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Book Review Essay: Canada's Constitutional Cul De Sac

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Lucien Bouchard was sworn in as Premier of Quebec on January 29, 1996. At that time he gave an answer to this troubling question: If Canada could be divided, why could not the same be true of Quebec in order to accommodate geographically concentrated non-Francophone minorities? Bouchard, perhaps out of frustration, perhaps as a provocation, responded directly. “Canada is divisible,” he said, “because Canada is not a real country.”

Whether or not Canada is a “real country” is a central focus in Peter Russell’s thorough, thoughtful, and highly readable history of Canada’s constitutional travails. Constitutional Odyssey was first published in 1992, as the Charlottetown Accord was being cobbled. A second edition, adding an account of the disastrous conclusion to that enterprise, came out the following year. Now he has added another chapter to bring the story up to date; it is otherwise identical to the previous editions.

Russell starts before Confederation, reviewing the negotiation of the British North America Act, its implementation, and the changing interpretations of federal and provincial power. He recounts the extended and murky development whereby Canada morphed from a self-governing colony to an independent state. He saves his greatest detail however, for the painful and futile efforts over the last thirty-five years to devise a satisfactory and comprehensive constitutional settlement. Russell tells the story clearly and intelligently. He is the perfect traveling companion, perceptive and witty, for what might otherwise be a taxing journey through Canadian constitutional history. This may be the best treatment of the subject for a general audience and it is satisfying to see it brought up to the current time.

Constitutional reform did not become a high-profile issue until the 1960s. French-speaking Quebec, transformed in the “Quiet Revolution,” developed a heightened sense of national identity and a new assertiveness in its relations within the federal system. Independence, once a fringe issue, gathered strength and exploded into national consciousness in its violent confrontation with the state in 1970.

Dealing with Quebec’s separate aspirations without secession required a reconsideration of Canada’s constitutional structure. But, for reasons to be discussed, no satisfactory solution emerged. In fact, since the 1982 patriation and Charter of Rights, things have gotten worse. Those changes, enacted over the Quebec government’s objection, were perceived as further confining the province’s autonomy.
While the federal government and the other provinces might have simply ignored Quebec's discontent, it was almost universally felt (if for nothing else for partisan political reasons) to be a critical problem in need of solution. By 1985, when new governments were installed in Ottawa and Quebec, the time seemed right for reform and reconciliation. What followed was fifteen years of passionate and sometimes bitter constitutional argument and, at the end, pretty much the same constitutional situation as before.

Two themes run through Russell's analysis. The first, illustrated by the quotation from Bouchard, is the assumption that a constitution presumes some pre-existing social entity that it is the constitution of. That is, it makes no sense to attempt to create a constitution—or a state—for a group of people who do not share some minimum commonalities.

The second theme is the inevitable and irreversible rise of popular participation in constitution-making. The quiet and comfortable official negotiations among ministers that used to dominate has now been reduced to a subsidiary role. The Constitution's legitimacy depends on the perception that it is the act of "the people." The relevant players have been multiplied many fold, making agreement much more difficult.

A. The Constitutional Subject

With respect to the first question, the most salient issue in Canadian history has been how to forge a common national identity bonding the Francophone and Anglophone populations. This problem has now been further complicated by Aboriginal claims to recognition as peoples with their own political authority. Perhaps because they have occupied public attention for a shorter period, however, those claims do not exude the same intractability as those of the two founding "nations."

Accommodating different linguistic, ethnic, and religious groups in the same state has proven to be the most obdurate of political challenges. The eruption of violence in the old states of the Soviet bloc is recent obvious evidence, and these tragic events have been repeated all over the world throughout human history. The United States, it is true, has, with some important exceptions, successfully consolidated many ethnic groups. This was largely the result of a historical pattern of continuous and digestible immigration and assimilation. The same factors may explain why the immigration into Canada of large numbers of people who were neither English nor French has never created the same kind of fundamental division.

The Canadian case is particularly poignant since the differences between the two groups are almost exclusively matters of language and ancestry. With respect to the kinds of things that would seem to be important in uniting a nation there is little to distinguish them. The prevailing political, economic, and social values are not identical but neither are they sufficiently different to raise doubts about national unity.
What then accounts for the persistent distance, even antipathy of French and English Canadians? The mere fact of separate languages should not be underestimated. They entail a separate press, a separate literature, film, drama, and perhaps even music. It is natural that social groups will be composed mainly of speakers of the same language. From that relative isolation distinct mores and tastes can follow. Historical inertia must also factor in. Ethnic groups have long memories. The recent bloodshed in the Serbian province of Kosovo was peppered with references to the Serbian defeat by the Ottoman Turks at the Field of Blackbirds in 1389. French Canadians may regard themselves even today as a conquered people. Two hundred years of social and economic discrimination in Quebec by which Francophones were subordinated to the Anglophone minority has certainly done its part.

