

## IV WILL CANADA SURVIVE?

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### ROADBLOCKS IN THE WAY OF CONSTITUTIONAL CHANGE

Alan C. Cairns

My question is where do we go from here, and how do we get there? I am going to talk about three fundamental impediments which stand in the way of the two major outcomes which I suppose confront us; one, the outcome of a significantly renewed and modified federalism and, the other outcome, a two-nations solution of some kind.

Of the three issues on which I wish to focus, the first two relate to change within federalism, an outcome that leaves us with a recognizable federal system after the next constitutional round of negotiations. If that is the case, we have to come to grips with the role of the *Charter* as a symbol of constitutional identity in English-speaking Canada and therefore as a constraint in responding to Québec. Second, we have to question the principle of equality of the provinces. Can the *Charter* have a significantly differential, i.e. lesser, application in Québec, and can Québec have jurisdictional powers that other provinces don't? If we are to go that route, then English-speaking Canada has to shed its allegiance to the principle of the equality of the provinces that certainly a number of provincial leaders are deeply committed to, and also to the *Charter* as having a uniform coast-to-coast application, a strongly-held belief of many of the groups that contributed to the demise of Meech Lake.

My third issue is the impediment to achieving a two-nations solution outside of federalism inherent in the fact that English-speaking Canada does not have a constitutional existence. It is unavailable as a bargaining partner to negotiate its own passage to independence and the terms of its coexistence with an independent Québec. And it doesn't help us very much for Québécois spokespersons, secure in the fact that they have one provincial government that can speak for the Québec Francophone majority, to tell the rest of us to get our house in order. We are scattered across nine other provinces and two territories and identify with a central government which can't speak for "rest-of-Canada" because it has got to speak for the pan-Canadian dimension of our existence, which includes the Québécois, as long as there is a faint hope that we can continue to live together within one country. It is a fundamental structural dilemma, for which a solution cannot easily be found.

Let's return to the first two issues that we must confront if the attempt is made to accommodate Québec within Canada. That requires us to think again about the *Charter*, to remember that it had broad nation-building political purposes. It was a political document. The federal government supporters of the *Charter* did not believe that Canadians lived in a country where they were unusually likely to be subjected to abuse of power by state authorities. They were not driven by a cringing fear of the Canadian state, federal or provincial. Further, the *Charter* emerged in a country that had been deeply wedded to the British parliamentary tradition with its premise that political elites can be trusted. If they encroached on rights they would only do so after they had weighed the balance of necessities and made a prudential moral judgment. Although the *Charter* project drew sustenance from the global rights revolution, the impetus for its sponsors came from the high political purposes it was intended to serve.

Essentially, the *Charter* was viewed as an instrument to restrain centrifugal provincialism by establishing a base point of Canadian rights which provincial governments had to respect. Second, by its language provisions, especially in the field of education, it was an attempt to keep alive a conception of French Canada that extended beyond Québec. Prime Minister Trudeau, always a keen student of Lord Acton, feared that the coincidence of linguistic and territorial boundaries would lead to the break-up of Canada. So this aspect of the *Charter* was to keep alive Francophone communities in the midst of unsympathetic provincial majorities outside of Québec by requiring provincial governments to provide official minority language education services that they could not be trusted to provide without constitutional compulsion. Now if we sum both of these up, we could say that the purpose of the *Charter* was to transform the psyche of Canadians. The *Charter* was an instrument to get at our very identities, to get at our very souls, to change the way we thought of ourselves. In essence, its purpose was to get Canadians living in provinces to stop thinking of themselves as provincial residents but rather as Canadian citizens who happen to live in a particular province. They were to view the conduct of their provincial governments through the lens

of Canadian rights and were to bring to bear a Canada-wide evaluation of the conduct of all governments in terms of the citizen-state norms singled out by the *Charter*.

Now, in these political terms, the *Charter* has both succeeded and failed. I do not think anyone can read the presentations before the various Meech Lake hearings without concluding that at least among the elites of those organizations that made presentations — various women's groups, ethnic groups, linguistic minorities, and the various equality-seekers of section 15 of the *Charter* — the *Charter* has taken root. It has been a profoundly successful experiment in political engineering in English-speaking Canada if you agree that its purpose was to change the way people viewed their relationship to the constitutional order, by inducing them to think of themselves as belonging to a community of rights bearers conditioned to be deeply offended when they see provincial variations in rights which conflict with the *Charter* premises of uniform treatment. That is a fairly accurate reading of where we now are, supported by the New Brunswick select committee report on Meech Lake. Their report stated that, for Canadians (they should have said English-speaking Canadians) the *Charter* was unquestionably the constitutional instrument with the broadest appeal and the most pervasive psychological impact. It was the focus of their identifications with the constitutional order. The Manitoba Task Force reported that many interveners expressed apprehension that the *Charter* might be deleteriously affected by the 'distinct society clause'. Women's groups had particular concerns about section 28; and ethnic groups linked to section 27 feared they were losing status to the distinct society. To immerse oneself in the various Meech Lake proceedings in order to find out what's going on in the elite stratum of the constitutional culture of English-speaking Canada, is to conclude that the *Charter* has taken root.

