Reshaping the Highest Law of the Land

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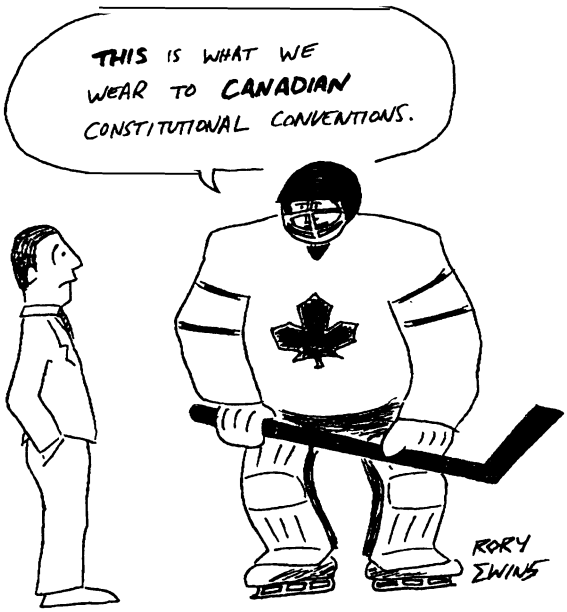
The Constitutional Convention through the eyes of a Canadian.



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Watching the Constitutional Convention from the Observer's Gallery was an exhilarating experience. This innovative exercise in participatory democracy seemed to touch even battle-weary politicians in unexpected ways. For a Canadian unaccustomed to such public input into constitutional debates, the convention provoked a feeling of envy. Yet, there were many times during the two weeks when it was easy to forget the discussion was taking place half-way across the world. Phrases such as 'the Golden Triangle' are familiar to residents of smaller Canadian provinces like my own (Alberta) where the same phrase describes a triangle consisting of Montreal, Toronto and Ottawa, which is where most of the power is believed to lie.

This article describes the reaction of an observer at the Constitutional Contention and the Women's Constitutional Convention, a reaction that is filtered through the eyes of a political scientist with a keen interest in the process of constitutional reform. The first goal is clarification: on numerous occasions during both conventions, Canada's constitutional travails were cited as a reason to avoid opening up the Pandora's box of constitutional reform.

To mention just two such instances, Federal Treasurer Peter Costello stated that attempts to repatriate the Canadian Constitution and institute a Charter of Rights has led to 'mega-constitutional politics', raising questions of secession, distinct cultural rights, sovereignty to indigenous people and various other issues. The Australian Republican Movement's Malcolm Turnbull was another delegate who raised the spectre of Canada. He mentioned how debilitating and divisive constitutional politics has been, and warned that Australia might find itself in a similar situation. On the face of it, these statements are true, but as we will soon see, the geographic concentration of French-speaking people in a single province is the biggest stumbling-block to constitutional peace in Canada.

Critics in Australia who cite the Canadian case fall into both monarchist and republican camps. As the former support the status quo, it is to their advantage to point to cases where tampering with it has had negative repercussions. As the Convention demonstrated, there are different strands in the republican movement. One represents those whose top priority is to abolish the monarchy. They would prefer to postpone other changes until a republic is a reality, lest a broader set of proposals fail, sinking the republic with it. For these republicans, Canada's experience is an object lesson in constitution-making. Another strand represents those favouring wider change in conjunction with attainment of a republic. This group is concerned that if it does not seize the historic moment, an opportunity will be lost.

While it is not my intention to underestimate the seriousness of our constitutional difficulties, a better understanding of the Canadian case will help explain why our problem cannot be exported. There are parallels between Canada and Australia, but together, the 'Quebec Problem' and our flawed constitutional amending process represent a profound

difference. The final section will discuss why the Australian debate has so much resonance for Canadians.

Canada and Australia are like siblings who share the same gene pool but who are not identical twins. Both countries are former British colonies which have metamorphosed into federal-cum-parliamentary systems. They are also large and sparsely populated countries with vast empty spaces inhospitable to human settlement. Prior to colonisation, both were inhabited by aboriginal people whose history since European settlement has been tragic. Both are constitutional monarchies which are now multicultural societies. There is also a remarkable similarity in the constituent units: Canada is dominated by two large provinces, Ontario and Quebec, which contain well over half the population (the former, with a population of almost 11 million people, has one-third of the Canadian population). These disparities in size resemble the situation in Australia where New South Wales and Victoria are home to much of the Australian population. A major difference is that Australia does not have a State in which over 80% of the population speaks a different language. As will become evident, this it a volatile ingredient in an already combustible brew.

