LET'S TALK: THE QUEBEC REFERENDUM AND THE FUTURE OF CANADA

Part Two

continued from the previous issue (volume 3, issue 8)

BY JAMES TULLY

UNIFORM AND FLEXIBLE FEDERALISM

As I suggested in Part One, the imperial constitutionalism, based on the fraud of the 1980s and the threats of force of the 1990s, is the major cause of the disunity of Canada. The offensive words and deeds of "put-up-or-shut-up" federalists have provided secessionists with their main justifications, as we have seen. Every time they say that they are like civilized and tolerant Czechs, while Quebeckers are like intolerant and ethno-nationalist Slovaks, or some such smug analogy, and repeat their threats to use force if Quebeckers refuse to submit to the status quo, the support for secession understandably increases. All I can say is that Quebeckers have no interest in a federation held together by fraud and force.

If this were the only kind of federalism available, Quebeckers would separate to preserve their sovereignty, however imperfect, at the cost of severing an association they once loved. This is because it is an intolerable affront to their dignity as a free and self-governing people. But is it the only federalism offered by the rest of Canada? I think not. There is considerable evidence of another federalism.

First, even though the interpretive clause of the Meech Lake accord was defeated, the justices of the Supreme Court interpret the Charter as though the clause had been passed, taking the preservation and enhancement of the French language, culture, and civil law into account in the application of Charter rights in Quebec. They continue to accommodate Quebec's national characteristics, much as the former justices of the Privy Council used to do, but now are adapting the common law to the more complex situation of post-modern cultural diversity.

A similar accommodative reasoning prevails in the federal parliament. Representatives from every side of the federation, with the exception of the First Nations, present their views as best they can, listen to the others, and seek to ensure that their perspectives are recognized in legislation. More often than not, the unintended consequence is legislation that fairly accommodates the concerns of each. The federal parliament and its standing committees are, thus, institutions at the political level of the same kind of dialogue that is present in negotiations at the constitutional level.

Next, the provinces continue to enjoy a considerable degree of sovereignty relative to that of the federal government. Quebec further enjoys a degree of sovereignty that the other provinces do not—with respect to language and culture in Bill 101, fiscal policy, pensions, international relations, social policy, primary and secondary education, immigration, and income tax. The problem is that there is a wasteful overlapping and often duplicating federal presence in each of these areas.

Most important, it is now not as certain as it was two years ago that the rest of Canada would refuse to reopen constitutional negotiations. Some polls indicate that a majority of Canadians are in favour of renewed constitutional talks. Moreover, Daniel Johnson has pledged that a "no" vote in the referendum will be followed by negotiations to rectify the injustice of 1982 and to repatriate powers to Quebec and to the other provinces if they want them. Some provincial premiers have suggested that they support Johnson.

SOME NEW INITIATIVES FOR CHANGE

The most important sign of change is the recent flexible federalism of the federal government. This consists in the dismantling of the enormous duplication and overlap of federal powers in provincial jurisdictions that have accumulated over the last 30 years. The Canada Assistance Plan, through which the federal government pays a large percentage of the country's welfare costs, and the Established Programs Financing, which goes to medicare and post-secondary education, have been replaced by the smaller and less-intrusive block grants of the Canada Social Transfer and given to each province to spend as they judge appropriate. So the provinces will gradually acquire the kind of sovereignty in health, education, and welfare that Quebec has asked for since 1971. There can be little doubt that the public sector will be considerably leaner and more decentralized by the end of the decade. The possibility of inter-delegation of powers by means of individual federal-provincial negotiations at the sub-constitutional level has been raised. This will still leave the federal government with its indispensable role of coordinating the common interests of the members.

None of these changes in federalism was initiated in response to Quebec or the other provinces. Each was forced on the federal government by international market forces over which Canada has little control. Canada can no longer afford the tug-of-war federalism of the last 30 years. There is little choice but to bring down the deficit and the foreign-owned debt in something like the way the federal budget proposes. With a smaller GDP and population than California, Canada has very little sovereignty over its own economic policy. An independent Quebec, with the population and GDP of Massachusetts, would have even less. Canada, one may say, is moving toward the kind of federalism that Quebec wants despite itself.

Recognition is not something that can be given in a half-hearted way as a result of Daniel Johnson pleading with one premier after another to give some hint of a willingness to consider it.

Consequently, two of the arguments for secession no longer apply. Constitutional change is unblocked and the expansion of federal powers into provincial jurisdictions is being reversed. Of course, there is a long way to go from

the point of view of Quebec sovereigntists. Nevertheless, the federal-provincial negotiations set up to reach agreement on block grants and cuts over the next four years will involve the devolution of power that Quebec has always demanded.

