

## **Rolling The Dice: Part II**

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Canada is yet again in the grips of a constitutional crisis - one which in my view has been manufactured unnecessarily by our leaders and elites. The prime minister and his lieutenants have cranked up the brinkmanship strategy, repeating incessantly the now familiar apocalyptic refrain that the moment of constitutional truth has arrived and that we have to conclude a constitutional deal or lose everything - our heritage, Canada and so forth and so on.

Back in 1990 Mulroney rolled the dice and came up craps; in 1992 he calls it "rearranging furniture", like the Friendly Giant. But the effect is the same - yet another desperate attempt to effectively dismantle the federal government in order to appease Quebec nationalists and preserve the Conservative Party's Quebec power base. Surely we deserve more than a prime minister gambling with our future.

One thing is obvious - the federal government has not learned the lessons of Meech Lake. These are threefold, and relate to the reform process, the Charter of Rights and Freedoms, and the division of powers:

First, constitutional reform will not be considered legitimate unless the Canadian people are satisfied that they have had meaningful influence and have the ultimate opportunity to approve the reform through a national referendum.

Second, Canadians are not prepared to see the Charter of Rights and Freedoms and the sanctity of individual rights undermined by a distinct society clause. 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.

Third, Canadians are not prepared to see our already very decentralized federation decentralized any further. Equally Canadians are not prepared to accept so-called asymmetrical federalism whether it is accomplished explicitly through giving Quebec special powers in such amorphous areas as "cultural affairs" or, by subterfuge, via mechanisms like bilateral agreements and legislative delegation. To maintain the integrity of our federal system, not to mention the role of federal members of parliament, 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.

Indeed, the division of powers debate so far has been, at best, incoherent and, at worst, unprincipled. The lack of any rational debate on the critical issue of the federal role in establishing minimum national standards is particularly astounding. Instead the chattering constitutional classes appear consumed with putting flexible mechanisms like bilateral federal-provincial agreements and legislative delegation in the Constitution, and crippling the federal spending power. The cumulative effect will be to prevent any coherent federal action in important public policy areas in future and effectively to destroy a clear division of powers between the two levels of government that is essential, among other things, to holding governments accountable.

Yet in a federal state as diverse as Canada, the establishment and maintenance of minimum national standards by the central government is essential to not only the economic union, but also the social union to ensure minimum acceptable standards in such areas as the environment, telecommunications, social assistance, social services, health care and education. Since provinces can always vary these standards upwards, and usually have considerable flexibility in the design and delivery of such services, it is beyond me why provincial elites always cry foul and allege “domineering federalism” and the like and why the federal government timidly backs away. All Canadians including Quebeckers benefit from national standards and the onus must be placed firmly on provincial governments to articulate clearly their reasons why they require jurisdiction to the exclusion of national standards.

More generally, first ministers must remember that in trading powers, they are most certainly not impartial. As at Meech Lake they all too often lose sight of the fact that they only hold power in trust for the Canadian people and must justify any changes in the division of powers with this in mind.

Before I discuss how these lessons have not been learned in the present context, perhaps I should also mention a fourth overarching lesson of Meech Lake. Canadians, including most Quebeckers, do not want to talk about the Constitution under a deadline. The Constitution, important as it is, seems far removed from our deep concerns over unemployment, poverty, environmental degradation, and nuclear proliferation. Canadians want our leaders to focus their attention and limited resources on finding effective ways to improve our quality of life and building a fairer, more compassionate society, rather than dissipate their energy on constitutional debate.

Instead Mulroney et al. are rolling the dice again. With Quebec’s referendum deadline looming they are hoping to manipulate our constitutional fatigue, hoping that if we are all so worn out, we will accept any deal, however distasteful we might find it, just to end all discussion. Certainly there are some Canadians who feel this way. But I am confident that most Canadians, tired as they are, know how important the Constitution is. It is our Basic Law: it guarantees our rights and freedoms, and sets out our basic institutions as well as the division of legislative powers between the federal and provincial governments. The Constitution cannot be tinkered with as if it was a corporate by-law, let alone turned into another version of the dreaded Income Tax Act, especially under the pressure of an artificially imposed deadline. Constitutional reform is too important for such games. Constitutions must, to the greatest extent, express broad principles and values, and any reform must be negotiated without deadlines.