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There are a number of groups that are specifically attached to particular clauses. Women talk of section 28 as 'their' clause and they write about the 'taking' of 28; while ethnocultural groups think they took section 27 and some others claim responsibility for particular categories in the section 15 equality rights clause; many of these groups have their own mini-histories of how they overcame the resistance

of those recalcitrant first ministers who didn't want to give them their rights and constitutional recognitions. Accordingly, they have a very proprietorial attitude to 'their clause' in the *Constitution* and they keenly watch its status versus other clauses when constitutional reform is underway. Is it perhaps being encroached on or weakened because some other clause is being elevated?

The consequences of Anglophone "*Charterism*" on constitutional reform are profound. The hostility to the Meech Lake distinct society clause and the opposition to Québec's use of the notwithstanding clause on the language of signs, I think, were unquestionably based on a *Charter*-influenced conception of citizenship. Another way of making the same point is that the 'notwithstanding clause' is on the defensive outside of Québec, although one can find all kinds of principled defenders of it in Québec. There are still some defenders in English-speaking Canada, but they're rather more hesitant than Québec supporters, and their numbers have diminished since 1980-82. The *Charter* has had a profound constitutional effect in English-speaking Canada. It greatly restricts the flexibility of political elites negotiating with a Québec still thought of as part of Canada. If Québécois are to remain as fellow citizens, there are limits to how much we can weaken the applicability of the *Charter* in Québec. Outside of Québec, the *Charter* is symbolically and tightly linked to conceptions of Canadian citizenship. That restraint on elite bargaining flexibility is strengthened by the fact that the *Charter* also generates participant orientations in its supporters. This contributes to a distrust of executive federalism in constitutional matters, as Meech Lake made clear. The traditional elites of executive federalism assumed that they could get together and transform the Canadian constitutional regime even if the result was to weaken the *Charter*, however marginally. They were wrong.

On the other hand, of course, the *Charter* has not 'taken' to the same extent amongst the Francophone majority in Québec. A very important piece of research needs to be done on the differential reception that the *Charter* has come to have. Some of it, of course, is due to the deliberate stratagems of the Québec government post-1982. Initially, the Parti Québécois did everything possible to make sure that the image of the *Charter* was stigmatized. Levesque categorically said he was going to do everything legitimately possible to see that "that bloody *Charter*" had as little impact in Québec as he could, and he did, including the across-the-board application of the 'notwithstanding clause'.

In any event, we are faced now with the reality that the *Charter* has become a source of division between

Francophone Québécois and the rest of Canada. Since Canadians outside of Québec don't think that the *Charter* should apply to the rest of Canada but not to Québec if Québec is an ordinary part of Canada, the solution has to be some attribution of a special constitutional status to Québec that takes its residents out of the category of normal Canadian citizenship. It doesn't bother us to know that the *Charter* doesn't apply to people who don't belong to our country. Presumably, if Québécois could be thought of as being in a special category, what we might call *Charter* exceptionalism would be less objectionable.

Is it necessary for the rest of Canada to be persuaded that the future status of Québec is to be sufficiently unique or special that the non- or much weaker applicability of the *Charter* appears constitutionally reasonable? I think the answer is "yes". Unless we come to think of Québécois as not being standard Canadians, the rest of Canada will insist that the *Charter* apply in Québec as it does elsewhere. If we think that way, a constitutional compromise will probably elude us.

The preceding analysis has an interesting consequence, that a large change in the status of Québec is easier to digest than a small one. A large change takes Québécois out of the category of being citizens like everybody else and this justifies a differential *Charter* regime in the way a smaller change, to which the normal rules apply, would not. In other words, we need to devise terminology and constitutional definitions that will make the fact that the *Charter* is not part of a common constitutional culture appear logical and defensible.

The second issue is the need to challenge the principle of the equality of the provinces in the next round of constitutional negotiations. In Meech Lake, we have seen the principle in action, by which a Québec round became a provincial round.

