another. However, these are the very dynamics of the state which present the challenges of working with diversity.

[36] Philip Resnick, *Twenty-first Century Democracy* Montreal-Kingston, McGill-Queen's University Press, 1997, p 31.

Therefore, the discussion of the state's ability to protect, support or represent fully all of its citizens can be addressed with either definition. As this paper turns to the discussion of Canada the elements of civic and ethnic nationalism will be explored further. Prior to that discussion more will be presented here on the relationship between nationalism and democracy.

Liah Greenfield, in her article on nationalism, presents three defining points.[37] First, nationalism is a modern phenomenon, more cultural than psychological and like other cultural phenomenons it can change or even disappear.[38] Second, nationalism provides an identity and outlines certain expectations. It also reflects the social consciousness and reflects our social order.

Finally, nationalism is secular but shares with religion a way of providing meaningfulness to life. Within Greenfield's definition of nationalism are the key concepts of the equality of the members of a nation and the sovereignty of the people.[39] Greenfield offers this definition of "the people":

> The "people" is a mass of population whose boundaries and nature are defined in various ways, but which is perceived usually as larger than any concrete

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[37] Greenfield, pp 93 - 108.

[38] This supports Kaplan's comment that democracy is the current, but not necessarily the enduring representative forum for capitalist nations.

[39] Ibid. p 94.

community and always as fundamentally homogeneous (essentially as a community of equals) and only superficially divided by the lines of status, class, locality or (in rare cases) ethnicity.[40]

By applying these definitions to sixteenth century Europe, Greenfield presents England as the birthplace of nationalism and the first nation. Specifically, the 'inventors of nationalism" were the new aristocracy, commoners who were unable to achieve the social standing they felt they deserved as a result of their economic success. It was this group who developed the image of the people as sovereign. However, this nation also rested on the social compact[41] that the will and interests of the individual were not separate from those of the nation. Greenfield defines this type of nation as both individualistic and civic. Greenfield further states:

> It is not coincidental that this original individualistic and civic nationalism is the type of nationalism characteristic of liberal democracies since its principles - the location of sovereignty within a people defined as a social compact of free and equal individuals - are at the same time the fundamental tenets of liberal democracy.[42]

The reference to Greenfield's work has established two necessary linkages; that England was first to develop the concept of a nation with the people as sovereign and that this type of nationalism is descriptive of liberal democracies. Canada's development as a nation and its current status as a liberal democracy draw heavily from its use of the British

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[40] Ibid. p 95.

[41] Social compact and social contract are used interchangeably in this paper.

[42] Ibid. p 104.

constitutional framework. At the same time, using Greenfield's definitions draws us back to the inherent contradiction of the homogeneous state representing individual needs.

Other points from Greenfield's work which will be referred to again are the concepts that nationalism is a cultural phenomenon and may change and that in order for the nation as we know it to survive there must be an adherence (or a return) to the social compact of a homogeneous population. The next section will concentrate on this last point. How do the tenets of democracy fit with a social compact that does not recognize the diversity of needs within a population?

Andre Van de Putte and K. U. Leuven[43] describe the development of a "nation" as having a complex and ambiguous logic. The authors present the idea that rather than destroying diversity, nations transcend it. Nations are produced by individuals pursuing democracy and nations will not survive if the basic tenets of democracy, the recognition of the particularities of the individual and their need for a forum in which to present themselves, are not met. Van de Putte and Leuven state: "The nation can not be considered in isolation from the aspiration for democracy, emancipation, political participation and self determination."[44] This theory follows the development of the

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[43] Van de Putte and Leuven, op cit. pp 161 - 195.

[44] Ibid. p 163. In contrast, Resnick states "The will to be a nation, does not necessarily have to take a democratic form." p. 119.

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concept of a social contract. As has been presented previously in this paper, John Locke

described a "social contract" as an agreement entered into by individuals which establishes

a community and an authoritative body which serves to protect the rights of the

individuals. Van de Putte and Leuven describe the resulting political society this way:

"What constitutes, animates and maintains a political society is the general will, the

consent and free choice of radically autonomous individuals to recognize one another and

live together."[45]

On the other hand, Van de Putte and Leuven recognize that a nation which focuses

on the general will of "radically autonomous" individuals is unstable. Nationalism

requires a certain level of homogeneity. The state, as a juridical and political body, needs

to build upon the relationship of individuals as reasonable human beings linked together by

their citizenship. Individualism and homogeneity define the democratic paradox. The

democratic legal order appeals to citizens to use reasonableness and make public rather

than personal decisions. However, the state can not, by this same legal order, compel

individuals to do so.[46] Citizens are free to use or not use their reason.

Van de Putte and Leuven conclude from their review of the development of

France as a nation that educating the masses on their commonality has the short term

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[45] Ibid. p 167.

[46] Ibid. p 171.

impact of producing the required homogeneity. However, the long term result of this

education brought greater awareness to individuals of their ability to present their

particularities in a broader forum. The initial homogeneity of the nation survived the

historical and cultural traditions of the individuals but did not destroy them. As

democracy spread, historical, cultural and traditional differences among

citizens began to be recognized as part of the private sphere. The ability to move issues

from the private sphere to the public sphere is the democratic right of the individual. It is

the state's role to provide a forum for issues, private and public, to be debated. To not

provide this forum would be to undermine the basic tenet of democracy and lose the

agreement of individuals to participate in a collective.

Van de Putte and Leuven summarize their work on democracy and nationalism by

stating that "the political nation is fundamentally pluralistic and multicultural".[47] This is

perhaps an ideal rather than a reality. However, if nations proceeded from this premise

then the democratic paradox will continue to represent the balancing act nations face in

preserving the elements of unity while providing a forum for meaningful participation of

individuals.

The contrasting elements of Greenfield and Van de Putte and Leuven's work , the

need for homogeneity vs. the recognition of a multicultural democracy are brought closer

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[47] Ibid. p 192.

together by Philip Resnick in his discussion of democracy and nationalism.[48] Resnick

poses the question as to whether democracy and nationalism are enemies or allies and

presents two hypotheses:

> The more democracy favours collective, no less than individual, forms
> of political activity the closer it comes to the spirit of modern nationalism
> The more nationalism accepts institutional and cultural pluralism, the closer
> it comes to the spirit of modern democracy.[49]

Resnick's response to the apparent dilemma presented in the above hypotheses is

to pursue the concept of political nationalism. This concept recognizes that, unlike civic

nationalism, individuals require more than an interest in voluntary association. Individuals

must have some commonalities and these may start as shared culture, language or history.

However, nations can build upon commonalities in such a way as to ensure their on-going

legitimacy but at the same time emphasize common political goals. Resnick used the

example of Quebec before and after the Quiet Revolution.[50] The ethnic sense of nation

based on the culture, language and French Canadian origin was replaced with the more

political sense of being Quebecois. Resnick does not propose that this is a perfect

example of political nationalism, as minority rights within Quebec are still at issue, but he

does suggest that greater emphasis on political goals offers a form of democracy that

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[48] Resnick, pp 113 - 122.

[49] Ibid p 114.

[50] Ibid p 120.

all can adhere to without the loss of historical common bonds.

In summary, a nation must respect and respond to the common values which historically brought individuals together without disadvantaging those who remain outside the majority group. Resnick suggests this may be done through developing new commonalities which offer the individual the opportunity to participate regardless of their membership to the majority.

The Individual, the State and Participation

From the philosophic theories presented so far it is possible to draw out, and within this tradition, define the individual, the community and the government and their respective roles in relation to basic human rights. The individual was the first element of the equation. Communities developed through social contracts and the polity evolved from the community. Significant movement developed as the concept of government as a necessary evil was replaced by a more balanced view of government as, among other things, a protector of minority interests.

More contemporary theorists expand not only on the definitions of the basic rights of individuals but also on the mechanisms within the control of state to ensure their

implementation. However, before moving on to these newer theories, it must be noted that during the period of Bentham and Mill, the late 1700's to the mid 1800's, there was also considerable debate on the role of economics versus the role of politics. It was during this period that the economists started to use the term "political economy".[51] A more thorough discussion of the classic approach will be given later in this thesis. However, it is relevant to the discussion of human rights to note at this time that the split between the economy and the polity had clear implications for the individual in satisfying his/her wants.

In illustrating the development of community and governmental interest in individual rights, the intention was not to imply that the basic unit for discussion of human rights has changed. Indeed since the nineteenth century much of the work of philosophers and social scientists has been directed toward increasing the scope of individual human rights. This point is made clear in the Universal Declaration of the Human Rights which states: "All human beings are born free and equal in dignity. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".[52] But, despite the egalitarian (yet gender specific) nature of this statement and the latitude it gives for broad interpretation, it has been recognized by most contemporary thinkers that

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[51] James A Caparaso and David P. Levine, *Theories of Political Economy* Cambridge, Cambridge University Press, 1992 p 1.

[52] United Nations General Assembly, 1948.

being born equal does not necessarily translate into equal status through the life of an

individual. Even equality of opportunity is not sufficient to ensure equal participation.

As John Rawls states "... empirical knowledge tells one that equality of opportunity is

not enough because society creates the conditions of pursuit thereby affecting the

outcome".[53] Rawl's comment provides an opening to discuss the social context in which

rights are defined and exercised. For the purposes of this thesis, that discussion centers on

democratic society. Two definitions will be used here to clarify the concept of

democratic society and to provide a measure of its development. Both are taken from the

International Centre for Human Rights and Democratic Development. [54]

> Democracy is seen as encompassing both the normative or institutional aspects
> of government, as well as the social praxis or exercise of effective citizen
> participation in determining the priorities and orientation of public policy.
>
> Development is seen as a political process of decision making by both the state and
> civil society actors leading to the effective mobilization of economic, social and
> cultural resources for a just process of socially negotiated creation and distribution
> of wealth and power that attempts to respect the entire family of human rights.

Fulfilling the expectations inherent in these definitions is seen by the Centre as and

on-going process for all societies. In fact the Centre recognizes that the making of

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[53] Shestack, p 221.

[54] Nancy Thede, Allain Bissonette, Stephanie Rousseau and Antonia Jose Almeida :"The Democratic Development Exercise: Terms of Reference and Analytical Framework" International Centre for Human Rights and Democratic Development, Montreal, July 1996.

democracy "..has no culminating point"[55] Discussion of some of the specific components

of these statements, such as whether or not economic equality is a goal, will be pursued in

later chapters.

Without meaning to diminish the previously stated principles of democratic

development, others have made different observations regarding the likelihood of attaining

success. For example, Thomas Christiano states "Democracy is a generic term which may

be vaguely but not very helpfully defined as a society in which all or most of the

population has the opportunity to play an essential if not always formative role in the

determination of legislation and policy."[56]

Participation as a means of exercising individual rights is also the concern of

Allison Jaggar in her critique of contractualism.[57] While Jaggar agrees with the

proponents of contractualism[58], that the possibility of gaining rational and informed

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[55] Ibid. p 5.

[56] Thomas Christiano. "Freedom, Consensus, and Equality in Collective Decision Making" *Ethics*, Volume 100 Iss 2, October: 1990 pp 151 - 179.

[57] Allison Jaggar, "Taking Consent Seriously: Feminist Practical Ethics and Actual Moral Dialogue" Applied Ethics: A Reader, Earl R. Winkler & Jerald R. Coombs , eds.,Oxford, Basil Blackwell Ltd, 1993.

[58] Contractualist moral theory is characterized by the notions of free and informed consent. consent. However, because of the difficulty of establishing empirical evidence of consent most contemporary versions utilize philosophic constructions of hypothetical consent. Ibid. p 69.

consent from a large community is remote, any other method such as the use of

hypothetical consent analysis is equally unsuitable in a democratic society. It is both the

pursuit of dialogue that brings the possibility of rational consent closer and the

mechanisms which are used to create that dialogue which are essential to ensure reducing

the inequities which hinder participation.

Keeping in mind the principle of democracy as stated in the Universal Declaration

of Human Rights and the practicality of participation as discussed above, a further list of

rights as presented in Shestack magnifies the dilemma of finding the right mechanisms for

support. Shestack refers to the work of McDougall, Lasswell and Chen[59] who qualify the

notion of dignity by listing the interdependent values of dignity, they are: respect, power,

enlightenment, well being, health, skill, affection and rectitude. The authors' position is

that all these are necessary for effective participation therefore, they become part of the

human rights definition.

In summarizing the key components of this section: the list of individual rights has

grown from that of freedom, self determination and equality to encompass value

statements regarding the worth of human dignity. The individual's role has evolved to the

community level, with social contracts, and from there to the establishment of a polity for

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[59] Shestack, p. 225.

preserving basic rights. The polity has emerged from a necessary evil to a more representational system which provides checks and balances in the interests of the minority. Greenfield's work was presented here to illustrate the tension that exists in nation building, the preliminary steps of which require homogeneity. But once established, the state must then begin its function of representing the individual needs of its constituents.

Nationalism, according to Greenfield, is modern phenomenon subject to change. It has both an identity and expectations. How these two components interact in Canada influences the rights of individuals.

Also included in this section is the suggestion that the concept of participation may be used as an indicator of a democratic society. It has also been suggested that while the mechanisms for ensuring this participation have had their roots within the governmental system, there is a strong argument that it is not enough. The presence of mechanisms does not denote the degree to which they are available to the public nor does it indicate the level of use by the public.

The remainder of this paper will follow the role of the Canadian government, as an example of the state in a liberal economy, in working with human rights. Specifically, the next chapter follows the developmental path taken by Canadians as we moved from the

inherited rights of the British constitutional monarchy to the Canada Act, 1982 (U.K.).

The treatment of minority populations within Canada will be discussed as part of the

description of the Bill of Rights and the Charter of Rights and Freedoms.

Chapter Two

Canadian Constitutional Development

The progress of any country toward democracy is never complete[60]. The history

of this process is often as revealing as any outcomes. Two authors whose work will be

used throughout this chapter have decidedly different views on the Canadian process.

Frank R. Scott states "The constitution of a country grows with the country as the roots

and branches of a tree reach out for greater sunlight and soil....That process of

constitutional adaptation is still going on and will go on into the future". [61] On the other

hand, David Milne, in the introduction to his book on the Canadian Constitution, offers

this opinion:

> Unlike Canadians, people of other nations do not normally spend decades
> debating their constitution. Nor are they inclined to think that "modernizing"
> is necessarily a progressive and welcome undertaking. On the contrary,
> apparently endless bursts of constitutional innovation are taken as testaments
> to grave political instability rather than signs of health.[62]

The contrast of these statements lends itself to this discussion because it represents

the theory and practice of Canadian human rights. Scott's theory follows the form of

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[60] Thede et al, p 3.

[61] Frank R. Scott, *The Canadian Constitution and Human Rights*. Toronto, The Hunter
Rose Co. Limited, 1959, p 1.

[62] David Milne, *The Canadian Constitution*. Toronto, James Lorimer & Company, 1991 p
37.

democratic development as presented in the previous chapter with elements of both civic and ethnic nationalism. Milne's contemporary analysis is reflective of Resnick's position on the role of political nationalism. Our constitutional process appears to highlight our differences rather than our commonalities and as Milne suggests perhaps call into question the stability of our nation. At this point it is neither the positive nor the negative connotations of our constitutional process which are at issue but rather the connection between the challenges for achieving constitutional harmony and the human rights debate. In order to make this connection clear, this chapter will provide a brief historical review of the development of the British North America Act and the Canada Act of 1982. By doing so, the concept of Canada as a nation will be explored along the lines of the previous chapter's discussion regarding the diversity of individuals and the homogeneity of the state. The division of powers in a federally constituted state and the role of the courts will also be presented in support of this paper's thesis regarding the shifting role of the state in human rights policy.

The two human rights mechanisms, the Bill of Rights and the Charter of Rights and Freedoms will also be described and compared. Relevant examples will be used to illustrate key points within each document.

The British North America Act

The acquisition of Canada (New France) from the French required an amalgamation of existing laws and principles in order to blend the predominantly French Catholic population with the British constitutional framework.[63] While this is somewhat of an oversimplification of challenges facing a new country, it does quickly pinpoint the cultural, political and legalistic diversity which faced the founders of the country. The Constitutional Act 1791 divided the territory into Upper and Lower Canada. Bayard Reesor describes the inhabitants as two homogeneous groups: "On the one hand was the conservative, static, agricultural, Catholic, French, represented by the assembly; on the other hand, was the aggressive, commercial, Church of England, English, represented by the governor and the two appointed councils."[64] Reesor also notes that within each group there were divisions along racial, political and economic lines.[65] While the lesser divisions within each faction are noted, the magnitude of the minority position would be felt to a much greater degree during the constitutional debates.

However, despite these differences, there were several motivating factors which heightened the need for this amalgamation: the need to expand economically; the military

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[63] Ibid. p 9.

[64] Bayard Reesor, *The Canadian Constitution in Historical Perspective,* Scarborough, Prentice-Hall Canada Inc., 1992, p 19.

