
A Western Perspective on the Constitution

by Allan E. Blakeney

Canadians are always talking about the Constitution. Sometimes the decibel count is low. Sometimes it is high. Currently it is very high. The present difficulties can be traced back to the constitutional settlement of 1980-82. Canada amended its constitution in 1982 to provide an amending process which ended the embarrassment of using the Imperial Parliament in London as the amending vehicle. We also added a Charter of Rights and Freedoms and made other changes respecting the rights of aboriginal peoples, and the equalizing of financial capacity of provinces. The changes were, eventually and reluctantly, accepted by all provincial governments but the Quebec government. These events have produced two radically differing views of how they were brought about. Leaders in Quebec declared that Quebec had been excluded from the Constitution by "English Canada."

Provinces like Saskatchewan regarded the constitutional crusade that ended in 1982 as almost wholly a mission of Pierre Trudeau. Many Saskatchewan MPs and the Saskatchewan government opposed it as vigorously as we could until the final days, when we saw no alternatives but to agree. The changes were supported in the House of Commons by 73 of the 75 Quebec MPs. As we saw it, and still see it, if the government of Quebec was excluded (and it is certainly true that it did not agree to the proposed changes), the excluding was done primarily by Mr. Trudeau and the Quebec MPs. This was not a French-English issue but rather one of two views of Quebec in Canada, both views coming from Quebec leaders.

One, Pierre Trudeau, had been elected in 1980 with the largest number of votes ever gained by any party in any Quebec election, federal or provincial. The other, René Lévesque had won two successive provincial elections in 1976 and 1980 with respectable majorities.

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This brings us to recent events. By 1985, both the federal Liberals and the Parti Québécois were gone from office, replaced respectively by Progressive Conservative Brian Mulroney in Ottawa and Quebec Liberal Robert Bourassa.

Mr. Mulroney promoted the Quebec view of the 1982 events, that Quebec had been excluded from the Constitution by English Canada – and set out, in his words "to make Canada whole again". He launched the campaign for the Meech Lake Accord. Few projects have ended more disastrously.

I will not outline the entire contents of the Meech Lake package. I mention three. One, there was a provision for recognizing Quebec as a "distinct society" and interpreting the constitution in that light. Two, there was a limitation on the ability of the federal government to launch new programs which are paid for by both federal and provincial governments – shared cost programs in our constitutional parlance. Three, there was a change in the formula by which the constitution can be amended. The constitution already has a short list of provisions which can be changed only with the consent of the House of Commons and the legislatures of all 10 provinces. Meech Lake would have added to this list. In particular it would have required that any reform of the Canadian Senate have agreement of all the provinces.

The Meech Lake constitutional proposal failed to receive approval of all provincial legislatures in the required three year period. Legislatures in Manitoba and Newfoundland did not give approval.

Failure of Meech Lake

With the wisdom of hindsight we can see that the Meech Lake effort failed because the architects failed to appreciate fully the changes in the Constitution that had been made by the *Constitution Act of 1982*.

Before 1982 the Constitution was changed by the House of Commons and the Senate passing resolutions and sending them off to London to be passed by the Imperial Parliament as amendments to the *British North America Act of 1867*. The custom – convention to use the lawyers word – was that if the changes affected provincial law-making power then provincial

governments had to consent. The operative word here is governments. This consent could be from a cabinet or even a Premier. It was very informal. Rumour has it that Alberta gave consent to constitutional changes to make unemployment insurance a federal rather than a provincial responsibility by a phone call from the then Premier Aberhart.

Before 1982, the Constitution was almost wholly a set of rules that (1) regulated the institutions of government – House of Commons, legislatures, courts, and (2) divided law-making powers between federal and provincial governments. Ordinary citizens did not look to the Constitution to give them rights. Their rights were set out in the Canadian Bill of Rights and the provincial Human Rights Codes or Bills of Rights. These were special statutes but were not part of the formal Canadian Constitution.

The Constitutional changes of 1982 added the Charter of Rights and Freedoms and set out specific rights for women, disabled people, aboriginal people, language minorities, multicultural groups – the list is long. Many of these people felt that their rights were included in the 1982 Constitution after a hard battle on their part.

Many of these groups had taken part in the intense lobbying which surrounded the joint Senate-Commons Committee hearings – hearings which were nationally televised – as the draft charter was debated and changes proposed almost daily.

