

Roll Of The Dice: Final Act

A citizen's guide to the constitutional proposal

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Canadians now face a national referendum on the constitutional deal concocted by Prime Minister Mulroney, the premiers, territorial and aboriginal leaders. As citizens of a supposedly mature liberal democracy, this should entitle us to make a full assessment of the merits of the deal following extensive, open debate. We should feel totally free to accept the deal if we think that it will strengthen our nation, or to reject it if we do not.

But unfortunately this is not the case. Our leadership is treating us as sheep rather than informed citizens capable of judging what are the best constitutional arrangements to govern both ourselves and future generations. First, we are being asked to judge the deal without the benefit of an informed debate on the merits in every legislature in the country. This is absurd and makes a mockery of the referendum. Who would ever buy a house without knowing the price in advance?

Second, we are told that there has already been such extensive consultation, no more is necessary. This is a false self-serving statement from those who cannot defend the deal on its merits. Not only are there several critical new elements in the deal that only emerged on August 25, such as the 25 per cent floor for the proportion of Quebec M.P.s, and the half-elected, half-effective Senate. But also the orchestrated consultation to date has been less than open with, for example, persons objecting in principle to the distinct society clause and the undermining of the Charter, being shouted down in committee hearings.

Finally, we are told that the deal is a delicate compromise that we cannot question. We must simply accept any bad with the good. This too is unacceptable. We do not demand perfection in constitutional reform. But we must demand excellence from our leaders. And this deal is only mediocre at best.

Canadians must insist on a free and informed debate and remind our leaders that they only hold power on trust for us and cannot abdicate their responsibilities to allow us a real choice in this referendum. Our leaders are in breach of this trust if they deny us this choice with threats that a vote against the deal will mean the end of Canada. Nothing could be further from the truth.

Canada will not end if the deal is rejected. But what **must** end, at least for the foreseeable future, are these tedious, interminable constitutional debates. For the last five years in particular we have been constitutionalizing every problem that has come along. Let our leaders stop hiding behind sterile constitutional excuses, and get down to work to solve our real problems, notably the economy, unemployment, poverty and environmental degradation. Let them start to really serve rather than ignore the needs of the people of Canada. And let them focus their attention and limited resources on finding effective ways to improve our quality of life and building a fairer, more compassionate society.

The constitutional **status quo**, while not perfect, has served us well for the last 125 years. To argue otherwise as our leaders have done, represents one of the most divisive and dangerous myths that has been propagated in the last five years (in addition to the myth that somehow Quebec is

excluded from the Constitution). While such things as aboriginal self-government and senate reform are undoubtedly important, surely we are mature enough as a nation to take the additional time necessary without any deadline constraints to achieve excellence rather than mediocrity in these areas.

Moreover, our leaders are deluding themselves and misleading us when they say that this deal will put an end to the constitutional wrangling. For Quebec, in particular, this is only the beginning. Quebec officials are already asserting that, with this deal, Quebec will eventually achieve the massive decentralization put forward in the Allaire Report. This will be done through the new mechanism of constitutionalized intergovernmental agreements by which Ottawa will continue to spin off more and more legislative powers to provinces à la carte.

Why is this deal mediocre? Why does it not reflect a viable vision of the country for the twenty-first century?

The deal is yet another step in the dismantling of the federal government, a one way shift of powers to the provincial governments with new constitutional mechanisms to further shift power to the provinces on an ongoing basis. The cumulative effect of all the complex provisions will be an ineffective federal government that is increasingly irrelevant vis à vis provincial governments.

But why is such decentralization wrong? It is wrong because as global forces strengthen, we need a coherent national government even more, one that can play an effective role on the world stage to meet the challenges of environmental decay and nuclear proliferation, urban sprawl and desperate poverty. Also, the federal ability to strengthen the ties among Canadians, whether through social programs, common Charter rights etc., is essential to offset the increasingly strong north-south pull.

Our leaders seem totally incapable of being forward thinking and anticipating new approaches to the challenges that confront us now and into the twenty-first century. Instead, they have provided a deal that is just a power grab among governments - a desperate, incoherent compromise for the short term. Yet constitutions are about **people**, and the long term. Any reform must be demonstrably good for individual Canadians - our present and future generations, not simply for governments or regions. These reforms are not acceptable for the following reasons:

1. Under this deal, the national government will effectively be unable to implement national programs and policies with minimum national standards in critical areas, to help us meet the challenges that lie ahead. In a federal state as diverse as Canada, the establishment and maintenance of minimum national standards is essential to not only the economic union, but also the social union, and involve the environment, child care, education, social assistance, social services and health care. Provinces can always vary national standards upwards and usually have considerable flexibility in the design and delivery of such services. Our leaders are therefore misleading the public when they allege domineering federalism as the rationale for hamstringing the federal government.

The non-enforceable Social Charter in the constitutional package is no substitute for the federal legislative authority to establish minimum standards and social and adjustment programs.

