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The Canadian Political Scene in 1989

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Following the excitement generated by the election last November, the Canadian political scene has been quiet lately. Parliament approved the Canada-US Free Trade Agreement in December -- then promptly adjourned for three months. It reconvened last week which makes this an opportune moment to reflect upon recent developments and speculate about the future.

I want to focus on two areas. First, constitutional changes over the last decade which, in my opinion, have resulted in a much more American style of government. Second, the perennial issue of French-English relations -- always an important factor in Canadian political life.

Evolving Bicameralism

Canada is a federation similar to, indeed modeled to some extent on, the United States. It has a popularly elected chamber known as the House of Commons and a Senate originally composed of members appointed for life but now to age 75.

There are, of course, significant differences. The congressional system is characterized by:

- the separation of the executive, legislative and judicial branches,
- elaborate checks and balances to prevent the concentration of power in a single branch,
- the supremacy of the constitution as interpreted by the Supreme Court.

The parliamentary form of government is based on:

- responsible government,
- the fusion of the executive and the legislative branches,
- the supremacy of parliament.

In light of developments over the last few years some of these distinctions have become more apparent than real but let me briefly outline what these terms mean.

Fusion of the executive and legislative branches means that the same person who serves in the cabinet is also a Member of Parliament, usually in the House of Commons. As such he or she has all the usual demands from constituents in addition to administrative responsibilities. Cabinet ministers can be appointed without holding a seat in Parliament but only for a brief period, for example while waiting for a by-election. Should the electorate reject them they would normally resign from office.

Responsible government is the term used to describe the unwritten custom whereby a government holds office only as long as it maintains the confidence of the popularly elected House. Confidence is a subjective term but can be determined at any particular moment by an opposition motion of non-confidence which, if carried, obliges the government to resign and usually results in a general election. A government can decide, on its own, that because a particular item of legislation was defeated it no longer enjoys the confidence of the House. It can also seek an election at any time whether it is defeated or not.

One of the corollaries to responsible government is that individual cabinet ministers are accountable to Parliament for the actions of their departments and their budgets must be approved by Parliament. Were Parliament to reduce by even one dollar a budget proposal by a minister it would be enough to force that minister to resign and probably cause an election.

Finally, parliamentary supremacy means that Parliament is virtually unrestricted in the laws it can pass. The courts do not sit in judgment as to whether a particular law is constitutional or not. This has never been completely true in Canada since in a federation jurisdiction is divided between two levels and in cases of dispute the courts decide which has authority.

Furthermore a Charter of Rights and Liberties adopted as a constitutional amendment in 1982 marked a significant step away from parliamentary sovereignty and toward constitutional sovereignty. The Charter contains many of the guarantees found in the American Bill of Rights and, since it is part of the constitution, cannot be changed by any future parliament without the consent of the provinces. The Canadian Supreme Court, like its US counterpart, can now declare almost any legislation unconstitutional if it violates rights guaranteed in the Charter.

This change was only accomplished after long debate between traditionalists and reformers. The compromise that made this amendment possible was inclusion of a so called *notwithstanding clause* whereby any legislature can escape judicial review by prefacing its legislation with a statement that the legislation shall be effective *notwithstanding* the Charter of Rights and Liberties. The exemption expires after five years but can be renewed.

Even with the notwithstanding clause Canadian governments at all levels have seen their sovereignty reduced at the expense of the courts. Our traditional understanding of the parliamentary system has changed even more with the emergence of an activist Senate as demonstrated by the unusual, indeed unprecedented announcement that it would not pass the government's legislation implementing the Canada-US Free Trade Agreement unless the issue was put to the people in a general election.

The Liberal Party enjoys a large majority in the appointed Senate having been in office for about three quarters of this century. For most of its existence the Upper House was criticized as little more than a haven for the party faithful. It generally avoided confrontations with the Commons, approved legislation and contented itself with studying matters, occasionally obtaining changes through quiet persuasion rather than public confrontation.

The move toward an activist Senate did not begin with the free trade debate. It can be traced back to

1979 when the Conservatives, under Joe Clark, managed to form a minority government. With few seats from Quebec, a province that has anywhere from 8 to 12 members in the cabinet, Mr. Clark decided to appoint a number of Conservative Senators from Quebec to the Cabinet and to give them some important portfolios such as Justice. This had the effect of turning the Senate into a chamber of accountability more like the House of Commons. The Clark government lasted less than a year but the seeds of change had been sown.

