

June 2005

The Hebrew University
Faculty of Social Sciences
Department of Political Science

Canadian Federalism in Comparative Perspective

Instructor: David Cameron

Constituting Canada

The Failures of Meech Lake and Charlottetown

Dubi Kanengisser

Introduction

In November 1981, Quebec refused to endorse what later became the *Constitution Act, 1982*. Only a short time after the failed referendum of 1980, the *Parti Quebecois* could not accept what it perceived as utter disregard for Quebec's demands. Quebecers themselves also felt cheated by Prime Minister Trudeau who has promised prior to the referendum to advance constitutional amendments, and while these amendments were not spelled out, many expected them to include at least some acknowledgment of the "distinct society" of Quebec.

In 1985, Quebec's Liberals were voted into office, and quickly established their conditions for joining Canada's constitutional family: "(1) the explicit recognition of Quebec as a distinct society; (2) a guarantee of increased powers in immigration matters; (3) the limitation of federal spending power; (4) recognition of a right of veto; (5) Quebec's participation in the appointment of judges to the Supreme Court of Canada" (Remillard 1989).

These demands did not fall on deaf ears, as the Mulroney government, voted in in 1984, has already made clear its intentions of bringing about a reconciliation between Canada and Quebec. Thus began the Quebec Round of Canadian constitutional debates. The round culminated in the Meech Lake accord, an amendment to the constitution agreed upon at a first ministers conference, which was jubilantly ratified by the Quebec legislature soon afterwards. Quebec's move started the three year period during which the Parliament and all provincial legislatures had to accept the amendment. In 1990 time ran out, but Newfoundland and Manitoba still hadn't voted. The accord failed.

Shortly afterwards, a further round of constitutional deliberation took place, with the Conservatives' popularity in a prolonged and painful drop, second only to the drop in popularity suffered by Prime Minister Mulroney himself. Still, Mulroney was able to work out a second proposal, this time far more robust, meant to deal with all of the most pressing constitutional issues on the country's agenda. With the agreement of all

provincial and territorial leaders, the support of the heads of the aboriginal organizations and a wall-to-wall coalition in the federal Parliament, the proposal that was known as the Charlottetown accord was to be decided on by a national referendum held on October 26, 1992. Following possibly the greatest deliberative effort in Canadian history (Brock 1995; Noel 1994), three quarters of Canadians showed up to vote. They rejected the proposal by a majority of 55% (Cook 1994)

Why have these two constitutional accords failed? Is Canada inherently unable to define itself and its constitution? This paper will attempt to answer these questions.

Meech Lake Accord

The Meech Lake accord, as mentioned earlier, was the result of a constitutional round triggered by Quebec's refusal to accept the *Constitutional Act, 1982*. Shortly after patriation, Prime Minister Trudeau wrote to Premier Levesque following the latter's demands for a veto for Quebec and exclusive jurisdiction in the area of language and education. He said he would agree to join Quebec in seeking a Quebec veto or compensation for opting-out in all cases, but only if Quebec formally accepted the *Constitutional Act, 1982* and returned to the constitutional table in good faith (Hurley 1996). Trudeau previously stated that it was Levesque's own decision to give up on veto rights in the agreement of April 16, 1981. The communications between the two first ministers was terminated at that stage, and it took the replacement of both to resume talks under the far more substantial demands posited by Bourassa's Liberal government.

As mentioned above, five conditions were set by the government of Quebec for its acceptance of the Canadian constitution. The Meech Lake accord follows closely on the heels of these conditions, while attempting not to step on the toes of other provinces. It provides for an interpretation clause which defines Canada in terms of two distinct societies, one centered in Quebec and the other outside it; for a commitment to negotiate immigration agreements with any province that so wishes; for an active role of the

2 © 2005 All rights reserved Dubi Kanengisser

provinces in selecting judges to the Supreme Court, allowing Quebec to submit names from which the three civil law judges are to be selected, and any other province to submit names for the other six positions; for opting out of any future shared-cost programs under exclusive provincial jurisdiction, with appropriate compensations; and for unanimous consent of all legislatures on a number of amendment issues, as well as the possibility of opting out of any transfer of jurisdiction from the provincial to the federal level, along with appropriate compensation. Two more amendments are included in the accord: a commitment for a first ministers conference to continue constitutional debates on issues other than Quebec's demands, including Senate reform; and until such conference bears fruit, a commitment of the Federal government to nominate Senators from lists submitted by the provinces to which the vacancies relate.

