

PROCESSES OF CONSTITUTIONAL RESTRUCTURING: THE CANADIAN EXPERIENCE IN COMPARATIVE CONTEXT

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INTRODUCTION: THE ISSUES OF PROCESS

Since the late 1960s Canada has experienced five rounds of constitutional politics. This paper focuses particularly on the most recent of those rounds, that which occurred during 1990-92, and attempts to place it in a comparative context. In the terminology suggested by Peter Russell, this round represented an effort at "macro" constitutional change in terms of the comprehensiveness of the reforms considered, and had all the characteristics of "mega" politics in terms of the degree and intensity of public involvement.

To students of Canadian politics or of comparative politics, the failure of the constitutional reform during the period 1990-2 raises three interesting questions about the process itself.

First, were the wrong lessons drawn from the failure of the preceding Meech Lake Accord process 1987-90? The extensive prior public discussions during the 1990-2 process were deliberately intended to avoid the criticisms that such discussion had been inadequate prior to the

negotiation of the Meech Lake Accord. Furthermore, the 1990-92 negotiations were consciously directed at being a "Canada Round" to overcome criticisms of the earlier Meech Lake Accord as a purely "Quebec Round". Nevertheless, despite these efforts to learn from the failure of the preceding round, this one too was in the end rejected by the Canadian public.

Second, what is the appropriateness of the alternative strategies of comprehensive constitutional reform as opposed to partial and incremental constitutional reform? Does comparative experience elsewhere shed any light on these alternative strategies?

Third, what are the appropriate roles of the public and of political elites in achieving constitutional accommodation and resolution? It was in order to combine the Canadian tradition of elite accommodation with the public demand for a larger say that over the past two years Canada underwent an extensive public involvement in constitutional deliberations. Yet the referendum result failed to bring a resolution and left fundamental structural problems unresolved. What then does this experience over the period 1990-92 tell us about the appropriate process for, or even the possibility of, future constitutional reform in Canada?

To provide a better understanding of these questions this chapter considers the process of attempted constitutional restructuring 1990-92 in terms of (1) the problems it was attempting to address, (2) the three stages of the 1990-2 process, (3) the significant features of the Charlottetown Agreement, (4) the referendum campaign, (5) the implications of the results of the referendum, and (6) concludes by raising some basic questions about the appropriate processes for constitutional restructuring.

1. Structural Problems which the 1991-2 Constitutional Review Process was attempting to address

By most standards Canada is a country of extraordinary accomplishment. In the 125 years since Confederation in 1867 the original four tiny colonies have expanded to ten provinces, and Canada has developed into a major federation.

And over the years Canada has done that peacefully, by practising persuasion and partnership, by pooling interests, perspectives and pride, without revolution and without civil war. As a result, on the cold northern half of the continent, Canadians have built the seventh largest industrial economy in the world.

But if Canada has been a land of such achievement, why has it appeared to be in such constitutional disarray over the past thirty years? The answer to that question lies in four sets of structural problems that the constitutional process was attempting to resolve.

The first of these relates to internal ethno-cultural relations of which the three basic components are: (1) relations between Quebec with its concentration of French-speaking Canadians and the rest of Canada; (2) relations between the native peoples and other Canadians; and (3) the relations between the multicultural immigrant groups and the wider Canadian community. Common to all three sets of relations is the need, as the Task Force on Canadian Unity put it, to develop institutions and processes that not only accept the fact of diversity but enable Canadians "to cherish and embrace it" (p. 6). In a country of Canada's diversity, there is a need to learn to live with differences if Canadians are to live together at all, and to understand that recognizing the distinctiveness of Quebecers or the aspirations of the native peoples does not diminish the rest of Canadians, but enriches them. The issue is a complex one involving not only effective institutions and political processes, but also attitudes and symbols.

The second set of problems relates to the character of the Canadian economy composed largely of a collection of regional economies based on different primary products and economic activities. As Jenkin has noted, these economies are furthermore marked by sharp disparities in the level of general economic welfare producing resentments between regions.

The third, and a crucial set of problems relates to the particular form of our institutions. They arise from the Canadian innovation in 1867 -- since copied in such federations as Australia, Germany and India -- of combining federalism with the institution of parliamentary cabinets. This has meant that because the federal cabinet has to be responsible to the elected lower house, the role of the Senate in offsetting the dominance in the House of Commons of Ontario and Quebec (which combined have more than 60 percent of the population) has been limited. Consequently, the eight smaller provinces in the Atlantic and the West have resented their perceived powerlessness in federal policy-making. This explains the persistent demands for Senate reform, intended to produce a body that would be elected, provincially equal, and effective as a check on the House of Commons. A further institutional factor is that the Canadian Constitution, unlike that of many other federations, emphasizes the exclusive powers of the federal and provincial governments rather than shared powers. As a result, the federal government's use of its spending power as a major instrument to expand its jurisdiction into areas of exclusive provincial jurisdiction has become an issue of intergovernmental contention, especially in Quebec.

