On Having Cake and Eating It: A Review of Jeremy Webber's Reimagining Canada

Jeremy Webber, *Reimagining Canada.* Montreal: McGill-Queen's University Press, 1994. Pp. ix, 368 [Cloth $44.95 (Can.); paper $19.95 (Can.)].

Reviewed by Dale Gibson*

There is an exception to the well-known rule that "you cannot have your cake and eat it too." A lawyer might express the exception as follows: "provided always that the said rule does not operate where two or more cakes are available to the cake consumer."[1] *Reimagining Canada*[2] contains some wise and important thoughts concerning the application of that exception in the realm of constitutional reform.

Professor Webber, a member of the McGill University Faculty of Law, was one of the founders of a group called "Friends of Meech Lake", which laboured in support of the ill-starred *Meech Lake Accord*[3] in 1989 and 1990. The failure of that experiment in constitutional reform, as well as of its sequel, the *Charlottetown Accord*,[4] so piqued his civic concern and his scholarly curiosity that he was prompted to produce this thoughtful analysis of those events. Anyone interested in the constitutional process in Canada or elsewhere will read it with profit, and recent developments have sharpened its relevance considerably.

The book begins, necessarily I suppose, with a lengthy review of events preceding the *Meech Lake-Charlottetown* debacles. Inevitably, so highly compressed a summary will draw quibbles from readers who feel that some topic of special interest to them has been misrepresented, overlooked or short-changed. I, for example, think Professor Webber was mistaken to say that accounts of the "Riel rebellion[s] ... have suffered from an excessive emphasis on central Canadian linguistic con-

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[1] This figure of speech does not appear in the book. If it is inappropriate, the blame lies with the reviewer, not the author.

[2] (Montreal: McGill-Qucen's University Press, 1994).

[3] *Constitutional Accord* (Ottawa: Government of Canada, 1987) [hereinafter *Meech Lake*].

[4] *Draft Legal Text (9 October 1992)* (Ottawa: Department of Supply and Services, 1992) [hereinafter *Charlottetown*].

flicts."[5] The principal accounts of the Riel uprisings indicate that the key issue was land, and language never played a major role.[6] Professor Webber's description of the Bill C-31[7] controversy is too brief and leaves the misleading impression that the re-instatement was uniformly welcomed in the aboriginal community. As well, his contention that Prime Minister Trudeau was primarily motivated during the patriation campaigu by a desire to displace Québec nationalism with Canadian nationalism[8] will be puzzling to some observers. Generally speaking, though, the historical overview is well presented and will be helpful to readers unfamiliar with the subject.

Professor Webber's most important contributions to the constitutional reform debate, however, are undoubtedly his analysis of what went wrong with the *Meech Lake* and *Charlottetown* initiatives and his suggestions for getting out of the mess in which we now find ourselves. It is here that questions of twice-eaten cake arise.

At an early point in the discussion, he quotes the well-known joke of Yvon Deschamps: "What do Quebeckers want? But it's quite simple: a free and independent Quebec in a strong and united Canada."[9] Professor Webber believes that this is an accurate assessment of what Québécois want,[10] and his book is an attempt to show that it is possible for them to achieve their goal. I agree: they can have their cake and eat it, because in my view "a free and independent Québec" and "a strong and united Canada" are different cakes.

The notion of "two solitudes" is often misunderstood and given inappropriately negative connotations, Professor Webber contends. He traces the term to a letter by German poet Rainer Maria Rilke, who referred to the *love* of two people whose "two solitudes protect, and touch and greet each other."[11] Turning then, very aptly, to the McGill poet and constitutionalist Frank Scott, Professor Webber quotes a poem extolling the replacement of arm-in-arm dancing with the more independent dance styles which became popular, appropriately enough, at about the time of Québec's "Quiet Revolution":

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[5] *Reimagining Canada, supra* note 2 at 30.

[6] See *e.g.*: G.F.G. Stanley, *Louis Riel* (Toronto: Ryerson Press, 1963); B. Beal & R. MacLeod, *Prairie Fire: The 1885 North-West Rebellion* (Edmonton: Hurtig Publishers, 1984).

[7] This Bill related to the re-instatement of *Indian Act*, R.S.C. 1985, c. I-15, status for Indian women and their offspring previously deprived of it because of marriages with non-status men (see *Reimagining Canada, supra* note 2 at 69).

[8] This assertion permeates the book. Early references occur *ibid.* at 56-7.

[9] C. Taylor, "Quebec Focus" (1990) 70:1 McGill News 8, quoted in *Reimagining Canada, ibid.* at 18.

[10] See *Reimagining Canada, ibid.* at 26.

[11] Letter of R.M. Rilke to F.X. Kappus (14 May 1904) in R.M. Rilke, *Briefe*, vol. 1 (Wiesbaden: Insel-Verlag, 1950) 74 at 80, quoted in *Reimagining Canada, ibid.* at 190.

Long ago
when I first danced
I danced
holding her
back and arm
making her move
as I moved

...

Now I dance
seeing her
dance away from
me she
looks at me
dancing we
are closer
held in the movement of the dance
I no longer dance
with myself
we are two
not one
the dance
is one[12]

Webber's message seems to be that describing Québec as a "distinct society" and agreeing to a somewhat distinct constitutional status for that province, as the *Meech Lake* and *Charlottetown* accords would have done, would no more undermine Canadian unity than would a married couple's change of dance style endanger their marriage. That seems to me to be so self-evident as not to require proof, but Professor Webber, nevertheless, provides considerable scholarly evidence. Proving his point entails examining both nationalism and constitutional asymmetry. His discussion of each topic is valuable, though I do not entirely agree with his approach to nationalism.