At the end, perhaps, the causes for these kinds of feelings must remain a social mystery. In any event, they more or less defined the state from 1763 and attempts to blur them have always failed. The United Province of Canada, intended to assimilate French Canadians, ended in deadlock. Canadian confederation was motivated by multiple issues, but that question of French and English identities was always the eight hundred pound gorilla at the conferences and legislative debates leading up to the British North America Act, 1867. The Act is strewn with references explicable only by the essentially special role of Quebec in the new federation.

There have been, it is true, periodic attempts to construct a Canadian nationality that transcends language and ethnicity, a moral or a political nationality. In 1867 George-Étienne Cartier rhapsodically foresaw the emergence of “a new ‘political nationality’ based on deep ‘racial’ diversity.” The possibility is most familiar in the form envisioned by Pierre Trudeau. He projected a single bilingual polity defined principally by shared values. Linguistic rights would be expanded and scrupulously protected but those rights would belong to individuals not to collectivities like Quebec or “French Canada.” So, when, in the 1980 Quebec Referendum campaign, Trudeau promised Quebec voters “to renew the constitution” he was covertly selling what Quebec nationalists least wanted to buy.

Trudeau turns out to be the last important politician fully to embrace that “civic” concept of Canada. Since the Conservative victory in 1984, every serious constitutional initiative has offered some kind of explicit constitutional recognition that Quebec is uniquely different. Such declarations implicitly presume that the Canadian entity must be a bi-national or multi-national state. We have already noted the unhappy track record of such states.

In light of the more or less intangible nature of the separate identities it is perhaps appropriate that the efforts to keep Quebec in Canada have often been based on symbolic measures. Most notable in this regard is the recognition of Quebec as a “distinct society.” “Distinct society” has its own index entry in Russell’s book, complete with numerous page references and subheadings. It was an essential component of both the Meech Lake and Charlottetown agreements. The narrow defeat of the Quebec sovereignty referendum in 1995 was swiftly followed by adoption
of a resolution in the House of Commons recognizing Quebec as a "distinct society" within Canada. The Calgary Declaration, agreed to by the premiers of the nine other provinces in 1997, was strikingly unfriendly to extra powers for Quebec. But even that statement paid homage to "the unique character of Quebec society."  

The enormous attention paid to this "most controversial" issue is remarkable in light of its practical inconsequence. Dire predictions that it would gut the Charter of Rights in Quebec were the merest speculation. In fact, it is highly doubtful that "distinct society" language would have made any change in the powers of the Quebec government or in the standards applied by the Supreme Court in evaluating its laws. This phrase's centrality to the discussions on constitutional reform underlines the fact that the main dispute was not a matter of practical authority but of historic grievance and national pride. As Jeffrey Simpson wrote, it was a "crisis of the heart and mind, a clash over symbols, a struggle for recognition and rights...." It should not be surprising that there was little room to make a deal.

B. Legitimate Constitution Making

The already formidable challenge of constitutional reform has been made more difficult by the factors constituting the second large theme in Constitutional Odyssey. That is the transfer of constitutional questions from the carefully limited regime of elite negotiation into the open arena of democratic debate. In the era of constitutionalism we have grown used to the idea that a country's constitution is the expression of the fundamental values of its people. Bruce Ackerman has posited a "constitutional moment," a period of unusually intense and principled public debate from which may emerge an agreement representing the most authentic will of the people.

Constitutions, themselves, are a fairly recent innovation in the history of government. Genuine popular participation in their creation is more recent still. The "we the people" of the 1789 U.S. Constitution was mainly a figure of speech. The assembly of "demigods" that framed it in Philadelphia contained some of the smartest, richest, and most political men in the country. It is true that its actual ratification was by extraordinary constitutional conventions held in each of the states. The members of those conventions, however, were also mostly drawn from the highest ranks of society and chosen by a process that, while democratic for its day, hardly conforms to our notions of popular representation.