Following a Liberal interlude from 1980 to 1984 under Pierre Trudeau, the Conservatives, now led by Brian Mulroney were returned in 1984 and 1988. The result has been a very unusual situation by Canadian standards -- an extended period where the Senate and House are controlled by different parties.

The refusal of the Senate to pass the free trade legislation, while constitutionally valid and politically understandable, put a considerable dent in the framework of responsible government.

It set off what, on reflection, can only be described as the surrealistic spectacle of appointed Senators, ears to the ground to hear the call of public opinion, dispatching the elected representatives to a fierce electoral battle while they remained safe and secure regardless of the outcome.

That election has been held and the Free Trade Agreement has been passed. In other respects the political situation is the same. There is still a Conservative government with a majority in the House of Commons and a Liberal dominated Senate. The problem of resolving disputes between the two houses is not going to disappear.

The Senate will not start this Parliament by blocking the government at every turn. But as time goes by and issues emerge --> be they related to free trade, taxes, or social programs I think we can, for the first time in Canadian history envisage a form of "divided government".

This term is associated with the United States when one party holds the presidency and the other one or both Houses of Congress. In a parliamentary system, because of the fusion of executive and legislative, a division of this kind is, strictly speaking, impossible.

However, if one party controls the House of Commons and another the Senate and if the latter decides to exercise its constitutional right to block legislation, I think you have essentially the same situation, -- only worse if there is no provision for an override or any effective dispute settling mechanism other than an election.

From 1984 to 1988 Prime Minister Mulroney declined to accept the Senate as an equal partner in the legislative process. This view of bicameralism -- with all legitimacy on the side of the elected House and all illegitimacy on the side of the appointed Senate is widespread but ignores the intentions of those who drafted the original Canadian constitution in 1867.

The Fathers of Confederation may be criticized for failing to anticipate some aspects of modernity but one problem they did anticipate was the possibility of disagreement between the House and Senate. They outlined a mechanism for joint conferences to work out such disputes. This procedure

has been used so little, the last time in 1947, that no one really has any idea how it should work in practice.

Unless Canadian legislators have lost all sense of perspective as a result of the heated debates of the last few years, I hope we will see some progress in working out a better mechanism for settling disputes between the houses in the coming parliament.

The Two Solitudes in 1989

Nothing in their experience equips most Americans to fully understand the province of Quebec and its relationship with the rest of Canada <196> what one famous Canadian novelist referred to as the two solitudes.

Indeed many English speaking Canadians are still asking “what does Quebec want?”. I think the answer is quite clear but before looking at whether Quebec will get what it wants we must briefly summarize developments since 1976.

That year the present Premier of Quebec, Robert Bourassa, was defeated by the Parti Quebecois which was and is dedicated to the political and economic independence of Quebec. The new government, led by Rene Levesque, quickly passed a Bill intended to protect the French language by restricting the use of English in government, the courts and business although it did allow more recognition of certain acquired rights of English Quebecers than many are willing to admit.

He also promised and held a referendum on the question of whether his government should be given a mandate to negotiate a new agreement with the rest of Canada based on political sovereignty and economic association.

His proposal was defeated by approximately 59% to 41%. During the course of the referendum Prime Minister Trudeau and other proponents of the federal side promised Quebecers a new deal if they rejected independence. Following the referendum Mr. Trudeau's answer was the Charter Rights and Liberties with certain guarantees for French language and education across Canada, and a new formula for future amendments.

He did not, however, accept Quebec's request for a veto over amendments to the constitution or any kind of special status. As a result the Quebec government opposed the changes which had the support of Ottawa and all the other provinces and were ultimately adopted. The Levesque government announced it would systematically preface all legislation with the notwithstanding clause and would not participate in federal-provincial conferences except as an observer.

In the 1984 federal election Mr. Mulroney promised he would bring Quebec back into the constitutional fold. He was assisted in this regard by the defeat of the Parti Quebecois the following year and the return of Robert Bourassa as Premier of Quebec. After discussions between them and with the other provincial premiers an agreement for a further set of constitutional amendments which met most Quebec requests was signed in 1987. This agreement is known as the Meech Lake Accord after the site where it was negotiated outside of Ottawa.