Therefore, if the Quebec government were to participate in these negotiations and fight for their traditional demands, they would be able to reach agreement on a form of decentralized federal association close to what the majority of Quebec citizens want as likely as they would be if they were to enter into negotiations with Canada after a "yes" vote in a referendum for independence with economic association. If we add the probability that Quebeckers would be worse off at the end of secession negotiations, it is more likely that Quebeckers would get closer to the sovereignty association they want if Quebec were to engage in the federal-provincial negotiations. Hence, if the government of Quebec aims to serve the sovereign people of Quebec, rather than their sovereignty project for its own sake, they should postpone the referendum question, take the beau risque once again, enter into these negotiations, and see what happens. Indeed, this seems to be precisely the conditional way Louise Beaudoin put it: "If the federal government cannot be reasonable [in the negotiations], Quebeckers will know the only other way is sovereignty."

MORE DIALOGUE IS NEEDED

Neither of these changes in the constitutional status quo addresses the other reasons for Quebec's right to secede: the breach of the conventions of consent and continuity and the failure to rectify these in 1990 and 1992. These constitute a problem of constitutional misrecognition. It can be resolved only by an acceptable form of recognition. This would require, first, public acknowledgment by the other provinces and the federal government that the constitution of 1982 is founded on an injustice that has not yet been corrected. This should not be difficult since the Meech Lake and Charlottetown negotiations were based on just such an acknowledgment. Second, adherence to the constitutional conventions of consent and continuity should be reaffirmed and Quebec's veto over constitutional change affecting it should be restored. Finally, negotiations should reopen to reach agreement on the recognition of Quebec as a multicultural, self-governing society in which the predominant language, culture, and law is French, and in which the language and institutions of the Anglophone minority and the sovereignty of the First Nations are constitutionally protected.

How much longer are Canadians going to bear the costs of a lower standard of living and an uncertain economic future in order to sit on a flawed constitutional settlement that could be rectified by a simple act of recognition?

Recognition is not something that can be given in a half-hearted way as a result of Daniel Johnson pleading with one premier after another to give some hint of a willingness to consider it. It requires a public affirmation of the difference of Quebeckers and the internal relation they bear to one's own identity as a Canadian, just as we have seen Quebeckers repeatedly affirm with respect to the rest of Canada.

The negotiations should proceed on the basis of all we have learned in the last five rounds. Public fanfare and vast campaigns should be replaced by calm negotiations and consultation. Rolling drafts should be widely discussed by citizens so they can become aware of the irreducible diversity of the association, and then returned to the negotiators. No artificial deadlines should be imposed. Canadians ought to realize that their association rests on this form of dialogue—in negotiations at the constitutional level and in federal parliament debates at the political level. The dialogue has been going on for 300 years and it can long outlast our present difficulties. Everyday politics should proceed and not be interrupted or overshadowed by the background negotiations.

Thus, before the referendum, the premiers and the prime minister should present a public, binding offer to begin negotiations of these unresolved constitutional issues.

RENEWING CANADIAN FEDERALISM

In conclusion, there are three reasons why Canadians should recognize and affirm Quebec in this whole-hearted way. First, justice demands it. Anyone who believes in a constitutional association based on negotiation and agreement rather than fraud and the threat of force should be moved by this reason alone. Of course, for those who value cultural and political diversity in itself, more than mere justice is involved.

Second, recognition is in the economic interest of every Canadian. Quebeckers will never abandon their identity as a sovereign people and assimilate to a minority status in a uniform, pan-Canadian nation, no matter how long the rest of Canada continues to force it on them. The political and economic uncertainty caused by the irresolution of this issue costs Canadians millions of dollars every year in inefficient federalism, higher interest rates, and a lower Canadian dollar. How much longer are Canadians going to bear the costs of a lower standard of living and an uncertain economic future in order to sit on a flawed constitutional settlement that could be rectified by a simple act of recognition? It took the British 11 years to amend their injustice of 1763 and it took the four old provinces 27 years to rectify the breach of 1840. Is it too much to ask contemporary Canadians to do the same in 14 years, especially since it is in their interest to do so?

The third and final reason is that the final report of the Canadian Royal Commission on Aboriginal Peoples will be published in December 1995. Canadians will be asked to recognize an analogous form of sovereignty and association for the First Nations. Although the demands of the Aboriginal peoples are not the same as Quebec's, they are based on the same constitutional conventions. The recognition of Aboriginal self-government and prior sovereignty over unceded territories was enshrined in the system of treaty constitutionalism with the Crown from the 17th to the late 19th century. The Crown was obligated to gain the consent of the Aboriginal nations to any alteration in their status such as ceding land and delegating powers of self-rule to the Crown through treaty negotiations in which the First Nations were considered equal in status to the Crown. In 1867 and 1874, the Canadian constitution was im-

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posed on the Aboriginal peoples without their consent, discontinuing and outlawing their forms of self-government. The Charter was imposed in 1982 without their full consent and it discontinued their laws and ways. Like Quebeckers, the Aboriginal peoples protested and suffered a series of unsuccessful negotiations from 1983 to 1992.