Some of these provisions hide amusing and sometimes dangerous possibilities within. As former Prime Minister Trudeau observed, the immigration provision dictates that Quebec's share of total immigration to Canada must not go below Quebec's own relative weight in the population of Canada – "what happens if people don't want to go to Quebec? Presumably, that means the other provinces cannot take the immigrants they want, because they will be diluting Quebec's share, but, also, Quebec has a right to have 5 per cent more, and similar agreements may be signed with all other provinces. How you can guarantee 5 per cent more to all of the provinces is something I cannot work out" (Trudeau 1989).¹ But more seriously, the provision for appointment of Supreme Court judges could be used by an uncooperative Quebec to drain legitimacy out of the Supreme Court simply by not submitting names for the appointment of judges.

Popular criticism of the accord was divided into two types: criticism of process, and criticism of substance. Criticism of process posited that the practice of executive

¹ A similar blunder was made with the formula for House of Commons representation of the provinces in the Charlottetown accord, awarding Quebec at least 25 percent of the house regardless of its share of the population, but also demanding that no province shall have less than its share of the population of Canada – if Quebec goes under 25 percent of Canada's population, this would be a mathematical impossibility.

federalism, commonplace up to 1982, was no longer acceptable after the acceptance of the *Charter of Rights* and the amendment formula. The *Charter* brought into the political life a variety of what Alan C. Cairns called "Charter Canadians" (Russell 1992). These groups of disadvantaged citizens were given leverage by the *Charter of Rights* to demand a say in the constitutional debate, and to protest when the first ministers preferred the old ways of executive federalism. While the fate of the accord was still in the dark, Alan C. Cairns expressed his hope that "future first ministers will see themselves as guardians, not owners, of the constitution, and that they will view the Meech Lake procedures as a regrettable aberration ... To be Meech Laked twice would surely be considered 'cruel and unusual treatment or punishment'" (Cairns 1989). The amendment formula, on the other hand, established the power of provincial legislatures to vote down agreements achieved by the executive branch. But the Meech Lake accord was presented to the legislatures as a *fait accompli*, it was said to be, in the words of Lowell Murray, "a seamless web", and Premier Bourassa went even further in announcing that "Quebec will not consider any proposed changes that may arise out of public hearings in other provinces" (Russell 1992). This clearly contradicted Murray's brief to the special joint committee on the 1987 constitutional accord, on August 4, 1987, where he told senators and members of Parliament "[y]our public hearings will ensure that the text of the amendment is carefully scrutinized before adoption. If it should come to light that there are egregious errors in the drafting, we would have an opportunity to address them" (Murray 1989). With no room for changes to the amendment draft, the various legislatures felt they were being cowed into a flawed agreement by threats of Quebec sovereignty.

Criticism of substance was also voiced by many opponents of the accord, not least of all former Prime Minister Trudeau, who appeared before the Senate and delivered a crushing critique of the accord, blaming it of obstructing the national will and giving in to Quebec's threats without getting anything in return.

"The 1987 accord is unlike the parson's egg: it is not only bad in part, it is completely bad. I think it should be put out in the dust bin. And of course the Quebec nationalists will be pretty mad, and there will be some wishy-washy federalists who will be pretty mad, too ... Once again, these experts from Queen's or Toronto, or elsewhere, say that "Quebec is in a state of anguish since the 1980 accord because it wasn't in." Not so. Life went on in the province. Sure, the Quebec nationalists will be a bit frustrated if the accord does not go through. That's the real world: 'You don't always get what you want.'" (Trudeau 1989)

For the abovementioned Charter Canadians, the biggest cause for anxiety was the interpretation clause, stating Quebec's place as a "distinct society"² in a country which is characterized by two societies: the French-speaking centered in Quebec, and the English-speaking, centered outside it. Aboriginal associations as well as ethnocultural minorities were infuriated by what they saw as being left out of Canada proper and characterized as "uncharacteristic" of Canada. Thor Broda of the Ukrainian Canadian Committee said this clause was based on "the outdated and discredited concept of two founding nations" (cited in Behiels 1989: 321). Even women's rights activists voiced concern over the implementation of the "distinct society" clause regarding their gains of 1982, although their concerns had more to do with the fate of shared-cost programs under a Meech Lake amended constitution (Federation des Femmes du Quebec 1989).

