Turning the Page (1)

Ten Lessons From The Referendum

by Roger Gibbins and David Thomas

It is not our intent to assess why the constitutional referendum failed. Rather, we will address the lessons to be learned regarding the future use of constitutional referendums. We will suggest that their use may become more problematic, not less, and indeed will emerge as a serious impediment to change. More specifically, the peculiarly Canadian rules of the referendum game as now played, and the nature of our constitutional conflicts, may make the referendum a particularly inappropriate mechanism of change or choice. At the same time, the demand for popular participation will remain strong, particularly if Quebec continues to use the referendum as its method of constitutional choice. Hence the dilemma.

> ***We face a serious dilemma. The uniquely Canadian referendum process is probably unavoidable in the future, unworkable in many of its important details, and totally unsuited to the avoidance of our longstanding and extremely complex abeyances.***

In thinking through the recent Canadian experience, it is important to note that the October 26 referendum was not of the sort held in relatively homogeneous states such as Ireland or France; even in these cases referendums create serious difficulties, as was evident with the Maastricht vote in France and the divorce referendum in Ireland. Other federal states which use a constitutional referendum process, such as Switzerland or Australia, operate on the basis of either a simple majority (of cantons) or a qualified majority (two thirds of the states). In Canada, however, a unique set of rules produced a federal referendum based on a provincial vote and requiring unanimity.

It was the provincial governments in Alberta, British Columbia and Quebec which made the Canada/Quebec referendum inevitable. (Quebec, of course, remained a unique case by rolling only the timing of its referendum into the national campaign.) They had each put in place legislation requiring a referendum before legislative ratification. It appeared in early 1992 as if other provinces — Saskatchewan, Manitoba and Newfoundland in particular — were likely to follow suit.

Thus in a quite extraordinary way our constitutional wheel has come full circle. During the patriation debate of 1981-82, the federal government used the threat of a preemptive national referendum to its advantage. Such a referendum was feared by the premiers, who did not want to campaign against the Charter of Rights. It was only Lévesque who, when goaded, took up the challenge and in so doing split up the "gang of eight" who were opposed to the Trudeau package. In 1992 the tables were turned and, in a sense, the chickens of 1982 came home to roost. To our already very provincialized amending formulae has now been added a final power play by the provinces via direct appeals to their electorates.

The end result has been a unique referendum process with very troubling implications for future constitutional politics. Before turning to this general conclusion, let us briefly consider ten more specific lessons that might be drawn from the October 26 experience.

Lesson 1: The 1992 precedent will be very difficult to ignore.

If our provincialized national referendum process is so complicated, requiring the winning of what Jeffrey Simpson has called ten poker hands in a row, why won't future governments just ignore it and pursue ratification of constitutional amendments through legislative action alone?

In practice, this would be very difficult to do. There is little doubt that the public will see October 26 as a binding precedent, and it would be all but impossible politically for provincial governments to rescind the referendum legislation now in place. Certainly it is

Roger Gibbins is Professor of Political Science at The University of Calgary. David Thomas is Chairman of the Department of Economics and Political Science at Mount Royal College.

unlikely that the Rest of Canada, having seen how effective a referendum can be against Quebec, will ever let Quebec threaten to use a referendum unilaterally, unopposed by a popular vote elsewhere. The use of referendums outside Quebec becomes a way of underscoring provincial equality and protecting symmetry within the federal system. Referendums will also be supported by groups who might feel excluded from intergovernmental and/or legislative politics, or who might lose in those forums and will then appeal to the public as a court of last resort.

Lesson 2: Referendums cannot be used to pick and choose.

In the public debate over the Charlottetown Accord there was considerable frustration that voters were unable to pick and choose among the constitutional offerings. The basic governmental strategy — to produce an inclusive document, replete with bells and whistles, that would have something in it for almost everyone — met with considerable public opposition. However, it is not clear that this concern can be addressed in the future.

Although it would have been possible to trim down the Accord by cutting out non-constitutional elements, the basic problem is that the Accord was a balanced package. If voters had been able to pick and choose, the results could have been chaotic. For example, we could have had Senate reform approved in the West and rejected in Quebec, with the distinct society and 25% seat guarantee for Quebec winning in Quebec and going down to defeat in the West. We would then have been left with a dog's breakfast, a constitutional mishmash acceptable to no one.

The only way in which elements of a future accord could be uncoupled would be to adopt a sequential strategy, to go to the Canadian people first with one element of the deal, then come back again with the second element, and then the third, and so on. However, this strategy holds out no greater hope than a one-time vote on the separate elements. Region A would not accept element X until it could be assured that Region B would accept element Y, and so forth. Thus it will be all but impossible to uncouple constitutional elements that form a package of balanced tradeoffs; a referendum on Senate reform or the recognition of Quebec as a distinct society alone would not fly.

Lesson 3: Either partisanship or nonpartisanship is the kiss of death.