The fourth set of factors has been the erosion of uniting beliefs. In 1867 and for long after, Canadians traditionally emphasized the importance of compromise, the recognition of diversity and even asymmetry as essential elements for continued federal unity. The past decade, however, has seen the emphasis instead upon issues of rights and equality, a tendency stimulated by the adoption of the Charter of Rights and Freedoms in 1982. Consequently, any concession is likely to be seen as a violation limiting those rights, and therefore to be resisted. Furthermore, as Alan Cairns has pointed out, there has emerged a clash between three different conceptions of equality.

These structural factors interacting with each other were exacerbated by significant events during the decade leading up to 1991-2. Although the *Constitution Act, 1982* which led to the patriation of the Constitution, the adoption of the Charter, and incorporation of a formal constitutional amendment formula represented an important achievement, nevertheless it left unresolved Quebec's concerns. The four aboriginal constitutional conferences between 1983 and 1987 by their failure left the aboriginal people frustrated. There were increasing tensions and concerns aroused by the internal economic restructuring caused by the Free Trade Agreement with the United States which came into effect in 1989 and by the following prolonged international recession accentuating these economic problems. Finally, the demise in 1990 of the Meech Lake Accord which had attempted to reconcile Quebec served in the end only to widen the polarization between Quebec and the rest of Canada.

The 1990-92 round of constitutional deliberations was made necessary by the conditions that arose from the failure in 1990 to ratify the Meech Lake Accord. The purpose of that Accord in 1987 had been to secure Quebec's consent to the *Constitution Act 1982*, to which Quebec had been the sole province not giving its assent. The Accord attempted to provide some constitutional recognition of Quebec's unique situation and place in the federation. But at that strategy backfired badly. Despite the agreement of the Prime Minister and all ten provincial premiers on the Accord, it faltered under public opposition to its focus solely on Quebec concerns. Although ratified by eight provinces, in the end it failed to win the required unanimous approval from all ten provincial legislatures before the deadline in 1990. Far from bringing Quebec "back into the constitutional family" as the Prime Minister had repeatedly advocated, the failure to adopt the Meech Lake Accord threatened to push the country as a whole closer

to divorce proceedings. (Fournier 1990, Simeon 1990, and Watts 1991).

Quebec and the rest of Canada drew sharply different lessons from the Meech debacle. In Quebec there was a sense of national rejection which was both widespread and deeply felt. Quebec had put forward modest proposals that involved little more than constitutionalising the status quo. For many Quebecers the rejection of Meech was interpreted, therefore, as the rejection of Quebec by English Canada.

The powerful sense of rejection engendered by the failure of the Meech Lake Accord had several consequences. At the level of public opinion it pushed support for Quebec sovereignty to unprecedented heights: 60-65 percent in some polls, up from the mere 25 percent in 1985 before the Meech Lake negotiations began. At the intergovernmental level Premier Robert Bourassa announced that he would boycott all multilateral intergovernmental negotiations and it was only two years later in July 1992, just one month before Charlottetown, that he returned to the post-Meech constitutional deliberations. Within Quebec itself, the failure of the Meech Lake Accord produced two large-scale efforts to chart Quebec's constitutional future on its own terms and if necessarily, unilaterally. One was the report of the Constitutional Committee of the governing Liberal Party of Quebec and adopted by it in March 1991. The other was the all-party Commission on the Constitutional and Political Future of Quebec (Bélanger-Campeau), heralded as a Quebec 'Estates General', which reported soon after. Although different in detail the two reports both argued that Quebec must have the jurisdictional space needed to redeem its national purpose - if not within a radically restructured and decentralized federation then outside it. Both called for a referendum within Quebec on its constitutional future by the end of October 1992 at the latest.

The rest of Canada was initially slow to respond to the demise of the Meech Lake Accord

but some prominent public figures soon began to wonder publicly whether keeping Canada together was "still worth the effort". Some others drew the conclusion that the differences between Quebec and the rest of Canada were essentially irreconcilable, arguing that Quebec's national collectivism was incompatible with the liberal individualism of the rest of Canada. Yet others, resenting Quebec's influence both in the adoption of the Canada-U.S. Free Trade Agreement and through the fact that in all but one of the past 21 years the federal Prime Ministership had been held by a Quebecer, frequently described Quebec as the "spoiled child" of the Canadian federation, and argued that it was time to be firm with Quebec. Generally within English Canada, there appeared to be a reduced rather than heightened sympathy for Quebec's concerns.

2. The process of constitutional review 1990-92

It was to deal with these unresolved structural problems and the intensifying polarization of views within Canada following the failure of the Meech Lake Accord in 1990, that a new set of constitutional negotiations was undertaken in the period 1990-92 leading to the Charlottetown Consensus Report of August 28, 1992. Two features distinguished this round of constitutional deliberations from the preceding one. First, the Charlottetown Agreement was based on the most intensive, extensive, exhaustive and exhausting round of public consultations and negotiations on constitutional issues that has ever occurred in Canada. The emphasis upon extensive public consultation and discussion was intended to avoid the widespread criticisms that such discussion had not occurred before the negotiation of the Meech Lake Accord. The second feature that distinguished this round from the previous one was that it represented a deliberate "Canada Round" to overcome public criticisms of the Meech Lake Accord as a purely "Quebec Round". Thus, while the Charlottetown Consensus Agreement dealt with Quebec

concerns, it also dealt with a wide range of issues relating to concerns elsewhere in Canada.