Now in 1987 comes Meech Lake. The architects apparently assumed that they could carry on in the informal pre-1982 way, where, effectively, only Parliament and Provincial premiers were involved. They appeared to assume that because the Meech Lake Accord had been agreed to by the Prime Minister and all ten provincial premiers that it was a done deal. But the Constitution now required that each provincial legislature approve the changes. The consent of a provincial premier or the provincial cabinet was not enough. Members of legislatures tend to get nervous when they are called upon to pass something that they feel their voters oppose. And opposition to the Meech Lake package was growing. So there was some hesitation. During the hesitation period, three governments were voted out, New Brunswick, Manitoba and Newfoundland.

Why did public opposition grow? Primarily, I believe, because there was a public perception that the Accord was a back-room deal by 11 men who were meddling with “our constitution without consulting us”. The women, the multicultural and the aboriginal groups who had acquired a strong sense of ownership of the Constitution in 1982 felt that they were being robbed of their rights by a clandestine deal.

So, the requirement of formal legislative approval, and the growing opposition of groups who felt that their 1982 rights were being compromised, eventually doomed the Accord. Premier Filmon of Manitoba found strong opposition to the deal among his voters. His legislative members were looking for ways to delay the process. And they found them.

One of the groups who felt that their constitutional concerns were being ignored was aboriginal peoples. One of the members of the Manitoba legislature was an aboriginal leader, Elijah Harper. He skilfully used legislative rules to delay the legislative processes.

The lessons to be learned from the Meech Lake failure seem to be two: (1) No wholesale amendment is likely to succeed in the near future unless it responds to the concerns of most of the interest groups in one package. Thus Quebec’s concerns, aboriginal matters, senate reform (dear to many people of the hinterland) assurances that the Charter of Rights is not weakened – will probably all need to be addressed. Not an easy task. (2) There will need to be a great deal more public involvement. Public hearings, perhaps plebiscites would seem to be called for. Certainly there will need to be many more opportunities to lay the issues before the public. The public must, in due time, come to believe, not that a secret deal is being struck, but rather that the politicians and others are talking the issues to death and should get on with it. Only then will the public permit a final settlement, inevitably a compromise. Where does this leave today’s Canada.

Strength of Quebec Nationalism

The first point to be made is that there has been a sharp reaction in Quebec to the failure of the Meech Lake initiative. Even though much of the opposition to the Accord was based on other grounds – resentment by aboriginal peoples that their concerns were not dealt with, fear that future shared cost programs were all but doomed, opposition to making the constitutional amending formula even more rigid and thus making impossible needed Senate reform – to name but three – the rejection of Meech Lake was widely regarded in Quebec as a rejection of any recognition of Quebec as a distinct society.

The result has been a surge of Quebec nationalism stronger than at any time in history. As I see it nationalism, and particularly separatism, does not have the enthusiastic and emotional public support that it did in the heady days of René Lévesque between 1976-80. And if you believe that no quasi-revolutionary movement such as one to separate Quebec from Canada can succeed without a charismatic leader, then perhaps

separatism is not as strong as I suggest. But, unlike 1980, this time the artists, the students and the other separatists of the heart in the separatist camp are joined by a surprising number of senior business people.

This is a new breed. After the "Quiet Revolution" of the 1960s Quebec set out to educate the engineers, scientists, accountants and business administrators that French Quebec so sorely lacked. Now thirty years later these people have largely displaced the anglophone business establishment as Quebec's business leaders. This new cadre of leaders are disgusted with the economic management of the federal government and convinced that in a free trade environment the Quebec economy could go it alone. These business leaders have formed close links with the Quebec government to plan common objectives. The alliance – almost European in its style is often called Quebec Inc.

So the fear that separation will carry a heavy economic price tag is not so keenly felt as during the 1976-1980 period which ended in the 1980 referendum.

The Indifference of English Canada

Canadians who do not live in French – English Canadians for these purposes – are suffering from constitutional fatigue. I had a predecessor as Premier of Saskatchewan who was asked what Saskatchewan people felt about the Constitution. His reply was that if he asked the average Saskatchewan citizen what his (or her) 100 most pressing problems were, the Constitution would rank 101. It has moved up a bit since then, but is not uppermost in the public mind of English Canada.

There are pressing economic problems stemming from massive governmental fiscal mismanagement for over 10 years and now from the general recession and (perhaps) from the effect of the free trade deal. In any case, in an economic and fiscal sense English Canadians are suffering from a perceived prolonged lack of competent Canadian leadership.

On constitutional issues there is a sense of weary disinterest. The Meech Lake Accord was promoted as something English Canada owed to Quebec. There was a guilt trip aspect to the campaign – a guilt which English Canadians did not feel, and do not feel, and now are unwilling to accept.

So that, increasingly, we hear in Western Canada and in Ontario comments like "well, if they want to go. Lets get down to negotiating the divorce". This is far from pervasive. But it is heard more frequently than anyone would have thought credible short months ago.