[65] In these circumstances "race" is used to define French and English speaking persons. No mention is made of the aboriginal population or other racial minorities.

threat presented by the United States; and, perhaps most important, the unstable nature of the government of the union.[66] Reesor notes "The political instability of this period was leading to a crisis. Following three government defeats in two years between May of 1862 and March of 1864, the assembly ground to a halt".[67] The "Great Coalition" which emerged in 1864 was followed by three conferences, the result of which was the British North America Act (B.N.A. Act). The governmental structure which resulted from the B.N.A. Act was termed a Confederation although the intent was that of federalism. Kenneth McRoberts explains this disparity by suggesting that the concept of confederation (wherein the sovereignty rests with member states) was more acceptable to those who feared assimilation.[68] Federalism is defined by McRoberts as: "a sovereign state with central and regional governments that have exclusive areas of activity in which they can directly regulate the activity of citizens. Typically, these different areas are delineated in a constitutional document that cannot be unilaterally altered by one level of government...."[69] The ways in which these areas of activities are described in the B.N.A. Act is an integral part of this discussion and fundamental to an understanding of the shifting of the balance of power between Canada and the provinces.

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[66] Ibid. pp 37 -45.

[67] Ibid. p 44.

[68] Kenneth McRoberts, "Federal Structures and the Policy Process", *Governing Canada*, Michael Atkinson ed., Toronto, Harcourt Brace and Company, pp 149 - 178.

[69] Ibid. p 150.

The following discussion of the B.N.A. Act will describe areas of activities with particular emphasis on the democratic process, distribution of power, the protection of minority rights and independence.

Sections 37 to 52 of the Act define the method of determining the number of representatives; provincial electoral districts; the selection of a speaker and the duration of the House.[70] It is understood from the Act that Canada is to have a constitution similar to that of the United Kingdom[71] with freely elected representatives. The basic democratic principles of public participation through representation are contained within these sections. A further demonstration of these principles is contained in Section 49 (Voting in the House of Commons) which states "Questions arising in the House shall be decided by a Majority of Voices other than that of the Speaker, and when voices are equal, but not otherwise, the Speaker shall have a vote".

Sections 91 and 92 refer to the distribution of legislative powers. Each section is lengthy, however, several Classes of Subjects (the enumerated list of exclusive powers) are worth citing as they pertain to the thesis statement that the locus of control of human rights issues has shifted, in some instances, from federal to provincial jurisdictions. The

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[70] British North America Act, 1967 Constitution. *Constitution of the House of Commons* Sections 37 - 52.

[71] Scott, p 16.

Classes of Subjects for the Parliament of Canada include: Regulation of Trade and Commerce; Unemployment Insurance; Banking; Fisheries; Indians and Land reserved for Indians; and, Criminal Law. Under Section 92, the provinces retain authority over activities which are for maintenance and benefit of the province such as: taxation for the use of the province; hospitals; local works; Incorporations of Companies with Provincial Objectives; and, Property and Civil Rights in the Province. Section 92A allows the legislature to make laws pertaining to the development and management of non-renewable resources.

However, there are many instances where the B.N.A. Act is less than clear regarding federal and provincial powers. There were several areas of overlap, including the right of Parliament to appoint provincial judges and senators, the right under certain circumstances to make laws with respect to education (normally a provincial jurisdiction) and the right to directly tax individuals (given limited monetary resources, potentially to the detriment of the provinces).[72] The occasionally conflicting nature of the distribution of power will be considered with the respect to the Constitution Act (1982) and will be illustrated in the discussion of human rights prior to the Bill of Rights.

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[72] Reesor pp 80 - 81.

The B.N.A. Act and Human Rights

The recognition of French language rights and the new oath of loyalty sworn by Catholics, allowing them to hold office, were the first steps towards the establishment of minority rights. This accomplishment preceded similar minority rights being granted in England. Indeed, according to Scott[73], Canada developed many Acts which protected civil liberties prior to Confederation, not the least of which is the separation of the judiciary from the legislature[74]. The British North America Act of 1867 (B.N.A. Act) contained many of the rights and freedoms already established by the colonies. This was done without the use of an appended bill of rights. Section 93 refers to support given for separate schools systems for Protestants and Catholics and thereby becomes the first minority rights issue addressed by the constitution.[75] Other minority rights issues include the optional use of French or English in the House of Commons and the mandatory translation of all federal statutes into both languages. Scott[76] points out that individual freedoms such as freedom of religion and freedom of the press are not specifically mentioned in the B.N.A. Act but are implied as part of the spirit of the constitution.

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[73] Ibid, pp 12 - 13.

[74] This point will be raised again as it relates to the British vs American view of the sovereignty of parliament to make the law and the role of the judiciary to apply it.

[75] A more detailed discussion of this issue is contained in: Thomas R. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada.* Toronto, Clarke, Irwin & Company Limited, 1981, pp 58 - 93.

[76] Scott, pp 22- 28.

However, the issue of individual freedoms had been dealt with through common law

which is described by Ian Greene as:

> ...whenever Parliament had not provided a law to define how a
> dispute should be settled, the courts would settle the dispute
> according to what the judges believed to be the community standards.
> The decisions of the higher courts became precedents for deciding future
> cases. This whole body of judge-made law became known as "common
> law".[77]

One final note from Scott's commentary on the B.N.A. Act is his observations

regarding economic human rights. The B.N.A. Act, while recognizing a free enterprise

system, does not commit us to an economic plan. In fact the division of powers leaves the

provinces with considerable control over such facets of the economy as natural resources.

However, the resources are not distributed equally among the provinces and employment

is based not only on the availability of resources but on industrial support. The movement

of labour capital is not as easily accomplished as the movement of economic capital. The

example cited by Scott refers to the Atlantic mining industry. A more recent example

could be the Atlantic fishing industry. The relationship between economic impacts and

human rights is essential to meeting the criteria of equal opportunity as was described in

Chapter One and therefore the locus of control greatly impacts the level of economic

enjoyment experienced by Canadians living in different parts of the country. Where

natural resources and labour are well balanced the locus of control favours the province as

is the case with Alberta.

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[77] Ian Greene, *The Charter of Rights*. Toronto, James Lorimer & Company, 1989 p 10.

After the passage of the B.N.A. Act there were several key constitutional

challenges that prompted consideration among some political parties to pursue a Bill of

Rights. Two examples cited by the Honourable Roger Salhany[78] are the Alberta Press

case of 1937 and the Quebec Padlock Act. In the first example, the Social Credit

Government of Alberta attempted to censor the press and thereby limit their ability to

criticize the government's planned changes to the provincial banking system. There are

two jurisdictional aspects to this case which the Supreme Court had to contend with.

First, the Alberta government was attempting to make changes to the Bank Taxation Act

and the Credit of Alberta Regulation Act which the Supreme Court indicated were statutes

clearly within the jurisdiction of the Parliament of Canada. However, the second decision

of the Supreme Court to strike down the Accurate News and Information Act is less

clear. Property and civil rights are within the provinces jurisdiction, but as this act was

"ancillary and dependent upon "[79] the first two statutes, the Supreme Court felt able to

proceed with its decision. Chief Justice Duff stated:

> Any attempt to abrogate this right of public debate or to suppress the
> traditional forms of the exercise of the right (in public and through the press)
> would, in our opinion be incompetent to the legislatures of the province... .
> (Re Alberta Statutes, 1938: 134)[80]

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[78] The Honourable Roger E. Selhany *The Origins of Rights* Toronto, Carswell, 1986
Pp 6 -8.

[79] Ibid. p 7.

[80] As cited in Michael Mandel, *The Charter of Rights and the Legalization of Politics in
Canada.* Toronto, Thompson Educational Publishing, 1994, p. 12.

Jurisdictional issues and the role of the Supreme Court in deciding civil liberty cases will be shown to be major concern to those opposed to the development of a Bill of Rights and to those who question the way in which the Charter of Rights and Freedoms is implemented.

The second example involved two interrelated cases, the Quebec Padlock Act developed out of a movement in the 1930's and 40's in Quebec to restrict the distribution of communist literature. This Act is further described as an Act to Protect the Province Against Communist Propaganda. Under this Act, the Attorney General of Quebec could have any building, suspected of being used for the promotion of communist propaganda, padlocked for one year. A similar restriction was placed on the distribution of literature by the Jehovah's Witnesses. The Quebec City Council enacted a law which ostensibly was aimed at reducing litter by requiring a permit to distribute information on the street. These permits were made available to everyone except Jehovah's Witnesses.[81] In both these cases, the Supreme Court acted again on an issue of civil liberties and found this Act and several related municipal by-laws to exceed the constitutional jurisdiction of the British North America Act. It is somewhat ironic that one of first indicators of freedom of religion was the granting of right for Catholics to hold office which was a significant event for the predominantly Catholic Quebec.

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[81] This literature was considered to offensive to the Catholic Church.

These two examples regarding the freedom of the press and freedom of religion occurred at point in history when the indifference of the majority allowed the lives of minorities in Germany to be lost. According to Salhany,[82] this was the beginning of public and political pressure to create the Canadian Bill of Rights. The two examples cited above have clear implications for minority positions. Despite concerns by the Canadian political elite that a Bill of Rights would interfere with legislative supremacy, through the use of the court system, the Bill came into effect in 1960.[83]

The Preamble to the Bill of Rights affirms that the Parliament of Canada holds to the principles of the supremacy of God, the dignity of men[84], free institutions and respect for moral and spiritual values and the rule of law.[85] The Bill itself is divided into sections which list the basic rights of individuals as follows:

  a) the right of the individual to life, liberty, the security of the person and the enjoyment of property and the right not to be deprived thereof except by due process of law;
  b) the right of the individual to equality before the law and the protection of the law;

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[82] Selhany, p 7.

[83] Greene, p 14.

[84] This is perhaps not intentionally exclusive of the dignity of women but as will be shown later, the ability of women's groups to be heard during the debates on the Charter of Rights and Freedoms was limited and considered unsatisfactory.

[85] Revised Statutes of Canada 1985 Appendix III, An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms (Statutes of Canada, 1960 C. 44).

c) freedom of religion;
d) freedom of speech;
e) freedom of assembly; and
f) freedom of association.

The second section deals with the application of the law. It includes the right to a fair trial, appropriate terms for detention and freedom from cruel and unusual punishment. The third section compels the Minister of Justice to ensure that every regulation and statute brought forward is consistent with the Bill of Rights.[86] Although similar in wording to the Charter of Rights and Freedoms, the Bill of Rights was not as binding as the Charter would be. The Bill was an act of Parliament and therefore not entrenched in the Constitution and may be amended by a majority decision. In addition, it was not binding on the provinces. As such, the Bill was considered by the courts to be a tool to interpret the statutes rather than a guarantee of freedoms. Bayard Reesor states: "There is some awkwardness in determining the status of a law which contravenes the Bill of Rights. Because the Bill and any other Act of Parliament are of equal validity, neither can be used to declare the other 'unconstitutional'."[87]

Scott's opinion of the Bill, in particular the use of courts to ensure concurrence, was that it would not withstand future laws and that the court's ability to use it even as a

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[86] Ibid.

[87] Reesor, p 122.

tool was limited.[88] Further, Scott's recommendations for improvement considered several options which ranged from a system similar to the Americans where certain rights are beyond the reach of the legislature, to having certain acts such as racial discrimination made a criminal offense. Scott's preference was to amend the B.N.A. Act itself to cover all legislatures. This would have needed to be done with full consent and participation of the provinces. Scott was cautiously optimistic about the success of such an endeavor. To some extent, Scott's desire to see an expanded, less vulnerable, bill of rights was realized through the Canada Act of 1982 and the Charter of Rights and Freedoms.

The Canada Act 1982

It may be useful to consider this definition of "constitution" which applies equally to the B.N.A. Act and the Canada Act:

> The constitution in a federal state forms a master power grid from which all the governmental players get their authority. Not only does it distribute legal power among legislatures, it also limits the exercise of these powers, imposes obligations upon governments, and declares and enforces through the courts certain principles which thereafter bind all the players.[89]

Clearly the distribution of power was established and certain limitations were in place. However, the B.N.A. Act (later to be renamed the Constitution Act 1867) was incomplete. Should conflict arise between the provincial and federal governments, it was

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[88] Scott pp 47 - 49.

[89] Milne, p 42.

the Judicial Committee of the Privy Council of Britain which provided the resolution. In effect, Britain, would be arbiter of provincial and minority rights in Canada. Further, the constitution as described in the B.N.A. Act did not contain an amending formula as it was assumed that Canada would follow the constitution of the United Kingdom where amendments were achieved through acts of Parliament. The complication with this assumption is that, unlike Britain, Canada is a federal state and as such has the jurisdictional issues of provincial responsibility to consider.

These issues are dealt with through the Canada Act (1982) which is an amendment to, rather than a replacement of, the B.N.A. Act. The Canada Act makes three changes: first, it patriates the Constitution to Canada making recourse to Britain unnecessary and conversely freeing Canada of obligation to laws created by the British Parliament after 1982; second, it entrenches the Charter of Rights and Freedoms; and, third it provides for an amending formula.

The struggle to come to an agreement of the amending formula was long and difficult. The formula would settle the distribution of powers within Canada and would therefore define who would have constitutional authority in Canada. As all governments were participants in this struggle, certain elements of diversity such as culture, economics and geography, were accentuated. (However, some groups such as women, First Nations and, most likely, the working class were still not recognized.) Various formulae were

offered beginning in 1927 and continuing for the next fifty years. Elements of these formulae included the consent of the provinces as well as parliament; the consent of provinces with at least fifty percent of the population, veto powers by certain provinces and individual provincial control over certain jurisdictional areas. With the exception of Pierre Trudeau's 1980 plan, which allowed for change by referendum, the general population had no direct voice in the constitutional debate.[90] Public involvement was subsequently made available by public hearings held by a special Joint Council of the Senate and House of Commons from November 1980 to February 1981.[91] Submissions from various interest groups were made and the discussions were televised. The limited and brief level of public participation at the citizen level and role of the interest groups will be referred to again, but it is important to specify here that two groups which had profound concerns with the content and process of the Act and the Charter were women's groups (outside of Quebec) and groups representing First Nations.[92] These same groups are cited in the introduction to this paper as those with whom the government is currently working to achieve increased equality.

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[90] Milne, p 50.

[91] *Amending the Constitution of Canada: A Discussion Paper*, p 4.

[92] See for example John Borrows "Contemporary Traditional Equality: the Effect of the Charter on First Nations Equality", *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics*, eds. David Scneiderman and Kate Sutherland, Toronto, University of Toronto Press, 1997 pp 109 - 168 and Christine Boyle, "Home Rule for Women: A Contribution to the Feminist Analysis of Representation", Critical Perspective on the Constitution, *Socialist Studies/Etudes Socialistes: A Canadian Annual*, No 2, ed Robert Martin, London, 1984, pp 131 - 148.

On November 5, 1981 nine provinces reached an agreement with the Prime

Minister on a patriation package. Quebec was the only province not in agreement. The

package would entrench the Charter and adopt an amending formula previously proposed

by eight of the provincial premiers in April of 1981. The new patriation package was

different from the 1980 package and was not open to public discussion. The amending

formula had changed and the Charter now contained a notwithstanding clause. It was

proclaimed in April 1982.[93]

The Charter of Rights and Freedoms

If the constitutional debates provided a pointed reminder of the differences among

Canadians, the Charter acted as a unifying force which emphasized the common elements

of living in a democratic state.[94] It provided access by individuals to law reform by means

other than political representation. Salhany describes the establishment of the Charter of

Rights and Freedoms this way:

> The Canadian Charter of Rights and Freedoms is not only unique in Canada's
> constitutional framework, it is totally foreign to the English concept of
> constitutional monarchy. No longer are Parliament and the provincial legislatures
> supreme within their own jurisdictional field....Section 52 of the Constitutional Act
> admonishes Parliament and the provincial legislatures to recognize "The

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[93] *Amending the Constitution of Canada: A Discussion Paper,*Ottawa, p 7.

[94] Greene, p 38, contends that the patriation, the Charter and the amending formula would
strengthen national identity and protect against increased provincialism. However,
Greene also notes that few Canadians appeared concerned with patriation while many
were interested in the Charter.

Constitution of Canada is the supreme law of Canada".[95]

Berger describes it as a "legal garment" which shows a respect to the past but is also addressed to future generations.[96]   In an introductory note, Sheila Copps (then Minister of Canadian Heritage) states that the Charter is "...an affirmation that as Canadians we cherish individual rights for ourselves and are determined to uphold the rights of others."[97]   Clearly the expectations of this Charter are high, but what exactly does it cover?

The Charter is divided into seven categories

1) fundamental freedoms
2) democratic rights
3) mobility rights
4) legal rights
5) equality rights
6) the use of official languages
7) access to education in either official language,

There are also sections on enforcement and on the application of the Charter. Within the Charter there is also recognition that other rights may exist under other laws.[98] There is further recognition that it would take time to bring provincial procedures into

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[95] Salhany, p 8.

[96] Berger, Introduction p xiv.

[97] Sheila Copps in *Your Guide to the Canadian Charter of Rights and Freedoms,*
    Hull, Minister of Public Works and Government Services, 1997.