Indeed, the Social Charter might actually impede innovation and programs in social and economic policies by in effect freezing existing rights in the Charter.

2. Under this deal, the coherence of the national government will be seriously eroded through a confusing mix of bilateral and multilateral federal-provincial agreements in a wide range of areas and then the entrenchment of the agreements, however complex, in the Constitution. This will result in not only a patchwork quilt of legislative powers among provinces in many areas, but also confusing lines of accountability and little sense of common national purpose. It will generate an uncontrolled and incoherent asymmetry in powers, wreaking havoc on our economic union. Regulatory chaos could be created across provinces, something about which businesses certainly should be particularly concerned, not to mention average Canadians.

The fact that these agreements may automatically expire at the end of five years but be renewable by a vote of the legislatures, readopting similar legislation does not change this assessment. Once a significant alteration in policy responsibility takes place, it will be politically impossible for the federal government, for example, to recover the power after five years of building up entrenched provincial bureaucracies and vested interests. And in any event, the five year renewable term guarantees ongoing disputes over division of legislative powers, and will encourage rather than end the constitutional wrangling.

Under this deal, intergovernmental agreements giving powers to the provinces will involve tourism, forestry, mining, recreation, housing, municipal and urban affairs, telecommunications, regional development, labour market training and development, immigration and culture. But agreements in other as yet unspecified areas may be designated as subject to the complex entrenchment provision.

More generally, the entrenchment of such complex agreements including detailed funding formulae etc. will quickly turn a constitutional document which ought to reflect general principles and objectives, into a version of the incomprehensible Income Tax Act! In addition, the role of federal M.P.s from provinces which have complete jurisdiction over a given policy area will certainly be called into question. To maintain the integrity of our federal system, all provinces must have the same constitutional powers, however differently they may choose to exercise those powers, and whatever the limited administrative arrangements some provinces might have with the federal government.

3. Under this deal, the federal government will be reduced to the sterile role of chief cashier, required to provide fiscal compensation to provinces not participating in a program, or that acquire more powers from the federal government. Indeed the vague compensation provisions that are sprinkled throughout the constitutional package are the height of fiscal irresponsibility. Taxpayers of Canada will be forced to fund a variety of provincial programs and activities potentially in perpetuity, something that will gravely undermine Parliament's ability to allocate tax revenues according to the democratic will of the Canadian people.
4. Under this deal, the Canadian economic union has likely been weakened, rather than strengthened. In addition the federal government will effectively be excluded from any

meaningful role in the labour market training field and unable to take steps to improve the productivity and skills base of the national labour force, which is an essential source of national competitive advantage. Explicitly excluding the federal government from the training field, notwithstanding the vague lip service to the maintenance of national objectives, will prevent long-needed reforms to replace production subsidies and trade restrictions and other adjustment-retarding policies with adjustment-oriented measures aimed at giving workers the capacity to find work outside depressed industries or regions.

5. Under this deal, the exclusion of federal jurisdiction over such environmentally sensitive industries as forestry and mining will gravely impair the important federal role in environmental protection. Also, since forestry and mining represent a considerable percentage of Canadian exports, what are the implications for a coherent federal international trade and related industrial policy?
6. Under the deal, "culture" will become a matter of exclusive provincial jurisdiction. This is a potentially enormous transfer of powers since no one really knows the limits of the meaning of "culture". It is wiser to leave "culture" unspecified in the Constitution as it now is. It will almost certainly prevent any coherent national cultural policy. Since no one knows how to distinguish cultural matters "within the province" from so-called Canadian cultural matters, much of our cultural policy will be tied up in contentious constitutional litigation for years to come.

Moreover, the appointed francophone senators from Quebec, together with the other francophone senators, will be able to veto what is left of so-called French "culture" at the national level, most notably, legislation involving the CBC and other national cultural institutions. Equally, anglophone senators will be able to veto legislation of particular interest to francophones. This is absurd and unacceptable. It is also contrary to the rule of law to provide that the Senate speaker will have the final word on what legislation is to require this double majority vote, with no possibility of review by the courts.

7. Under this deal, it will be henceforth virtually impossible to ever repeal the notwithstanding clause in the Charter and thereby assure full and complete protection of individual and minority rights, including equality rights. Moreover, the use of the notwithstanding clause has been extended to new aboriginal governments, among others things, against the wishes of the Native Women's Association of Canada, an organization which has been unconstitutionally excluded from the discussions.
8. Under this deal, the individual and minority rights in the Charter will be undermined by Quebec's distinct society clause. This is unacceptable. The Charter is there to protect individuals and minorities from the "tyranny of the majority". It is **not** there to allow Quebec's French-speaking majority (and so-called "unique culture") to suppress individual rights, especially when that majority controls the Quebec government and appears to be doing a good job with its existing powers in preserving and promoting the French language and culture. Moreover, a June 1992 CROP opinion survey found that over 70 per cent of Quebecers identify with the Canadian Charter.