There were *three* basic stages to the renewed constitutional review process. The *first* was that of public discussion in order to ascertain the nature and extent of constitutional revision that the public would be likely to support. This needed to be open and public. The *second* was the actual negotiation of a proposed set of constitutional amendments. If the negotiation was to involve give and take, at least some of it had to be behind closed doors, and the chances of ultimate success were likely to be improved if those who under the formal constitutional amendment process ultimately play a key role in ratifying the changes, i.e. representatives of the federal and the provincial governments, were represented in the negotiations. The *third* stage envisaged was the formal ratification of the constitutional amendment. In the Canadian case, the normal procedure for constitutional amendment requires the passage of a resolution in Parliament and in the legislatures of seven provinces representing at least 50 percent of the population (section 38 of the *Constitution Act, 1982*). A restricted range of amendments, those relating to the monarchy, minimum provincial representation in the House of Commons, the use of the official languages, the composition of the Supreme Court, and changes to the amendment process itself, requires the consent of all ten provinces (section 41). The Constitution does not require a referendum for ratification of constitutional amendments, but during 1992 the conviction developed among the negotiating governments that popular support indicated by a favourable consultative referendum result would facilitate ratification by the required legislatures by giving the proposals political legitimacy.

(1) *The stage of public discussion*

One lesson learned from the Meech Lake failure was that the lack of public discussion before the original Accord was negotiated contributed to its ultimate failure. As a result in

the 1990-92 round of constitutional revision, a great deal of emphasis was placed on the first stage. The intention was to lay solid foundations for the later stages of constitutional revision.

That first stage began late in 1990 and came to a conclusion at the end of February 1992 with the release of the report of the Special Joint Committee of the House of Commons and the Senate on a Renewed Canada. This first stage can itself be divided into a number of phases or substages.

A preparatory phase which began late in 1990 and lasted to the end of June 1991, involved a number of parallel sets of activities. One was the Citizens' Forum on the Future of Canada, chaired by Keith Spicer, which conducted an unstructured public discussion of the concerns and aspirations of Canadians through a variety of activities all across the country. This in total involved some 400,000 people. The Citizens' Forum served to leech out some of the public frustrations apparent immediately after the failure of the Meech Lake Accord, it identified the main public concerns and desires for a transformation of political institutions to make them more responsive, and it culminated in a report at the end of June 1991. At the same time a Special Joint Committee of the Senate and the House of Commons, usually referred to after its co-chairman as the Beaudoin-Edwards Committee, was appointed to review the process for amending the Constitution. It too reported in June 1991. Paralleling this activity at the federal level was the establishment by most of the provincial legislatures of select committees or task forces, each holding their own public hearings, to obtain the views of their citizens on issues of constitutional reform. This provided further channels for the expression of public opinion.

The next substage, intended to build on the preceding one, was the preparation of specific federal proposals for constitutional revision which, when published, would provide a basis for further and more focused public discussion.

Between April and September 1991 a Cabinet Committee on Canadian Unity, chaired by Joe Clark as Minister of Constitutional Affairs, carried out this task. On 24 September 1991, the results of that committee's work were made public in a document entitled *Shaping Canada's Future Together: Proposals*.

Next came the public consultation on these proposals, spanning the period from September 1991 to the end of February 1992. A new Special Joint Committee of the Senate and the House of Commons on a Renewed Canada, co-chaired by Dorothy Dobbie and initially Senator Castonguay but subsequently Senator Beaudoin, was established in September 1991. Its task was to conduct public hearings across the country, to meet with the legislative committees for constitutional affairs established in the provinces, and to obtain the views of the provincial premiers on the federal proposals. A separate parallel process of consultation among the aboriginal peoples carried out by their own organizations was also established.

The Special Joint Committee ran into some early organizational difficulties. It was decided, therefore, to supplement its hearings by a series of six widely televised public conferences that would examine specific aspects of the federal proposals. These were held on successive weekends in January and February in major cities across Canada. The conferences were attended by members of the Special Joint Committee, by representatives of the federal political parties, by representatives of provincial governments, by representatives of a wide range of interest groups, and by a number of ordinary Canadians randomly selected from lists of applicants. The conferences served almost as mini-constituent assemblies. Despite their limitations, their contribution to the process exceeded all expectations. They helped to identify in broad terms the extent and limits of likely public support for the proposed changes. But perhaps their greatest contribution was to change the political climate of the country through the

emphasis upon reconciliation and accommodation which emerged from these conferences.

The public consultation stage was brought to a conclusion at the end of February 1992 with the appearance of the Report of the Joint Parliamentary Committee on a Renewed Canada (Beaudoin-Dobbie). This report took the Federal Proposals of 1991 as its starting point, but on the basis of the views expressed at its own hearings and at the six public conferences the Joint Committee suggested some modifications. A particularly significant feature was that although on some issues differences were simply papered over or alternative minority positions were reported, the report generally represented an all-party agreement of the three major national parties, the Progressive Conservatives, the Liberals and the New Democratic Party.