[98] Canada Act, 1982 (U.K.) Section 26.

concurrence with the Charter. A period of three years was granted after the section came into force.[99]

The Charter also contains a clause which is frequently referred to as the "notwithstanding clause". Within Section 33, Parliament and the provincial legislatures are afforded the opportunity to create laws which contravene section 2 and sections 7 to 15 by declaring in an Act of Parliament or provincial legislature, as the case may be, their intent to do so. The declaration is valid for five years after which the province may reenact the declaration but only after public debate. Domestically, this section has significant implications for individual rights. Although used rarely, its presence within the charter may suggest the possibility of lack of universality of rights across the country. What is a right provided for under the Charter in one province, for example the freedom and/or equality for gays and lesbians, is not necessarily true in another province[100].

The Charter and the Bill of Rights

There several key points of comparison between these two documents.[101] It must first be noted that the Charter does not repeal the Bill of Rights, it both recognizes the

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[99] Ibid. Section 32 para 2.

[100] Sexual orientation is not specifically described in section 15. The Supreme Court has, on occasion, ruled that the Charter may cover sexual orientation. See Vriend vs Alberta [1998] 1 SCR 493.

[101] Bruce Carson, *Charter of Rights and Freedoms and the Bill of Rights: A Comparison*, Ottawa, Library of Parliament, Law and Government Division, 1988.

existence of the Bill of Rights and reproduces many of the provisions from the Bill. However, two areas of divergence do occur in the entrenchment of the Charter and the applications to levels of government. First, the Charter is part of the constitution and may be changed only through an amendment to the constitution. Second, the Charter applies to both federal and provincial levels of government, whereas the Bill of Rights applied only to the federal government.

Carson lists three further areas where provisions in the Bill of Rights go further than the Charter[102], they are: the duty of the Minister of Justice to review proposed legislation and statutes with respect to compliance with the Bill; the Bill's requirement for a fair hearing; and, the protection of property rights through a due process clause. On the other hand, the Charter provides an expanded section on equality and provides the right for every citizen to vote in federal and provincial elections. The co-existence of both the Bill and the Charter provides Canadians with a complex system of procedures to ensure the protection of minority rights.

The Role of the Judiciary

Again in comparing the Bill of Rights and the Charter there is a significant shift in the role of the judiciary. Prior to 1982, the Supreme Court could review federal and provincial statues to determine if they were within the appropriate realm of jurisdictional

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[102] Ibid, p 9.

authority as described in the Constitution Act, 1867. The Charter, as entrenched in the

Constitution Act, 1982, expanded the role of courts for both levels of government. The

respective federal and provincial courts were now required to consider both existing and

new laws in light of the constitutional protections set out in the Charter. Michael Mandel

describes the perceived benefit of this system by quoting a government pamphlet issued

prior to the Charter's enactment:

> Constitutional entrenchment of a *Charter of Rights and Freedoms* limits
> the power of both the federal and provincial governments in favour of
> rights of individual citizens. *It gives people the power to appeal to the courts* if
> they feel their rights have been infringed or denied. The Charter does not transfer
> any power of authority from the provincial governments to the federal government
> rather it transfers power to all Canadians. (Emphasis in original)[103]

Mandel goes on to suggest that Canadians, through their support for the Charter,

declared their preference for judges over politicians when it concerned their rights as

individuals. This preference was based on the assumed impartiality of the judiciary. [104]

The role of the judiciary raises two key questions; how accessible are the courts to

individuals (is it easier to see your MP or a judge?) and who is the final policy making

body in Canada? A third question may also be addressed by responding to the first two;

given the Charter and the role of the judiciary, where does the state now stand with

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[103] Mandel, p 39.

[104] Mandel's opinion is that the judiciary is anything but impartial and non-partisan,
however it is the *intended* role of the judiciary which is being discussed at this point.

respect to individual and collective rights?[105]

Summary

This chapter began with two contrary views on the constitutional process in Canada. The common element within these two opposing views is that Canada has, since 1867, been negotiating, in one form or another, a way to recognize the diversity of its population and to provide appropriate representation while maintaining a sense of nationalism. The distribution of power between the federal and provincial levels of government through the B.N.A. Act, and later the Canada Act (1982), illustrates the challenges faced by a federal state in defining areas of jurisdiction. In much the same way, the process which moved Canada from the Bill of Rights to the Charter of Rights and Freedoms describes the changing role of the state in securing individual and collective rights.

While this chapter focused on the internal mechanisms of the Canadian government, with some mention of the personalities which shaped the countries response to human rights issues, the next chapter will discuss the expectations of the population in general and the external pressures faced by the government.

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[105] While the question regarding an individual's ability to access the Supreme is a valid one, it must also be noted that decisions by the Supreme Court set precedence for groups.

Chapter Three

Federal Leadership in Human Rights

The first part of the thesis statement, outlined in the introduction, suggested that the federal government has lost its role as leader in the area of human rights and that certain activities on behalf of the state may be interpreted to mean that there is an effort to regain leadership. This statement will be more fully examined in this chapter. It will be shown that this role has waxed and waned over the years since confederation. An historical overview will be provided which analyzes Canada's ability to sign and implement international human rights conventions on behalf of the country. A more contemporary view of the leadership role will be discussed with respect to the constitutional debates, both pre and post 1982. These two viewpoints represent national and international perspective on human rights and demonstrate the internal and external factors which have influence on the way in which the state conducts itself. The impact of globalization on all nation-states will be discussed in order to provide theories regarding the shift of power away from states and their consequences.

Canada's International Role

Canada's recognition as an international entity started with the independent (as separate from the United Kingdom) signing of the Treaty of Versailles in 1919. From there, Canada gained international prominence through its membership in the International

Labour Organization (ILO) and the League of Nations.[106] Along with this enhanced role

and the new level of responsibility that Canada assumed came new areas of controversy.

Like other federal states, Canada was faced with the difficulty of signing treaties and

conventions which had implications beyond federal jurisdiction, essentially committing the

provinces to a course of action or to a code of conduct without their consent. This

controversy is best described through the example of Canada's ability to ratify labour

conventions, as labour falls within the provincial jurisdiction.[107] Two perspectives were

given on this matter. First, Section 132 of the B.N.A. Act allows legislation by Canada,

as part of the British Empire, to be made on behalf of the federal and provincial

legislatures on treaties and conventions which were required to fulfill Canada's obligations

to foreign countries. A second perspective was more restrictive. An order-in-council

passed in 1920 required Canada to refer treaties and conventions to the appropriate

legislative authority based on areas of jurisdiction. The Supreme Court reviewed both

approaches and ruled in favour of the second approach.

This second approach required federal-provincial cooperation to meet the

responsibilities of Canada while ensuring any treaties or conventions which had provincial

implications would be implemented and enforceable. This system remained in place until

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[106] Allan Gottleib, "The Changing Canadian Attitude to the United Nations Role in
Protecting and Developing Human Rights", Human Rights, Federalism and Minorities
ed. Allan Gottleib, Lindsay, John Deyell Limited, 1970, pp 16 - 53.

[107] Ibid. pp 20 - 23.

1935 when, after only 4 of 44 ILO conventions were successfully ratified, the Bennett

government decided to revert to the first interpretation of the B.N.A. Act. This too was

struck down by the Judicial Committee of the Privy Council and again treaties which had

implications for provincial governments could be ratified only where sufficient co-

operation was in place between the two levels of government. The attempt by the

Bennett government to centralize legislative powers was unsuccessful.

As stated previously, the jurisdictional issues for Canada as a federal state had

ramifications for other countries as well. There were many efforts by the ILO and the

League of Nations to find solutions on behalf of all federal states. A "federal state

clause" attached to particular conventions was suggested by several federal states which

would allow ratification with limitations or reservations by those states. The limited

ratification would allow federal governments to implement and enforce those sections

which fell within their jurisdictions and to strongly encourage its application within other

jurisdictions. This clause frequently did not meet with the approval of non-federal states

as they felt it weakened any convention to which it was attached. An example of a treaty

where the clause was allowed was the Convention on the Political Rights of Women.

Canada signed this treaty with the following restriction, "Inasmuch as under the Canadian

constitutional system legislative jurisdiction in respect of political rights is divided between

the provinces and the federal government, the Government of Canada is obliged, in

acceding to the convention to make a reservation in respect of rights within the legislative

jurisdiction of the provinces."[108]

However, the reliance on the use of federal state clauses continued to affect Canada's role with the United Nations and in particular with respect to the Universal Declaration of Human Rights. Canada responded in two ways to this United Nations Charter; while Canada was involved in developing many of the human rights treaties and conventions,[109] it abstained in the vote on the draft of the Universal Declaration in 1944 citing the jurisdictional issues.

It must be noted at this point that there are other interpretations of Canada's reason for abstention. A.J. Hobbins suggests that many Canadians were cautious about supporting the Declaration.[110] Although Canadians responded favourably to certain human rights guarantees in the post World War II era (as noted in Chapter Two of this thesis), the inclusion of economic and social rights along with political and civil rights was considered by some to be problematic. Particular concern was raised by both the Canadian business class and by the legal profession in this regard. Hobbins contends that

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[108] Ibid p 43.

[109] John Peters Humphrey, a Canadian, was the first director of the United Nations Division of Human Rights and wrote the initial draft of the Universal Declaration of Human rights.

[110] A. J. Hobbins, "Eleanor Roosevelt, John Humphrey and Canadian Opposition to the Universal Declaration of Human Rights", *International Journal* Canadian, Institute of International Affairs,Vol LIII, No. 2 Spring, 1998 pp 325 - 342.

it was in fact the Canadian Bar Association, perhaps under the influence of the American

Bar Association, which ultimately prevented Canada from openly supporting the first

draft.[111] However, Canada ultimately did vote for the Declaration in 1948 and was

comfortable in doing so because the Declaration was not an enforceable treaty but a

statement of principles.[112] Even so, Canada still made reference to the areas of the

declaration which applied to the provincial legislatures.[113]

Canada did continue to play a prominent role in the development of many of the

United Nations Charter issues during the 1950's and 60's, despite the unresolved federal

state jurisdictional debates.[114] Canada's role after 1982 will be considered later in this

chapter.

The Development of National Human Rights Mechanisms

The mood of Canadians during the United Nations discussions also affected the

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[111] Ibid. p 339.

[112] Hobbins again provides an alternate explanation by suggesting that Canada was more comfortable signing the Declaration than it was abstaining along with the Soviet Union and South Africa.

[113] Walter S. Tarnopolsky, "Impact of UN Achievements on Canadian Laws", Human Rights, Federalism and Minorities, ed. Allan Gottleib, Lindsey, John Deyell Limited, 1970, pp 60 - 64.

[114] Nancy Gordon and Bernard Wood "Canada and the Reshaping of the United Nations" International Journal Canadian Institute of International Affairs, Vol. VXLII No 3, Summer 1992, pp 479 - 503.

federal government's ability to introduce its own Bill of Rights. Ivan L. Head describes

Canadians as feeling self righteous and superior to the peoples of other countries with

respect to human rights and therefore not in any need of outside criticism when in fact

Canada had quite a "disorderly human rights closet".[115] Head further notes that during the

constitutional debates of 1968, two provincial premiers (unnamed by the author)

considered the Canadian Charter of Rights and Freedoms to be, in turn, unnecessary for a

country as advanced as Canada, and inconsistent with the parliamentary system.[116]

The mood of the population and the positions of the provinces during the

constitution debates will be discussed next in the context of the federal role in human

rights leadership.

As has been mentioned previously, the patriation of the constitution and the

entrenchment of the Charter of Human Rights were attempts, in part, by the federal

government to promote nationalism and therefore unity. Alain-G. Gagnon and Guy

Laforest quote Pierre Trudeau in reference to the Meech Lake Accord as saying:

> And once again, it means an even greater tendency, an even greater
> weight on the side of provincialism, at the expense of a federal institution
> or legislation which, up until now, has given Canadians a feeling of
> belonging to one Canada. In the same way, the Canadian Charter of Rights
> and Freedoms was important to Canadian unity, as were the patriation of

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[115] Ivan L. Head, "Regional Developments Respecting Human Rights: The Implications for Canada" in, Gottlieb, p 241.

[116] Ibid. p 237 - 238.

the Constitution and the new Canadian flag. All of those things are important in the sense that they help Canadians to realize that they share with all other Canadians, throughout the country, the same set of fundamental values.[117]

Indeed, Gagnon and Laforest go on to describe the Charter as "promoting a political culture of constitutional minoritarianism".[118] As such, it offers groups such as aboriginal peoples, feminist organizations and multicultural groups a sense of allegiance to institutions which protect their rights.[119] The authors do note that this sense of belonging has not yet extended to Quebec.

In other parts of Canada the Constitution debates and the Task Force on National Unity produced slightly different opinions. In his article "Turning A Blind Eye", David Thomas discusses the many constitutional abeyances which exist within our constitution.[120] The presence of abeyances, which are areas of ambiguity, is not unusual in

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[117] Alain-G. Ganon and Guy Laforest, "Federalism: Lessons from Canada and Quebec", *International Journal* Canadian Institute of International Affairs, Vol XLVIII, No. 3 Summer 1993.p 477.

[118] Ibid. p 478.

[119] This point is debatable as both aboriginal groups and women's groups felt particularly excluded from the Meech Lake discussions. It is also interesting to note that The National Action Committee on the Status of Women (NAC) initially was alone in its opposition to the Charlottetown Accord despite tremendous pressure from both inside and outside the government. This stance is illustrative of two points: first, the Third Sector is not a homogeneous group; and second, that even within social movements, in this case the feminist movement, there may be disagreement on approaches to working with the state. The latter point will be dealt with more fully later in the thesis.

[120] David Thomas, "Turning a Blind Eye: Constitutional Abeyances and the Canadian Experience", *International Journal of Canadian Studies*, special issue on The Charter,

a constitutional document. However, Canadians have a tendency to want to expose these

abeyances and by doing so emphasize our differences as a population rather than our

similarities. Thomas cites Peter Russell who concludes that : "Canadians have not yet

constituted themselves as a sovereign people. So deep are their current differences on

fundamental questions of political justice and collective identity that Canadians may now

be incapable of acting together as a sovereign people".[121]

It is questionable whether the unilateral patriation of the Constitution without full

agreement by the provinces on the amending formula can be considered a positive

indication of leadership. The failure of the Meech Lake and Charlottetown Accords

emphasize the on-going struggle Canadians have in settling the contradictions of

difference blindness and difference valorization. Apparently the culture of

"Minoritarianism" was not sufficient to produce the level of unity and allegiance required

for a successful conclusion to the constitutional debate.

Federalism and the Constitution, Vol 7-8, Spring-Fall 1993, pp 63 - 80.

[121] Ibid. p 65.

Canada and the Effects of Globalization

      To this point the role of the state has been discussed with respect to jurisdictional

issues between the federal government, the provinces and international governing bodies.

The next section of this chapter will consider the impact of globalization on the role of the

state in promoting and protecting human rights both domestically and internationally.

Two aspects of the possible impacts will be presented; first, Daryl Copeland suggests that

multilateral economic interests have a tremendous influence over democracy itself which

will have the resulting effect of creating virtual states and expanding populations of

marginalized individuals.[122] Second, Peter W.B. Phillips provides additional examples of

ways in which globalization affects Canada's role as a state through an examination of the

expectations Canadians have of their governments and through an analysis of the

movement of power.[123]

      According to Copeland, globalization is possible for the following reasons: the

greater interdependence and technological capacity, increased mobility of most factors of

production (the exception being labour), higher levels of market integration and

liberalization, deregulation, privatization and a reduced role for government. It is the last

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[122] Daryl Copeland, "Globalization, Enterprise and Governance: What Does A changing World Mean for Canada", *International Journal*, Canadian Institute of International Affairs, Vol LIII, No 1, Winter 1997-98, pp 17 - 37.

[123] Peter W. B. Phillips, "Power and the Federal State in Canada: Is it Being Hollowed Out?", *International Journal*, Canadian Institute of International Affairs, Vol LIII, No 1, Winter 1997-98, pp 57 -72.

point which is of particular concern to this paper. Copeland makes several observations regarding the role of the state. First, Copeland states that "Maximum efficiency in a global economy requires an unprecedented degree of policy uniformity, which in turn involves a substantial surrender of national decision making control."[124] The surrender of control is achieved through the realization that neither parliament nor trade unions are capable of withstanding pressures such as a potential run on their currency or the threat of relocation of industries. According to Copeland, Canada's response to this global pressure has been to re-invent itself which he describes this way, "Except for Foreign Affairs and Finance, and a few other core policy areas, the apparatus of the state has been stripped, public services have been repackaged as business opportunities and corporatized, privatized or simply vacated, and large swaths of regulatory administration and programme delivery capacity have been dismantled or sold off."[125]

The move to a stronger business climate within the state, along with the decentralization of powers to the provinces, has many implication for marginalized groups. Democracy and human security require both social justice and economic well being. The loss of control of economic decision making within a state would therefore jeopardize part of this equation. More specifically, Copeland notes that the shift of responsibility for social programmes to the province, which already has jurisdiction over

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[124] Copeland, p 26.

[125] Ibid. p 27.

labour, provides the international community the opportunity to challenge those

programmes as subsidies and therefore potentially in violation of certain trade agreements.

