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# CONSTITUTION-MAKING AS INTERGOVERNMENTAL RELATIONS

A Case Study of the 1980 Canadian Constitutional Negotiations

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The *Constitution Act, 1982* is a document that profoundly changed the Canadian political landscape. It brought home the highest law of the land; it provided Canadians a mechanism to change their Constitution; it created a Charter of Rights and Freedoms, entrenched within the Constitution, out of the reach of one government. Perhaps its most important legacies, however, are the seemingly permanent isolation of Quebec and the primacy of place in Canadian history it gave Pierre Trudeau.

This paper will examine the constitutional history of Canada with a view to determining what made the 1980 negotiating sessions successful when the sessions that led to both the Meech Lake Accord and the Charlottetown Accord were not. It is important, however, to note that the word “successful” is used in the sense that an agreement was reached. Unlike Meech and Charlottetown, the repatriated constitution did not have unanimity among the participants.

The question that comes to mind is this: if the governments did not really agree in 1981, why was a Constitution ratified? More importantly, are there lessons that can be drawn from this agreement that can be applied to the failed accords of the Mulroney era?

In order to complete this examination, the paper will be divided into two parts. In the first part, Canada’s constitutional story will be told. This is a necessary part of any examination of the constitutional negotiations, for without knowing what the players wanted historically, one cannot see what was changed by the 1980s. The second part of the paper will discuss both *what* happened in the 1980 negotiations as well as the lessons which may be drawn from it. This

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section will examine why a constitution was ratified in 1980 when so many other attempts failed over a sixty-year period.

By the end of this paper, the lessons learned from the Trudeau constitution will be examined and an analysis of what made this Constitution possible will be completed. Trudeau's success was due to his skill at combining two facets of negotiation: public participation and closed-door negotiations. As a politician, Trudeau had to keep the proceedings open so that all members of the public could weigh in with their opinions. It is a reality of politics, however, that that statements that will get you elected – such as *maitres chez nous* or *Vive le Québec libre!* – do not help around the negotiating table. Trudeau was successful because he allowed the politicians to be politicians while creating an atmosphere where negotiations could really occur. By providing some cover to the lawmakers, Trudeau made it possible for them to announce with one voice, “This is our Constitution.” In allowing the premiers' posturing for the cameras, he allowed politicians to be politicians and still come out with a deal that met the real needs of real Canadians. Unlike Trudeau, Mulroney did not combine these factors, and so was unsuccessful. That is one of the most important lessons to be learned from Trudeau's constitution-building.

Although the patriation of the 1982 Constitution can be pinpointed to a single moment in time – when the Queen signed it on Parliament Hill – its creation is a much longer odyssey. Indeed, one could trace the origin of the Canadian constitution to the first kings of England. The Westminster parliamentary tradition began in England, and was thus already part of Canadian politics when France ceded its North American colonies to England in 1760. The specifically Canadian parts of constitutional politics began at this time, formalized in the Proclamation of 1763.

Like the Proclamation, most of Canada's constitutional history has come from England, both in the sense of the English traditions and, more importantly, in that the English monarch has been responsible for the creation and administration of these constitutional documents. Indeed, Canada was not able to act as an independent nation until the 1931 Statute of Westminster, which granted the government both internal and external independence from Great Britain. For this reason, an examination of the first 270 years of the Canadian constitution is beyond the scope of this paper. After all, a country that is still only a colony cannot meaningfully affect its own destiny. As long as Canada did not have control over its own affairs, constitutional discussions were undertaken in London, not Ottawa.

Although the Statute of Westminster gave Canada the right to act as a sovereign nation, it did not provide Canadians with a mechanism to alter their own constitution; this right lay with the British Parliament. Since the country had to appeal to a "higher body," Canada did not have complete independence from Britain; it would not until the creation of a "home-grown" constitution, complete with an amending formula, in 1982.