(2) *The stage of intergovernmental negotiations*

The second general stage, the intergovernmental negotiations over the proposed constitutional amendment, occupied the period between March and August. The original conception had been that this stage should be completed by mid-April but in the event it proved more protracted. The reason for this was that although the federal government originally envisaged this as an opportunity to start with the Beaudoin-Dobbie report and improve on it, a number of provinces, most notable Ontario and Saskatchewan, insisted on reopening virtually every issue and indeed on introducing new issues. The result was that much of the public support generated in the previous stage was dissipated especially as a result of the media dramatization of the closed door nature of these deliberations.

This stage, like the previous one, also involved a number of substages or phases. The first, running from the beginning of March until mid-June, involved the meetings of the Ministerial Meeting on the Constitution (MMC). This was made up of two ministers or leaders assisted by their officials from each of the federal,

provincial and territorial governments and from each of the four aboriginal associations.¹ Quebec, however, abstained from the process insisting that it would not participate until it had had an opportunity to review satisfactory "offers" from the federal government. This was a strategy that was to backfire for it meant that by the time Quebec joined the deliberations late in July much of the basic framework of the proposals had already been shaped.

The MMC met for two or three days in most weeks between March and June. It was assisted by the Continuing Committee on the Constitution consisting of the senior officials of intergovernmental affairs from each of the governments or associations involved. Its role was primarily logistical. The MMC created four working groups to assist it. Each was composed of two officials from each of the governments and aboriginal associations to develop proposals and prepare draft legal texts for the MMC to consider. These four Working Groups were to deal with specific aspects: Working Group I dealt with the Canada Clause, the Distinct Society clause, and items related to the Charter; Working Group II dealt with Federal Institutions including the Senate, the House of Commons, the Supreme Court and First Ministers' Conferences; Working Group III dealt with Aboriginal issues and concerns; and Working Group IV with issues relating to adjustments in the distribution of powers and on proposals relating to the economic and social union.

By mid-June a great deal of progress had been made in many of these areas, although the MMC remained deadlocked on the issue of the composition and powers of the Senate. The basic difference lay between the representatives of a number of the smaller provinces who pressed for equal provincial representation in the Senate as a counterbalance to the dominance of central Canada in the House of Commons, and the others who pressed for weighted representation of provinces to take account not only of the enormous variation in provincial size, but also to

provide adequate representation for the francophone official language minority population largely concentrated within Quebec.

The intergovernmental negotiations moved to a higher level when the Premiers of all the provinces except Quebec met with Joe Clark, the federal Minister of Constitutional Affairs on July 3 and 7 to try to resolve the impasse over the Senate. Premier Bourassa of Quebec continued to abstain from these deliberations though he had an indirect influence through telephone consultations conducted by a number of the participants. At the Premiers' meeting on July 7 agreement was reached on a Senate in which the provinces would be equally represented, but special super-majorities in the Senate would be required to block legislation from the House of Commons. This was designed to prevent a simple majority composed of the six smallest provinces, representing only 17 percent of the population, by themselves blocking a majority in the House of Commons. This proposal was subsequently sharply criticized within Quebec, however, because it would have reduced the francophone voice within the Senate to 9 percent when francophones represented a quarter of the federal population.

The final phase of the intergovernmental negotiations involved all the First Ministers including the Prime Minister of Canada and the Premier of Quebec. After two preliminary meetings at Harrington Lake, and then two formal First Ministers' Conferences in Ottawa, August 18-21 and in Charlottetown August 27-28 agreement was reached upon a modified model for Senate reform and upon the other outstanding constitutional issues. In the case of the Senate, it was agreed that the provinces should be equally represented but that the concerns of the larger provinces including Quebec were to be taken into account by adjustments in the composition of the House of Commons and the predominance of the latter in joint sittings to resolve deadlocks between the two houses. Representation by population would be more fully implemented

there but Quebec (which currently has 25 percent of the federal population) would be guaranteed 25 percent of the seats in the Commons even if its population declined.²

It was also agreed at Charlottetown that prior to the normal constitutional amendment procedure of ratification by Parliament and the provincial legislatures a Canada-wide referendum would be held on October 26. This was considered desirable in order to give political legitimacy to the proposed changes. A further reason was that Quebec was already committed to a referendum on that date and that both British Columbia and Alberta had recently passed provincial legislation requiring their legislatures to hold a referendum prior to ratifying any constitutional amendment. It would have appeared anomalous to have some provinces and not others seeking the views of their electorates on the proposed constitutional amendments.