The defense of these programmes becomes the responsibility of the provinces. This point

confirms the downward flow of responsibility for certain human rights issues to the

provinces. The author is not optimistic about the provincial governments' abilities to

defend their programmes or to negotiate individual treaties which contain acceptable levels

of human rights protection.[126]

Copeland also notes the upward trend of responsibility to international

organizations. However, in the era of globalization those organizations are more likely to

be the World Trade Organization (WTO) or the Asian Pacific Economic Council (APEC)

than the United Nations or the ILO.

The movement of the locus of control for human rights issues is also explored in

Peter Phillips article, albeit somewhat more optimistically. This article provides some of

the strongest arguements in support of the thesis statement regarding the loss of

leadership by the state for human rights issues. Phillips provides a simple measurement for

loss of leadership, as well as a description of several ways in which loss may occur. Loss

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[126] This concept creates a certain irony when compared to the issues raised in the first part
of this chapter. The federal government's ability to sign and enforce international
treaties is limited by its jurisdiction whereas in this scenario the provinces are equally
disadvantaged if they must act independently of either the federal government or other
provinces.

of leadership by the state may be measured by comparing the expectations of Canadians with the government's actions and reasons for their actions.[127] Implied by this definition are the questions of whether or not the government is capable of meeting the expectations and if not, is it due to a lack of power or a failure of will? The difference between these two scenarios is one of choice. In the Chapter Four, the development of formal linkages between the federal government and the third sector will be discussed and this issue of choice is significant.

Phillips cites a 1996 Maclean's magazine poll which suggests that Canadians would like increased action in areas of job creation, health and social programming, education, the environment and economic and cultural environment[128]. The findings of this poll are reinforced by a similar poll conducted by Ekos Research Associates which asked Canadians to rank the values they would like the federal government to follow. The top ten values cited in the Ekos survey results included a healthy population, clean environment and equality for all regions.[129] These values or areas where action is desired correspond to some of the basic tenets of human rights as presented in Chapter One. The right to equality of participation and the right to economic security are two of these expectations.

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[127] Phillips p 60.

[128] Ibid p 60.

[129] As cited, Keith G. Banting, " Social Policy", *Border Crossings.* G. Bruce Doern, Leslie A. Pal and Brian W. Tomlin, eds., Toronto, Oxford University Press, 1996, p 39.

Many of these areas are either the sole responsibility of the provinces, education for example, or at most are shared jurisdictional responsibilities such as health. Phillips does not indicate in his article the rationale for what appears to be the request for greater intervention on behalf of the federal government in this areas, but he does note that current federal initiatives fall short of the expectations. Several possible explanations which may be considered include a lack of understanding by the public of the separate roles each jurisdiction has with respect to these concerns or, conversely, the public may be quite aware of the distinctions and have indicated a preference for increased involvement by the federal government.

The gap between expectations and action is examined by Phillips through an analysis of the movement of power. There are four directions in which power may move, they are: 1) sideways to other states or the market place; 2) downward to regions or cities; 3) upwards to international governance or structures; and, 4) nowhere. Taking these one at a time, Phillips provides examples specific to the role of the Canadian government. The sideways movement of power to other states and the market refers to Canada's reliance on the United States as a huge market for Canadian goods and services resulting in possible influence by the United States on Canadian trade policy. Other influences on Canadian policy may result from extensive foreign investment in Canada and from foreign ownership of industry within Canada. According to Philips, the North American Free Trade Agreement (NAFTA) exacerbates these two issues. The balance of Canada's natural

resources and relative wealth with our dependence on international trade and investment leaves Canada vulnerable.

The second movement of power downwards has been discussed previously within this paper in the sections describing the B.N.A. Act. Phillips notes the jurisdictional issues which arose from the Act but also adds several issues which reflect the increased activity of provinces in collecting corporate taxes and the subsequent diminished ability of the federal government to exert financial pressures on provinces through the approval or denial of certain grant monies. Phillips also uses this section to introduce the role of community groups (Non government organizations or NGOs) and other levels of government such as First Nations. He sees these new players as taking power from all levels of government.

As stated previously, Canada has been instrumental in the development of many international organizations (League of Nations, United Nations etc.) however Canada's role has been that of a middle power. Canada has also played a role in the development of the International Monetary Fund and the International Bank for Reconstruction and Development (the World Bank), although once again Canada is seen as a middle power. In the area of international economics, Canada has concentrated its efforts on the development of the General Agreement on Trades and Tariffs (GATT) and on-going participation in the Organization for Economic Co-operation and Development. Phillips'

view is that Canada, like other middle powers, is dependent upon both GATT and the

OECD for its economic security and therefore has lost some its power to international

organizations.

Finally, Philips' fourth direction for the movement of power, to nowhere, is

exemplified in Canada in several ways. First, Phillips cites the Charter of Rights and

Freedoms which in theory is intended to provide individuals with increased protection and

increased access to challenge human rights issues. This is seen as a shift of power from the

federal government to the court systems and the individual.[130] However, court challenges

are not without cost and therefore not equally available to all individuals. Phillips

concludes that if the power has shifted but cannot be exercised then it does not exist.[131]

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[130] The role of the Supreme Court in determining human rights issues is currently receiving extensive media coverage. There are several issues being discussed; the blurring of the role of the Supreme Court regarding the development of social and economic policy particularly when it crosses into provincial jurisdiction; the way in which Supreme Court judges are appointed (without provincial consultation); and, the potential impact of individual biases among the members of the Supreme Court. See for example: Jeffrey Simpson, "What are we Chopped Liver?"*The Globe and Mail*, October 22, 1999; John Ibbitson and Steven Chase "Ontario joins Alberta: Reign in top court" *The Globe and Mail*, October 25, 1999; *The National Post* editorial *Supreme Bias* October 25, 1999. For a brief discussion of the bias issue see Ian Greene "The Courts and Public Policy" *Governing Canada* Michael M. Atkinson , ed. Toronto Harcourt, Brace and Company, 1993, pp 198 - 200.

[131] In a recent decision, *New Brunswick (Minister of Health and Community Services) v. G. (J.)* (September 10, 1999), found that lack of legal representation violated s. 7 of the Charter of Rights and Freedoms. In this case, a mother on social assistance applied for Legal aid in order to challenge an application by the Ministry to extend a custody order. Legal Aid was denied. The Supreme Court ruled that Section 7 of the Charter protects the right to security of the person, both the physical and psychological aspects. The potential removal of a child by the state constitutes interference in the psychological

The second example Phillips cites is the restrictions imposed by the many trade agreements that Canada has entered into. These restrictions are both domestic and international. Certain conditions for NAFTA are there not at the request of the United States but to appease the provinces. The balancing act of meeting the requirements of other states and other internal jurisdictions at the same time presumably produces the effect of power being "nowhere" with respect to the needs of the federal government, although some may suggest that is in fact the role of the federal government. At the time the article was written, discussions were underway with the OECD on the Multilateral Agreement on Investment (MAI), Phillips predicted that, if the MAI were passed, it would result in an even greater loss of control over foreign ownership of Canadian industry. Finally, Phillips cites the deficit as restricting the federal government's ability to implement new programmes regardless of the role definitions.

The last examples within the "nowhere" category are less clear than the others which Phillips presented but they do provide the basis for Phillips' optimism regarding the role of the state. Phillips concedes that there is loss of power within the state but it is not all permanent. Changes within the economic conditions nationally and internationally could have a positive impact for the state. At the same time, the state can be more proactive by taking steps to reduce the deficit and thereby increase economic advantage

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integrity of the person and therefore legal representation should be made available. It should be noted here that the provision of legal aid services is a provincial responsibility.

for use in negotiation with the provinces. Phillips also sees the accountability of

governments as one characteristic not shared by other centres of power and this allows for

the potential of greater control by the nation-state. However, this last point is viable only

with the active participation of the voters in valuing accountability. The accountability of

non-state actors and the role of the public will be discussed more fully in chapter four.

Support for many of Phillips' arguments is found in an article by Terry Morley

entitled "Deconstructing the Canadian State".[132] In this article Morely cites several

challenges facing Canada as a nation-state. First and foremost are the jurisdictional issues

which dictate the division of powers between the federal and provincial governments.

Morley contends that Canada is a national built on the principle of division and this

principle defines Canada.[133] Further, Morely states that the Canadian economy is an

"artificial construct" made up of competing regional economic interests. At the same

time, Canada has developed and implemented social programmes as a way of uniting the

country, but these same programmes are often at risk of being withdrawn as a result of

economic pressures such as debt and deficit reduction.

The passing of the Free Trade Agreement and the North American Free Trade

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[132] Terry Morley, "Deconstructing the Canadian State", *American Review of Canadian Studies*, Vol 26, No. 2 Summer 1996, pp 245 - 259. (This article has been downloaded from the Internet, currently page numbers refer to estimated placement in the original article).

[133] Ibid. p 245.

Agreement along with the tremendous cultural impact of the United States are, according to Morley, leading to the point where Canada will be absorbed by the Untied States. This concern has raised awareness and discussion of the sovereignty of the Canadian state. The division of powers between the federal and provincial governments, the lack of stability of the unifying elements of federal programming and the role of the Supreme Court also have a significant impact on sovereignty. Morely states:

> So no one, no institution, no combination of institutions is absolute. In view of this, we might say, along with the Americans, that the people are sovereign. But that phrase has no practical impact, for the will of the people is necessarily expressed through a multitude of institutions in conflict with one another. We say that the total legal order is sovereign, but the legal order can have no will. So what can it mean to say that Canada is a sovereign state if we can not locate that sovereignty in an individual nor in an institution?[134]

The reference to the lack of locus for sovereignty is consistent with Phillips' assertion that power can move in a number of directions and that this fragmentation leaves little recourse for the individual to affect change. Phillips questioned whether the state's perceived inability to meet the expectations of Canadians was a lack of power or a lack of will. Morely's answer is that it is a lack of power brought about by an ever increasing move to decentralization. It is predicted in Morley's conclusion, that political nationalism in Quebec will ultimately prevail and Quebec will separate. In addition, an emerging western economic nationalism may result in the separation of British Columbia from Canada. Given this prediction, it may be safe to speculate that the loss of state

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[134] Ibid. p 250.

power would be significant if not complete. Under these circumstances, minority groups within these new states may find that one or more avenues of redress no longer available.

In contrast to Morely's prediction is a recent empirical study which indicates that over the past five years Canadians' sense of identity and national attachment has increased while provincial and regional attachments have decreased.[135] The authors of this study were examining the hypothesis that "national attachment is weakening under the pressures of devolution, federal dimunition and globalization. Is Canada an anachronism unravelling under the combination of regionalist frustrations arising from its historical roots and the contemporary pressures of globalization?"[136] Also included in this article are related studies carried out by Ekos Research Associates on Canadian attitudes towards the role of the state.[137]

Briefly stated, the concept of attachment was rated using a seven point scale which asked Canadians to identify their sense of belonging to family, Canada, their community,

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[135] Frank L. Graves, Tim Dugas and Patrick Beauchamp. "Identity and national Attachment in Contemporary Canada" in *Canada: the State of the Federation 1998-99* Harvey Lazar and Tom McIntosh, eds., Institute of Intergovernmental Relations, Vol. 13, forthcoming.
(Again, this article has been downloaded from the Ekos Research Associates website and therefore page numbers may be different from the text once it is published).

[136] Ibid. p. 1.

[137] These may be found in *Rethinking Government*, a series of surveys conducted and analyzed by Ekos Research Associates, 1994.

their province and their ethnic group. Family attachment ranked first with 95% response followed by Canada (81%), Community (74%) Province (71%) and Ethnic group (55%). There were regional variations with Quebec having the lowest ranking for Canada..[138] Over a five year period this research also indicates that the sense of belonging to one's province declined from 77% in February 1994 to 70% in March of 1998.

It is important to note that the authors stress the relationship between the factors of identity and national attachment and the values and culture of Canadians as opposed to our economic status. They conclude: "Attachment to Canada is inversely related to economic security. The most economically secure have the highest level of attachment to Canada and the economically insecure have lower levels of attachment to Canada".[139] Further, those most comfortable with technology and those most confident of their skills in a globalized world are less likely to have a strong national identity. These characteristics are found most commonly among youth and this point makes a clear connection with Morley's prediction of movement toward economic nationalism. Essentially, Morley is indicating the future direction of Canada, as defined by the attitudes of today's youth, leans more towards Canada as part of a globalized economy and as a state having value only in its ability to provide access to this economy.

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[138] Ibid. p 5 fig 2.1.

[139] Ibid. p 17.

As mentioned previously, the Graves et al study also examines the perceived role of the state. Not surprisingly, there is a correlation between the level of attachment to Canada and the perceived role of the state. The higher the level of attachment, the more positive the response to the measurements defining the role of the state. Ekos used four key statements to measure the expectations of Canadians regarding the role of the state. They include: the need for a strong federal government to provide shared goals and values for a diverse population; the importance of national standards for in areas such as medicare; the positive role of the government in an individual's life; and the level of contact with the federal government within a specific timeframe.[140] The results indicate that the strongest linkages are those which relate to national unity and standards These may also be described as the culture and values of Canadians. According to the researchers, these indicators of attachment, national identity and role expectations contradict the popular notion of an imminent demise of Canada as a nation state. The general public is less inclined to shift affiliation to a more global community. On the other hand, there is evidence within this study which implies a gap between the general public and the elite and youth. The elite (defined here as members of the business community) and youth (those technologically more advanced and less economically secure) are those who are least likely to see the need for on-going state identification and support.

Under these circumstances, the author suggests that the role of the state in the

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[140] Ibid. pp 16 -17.

future depends upon its ability to provide a new vision of Canada and to speak to the cultural as well as economic insecurity of Canadians in the face of globalization. The state will need to find the balance between these two, possibly conflicting, realities. As has been shown, the ability to create this new vision may not rest with the state alone but, may require a consensus among the provinces. Achieving this balance may also require the support of other partners as will be discussed in Chapter Four. The addition of new partners has the potential to broaden human rights activities by allowing greater participation of the public in realizing a new vision but the addition of new partners does not necessarily alleviate the tension between diversity and homogeneity.

Summary

The evidence presented in this chapter provides, on balance, support for the thesis statement that Canada, as a nation-state, has had difficulty in defining and maintaining its role as the leader in human rights issues. From the impact of the B.N.A. Act domestically and internationally on human rights legislation to the effect of globalization and multilateral trade agreements, Canada has at various times been both a leader and a follower in the area of human rights. This is a position which is not entirely unique to Canada. Daryl Copeland suggests that the current trend will ultimately lead to the dissolution of the nation-state. Without denying this possibility, Phillips, Morley and Graves et al provide direction which may result in a stronger leadership role for the state

in areas which have been defined by the Canadian population. Phillips has defined where the power has gone and both he and Morley have described the process and the results. But Phillips and Graves et al have also provided, through the identification of the gap which exists between the current role of the state and the expectations of the population, some potential actions by the state which may restore power to the state.

The bridging of this gap will bring into focus renewed discussions of democratic society. If the state has not been representing the diverse needs of the population, who has? It has been suggested in the thesis statement that those involved in the social economy movement have, in the absence of strong state leadership, taken up the causes of human rights and democratic debate. The next chapter will consider how the state and social economy movement could work together and what benefits may be derived from such a coalition.

Chapter Four

The State and the Third Sector

This thesis began with an overview of the construction of a state and a discussion

of the tenets of democracy, the development of human rights and the refining of the

definition of human rights and it then went on to apply this information to an analysis of

the development of Canada as a country. Throughout this thesis, in one form or another,

there have been references to the third sector and many of its components and how these

components furthered the development of democratic society.[141] From the Levellers brief

social movement to broaden the voting franchise to presentations by special interest

groups to the MacDonald Commission, the rise of social movements has been constant.

So too has the increase in governmental and non-governmental mechanisms to respond to

these movements.

Different theories have suggested that social movements are a requirement of

liberal democracies and others suggest that they are a result. The distinction is the

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[141] Although definitions vary, for the purposes of this paper "third sector" will refer to the grouping of non-governmental organizations (NGOs), interest groups and social movements. It is understood that at times these groups are mutually exclusive with some theorists such as Warren Magnusson suggesting that social movement organizations (interest groups or NGOs) may in fact be detrimental to a social movement- see "Social Movements and the State: Presentation and Representation", in *A Different Kind of State: Popular Power and Democratic Administration* Gregory Albo, David Langille and Leo Panitch eds., Toronto, Oxford University Press, 1993 p 123.

position the social movements have, as responsive to the state or in opposition to the state: between those movements which advocate social change through expansion of the state to include previously unheard voices and those movements who wish to fundamentally alter the state system. A third position is one which sees movements work with the state where there is forum for change and take action outside the state where this is not possible. The latter point refers to the already discussed limitation of state powers to concerns within its borders and more evidence will be given in this chapter to support the theories of "decentering" or the "withering away of the state" as it relates to the rise of the third sector and the loss of state power.[142]

This chapter will review some of the relevant literature available on the rise of the third sector, its relationship to power, human rights and the state. In particular, the relationship between social movements and liberal democracies will be explored. A discussion of the third sector in Canada will place the theoretical concepts within a framework which will begin to answer the question of impact and benefit to Canadians that a collaboration between the state and the third sector may have domestically and internationally.