The fathers of Confederation were, if anything, less representative. Unlike their American counterparts they were principally provincial ministers and opposition leaders. They had been given no electoral mandate to make fundamental constitutional changes. The process throughout was prodded and pressured in various degrees by royal governors and by the Colonial Office in London. In fact, it is anachronistic to speak of those events as constitution-making in anything like the modern sense. The decisions were (mainly) those of the Canadian statesmen and it was understood that
Canada would (mainly) be self-governing. There was no doubt, however, that the Dominion would be tightly bound to the British Empire and to the Queen’s parliament and government at Westminster. At that stage, anyway, no one worried about consulting some sovereign authority residing in the Canadian population.21

Popular participation in constitution-making had not advanced much by 1982. The Constitution Act of that year was made possible by the archetypal political deal, the famous “kitchen accord” worked out in the late hours of November 4, 1981 in a “secluded room” in the Ottawa Conference Centre.22 Although hearings on that agreement were held afterwards and there were some modifications originating in “popular agitation”23 the undemocratic nature of the process was not prominent in the ensuing debate.

There was no seriously articulated objection to the role of government elites in constitution-making until the 1987 Meech Lake Agreement. That accord emerged from the usual informal inter-governmental negotiations leading to First Ministers’ Conferences. Only after the final result was made public did criticism of the process emerge. By that time a degree of public involvement was built into the constitutional amendment procedure. Amendments now required ratification by both houses of the Federal parliament and by the legislative assemblies of some number of provinces (in the case of Meech Lake, all of them). The legislative votes were preceded by the public hearings and debates usually associated with legislative acts.

As Russell shows, the most active participants in this process turned out to be organized groups with relatively narrow interests. They criticized the accord because, for example, it failed to institute aboriginal self-government or to reform the Senate.24 They also pointed out the limited and secretive process leading to the text.25 These cumulative attacks had their effect. By the time the three-year ratification period was coming to an end, Meech Lake was decidedly unpopular.26

The genie was out of the bottle. It would never again be possible to rely on quiet bargaining to effect constitutional change. “Elite accommodation operating through the machinery of executive federalism,” notes Russell was “a major casualty of the Meech round.”27 When constitutional discussion began again in 1990 and 1991 it was clear there would be public participation—and with a vengeance.

During this round the country was awash with tasks forces, polls, forums, town meetings, debates, and hearings sponsored by Federal and provincial authorities. Some of the more media-intense aspects of this effort were embarrassing failures. But, at the end, hundreds of thousands of Canadians expressed their opinions. Press coverage was intense. The problem was that the data merely confirmed the fact of fundamental political dissensus. So much for the constitutional moment.

If Meech Lake introduced the elected provincial legislatures to the debate, Charlottetown recruited the people themselves in the referendum of October 1992. The referendum debate, not surprisingly, suffered from the well-known defects of modern political campaigns. Russell accurately describes the campaign carried on “with the newscasts’ ten-second sound bites, the snappy one-liners from participants
in televised ‘town halls’ and the spot ads squeezed between innings of the Toronto Blue Jays’ (successful) quest of the World Series baseball championship.\textsuperscript{28}

The movement from elite bargaining to public debate turns out to have actually increased the difficulty of reform. Whatever their defects, First Ministers’ Conferences brought together people who understood the necessity of compromise. Especially when debating such spectral notions as “distinct society,” private individuals have little disincentive for indulging their strongly held if ill-defined senses of grievance and justice.\textsuperscript{29} For the general public, one observer wrote, “the debate centered on symbols, impressions, biases, hopes and aspirations.”\textsuperscript{30} For Quebeckers, rejection demeaned their most serious attachments. For other Canadians, adoption meant recognition of an unjustified special status. If the issue was understood that way compromise was not in the cards.

Russell is undoubtedly accurate in saying that “[t]he Charlottetown Accord was defeated because, outside Quebec, it was perceived as giving Quebec too much, while inside Quebec it was perceived as not giving Quebec enough.”\textsuperscript{31} That is, the very divisions that motivated the project of constitutional reform defeated it.

C. Facing Up to Constitutional Failure

This returns us to the first question—whether Canadians can recognize sufficient common interests to make their coexistence in a single state possible. Nationhood can’t be secured by careful drafting. If the preconditions to Cartier’s and Trudeau’s state, one defined by common political values that transcend language and ethnicity, are absent, no amount of popular consultation will provide them.