Now I will describe briefly in what way the federal government has not learned the lessons of Meech Lake with its latest constitutional initiative.

### **Constitutional Reform Process**

First, with respect to process, the federal government continues to resist the calls for a national referendum (although not foreclosing it as a desperate measure in the event of a deadlock with the provinces). In so doing, it is denying that ultimate sovereignty in the nation rests with the people of Canada not their governments. Among other things, this principle requires that the people have the final word on constitutional change and necessitates a new constitutional amending formula that incorporates a referendum mechanism for this and all future constitutional change.

Yet the federal proposals and now the Beaudoin-Dobbie Report, go in the opposite direction and instead strengthen the role of governments in the amending formula. They would make our already inflexible amending formula even more rigid and more distanced from the people.

A new amending formula with a referendum mechanism would finally clarify once and for all that in our federal system, the federal government is more than a sum of its provincial parts and derives its legitimacy, not from provincial governments, but from the Canadian people. In addition to recognizing the sovereignty of the people, a new formula based on the need for the approval of the majority of people in each of the four or five regions of Canada would be a means of giving Quebecers a constitutional veto. In my view, such a veto would legitimately enhance Quebec's bargaining leverage and permit it to influence positively the substance of any constitutional change - something that will ensure that Quebec plays, as it should, an integral part in our future evolution as a progressive dynamic nation. It is also a legitimate way to provide French-speaking Quebecers, who are a minority in national forums, with some additional protection. This is preferable to the federal government's approach which calls for more powers for the Quebec government and distinct society status in the Charter.

### **Charter of Rights and Freedoms**

This brings me to the second lesson of Meech which the federal government has ignored - Canadians do not want the Charter undermined by a distinct society clause. The notwithstanding clause is bad enough and should be repealed as soon as possible.

In its latest initiative, the government has divided the Meech distinct society clause into two parts - one in the Charter and one in the Canada clause. It raises all the same concerns as that of the Meech Lake Accord, including its fatal ambiguity whereby the clauses appear to mean different things to different people. In my view, there is no doubt that the proposal allows the Quebec government to override the Canadian Charter and potentially creates a special legislative status for the Quebec government to preserve and promote the French-speaking majority.

The distinct society clause is therefore "power-granting". It gives the Quebec government more scope to justify infringements of individual rights in the name of promoting the French-speaking majority (not to mention Quebec's "unique" culture!?). In other words, more power. What will Quebec do with this power? Will it take steps to limit mobility rights and minority language and education rights, which are not currently subject to the notwithstanding clause? As Peter Blaikie queries: Would Quebec limit the number of non-French newspapers, radio or television stations? Could it reduce or otherwise circumscribe the English language minorities? Could it impose language-related taxes?

We must debate the merits of the proposed approach to the preservation and promotion of the French language and culture in Quebec. Do Quebecers really understand the implications? Does the Quebec government not have already sufficient existing legislative powers? Does it have to override individual rights? Is not the federal role in promoting bilingualism and the French language and culture throughout Canada important especially over the long-term? If a recognition of Quebec's distinctiveness is of such importance, then why not place it in the preamble where there is no ambiguity as to its meaning, along with the other important elements of the Canadian identity, and then ensure that existing provincial legislative powers with respect to critical areas like education are exercised in such a way as to truly enhance the quality of the French language and culture.