[142] Warren Magnusson, "Decentering the State or, Looking for Politics" and Colin Mooers and Alan Sears "The 'New Social Movements' and the Withering Away of State Theory" in *Organizing Dissent: Contemporary Social Movements in Theory and Practice*, William K. Carroll ed., Toronto, Garamond Press, pp 69 - 80 and pp 52 - 68, 1992.

The Rise of the Third Sector

Contemporary analysis of the rise of the third sector as a potential change agent usually cites the early seventies as the beginning of a new era for social movements.[143] Not coincidentally, as will be shown, the rapid growth of globalization is tied to this same time period as is the increase in liberalism. Indeed, several theorists have suggested that the rise of third sector groups and the reduced role of the state in human rights activities is the natural consequence of liberal democracies. In a recent work, Marc Plattner states:

> The last two decades, however, have seen a remarkable revival of liberalism. Market economics have come back into vogue. State owned industries are being privatized, and welfare benefits trimmed....Right-of-centre and explicitly promarket parties governed the leading democracies during the 1980's. Left-of-centre parties, many of which have returned to power in the1990's, have largely abandoned statist economics and have rediscovered the virtues of markets and entrepreneurship.[144]

Plattner goes on to argue that the concept of popular representation and equal inclusion in choosing governments has increased but, on the other hand, governments have not made any effort to be more responsive to the electorate. In fact, Plattner claims that the opposite is true, governments are moving toward increased use of the judiciary and independent agencies for policy setting and decision making. Both of these systems are further removed from the population and not accountable to the voters. Other agencies

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[143] It is not the intention of this paper to provide a comprehensive review of this analysis nor to distinguish among the different theories ("New Social Movement" vs "Resource Mobilization Theory" for example) but to use aspects of several approaches in order to examine the thesis topic.

[144] Marc F. Plattner, "From Liberalism to Liberal Democracy", *Journal of Democracy*, 10.3, 1999, p 130.

which Plattner cite as "non-responsive" (that is, not directly accountable to the public) include central banks, human rights commissions, and ombudsmen. The existence of these bodies is viewed by Plattner as a sign that, beyond electing a set of representatives, the public has less influence on government policies than in previous years.

The use of agencies of this kind, particularly constitutional courts, is well supported by opinion polls. According to Plattner, this indicates both a suspicion on the part of the public as to the ability of their elected representatives to act in a fair and impartial way and it "...reflects a triumph of liberal ways of thinking. A sense that limiting the excesses of government and protecting individual rights are (sic) of greater concern than translating immediate popular sentiment into public policy."[145] The implication here is that a trade off is required and that the potential biases which may cause politicians to be less than non-partisan do not exist in other institutions which are less accountable to the public.[146] It may be assumed, however unlikely, that while these other institutions are beyond the direct influence of the citizens, they remain within the state and therefore a newly elected government may reverse the trend for their use. This position will have some bearing on portions of the third sector which are, either through mandate or funding, reliant upon the government for their existence. It also makes clearer the occasional need

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[145] Ibid. p 132.

[146] There is a sense of contradiction in Plattner's theory. If the public is wary of political impartiality then a move by the government to use other more neutral mechanisms should be seen as a responsive one to the voters.

to differentiate between components of the third sector.

The issue of responsiveness becomes clearer when institutions are outside the control of the state. In an article on the impunity of non-state actors, Chris Jochnick[147] presents a new approach to human rights which addresses the shifting role of the state and the influence on human rights by corporations, financial institutions and third state actors (defined here to mean any other actor than the one in question). Jochnick's analysis is based on the economic impact of globalization and the entrenchment of poverty which is a more specific discussion than is required for this thesis. It does, however, focus on the need to shift the view that human rights are state centered and change is only possible through traditional methods of popular representation. Jochnick states: "Neo-liberal reforms have gradually whittled away at state authority over economic and social spheres. Human welfare and the environment have been increasingly left to the vagaries of the markets, with governments playing almost a secondary role in trying to ensure basic levels of welfare for their populations."[148] Further, Jochnick suggests that not only is the focus on the state useless in bringing about change, it actually shields others who should be held accountable.[149]

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[147] Chris Jochnick, "Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights", *Human Rights Quarterly*, 21.1, 1999 p 56 - 79.

[148] Ibid. p 64.

[149] Mooers and Sears cite Hall who claims that in fact it is capitalism and not socialism that is responsible for the withering away of the state p. 61.

In essence, Jochnick picks up where Plattner left off. Plattner appears willing to

accept that in a liberal economy direct influence on public policy is lost to the need for

increased mechanisms which are deemed to be more impartial. Jochnick, on the other

hand, sees that this not only reduces accountability by the state, it prevents others from

being held accountable. The way in which state and non-state actors are influenced or

held accountable will be shown to be the role of social movements or the third sector.

However, prior to leaving this discussion it must be reiterated that the "triumph of liberal

ways of thinking"(lessening the role of the state) does not release a liberal democracy

from its responsibilities in the area of human rights. On the contrary, Donnelly contends

that democracy and human rights, along with development, are interdependent and

mutually reinforcing.[150] Donnelly goes on to say that "Liberal democracy is a very specific

kind of government in which the morally and politically prior rights of the citizen and the

requirement of the rule of law limit the range of democratic decision making. Democracy

and human rights are not merely compatible but are mutually reinforcing in contemporary

liberal democracy...."[151] Therefore it would follow that the state, wishing to remain a

liberal democracy, would pursue human rights by recognizing its own limitations and the

potential of other institutions (the third sector) to support this aim. This is of course

based on two assumptions: that the third sector is single entity with one purpose; and that

the preferred outcome is an enhanced liberal democracy. The next section will outline the

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[150] Jack Donnelly, "Human Rights, Democracy and Development", *Human Rights Quarterly*, 21.3 , 1999 pp 608 - 632.

[151] Ibid. pp 620 - 621.

connection between human rights and social movements, a significant component of the third sector.

Human Rights and Social Movements

In previous chapters of this thesis the connection between human rights and the state has been discussed from several viewpoints. The role of the state in relation to the third sector is a focus of this chapter, but in order to make this connection it is necessary to ensure that an understanding of the role of social movements (as noted above, "social movements" will be discussed as a component of " third sector") and human rights is clear. Neil Stammers provides a comprehensive analysis of the interaction of social movements, human rights and power.[152]

The inclusion of the element of power is integral to this discussion as it recognizes power which exists in well known and understood institutions such as the state and political parties, and in less well known contexts such as those described by Stammers as a blend of the theories of Foucault and Luke.[153] Stammers summarizes his synthesis of the two theorists as follows: "... we need to see power held, developed and exercised by individual and collective social actors, but also recognize that it manifests itself structurally

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[152] Neil Stammers, "Social Movement and the Social Construction of Human Rights", _
Human Rights Quarterly, 21.4, 1999, pp 980 - 1008.

[153] Ibid. pp 982 -3.

through the patterning of social systems regardless of consciousness or intent".[154] The

existence of power outside the state or government and the ability of that power to

influence human rights provides another venue for groups and individuals

to seek change and to make others accountable for rights.[155]

Social movements, according to Stammers, play two roles with respect to human

rights and power: first, social movements have an instrumental focus which makes

political, social and economic demands of traditional sites of power; and second, social

movements work at the level of social relations, changing values and legitimizing

identities. Given this understanding, liberalism itself is a social movement. Stammers

states "...increasingly, at least since the beginning of the Enlightenment period, social

movements have demonstrated a capacity to, as Melucci put it'[make] power visible'

utilizing rights claims to challenge such relations of power both instrumentally and

expressively."[156] By doing so, more opportunities are exposed for social actors to create

change at political and economic level and to legitimate and bring value to alternative

groups.

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[154] Ibid. p 983.

[155] The concept of power was discussed in Chapter Three, specifically through Phillip's
analysis of the movement of power in four directions: 1) sideways to other states or the
market place; 2) downward to regions or cities; 3) upwards to international
governments or structures; and 4) nowhere. Phillips suggests that if power can not be
exercised it does not exist. Similarly then if power can not be identified then action can
not take place.

[156] Ibid, p 989.

To support his position Stammers describes four discourses on human rights: metaphysical abstraction, defined here as natural rights which are universal; legal positivism, which will be defined further; strong particularism, the opposite of metaphysical abstraction; and, structuralism, a more traditional Marxist view of human rights. Of these four options, Stammers finds that legal positivism provides the opportunity to balance social construction with the influence of social movements. Within this discussion of the history of human rights and legal positivism, the preeminence of bills of rights and human rights instruments reinforces the concept that rights, which are codified, are therefore recognizable only through legal systems. On the other hand, social movements, as was noted above, work both within this system and outside it. This raises the question of recourse where laws do not exist or more importantly where an inaccurate assumption is made regarding the duty bearer for human rights. Stammers summarizes this point by saying:

> One of the major difficulties with this state-centrism lies in the way international public law is constructed. Based on treaties by 'contracting state parties', it follows that duty bearers in respect of human rights are virtually always specified as states. This strongly reinforces the almost universal assumption that states are *necessarily* the principal duty bearers in respect of human rights. ...human rights constructed by social movements as challenges to particular forms of power have sought to ascribe duties directly to the perceived violators of such rights.[157]

In support of the first point regarding the entrenched legal view of the state and human rights in the above quote, McCorquodale and Fairbrother state "...international

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[157] Ibid. 992.

human rights law, despite its concerns with the protection of the rights of humans, remains

largely contained within a state based framework where the responsibility for violations of

human rights is by states alone...."[158] Magnusson appears to agree with this statement

when he describes the theory of the state as having complete authority over the market,

the family and cultural relations. But the state is ultimately in a position of trying to "... fix

the unfixable - to reduce global change to territorial order"[159]

There are several key points which may be drawn from the above quotes. First,

there is the obvious challenge to the state's role as duty bearer; second, social movements

construct human rights; and, third, ascribing duties to other non- state actors

simultaneously ascribes responsibilities to others for change. These points are reflected in

a quote used by Stammers from the Commission on Global Governance, which states:

> [A]s presently conceived, rights are almost entirely defined in terms of
> the relationship between people and governments. We believe it is now important
> to begin to think of rights in broader terms by recognizing that governments are
> only one threat to human rights and, at the same time, that more and more often
> government action alone will not be sufficient to protect many human rights. This
> means that all citizens, as individuals and as members of different private groups
> and associations, should accept the obligation to recognize and help protect the
> rights of others.[160]

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[158] Robert McCorquodale and Richard Fairbrother, "Globalization and Human Rights",
Human Rights Quarterly, 21.3 1999 p 741.

[159] Warren Magnusson, "Social Movements and the State: Presentation and
Representation", p. 125.

[160] Stammers, p. 1004.

In this period of globalization, there are opportunities for social movements to act on their new role with the greater possibility of success. If, as Stammers claims, human rights may both challenge and sustain power then the concept of the institutionalization or legitimation of that power is important. Stammers concludes: "...under contemporary conditions of globalization - social movements might become more effective agents of global socio-cultural change in respect of human rights than existing nation-states and emerging supranational institutional structures".[161] Stammers does not suggest that social movements will replace all existing mechanisms for protecting or expanding human rights but, that where nation-states are limited in their scope or are not the violators of rights, then there is a legitimate and necessary role for other actors to play.

The degree to which the concept of the state as only one actor in the area of human rights has been accepted may be indicated in a quote from the World Bank cited by McCorquodale and Fairbrother:

> [A]n effective state is vital for the provision of goods and services-and the rules
> and institutions-that allow markets to flourish and people to lead healthier
> and happier lives. Without it, sustainable development both economic and social,
> is impossible. ...[T]he state is central to economic and social development, n
> as a direct provider of growth but as *partner*, catalyst and facilitator.[162] (Italics
> added)

This concept of "partner" is interesting, although neither McCorquodale et al or

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[161] Ibid. p 1007.

[162] McCorquodale and Fairbrother p 746.

the World Bank (within the context of this article) define just with whom the state might

partner, however, the assumption here is that it is with the market or, more precisely,

those economic interests which control the market. This is a fundamental shift in the view

of the World Bank.[163] Regardless of the World Bank's definition of partner, sufficient

evidence exists to suggest the partner may in fact be social movements or more broadly

the third sector. In order to pursue this possibility it is necessary to present an overview of

the development of the third sector in Canada. The next section will consider the third

sector in Canada and introduce the concept of coalition building between the state and the

third sector.

Canadians and the Third Sector

There is a significant body of literature currently available on Canada and the third

sector, but one point of agreement among the many discussions is that the third sector is

impossible to measure. This is partially due to the lack of a standard definition. Some

social analysts include all non-governmental organizations (NGOs), charitable

organizations, churches and voluntary groups. According to a study by the Canadian

Policy Research Network, there were over 67,000 registered charities in Canada in 1994

with combined revenues in excess of $60 billion.[164] The 1997 Survey of Giving,

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[163] Another possible theory of "partner" is one where states act in partnership with each
other perhaps in opposition to the market or in response to globalized trends such as
the Multilateral Agreement on Investing.

[164] Backgrounder, "The Emerging Sector: In Search of a Framework", Canadian Policy
Research Network. This paper is based on a Roundtable Study conducted in January

Volunteering and Participating found that Canada has over 175,000 voluntary

organizations, over 77,000 are registered charities;[165] a significant increase. While the

government is responsible for over half of the revenues of these groups that still leaves a

considerable amount of money which is donated from corporations and individuals, a

significant factor in determining confidence in non-state institutions and the level to which

these groups are responsive to the public and to the government.[166]

Other definitions of the third sector in Canada focus on specific issue areas such as

the environmental lobby, the feminist movement, the economic and the aboriginal

movements. Neil Nevitte points out that in the 1980's there were between 1,800 and

2,500 environmentalist groups alone.[167] The Action Canada Network, originally formed

to oppose the Canada-U.S. Free Trade Agreement, has a membership of 45 large national

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of 1997.

[165] Mel Cappe, "Building a New Relationship with the Voluntary Sector", Notes from an Address to the Association of Professional Executives, Office of the Privy Council, 1999, p 3.

[166] Ibid. Mel Cappe confirmed that over half the revenue of charitable organizations comes from government, most at the provincial level. The next largest portion comes from fundraising activities and 10% comes from individuals. This leaves, according to Cappe, a 1% donation from corporations. Two points may be made from this information: first, that charitable organizations are less reliant on the federal government and therefore possibly less deterred from a strong advocacy position; second, they are more reliant on provincial governments which has implications for the locus of control; and, third, charitable groups are even less reliant on corporations than may have been assumed.

[167] Neil Nevitte, *The Decline of Deference* Peterborough, Broadview Press, 1996, p. 4.

organizations and provincial coalitions.[168] The Council of Canadians also provides a

forum for individuals and groups to voice concerns regarding issues which range from the

global economy to the use of bovine growth hormone.[169]

It would likely be safe to assume that these groups are not necessarily mutually

exclusive nor is each group necessarily focused on the same aspect of the larger issue. For

example, the environmental groups include those concerned with animal rights and those

opposed to clear-cut logging. Similarly, the feminist movement is comprised of those

seeking action on poverty and those who are addressing the issue of political

representation. What is clear from depth and breadth of activity is the support Canadians

appear to have for the work of these groups. This support can be considered both from

numbers of Canadians who participate in these groups (and their motivation for doing so)

and from the support given to the principles of these groups by non- participants. A

questions may be raised in this context about motivation. Certainly there is intrinsic value

in participation in charities, but a more fundamental question may be why there has been

such an increase in third sector activity in Canada.

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[168] Peter Bleyer, "Coalitions of Social Movements as Agencies for Social Change: The Action Canada Network", in *Organizing Dissent: Contemporary Social Movements in Theory and Practice*, William K. Carroll ed., Toronto, Garamond Press, 1992 pp 102 - 117.

[169] The Council of Canadians asks in its introduction to the Citizens' Agenda for Canada, "How can citizens exercise their democratic rights when governments refuse to act on their behalf?" A pertinent question for this thesis.

In partial answer to this question, it is important review again the affects of

globalization. From the economic perspective, Keith Banting suggests that the post war

period saw massive economic development in international trade and the expansion of the

welfare state and its social programs. However, by the 1970's, increased international

competition and decreased production had the simultaneous effect of reducing the state's

ability to support social programs and increasing the number of people who required those

programs.[170] If the government no can longer support the necessary social framework,

then other mechanisms will need to be developed to fill the gap. However, another

outcome of globalization is the technological changes which have lead to greater access to

information and communication. As a result, the ability to fill this gap is enhanced.

Chapter Three of this thesis described the ways in which power moves from the

state to other levels and provides examples specific to Canada. It also showed that

Canadians have certain expectations of the government which are not entirely being met,

which leaves the same question as above on who will meet those expectations if not the

state. This Chapter has provided an overview of third sector actors, in particular social

movements, and has identified the extent to which the third sector exists in Canada. The

next step is to link these points in a discussion of the acceptability of social movements

providing what the state can not or will not. To do this, reference will be made to the

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[170] Keith Banting, "Social Policy" Bruce G. Doern, Leslie A. Pal and Brian W. Tomlin,
   Eds., *Border Crossings: the Internationalization of Canadian Public Policy*, Toronto,
   Oxford University Press, 1996 p 28.

analysis Neil Nevitte provides regarding Canadians' confidence in the government and in non-governmental institutions.[171]

Based on data supplied by the World Values Survey in 1981 and 1990, Nevitte is able to show that Canadians' confidence in government institutions (defined here as parliament, police, the civil service and the armed forces) has declined significantly. The percentage of Canadians ranking their confidence level as 'high' in 1981 was 36.9 but in 1991 it was only 29.9. In response to the question "do you trust the government in Ottawa to do what is right?", only 20% of Canadians answered "always" or "almost always". One in four Canadians answered "never".[172] Nevitte provides several possible explanations for this decline. However prior to that discussion, a brief review of Nevitte's work regarding public participation in policy making is necessary to emphasize this shift in confidence.