Some provinces have also voiced disagreement with the accord on similar ground. Two provinces held out on ratification, demanding changes be made to the amendment proposal to safeguard *Charter* rights, ethnocultural diversity and the equality of provinces. It was, however, Clyde Wells, of Newfoundland, whose province has already ratified the accord prior to his election into office in 1989, who led the opposition to the accord, and warned that the accord would, at worst, "result in the destruction of the nation in a relatively short period of time" (Russell 1992). Wells had the Newfoundland legislature rescind its support for the accord, which brought the hold-out provinces count to three. After yet another first ministers conference, in which Prime Minister Mulroney

² One cartoonist depicted Premier Bourassa telling francophones outside Quebec that they are an extinct society (Behiels 1989).

promised the dissenting Premiers a further round of constitutional negotiations after Meech was ratified, New Brunswick finally gave in and ratified the accord. But Manitoba and Newfoundland held out. In Manitoba, the leaders of the legislature had agreed to bring the accord to vote, but Elijah Harper, the sole Aboriginal member of the legislature, had arranged for a filibuster which would last long after the deadline for ratification. In Newfoundland, though Wells had agreed to a vote in the legislature, he objected when Ottawa tried to pressure him to make the deadline, while promising to go to the Supreme Court for an extension for Manitoba should it remain the last hold out province. The Newfoundland legislature adjourned on June 22 without ratifying the accord, and by midnight, the accord was dead (Russell 1992).

It is important not to overstress the failure of Meech Lake. While *Quebecios* saw its rejection as a betrayal by English-speaking Canada, one must remember that none of the provinces actually rejected the accord. Manitoba would have, in all likelihood, ratified the accord were there time enough after the last first ministers conference. Newfoundland was also, grudgingly, on its way to ratification. While many Canadians saw the Meech Lake accord as flawed, its acceptance into the Canadian constitution was but a hair's breadth away. Trying to learn the "lessons of Meech Lake", therefore, may be a risky business (Cairns 1992).

Charlottetown Accord

If objection to the Meech Lake accord outside Quebec seems almost self-explanatory, the impressive failure of the Charlottetown accord at the referendum polls appears to be more complicated. Constituting the most extensive effort in Canadian political history to incorporate the public in constitutional deliberations (Noel 1994), the accord was a tight package designed to please everyone, but eventually it managed to lose the vote in most provinces, and garnered an all-Canada support rate of merely 45 percent (Cook 1994).

Unlike the Meech Lake accord, the Charlottetown accord was not a draft text for constitutional law, but rather a set of guidelines and commitments, to be fashioned into constitutional law after acceptance by the public. It tended to a long list of constitutional concerns, including a Canada clause defining the Aboriginals and ethnocultural communities as part of the fabric of the Canadian people; institutional reforms in the Senate, the House of Commons, the Supreme Court and other institutions; federal spending power and the distribution of jurisdictions; the amending formula; and a large section devoted to the Aboriginals, granting them self-government under an independent and equal order of government.

Trying to explain the failure, some observers have pointed to public dislike of the Conservative party by the time of the referendum, and particularly of Prime Minister Brian Mulroney (Clark 1994). Indeed, polls taken before the referendum placed Brian Mulroney as the least liked key-player politician of the time, rated 30 on a 0-100 scale where 50 means indifference. For comparison, the most highly rated politician in this poll was former Prime Minister Trudeau, who opposed the accord, and was rated 57 (Johnston et al. 1996). But there must be more. The same group of researchers also found a sharp decline in support for the accord in the weeks preceding the referendum, with 'yes' votes among the decided reaching as high as 56 percent in Quebec and 70 percent nationally in early September, 1992, before the drop began (Johnston et al. 1996).

Further confusion arises from the distribution of votes across the country. With the exception of Nova Scotia, the Maritime Provinces voted overwhelmingly for the accord, with over 60 percent support in New Brunswick and Newfoundland, and over 70 percent in Prince Edward Island. Nova Scotia and Ontario were more equally divided, with just under 50 percent in the former and just over it in the latter. Another yes majority was achieved in the Northwest Territories with over 60 percent. Among the other provinces, though, the yes vote did abysmally: from 44.7 percent in Saskatchewan, to as low as 31.7

percent in British Columbia. In Quebec, the yes votes comprised only 43.3 percent (Cook 1994).

It is therefore misleading to speak of a "Rest of Canada" in this context: English-speaking Canada was thoroughly divided on the subject of the Charlottetown accord. If ROC's rejection of the accord is a signal of an incipient ROC nationalism (Cairns 1994), then this nationalism is currently limited to the west. This nationalism can be construed as ultra-Canadianism, reactionary to Quebec's perception of itself as distinct and possibly separate from Canada (Gibbins 1995). As Johnston et al. (1996) have shown, there's a strong correlation between sympathy for Quebec and support for the accord. The west, with sheer distance from Quebec, only a small francophone community and a need to assert itself as fully Canadian – if need be by stripping the Quebecers from that title – was a prime candidate for rejection of Charlottetown.