University of Toronto law professor Lorraine Weinrib, in a brief to the Beaudoin-Dobbie Committee, has made the excellent point that the distinct society clause is about collective power, not collective rights. "At issue here is not the right of a collectivity to preserve and promote its identity, but rather the legitimacy of its doing so in a way that may deny the guaranteed rights and freedoms of others. Distinctiveness as such is not a legitimate basis for limiting rights. Every liberal democracy has its distinctive, special features. Nations with diverse language and ethnic communities are increasingly the norm in a modern world. But the very meaning of liberal democracy is that such features are to be promoted and protected only in a way that is consistent with the equal rights of all citizens. This is the rigorous, self-imposed standard that makes us a free as well as a democratic society."

In any event what exactly is a collective goal? Is it not ultimately another name for the tyranny of the majority? As philosopher Michael Posner notes, admittedly we are rooted in families, communities and cultures that inevitably shape our character and decision making. But it does not follow that all individuals tied to the same community and its core values must share the same objectives.

In one of his last commentaries before his death in January 1991, Northrop Frye advocated a cultural reconfederation. (One can safely assume this is something quite different from the mish mash, technocratic proposals put forward by the federal government). He observed that Quebec is a province like other provinces - the more separatist its policies, the more inevitably provincial their characteristics. Quebec, the political entity, in any case is not a cultural one. French-speaking Canada is a cultural reality of the highest importance; Quebec is a province like other provinces and always will be. "Such pedantic fatuities as outlawing English signs on buildings are typical of the way that the political mind works when dealing with a cultural problem."

Frye went on to note that the federal bilingualism program is a sensible policy and that "culture and language are an area - perhaps the only area - where privatization really does work." In any event, the "spearhead of the invasion of English into Quebec does not come from English Canada but from American television. French Canada is in flourishing shape, in no danger except when politicians refuse to leave it alone."

All Canadians, including Quebeckers, must debate whether Quebec's distinct society really needs to limit individual and minority rights in order to survive and flourish. The federal government and our constitutional elites must permit and encourage this to the fullest, rather than attempt to suffocate and bury concerns at every turn. I am confident that the conclusion will be that it is a wrongheaded approach and a wholly inappropriate addition to Canada's constitutional arrangements.

### **Division of Legislative Powers**

Finally, I turn to the Meech lesson concerning decentralization and the division of powers: Canadians are not prepared to accept any further decentralization of our already very decentralized federation, and are fed up with our politicians talking incessantly about trading legislative powers without articulating precisely what they want to do with these powers and how it will advance the public interest and social justice. Moreover as Quebec political scientist, Stéphane Dion, persuasively argues, average Quebeckers have never been really concerned about a transfer of powers between Ottawa and Quebec, or which level of government delivers what service from telephones to manpower training. Dion criticizes the current debate for failing to consider the issue of the division of powers from the point of view of improving the quality of services offered to Quebeckers, something which would bring into question the need for a

massive transfer of powers from Ottawa to Quebec. In many cases, Quebecers are more critical of their provincial services than other Canadians.

The federal government's approach to the division of powers and its sell-out of powers to the provinces, again more or less confirmed in the Beaudoin-Dobbie Report, illustrate well the lack of any coherent vision of the future. For example, Beaudoin-Dobbie proposes a general open-ended power to delegate legislative powers to provinces (and vice versa) as well as to conclude a confusing mix of bilateral agreements in a wide range of areas, and then to entrench the agreements, however complex, in the Constitution. This will result in not only a patchwork quilt of legislative powers among provinces in a wide range of 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.

In addition, the entrenchment of 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! Finally the role of federal M.P.'s from provinces which have complete jurisdiction over a certain policy area will certainly be called into question.

The explicit devolution of powers proposed by Beaudoin-Dobbie involve the following areas: culture (Quebec only - a potentially enormous transfer of powers), immigration, tourism, forestry, mining, recreation, housing, municipal affairs, labour market training, family policy, inland fisheries, personal bankruptcy, broadcasting, energy and regional development. In some cases, this devolution will be accomplished by complex bilateral agreements and only on the initiative of the provincial government. But in all cases, the federal government will be weakened, and in a fundamentally undemocratic way that involves behind-the-scenes horse-trading and brokering between government executives.