Similar to the work of Graves et al. in the previous chapter, Nevitte examined the shift in values held by Canadians between the materialist and post materialist periods. These periods are defined by the values associated with economic growth. In years where there is an economic downturn, Canadians tend to value money and security. In periods of economic growth, Canadians value quality of life over money and security. Starting in

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[171] Nevitte, pp 54 - 62.

[172] Ibid. p 76.

the 1970's and continuing through the 80's and 90's the emphasis on post materialist values

has increased. The World Values Survey's 1990's findings include increased desire on the

part of Canadians to have a less impersonal society, to protect freedom of speech and to

have more say in government[173] On this latter point, while Canadians are expressing a

greater interest in politics, there has been a shift in way in which they wish to engage in

political activity. For example, interest and participation in political parties has declined

and Canadians are less likely to adhere to a particular party. In combination with the

above information on the declining level of confidence in government institutions the

question to ask then is where and how do Canadians express themselves politically.

Nevitte responds to this by looking first at the level of confidence Canadians have in non-

governmental institutions.

Overall there was also a decline in confidence for non-governmental institutions,

defined as the church, legal system, educational system and the press. However, there are

important differences between this measure and the measure of government confidence

which must be noted. First, the types of institutions selected for this survey are quite

different from each other and the rate of change in confidence among the institutions

varies more widely here. Second, the level of confidence both started higher and ended

higher for non-government institutions than government at the 1981 and 1990 survey

points. The common factor which Nevitte sees in the decline of confidence in both types

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[173] Ibid. pp 40 - 46.

of institutions is in fact a general attitudinal shift against hierarchical structures. Therefore, the next issue for analysis must be how Canadians respond to institutions which are not structured in this way.

Nevitte examines the public's stated desire for an increased say in government and a decline of interest in traditional venues through a discussion of what he terms "protest movements", which for the purposes of this paper correspond to the third sector and social movements. Inherent in the discussion of protest movements is the type of activity which constitutes protest activity. Nevitte describes a hierarchy of activities which range from voting to occupying a building. On this scale, Canadians appear to be increasing in their willingness to participate in protest behaviours including: joining in boycotts; attending unlawful demonstrations; joining unofficial strikes; and, occupying buildings or factories. In fact, over the ten year period of the World Values Survey, the percentage of Canadians who indicated that they have participated in two or more of these activities increased by ten points. At the same time, the percentage of Canadians who indicated they would never participate in these activities declined by nine points.[174]

Returning to the issue of protest movements, once again Canadians' support is quite high. In particular, Canadians show high levels of support (relative to the other countries surveyed) for human rights (58.3%); ecology (53.9%); peace/disarmament

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[174] Ibid. pp 77 - 84.

(40%); and, women's rights (36.7%).[175] Of the twelve countries participating in the

World Values Survey, Canada never ranked lower than sixth in their support for these

movements and came second only to Ireland in support of women's rights, although, it

must be noted that women's rights as a cause received the lowest overall support by all

twelve countries.

To summarize Nevitte's findings, since the early seventies the values of Canadians

have changed from the need for economic security to the desire for a better quality of life;

in the ten year period covered by the World Values Survey, Canadians have lost

confidence in governmental institutions and to a lesser degree in non-governmental

institutions. The general level of interest in politics has increased while interest in

traditional forms of political involvement have decreased. And, finally, Canadians are

more inclined to participate in protest behaviour and show high levels of

support for protest movements than they were ten years ago.

What are the underlying motivators for these changes? Nevitte provides an

extensive analysis for this pattern, from the simple observation that the drop in confidence

in governmental institutions was recorded at the time when the Mulroney government was

at the lowest level of popularity ever experienced by a political party in Canada, to

multiple classification analysis which combines age, language group (french/english),

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[175] Ibid. p 86.

education and value system (materialist/post materialist). Younger Canadians and those with higher levels of education are more likely than the general population to participate in protest activities and be supportive of protest movements. Nevitte also suggests that the introduction of the Charter of Rights and Freedoms may have played a role (although not a very large one) in the behaviour change of Canadians by providing new forums for political participation. Ultimately, Nevitte assigns the greatest significance for this change to increased education of the population, increased access to information, and post materialist values which result from increased economic security. Age and education are certainly generational characteristics and therefore Nevitte sees this shift as one with some permanency.[176] These actors are part of the "new social movements" described by Nevitte as:

> ...the ranks of the new protest movements are not filled with those who suffer any personal deprivation. On the contrary, they are stacked with those of the post war generation who are part of the educated new middle class and who are typically well off...new protests rely on a more deliberate array of political tactics including media campaigns to mobilize public opinion, intense lobbying of bureaucratic and legislative agencies, the use of the courts, and the formation of new political parties.[177]

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[176] Ibid. pp 104 - 106.

[177] Ibid. p 84. Several exceptions must be noted here. The range of activities within a protest or social movement contradict Nevitte's point about the lack of personal deprivation. For example, the environmental groups may include those whose living is affected by changes to environmental law in areas such as forestry and fishing, aboriginal hunting and fishing rights may be used as an example here. The women's movement, as noted previously, encompasses some of the work the anti-poverty organizations as poverty is highest for women in Canada. This classification of the new movements may reflect the media or public image rather than a true reflection of membership. Second, Nevitte suggests that the new movement actors use a new array of political tools, yet the results of the World Value Survey indicate that Canadians are

What needs to follow from this statement, even with the exceptions noted below, is an examination of how Canada as a state is responding to social movements, interest groups and non-government organizations.

The Canadian State and the Third Sector

Staying with the contemporary analysis of the 1970's to the present, rather than an historic one, there is still much which can be said regarding the shift in Canada's relationships with the third sector in even this time period. Books such as Coleman and Skogstad's *Policy Communities and Public Policy in Canada*[178], to name one source, provide both a framework which combines interest groups studies and public policy analysis and a wide range of examples of government and third sector interactions in the seventies and eighties. Coleman and Skogstad also provide several concepts regarding the structure of public policy influence which will be shown to be integral to Canada's most recent approaches to the third sector.

In an effort to understand the different ways in which the state and civil society interact, Coleman and Skogstad differentiate between "policy communities" and "policy

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more willing than ever to participate in some of the more old fashioned techniques.

[178] William D. Coleman and Grace Skogstad, eds., *Policy Communities and Public Policy in Canada*, Toronto, Clark Pitman Ltd., 1990.

networks".[179] The first concept, policy community, is defined "... to include all actors or potential actors with a direct or indirect interest in policy area or function who share a common 'policy focus' and who, with varying degrees of influence shape policy outcomes over the long run." The policy community may also be subdivided into 1) the sub-government which is comprised of government agencies, interest associations and business firms and who make policy in a given area; and 2) the attentive public comprised of the media, interested individuals and experts in the field. The attentive public does not usually influence policy directly, according to Coleman and Skogstad, but their opinions provide the value base used by the policy communities to shape policy.

Policy networks describe the characteristics of the relationship which occurs between policy actors and the policy community. Coleman and Skogstad define several models of policy networks. However for the purposes of this discussion the distinction between networks and communities is a sufficient basis to examine the recent activities of the federal government with respect to the third sector.

Beginning with the 1997 Speech from the Throne, the federal government launched a campaign of sorts, the goals of which appear to be increased individual and collective access to the policy process and increased ability by the public to influence international events which impact on their lives. The concepts of citizen engagement and

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[179] Coleman and Skogstad pp. 25 - 26.

a more collaborative approach to policy development and implementation between the voluntary sector and the government are key components of this new campaign. How far do these concepts go in recognizing and responding to the combination of an increasingly educated and political public who have expressed a declining trust in the government while growing more concerned with the seemingly unchecked influence of a global economy on their lives? There are two elements of this approach which may serve to answer this question. The first is " recognition", which defines both the state's open acknowledgment of the role of the third sector and, less explicitly, acknowledgment of its diminishing capacity. In the first instance, the recognition of the third sector by the state is not new. What is new is the context in which it is presented, as a necessary aid to the state. The second element is "implementation": how will the state actualize its plans; how well will this be received by the third sector; and, what are the indicators for success? A more detailed discussion of these points follows.

Recognition

In the 1997 Speech from the Throne, the government promised to fulfill the Red Book commitment of strengthening knowledge and increasing the technical infrastructure which modernizes the country and makes information more accessible to more Canadians.

> This will provide individuals, schools, libraries, small and large businesses, rural and aboriginal communities, public institutions and all levels of government with new opportunities for learning interactively, transacting business, and developing their social and economic potential. For example, we will enhance the voluntary sector's capacity to engage Canadians by improving their access to technology and

the need to play a stronger role in Canadian life.[180]

Several points may be drawn from this quotation. First, the diverse nature of the Canadian public requires significant support to reach its "social and economic potential". Provided with the appropriate level of support, the public will work more interactively with governments. Taken together, these points may be interpreted as recognition that the two segments of the policy community have a need to communicate both with the government and outside the government. The role of the business sector will be considered later in the discussion.

The interpretation of this section of the Speech from the Throne is supported by comments made by Jocelyn Bourgon, then Clerk of the Privy Council, in a speech to the Assistant Deputy Ministers Forum in October of 1997.[181] In direct reference to the Speech, Madame Bourgon highlighted the interdependence of governments (which she notes is not an effort to devolve, delegate or opt out of federal responsibilities) and the need to shift to a realistic concept of citizen engagement. Madame Bourgon states that the enhanced knowledge base of the public and the increased technical infrastructure may result in the following: 1) a richer and fuller meaning to democracy and citizenship; 2) the elimination of disadvantage of physical distance; 3) a comparative advantage for

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[180] Speech from the Throne, *Debates of the Senate*, 1st Session, 36th Parliament Volume 137, No 7, p 10.

[181] Jocelyn Bourgon, "The Changing Paradigm of Governance: Are we willing and able to exercise power differently", Address to the Assistant Deputy Ministers' Forum, October 29th, 1997, Privy Council Office.

Canadians in competition for talent and investment; and 4) a changed relationship between the government and citizens.[182] These potential impacts are not fully defined and may be viewed as somewhat optimistic, but they do support the idea of an evolving role for the public and the third sector.

The Clerk continues in this speech to address the issue of citizen engagement. While giving recognition to the benefits of citizen engagement (strengthening the relationship between government and the public and uniting the country), Madame Bourgon suggested that limits on citizen engagement are required when she states, "The purpose of citizen engagement is not to make citizens feel good, but to produce sounder policies. However, it is an arduous and time consuming approach. It should not be undertaken lightly and it should be reserved for those initiatives which have a major impact on peoples lives."[183] Again, a definition of 'major initiatives" is not provided nor is there discussion of who should be involved in making the decision of what constitutes a major impact. There also seems to be an implication that citizen engagement in and of itself is valuable.[184]

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[182] Ibid. pp 3 - 4.

[183] Ibid. p 4.

[184] In Chapter 2 of this paper, the concept of the pursuit of dialogue is presented as a necessary mechanism to ensure informed and rational consent and a precursor to other levels of citizen participation in government decision making. See page 30.

More recently, Mel Cappe, the current Clerk of the Privy Council made reference to some of these same issues and took the role of the voluntary sector a bit further.[185] Cappe suggested that there are three roles for the voluntary sector: 1) service delivery, reaching populations that the government can not; 2) contributing to public policy dialogue, the voluntary sector reflects the interests and concerns of its members[186]; and 3) citizen engagement, the work which the voluntary sector performs that enhances communities and reinforces citizenship.

Two other key points were presented in this address. First is accountability. Cappe briefly recognized that accountability, when involving the voluntary sector in policy considerations, must be finely balanced with the recognition that voluntary sectors tend to represent narrow issue areas while politicians are held directly accountable to the electorate for a broad range of issues. This point is quite different from the issue of accountability as raised by Phillips in discussing the shifting by government of certain policy or policy related activities and will be discussed further in the next chapter.

The second point is the explicit recognition Cappe gives to the voluntary sector

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[185] Mel Cappe "Building a New Relationship with the Voluntary Sector", Address to the Third Canadian Leader's Forum on the Voluntary Sector, Association of Professional Executives, Ottawa, May 31, 1999.

[186] Within this role Cappe makes the link between the voluntary sector and advocacy but considers it from both the perspective of influencing policy and the perspective of the voluntary sector influencing society.

and its place within a liberal democracy, which is captured in the following statement: "Over the last several years we have come to understand that our social and economic objectives are complimentary. This approach is rooted in a new understanding about the role of government, not only in Canada but around the world."[187] Cappe concludes this portion of his speech with a suggestion that more work needs to be done to build on the relationships which currently exist between the voluntary sector and the federal government.

Finally, another indicator of the recognition of the third sector's role in Canada is contained in the Social Union Framework Agreement (SUFA).[188] This agreement between the federal and provincial governments[189] is described as a framework to improve the social union of Canada. While much of the document is intended to clarify the roles of the two levels of government with respect to social programming, there are sections which support Mr Cappe's comments regarding the role of individuals and organizations in policy making. In Section 1, entitled Principles, the SUFA outlines the need to work in partnership with Canadians to have meaningful input into social policies and programs. Section 3 speaks to the issues of making governments accountable to the people through information sharing and direct involvement of third parties in program assessment. Clearly

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[187] Ibid. p 4.

[188] Social Union Framework Agreement, Privy Council Office, Government of Canada , February 4, 1999.

[189] Excluding Quebec.

this framework document does not describe the same level of involvement of third sectors actors as has been advocated by both Clerks. However, there are at least two possible explanations for this: first, the focus of the agreement is on federal/provincial relationships and second, there are many barriers to the implementation of an agreement that would define a tripartite arrangement between the governments and the third sector. The next section considers some of these barriers and presents some indicators that work is progressing to address them.

Implementation

This section draws on a series of papers presented by the Institute for Public Administration of Canada entitled "Collaborative Government: Is There a Canadian Way".[190] The majority of the papers in this collection concentrate on federal/provincial partnerships; however, there are several points regarding the role of the third sector in collaborative government.

In their opening remarks, Delacourt and Lenihan make a key point which defines the difference between partnerships and governance.[191] Partnerships may involve shared decision-making, gains and losses, but collaborative partnerships require shared vision and

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[190] Susan Delacourt and Donald G. Lenihan. Eds. "Collaborative Government: Is There a Canadian Way?", *New Directions*, Number 6. Toronto, Institute Of Public Administration in Canada, December, 1999.

[191] Ibid. p 1.

long term planning in addition to shared outcomes. According to Delacourt and Lenihan, traditionally governments have resisted collaborative partnerships for three reasons:

> In representative democracies such as Canada, governments have been, by and large, unwilling to share *decision-making authority,* particularly with private- or voluntary sector organizations. Collaborative partnerships require such a willingness. Because the long term implications of collaborative partnerships are poorly understood, governments are inclined to be skeptical about them. Governments dislike uncertainty. It increases the risk of error, which they will go to great lengths to avoid. If these arrangements are to become part of the landscape, governments must be willing to accept new uncertainties and that mistakes will be made.... In addition, governments must be open to new ways of managing that will improve their capacity to learn from error. In brief, they must *develop a learning culture.* Collaborative partnerships, almost by necessity, require long range thinking. Governments, for political or practical reasons, have largely been adverse to planning beyond their own mandates.[192]

Given these restrictions, it is quite apparent that much work will be required to shift the political and cultural contexts. Without these shifts it may be difficult to achieve collaborative partnerships. But this is only one side of the issue, albeit a significant one. The above statement presents the question as to whether the government is ready to make the commitment required, the corresponding question which must follow is, are Canadians willing to accept collaborative partnerships?

Drawing from the work of the Ekos Research Associates on "Rethinking Government", Frank L Graves provides survey results which indicate that the answer to the above questions is yes.[193] There are several survey results cited in this article which

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[192] Ibid. p 2.

[193] Frank L. Graves "Collaborative Government: Looking for A Canadian Way" in Delacourt and Lenihan, pp 12 - 22.

support this conclusion. First is the response to questions regarding how much influence certain groups in Canada have verus how much they should have.[194] The biggest gap is seen in the results for the "average citizen" which shows a difference of 52% between "have" and "should have". Also included in this section is the relative level of influence for "interest groups" and "community groups". Survey results indicate public support for increased influence by each of these groups but with "community groups" receiving a much wider margin than interest groups. Somewhat surprising is the response to the same questions regarding the federal and provincial government. The provincial governments are seen to have an appropriate balance between the influence they do have and what the public thinks they should have. The federal government is slightly out of balance with public indicating that it has more influence than it should but the margin is quite small. Not surprisingly, big business and the media are seen as having considerably more influence than they should.