To understand what was going on in the 1980 negotiations, an overview of constitutional reform from 1931 until the 1980 Québec referendum is necessary. This overview will provide both the facts of constitutional reform as well as the positions taken by the various levels of government as they sought to create a constitution acceptable to all parties involved.

It was recognized as early as 1926 that an amending formula would have to be agreed upon before Canada could truly be an independent state. The Balfour Report of 1926 pointed out that the British North America Act, 1867, did not provide for Canadians to amend it without reference to Great Britain. The report "made it essential for Canadians to reach agreement on procedures or a 'formula' to permit them to remove the British North America Act from the

legislative jurisdiction of the Parliament at Westminster.”<sup>2</sup> Between 1927 and 1982, fourteen different attempts were made to do just that.

As often happens in the political world, the Canadian constitutional debates occupied the minds of both politicians and the electorate in spurts. By the end of the 1930s, for example, there were four different attempts to create a realistic amending formula. The 1926 Balfour Report spurred the first of these meetings, held in 1927. This conference was a failure because there was no general support for the federal proposal that a majority of governments would be required for most amendments and unanimity would be required for amendments “involving provincial rights, the rights of minorities or rights generally affecting race, language and creed.”<sup>3</sup> Those provinces that disagreed with the federal proposal believed that “if the authority to amend the [British North America] Act were transferred to Canada ‘all sorts of demands for changes would be made.’”<sup>4</sup> This ran contrary to the belief that amendments should be difficult to entrench.<sup>5</sup> Moreover, it was argued that since the British government always granted amendments, it made no sense to transfer the power to amend the Constitution to Canada.<sup>6</sup> Finally, “because the Act was a British statute ‘Canada should go to London for amendments thereto.’”<sup>7</sup>

In 1931, the provincial and federal governments met to discuss the ways in which the Statute of Westminster would be implemented in Canada. The Statute itself gave the Parliament of Canada the power to make laws on behalf of the Dominion. The provinces were concerned that their powers would be modified in favour of a stronger federal government.<sup>8</sup> In order to curtail these fears, the Canadian Parliament issued a request to King George V that the British

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<sup>2</sup> James Ross Hurley, *Amending Canada's Constitution*. (Ottawa: Canada Communication group, 1996), p. 25.

<sup>3</sup> Hurley, p. 26.

<sup>4</sup> Bayard Reesor, *The Canadian Constitution in Historical Perspective*. (London: Prentice Hall Inc., 1992), p. 127.

<sup>5</sup> Reesor, p. 127.

<sup>6</sup> Reesor, p. 127.

<sup>7</sup> Reesor, p. 127.

<sup>8</sup> Hurley, p. 26.

North America Act would not be modified except by the British Parliament.<sup>9</sup> The same Westminster statute that gave each Dominion autonomy also restricted the ability of the Canadian government to be truly independent. This change in the distribution of Commonwealth power meant that Canada would struggle with the issues of an amending formula and the power of the different levels of government.

The Depression of the 1930s prompted another round of constitutional discussions. The first ministers met to consider amendments to the constitution to allow the federal government to interfere with some of the social policy jurisdictions of the provincial governments. However, in order to amend the constitution, the governments determined that different amending formulas were needed depending on the situation.<sup>10</sup> Although nothing came from these meetings, some of the concepts discussed resurfaced over time, such as the “opting-out” clause suggested by Alberta in 1976.<sup>11</sup> The 1935-1936 constitutional conference formed the basis of many of the proposals put forward over the following fifty years. Each successive conference built upon the proposals of the one before.

In 1949, the government of Canada was granted a power the provincial governments had had for some time: the power to amend its own constitution. Under section 91(1), the government could unilaterally alter portions of the Constitution that applied only to it with a few exceptions. These exceptions were reserved specifically for the British Parliament to amend until the federal and provincial governments of Canada could agree upon an amending formula.