In addition to the explicit and latent devolution of powers, there is the limitation on the federal spending power. The Beaudoin-Dobbie Report essentially puts forward the Meech Lake proposal with all its attendant problems: The federal government will not be able to establish minimum national standards in critical public policy areas. In addition, the ease with which a provincial government can opt out of a new program with financial compensation by only meeting the objectives of the new program, creates a massive disincentive to the federal government's pursuit of social and adjustment programs.

Why would a federal government ever raise the necessary revenues to finance such a program and incur the tax payers' flak, only to hand them over anonymously to provincial governments? Moreover, the determination of whether an opted-out province is entitled to compensation transfers critical powers to ill-equipped judges to decide a whole range of essentially political/policy questions such as when a provincial program "meets the objectives" of the new program.

As with the Meech Lake proposals, one implication of this is that the federal government will be unable to play any meaningful role in social policy as it has in the past and is effectively abandoning an area that not only is inextricably linked to any effective economic development policies, but also, as Professor Lars Osberg notes, encompasses much of the interaction between citizens and the modern state. Through establishing minimum national standards in such areas as health and welfare, but also the environment and post-secondary education, the federal government is able to promote our sense of national identity, and commonality of experience. In this way, it is also able to carry out our collective commitment to helping

out the weaker regions and to reducing the inequalities of income and wealth among individual Canadians. In short, the proposed spending power limitations are at odds with our commitment to promoting greater social justice and a fairer, more compassionate society.

The limitation will severely constrain the federal government's ability to initiate new programs and impose critical national standards in a variety of areas that may require national action in the future. Examples include child-care, a comprehensive disability insurance scheme, a national science and technology strategy, a national commitment to improving the quality and accessibility of education at all levels, the integration of our social assistance and employment policies, new services to cope with our aging population, and environmental protection.

Advocates of limiting the spending power often argue that, in times of fiscal restraint, the federal government has no money to spend anyway. This is fallacious. First, the spending power is not simply a matter of spending more and more money; it is a mechanism by which the federal government allocates revenues in order to achieve a given set of policy objectives. This involves, of course, reallocating such revenues in accordance with changing priorities.

Second, as economist Robin Boadway notes, the federal capacity to spend is limited primarily by its capacity to tax, which is by no means limited. Yet, rather than expanding its tax revenues in order to maintain, for example, transfers to the provinces, the recent trend has been to adjusting so-called tax room in favour of the provinces thereby reducing the federal capacity to tax. This is a policy decision that is not irreversible and, in Boadway's opinion, it has resulted in unnecessarily greater taxing capacity on the part of the provinces and an unnecessarily diminished federal role in redistribution and the pursuit of equity.

Of course, one understandable irritant for provinces that must be resolved is the ability of the federal government to unilaterally alter or withdraw from its commitments under a federal-provincial shared-cost program. This ability was recently confirmed by the Supreme Court of Canada in respect of the limitations of federal transfers to the more well-off provinces under the Canada Assistance Plan (the CAP Reference). One useful suggestion is that the Constitution be amended to provide that commitments made in federal-provincial agreements with respect to shared-cost programs (or contained in related legislation) are legally binding for the duration of those agreements. This would reverse the CAP Reference decision and maintain the integrity of the shared-cost approach.

One possible direction for reform is to make explicit the federal regulatory authority in respect of the use of the spending power. Historically, the emphasis on the federal spending mechanism particularly as the welfare state developed after World War Two, was really a direct result of the constitutional uncertainty about the federal role in respect of all the new policy areas that had, of course, never been thought of in 1867 when the original division of powers was established. As we approach the twenty-first century, it is now appropriate to rethink this division of powers and assign the necessary powers to the federal government to enable us to meet the challenges that confront us.

For example, regulatory authority could be explicitly allocated to the federal government to set minimum national standards in specified policy areas, and then these standards could be subject to approval by an elected and regionally representative Senate. In addition, a limited opting-out mechanism might be appropriate but only after, for example, a specified majority of MP's and Senators from the province voted in favour of it, such that fiscal compensation would then be given directly to the people in the province, such as through the mechanism of a tax credit.