Graves also indicates that there is public support for a more active role of government. This is not, according to Graves, a contradiction of the studies which indicate a lower level of trust by the public of institutions, but rather a willingness on the part of the public to work with government to ensure that appropriate action is taken on issues of importance to the public.

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[194] Ibid. p 15.

Further detail regarding the challenges to collaborative work between the

government and third parties is presented by Denis Desautels, the Auditor General of

Canada.[195] The criteria which must be met in order to be successful in using collaborative

service delivery include: service to the public, transparency and accountability. The

accountability factor presents several difficulties. In this quote from the United Kingdom's

Committee on Standards in Public Life, Desautels underscores the main issue: "When a

citizen receives a public benefit, government is responsible for safeguarding the public

interest of both the user and the taxpayer regardless of the status of the provider."[196] The

mechanisms to ensure that all participants are held accountable are currently being

developed.

A New Initiative

In April of 1999 the federal government met with leaders from the voluntary sector

and developed three Joint Tables to discuss issues of Accountability, Capacity and

Regulation.[197] The Report of the Joint Tables[198] provides a framework for the development

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[195] L. Denis Desautels, "Accountability for Alternative Service Delivery Arrangements in the Federal Government: Some Consequences of Sharing the Business of Government" in Delacourt and Lenihan, pp 23 - 37.

[196] Ibid. p 26.

[197] Cappe, p 4.

[198] "Working Together: A Government of Canada/Voluntary Sector Joint Initiative", Office of the Privy Council, Ottawa. The federal government was represented by 17 departments and agencies. They met with 15 leaders from the voluntary sector and two representatives of legal firms.

and implementation of these mechanisms.[199] The report is quite comprehensive and covers

such factors as the history of the relationship between the federal government and the

voluntary sector as well as the current status of the Income Tax Act as it pertains to

charitable organizations. The range of issues addressed in the report indicates the

complexity of creating a collaborative partnership with the voluntary sector. There are 26

recommendations in total from the three Tables, most of which are directions for future

actions.[200] In this sense, equal significance may be placed on the process to achieve

consensus on the many recommendations as well as the recommendations themselves.

Within the recommendations there are directions for the establishment of a

permanent structure to continue the dialogue; suggestions for communication with

Parliament; creation of a new standard for charities who wish to engage in advocacy work

and for a separation of advocacy from public education; and, the strategic infusion of

funding to selected areas to increase the capacity of the voluntary sector to continue their

work. Recommendations for the future include the establishment of a new framework for

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[199] This initiative is described as "new" for several reasons. The federal government has
certainly used "joint tables" or "round tables' as methods of consultation before,
however, these are usually specific to a particular issue or concern such as the
environment. Frequently these consultations are department lead . The difference here
is both the scope of the discussion and the level and type of departmental and political
involvement.

[200] The "recommendations" are actually a series of recommendations and options for
further action. A listing of these recommendations/options is provided in Appendix A.
A more detailed analysis of the recommendations relevant to this paper will be given in
Chapter Five.

regulatory bodies to oversee the distribution of funding.

These recommendations are intriguing. Two that are of particular interest to this paper involve advocacy and regulation. The potential for the expansion of the advocacy role would fit well with the theories presented in this paper regarding the need for third sector organizations to assume a more significant role in achieving human rights. However, the tone of the recommendation is quite cautious and deals first with the Income Tax Act which allows for only 10% of the charities' work to be advocacy. The recommendation is that the 10% rule be broadened, but only if this does not lead to advocacy predominating the activities of the group.[201] Non profit groups that are not registered as charities may see beneficial changes to the Income Tax Act if their work is deemed to be in the public interest. The definition of public interest is not complete and it is the recommendation of the Regulatory Table that further work is required and may include review by a Joint Committee of Parliament and the development of a formal legal definition.[202]

The Regulatory Table also provided three models for improving the management of charitable organizations. Currently, the activity is carried out by Revenue Canada Charities Division. In consultation with the Voluntary Sector leaders, preference was given to a

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[201] Ibid. p 51.

[202] Ibid. p 52.

model which would see this role delegated to an agency outside of Revenue Canada, which is itself a Special Operating Agency.[203] There is no connection within this discussion to the point raised by Mel Cappe which indicated that the majority of funds received by voluntary organizations came from the provincial governments. Indeed, there is little mention of the roles of the provinces in any of the discussions and only one recommendation which indicates that further work needs to be done to include the provinces in this initiative.

Also missing from the discussion appears to be the concept of sharing power that was presented by both Jocelyn Bourgon and, to a lesser extent Mel Cappe. On the other hand, the conclusion to the executive summary discusses this work as a new model for "governance". This raises questions as to how close this Report comes to reflecting the type of collaborative partnership described by Delacourt and Lenihan and seemingly endorsed by Cappe and Bourgon? Will this new relationship fill the gap created by the shifting of power away from the state or does it draw control back to the national state, particularly from the provinces? Does this initiative address the human rights concerns currently facing Canada in a globalized economy? In summary, is this of benefit to Canadians?

A full analysis of this initiative is contained in chapter five and the conclusion to the thesis will address the questions outlined above.

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[203] Now referred to as Canada Customs and Revenue Agency.

Chapter Five

Summary and Conclusion

There are three aspects to the thesis statement for this paper: first is the issue of leadership or control by the state in a liberal economy, particularly with respect to the state's role as the protector of human rights as defined through a democratic process and with the suggestion that the state is losing its status; second, is the assertion that the state is attempting to regain or redefine its position of leadership; and, third, that this attempt is tied to the emerging influence of the third sector. This chapter will begin with a summary of the information presented in the first four chapters, concentrating on key points and relating them directly to each of the three aspects of the thesis statement. Following this section, a more detailed analysis will be presented which focuses specifically on the third aspect and will explore whether the new initiatives begun by the federal government to involve the voluntary sector in participatory policy decision making will meet the needs of the state as well as the expectations of Canadians.

Summary

Prior to discussing the role of the state in a liberal economy, it was necessary to present historical information on several, inter-related themes. This paper began with a description of the creation and evolution of democratic principles which form the basis for

this paper. As democratic principles evolved so did the understanding of human rights. Democratic principles have transitioned from the theoretical starting point of a collective agreement among individuals as a safeguard against external forces, to the more formalized systems of representation meant also to ensure a balance of power within a state. The systems of representation themselves have changed to recognize that the homogeneity required in nation building served its purpose but was not in line with the original concept of the needs of the individual. The notion of representation of the masses became the expectation of participation by the masses.

Aligned with these changes was the expansion of the definition of human rights. The definition broadened as the wealth of democratic nations increased. At present, the definition includes civic, political, social and economic rights and the appreciation that a declaration of equality for all individuals is one step towards the actual achievement of equality. Further supports and systems are required to ensure that the pursuit of equality takes into consideration the issue of equity. John Rawls, as quoted in Chapter One, reminds us that society creates the context in which the equality of opportunity is pursued. Therefore equality may be promoted by the state through interventions such as employment equity programs and the funding of programs for aboriginal persons designed to increase their capacity to participate in all aspects of Canadian life.

As a foundation for this paper, Chapter One provided not only a philosophical

understanding of the individual, her/his rights, and an historical perspective of the development of the state, but also the expectations of each in their relationship with the other. The individual expects basic protection without undue interference from the state, the opportunity to influence policy and the support she or he needs to achieve social and economic parity with others. The state sees its role as finding the balance between the needs of individuals (their human rights) and the needs of the population as a whole. The state must therefore create and sustain structures and policies which will provide this balance.[204]

The issue of the individual's expectations and the perceived role of the state are essential to   understanding the contemporary possibilities the state may have in regaining its leadership role.

Chapter Two discusses at length just what structures and policies the federal government of Canada has available to it in order to meet the balance required. In order to present the argument that Canada has lost some of its power as a state, it is necessary to know what powers it had to begin with. A review of the division of power between the federal government and the provinces provides the required information to begin to assess

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[204] While the theory presented here focuses on the individual and the state, in practicality it is the state's role to balance the needs of *groups* of individuals. This is seen later in Chapters Three and Four which deal with Canada's historical role in human rights negotiation, both internally and externally, and with its recognition of the contributions of the many organizations and interests which comprise the third sector movement.

whether or not there has been a shift in power by outlining jurisdictional boundaries and some of the resulting ambiguities.[205] The B.N.A. Act, the Bill of Rights, the Constitution and the Charter of Rights and Freedoms define the process, the rights of Canadians and to a certain extent the attitude of Canadians towards the concept of the nationhood and the roles and responsibilities are components of the state.

The move from a parliamentary democracy to a constitutional democracy was discussed briefly at the end of Chapter Two in order to raise the issue of the role of the judiciary and in particular, whether the expanded role of the courts was a) indicative of the loss of power by the federal government and b) was of benefit to Canadians. The response to questions raised with respect to these two points is mixed. The selective use of the judiciary by the state to address contentious issues may be viewed as an attempt by the state to meet the needs of some segments of the population in a way that deflects potential criticism away from political parties The result of which is the fulfilment of state responsibilities to represent the interests of the population From the state's point of view, this shift in decision making may be regarded as an extension of the state's power to ensure certain actions are taken or policies are created. Conversely, the apparent delegation of responsibility for policy decision making to the courts greatly reduces the chances the public may have in influencing policy.

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[205] This is most clear in the examples of jurisdiction over natural resources and economic security. It is also the first indication of the state's ability to provide the elements of human rights related to social and economic equality.

The general issue of accountability was also raised here as the judiciary, along with other third party agencies or commissions used by the government, have no direct accountability to the public. The use of alternative forms of policy decision making is at the core of the discussion regarding a formalized relationship between the Third Sector and the federal government.

Canada's involvement in international human rights causes is discussed in Chapter Three and it is emphasized again that jurisdictional issues in federal states create challenges in a globalized society. This discussion is followed by a more detailed presentation on the effects of globalization on democracy itself which in turn is linked to the state's ability to protect its citizens from economic forces outside its control. The limitation of the state's role is then compared to the expectations Canadians have of the state.

Peter Phillips' model on the movement of power is used to indicate that the locus of control has shifted from the state to: international arenas (mostly in the area of trade and investment); to the provinces (particularly social programs); to other states (reliance on the United States as a trading partner); and to areas such as the courts and individuals. Implicit in this model is the concept that the loss of control is not in the best interest of Canadians. It is within Phillips' framework that the question emerges of whether or not the state has ability and the will to regain its leadership role, or possibly even exceed its previously defined role.

To begin to address this last point, it was necessary to consider the relationship between Canadians and the state from another perspective. Chapter Three presented information regarding Canadians expectations of the state. Clear indication was given that Canadians expect the state to intervene in certain areas of Canadian social and economic life. These expectations were given without reference to jurisdictional constraints on the federal government. The cross jurisdictional nature of these expectations is significant to the role definition of the state, as is the concept that these expectations exist despite what is later shown in Chapter Four to be some seemingly contradictory arguments which indicate that Canadians have lost confidence in the state's ability to meet their needs. Perhaps as a result of this loss of confidence, Canadians are exhibiting an increased interest in politics but are less likely to associate with a particular political party.[206] This expression of the political interest may be seen in Canadians' increased support to agencies outside of government which have taken on several roles associated with the state: the presentation of the needs of Canadians at an international level; the communication of international activities and their potential impact on Canadians; and, the provision of services within Canada particularly with marginalized populations. In theory, these changes are in line with the expectations of a state in a neo-liberal economy as presented by Plattner, Jochnick and Donnelly in Chapter Four. Plattner in particular noted the decrease in the public's trust

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[206] It must be noted that these conclusions are drawn from Neil Nevitte's analysis of the World Survey data collected from 1981 to 1990 and may not reflect the fact that Canadians have since created two new political parties, the Bloc Quebecois and the Reform Party (the Conservative Alliance Party of Canada).

of the government while Jochnick suggests it is less of trust issue and more of practical understanding that the public must focus its energies where there is the greater likelihood of influence. In either case, the result is similar. New actors are introduced which may influence policy. It is Donnelly's work which links the above positions with the potential for an active partnership with the Third Sector.

Chapter Four extends the discussion of the role of the Third Sector by providing an overview of the rise of the Third Sector as a natural consequence of liberal democracies. An application of the theories presented by Plattner and Jochnick suggest that, in fact, Canada may be resisting this natural progression. At the same time, Canadians are embracing and, in some cases, insisting on the acceleration of this movement. By doing so, and following the theories of McCorqoudale and Fairbrother, Canadians may take on the role the bearers of human rights protection by both assigning responsibility to non-state actors and to themselves. Canadians' support to the Third Sector movement may also indicate the public's recognition of their role in defining and legitimizing of human rights. Stammers' theories on the ability of social movements to challenge and sustain power illustrates the potential role this sector may play as partner to the state.

Various facets of the Third Sector in Canada are also presented in the fourth chapter. Briefly stated, the third sector is extensive, both in its areas of interest and the involvement of Canadians either directly through volunteerism or through financial support.

These characteristics along with the theoretical potential of the Third Sector to influence the world beyond the reach of the state, also contribute to the argument for partnership with Canada.

To this point, the thesis has provided the definitions, theories and evidence which are intended to give the reader an appreciation of the circumstances that should make the possibility of a state/third sector partnership viable. Chapter Four introduces theories on why such a partnership has not been successful to date; specifically the tradition of hesitancy on the part of the state to share decision making authority, the risk of error without shared accountability and the need to plan and commit beyond the government's own mandates. Systems of accountability and transparency in policy decision making are not yet in place. However, the Joint Tables initiatives on government and voluntary sector collaboration has as one of their goals the establishment of these systems.

Chapter Four provides a brief overview of the Joint Tables. The following section will analyze the options and recommendations of the Joint Tables and compare them to some of the stated and implied expectations of Canadians and the state.

Analysis of the Joint Tables Initiative

The creation of a collaborative partnership between the federal government and the third sector is the primary goal of the Joint Tables Initiative. If successful, such a partnership may alter the Canada's approach to governance, therefore the analysis will begin with a discussion of partnerships.

Partnerships

The concept of limited partnerships between government and non-government actors is not new. A body of literature exists which provides theories and analyses with respect to this issue. Chapter Four briefly discusses the work of Coleman and Skogstad on policy networks and policy communities. Both these concepts take on new meaning when considered in light of the government's recent statements regarding the third sector. Policy communities have been defined as comprising all actors interested in a policy issue with particular mention of interest associations, businesses and the attentive public. Coleman and Skogstad's definition for the attentive public includes the media, interested individuals and experts in the field. While a gradual expansion of this definition by the government has brought it closer to the concept of citizen engagement (enhanced communication and transparency of government policy), the presentations on policy decision making by two consecutive Clerks of the Privy Council, as well as the 1997 Speech from the Throne, now indicate a willingness to go further still. Similarly the Third Sector now more accurately reflects the organizational structure referred to above as "interest associations".

Through the presentations by the Clerks and the Speech from the Throne, the government recognized several roles the Third Sector played in certain aspects of society including: the provision of services, particularly to marginalized groups; their potential use of the Third Sector as conduit of information between the state and the public; and, as a mechanism of advocacy where the federal government has a limited jurisdiction. The policy community's role should therefore be considered as much more than an *interest* in policy issues. The government is approaching the attentive public both directly through initiatives aimed at individuals and through its relationship with the Third Sector.

The establishment of the Government of Canada/Voluntary Sector Initiative is intended to strengthen policy networks and the way in which the state and the policy community interact. Several of the Joint Tables on Building a New Relationship recommendations speak directly to this point.[207]

While the initiative must be viewed as the first step in what may be a long process, it provides sufficient information, through the description of its goals and objectives and its recommendations for further action, to begin an analysis of whether this is the course of action that will move from partnership, to collaboration, to shared governance.

By comparing the recommendations of each table against the expressed needs of

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[207] See Appendix A, Table 1, particularly 1.1 to 1.7.

individuals (on their own, as part of marginalized groups and as the aware public) and the expressed needs of state, it may be possible to estimate to what degree this initiative will fulfill the expressed and implied needs of Canadians and the state.

Meeting the Needs of Individuals and Groups

Beginning with the individual as a singular member of the state whose needs are defined as protection from international pressures, promotion of individual rights and freedoms and the expectation of increased access to the state, the Joint Initiative offers very little of a direct nature. Only two sets of recommendations[208] speak to the individual. The first is the development of a national volunteer initiative that would encourage Canadians to participate more in voluntary activities and another strategy, within the same section, would provide enhanced training for existing staff of voluntary organizations. The second set refers to the development of a youth employment/co-op/apprenticeship program in the areas of Information Management and Information technologies. This set of recommendations has the dual purpose of providing training and employment while strengthening Canada's capacity to compete internationally in this area.

The relative lack of direct recommendations for the individual may be a reflection of the expectation that there will be a roll out effective of the whole initiative which will reach individuals through the broader representation by groups. The encouragement to join

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[208] Appendix A, Table 2, 2.2 and 2.4.

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voluntary activities may be viewed as an attempt to draw the individual closer to parts of the initiative which involve meeting the needs of groups of individuals.