3. Fundamental flaws in the process of public discussion

Extensive as was the public consultation in the period 1990-92, one fundamental flaw until nearly the end of the intergovernmental negotiations was the relatively little interaction between Quebec and the rest of Canada. Quebec pursued its own deliberations separately; wide consultations throughout the province being followed by the reports of the Allaire Committee and of the Bélanger-Campeau Commission. Both reports called for a referendum within Quebec on its constitutional future, and in May 1991, the Quebec National Assembly committed itself to a referendum on "the sovereignty of Quebec" not later than 26 October 1992. It then proceeded to await the "best offer" that might come in the meantime from the federal government. Furthermore, during the intergovernmental deliberations, Premier Bourassa did not participate in any intergovernmental meetings until very late in the process. But this meant that for much of the period before that the input of

Quebec into the public discussion elsewhere and into the intergovernmental negotiations was only indirect and the concerns of Quebec did not have their full impact. It also meant that by the time Bourassa joined the deliberations late in July 1992, much of the basic framework of the proposals under consideration had already been shaped and he had to work within those constraints.

The second flaw was that the decision to hold a Canada-wide referendum on 26 October 1992 was not made until *after* the text of the Charlottetown Agreement had been arrived at. As a result, the document with its many complex intergovernmental compromises was in a form that was not "user-friendly" to the voters in the referendum. The decision to have the Canada-wide referendum was politically unavoidable given that Quebec, Alberta and British Columbia had already independently committed themselves to provincial referendums before approval of any constitutional amendment. If this reality had been recognized earlier, greater efforts might have been devoted during the intergovernmental negotiations to crafting a document more easily understood by the voters.

3. The Character of the Charlottetown Agreement

Some basic features of the Charlottetown Consensus Report are worth noting. First, the efforts and determination of the political leaders to reach an agreement that would take account of the enormous variety of views that had been expressed by the Canadian public and their attempts to produce a document carefully balancing all the conflicting claims was clearly evident. On many occasions during the deliberations it seemed that agreement would simply be impossible; yet, in the end, during the intergovernmental negotiations concessions and compromises by political leaders on all sides did reach a consensus. That was a major achievement.

Second, drawing upon the lessons of the Meech Lake Accord failure, the Charlottetown proposals represented a deliberate "Canada Round". The Charlottetown Consensus Report dealt with Quebec's concerns but not just Quebec's concerns. It also addressed Western concerns about the need for Senate reform, the concerns of the less prosperous provinces in the Atlantic region, Manitoba and Saskatchewan for a stronger commitment to equalization and national social objectives, the desires of the aboriginal people for self-government, and views of those believing the importance of the Charter and of other constitutional expressions of fundamental economic and social objectives. A major theme, therefore, was *inclusiveness* - emphasis upon inclusion of all the various interests and elements that make up Canada. Assuredly no group got everything it wanted -- that was hardly possible if the enormous variety and diversity within Canada were to be reconciled -- but an attempt was made to take into account the interests of the widest possible range of groups.

Third, the Charlottetown Agreement attempted to deal with the four sets of structural problems identified earlier in this chapter. It consciously set out to provide a constitutional recognition of our diversity and specifically of Quebec's distinctiveness, of the place of the official language minorities, and of the desires of the aboriginal peoples to govern themselves. It identified objectives and a process for enhancing the Canadian economic union and strengthened the commitment to equalization and regional development as means to reducing economic disparities. It included a reform of Canada's federal institutions aimed at making them more responsive and representative. The major institutional changes involved creating a Senate in which the members would be elected and the smaller provinces would have stronger voice, improving representation by population in the House of Commons while at the same time giving Quebec guaranteed representation to offset

the reduction by three-quarters in its Senate representation, and entrenching the Supreme Court as an independent interpreter of the Constitution. The Charlottetown Agreement also provided for a modest rebalancing of the distribution of powers and roles of the federal and provincial governments, and it proposed instruments to facilitate more effective federal-provincial cooperation through intergovernmental agreements and arrangements for the exercise of the federal spending power within areas of exclusive provincial jurisdiction. Finally, it included a constitutional articulation in a Canada Clause of shared values and uniting beliefs. That clause which would have provided the courts with a basis upon which to interpret the Constitution would have recognized not only the diversity that contributes to the richness of Canadian society but the values which Canadians hold in common and which would provide the cement to bind them together. Among those shared values identified were: parliamentary democracy, federalism and the rule of law; racial and ethnic equality; respect for individual and collective human rights and freedoms; equality of men and women; and equality of the provinces. The Agreement would also have identified in the Constitution the basic objectives of Canada's social and economic union.

Thus, as Lenihan has argued, the Charlottetown Agreement embodied a set of proposals integrating together coherently the values of both federalism and the Charter. Indeed, in attempting to provide a constitutional framework for the resolution of the basic structural problems facing Canada the Charlottetown Agreement encompassed the fundamental elements that the study of federations elsewhere indicates are required in any federal constitution that is to be stable and effective over the long term. These are the explicit recognition and accommodation of major internal diversities, the strengthening of economic ties and the reduction of regional disparities, the establishment of effective,

representative and responsive federal institutions that include adequate safeguards for the influence of smaller provinces and for official language minorities in federal policy-making, a distribution of powers among federal and provincial governments that takes account of changing economic and social conditions, and the constitutional articulation of the shared values that hold the federation together.

