Assessing the Outcomes of the Current Constitutional Rounds

by Peter H. Russell

In assessing the possible outcomes of a Quebec referendum on sovereignty, the critical question is whether the referendum will be followed by yet another Canadian effort at constitutional restructuring. Set out below is a matrix that displays four possible outcomes, each combining a "yes" or a "no" vote in the referendum followed either by a heavy round of constitutional negotiations or no such effort. What follows is an explanation of what would be most and least beneficial for all Canadians—including Quebeckers.

	No constitutional negotiations after referendum	Constitutional negotiations after referendum
Majority "no" in referendum	Best	Second worst
Majority "yes" in referendum	Worst	Second best

The Best Outcome

A "no" majority followed by a return to incremental constitutional change. Fortunately this outcome, a win for the "no" side in the referendum followed by avoidance of the constitutional table, is also still the most likely outcome. This outcome would abort another round of macro constitutional politics. That, in a nutshell, is exactly why it is the best possible outcome.

To understand why this outcome is preferable, it is essential to grasp the challenging nature of efforts at macro constitutional change and the exceptional circumstances required for their success.

Macro constitutional politics is an effort to achieve a grand resolution of constitutional issues by a major restructuring of the written constitution. A generation of Canadians have been so engrossed in this kind of constitutional politics that they have come to think that this is the only possible means of constitutional change. Changing the constitutional status quo has come to mean "going to the table to cut a big deal."

The trouble with projects of macro constitutional change is that they are apt to escalate into mega constitutional politics. *Macro* refers to the scale of the constitutional agenda; *mega* refers to the intensity of the public debate on constitutional issues. When constitutional politics reach the "mega" level, the constitutional question eclipses all other public issues and monopolizes the attention of the body politic. This will occur where the following three conditions hold: (1) the country attaches great importance to its written constitutional text; (2) the country has come to believe in a highly democratic constitutional process; and (3) the country is deeply divided on constitutional matters.

All three of these conditions now hold in Canada. Under these conditions, a successful resolution of the constitutional debate, especially when the constitutional amendment rules require unanimous agreement of all the parties, is virtually impossible, absent the most dire of straits.

As Canadians well know, these rounds of mega constitutional politics are exhausting, frustrating, and divisive. Recognition of that fact is the source of our "constitutional fatigue." Following a "no" victory, if we and our leaders have any sense, we will avoid macro constitutional politics like the plague.

Avoiding efforts to cut a big constitutional deal does not commit the country to the status quo. Indeed, there is no status quo in constitutional life. The constitution is constantly changing and adapting. The choice is between relying on the normal, incremental process of constitutional change or trying our luck, once again, at big bang constitutional change. The normal process through which constitutional systems evolve and develop involves a combination of instruments including political practice, legislation and administrative arrangements, judicial decisions, and the occasional constitutional amendment.

Most of the time, constitutional democracies rely on the normal process of constitutional change. It is, indeed, the process that Canada relied on for the steady evolution of its constitution from Confederation until the late 1960s. Already, in the short span of two and a half years since the Charlottetown accord, our most recent big bang constitutional effort, went down to defeat, we have accomplished much through the normal, incremental process. These changes include:

- the establishment of Nunavut, self-governing region of the Arctic with an aboriginal majority;
- settlement of the Yukon land claim, with self-government for the Yukon Indians;
- political agreements to implement aboriginal self-government in many of the provinces;

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- a federal-provincial agreement on reducing barriers to internal free trade;
- Canada's participation in NAFTA;
- a reduction of the federal government's use of its spending power to influence provincial social and education policies;
- a constitutional amendment recognizing the bicultural nature of New Brunswick; and
- a constitutional amendment changing Prince Edward Island's terms of Union

Through these normal processes of constitutional adaptation, much could be done to give more policy room to Quebec and other provinces that wanted it and to make our federation operate more efficiently. However, what the normal process cannot deliver is symbolic gratification to Quebeckers who aspire to the trappings of statehood or explicit redress of the injustice inflicted on Quebec in 1982 by amending the constitution in matters relating to its interests without its consent. If these symbolic objectives turn out to be important enough to Quebeckers to risk the heavy transaction costs of realizing them, the "yes" side will win the referendum and my second best outcome will come into play.

The Second Best Outcome

Negotiating an agreement after the "yes" side wins the referendum. It may seem perverse for a committed Canadian federalist to prefer this outcome to a win for the no side followed by constitutional negotiations. But constitutional negotiations after a federalist win would be futile. (See "The Second Worst Outcome.")

It would be better to get down to negotiating sovereignty association with Quebec sooner rather than later, assuming that that is what a majority of Quebeckers want. The PQ's draft bill gives up to a year to negotiate the terms of Quebec's independence. With a very small "yes" majority—which is the most the sovereigntists can reasonably expect—they will be all the more inclined to negotiate. The question is: will the rest of Canada be willing and able to negotiate?

Its leaders might well agree to negotiate, though perhaps not right away. If the referendum question were too tricky or obscure to interpret a "yes" majority as a vote for sovereignty, the federal government might insist on another referendum or it might call a federal election to strengthen its negotiating mandate. If a second referendum did produce a sovereigntist win, the federal government would agree to convene and participate in constitutional negotiations with Quebec—even if the sovereigntist win was by a slight majority.

The consequences of refusing to negotiate would be too unattractive. A refusal by the federal government to negotiate would very likely induce the Quebec government to make a unilateral declaration of Quebec independence. Parizeau's only option would be another referendum to get a stronger mandate, which the federal government's refusal to negotiate would make all the easier to obtain. A unilateral declaration of independence would plunge the country into economic and communal chaos. Two regimes claiming sovereign authority over the same people and territory is a recipe for disaster.