The current legal procedures for amendment, moreover, set a high bar for demonstrating national assent. Most amendments need the approval of the Federal Senate and House of Commons and of the legislative assemblies of seven provinces representing at least fifty percent of the national population. Certain important matters, including, significantly, changes to the Senate or the Supreme Court, or to the amending formulas themselves, require approval by the legislative assemblies of every province.\textsuperscript{32} The Meech Lake agreement, approved by only eight legislatures, came to grief because it dealt with the appointment of justices of the Supreme Court.

Any future proposal for significant reform would also almost certainly require unanimous consent. Quebec leaders of both parties have consistently insisted on a more formal role in selecting the Justices of the Supreme Court.\textsuperscript{33} Western provinces could not be counted on to agree to any meaningful package without Senate reform.\textsuperscript{34}

Even amendments that are governed by the standard (7/50) formula now seem out of reach as a practical matter. Parliament attempted to assuage Quebec voters in the aftermath of the close 1999 Quebec referendum, by enacting a statute that conditioned federal assent to an amendment on approval by Quebec. It also, however, requires the assent of Ontario, British Columbia, two provinces representing 50 percent of the population of the Atlantic provinces, and two provinces representing
50 percent of the population of the Prairie provinces. The attempt to give Quebec a veto on amendments has ended up creating five vetoes. Theoretically, Parliament could repeal this requirement but, for the foreseeable future, given the facts of political life, it is as entrenched as the Constitution Act itself. As a result, it will be a hot day in Iqaluit when we next see a constitutional amendment of any national consequence.35

That is where Russell leaves us—at the end of mega-constitutional politics. He concludes that it is time to throw in the towel on constituting Canadians a "sovereign people." "We know now that we cannot expect such a finish to our constitutional odyssey," Russell concludes, "for the simple reason that we do not share a common vision."36 There will be no epiphany revealing a previously undiscovered pan-Canadian soul upon which a new constitution might be constructed.

But for Russell this is not such a bad thing. Mega-constitutional politics may be impossible but "normal" constitutional politics can continue and has continued. Narrowly drawn responses to discrete constitutional problems and perhaps some minor tinkering with the federal system can still be achieved. Since the 1995 Quebec Referendum and the judgment of the Supreme Court in the Secession Reference the regulatory reach of federal spending programs has been curtailed, the functioning of legislative bodies has been improved, and details of Aboriginal self-government are gradually being worked out. "[T]he evidence is strong," Russell says in his preface to this edition, "that the country can survive and function effectively despite these differences, so long as we don't try to overcome them by constitutional reform."37

The question is, how long it will be possible to postpone another attempt at reform? There are many Canadians, probably most Canadians, who would be glad to leave the wrenching constitutional struggles in the past. But it may not be up to them. Normal constitutional politics is possible only so long as the antagonistic groups are, however grudgingly, content with it. The wild card, as always, is Quebec separatism—the idea that no modus vivendi between the two peoples, short of independent statehood, is acceptable. That is a sentiment that, we know, waxes and wanes. When Russell was writing his last chapter, separatism was in a notable decline. But, as I write, the last opinion poll sets support for sovereignty in Quebec at 54 percent, the highest figure in the last ten years. Among Francophones the number was 62 percent.38 Maybe not this time, but almost surely some time, a sovereigntist government will be elected and another referendum will be called. Mega-constitutional politics will be back.

Advocates of sovereignty will certainly not be deterred by the Supreme Court's judgment in the Quebec Secession Reference39 holding that Quebec may only depart if the Constitution is properly amended—a political impossibility. Even less will they be daunted by the federal interpretation of that judgment in the Clarity Act of 2000.40 Those are matters of Canadian law. The premise of the separatist project is that the Quebec people are already sovereign with respect to the determination of their status. In making that decision they are not controlled by the law of any other entity.41 Canadian law is irrelevant.
The next round of mega-constitutional conflict, that is, will not be stopped by an injunction. Legal developments will simply add one more issue to be argued over. And, should sovereigntists prevail in a referendum, the subsequent negotiations will be that much messier. Canada may hold together for a long time but the now necessary intersection of substantial national aspirations and popular politics means it may expect periodic episodes of constitutional turmoil—all with no better prospect of resolution. Ultimately Dan Quisenberry, the late Kansas City Royals relief pitcher and sage got it right: “I've seen the future and it's much like the present, only longer.”

NOTES


11. Milne, pp. 216-17

12. Russell, p. 109

13. Russell, p. 351

15. Russell, p. 133


27. Russell, pp. 156-68, 175-89


30. Simpson, supra at p. 74


34. Russell, p. 205.
35. Russell, p. 239.
40. Russell, p. 245-256.