These are early days and it is far too early to predict the outcome of likely future negotiations. But never had we had such an unpromising start.

Mechanics of Negotiation

The Quebec government is currently insisting on one to one negotiations with the federal government on constitutional change. That course of action is doomed to fail. The Federal government does not have any legal authority to negotiate on behalf of Parliament and the provincial legislatures. And no Prime Minister, particularly one from Quebec, has the moral authority to do so. It is virtually impossible to conjure up a basis for negotiating either the separation of Quebec from the federal union or some form of sovereignty association except by using the constitutional structures and provisions now in place. And these have been damaged at least temporarily by the failure of the Meech Lake initiative. It is very likely indeed that interest groups across Canada will insist on being consulted as they were not during the Meech Lake negotiations and that provincial legislatures, in response to this pressure, will set up task forces and legislative committees to provide for this consultation. This is not the environment for delicate negotiations about Quebec demands, – demands which are supported strongly in Quebec but little understood elsewhere. It is perhaps possible that there may be some resort to national and provincial referendums but these will have no legal force and may or may not be morally persuasive. No simple way around the procedural pitfalls is evident.

Future

What will be the outcome of the looming confrontation? The future is not easy to predict but let me sketch a few possibilities.

- The Go Option - The Quebec provincial government will put forward a proposal for separation, will negotiate it in a preliminary way with a federal government, not necessarily the present one, and a separation arrangement will be confirmed by legal constitutional steps involving Parliament and all provincial legislatures.
- The Sovereignty Association Option - This would be the same as the Go Option except that the end product would be some form of sovereignty association. This I regard as the least likely option. Sovereignty association might be achieved, but I believe that full sovereignty for Quebec (or some area based in Quebec) will need to come first and any association negotiated later.
- The Failed Go Option - This postulates that efforts to negotiate separation (or sovereignty-association) run into acrimonious

difficulties and a confrontation ensues. The issues to be resolved would include boundaries, division of assets and the national debt, use of the St. Lawrence River and seaway, east coast fisheries and on and on. Issues enough and more to produce a deadlock. Splitting countries that have in some sense existed for 200 years is not an easy task and we should not assume that Canadians can achieve this result without violent confrontation where few countries have succeeded. Canada too could fail.

- The Stalemate Option - This involves the government of Quebec putting forth its proposals and these being, in effect, rejected. Negotiations continue. Quebec may or may not have a referendum. But no legal basis for separation is arrived at, and the issue is not pressed to confrontation. The result will be stalemate. At least for the time being. An unhappy result but perhaps the best of some unpalatable choices.

It is generally agreed that economically Quebec does well in Confederation. And in times of recession when economic issues dominate the public agenda, there is less pressure to pursue separation, which is a cause of the heart more than a cause of the pocketbook. Clearly much will depend upon the deep down desire of Quebec people to be out of Canada.

In some ways Canada had been a country of sleepy accommodation prior to World War II. Happy in our state of being not American we were like the Miller of the Dee "We envied nobody no not we, and nobody envied us". But after World War II we enjoyed a national renaissance spurred by pride in our wartime performance and quite phenomenal industrial expansion. We began to develop a sense of being Canadian. The national hospital and medical care plans and other national social safety net measures played a

major part in this. It was added to by adopting the Charter of Rights and Freedoms in 1982. We came to know what it meant in a positive sense to be a Canadian.

But we are finding that we have not one but two senses of identity. The national health plans are overwhelmingly popular in English Canada but in Quebec are regarded by many as an invasion of provincial legislative rights – a position totally uncomprehensible to ordinary English Canadians.

Similarly with the Charter of Rights and Freedoms, English Canadians have clasped it to their bosoms. Many Québécois regard this too as an unreasonable and unnecessary invasion of Quebec's constitutional jurisdiction.

There is no doubt that the views I have ascribed to English Canadians are firmly held by ordinary citizens – indeed more so than by the elites who may appreciate constitutional niceties. What is less clear is whether the views in opposition to the national safety net plans and the Charter of Rights are as firmly held by ordinary citizens in Quebec as they are by the elites. Constitutional issues are issues of popular debate in Quebec. Just how deeply views are held is less easy to assess.

Much will depend upon the deep down desire of Quebec people to be out of Canada. As opposed to a desire that their language, their culture and their way of life be fully respected in Canada. The latter desire can be accommodated within a united Canada. The former clearly cannot.

I remain optimistic and somewhat confident that this difficulty in our national life will be surmounted. However, at times I am not sure of the basis for such confidence!▲