Among other things this Accord recognizes that Quebec constitutes within Canada a <169>distinct society<170> and requires that the constitution be interpreted in the light of that fact. It also gives Quebec, and all the provinces, an increased role in immigration policy, and in the appointment of Senators and Justices of the Supreme Court by allowing them to provide names from which the appointments will be made. Provinces will be allowed to opt out of national programs and still receive equivalent funds provided they establish programs with similar objectives.

A number of women's groups have been critical of the Accord arguing that their rights under the Charter could be subordinate to the distinct society clause. Others critics, such as former Prime Minister Trudeau, have argued that the Accord increases the importance of the provinces to the detriment of the national government.

To come into force the Accord must be approved before June 1990 by Parliament and all ten provincial legislatures. So far Ottawa and eight of the provinces have given their approval. In the other two provinces there have been elections and changes in government since the accord was signed. Manitoba and New Brunswick are threatening to withhold ratification unless certain changes are made. New Brunswick, which has a large Acadian population, feels the Accord leaves francophones outside of Quebec as second class citizens. The new Manitoba government is in a minority position and given the long history of French-English antagonism in that province is very sensitive to the feeling that the Accord gave too much to Quebec.

Thus the Meech Lake Accord is stalemated. As result we have a constitutional smorgasbord where some provinces are submitting lists of persons to be named Senators; others such as Alberta are going to hold an election to come up with the name of the person to be submitted; others are refusing to submit names either because they have not approved the agreement or because it is not technically in force.

One of the Mulroney government's most challenging and urgent task's will be to convince the recalcitrant provinces to approve the Accord without changes that will alienate some or all of the eight provinces that have already agreed.

The plot thickened last December when the Supreme Court, relying on the freedom of expression clause of the Charter, declared unconstitutional the Quebec law banning English language advertising by most commercial establishments. The Quebec government reacted by introducing a slightly modified version of the bill which allows English advertising inside but not outside.

To make sure the court could not strike down this law Mr. Bourassa invoked the notwithstanding clause earning plaudits in Quebec and criticism elsewhere.

Conclusion

Canadians have always been attracted by certain aspects of the American political system -- federalism in the last century, the Bill of Rights in this one. We have also seen, in the last decade more than ever before, American assumptions about politics replace British ones -- the preoccupation with diffusing power throughout the system being the most important example.

Does this mean we are on the way to full scale congressionalism? I do not think so. For one thing, in practical terms the essence of congressionalism derives not so much from its theory as from the process by which Members of Congress are chosen and the independence they enjoy vis a vis their party that they enjoy because of it.

The American electoral process with its laissez-faire approach to voter registration and primaries, its ritualistic conventions and debates, and its method of election financing and reapportionment resulting in almost no turnover among incumbents probably holds little attraction for most Canadians

My answer to “what does Quebec want?” is that it wants what it has always wanted -- an influential role in national politics but freedom to develop its own unique and French speaking society with a minimum of outside interference.

In 1987 the Prime Minister and Premiers of the other provinces seemed willing to give constitutional recognition to those aspirations. I am not so sure that is still the case. The two provinces which oppose Meech Lake seem adamant. Both federal opposition parties will probably have new leaders before too long and it is unlikely all candidates for those jobs will be as supportive of Meech Lake as the present leadership.

Perhaps most significant was the statement last week by Mr. Mulroney that he thought the notwithstanding clause was a great weakness in the Charter of Rights and would work for its removal. This leaves us with the prospect of another surrealistic spectacle where the province unhappy with the 1982 constitutional reforms and supposedly needing to be brought back into the constitutional fold is using those very reforms to its advantage while the Prime Minister, who predicated the entire Meech Lake package on the argument that Quebec was opposed to the status quo, is now suggesting a change that Quebec would be unlikely to accept.

You will not be surprised, therefore, if my conclusion is that while the free trade agreement has opened some very interesting long term possibilities, they are going to be overshadowed on the Canadian political agenda by some constitutional and language battles that many people thought had been resolved by the referendum and by the 1982 and 1987 constitutional amendments.