**Comment:** Section 91(1) of what, exactly? What happened in 1949?

This last point is an important one, as the provinces felt that the federal government had received too much power with this so-called “partial patriation.”<sup>12</sup> Their complaint was

<sup>9</sup> Hurley, p. 26.

<sup>10</sup> Hurley, p. 28-29.

<sup>11</sup> Reesor, p. 129.

<sup>12</sup> Hurley, p. 31.

somewhat justified, as Ottawa retained significant power. One of the first things it did upon receiving the power to amend its portions of the constitution was eliminate the Judicial Committee of the Privy Council as the court of highest appeal. The Supreme Court of Canada was thereafter the last place to appeal a judicial ruling in the country. It should be remembered that the JCPC was responsible for a great deal of the province-building in the early years of Confederation. By removing the JCPC from the equation, the federal government placed significant power in a body over which it had some limited control. After all, with the Prime Minister responsible for filling seats on the Supreme Court, it is possible to place judges on the bench with a particular constitutional view. While the Supreme Court of Canada is an independent judiciary, the federal government has at least *some* control over the process; it had none where the JCPC was concerned.

Conversely, the provinces – who benefited most from the Judicial Committee – were not happy with the new arrangement. Prime Minister St. Laurent pointed out that section 91(1) could be repealed, “but only in the context of agreement on an overall set of procedures to amend the Constitution.”<sup>13</sup>

The 1960-1961 constitutional conference was responsible for the creation of the “Fulton formula” for constitutional amendment. Ironically, E.D. Fulton, the federal minister of justice and the man responsible for the creation of this formula, initially suggested that the Constitution Act did not need an amending formula. He thought that the unanimity rule could be preserved until such time as an amending formula could be agreed upon. He thought it was more important that the Constitution be brought home.<sup>14</sup> Instead, it was thought that an amending formula could

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<sup>13</sup> Hurley, p. 31.

<sup>14</sup> Reesor, p. 129.

be easily agreed upon, and Fulton proposed a general amending formula. The Fulton formula had three main components:

- Two-thirds of the provinces with fifty percent of the population would be required for most amendments
- Amendments which did not affect all provinces could pass with the consent of Parliament and the provincial legislature in question
- Unanimity would be required for seven provisions: provincial representation in the House of Commons; the legislative powers of the provinces; the rights and privileges granted the provinces; the assets and property of the provinces; the use of English and French; education; the amending procedure itself<sup>15</sup>

Under the Fulton formula, a new section was added to the British North America Act whereby jurisdictional responsibilities could be delegated to the other level of government with the consent of Parliament and at least four of the provinces. The originating jurisdiction retained the power to take responsibility back at any time.

The Fulton formula was not adopted. Fears that the unanimity required meant that each province had a veto caused further concern that the formula “would create constitutional inflexibility.”<sup>16</sup> Saskatchewan’s fear of the veto given to each province forced the premier to veto the Fulton formula.<sup>17</sup>

Although the Fulton formula failed, it was revived in 1964 by Guy Favreau, the federal Attorney-General under Pearson. Favreau took Fulton’s formula and added clarifications about the ability of a government to amend its own constitution under sections 91(1) and 92(1).

Amazingly enough, all governments agreed on the Fulton-Favreau formula. Québec premier Jean Lesage, however, submitted the proposal to the Québec Assembly, as was the custom of the Government of Québec. When it became apparent that the Assembly would not approve it, the

<sup>15</sup> Reesor, p. 130.

<sup>16</sup> Reesor, p. 130.

<sup>17</sup> Reesor, p. 130.



debate was turned over to the public. The government argued that the formula would do no more than put informal practices into law, while its opponents wanted more guarantees out of the constitution. When it became apparent that the latter was the most popular point of view, Lesage decided not to submit the proposals to the Assembly, and the Fulton-Favreau formula died.<sup>18</sup>

It is important to note at this point that this was the first time public participation had been granted in constitutional negotiations. Until 1965, all constitutional discussions had been done solely through executive federalism. The premiers and prime minister had made all decisions regarding Canada's constitutional future without asking for public opinion. It is somewhat ironic, therefore, that when executive federalism had finally worked, public opinion stopped an accord from being completed.