9. Under this deal, the two founding nations theory is adopted, something which is both historically incorrect as well as irrelevant to the Canada of the future. Special status for Quebec, whether through a distinct society clause or special bilateral agreements, is still not a viable option for long-term constitutional peace.

While the Canada clause reference to the commitment to the vitality and development of official language minorities may be regarded as positive, these minorities may be forgiven for being sceptical of the real strength of this provision. Will Bob Rae, for example, now finally declare Ontario to be officially bilingual? Will Don Getty start supporting a more generous interpretation of the existing minority language and education rights?

10. Under the deal, the federal government will only be able to appoint judges to the Supreme Court from lists provided by the provincial governments. This means that henceforth the final adjudicators of, among other things, federal-provincial constitutional disputes and Charter challenges will owe their positions to provincial governments. It is inevitable that the provincial appointments will be ideologically inspired - something that will subtly influence the approach of the Supreme Court of Canada to the resolution of disputes. For example, one cannot imagine a future Parti Québécois premier putting forward the names of judges who were particularly sympathetic to the federal government.

In effect, the proposal simply transfers the patronage powers to appoint judges from the federal to the provincial levels. A valuable opportunity to negotiate a more open and acceptable appointment mechanism involving, for example, a non-partisan nominating council at the federal level, was lost.

11. Under this deal, the proposal to entrench annual first ministers' conferences will have a subtle but potentially very damaging impact on the ability of the federal government to articulate and implement policies in the national interest. This is because inevitably the focus of attention with respect to matters of national policy will shift away from the federal Parliament where it belongs, to an unaccountable third level of government - the first ministers' conference.

Parliament and the provincial legislatures will be relegated to mere ratification chambers, and Canada's position whether on international or domestic issues will be reduced to the lowest common denominator of rival provincial interests. In effect, we will no longer elect the federal government to articulate and pursue the national interest. Instead, eleven governments (federal and provincial) will speak for Canada, and crucial matters of national policy will be determined in regular first ministers' conferences, rather than the federal cabinet. Certainly, the latest constitutional package leaves much to be desired in terms of a coherent national institutional framework to take us into the twenty-first century.

12. Finally, under this deal, if we discover that this or that reform is not working well in the future, it will be virtually impossible to change since all provinces now have a veto over federal institutions, and can easily opt-out of any other type of reform, such as a transfer of powers to the federal government, with full compensation.

Conclusion

Why are our governments once again pursuing such unpopular constitutional reforms? Why do they refuse to learn the lessons of Meech Lake? The reason appears to be that they believe that we can appease Quebec nationalists with more legislative powers and a Charter override and put an end to the indépendantiste threat.

This is naive. Meech was wrong in principle in 1987 and it is still wrong in 1992, as are the additions put in to buy off some of the more vocal opposition. Quebec nationalists are unappeasable and the current media and political elites in Quebec will never actively support a coherent federal system without special status for Quebec. The risk that Quebec will separate is no greater if these proposals or a variation thereof are set aside than if they are implemented. It is far better not to cave into blackmail and, instead, to pursue only those constitutional reforms that are good for the entire nation and reflect a coherent, principled vision of our future.

The proper responsible approach is, first, to cool down emotions and remind people that constitutional reform is not necessarily so urgent as the government has claimed to date. The existing Constitution is working, something that too many people seem to forget or ignore. Second, the most important constitutional questions relating to the division of powers and institutional reform should be referred to an expert commission for in-depth study and recommendations over an extended period. Finally, a new constitutional amendment procedure must be implemented that will make it clear that sovereignty in our democracy resides in the **people** and provide for a permanent referendum mechanism to ratify any reform.

If Quebec insists on proceeding with a referendum on sovereignty, then we must all simply get down to work, participate on the federalist side and hope to persuade at least the Quebec public (if not their elites) of the value of remaining with the Canadian federation committed to expanding bilingualism from coast to coast. But Quebeckers will have to accept that general principles of federalism must apply and that if they agree to remain part of Canada, then any constitutional reform will maintain a strong coherent federal government, one in which they have significant influence. In other words, the rest of Canada is not prepared to devolve substantial new powers to the provinces, or to create a special status for Quebec. But we are committed to continuing to strengthen the bilingual character of Canada and to clarify and develop the concept of linguistic rights, something which should reassure Quebeckers genuinely concerned about the security of the French language and culture. And we sincerely believe that the Quebec government already has sufficient existing legislative powers to promote the French language and culture in, and the distinctiveness of, Quebec.

This rejection of this deal is a wise choice. It is not the end of Canada. It simply means that at this particular point in time, our leadership could not forge the extraordinary consensus necessary to legitimize the most complex set of constitutional reforms in the history of Canada. As we strive for excellence in constitutional reform, one should keep in mind the words of Alexis de Tocqueville: "...ce n'est point à l'aide de médiocre sentiments et de vulgaires pensées que se sont jamais accomplies des grandes choses." (Discours à l'Académie française, le 21 avril, 1842.)