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MEECH LAKE: THE DEBACLE REVISITED

THE HISTORICAL CONTEXT OF MEECH LAKE
Doug Owram

I would like to begin with two quotes, both about the constitution and by Queen's professors. The first is from George Munro Grant, one of nineteenth century Canada's best known intellectuals. A constitution, he wrote in 1891, "is not like a coat to be thrown aside...but the very body which the inner life has gathered round it from the past and the present. The outward form can only be changed gradually by development to meet the changing environment and the growth of ideas, but it cannot be changed for another by revolution without grievous – perhaps irreparable – hurt to the nation's life."[1] The second is from a 1987 presentation of Richard Simeon, currently professor of Political Science at Queen's. "We must see it [constitution-making] as a continuous matter of unfinished business and not require that constitution-making...address all the possible issues".[2] Here are two very different concepts. Grant provides us with an almost classic Burkean statement about the national evolution as a slow, organic process. While Simeon is talking about normal entrenchment processes on an almost annual basis, Grant is talking about the slow evolution of the popular will. If I have a thesis for this paper, it is that George Grant understood constitutions better than Richard Simeon.

Underlying this view of constitution-building are the following premises. First, a workable constitution can only emerge when it contains the basic (and only the basic) values of a wide range of the populace. Fundamental law should not be employed to resolve issues that belong in the political arena. Second, the constitution, and the process of constitutional discussion, should be a stabilizing force. The fundamental law is the basis around which all other law, regulation and social policy revolve. If it is not reasonably stable, then nothing else can be.

What then has happened to constitution-making in Canada? For it should be understood that Meech is not an isolated incident but the culmination of an accelerating process. Increasingly, we have ignored George Grant's advice and have looked to constitutional reform as a quick fix. In historical terms, after 100 years of a relatively fixed formal constitution (and a minimalist one), Canada embarked on a series of ventures to find some sort of solution to national problems by rewriting the fundamental law – but this has made matters worse rather than better for two reasons. First, the reformism has destabilized the system. Second, this destabilization has occurred in part because we don't know what we want. In a sense, constitution-building in Canada has become another form of brokerage politics. In Grant's terms, we have been trying to change our coats on an almost yearly basis, alter them, or maybe pile coats one upon the other. The failure of Meech Lake and the legacy of bitterness and confusion it leaves, demonstrates just how critical the historical process has become.

This confusion and instability is of recent origin. Throughout much of its history the Canadian constitutional scene was surprisingly placid. In 1867, of course, the basic Canadian law was created via an act of the British Parliament and – if I might use a slight paradox – that constitution was very much in the tradition of a nation that did not believe in constitutions. It was concerned with government and governmental relations. In the British tradition, the protection of people was seen to be in the process of election and representation – not in a bill of rights. Over the next half century there was evolution but this was not by formal amendment but by judicial process. The courts set a series of precedents in place which adjusted (or maladjusted) the *Constitution* to new circumstances.

Until the 1920s, the 'Dominion status' of Canada made a British-based constitution appropriate. By 1926, however, the Dominions had achieved recognition of their equality within, and independence from, the Commonwealth. The natural step, it would seem, was to make Canada's *Constitution* a fully Canadian document. As is well known, this is not what happened. In 1931, Britain retained control of the *B.N.A. Act* at Canada's request. Thereafter, there were desultory attempts to do something about 'repatriation' and there were amendments made on occasion, but through all of this period Canadians continued to live within the more or less fixed framework of the 1867 act.

That began to change in 1960. The impetus here was undoubtedly the Quiet Revolution in Québec. That province, which until then had always argued that the 'true' interpretation of the *B.N.A. Act* would give Québec sufficient power, now began to take a more experimental, aggressive, but still nationalistic view, of the federal arrangement. In response, the federal government came forward with a series of proposals. In 1960, Justice Minister Davie Fulton of the Diefenbaker government proposed an

amending formula. It reappeared under the subsequent Pearson administration as the Fulton-Favreau formula. In both instances, the proposal died when Québec failed to support it.[3] Even at this point, constitutional reform was very limited in scope. The Fulton-Favreau formula involved a process of amendment and patriation. It did not, in itself, involve a restructuring of the *British North America Act*.

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Overall then, for the first century of Canadian existence, constitutional reform was limited. The *British North America Act* remained substantially untouched between 1867 and 1967 though, as mentioned, judicial interpretation had an impact. It was also limited in that the *Constitution* was still seen primarily as an issue of relationships between governments. It defined our federal relationship and even the amendments that had taken place, such as that involving unemployment insurance (1940), dealt with jurisdictional questions. Also, the absence of an amending formula gave both frustration to lawmakers and protection to those concerned about their position in Confederation. In effect, every province had a veto and Québec, most sensitive about its provincial rights, possessed a shield against excessive destabilization of the status quo. That was why Québec, which sought reform, also proved the most obstinate when it came to accepting reform.