The question remains how is it that precisely those who harbor the least affection to Quebec are the ones who joined hands with Quebecers in toppling the accord.

Quebec's disapproval of the accord was almost a given. Of the five conditions that were the basis of the Meech Lake accord, only limitations on federal spending power and increase in powers over immigration issues were fully accepted. The distinct society clause was diluted in a more general interpretive Canada clause, which did describe Quebec as a distinct society, but, though not in so many words, also stated that everyone is distinct. Supreme Court involvement was promised in section 19 of the accord, but without any direct reference to Quebec's particular role. Finally, the veto rights demanded by Quebec were severely limited compared with the gains of Meech Lake, though compensation was assured for opting out of jurisdiction transfers. This failure in achieving anything near Quebec's original demands was only highlighted by the significant gains of the Aboriginals (Cairns 1994). Indeed, except for a "bleep" in the polls in early September 1992, the *Quebecois* vote was consistently under the 50 percent mark (Johnston et al. 1996).

The western vote, on the other hand, was less decisive from the beginning. For the better part of September, polls have predicted a 'yes' victory in all the Prairies, although British Columbia began dropping sooner (Johnston et al. 1996). As Noel (1994) remarks following allegations that the west voted mainly on anti-Quebec sentiment and without knowledge of the particulars of the accord, it is unlikely that several weeks after the formal campaign began, Canadians in the west were less knowledgeable than they were before it, nor can it be said that the results earlier on were a show of support for Mulroney, whose party was already trailing behind Manning's Reform party west of the Ontario-Manitoba border.

Paradoxically, it was the Canada clause, which Quebecers saw as a breach of their demand for recognition as a distinct society, that westerners also saw as anathema to their pan-Canadian cause. In Preston Manning's own words, "Canada's national symbol has become the hyphen, rather than the maple leaf: 'Its federal politicians talk incessantly about English-Canadians, French-Canadians, Aboriginal-Canadians, ethnic-Canadians, but rarely about 'Canadians period'. It has become patently obvious in the dying days of the 20th century that you cannot hold a nation together with hyphens'" (Gibbins 1995). The clause that was to define Canada, then, instead dissected it into separate components – and what more, this dissection trumps over Charter rights, the equalizing power of the *Constitution Act, 1982* (Baines 1992). It therefore seems that what leaders thought was the single most redeeming point of the process of achieving the Charlottetown accord – the inclusiveness of interest, ethnocultural and national groups, was in fact its bane in the eyes of many Canadians, who saw their equalities of individuals and of provinces ravaged by competing perceptions of equality of nations and collective rights (Noel 1994).

Surprisingly, then, while Quebec rejected the accord for the same reasons it refused to accept the 1982 constitution, the west (and partly Ontario as well) rejected it for the same reason that it rejected the Meech Lake accord, namely, that the so-called Canada round

9 © 2005 All rights reserved Dubi Kanengisser

was still centered on taking Canada apart rather than putting it together. In the name of keeping the federation intact, the leaders of Canada gave up on doing the same for Canadians as a nation.

Conclusions

In 1995 the *Parti Quebecois* initiated the second sovereignty referendum in Quebec, which was rejected by a minute majority of 50,000 votes. With Canadian party politics in the throes of an unprecedented crisis, and with a population sick and tired with constitutional accords, the referendum seems to have been the swan's song of mega-constitutional debate in Canada. However, signs which may predict the return of the constitutional issue to Canada's agenda seem to be proliferating. The unification of the Canadian Alliance with the Progressive-Conservative party and the subsequent stabilization of the political arena was the first step, with recent polls predicting the Liberal's decade long dominance over the federal Parliament coming to an abrupt end. Another omen is recent voices in the PQ contemplating the re-adoption of a commitment to hold a referendum soon after the next provincial elections. When joined with anti-Liberal sentiments in Quebec, and polls showing unprecedented support for sovereignty, this turn of events may signal a repeat of the circumstances that led to the two previous rounds of constitutional debate.

It is important to note that the two amendment proposals discussed in this paper were far from being the only ones to fall through. Four other amendments failed to achieve ratification before 1987, and two more were not acted upon by the relevant legislatures. Of the four amendments that were passed between 1983 and 1994, only the *Constitution Amendment Proclamation, 1983* required the 7/50 amendment formula. It was ratified unanimously or nearly so by the Parliament, the Senate and all legislatures barring Quebec, which did not oppose the amendment dealing with Aboriginal rights, but refused to even consider it before Quebec's own demands were tended to. Three other

10 © 2005 All rights reserved Dubi Kanengisser

amendments passed in 1987, 1993 and 1994 required ratification only by the federal level and the legislatures of the relevant provinces (Newfoundland, New Brunswick and Prince Edward Island, respectively) (Hurley 1996).