Canada slipped the colonial yolk first in 1867, so it had been a political experiment that Australians considered when designing the political structure of their federation. By all accounts it was regarded as a negative role model as the Constitution assigned a powerful role to the central government. Despite opting for the same political framework, a parliamentary system wedded to a federal form of government, Canada and Australia have evolved in different ways. On the brink of a new millennium, Australia is engaged in a debate on the merits of a republic while Canada is locked into an interminable discussion on national unity. As Australians have discovered, abolishing the monarchy will entail much more than replacing the words 'Queen' and 'Crown' in the Constitution. As we have found in Canada, constitution-making involves changing the architecture of a political system and once you embark on such a job, it is difficult to restrict its reach. However, before discussing the difficulty in restricting the ambit of such discussions, it is important to understand why the situation in Canada is unique.

Two major factors contribute to Canada's constitutional paralysis: linguistic cleavage and an elite-dominated amending process. Neither of these exists in Australia so the Canadian condition is not contagious!

The Quebec problem

The province of Quebec with its majority French-speaking population injects a unique dynamic into Canadian political discourse. That province's grievances have caused a substantial minority, believed to hover around 30%, to strive for independence.[1] Dissatisfied with the federal bargain, Quebec governments since the 1960s, have sought special concessions for the province on the grounds that Quebec requires greater autonomy to protect its language and culture.

Ironically, when the Constitution was changed in 1982, Quebec, whose demands provided the initial impetus for constitutional discussions, was the only province that rejected the deal. Since then there have been attempts to bring Quebec into the constitutional fold but all have failed. The separatist Parti Quebecois has held two referendums on sovereignty, the first when it was in office in 1980 and a second in 1995.[2] The possibility of Quebec separation hangs like a pall over constitutional negotiations and feeds the rather undemocratic process we have for amending the Constitution.

The process

Constitutional amendments in Canada do not require popular approval, they must be ratified by Parliament and provincial legislatures. Normally discussions take place among the First Ministers (the Prime Minister and Provincial Premiers) who often meet behind closed doors and then unveil their plans to the public. Passage through each legislature is a mere formality as governing parties invariably enjoy a majority there.[3] There are no second chambers at the provincial level.

As all participants are heads of governments (and the federal government is just one out of eleven) with interests to protect, each has a barrow to push. The cumulative effect is that any concession to Quebec must be matched with similar concessions to the other provinces. This highly-politicised process shapes the outcome at these meetings and by and large, the Canadian public does not have an opportunity to participate. The exception was in 1993 when a set of amendments called the Charlottetown Accord, was put to the people but was rejected. The reasons for this outcome are complex and it would be impossible to do them justice here. However, some are mentioned below.

It can thus be argued that Canada's constitutional stalemate is due in part to the fact that the process compels participants to focus on short-term goals and for provincial premiers to adopt an aggressive stance. To point to Canada as an object lesson then is to ignore the fact that our problems flow from trying to accommodate Quebec's aspirations within a difficult amending framework. Pointing with dread to the Canadian case demonstrates a profound misunderstanding of the facts since Australia is spared the linguistic divide. There are nevertheless, parallels between the two countries in other aspects of constitution making.

Similarities

Perhaps the most striking similarity revolves around the parameters of debate. In both countries it has been difficult to confine it to a narrow channel. As mentioned above, the 1982 *Constitution Act* came into effect over the objections of the Quebec Government. Consequently, the first attempt to remedy the problem was an Accord among the First Ministers signed at Meech Lake, Quebec (hence it is referred to as the Meech Lake Accord). This Accord was opposed partly because of the hasty and secretive way in which it was drafted, but the fact that it dealt exclusively with Quebec's demands angered many people.[4] The next stop on the constitutional journey, the Charlottetown Accord, therefore attempted to give a little something to everyone. The unwieldy nature of the Accord no doubt contributed to its rejection in the referendum. An additional problem was that many provisions had not been finalised so citizens had to vote on an unfinished document. There was also a feeling within groups such as Canada's First Nations (aboriginal groups), that once Quebec's demands were met the Constitution would not be reopened for a good long time. This lent urgency to getting their issues on the table.

The Constitution preamble proposed in the Charlottetown Accord was questioned in much the same way that the Australian preamble was subjected to intense scrutiny. The preamble was intended to describe the character of Canada

and to articulate certain common values. It recognised the First Nations, Quebec's distinct society, as well as racial and gender equality, among other characteristics. This section, called the 'Canada Clause', provoked vigorous debate. It must be emphasised that the Canadian Constitution has, since 1982, had an entrenched Charter of Rights and Freedoms which affords protection to all these groups. As the objective of the preamble was to provide guidance to the courts in their interpretation of the entire Constitution, no group wanted to be left out of the Canada Clause in case it provided double protection.