Only after the centennial did Canada enter a new and much more unstable constitutional era. Various elements in English Canada and the federal government feared that Québec was moving rapidly toward separation. This fear was reinforced by the rise of terrorist activity by the F.L.Q., the creation of the Parti Québécois, and, after 1968, a national government under Pierre Trudeau that saw itself locked in an elemental battle with provincial forces for control of the soul of Québec.

The Trudeau administration challenged several basic assumptions about both French-English relations and the constitutional process. First, and most famous, the federal government contested Québec's long-standing role as the special protector of the French fact in Canada. Instead it sought a pan-Canadian solution to French-English relations that focused on redefinition of Canada rather than a federal-provincial balance of power. The centrepiece of all this was, of course, the *Official Languages Act* of 1968 but many other initiatives were also undertaken. Second, the Trudeau administration began to develop a series of relationships with the Canadian public which raised constitutional issues in areas other than that of federal-provincial relations. In two potentially contradictory moves, it saw people in their capacity as members of groups, initially linguistic but later ethnic as well, and, on the other hand, the administration became increasingly receptive to a formal statement of rights along the American or French models. This was revolutionary enough. What made it more so, however, was that Trudeau and his rationalist coterie of advisors had little sympathy for the 'go slow' approach to constitution-making. From the late sixties on, the idea of 'renewed federalism' became a catchword in the battle for the hearts of Québec Francophones.

By the 1970s, therefore, a new set of political forces were in place. For once the federal government challenged Québec's position as the exclusive voice of French Canada, and once new concepts of the relationship between the state, the people, and the constitution began to develop, a Québec veto became too costly. After all, should one province hold up important constitutional reforms that affected the basic relationship not just between governments but between the people and their government? This emerging partnership between government and populace thus downplayed provinces, and put provinces on the defensive during the often vicious battles over the 1982 *Constitution*. Ultimately, of course, other provinces made trade-offs obtaining, among other things, the notwithstanding clause in return for their signature. Québec, however, did not.

The refusal of Québec to sign the 1982 *Constitution* has often been dismissed by saying that Premier Levesque, as leader of a separatist government, could never have agreed. That is a red herring, however. Lesage refused to sign Fulton-Favreau and Bourassa refused to go along with the so-called Victoria Charter. It is unlikely either would have signed in 1982. For the point is that the 1982 constitution was revolutionary in two ways. First, an undertaking that began as part of 'Non' campaign in the 1980 referendum had, in the end, practically nothing to do with Québec and everything to do with a new concept of rights in Canada. Québec really did lose something along the way. It lost its veto over the constitutional process. Before, at the very least, the *BNA Act* had been a rock, however imperfect . Now there was much less certainty as group and individual rights clashed within the same constitutional framework – and as

the 'deux nations' concept gave way to pan-Canadian bilingualism.

The second problem – to return to Grant's analogy – is that Canada hadn't changed coats. Rather it seemed to be piling new coats upon old. For, by the early 1980s, there were three competing constitutional concepts. The first was the traditional view of the constitution as primarily a vehicle for resolving division of powers between governments. The second was a more modern version of power sharing. Under this definition, the groups involved had spread outward, from governments to various special linguistic and minority interests, all implying positive government action.[4] Finally, there was a long-standing view, but one new to Canada, that involved elevating individual rights from the common law to the entrenched *Constitution*. The result was a constitution with a good many contradictions, from forces within the *Charter* itself, from the tension between linguistic and individual rights, from the tension between group and individual rights, and from the notwithstanding clause which was a safety valve for the whole experiment.

For all of the contradictions inherent in the 1982 *Constitution*, there is a strong argument made by observers that English Canadians adopted quickly the principles of the *Charter* as a social contract in two senses: between the state and the individual, and as an affirmation of the bilingual-bicultural nature of Canada.[5] Québec, in contrast, had not signed the *Constitution* and never took the *Charter* to heart. It seemed, instead, a dangerous instrument for the weakening of the sense of group identity and the identification of that group with the province.

It is against this background that the Meech Lake talks were held in 1987. They were held, in theory, to 'complete' the process begun in 1982 by making Québec a signatory to the *Constitution*. And they were a continuation of the 1982 process in their assumption that constitutionalism was the path to peace, and in the radical notion that constitutions could be endlessly refashioned without disrupting the political and social equilibrium. At the same time, the Meech deal returned to an older conception in two ways. First, it concentrated on federal-provincial relations and did not deal with *Charter* issues, except by accident. That focus on governments was also reflected in the process. It was, as the phrase went, eleven politicians (add adjectives depending on which group feels shut out) behind closed doors. Second, the distinct society clause was, in essence, a recreation of the 'deux nations' concept of the 1960s.

Initially, neither of these points were sufficient to alienate the public. Indeed, the primary public reaction was confusion. The press generally saw the reconciliation of Québec as a good thing and portrayed Meech Lake as being in the train of national unity policies adopted by Pearson and Trudeau. People of good will should support it. In fact it is possible that the attachment to the *Charter* stressed by Cairns and others should not be overstated. The public seemed willing to set aside *Charter* issues, at least for a while, in order to bring Québec into the constitution.

