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# Parliamentary Government and Constitutional Amendment

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Discussion papers are intended to be thought provoking but the first thoughts provoked by the recent Discussion Paper is that it seems based on some questionable assumptions - first that the 1982 amending process does not work; second that the Meech Lake Accord made use of the 1982 procedure; third that the success of constitutional amendment depends primarily on intergovernmental consultations in the form of First Ministers conferences and fourth that Quebec remains outside the constitutional family. This paper will examine these assumptions that are central to the present political and constitutional debate in Canada and in Quebec.

## The 1982 Formula

As a result of complex negotiations between Ottawa and the provinces leading up to the 1982 constitutional settlement, Canada does not have a single amending procedure but rather a number of formulae. Most amendments fall under section 38 of the Constitution Act and require the consent of Parliament and legislatures in two thirds of the provinces that have at least fifty per cent of the population. The maximum time limit for amendments under this section is three years. It is possible for any province to opt out of section 38 amendments. Certain matters including the powers of the Senate and the method of electing Senators, the creation of new provinces or the extension of existing provinces into the territories are specifically listed as falling under the general amending formula.

Amendments in five special areas involve the use of a different formula (section 41) requiring the consent of all legislatures. There is no opting out and no time limit for these amendments that relate to the Monarchy, the use of the French and English language, the composition of the Supreme Court, the right of a province to have at least as many members of the House of Commons as it has Senators, and changes to the amending formula itself. A third formula outlined in section 43 is for matters that affect one or more but not all the provinces such as the alteration of interprovincial boundaries. Such amendments require only the consent of Parliament and the legislature of the province or provinces concerned.

With so many different formulas there is much room for confusion. For example, one could argue that a distinct society clause as in the Meech Lake Accord would require the consent of seven out of ten provinces. Others could claim that it pertains to the use of the French or English language and therefore would require unanimity. Still others might maintain it involves only one province and the

federal government so could be adopted by those two alone.

An amendment process that fosters ambiguity cannot be considered a resounding success. But has it been a total failure? The Discussion Paper examines the experience gained in using the new formulae since 1982. It notes that only one successful amendment involving more than one province (the establishment of a conference on aboriginal rights) has been adopted. It was approved following a first ministers conference that had been preceded by a series of private preparatory meetings at the level of officials. No public hearings were held before the amendment and legislative debate on the amendment resolution ranged from a maximum of five days in the Senate to a minimum of one day in several provinces. In no case were public hearings held.

Among the failed amendments were three attempts to entrench property rights in the Charter by British Columbia (1982), New Brunswick (1983) and Ontario (1986). Based on this record the Discussion Paper seems to conclude that: (a) lack of public involvement is the key to success and (b) "in the absence of a prior executive agreement among first ministers in Canada's federal and parliamentary system, unilateral action by one legislative body would be unlikely to lead to the required approval by the other legislative bodies and, hence, proclamation of an amendment."1[1]

The second conclusion is consistent with a basic precepts of parliamentary government, the confidence convention. While there may be good reasons for acknowledging the importance of a government's right to govern in the normal course of the parliamentary process, the question is whether constitutional amendments are just another part of that process to which the same rules and conventions are applied. Or does the constitution belong to all the people and does it therefore require a completely different process and a completely different attitude from the paternalism that pervades the parliamentary process?

Nor can one argue, as does the Discussion Paper that because three amendments have failed in the last decade there is something wrong with our amendment process. Perhaps there was simply insufficient support in the country for these amendments. In the United States some 10,000 constitutional resolutions have been proposed since 1791 but only 16 (aside from the original ten) had the necessary support to become law.

**The Lessons of Meech Lake**

This brings us to the third and most serious weakness in the Discussion Paper, its contention that the Meech Lake Accord was done under the 1982 amendment process and that it too failed. This proposition is only half right. The constitutional amendment known as the Meech Lake Accord did fail but, in fact, was a direct violation of the 1982 formula.

Most criticism of the Accord was highly emotional and filled with symbolism. More legalistic arguments, including one that the First Ministers had actually violated the constitution, did not interest the media or the public. The argument was put most forcefully by Tom Berger in testimony to a Special House of Commons Committee studying the New Brunswick Companion Resolution to the Meech Lake Accord (The Charest Committee).

