

TWO BIG HURDLES FACING CONSTITUTIONAL RENEWAL

Incorporating Quebec's Concerns and Securing Public Ratification

by *Kenneth McRoberts*

By some readings, the recently concluded multilateral constitutional talks fell just short of success. In only three areas, albeit important ones, was there no agreement: Senate reform, the amendment formula and strengthening the economic union. Thus, one might be tempted to conclude that Canada came close to a resolution of its constitutional crisis. By this same reasoning, if Ottawa should somehow be able to resolve these outstanding issues at the First Ministers' meeting on June 29, then our problems would be over. Unfortunately, Canada's constitutional predicament is much more complex.

Any accord stemming from this process would be under attack on two fundamental counts. From one perspective, firmly rooted in English-Canadian opinion, this is just one more instance of the old way of doing things: negotiations among officials behind closed doors. Yet, from another perspective they are not even that: there were no participants from the Quebec government, either at the multilateral talks or the First Ministers' meeting.

NEGOTIATIONS "BEHIND CLOSED DOORS"

In recent years, many English Canadians have become wedded to the argument that the constitution should no longer be the preserve of politicians and bureaucrats. Thanks in particular to the repatriation of the constitution and adoption of the Charter of Rights and Freedoms, in 1982, large numbers of Canadians feel a new ownership of the constitution. After all, the Trudeau government had presented these changes as no less than a "people's package."

This new public sense of constitutional proprietorship was a major element in English-Canadian opposition to the Meech Lake Accord, widely castigated as the product of "eleven men in suits behind closed doors."

To be sure, the recent multilateral accords improved somewhat on the Meech process: the two territories and four aboriginal groups were directly represented. Yet, other interests were not — and the doors were still closed. (This came on the heels, moreover, of five public, nationally televised constitutional conferences in which a wide variety of groups did participate.) The National Action Committee on the Status of Women and multicultural spokespeople openly protested their exclusion from the multilateral talks. Groups such as these can be expected to be highly suspicious of any new accord and to attack its legitimacy.

TAKING THE CONSTITUTION "TO THE PEOPLE"

Beyond that, there is now strong support for the notion that constitutional talks alone are not sufficient, however they may be constructed. Any agreement must be submitted to the people—through a referendum. Quebec is not the only province committed to holding a referendum on the constitution. The British Columbia government is legally bound to hold a popular referendum on any proposed constitutional change. Alberta has introduced referendum legislation. Last year, the Saskatchewan electorate overwhelmingly approved the notion of constitutional referenda. For its part, the federal government has just

passed legislation for its own national referendum.

It is now virtually certain that any constitutional accord will be submitted to a referendum in some provinces, if not all of Canada. Never before has this happened in Canada. The outcome of such a vote is hard to predict. Not only may symbolic elements of an agreement produce strong popular reactions that politicians cannot anticipate (as the Meech Lake debacle demonstrated) but a referendum could be heavily influenced by popular feelings about the government itself. The Mulroney government may try to intimidate recalcitrant provincial governments with a threat to go "over their heads" and take its constitutional package to the people. After all, precisely this threat worked for the Trudeau government in the fall of 1981. But times are different. Canadians are exceedingly dissatisfied with the present federal government; many of them might well use a constitutional referendum to give vent to these feelings.

INCORPORATING QUEBEC'S CONCERNS

The second challenge to the multilateral talks lies in the fact that Quebec officials did not participate in them. In the wake of the collapse of the Meech Lake Accord, Premier Robert Bourassa declared that Quebec would no longer participate in constitutional discussions. Instead Quebec would wait for the rest of Canada to formulate an "offer" of a renewed federalism. As a result, Quebec feels in no way bound by an accord produced by the multilateral discussions. There will be a suspicion in Quebec, given its absence


from the talks, that its concerns have not been met and the consensus reflects English Canada's agenda.

In point of fact, the consensus does seem to fall short of even Premier Bourassa's conditions for a renewed federalism, let alone the far more sweeping demands of the Quebec Liberal Party's Allaire Report. Bourassa has stated that renewal must include all the elements of the Meech Lake Accord plus a significant devolution of powers to the Quebec government. Yet, a key element of the Meech Lake Accord, the "distinct society" clause has been considerably reined in. And a veto for Quebec, and the other provinces, over constitutional change involving federal institutions is not assured. As for the multilateral consensus on the division of powers, it

merely reinforces existing provincial jurisdictions rather than adding to them. In effect, it falls within the parameters of the Beaudoin-Dobbie parliamentary committee's report, which Premier Bourassa felt compelled to rebuke publicly in March.

Clearly, francophone public opinion in Quebec will expect a substantial modification of the areas of consensus in order to meet Quebec's objectives. Such changes might well require formal negotiations between the Quebec government and the various parties to the multilateral talks. Yet in all likelihood these parties will be most resistant to renegotiate with Quebec the matters upon which, often with considerable difficulty, they managed to come to terms. Even if they were prepared to do so, public opinion in English Canada probably would not stand for it.

In short, even if in the coming days Ottawa should tease a complete consensus out of the multilateral talks, such an agreement would face two major hurdles: finding legitimacy in Quebec and securing public ratification by referendum. Moreover, the effort to clear the first hurdle might well weaken its hope of clearing the second. Alternatively, going to a national referendum without a prior agreement from provincial and aboriginal leaders would be a risky venture for such an unpopular government. Papering over Canada's constitutional cracks has become a daunting exercise indeed.

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CONSTITUTIONAL PROPOSALS AT A GLANCE

by David Johnson

HIGHLIGHTS OF THE FEDERAL STATUS REPORT

The Status Report summarizes the results of the Multilateral Meetings on the Constitution which began on March 12 and concluded on June 11. The Meetings were chaired by the Right Hon. Joe Clark, Federal Minister of Constitutional Affairs and were attended by Intergovernmental Affairs Ministers from nine provinces (excluding Quebec), the two territories, and leaders of four national Aboriginal organizations. Generally, these proposals had support from at least seven provinces representing fifty percent of the population and the federal government. With respect to Aboriginal issues, consensus was considered to have been achieved only where there was substantial support from Aboriginal delegations.

CANADA CLAUSE

The constitution should be amended to recognize fundamental Canadian values and characteristics such as: parliamentary government, federalism and provincial equality; Aboriginal rights; Quebec's distinct society; linguistic duality and multiculturalism; the equality of men and women.

DISTINCT SOCIETY

An interpretative clause should be added to the Charter to ensure that future Charter review takes into account Quebec's existence as a distinct society within Canada, and the vitality and development of the language and culture of French- and English-speaking minority communities throughout Canada.

THE SOCIAL AND ECONOMIC UNION

A constitutional provision should describe the commitment of all governments to the policy objectives underlying the social and economic union, including: maintenance of the current health care system; provision of reasonable access to housing, food and other necessities; protection of the environment; the free movement of persons, goods, services and capital nation-wide; the goal of full employment.

All these commitments, however, would be non-justiciable and thus could not be legally enforced should a government depart from them.

THE SENATE

The Senate should be elected with all Senators elected at the same time