The preliminary nature of this work is exemplified by the recognition that not all groups are represented at the joint tables. Indeed, in both the Transmittal portion and Preface to the "Working Together" document, there is an acknowledgment that the non-governmental representatives were selected for their individual expertise and the views expressed by them did necessarily reflect those of the organizations with which they are associated.[209] As a result, the initiative recognizes that further work needs to be done to ensure that all voices are heard. This portion of building new relationships is seen as an evolutionary process and the primary responsibility for ensuring that diversity is respected is left to the voluntary sector. Other than the recommendation for further consultations with other groups, there is no recommended structure for this work. The possibility that the result of the expansion of representatives may simply create another bureaucracy is recognized only in a cautionary note that this must be avoided. No mention is made regarding the inclusion of an accountability framework for this phase of expansion.

More emphasis is placed on supporting the existing structure of national organizations and coalitions of organizations. A number of recommendations are directed toward enhancing the relationship between these groups and the federal government and

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[209] "Working Together", p. iii of the Transmittal and p. 7 of the Preface.

increasing the capacity of the groups to function independently and collectively. Further

changes are recommended to the regulatory system for non-profit groups that increases

capacity to engage in advocacy work and simplifies their mechanisms for financial reporting

to the federal government.[210] The increase in area of advocacy work is critical to both the

concept of increased representation and the potential for increased influence on policy

related issues at all levels. These same areas are also to the advantage

of the state where the increased access to the public allows for increased flow of

information. If the flow of information is truly reciprocal, this would indicate a significant

change in attitude by the state. A less direct statement may be made regarding the federal

government's ability to influence those who influence other policy areas. This latter point

will be discussed further in the next section.

Before leaving this section it important to address the idea of the cohesiveness of

the groups and individuals involved directly or tangentially in this discussion. The

perspective of this thesis has been that of examining the role of the state and the state in its

relationship with the public and Third Sector. In Chapter Four, Delacourt and Lenihan

describe three restrictions which have made the state resist forming collaborative

partnerships with the Third Sector. In balance, in must be noted that similar hesitations

exist within the Third Sector. Two examples of the debate within the Third Sector will

illustrate this point. Gary Kinsmen, in his article "Managing AIDS Organizing:

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[210] Appendix A, Tables 2 and 3.

'Consultation', 'Partnership', and the National AIDS Strategy" describes the dilemma of a

relatively new social movement struggling to develop its own sense of partnership and

collaboration while at the same time experiencing a sense of cooptation by the state as it

attempts to meets its objectives of responding to the increasing AIDS crisis.[211] According

to Kinsmen, as the state (in this case Health Canada) began to establish a working

relationship with NGOs in the AIDS community, there was a strong commitment to

partnership on both sides. However, the parameters of the partnership began

to shift as Health Canada assumed an increasingly prominent role in the development of the

Atlantic AIDS Network. While the provision of funds and administrative support through

the AIDS Secretariat may have been necessary to achieve the goal of an Atlantic AIDS

Network, Kinsmen questions the impact of this type of partnership arrangement. Rather

than having the time and opportunity to coalesce as a community and then develop a

partnership with the state, the community was responding to the state's agenda and

definitions of partnership. In particular, Kinsmen notes that this produced a blending of

diverse groups and the mainstreaming of issues. Since a certain loss of autonomy may be

the natural outcome of entering into a partnership with the state while receiving funds from

the state, Kinsmen suggests it is something which must be monitored carefully.

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[211] Gary Kinsmen "Managing AIDS Organizing: "Consultation', 'Partnership', and the
National AIDS Strategy", *Organizing Dissent: Contemporary Social Movements in
Theory and Practice*, William K. Carroll ed. Toronto, Garamond Press, 1992, pp. 215 -
233.

These issues may be new to the AIDS community but they have formed the basis of an on-going debate within the feminist community for several decades. There are many levels to this debate and they range from the questioning of the ability and willingness of the state to act as an agent of effective social change for women's issues to the encouragement of closer ties to the state at both the bureaucratic and political level. Melanie Randall, in her article "Feminism and the State: Questions for Theory and Practice" challenges the notion of partnership with the state by asking "... is the state in its current form irretrievably an institution of men's power? Or is it a form of power in society which is contested and malleable?"[212] In response to these questions, Randall examines the ways in which the state "legitimizes" feminists demands into an agenda that can be dealt with incrementally but without fundamentally challenging what Randal describes as the state's "commitment to the dominant gender, class and racial groups in society".[213] Despite the incremental nature of progress on feminist demands, Randall concludes that it is still necessary to work with state. However, work must continue within the feminist movement itself to regain the critical analysis of issues lost in the process of state legitimization. Further, work must continue in the formation of strategies for change that both confronts the state and works beyond it.

In a similar approach, Sue Findlay considers the ways in which feminist issues have

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[212] Melanie Randall "Feminism and the State: Questions for Theory and Practice", *Resources for Feminist Research*, Vol. 17 No. 3, September, 1988, p 10.

[213] Ibid. p 15.

been have been drawn into the state system.[214] In reviewing the history of Canadian women and the state from the announcement of the Royal Commission on the Status of Women, Findlay described several of the state sponsored programs intended to improve the status of women. Despite the positive shift in attitude of the political parties towards equality initiatives and the increasing level of participation by feminist groups in government consultations, implementation of policies was quite slow.[215] Findlay further noted that by the 1980's the feminist movement faced a new challenge. The state had , by that point, "...institutionalized the representation of feminist issues; that is, it has integrated women's issues into the 'unequal' structure of representation that is the basis of policy decision making".[216] The process of institutionalization of feminist issues by the state allows for their redefinition. This, according to Findlay, is one of the contradictory aspects of liberal democracy: the strategies and forums which make the pursuit of social reform possible may be in direct opposition to the desired outcomes. It is therefore necessary to ensure that the feminist movement not internalize the state limits.

Other participants in this debate on the feminist movement and the state are

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[214] Sue Findlay, "Feminist Struggles with Canadian State: 1966 - 1988" *Resources for Feminist Research*, Vol. 17 No. 3, September, 1988, pp. 5 - 16.

[215] Findlay also notes this slowness to respond was in part due to the lack of universal acceptance by all members of the state. Political acceptance did not necessarily translate into administrative acceptance by federal government departments. There was movement both forward and backward as all players struggled to reach consensus.

[216] Ibid. p 7.

somewhat more optimistic than Randall and Findlay. Freda Paltiel and Catherine Frazee, writing in *Women and the Canadian State*, indicate that the relationship between women and the state has been one of positive forward progress.[217] Both authors credit the partnership of the voluntary sector, the bureaucracy and the politicians for the positive changes that have taken place. Neither author believes that the work of the feminist movement is complete and both see an on-going partnership as a necessary means to continued social change.

The inclusion of this section of different factions within Third Sector provides a brief critical framework for reference later in determining the potential for success of the Joint Initiative.

Meeting the Needs of the State

The "Working Together" document outlines the government's objective as a desire to work more closely with Third Sector organizations in order to better meet the needs of Canadians. This somewhat simply stated objective may be considered at least partially achievable by the very nature of offering Third Sector organizations the opportunity to meet and represent the interests of a cross section of Canadians. However, as has been

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[217] Freda Paltiel "State Initiatives: Impetus and Effects" and Catherine Frazee "Do State Initiatives Make a Difference", *Women and the Canadian State*, Caroline Andrew and Sanda Rodgers Eds., Montreal, McGill-Queen's University Press, 1997, pp 27 - 51 and 51 - 63.

shown throughout this paper, meeting the needs of Canadians is a complex issue. It is in the state's own interest to achieve the appropriate balance of needs fulfilment for Canadians[218]. Achieving this balance can not be accomplished without the ability to control certain areas. Would a formalized partnership between the Third Sector and the federal government meet the challenges inherent in the government's stated objective? To answer this question, the potential work and benefits of the Joint Tables will be analyzed against Phillip's model of the ways in which power (control) may shift as discussed in Chapter Three.

The first movement of power is to other states or to the market. Phillip's examples were strictly economic, e.g. the influence of the United States as a trading partner and the increased level of foreign investment in Canada. There is little within the Joint Initiative which speaks to this issue, with the exceptions of creating new resources in the Im/It market. There are two areas of enhancement in this resource base: the first is directed toward augmenting electronic communication systems used by Third Sector groups, the potential result of which may be stronger linkages locally and internationally, thus broadening spheres of influence; the second area is increasing the capacity to compete in the IT/IM market by encouraging increased education and training opportunities for youth.

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[218] There are two aspects to the state's interest. First, it is in the public's best interest to have such a balance. Second, there could be implications for Canada as a nation if the competing interests of the provinces are not balanced.

The second movement of power is downward to other jurisdictions. This thesis has reviewed the division of power between the federal and provincial governments. Constitutionally, certain aspects of this division will not change. Phillips refers to the growing financial independence of the provinces and the transfer of social programs to the provinces. It has been recognized in this thesis that current social programs are not sufficient to meet the needs of Canadians and therefore work in this area falls to the Third Sector groups. It has been further noted that the majority of funding for these groups comes from the provinces. The Joint Initiative has recommendations in each of these areas which may alter the balance of power somewhat and increase the federal leadership role. By formalizing a relationship with the Third Sector at a national level, the potential for influence at a provincial level increases despite the lead role provinces play in providing core funding to these groups. Further, only one reference is made to the provinces and territories, contained in recommendation 1.9, which suggests that the provinces and territories should become engaged in the work of the federal/voluntary sector. By suggesting an invitation to the provinces and territories to participate is forthcoming, the government may be seen to have been postponing their involvement until a relationship with the Third Sector had been developed. There is also the promise of direct transfer of funding and other resources to voluntary groups. While this may not equal provincial/territorial contributions, it may increase commitment on behalf of the Third Sector to the federal government and its policies.

Finally, there may be ways in which the federal government, through the representation of the Third Sector groups in the regions may influence provincial decision making. This would be possible only if a true collaborative partnership exists between the Third Sector and the federal government. Such a partnership would have to include a shared vision and long term commitment.

The third movement of power is to international agencies or structures. Again Phillips looks at economic factors and the relationship with the Joint Initiative is weak for the same reason as stated in the response to the first movement of power. On the other hand, the work of McCorquodale and Fairbrother suggests that the Third Sector may work independently of the state in assigning responsibility for human rights violations and taking action appropriately and directly. This could mean, therefore, that by empowering the Third Sector the state may in fact contribute to its own loss of power in this arena.

Finally, there is Phillip's fourth movement of power, to nowhere. Phillips illustrates this movement by discussing the role of the Supreme Court and the Charter of Rights and Freedoms. There are two aspects to this discussion. First, there is the controversy regarding the Supreme Court's role in shaping social policy, i.e., has the state abdicated this role where policy issues are contentious? Second, is the Charter an effective tool for individuals in protecting their rights? The concept of power being "nowhere" when it rests with the courts or the Charter reflects Phillip's notion of accessibility. In this

case by individuals and trying to access the court system. The potential for shared decision making with the third sector may lessen the reliance on the courts. Increased citizen representation to the federal government through the Third Sector may provide an increased sense of comfort to the government when addressing areas of political uncertainty.

On the other hand, it has already been noted that both accountability and access are portions of the initiative which have not been properly defined. Are the chances any better that an individual working either independently or through a unrepresented group will have additional access to, or influence on, policy decision making? Recommendations 1.6 and 3.2 discuss the establishment of organizations to monitor activities of the Joint Initiative and of voluntary sector organizations. In particular, 3.2 suggests three regulatory models which may be considered: an enhanced Revenue Canada Charities Division; an advisory body (vaguely defined in the Working Together document as an arm's length agency acting to support the Charities Division); and, a quasi-judicial commission Each of these models is intended to compliment the monitoring organization outlined in 1.6. It is possible, given the above, that by attempting to increase access and gain broader support the government has created additional barriers.

One final area of consideration in analyzing the potential of the Joint Initiative to meet the needs of the state involves the use of the Third Sector to secure or at least

improve national unity. Again this is a preliminary and tenuous connection but one worth mentioning. Both Jocelyn Bourgon and Mel Cappe, Clerks of the Privy Council, refer to the government's work with the Third Sector as enhancing citizenship and creating a new kind of democracy. And, while the Social Union Framework has agreement from all provinces and territories except Quebec, the Joint Tables have the potential for representation from across the country.

Meeting the Needs: A Summary

In reviewing the recommendations from the Joint Tables, it is clear that there is potential for many needs to be met for both individual Canadians and for the state. There is stronger evidence that the benefits are more immediate for the state in gaining back some of its leadership role with respect to he provinces. Less clear is the effect the partnership between the Third Sector and the state will have internationally, despite the World Bank's revised view of the state as partner in social and economic development rather than the provider.

The Relationship with Human Rights

Much of the discussion in this chapter has been directed toward an analysis of the role of the state and potential for new working relationships to restore and enhance its leadership role. The relationship between this work and human rights may have seemed tangential at times. However, in returning to the concepts presented in Chapter One, it is

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clear that the pursuit of a partnership with the Third Sector has the potential to enhance human rights issues within Canada.

Two aspects in particular connect the new partnership with human rights. The first is the possibility of enhanced participation and representation by groups in the policy decision making process. Participation is central to the definition of democratic society and the protection of the rights of individuals as was described by the International Centre for Human Rights and Democratic Development. It is, however, optimistic to expect that anything approaching full participation is obtainable. The process and dialogue used to pursue participation are perhaps as critical as the result as suggested by Alison Jaggar.

The preliminary nature of the new initiative presents many challenges in determining the impact beyond participation on human rights. Increased support to voluntary organizations and a formalized relationship are of course excellent starting points. The outstanding issues of accountability and diversity require further monitoring and assessment. In addition, there is the condition of sustainability. The recommendation of the Joint Tables are at the moment, just that. Even if they are enacted, they remain the vision of the current government. This leads to the question of viability under a different government.

Conclusion

The application of Phillips' model on the movement of power supports the thesis statement that the state has indeed lost its role in leadership on human rights issues. The comparison of recommendations presented by the Joint Tables to the needs of Canadians and the state suggest that a partnership between the Third Sector and the state is one which may produce increased benefits for both partners and consequently for the Canadian public as a whole. A review of the recent social, political and economic history suggests that the timing could not be better to enter into a true partnership arrangement.

There are, however, several cautionary notes. The debates within the AIDS and Feminist components of the Third Sector on whether or nor to partner with the state indicate that, at times, the Third Sector will be less than fully represented and indeed certain of these groups may be actively working against state or State/Third Sector strategies. Challenges of this sort to the structure of the state or to the structure of the Joint Initiative have a legitimate role in neo-liberal economy.

Another issue which must be considered when assessing the potential of the Joint Initiative is that of sustainability. There is no indication that the Joint Initiative has the support of other political parties and therefore a change of administration may result in a dismantling of this partnership.

Finally, and perhaps most significantly, is the issue of governance. The gap between collaboration and shared governance is, at this point, difficult to measure. Perhaps, like the pursuit of democracy, the closing of this gap is an on-going process which may never be complete. However, the process itself may be sufficient to continue Canada's human rights agenda.

Appendix A
Options for Considerations from the Joint Tables[219]

Table 1 Building A New Relationship

1.1   An accord between the government and the third sector to guide the evolving
      relationship.

1.2   Developing a mechanism to orchestrate the sector's voices.

1.3   Assigning ministerial leadership and responsibility for building the relationship
      between the government and the sector.

1.4   Creation of a Secretariat to support the work of the Joint Tables.

1.5   Establishment of a Joint Implementation Group to provide direction on research and
      consultations.

1.6   After the implementation phase, develop a permanent organization to monitor
      activities.

1.7   Establish an all-party parliamentary committee responsible for the voluntary sector.

1.8   Provide parliament with an annual report.

1.9   Engaging the provinces and territories in the federal/voluntary sector work.

1.10 Introduction of a "voluntary sector lens" into the government policy process.

Table 2 Strengthening Capacity

2.1   Financial Capacity: research and recommend government -wide funding guidelines
      and principles.

2.2   Human Resources: establish a National Volunteerism Initiative which will encourage
      Canadians to volunteer and provide training resources for staff of voluntary
      organizations.

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[219] Summarized from *Working Together: A Government of Canada/Voluntary Sector
Initiative*, Office of the Privy Council, Ottawa: Minister of Supply and Services, 1999.

2.3 Knowledge: creation of a subset of Statistics Canada's System of National Accounts to provide information about the voluntary sector and to encourage the sector's involvement in policy work.

2.4 Information Management/Information Technology: development of youth employment programs in the IM/IT fields and research the benefits of specialized software for use by voluntary sector organizations

Table 3 Improving the Regulatory Framework

3.1 Legislative Change: allow public access to Revenue Canada's information regarding applications for charitable status; clearly define non-partisan advocacy and raise the percentage of resources which may be used to support this activity above 10%; allow certain categories of public-benefit organizations to be registered as "deemed charities" even though they do not operate exclusively for the benefit of their members and to promote specific causes not currently considered charitable under common law; and, undertake a study of liability issues as they pertain to voluntary organizations.

3.2 Institutional Change: Review three possible models for oversight regulatory bodies. The models include; an enhanced Revenue Canada Charities Division; an advisory body; and a quasi-judicial commission.

3.3 Administrative Change: develop shortened version of tax return form; introduce compliance mechanisms other than de-registration; introduce new guidelines on "business related activities" undertaken by charities.

3.4 Funding: an analysis has already been conducted on types of funding vehicles. Further work needs to be done in collaboration with the Table on Strengthening Capacity.

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