The principle of equality of the provinces, that whatever Québec receives has to be granted to everybody else, has two negative consequences. From Québec's perspective, it is constraining because Québécois realize that at some stage a positive response to their demands is resisted because British Columbians may not wish to strengthen their provincial government. So it makes it harder for Québec to press claims appropriate to its unique situation. From the rest of Canada's perspective, the problem with the equality of the provinces principle, particularly as it applies to jurisdictional concerns, is that the extent and nature of provincialism in rest-of-Canada is driven by Québécois

nationalism. And that's simply not acceptable to all kinds of Anglophones. It was unacceptable for many even in its mild Meech Lake version. It will be even more unacceptable next time when the demands will be greater. If we adhere to the principle of equality of the provinces we get into the situation that the cost of accommodating Québec is paid by those English-speaking Canadians who have no desire to strengthen their provincial against their Canadian or central government identity or allegiance.

So we have to ask ourselves, are we prepared to move in the direction of asymmetrical federalism? We have to question the equality of the provinces from two perspectives. Recently the principle of equality of the provinces has come to be thought of essentially as a norm of equality amongst the provinces as provinces. It is seen to be unfair in some sense for Albertans not to have a provincial government wielding the same bundle of jurisdictional responsibilities as Québécois have for their provincial government.

On the other hand, I think we have to resurrect Mr. Trudeau's concern that one of the key reasons for observing the principle of equality of the provinces in terms of jurisdiction was so that one could maintain the equality of status and responsibilities of members of the federal House of Commons. Now this is a crucial constitutional point. It seems to me one cannot have a constitutional system in equilibrium if one province with 75 seats in the House of Commons has M.P.s with voting rights no different from other M.P.s across the whole range of issues that the House addresses, if at the same time many of the issues are provincial issues in Québec because Québec has a superior jurisdiction in five to ten areas.

Constitutional orders can stand a lot of untidiness, a lot of fuzziness, a lot of anomalies, but they cannot stand an anomaly that profound with such a large number of M.P.s if Québec has many jurisdictional powers the rest of the provinces do not have. Such a situation may be viable in small doses, but if we're talking of a big dose, it's not. If, therefore, Québec is to have significantly greater jurisdiction than the other provinces, Québec M.P.s cannot play the same role as other M.P.s. And I'm therefore not sure that we can work our arrangements to have them as members of the same House of Commons. I'm not sure it would be workable. This is particularly so because we're talking of a lot of M.P.s and we're also talking, of course, of a situation which would be fraught with extraordinary symbolism because of the historical context from which it emerged.

The preceding are fundamental issues of principle and constitutional theory which we can't put under the rug.

Unless we grapple with them successfully, we cannot reach an accommodation that is in some sense "federal". It may be that an asymmetrical Québec in terms of jurisdiction will generate such a serious challenge to the equal status of M.P.s that we will be unable to maintain the House of Commons as a common legislative body. Now we might then put another tier of a legislature on top, but then we run into a different set of problems — a certain distaste in English-speaking Canada for legislative complexity.

The third issue relates more to what happens if accommodation within federalism is not possible. Serious practical problems flow from the inescapable reality that in the present structure of the Canadian constitutional order English-speaking Canada has no constitutional existence, no institutional existence, no spokesperson to speak to it or for it, to define it, to debate its future, to bargain with the Québec side. I am always amazed that people don't seem to understand how terribly, terribly threatening this is for a future civilized breakup of Canada that would require negotiators with power to deliver the goods for both Québec and rest-of-Canada as they work out the terms of their disentanglement and subsequent coexistence.

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It is self-evident that the federal government of all of Canada cannot negotiate on behalf of the rest of Canada with Québec if the goal is two countries, however tightly they might be linked by various treaties and common arrangements. Not only would such a role be objected to in English-speaking Canada, but the federal government would be impossibly cross-pressured, particularly if it had a very strong base of support in Québec. It would be tempted to try to find an accommodation within federalism, even at a very high price, in order to preserve its electoral base of support in Québec. So the federal government can't speak for rest-of-Canada, and it's obvious that provincial governments can't fill the gap no matter how many provincial constitutional commissions they establish. They can't speak for rest-of-Canada — that's not their mandate. It's not the 'jurisdiction' for which they are responsible. So if the long-run resolution of our constitutional problems is to be an amicable parting of the ways, we confront a very serious

structural dilemma that English-speaking Canada is headless and voiceless. We are often told by our Québec colleagues that we are lucky to control nine provinces and to exercise majority control in the federal parliament. However this constitutional Midas touch has disabling effects. English-speaking Canada lacks the singular advantage that Québec has, now that it has shed its former feeling of responsibility for and affinity with Francophones outside Québec: a single spokesperson for its position. We're scattered all over the map.