To avoid such a disaster, both the Quebec and the Canadian governments should have a strong incentive to enter into negotiations following a sovereigntist win. These negotiations to be sure will be horrendously difficult. To begin with, there will be big questions about the table: who should be there and what should be on it?

Quebec might ask for—might even insist on—nation-to-nation negotiations. But it would be wrong for the federal government to accede to such a demand. Quebec will have to respect the federal nature of Canada. The government of Canada has no mandate in law, politics, or principle to negotiate on its own the constitutional future of all the provinces other than Quebec or the aboriginal peoples. The constituent elements of Canada that share its sovereignty must all participate in restructuring their constitutional relationship to one another.

Alan Cairns, Patrick Monahan, and others have said that the rest of Canada is ill prepared for such negotiations. That is surely true. But it does not follow that the negotiations cannot produce an agreement. The difficulty of the negotiations cannot be discounted. The agenda will include the tough separation issues that we are all learning like a mantra—apportioning the debt, currency, citizenship, the sovereign claims of First Peoples, boundaries, the terms of Quebec's economic association with Canada, as well as the reconstitution of a Canadian federation without some or all of what is now Quebec. But tough as this agenda is, there is a fair prospect of reaching agreement on all of its major items.

There may be a better than even chance of negotiating an agreement in these circumstances because all concerned recognize that the alternative to not agreeing entails unacceptable risks. Under a dire-straits hypothesis, the possibility of resolving what would seem to be virtually unbridgeable constitutional differences increases significantly when the default condition—assuming that a resolution of the constitutional issue is not secured—is regarded by an overwhelming majority of those involved as utterly unacceptable.[1] This was the condition that induced white and black leaders in South Africa to reach an accord on the formation of a new fed-

eration: recognition that economic collapse and communal violence would be the result of a failure to reach an accommodation.

In the Canadian case, the consequences of a failure to negotiate will not be as dire as they would have been in South Africa. But they will be dire enough. All the time the negotiations are going on—indeed, from the moment a sovereigntist win is evident—the Canadian economy would be under tremendous pressure. Hotheads intent on arousing communal passions would not be lacking on each side. Under these circumstances, a year's time limit on the negotiations would be a blessed discipline. Even if everything were not settled at the end of a year, provided that progress was being made, the Quebec government would be unlikely to walk away from the table.

The product of an agreement reached under these circumstances would likely be quite a mess. It would certainly be a compromise containing elements that would be a hard sell both in Quebec and in the rest of Canada. As with previous constitutional "dog's breakfasts" negotiated by Canadian elites, this one, too, could encounter serious difficulties at the more democratic stage of ratification—whether by legislatures, referenda, or some combination thereof.

At this stage, anything is possible. It is even possible that the democratic ratifiers, holding their noses and anxious to bring the cursed constitutional thing to an end, would give it the necessary degree of approval. Alternatively, they may not, plunging us back into the maelstrom unless Quebec's constitutional agents provocateurs take a rest or lose their mandate. In which case we might live happily, if not ever after, at least for another year or two, which for Canadians would be a veritable eternity of constitutional peace.

The Second Worst Outcome

Returning to the constitutional table after a win for the "no" side. Without the imminent threat of Quebec separation, Canada outside of Quebec would not have sufficient incentive to agree to constitutional changes satisfactory to Quebec. The effort to negotiate such a deal would simply end up in another distracting, energy-draining failure. Without a gun to our heads, there is no basis for a popular consensus on a constitutional restructuring of the Canadian federation.[2]

Though this outcome would be an unfortunate waste of time and effort, I still prefer it to that worst of all possible outcomes—a unilateral declaration of independence by Quebec. Spinning our wheels at the constitutional table would distract the country from dealing with pressing practical problems and would probably leave us more divided than ever. But not as many people would be as badly hurt as is likely to be the case if Quebec asserts its independence extra-constitutionally. It is better to be bored to death than scared to death.

The Worst Outcome

The government of Quebec declares Quebec independence in effect before negotiating its terms. This outcome is the least likely. This is fortunate because unilateral declarations of independence (UDIs) are very dangerous enterprises. The danger arises from a possible breakdown of law and order. When a province of a federal state acts extra-constitutionally on a grand scale, it creates a climate of uncertainty. Citizens are not likely to agree on whose laws should be obeyed. The central government is put in the dilemma of either abandoning its constitutional responsibilities or using minimal force to protect them—such as protecting the rights of Canadian citizens, securing compliance with its laws, keeping its offices in the province open, and maintaining its delivery of services. In this jittery climate of uncertainty, many people will leave the province and gobs of money will leave the country. I know of no happy experiences with UDI. Chechnya is just the most recent tragic example.

In such situations, most of those who get hurt, badly hurt, have little interest in constitutional affairs. They are the economically most vulnerable who have no place to go and no wealth to move. These people, in a UDI, literally will not know what hit them. This is grossly unfair. If it were for some great cause—to end a terrible oppression—then the end might justify the means. Only the most fanatic Quebec sovereigntist could think that their cause justifies such means. Hopefully, it is not naive to believe there are few such fanatics in the leadership of the Parti québécois.

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1 See my paper "Canada's Mega Constitutional Politics in Comparative Perspective," presented at the World Congress of the International Political Science Association, Berlin, August 21-25, 1994.

2 See Michael Lusztig, "Constitutional Paralysis: Why Canadian Constitutional Initiatives Are Doomed To Fail" (1994), *Canadian Journal of Political Science* 747.

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