4. The Referendum Campaign

By the time of the Charlottetown Agreement in August 1992, it appeared that the country's leadership had squared the constitutional circle -- to have got the agreement of the Federal Government all ten provincial governments, the two territorial governments and the leaders of the four Aboriginal associations on a Consensus Report sufficiently inclusive to accommodate all conceivable forms of constitutional disaffection. At the moment the Accord was struck the prospects according to opinion surveys looked good. However, despite all the previous public consultation, during the course of the campaign for popular ratification things came unglued. Unfortunately, in the hurly-burly of the referendum debate the larger vision and context was lost in the media and partisan preoccupation with specific provisions and with concerns about the extent to which each particular group had or had not achieved all its own specific claims. As a result the political leaders found they had crafted a document which made more enemies than friends. There was an ensuing preoccupation during the referendum campaign with assessing losers under the Agreement, and Canadians seemed to become involved in a competition to see which province, region or groups could claim to be the biggest losers as a result of the Charlottetown Agreement.

On October 1992 Canadians were given the opportunity to approve the package of constitutional proposals carefully negotiated and agreed upon by their political leaders. They rejected it. Nationally, the No vote came to 54

percent. Six of the ten provinces, including Quebec, plus the Yukon Territory voted No. Three of the Atlantic provinces - Newfoundland, New Brunswick and Prince Edward Island and the Yukon - voted a substantial Yes and Ontario voted Yes by a narrow margin. Since most of the items in the Charlottetown Agreement needed for implementation the assent of the legislatures of at least seven provinces representing 50 percent of the population and some of the elements needed ratification by every province, it was clear that the Agreement had been killed decisively.

During the referendum the National Election Study Research Group of political scientists conducted a day-by-day tracking of public opinion during the campaign and an analysis of the positions of different groups upon the issues involved (Johnston, Blais, Gidengil and Nevitte). Their study indicates that in Quebec the balance of opinion initially leaned towards a No vote but there were signs of a possible advance towards a Yes vote. The possibility of such an advance was arrested, however, by the leaked telephone conversation of two of Premier Bourassa's advisors which seemed to confirm that the Premier had failed to bargain hard enough, and by the reassurance of the Péquistes that to vote No was not necessarily a vote for separation. Outside Quebec, the prospects for a Yes vote were strong at first with over 60 percent in favour. But over the latter half of the campaign this support collapsed. Clearly many factors affected the result including the unpopularity of Prime Minister Mulroney and of politicians in general. Voting No was seen as one way of sending a message to the politicians. Not insignificant too were a number of tactical mistakes of the "Yes" advocates during the referendum campaign and the influence of former Prime Minister Trudeau's public repudiation of the Charlottetown Agreement early in October. Indeed, a major shift in public opinion outside Quebec occurred just after Mr. Trudeau's intervention. There seems to be some evidence too that the voting divided fairly

consistently along socio-economic lines with those less well off in economic and educational terms voting No more heavily. Thus we have the paradox that those who were suffering most under the status quo were the strongest opponents of change, largely because they did not trust the politicians who were advocating those changes. There appears also to have been a general presumption among voters that, when faced with a complicated document which included some specific provisions that were controversial, the safest and least risky vote was No. Furthermore, the National Election Study Group's analysis suggests that the publication of frequent public opinion polls and particularly those early in October indicating a trend in favour of a No vote in Quebec contributed strongly to the result in the other provinces. It left voters who early in the campaign were willing to vote Yes to accommodate Quebec, free in their consciences to vote No without the fear that they would thereby be seen as rejecting Quebec.

Despite the apparent Canada-wide referendum consensus for rejecting the Charlottetown Agreement, the contradictory motivations of different groups for voting No in the referendum illustrated vividly the continued clash of views held by different groups within Canada. The majority in Quebec, including many Quebec federalists who would prefer not to separate from Canada, voted No because the Charlottetown Agreement did not give Quebec enough control over its own affairs; many in the rest of Canada and particularly in the West voted No because in their view it involved too much in the way of special arrangements for Quebec. Many aboriginal people voted No or abstained because the Agreement did not go far enough in recognizing their claims; many non-aboriginal people voted No because they felt that the recognition in the Agreement of an inherent aboriginal right to self-government was too sweeping and would be too costly. Many voted No from fear that the particular rights of a specific group were not adequately reinforced;

others voted No because they were opposed to the emphasis upon the rights of specific groups. Efforts to reduce disaffection in one region or for one group seemed only to increase disaffection elsewhere. Thus, in the crucible of the referendum the will of the electorate to accept the concessions and compromises necessary to resolve Canada's structural problems in a united way simply leaked away.

5. The Implications of the Referendum Result: What's Next?

Given that the Charlottetown Agreement was the product of such an extensive process of prior public constitutional discussion, and that in the subsequent intergovernmental negotiations the great variety of views were reconciled only with extreme difficulty, the prospects now for producing another comprehensive proposal for constitutional reform that would obtain public support in the near future, however much desired, seem totally unrealistic. In spite of the earlier widespread public demand for an extensive constitutional transformation as reported by the Spicer Citizens' Forum on Canada's Future, the referendum result points to just how difficult it is to get agreement within the diverse Canadian society on comprehensive constitutional change. What the referendum seems to indicate is the paradox that the Canadian electorate wants transformation but without change! Indeed, the *Economist* of 31 October 1992 described the negative referendum result rather scathingly as "horrendously Canadian: a populist revolt in favour of the status quo."

