



Practical Analysis of Constitutional and Other Key National Issues

## THE *REAL* FAILURE OF THE REFERENDUM

### The "Quebec question" remains unresolved

*Kenneth McRoberts*

For over 30 years now, Canada's political leaders have repeatedly sought to find a way to resolve "the Quebec question." Once again they have failed. This is the real significance of the referendum defeat.

In the early 1960s, social and political change in French Quebec produced demands for fundamental change in Canada's political system. There were two thrusts to these demands: one had to do with the status of French and of French-speakers within federal institutions and Canada as a whole; the other, the more powerful one, had to do with the status of Quebec. French-Canadian nationalism, which had roots going back to the 1820s, was transformed into a Québécois nationalism. Within this new nationalism, the Quebec government needed not only the status of a "national" state but additional powers so that it could meet the pressing needs of a modern Quebec society.

Inevitably, these demands became focused on the constitution, concerned as they were with the fundamental relationship between Quebec and the rest of the country. As a result, English Canada was drawn with great reluctance into a debate over constitutional revision.

### PAST FAILURES TO RESOLVE THE "QUEBEC QUESTION"

Out of this debate emerged the Victoria Charter of 1971, which would have linked constitutional repatriation with a new charter of rights, faithfully reflecting the priorities of Prime Minister Trudeau. Reflecting these same priorities, the Victoria Charter did little to strengthen the powers of Quebec, or the provinces in general. It was primarily for this reason that public opposition in Quebec forced Premier Robert Bourassa to reject the Charter, to the dismay of all the other first ministers.

In 1982 the constitution was repatriated and included the Charter of Rights and Freedoms, which constitutionally entrenched the status of French and English as official languages. Once again, however, the division of powers was virtually untouched and Quebec remained very much "a province like the others." And, once again, the Quebec government refused to sign. In this refusal, it was supported by large numbers of Quebec federalists. Thus, Canada's constitution was repatriated without the consent of the second-largest province.

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#### ARTICLES

The <i>Real</i> Failure of the Referendum by Kenneth McRoberts .....	45
After the Referendum by Ramsay Cook .....	47
Canada After Charlottetown by Patrick J. Monahan .....	48
What Part of "No" Will They Understand? by Janine Brodie .....	50
The Referendum in Canada: A US Perspective by Stephen Blank .....	52
Unravelling Charlottetown's Web by Bruce Ryder .....	53
The Advertising Campaign: Confounding Conventional Wisdom by David Johnson .....	55
<b>REGULAR FEATURES</b>	
<i>Western Report</i> by Roger Gibbins .....	56
<i>Quebec Report</i> by Guy Laforest .....	57
<i>Legal Report</i> by Jamie Cameron .....	59
<i>Canada Watch Calendar</i> .....	60

#### PLEASE CIRCULATE TO

- 1. \_\_\_\_\_
- 2. \_\_\_\_\_
- 3. \_\_\_\_\_
- 4. \_\_\_\_\_

It was to remedy this fundamental flaw that, in 1987, the first ministers agreed to the Meech Lake Accord. Beyond reinforcing some provincial powers, the Accord explicitly declared Quebec to be a "distinct society." Largely for this reason, the Accord was rejected by public opinion in the rest of the country — two provincial legislatures allowed it to die. Quebec francophones, who had viewed the accord as an absolute minimum, felt rejected by the rest of the country, and support for Quebec sovereignty soared.

#### THE CHARLOTTETOWN ACCORD'S FATAL FLAWS

Now, yet another constitutional venture has ended in fiasco. This time, of course, the rejection extended to both English Canada and Quebec. Ironically, Canadians were "united" through their common opposition to the agreement, which had been intended to bring them together.

Once again, the key to constitutional failure lies with the "Quebec question." After all, on July 7 Prime Minister Mulroney and the English-Canadian premiers announced their agreement to a constitutional accord that had a good chance of securing popular approval in English Canada. In particular, the July 7 agreement clearly responded to the primary English-Canadian constitutional demand: make the Senate "equal, elected, and effective."

If, however, the agreement responded to English Canada's concerns, it did not respond to Quebec's. Premier Bourassa had not even been at the bargaining table. Yet, in their effort to render the agreement acceptable to Quebec, the first ministers proceeded to modify the accord along lines that virtually doomed it to rejection—not only in English Canada but in Quebec as well.

As ever, the main focus of Quebec's demands had been the division of powers. Given English Canada's continued commitment to a strong federal government, the logic of Quebec's needs was an "asymmetry" in powers, through which the Quebec government could exercise jurisdictions that the other provinces preferred to leave with the federal government. Beyond affording the additional powers that Quebec wished, asymmetry had the added appeal of reflecting Quebec's

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distinctiveness. Precisely for this reason, English-Canadian leaders presumed that asymmetry in powers could not be sold in English Canada. Thus, they sought to render the package acceptable to Quebec by downscaling the powers of the reformed Senate and by increasing Quebec (and Ontario) representation in the House of Commons. They even went so far as to guarantee Quebec 25 percent of Commons seats in perpetuity. (In effect, unwilling to introduce asymmetry into the division of powers, the first ministers ended up introducing it into the House of Commons.) In the process, they undermined much of English Canada's support for the accord. In particular, the 25 percent

guarantee produced a storm of opposition in English Canada.