However, problems began to arise and public confusion turned to distaste. Important to this hardening of attitudes was the absence of a strong pro-Québec constituency in English Canada for the first time since 1960. There were several reasons for this, but two stand out. Québec's passage of Bill 178 using the 'notwithstanding clause', seemed a violation of the informal understanding which had arisen in English Canada about the nature of renewed federalism. On a practical level, it betrayed the efforts of all those middle-class Canadians who had been sending their children off to immersion. Also important was that the left wing nationalists in Canada felt betrayed by Québec. Over the years this group had been among the strongest supporters of minority rights for Francophones. They saw it both as a matter of justice and as a part of the definition of Canadianism. Then, in 1988, Québec supported free trade and seemed to sell Canada out. The disenchantment could be profound.[6]

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Exacerbating all this was the reaction of the governments involved. Once concerns surfaced, they refused to treat them seriously. Even when the hold-out provinces forced the Charest Commission into being, the hearings were so obviously biased and, ultimately, so inconsequential that they only made the public more cynical. By the time the crisis arose in the spring of 1990, the politicians had lost their constituencies. This is crucial, even though the public had no immediate access to the discussions. For throughout the final

weeks, politicians asked how it was that a couple of small provinces, representing between them less than ten percent of Canadians, could resist. The answer was, of course, that Clyde Wells and Gary Filmon probably could not have withstood the pressure had they not realized their sentiments reflected widespread English Canadian opinion.

Now that Meech is dead, Canadian constitution-making is in a shambles. Even so, Meech did clarify two things. First, until Meech the strongest card a politician could play was to portray national unity as threatened. That card was played to the hilt in Meech and English Canada did not respond. It is equally unlikely to respond to deals it finds unacceptable in the future. Special status is unlikely to succeed in any form and Canada without Québec is now openly contemplated. Second (and here I must admit to a twinge of doubt), the old process is dead. I cannot imagine any politician undertaking constitutional reform in a manner as closed as the Meech Lake one. The doubt arises, though, from a fear that panic ensuing from a threatened referendum in Québec could lead to anything. Finally, constitutional reform itself probably should move more slowly than it has in the past. We have to absorb the massive implications of 1982 and sort out in our own minds all sorts of priorities of rights, identities, and federal-provincial balances required to make Canada governable again – for at the moment it seems frighteningly ungovernable and ungoverned.

Doug Owram, Department of History, University of Alberta.

1. G.M. Grant, "Review of Goldwin Smith, 'Canada and the Canadian Question'" *The Week* (April 1891).
2. Richard Simeon, "Political Pragmatism Precedes Democratic Process" in M. Behiels, ed., *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: Ottawa University Press, 1989) 125-35 at 135.
3. For a quick summary of post-1945 constitution making see Robert Bothwell, Ian Drummond, and John English, *Canada Since 1945*, Rev'd. Ed. (Toronto: University of Toronto Press, 1989) c. 28, 29, 32.
4. Of course there were elements of this in the minority religious clauses of the *British North America Act*. Those clauses, however, were not phrased in universal terms but related to specific provincial jurisdictions such as Manitoba and Québec. In effect, they were caveats to the norms of federal-provincial power sharing.
5. Alan Cairns, "Citizens and Their Charter: Democratizing the Process of Constitutional Reform," in Behiels, *supra*, note 2, 109-124.
6. See as an example Philip Resnick, *Letters to a Québécois Friend* (Montreal: McGill Queen's Press, 1990).

MEECH LAKE AND DEMOCRATIC POLITICS: SOME OBSERVATIONS

Allan Tupper

Canadian elites have long been concerned with constitutional reform. But only recently has debate about the democratic quality of constitutional change become prominent. Indeed, a noteworthy aspect of the Meech Lake round of constitutional negotiations was its explicit focus on such broad questions as how the Canadian constitution should be amended, the relative roles of governments, interest groups and citizens and the desirable extent of public participation in constitutional negotiations. As Reg Whitaker argues, our relatively late discussion of such basic issues reflects deeper weaknesses in the Canadian democratic tradition, notably a powerful elitism, and an anti-democratic strain in our political culture.[1]

My goals in this brief paper are threefold. First, I outline and try to explain briefly the various criticisms, during and after the Meech Lake negotiations, of "executive federalism" as the basic process of constitutional change. Second, I outline and assess some of the possible alternative methods for securing constitutional amendments. Finally, I speculate about some of the lessons the debate about the Meech Lake process might hold for the broader conduct of Canadian politics. Does the Meech Lake experience raise questions that are somehow unique to constitutional negotiations or does it reflect broader concerns about the quality of contemporary Canadian democracy?

Before probing these issues, a number of qualifications and assertions merit some attention and explanation. First, while I am a member of the large chorus of critics of Meech Lake's democratic qualities, I offer neither a panacea nor a powerful, overarching explanation of our recent constitutional experiences. Second, it is important to avoid falling into the trap of arguing that a reformed, more