A complementary reform might be to strengthen the existing section 36 of the Constitution Act 1982 and elevate it to the status of an interpretive clause. More specifically, the Constitution would be interpreted consistent with the principles set out in section 36 which include (a) the promotion of equal opportunities for the well-being of Canadians, (b) furthering economic development to reduce disparities in opportunities and (c) the provision of essential public services of reasonable quality to all Canadians.

One reform that is not advisable is the entrenchment of detailed social rights in, for example, a Social Charter. Among other things, this might actually impede innovation and progress in social and economic policies by in effect freezing existing rights in the Constitution. There is nothing wrong, however, with the entrenchment of general social justice principles in the Constitution as long as we remember that it is no substitute for the federal legislative authority to establish minimum national standards and social and adjustment programs.

## **Conclusion**

Why is the federal government once again pursuing such unpopular constitutional reforms? Why does it refuse to learn the lessons of Meech Lake? The reason appears to be that it believes that it can appease Quebec nationalists with more legislative powers and a Charter override and put an end to the *indépendantiste* threat.

This is naive. 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. Aboriginal self-government is probably the only topic that should be addressed immediately. The existing Constitution is working, something that too many people seem to forget or ignore. As economist Albert Breton notes: "Virtually all the problems, real or imagined, which the current constitutional proposals address could be dealt with in a satisfactory fashion through legislative and administrative methods instead of through clumsy and divisive constitutional means". 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 the locus of sovereignty in our democracy is with the people and provide for a national referendum.

If Quebec insists on proceeding with its referendum, 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 within the Canadian federation committed to expanding bilingualism from coast to coast. But Quebecers 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, 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.

But all this will require fundamental changes in our national leadership which has proved itself remarkably inept and inward looking to date. We do not want leaders who tell us patronizingly that we must accept a constitutional deal against all our principles, because poor Robert Bourassa is backed into a corner by Quebec nationalists. We do not want leaders who are prepared to undermine the sanctity of individual rights and freedoms, the cornerstone of our liberal democracy.

We want principled leaders who will stand up to the threats and demands of Quebec nationalists. We want leaders who will inspire us and transmit confidence in our future. If we are ever to dispel the cynicism that has enveloped our political system today, our leaders must be poets. They must talk about the value of being Canadian in our interdependent world and the importance of national cohesion to ensure that we act coherently on the world scene in all those areas of human activity which can no longer be addressed by national governments alone.

They must draw us beyond the short term and make us think about how the world is changing and how the irresistible forces are sweeping us into a more cosmopolitan age. They must then be able to transmit a vision of Canada to Canadians, a description of the projects we must accomplish together, an understanding of how we can reconcile a strong national government with sensitivity to community and regional concerns. The role of the government may be different in an age of globalization, but it is no less important if we are to avoid the emergence of a neglected underclass permanently underemployed and living at the margins of an increasingly uncivil and unjust society. The possibilities for public action are limited only by our imagination, and these in turn provide the domestic examples and credibility to guide our efforts at the international level.

Our leaders must also talk about the purposes for which we want to use government powers, and our shared values and goals as Canadians. They must talk about how we have built a great country which ensures equality of opportunity for all, and respect for basic rights and freedoms, human dignity and self-worth. They must talk about their experiences as Canadians, here and abroad, and what makes us respected and envied on the world stage while reminding us how bemused are those on the outside looking in to see us in our present stage of disarray. They must talk about the challenges which we face in common and the joint action required to overcome them, more than what divides and irritates us.

If they succeed, we will have brought the poetry back to politics and restored the critical degree of confidence in our political institutions and faith in our national leadership that is so necessary to smooth the transition into the 21st century. And we will have found again that special sense of idealism captured in author Robertson Davies' comment:

"I think somewhere there is a dreamer, and he is dreaming us"