But although comprehensive constitutional reform would now appear unrealistic, the crucial structural problems facing the Canadian federation still remain. The issues of Quebec's place within the federation, of aboriginal self-government, of the political framework for economic development and the reduction of disparities, of more representative and responsive federal institutions, and of articulating

uniting values are still there. Experience in federations elsewhere that have disintegrated indicates that the repeated refusal to resolve basic problems may accentuate internal grievances and frustrations cumulatively to the point where eventually disintegration may become unavoidable. The referendum result, therefore, did not remove these issues as their revival in the period following the 1994 Quebec election makes clear.

The impracticality of another round of comprehensive constitutional reform has two major implications. In September 1994, in a provincial election the Quebec electorate voted the federalist Liberal Party out of office after two terms. By a narrow majority in the total votes cast, with the sovereigntist Parti Québécois which is committed to holding a referendum on independence during 1995 was elected into power. Post-referendum opinion surveys have consistently indicated that declared separatists make up only just over 40 percent of the Quebec population, a sharp drop from the 65 percent registered in polls taken immediately after the failure of the Meech Lake Accord. Indeed in that respect, in lowering the tension the 1990-92 constitutional deliberations were in fact a total failure. But those same surveys indicate that a substantial number of those who still call themselves federalist would support continued federalism only if Quebec were to be given more additional powers than Charlottetown offered. With little prospect of agreement from the rest of Canada on such additional powers before the referendum of independence, the Quebec electorate is now for the first time likely to be faced with the stark choice between the status quo and sovereignty. In the past, Quebecers focused on relatively soft options: a revised decentralized federal system advocated by Claude Ryan and Robert Bourassa's Quebec Liberal Party or sovereignty with a close economic association with Canada as advocated by René Lévesque's Parti Québécois. The 1980-82 constitutional negotiations, the Meech Lake

Accord 1987 and the Charlottetown Agreement, 1992, each aimed at a comprehensive constitutional restructuring that would create a 'renewed federalism' that would be a third way, an alternative to both status quo federalism and Quebec independence. Now with the 1992 referendum apparently closing the door on any such revised federalism as a middle way and with the lack of sympathy in the rest of Canada for sovereignty-association as an alternative, Quebecers will have to make the more dramatic choice between the Canadian federation as it is and unmoderated sovereignty. Stéphane Dion has suggested that faced in a referendum with the hard choice between the current federal structure unchanged and complete sovereignty, a majority of Quebecers would probably prove reluctant to vote for complete sovereignty when the full implications of its consequences are clear. But that is far from certain.

The second major implication arising from the difficulties of comprehensive constitutional reform as a way of tackling Canada's unresolved structural problems, is the need to consider returning to incremental constitutional changes and to non-constitutional political processes and policy adjustments to address Canada's problems (see for instance the discussion in Laponce and Meisel: 89-102 and Russell: 228-235). Canadians relied heavily on such means in the 115 years before a formal constitutional amendment process was inserted in the Constitution in 1982. It has only been during the last three decades that comprehensive constitutional reform has become such an obsession for Canadians. A considerable rebalancing of the roles of the federal and provincial governments and towards aboriginal self-government could be achieved without extensive formal constitutional amendment.

An important question, however, will be whether sufficient progress can be achieved and quickly enough by such incremental methods. There are significant limitations to relying on such an approach. First, the incremental approach is not likely to move sufficiently

quickly to meet the urgent concerns that gave rise during the past decade to the intense impetus for comprehensive constitutional change. The second limitation is that non-constitutional adjustment cannot provide the *symbolic* significance and the assurance of constitutional safeguards that formal constitutional amendments would. Nevertheless, given the growing realization of the almost certain immobility any effort to resolve Canada's structural problems through comprehensive constitutional change is likely to face, the pragmatic incremental approach may be the only route left. At least, agreement may be easier to achieve through such an approach when the higher stake deliberations of mega constitutional politics are avoided. Whether there will be an opportunity to proceed along such an evolutionary path will depend, however, on whether developments in Quebec following the impending referendum will preclude this possibility.

6. Conclusions

Let me conclude by returning to the questions about process raised at the beginning of this chapter. Lessons drawn from the failure of the Meech Lake Accord certainly dominated the strategies adopted during the 1990-92 deliberations. Yet, like the Meech Lake Accord process, this round also ultimately resulted in failure. Two of the most important apparent lessons from the Meech Lake process which influenced the character of the 1990-92 process were the need for a comprehensive set of constitutional proposals and the need for extensive public consultation prior to any intergovernmental negotiation. Were these mistaken strategies?