It would be extremely difficult to win a national referendum unless the major national parties all supported the package, as they did in 1992. Given the regionalized nature of partisan support and the provincialized amending formula, partisan discord would be the kiss of death for a package requiring consent in ten electorates across the country. Unfortunately, nonpartisanship poses an equally formidable problem. In a nonpartisan campaign, partisanship cannot be used to sell the package, and party organizations have no incentives to get out the vote or to sell the types of compromise packages that are commonplace in national election campaigns. If partisanship is neutralized, then voters are free to gravitate to specific issues in their assessment of constitutional proposals. Nonpartisanship sets up the type of campaign environment — death by a thousand cuts — that worked to the advantage of the No side in the 1992 referendum.

Lesson 4: Elite consensus is difficult to sustain in a national referendum campaign.

During the recent campaign the Minister of Constitutional Affairs, Joe Clark, stated repeatedly that we would be unlikely to see again the elite consensus found at Charlottetown. Yet creating this consensus in the first place is only part of the problem; the more difficult problem may be sustaining it during the national campaign. It appeared in late August that our elites had reached a consensus and we would be spared a vociferous debate about national values and identity. But the apparent consensus, and along with it public support, were quickly eroded. This happened not because elites were opposed by "the people" and not because members of the original consensus defected, but rather because the campaign mobilized competing elites. To a degree, those competing elites were drawn from groups who felt excluded from the intergovernmental process leading up to the Charlottetown Accord, and such exclusion will be inevitable in the future.

It could be argued, admittedly, that the erosion of support was due to voter alienation and angst, especially among those lower down the educational and socio-economic ladder. Nevertheless, it is clear that the charge against the Accord was led more by disaffected elites than by an amorphous disaffected public. Apart from their exclusion from government, Pierre Trudeau, Preston Manning, Jacques Parizeau, Deborah Coyne, and Sharon Carstairs shared an elite status indistinguishable from those gathered around the table at Charlottetown.

Lesson 5: We cannot neutralize the impact of personalities.

One of the concerns raised during the recent campaign was that many Canadians might use the referendum to express their disapproval of incumbent politicians, in their own province or elsewhere. For example, the No vote may have been increased by labelling the

Charlottetown Accord the "Mulroney deal." At the very least, the prime minister's lack of popularity was an impediment to the Yes campaign. However, it is unlikely that anything can be done about this type of contamination. Indeed, we would suggest that future constitutional referendums will likely be held in conjunction with federal elections, if only to avoid the very considerable cost of stand-alone referendums. (The administrative cost of the 1992 Canadian and Quebec referendums has been estimated at approximately $165 million.) This strategy would make particular sense if future referendums were more narrow in scope, and tackled very specific aspects of constitutional reform, much as Australian constitutional referendums have done. Yet in this scenario, the dynamics of a national election campaign, in which political leaders play a central role, would inevitably spill over into the referendum debate.

Lesson 6: The mechanisms of interstate rather than intrastate federalism have been strengthened.

The apogee of "interstate federalism" in Canada has been the First Ministers' Conference. Although First Ministers' Conferences are not a formal part of the constitutional process, they have played the central role as the premiers and prime minister have been expected to be the initiators of constitutional change. It might be argued, then, that the use of referendums will take power away from the FMC and the premiers, and thus strengthen the "intrastate" or centralizing mechanisms of the federal state. This would normally be the case, and Canadians may well feel that they have been empowered as citizens. However, such an outcome requires a truly national referendum campaign and this is difficult to achieve when the rules of the game create provincialized electorates. The Yes side was forced to run a national campaign in 1992, but the No side was not and, as a consequence, found itself in an easier strategic environment. When the Yes side tried to exploit the provincialized electorate, disaster ensued. Witness here the experience of Mr. Sihota when he tried to defend the Charlottetown Accord in British Columbia by arguing that Quebec had caved in on the deal.

Lesson 7: Referendums have not worked to Quebec's advantage.

The national referendums in 1898 (prohibition) and 1942 (conscription) were both defeats for Quebec, particularly the latter. The 1980 Quebec referendum on sovereignty association did not provide the government of Quebec with a clear constitutional mandate, nor did it provide useful leverage on the Canadian state. Indeed, it led directly to the 1982 *Constitution Act* and the "betrayal" of Quebec. The 1992 referendum shows that our provincialized populations are not as accommodating of Quebec as are our provincial/federal elites. When premiers gather around a table they begin to see each other's points of view; they develop a better sense of the country's history and complexity. This does not happen in a referendum campaign.

Lesson 8: The referendum process is inappropriate for constitutional changes affecting Aboriginal peoples.

The October 26 referendum was particularly ineffectual in capturing the preferences of Aboriginal peoples. During the campaign there was considerable division of opinion within Aboriginal communities, and particularly within the Assembly of First Nations. In the referendum itself, many communities did not participate, many Aboriginal voters living off reserve and in urban settings were swallowed up in the provincial vote count, and where a count could be done of Aboriginal preferences, those preferences were often at odds with the constitutional position adopted by the Aboriginal leadership. In short, we do not know who speaks for Aboriginal peoples, but we do know that a national referendum is ineffectual as a ledger of Aboriginal preferences.

Lesson 9: We may have picked the wrong amending process in 1982.