If, therefore, we are forced into the situation where we have to reconstruct the relations between Québec and English-speaking Canada as two nations, English-speaking Canada has to be given time to develop a separate constitutional existence. I am floundering as I try to think my way through the difficulties we have ahead, but it seems to me, though I hesitate to speak so categorically, that this can only happen after Québec separated and elections are held in Canada without Québec, to constitute a new government which can then come to the table. And then they can negotiate at the top whatever degree of linkage seems appropriate.

Now, what worries me in this process is that Canada outside of Québec may reconstruct itself on the basis of a more provincial vision than is appropriate because of the circumstances of the break-up. When Mr. Bourassa, or Jacques Parizeau or Lucien Bouchard or whoever defiantly walks out after negotiations have broken down and says "we're going to go our own way", the rest of Canada is left with the rump of a country whose central government has been destroyed, along with the pan-Canadian dimension of its existence. What remains strong and virile? — the provincial governments. They're going to be there and we have already seen their avaricious conduct in constitutional affairs. And so we can anticipate what we will come up with if the reconstruction of Canada without Québec is led by provincial forces. We will end up with a much more provincial vision of Canada than I think would emerge if we were given time to put our act together after Québec has gone. So I think that we have to try to devise some kind of way, if this is the scenario that unfolds, to develop an understanding in Canada outside of Québec that for some transition period the existing constitution minus Québec should be respected, that we would carry on with what we've got without Québec and then, of course, we'd have a new set of elections and one of the issues in that election would obviously be relations with Québec and the constitutional remaking of rest-of-Canada. Thus I would like to put a damper on the process of constitution-making in a situation of maximum demoralization and insecurity in English-speaking Canada. If

we don't have this slowdown, this transition period, the future national existence of English-speaking Canada will be gravely weakened because its reconstruction will have occurred in the context of a demoralized central government and very strong provincial governments.

So to recapitulate, if we're talking of continuing within federalism we've got to make this big intellectual and normative judgement of the extent to which the *Charter* can be differentially applied in Québec. Second, we have to decide how great a departure from the principle of equality of the provinces is acceptable, making very clear that the real issue is the status of M.P.s in the House of Commons, not

the lesser question of variations in the status of the several provincial governments. Third, if a future within federalism is not to be our fate, we have to think very seriously about ways and procedures for English-speaking Canada to get its act together, which is not possible in the existing constitutional structure.

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[A more elaborate presentation of the argument will be published in a volume of research papers commissioned by the Business Council on National Issues, to be edited by Professor Ronald Watts of Queen's University.]

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## QUÉBEC AFTER MEECH: ON THE THRESHOLD

Lise Bissonnette

I will not dwell too long on the Meech failure. I do not think it is worth it anymore except to say that I am not one to pursue a witch hunt against some individuals for its failure, be they Mrs. Carstairs, Mr. Wells, or Mr. Harper. I think that much of the press indulged too much in that. In the end, why do political deals fail? It is not because of individuals, but because they have to fail. Conflicting visions of Canada were clashing over the Meech Lake Accord and they were, in my view, impossible to reconcile while they were both absolutely legitimate.

In all of my editorials I have written that I understood perfectly why people opposed the Meech Lake Accord and why people in Québec wanted it. In both cases, one was not more of a culprit than the other. It is possible that legitimate views conflict, and so if you cannot reconcile them, you just don't. You just stop trying, at least for this kind of accord. Should Meech have been signed, I am totally convinced that the clash would have manifested itself nevertheless in the future. We would have had a period of calm, no doubt, but ten years from now the same problems would have come up again. Meech failed, then, and that is it.

I wish to address here a few of the clichés that some of my friends and colleagues, very often from the English-speaking press in Canada, are still challenging. First, and I am totally convinced of this, Québec will not go back

to the negotiating table, at least the negotiating table as we know it. Québec will not abide by the present constitutional rules whereby one or two smaller provinces can challenge a majority's consensus. That is quite clear. We can have discussions about it, of course, but I do not see any kind of Meech II if that means we go by the same rules.

Second, the post-Meech mood of renewed nationalism is a resilient one in Québec. I recall this summer, when the Mohawk crisis erupted in mid-July, when I read many an editorial in English Canada that triumphantly stated that the national question would go on the back-burner and that Québécois would soon forget about their mood of the 24th of June. Well, if you look at the opinion polls today, you will see that they are consistent with where they were just at the time of the failure of the Meech Lake Accord. So this is not something that is going to just go away when the public mood changes. And that is quite remarkable because if you watch public opinion today on any other question, it is usually very volatile. But in Québec, this stand in favour of larger sovereignty or political autonomy is there, and it seems there to stay.

Third, if Canada has any chance to remain a country, it will have to accept many greater changes than most people outside of Québec are presently prepared to accept. This is in contrast to those who argue that, if Canada is to remain