In 1996, the Canadian Royal Commission will ask Canadians to recognize and modernize this treaty federalism, the oldest of the forms of association that constitute the Canadian association. If the Royal Commission waters down its final report, or if Canadians refuse recognition, then the Aboriginal peoples will protest and continue to demand it. The immensely expensive and damaging failure to face this injustice will continue, just as it did in the case of a similar refusal with respect to Quebec. Conversely, if Canadians initiate negotiations to reach agreement on a modern form of accommodation of Aboriginal sovereignty association, they should, by the application of the same constitutional conventions, act consistently with respect to Quebec. If they recognize one but not the other, the blatant injustice will fuel another secession movement. Therefore, for reasons of justice and interest, Canadians should recognize these two demands through constitutional negotiations in 1996.

Many countries face analogous demands for recognition. Under the deadly presumption that a constitutional association must be a uniform nation, most demands are dealt with by repression, secession, and war. Canadians have the opportunity to show that such demands can be handled by dialogue rather than war. This would not be an insignificant contribution to peace on our culturally diverse planet.

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cial and costly preparations were under way, the court system was still studying whether Quebec had a right of veto according to Canadian laws and conventions?

PATRIATION REVISITED

It was on April 7, 1982, only after the Queen had officially confirmed the principle and details of her trip, only after the federal government had put the last touches on the ceremony, that the Quebec Court of Appeal decided Quebec had no right of veto. In the hours following the judgment, the government of Quebec announced that it would launch an appeal to the Supreme Court of Canada. This had no influence whatsoever on the proceedings in Ottawa. The Queen crossed the ocean and, just like Prime Minister Trudeau, she signed under the approving eyes of, among others, Jean Chrétien, André Ouellet, and Michael Pitfield.

I have argued frequently in past years that this ceremony and this picture mark the end of a certain Canadian dream in the hearts and minds of many Quebeckers. In early December 1982, almost eight months after the law had been in force, the Supreme Court confirmed the judgment of the lower tribunal. A right of veto for Quebec had never existed.

In the early '80s, the whole patriation exercise was criticized harshly by many commentators. For Gérard Bergeron, it was a legal "coup d'état." In the eyes of Donald Smiley, it was a fundamental breach of convention. For Philip Resnick, Trudeau's crusade was a form of constitutional Bonapartism. I suspect that these writings do not figure prominently in the academic manufactures of Charter patriots across the land.

It seems to me that if an impartial body of observers were asked to evaluate the 1982 affair, they would seriously question a number of its dimensions. The whole thing went against the grain of the political and juridical traditions of the British-based parliamentary liberal democracy that was *our* system before 1982. In that system, it remains improper for the government to behave as if a favourable decision had already been given by the courts. This amounts to a clear intimidation of the tribunals. There is such a thing as the honour of the Crown in our juridical and political system.

In his dealings with the Queen and her government in Britain, Jean Chrétien, who was the federal minister of justice at the time, could in no way provide guarantees that Canadian courts would not invalidate the whole matter. The only way for him to give such guarantees would have required a radical breach with a central element of our liberal democracy: the independence of the judiciary. Mr. Chrétien, at the very least, would have had to be privy to the yet unavailable conclusions of the Quebec Court of Appeal. This was unthinkable—it would have disqualified Mr. Chrétien and the federal government. Therefore, it must be said that all parties involved, including the Queen, chose to place the courts in an impossible position. This renders quite disgraceful the last chapter in the history of the British colonial experience in Canada.

THE COSTS OF UNILATERALISM

Having some distance, we can now reconstruct what occurred in the spring of 1982. With formidable political pressure on their shoulders, two benches of justices, all unilaterally nominated by the Canadian prime minister and his predecessors, chose to confirm the legal validity of a reform whose chief characteristic would be to reinforce, through the enshrinement of a charter of rights and freedoms, their own power in the institutions of the land. On a matter of fundamental importance for the history and future development of the federation, substantial disrespect was shown for the idea of due process.

In juridical and social science circles, the constitutional judgments of 1981–1982 produced a huge secondary literature. Some doubts have been expressed about the way the courts defined a constitutional convention and the relevant criteria to ascertain its existence. At least twice in the '60s and early '70s, the machinery of constitutional reform was stopped because Quebec had expressed its sole dissent.

The dominant opinion for the courts was that this did not amount to a clear, explicit recognition that Quebec had a