We have put ourselves through all sorts of constitutional contortions, and have succeeded in creating a virtually unworkable amending formula, in order to avoid the overt recognition of Quebec's demand that it should possess a veto or, to be more positive, that its consent to major change be required.

Any move to the only other amending approach in sight, some sort of four region ratification, would meet very strong opposition. It would be seen as running counter to the doctrine of provincial equality asserted in 1982, restated in the Meech Lake Accord, re-emphasized in the Charlottetown Accord, and reinforced by a provincialized referendum process. It would be seen as a major concession to Quebec, without a *quid pro quo*. Yet such an approach has always been a highly recommended alternative. It formed the basis of the Victoria Charter of 1971, The Unity Task Force Report of 1979 recommended a four region ratifying referendum process, and the Beaudoin-Edwards Committee returned to the Victoria approach in its conclusions.

Lesson 10: In cases of confusion or doubt, the status quo will win.

This is not surprising. Alan Cairns noted in 1983 that the constitutional status quo "survives because no other constitutional option enjoys enough first choice support to replace it...it alone possesses the supreme advantage

of existence...."[1] In this case, failure of the referendum entrenched the arrangements arrived at in 1982, arrangements which still lack political legitimacy in Quebec. If the future use of referendums threatens to inhibit rather than facilitate constitutional reform, then the 1982 arrangements are likely to be further embedded with the passage of time.

In summary, future constitutional referendums may be difficult to hold and impossible to avoid. This dilemma, however, goes much deeper than the specific concerns mentioned above. More fundamentally, we might ask if referendums can be used to address the types of constitutional conflicts we face, to bridge conflicting national visions, and to accommodate quite different conceptions of the political community. Unfortunately, there may be constitutional conflicts for which referendums would be inappropriate and even dangerous. If this is the case, and if we are locked into constitutional referendums, are there some forms of constitutional change that should be avoided altogether?

This issue was touched on in Kenneth McRoberts' insightful analysis of the October 26 outcome. McRoberts argued that the Charlottetown Accord was fundamentally flawed in its response to the constitutional visions of Quebec and western Canada:

> For 30 years, the primary focus of Quebec's program for a "renewed federalism" has been to expand the powers of the Quebec government so that it can assume its proper role as a "national" government. In recent years, Western Canadians, with some Atlantic support, have championed reform of the Senate, preferably along Triple-E lines, to weaken Central Canada's hold over the federal government. One might have expected a trade-off — a Triple-E Senate for Western and Atlantic Canada, combined with an "asymmetrical federalism" through which Quebec would exercise powers that other provinces did not want. Instead, while the accord adopted these projects in form, it compromised them to a degree that many of their supporters could not possibly have accepted.[2]

Our own assessment of the Charlottetown Accord is in basic agreement with the above. However, McRoberts goes on to argue that an acceptable compromise was possible, and that governments must be willing to confront directly what Canadians are seeking. This runs counter to the view that constitutions should remain silent on matters which are inherently intractable. According to Michael Foley, mature and workable constitutions contain abeyances which one approaches and makes public at one's peril. Such abeyances are holes or "gaps of unsettlement" in a constitution, and "it is recognized that any attempt to define them would be not merely unnecessary or impossible, but positively misguided and even potentially threatening to the constitution itself."[3] Abeyances represent implicit understandings by which we preserve "an approximate appearance of internal coherence," but, in reality, matters have not been resolved nor have fundamentally differing points of view, or principles, been reconciled: they are simply ignored and set aside so that we may live to fight another day.

Abeyances are usually the product of long historical experience and accumulated practice, of which the public is but dimly aware. They will never be neatly set out in readable and explicable form, but exist in a "shadowy world" of complicity, loosely linked to political conventions and expediency. As such, they are exceptionally difficult to discuss and explain during a referendum debate. Merely raising them ups the ante so much that passions may reach a crisis point. It is almost impossible to explain why there cannot be a principle (such as equality) which "wins."

In Canada's case, abeyances include the question of popular sovereignty, the clarification of Quebec's distinctiveness, the problem of provincial equality, the resolution of the amending process (prior to 1982), and the definition of aboriginal rights. Such abeyances will not fare well when the searchlight of public debate is turned upon them. They may well appear too equivocal, and too dangerous to leave unresolved (and well enough alone). Hence abeyances are precisely those matters one does not want the public to sink its opinions into.

If we are to use referendums in the future, how are we to avoid drawing abeyances into public debate? How do we avoid spelling out what we know cannot be spelled out? How do we avoid providing textual certitude and clarity when any inability to do so will be seized upon by a small army of single principle exponents who will claim that x or y is being threatened by attempts to leave matters vague, generalized and contradictory? How do we keep abeyances under the constitutional rug, knowing as we do that referendum campaigns are a blunt and even dangerous tool to use on such deep-seated and emotionally powerful problems?"

Notes

1. Alan Cairns, "The Politics of Constitutional Conservatism," in Keith Banting and Richard Simeon, eds. *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983), 53.

2. Kenneth McRoberts, "Blame it on a fundamentally flawed accord," *The Globe and Mail*, October 29, 1992, p. A19.

3. Michael Foley, *The Silence of Constitutions* (London: Routledge, 1989), p. 9.