Berger noted that amendments to the Constitution must be made in accordance with the authority contained in the Constitution Act. But the Meech Lake Accord was a package deal. "Under section 41 where unanimity is required there is no time limit. The Parliament of Canada and the legislatures can take as many years as they want before they pass an amendment. The three year time limit does not apply. But the Meech Lake resolution violates this provision of the constitution. It gives Parliament and the provinces only three years. It purports to deny them what the Constitution gives them."[2]

Similarly under section 38 an amendment must be proclaimed as soon as the requisite number of provinces (seven) have agreed. "It is not a matter of the first ministers' agreeing, by a procedure of their own inventing, that the deadline can be deferred indefinitely until unanimity has been achieved . . . That is a breach of the Constitution that occurred as soon as the consent of seven provinces was obtained and no proclamation was issued. It is my view that our constitution does not authorize the first ministers to adopt a hybrid amending procedure and say to Parliament, the legislatures, and the country that their amendment must be passed "all or nothing" nor does it authorize them to add that it must be done within three years."[3]

With the demise of Meech Lake Accord the Berger argument is rendered somewhat academic although when the Discussion Paper tries to argue that the package approach was correct, one is left to wonder just what lessons were learned from the Meech Lake experience.

**Legality and Morality in Constitutional Dialogue**

The Discussion Paper does not address the underlying constitutional problem -- the fact the 1982 changes were adopted against the express wishes of one province. The government of Quebec, while recognizing it is legally bound by the 1982 settlement and ready to use certain parts of the constitution for its own purpose continued to argue that since it did not sign any agreement leading to the 1982 changes it was, morally speaking, entitled to refuse to participate in further constitutional discussions until certain conditions were met. This was an understandable, even astute, bargaining position and it nearly succeeded.

But the demise of the Meech Lake Accord has made that position untenable and put the emphasis back where it should be, on the substantive nature of the Constitution not on the technicalities of amendment. In this respect the work of

the Campeau-Belanger Commission will probably provide a better basis for confronting real as opposed to pseudo constitutional issues.

Nevertheless the following suggestions are offered in terms of stimulating public debate about the amendment process as advocated by the Discussion Paper:
Let us consider the use of more inter-jurisdictional legislative committees along the lines of Belanger-Campeau. For example instead of every province having a committee on the constitution and hearing the same witnesses say the same things why do the four western (or eastern) legislatures not set up a single parliamentary committee. If such a committee, perhaps including some non political members, came up with an amendment acceptable to all governments in the region it would have more credibility than something worked out by the First Ministers at one of their brutal conferences.

Whatever process we do use for coming up with constitutional amendments let us proceed with one amendment at a time. No packages please. For greater certainty let us indicate clearly that of several formulas is being used. Constitutional amendments do not lend themselves to private negotiation in packages to be slipped onto legislators and the public. Proponents of Meech Lake will argue that without a package there would have been no agreement. This is circular reasoning at best and sophistry at worst. If there is no agreement than you do not have the basis for an agreement and packaging will not change this.

Let us be creative within the letter of the law. Most things can and should be done without amendments or by agreement only of the jurisdictions concerned.

Let us address the absence of a time limit for amendments requiring unanimity by following American practice and simply inserting a limit (usually seven years) into the body of the amendment.

Let us recognize that executive federalism as a way of amending the constitution ended in 1982. Henceforth if any government (or indeed opposition) has a constitutional amendment please put it in writing and get it debated and adopted in your assembly. Debates on constitutional amendments should not be subject to party discipline and the confidence convention. If adopted let us respect the ability and integrity of legislators in the other provinces to deal with a proposal on its merits rather than as a result of commitments made on their behalf by First Ministers at private meetings. Let us not be discouraged if some, indeed many, amendments fail.

Finally let us submit concepts like referenda and a constituent assembly to as rigorous an examination as possible. If we do we will likely discover that the latter is more appropriate as a ritual to symbolize a fait accompli than as an instrument for reaching consensus. A constituent assembly would be overkill to deal with the amending formula but might be necessary if existing institutions cannot resolve issues such as Senate reform and the division of powers.

## Conclusion

No political party or government is beyond reproach for the present constitutional malaise. Yet the answer may be deceptively simply. If the constitution belongs to the people, amendments have to be put forth without the kind of guarantees that come with a majority government and party discipline. Let us try using the existing amending formula and invent, if necessary, inter-parliamentary institutions more conducive to consensus building by mature citizens with strongly held views. We wanted our constitution back from England. We got it, albeit not as neatly as some would have liked. Now the question is whether we have the political maturity, imagination and skills to use it.

A great myth of modern Canadian politics is that the Meech Lake Accord failed because of inadequate public input. Few measures have ever been subjected to more extensive examination and debate. It failed because the First Ministers were not listening or else were unable to extract themselves from intransigent and impolitic positions.

Parliamentarians, not First Ministers or bureaucrats or referenda, are the link between the people and the constitution. The future of the country may well depend on making more intelligent use of legislative institutions in the amending process.

## Notes

[1] Federal-Provincial Relations Office, *Amending the Constitutions of Canada: A Discussion Paper*, Supply and Services, Ottawa, 1990, p. 7.
[2] Canada, House of Commons, Special Committee on the New Brunswick Companion Resolution to the Meech Lake Accord, *Minutes of Proceedings*, Issue 19 May 3, 1990 pp. 8-9
[3] *Ibid*.