Ironically, the guarantee of Commons seats appears to have mobilized little support in Quebec. After all, the provision had not even been proposed by Quebec, and it could not compensate for the fact that Quebec had not secured its long-sought additional powers.

#### THE NECESSITY OF ASYMMETRY

Clearly, the political and ideological forces in English Canada arrayed against asymmetry are powerful. It is, however, also clearer now than ever that only on this basis can the "Quebec question" be resolved. In fact, among the documents prepared by top Quebec civil servants that were recently published in *L'Actualité*, there is the intimation that even the stronger Senate proposed in the July 7 agreement would have been acceptable to Quebec — if it were accompanied by additional powers.

Asymmetry could be secured in a couple of ways. Certain jurisdictions might be formally assigned to Quebec alone, among the provinces. Or jurisdictions could be made available to both levels of government with the right of provinces to occupy them exclusively through the exercise of paramountcy.

To be sure, if federal measures do not apply to Quebec, Quebec MPs probably should not vote on them; that would be the price of asymmetry. Conceivably, cabinet portfolios in areas from which Quebec has extensively "opted out" would not go to Quebec MPs — although two Quebec ministers have administered the Canada Pension Plan (which does not apply to Quebec) without generating any protest. Over the years, a certain number of scholars have developed schemes through which federal institutions might take asymmetry into account. In fact, as Gordon



Laxer of the University of Alberta recently noted, asymmetry might actually have some appeal for western Canada: when Quebec MPs do not vote on a measure, western and Atlantic Canada will control a majority of the House seats.

In sum, this most recent episode clearly proves, if proof were still necessary, that the Canadian constitution cannot be revised without affording greater powers to Quebec. Given the continued support of English Canada for a strong federal government, accommodating Quebec means asymmetrical federalism. In all likelihood, such a formal asymmetry in powers would complicate the functioning of our central institutions, and would require a certain degree of innovation and even improvisation. That, however, might be a small price to pay when compared with the costs in energy and time of Canada's interminable constitutional debate.

The problem is that we may have just missed our last opportunity to put this option to work. A great many Canadians have concluded from this last episode that Canada's constitution *cannot* be revised. Few political leaders will be prepared to risk yet another fiasco. Thus, when Quebecers once again raise the constitutional question, as inevitably they will, the response will be that there is only one alternative to the status quo — Quebec sovereignty. Under these conditions they may well conclude that sovereignty is the answer. Compared with the potential costs of this answer, for Quebec and for the rest of Canada, asymmetry looks like a bargain.

*Kenneth McRoberts is Director of the Robarts Centre for Canadian Studies and Professor of Political Science at York University.*

## AFTER THE REFERENDUM

by Ramsay Cook

Once the noxious rhetorical gases generated by the referendum have dissipated, the good sense of the majority of Canadian voters may gradually become obvious — and for two reasons. For a time, the constitutional question, or at least the Quebec-Ottawa part of it, will slip to the margins of the political agenda. A minor, but only temporary, respite. More important, however, is what the voters said about the future options available to constitution makers in Canada. What they said is hardly novel, but they shouted it so loudly that not even a journalist should mistake the message.

### QUEBEC'S QUEST FOR SPECIAL STATUS

Over the last 30 years, two constants have been present in our constitutional discussions, and those constants were reaffirmed during the referendum. The first has been Quebec's quest for a status reflecting its self-description as "une province pas comme les autres." The second constant has been the unwillingness of the other provinces, or the federal government, to accept that claim at least as far as it involved transferring federal powers to Quebec alone. Out of the conflict between these views has emerged a view of the federation that was once rejected by most scholars and federal politicians — namely, a federalism in which all provinces are equal with a central government that is merely *primus inter pares*. Ironically, this view of the federation has actually reduced the *de facto* "special status" that Quebec has traditionally had in such matters as Senate representation and in constitutional amendment.

Quebec's quest for a formal "special status" under whatever name — "two nations," "distinct society,"

"asymmetrical federalism" — represents an understandable attempt to enjoy the benefits of both federalism and independence. As often as not, it is advocated by politicians and academics who view "special status" as a version of *étapisme*, the gradual evolution of Quebec from colony to province to "distinct society" to nation. It is almost invariably the position of those who have only a marginal interest in the efficient

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*"... 'special status' has been looked at skeptically because most federal and provincial politicians cannot conceive of a system in which one province operates on a half-in, half-out basis. The problem here is simple: the advocates of 'special status' have never proposed a workable plan ..."*

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operation of the Ottawa level of government since their primary, sometimes exclusive, focus is on Quebec. That probably explains why no advocate of "special status" has ever seriously attempted to provide a blueprint explaining the manner in which "asymmetry" would work — that is, the role of Quebec federal members of parliament in areas where Quebec had withdrawn from federal jurisdictions. Philip Resnick has at least made an attempt, but the result is hardly promising.

### TWO CONCERNS

The rejection of the "special status" option by non-Quebeckers has reflected two concerns. The first is the suspicion that "special status" really means "special" treatment — as, of course, it does, although special treatment may be justified. More significantly, however, "special status" has been looked at skeptically