Commentators were divided on the necessity for, not to mention the consequences of, spelling out what we stand for. Would it lock us in to a set of values that future generations would reject? Should constitutions be a source of inspiration or a legal contract? Some argued that the preamble could serve as a statement of principles and play an educative role helping to socialise children and new immigrants. Others were afraid it would be a basis for claims of entitlement.

Discussion of the preamble in Australia was startlingly similar. Like Canada, there were two camps, the poetic and the prosaic. The former camp sees a preamble as a welcome mat of the Constitution, a section that contains aspirations and inspiration, and articulates fundamental values. In the other camp are those who fear that the courts will make a meal of it. As Professor Craven put it so colourfully, such statements in a preamble would be like lymph glands pumping their poisons right through the body of the Constitution thereby attracting judicial attention.

There was also a polarisation between minimalists and those who favoured wholesale change. It is not certain that a transition to a republic can be accomplished without a larger package which addresses broader concerns. Returning to the analogy of structural change, those who have renovated a house will appreciate that what might start out as a minor renovation to the kitchen soon spreads to other parts of the house. There are two reasons for this: first, the rest of the house might look tacky next to the brand new kitchen and second, it is better to put up with one major disruption than with a series of small ones. Opening up a Constitution for debate inevitably leads to 'big questions' that are almost cosmological in scope. In Australia, the conjunction of the millennium, the Olympics and the centenary of federation are driving these first order questions. Becoming a republic is becoming bound up with questions of identity.

In addition to these powerful forces is the temper of the times, that is, the growing desire of citizens to become involved. Discussions revolving around election of the new head of state illustrate this point.

While popularity of the notion of an elected head of state may demonstrate naiveté about how the system works, it is also symptomatic of a much deeper phenomenon. Many people want input into Constitution making, in part because they are cynical about representative institutions such as parliament and politicians, but also because they want to be engaged in important decisions. During the 1993 referendum campaign in Canada, an astounding number of people obtained copies of the Accord and demonstrated a voracious appetite for an explanation of its provisions.

The desire for meaningful input and the distrust of politicians is not confined to Canada and Australia. People are anxious about the pace of change and the apparent unwillingness on the part of governments to act on their behalf. These sentiments manifest themselves in a craving to reaffirm shared values and aspirations. Where better to place such a statement of principles than in the preamble to the highest law of the land?

Whether the people of Australia approve of the recommendations of the Convention remains to be seen. Whatever the outcome, the exercise has been a shot in the arm for the democratic process. I can only hope that Canada will follow the lead of its younger sibling. Big questions need to be debated and discussed openly. The people should have a conversation about the kind of country they want their children and grandchildren to inherit. At that stage, constitutional lawyers and political scientists can spring into action. Their task will be to articulate that vision in a way that satisfies the powerful urge for the Constitution to speak to the people in a language they understand.

References

1. Disillusionment flows from the belief that only an independent Quebec can provide nourishment to the French language and culture and that French-Canadians outside Quebec are doomed to be assimilated. Even within Quebec, French was vulnerable until provincial legislation made it the language of the workplace.
2. The hairsbreadth that separated the 'Yes' and the 'No' sides, 1.2%, shocked Canadians and delighted sovereignists who believe they will succeed next time.
3. Canada uses the first-past-the-post electoral system with candidates requiring only a plurality of votes to win a seat. This rarely translates into a minority government.

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5. *Weekend Australian,* 6-7 December 1997.
6. Clark, P., 'Wik response: just a Lapps in judgment?' *Sydney Morning Herald,* 25 January, 1998.
7. Campbell, I., 'The Protection of Constitutional Rights in Sweden' (1997) *Public Law* 488, at 492 .
8. Campbell, I., above, p. 49.
9. Campbell, I., above.
10. Korsmo, F., 'Resonance and Reduction of Indigenous Claims in Western Legal thought: The Place of the Origin' (unpublished article, courtesy of the author), p.1.
11. Korsmo, F., above.
12. Korsmo, F., above.
13. Korsmo, F., above, p.4.
14. Korsmo, F., above, p.4.
15. Korsmo, F., above, p.3.
16. Korsmo, F., above, p.4.
17. *Time* 20 October 1997, p.14.
18. Jull, P., 'The future and the frontier', (1992) 13 *Policy Options* 25.
19. Korsmo, F., above, p.3.
20. 19 January 1998.
21. Jull, above, p.25.
22. Richardson, C., 'The Multilateral Agreement on Investment', *46 Australian Rationalist* 22 at 22.