It is clear that Quebec's shadow still looms over Canada's ability to constitute itself. Any change that requires unanimity will have to appease a more and more nationalist Quebec public, as well as lingering anti-Quebec sentiments elsewhere in the country. Sooner or later, the subject will resurface. However, doomsday predictions for the day after Charlottetown fails have also been disproved for the time being. Canada's constitutional odyssey, in Peter H. Russell's words, or "never-ending story" in the words of Alan C. Cairns, continues still.

Bibliography

Baines, Beverley (1992). "Why Lawyers Should Vote 'No'," in Kate Sutherland (ed.) **Referendum Round Table: Perspectives on the Charlottetown Accord**. Edmonton: Centre for Constitutional Studies. pp. 21-30.

Behiels, Michael D. (ed.) (1989). **The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord**. Ottawa: University of Ottawa Press.

Brock, Kathy L. (1995). "The End of Executive Federalism?" in Francois Rocher and Miriam Smith (eds.) **New Trends in Canadian Federalism**. Peterborough: Broadview Press. pp. 91-108.

Cairns, Alan C. (1989). "Citizens and Their Charter: Democratizing the Process of Constitutional Reform," in Michael D. Behiels (ed.) **The Meech Lake Primer: Conflicting View of the 1987 Constitutional Accord**. Ottawa: University of Ottawa Press. pp. 109-124.

Cairns, Alan C. (1992). **Charter Versus Federalism: The Dilemmas of Constitutional Reform**. Montreal: McGill-Queen's University Press.

Cairns, Alan C. (1994). "The Charlottetown Accord: Multinational Canada v. Federalism," in Curtis Cook (ed.) **Constitutional Predicament: Canada After the Referendum of 1992**. Montreal: McGill-Queen's University Press. pp. 25-63.

Clark, Joe (1994). **A Nation Too Good To Lose: Renewing the Purpose of Canada**. Toronto: Key Porter Books.

Cook, Curtis (ed.) (1994). **Constitutional Predicament: Canada After the Referendum of 1992**. Montreal: McGill-Queen's University Press.

Federation des Femmes du Quebec (1989). "Are Women's Rights Threatened by the Distinct Society Clause," in Michael D. Behiels (ed.) **The Meech Lake Primer: Conflicting View of the 1987 Constitutional Accord**. Ottawa: University of Ottawa Press. pp. 295-301.

Gibbins, Roger (1995). "Western Canada: 'The West Wants In'," in Kenneth McRoberts (ed.) **Beyond Quebec: Taking Stock of Canada**. Montreal: McGill-Queen's University Press. pp 45-60.

Hurley, James Ross (1996). **Amending Canada's Constitution: History, Procedures, Problems and Prospects**. Ottawa: Canada Communication Group.

Johnston, Richard, Andre Blais, Elisabeth Gidengil and Neil Nevitte (1996). **The Challenge of Direct Democracy: The 1992 Canadian Referendum**. Montreal: McGill-Queen's University Press.

Murray, Lowell (1989). "The Constitutional Politics of National Reconciliation," in Michael D. Behiels (ed.) **The Meech Lake Primer: Conflicting View of the 1987 Constitutional Accord**. Ottawa: University of Ottawa Press. pp. 13-28.

Noel, Alain (1994). "Deliberating a Constitution: The Meaning of the Canadian Referendum of 1992," in Curtis Cook (ed.) **Constitutional Predicament: Canada After the Referendum of 1992**. Montreal: McGill-Queen's University Press. pp. 64-81.

Remillard, Gil (1989). "Quebec's Quest for Survival and Equality Via the Meech Lake Accord," in Michael D. Behiels (ed.) **The Meech Lake Primer: Conflicting View of the 1987 Constitutional Accord**. Ottawa: University of Ottawa Press. pp. 28-42.

Russell, Peter H. (1992). **Constitutional Odyssey: Can Canadians Be a Sovereign People?**. Toronto: University of Toronto Press.

Trudeau, Pierre Elliott (1989). "Who Speaks for Canada?: Defining and Sustaining a National Vision," in Michael D. Behiels (ed.) **The Meech Lake Primer: Conflicting View of the 1987 Constitutional Accord**. Ottawa: University of Ottawa Press. pp. 60-100.