Professor Webber believes that nationalism is a major source of our constitutional problems. He considers the concept of "nation" to involve an exclusivity that would preclude one's simultaneous membership in a Canadian nation and a Québécois or aboriginal nation. He argues, therefore, for substituting the terms "community" or "society" for "nation" when referring to the latter allegiances.[13] I do not think that would help.

Etymologically, "nation" simply refers to one's group association at birth. It is a sociological concept as much as a political one. It is a notion that attracts powerful emotional attachments. It would be futile (and perhaps even foolhardy in some circumstances) to tell the Cree or the Métis of western Canada, the Hasidim of the

[12] F.R. Scott, "Dancing" in *The Dance is One* (Toronto: McClelland & Stewart, 1973) at 20, quoted in *Reimagining Canada*, *ibid.* at 191.

[13] *Reimagining Canada*, *ibid.* at 23-24.

world or the Québécois that they are mere "communities" rather than nations. Cree, Métis, Hasidic or Québécois nationhood does not, however, prevent citizens of those nations from simultaneously belonging to the Canadian nation. Professor Webber has correctly identified misunderstandings about nationhood as a major source of trouble for the Canadian constitutional dialogue. The problem lies, however, not in assertions of nationhood by various sectors of the Canadian population but in the fallacy that nationhood is, as Professor Webber claims, an "exclusive" concept. As I see it, nationhood involves several cakes (or solitudes or dancers), not one.

I find it easier to agree with Professor Webber's observations about constitutional asymmetry. Objections to the *Meech Lake* and *Charlottetown* proposals on the ground that treating one province or group differently than another would create an unacceptably asymmetrical constitution are in Webber's view, and in mine, misplaced. As he points out, the Canadian Constitution[14] has never been symmetrical.[15] For example, bilingual legislation and court processes are required in only three provinces. Constitutional protections for denominational schools vary considerably from province to province. Nova Scotia and New Brunswick were originally guaranteed subsidies not available to Ontario or Québec. Unlike other provinces, the prairie provinces did not own their public lands until 1930, by which time the lands had been largely alienated by the Government of Canada. No province has, or will, ever enjoy the same constitutional status as any other province.

Professor Webber's illuminating discussion of the implications of constitutional asymmetry[16] demonstrates that there is nothing to fear from reforms that might make the Canadian Constitution slightly more asymmetrical than it already is. A poet the author did not mention, William Blake, coined the phrase "fearful symmetry" in reference to the awesome patterning of the universe:

> Tyger Tyger, burning bright,
> In the forests of the night;
> What immortal hand or eye,
> Could frame thy fearful symmetry?[17]

Jeremy Webber's analysis has shown that there is nothing fearful about a *lack* of constitutional symmetry. I would only add that it may well require an "immortal hand or eye" to achieve perfect symmetry in something as complex as a constitution designed to govern millions of diverse human beings for decades or centuries; so long as mortal hands hold the drafting pens, asymmetrical constitutions are the best we can reasonably expect.

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[14] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3; *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter Canadian Constitution].

[15] See *Reimagining Canada*, *supra* note 2 at 231-32.

[16] See *ibid.* at 232-59.

[17] W. Blake, "The Tyger" in *Songs of Innocence and of Experience* (New York: Orion Press, 1967) at 42.

In his concluding discussion of realistic ways out of Canada's constitutional morass, Professor Webber makes an important point about the future of wholesale constitutional revision:

> Given the collapse of the Meech Lake and Charlottetown rounds, we have probably seen the last of full-scale constitutional reform for the foreseeable future. If we achieve reconciliation, it will probably be through adjustments within the existing framework (at least in the short term). That framework allows substantial, though not unlimited, scope for change. Moreover, adjustments can be made more easily by subconstitutional means than by formal amendment. Informal adjustments do not require the same degree of consensus ... They do not have the same prominence, the same symbolic charge, or the same high stakes as formal amendment.[18]

He then offers some suggestions concerning "subconstitutional" ways in which such objectives as reconciliation between francophone-Québécois and other Canadians and accommodation of the aboriginal peoples' self-government aspirations can be achieved without formal constitutional amendments. They are good suggestions, worthy of careful consideration by everyone whose interests are affected. Here again, to some extent, is a multiple-cake situation. We can consume a considerable number of small *de facto* constitutional reform cakes without nibbling at the formal wedding cake we call the Canadian Constitution.

Unfortunately, that will not be enough. Symbolism and formal recognition are the essence of some of our thorniest constitutional difficulties. Québécois will probably be dissatisfied with a *de facto* conferral of distinct status (which, to a very large degree, they already possess). They seek, and in my view are entitled to, formal recognition in the text of the Canadian Constitution that they are a distinct society within the Canadian confederation. Canadians of aboriginal ancestry similarly seek, and are similarly entitled to, a forthright acknowledgement in the Canadian Constitution of their inherent aboriginal right to self-government. These are not matters for quiet back-room deals; they require formal public pronouncement. To that extent, we will simply have to eat part of the wedding cake.

Jeremy Webber acknowledges that some such formal amendments must be made. His splendid book should help persuade Canadians that those changes are vital to Canada's future constitutional health, and that if politicians have the mettle to make them, there will be nothing to fear from the bogey-man of constitutional asymmetry.

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[18] *Reimagining Canada, supra* note 2 at 261.