The first issue is whether comprehensive or incremental constitutional change is the more productive approach. Experience in other federations indicates that comprehensive constitutional change is much more difficult than incremental change. Switzerland provides a particularly instructive example. It has separate

procedures for partial revision and total revision of the constitution. It has managed the former over 110 times in the period 1848-1994. But of four attempts at total revision, including the most recent one, a protracted effort from 1965 to the early 1980s, involving two commissions and much intergovernmental deliberation, only that in 1874 succeeded in achieving a total revision (*Annuaire statistique de la Suisse* 1994: p. 379 Table T 17.10: 1848 to March 1993). A paper by Cheryl Saunders at the ANC conference on "Redisigning the State: The Politics of Constitutional Change," 1994, outlined four major efforts at constitutional change in Australia and the problems of achieving comprehensive constitutional revision in that federation. Another paper at that conference by Uwe Leonardy reviewed the German experience and difficulties. Nor has the U.S.A. in its recent history been marked by major constitutional revisions and the failure of the Equal Rights Amendment points to the difficulty of achieving substantial constitutional amendment there. All this suggests that an incremental approach to constitutional change should be the preferred strategy.

But the situation following the demise of the Meech Lake Accord foreclosed an incremental approach. That previous Accord had represented an explicit attempt to deal only with the problems of Quebec and to defer consideration of other constitutional issues for later consideration. Its rejection had been the direct result of opposition from other groups within Canada who insisted that they would not approve it unless their concerns were also resolved at the same time. Thus comprehensive constitutional reform seemed the only possible path.

Nevertheless, the difficulties of getting agreement upon a complex and comprehensive change in a referendum campaign have been amply illustrated in the recent Canadian experience. The notion of a referendum on major constitutional change has an appeal in theoretical democratic terms as a basis for legitimizing such changes. But the Canadian experience and that

elsewhere in several European countries which have held referendums on the Maastricht Treaty or in Australia where constitutional referendums are mandatory, has indicated the difficulty of achieving approval of comprehensive change through a referendum process. Referendums provide an opportunity for various specific groups and vested interests to concentrate on attacking different aspects without agreeing amongst themselves on an alternative. Thus, the cumulative effect is to undermine general public confidence in the proposals under consideration. Indeed, in the Canadian case, since concessions had to be made on all sides in order to produce a comprehensive consensus, the resulting agreement provided ample opportunity for opponents to emphasize the degree to which particular groups had not gained everything they had sought. The proponents of the comprehensive proposals for change, on the other hand, were left with the much more difficult task of explaining and defending the total set of compromises. As a result during the referendum campaign, public support progressively drained away.

The dilemma that Canadians have now been left with is that in the Canadian context *neither* partial nor comprehensive constitutional reform seems to be workable or acceptable. Canada may, therefore, have a Constitution that is for all practical intents and purposes virtually unamendable for significant issues.

It may be that the intense Canadian debates over the Meech Lake Accord, 1987-90, and the Canada Round, 1990-92, have, at last inoculated Canadians from the disease of wanting to solve all structural and policy problems by means of constitutional change. Many of the basic problems outlined early in this paper could be tackled by means other than formal constitutional amendment. Considerable progress could be made by means of ordinary legislative and administrative action and by intergovernmental agreements on the development of Aboriginal self-government, improving the economic and

social union, improving the representativeness and responsiveness of the House of Commons through electoral and procedural reforms relating to that body, and adjusting the roles and fiscal relationships of the federal and provincial governments although as noted in the preceding section of this chapter, there are some limitations to this approach.

The second issue about future processes for constitutional change or adaptation concerns the appropriate role of the public and of elites in the process of constitutional change. The 1990-92 process attempted to establish a blend of extensive prior public input, elite intergovernmental negotiation, and public ratification by referendum. This represented a conscious effort to avoid the accusations of lack of prior public discussion and public involvement that were directed at the politicians who produced the Meech Lake Accord. Indeed, as already noted earlier, the 1990-92 process involved very extensive public consultation. Yet, in spite of this, during the referendum campaign the media and public critics attacked the Charlottetown Agreement as simply the product of elites because the intergovernmental negotiations had been carried out behind closed doors.

This raises two questions. First, does the failure of the 1991-2 attempt at constitutional reform represent the end of the tradition of elite accommodation as a means to reconciling differences within Canada? Second, if so, is there any viable alternative process for constitutional change? The alternatives are not clear. Some have advocated a constituent assembly process but that requires prior agreement on composition, method of selection and mandate, all issues on which there is no easy consensus. Furthermore, a study of constituent assemblies and conventions elsewhere by Fafard and Reid suggests that rarely have they been successful except in post-revolutionary situations where the establishment of a new political structure is unavoidable. Does the lack of a

viable alternative process for major constitutional change mean then that like some other federations Canada is locked into a basically unalterable status quo because there will always be conflicting vested interests resisting change for various reasons? If so this is likely to induce resort to extra-constitutional means to achieve major change.

What the failure of the 1990-92 constitutional review process has done, therefore, is to face Canadians now with the need to consider what process, if any, can be developed for dealing effectively with the as yet unresolved structural problems of Canada.

ENDNOTES

1. In the instances of Ontario and Prince Edward Island and on some occasions for Newfoundland and Nova Scotia the premier of the province participated as one of the two ministers.
2. The current overrepresentation of the smallest provinces in the House of Commons was to be reduced by removal of special guarantees in their representation (Watts, 1993b: 29-30).

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