By 1968, the focus of the governments of Canada turned from just getting the constitution home to real constitutional change. The argument was that if they were going to meet anyway to hash out an amending formula, why not try to change other parts of the BNA Act as well. These meetings stretched over three years, culminating in the Victoria Charter of 1971.

The Victoria Charter was a complete review of the Constitution, designed to bring it into the modern era. It was composed of an amending formula, guarantees of protection to Québec, and a reciprocal guarantee of protection to Ontario. Just as in the case of the Fulton-Favreau formula, consensus was reached. Like Lesage, however, Robert Bourassa was unable to get consent from the National Assembly.<sup>19</sup>

Comment: Too much normative content here?

There are two points to note about the Victoria Charter. First, it gave more concessions to Québec than any previous attempt. Québec was guaranteed a veto over any future constitutional

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<sup>18</sup> Hurley, p. 35.

<sup>19</sup> Reesor, p. 132.

change, something it had not received before. Second, and more important, the entire proceedings were televised.<sup>20</sup> The Canadian public had an opportunity to see every aspect of these negotiations, which allowed for indirect public participation. This public participation gave Canadians access to their government in a very real way. They were able to see the inner workings of constitution-making as well as see their premiers at work. This probably worked against Bourassa in the end. By allowing Quebecers the opportunity to see the negotiations and the Charter, dissent was stirred up in the province, and the Charter was not passed.

Two more constitutional conferences were held in the 1970s. The first of these, held from 1975-1977, was designed specifically to attach an amending formula. Any other considerations were to be made at a later time. The negotiations were conducted secretly, and were not conducted in a group. Instead, the Secretary to the Cabinet for Federal-Provincial Relations would hold bilateral meetings with the premier/designate of each province.<sup>21</sup>

Unfortunately for the federal government, there was greater interest than ever if substantive changes could be made to the Constitution. Although patriation was desirable, there seemed to be little point in bringing a constitution home if it were not really a Canadian-made document. Specifically, there were two points of concern:

- The West wanted to see an amending formula that required the consent of two out of the four western provinces. They also wanted the fifty percent of the population requirement dropped.
- Québec's now traditional demands for constitution guarantees surrounding culture were difficult to agree to.<sup>22</sup>

By the end of 1976, there was still no agreement on a constitutional package. Trudeau's previous threats to proceed unilaterally lost political legitimacy as his popularity dipped; at the

<sup>20</sup> Hurley, p. 36.

<sup>21</sup> Hurley, p. 41.

<sup>22</sup> Hurley, p. 42.

same time, the provincial premiers co-operated more and more behind the scenes.<sup>23</sup> The election of the Parti Québécois government in November even helped on this score.<sup>24</sup>

The second constitutional conference was really the formation of a federal negotiating position. Bill C-60 was tabled in the House of Commons. It was the first phase of the White Paper entitled *A Time for Action: Toward the Renewal of the Canadian Federation*. Bill C-60 would amend those portions of the Constitution that the federal government believed it could amend unilaterally. However, there was so much opposition to this bill that it was abandoned when it died on the order paper.<sup>25</sup>

The second phase in the government's White Paper involved the other provinces, as it dealt with amending the constitution in areas of provincial jurisdiction. The first ministers met in late 1978, and Trudeau "proposed an agenda for constitutional renewal that would embrace the key elements of Bill C-60 and the principal concerns raised by the premiers."<sup>26</sup> The constitutional discussions were fraught with conflict: Québec argued that discussion of an amending formula should wait until the substance of a new constitution was worked out; Alberta could not agree to the "Toronto consensus" of 7 provinces with 85 percent of the population; British Columbia wanted the new Senate to approve amendments. In other words, unanimity could not be achieved on any amending formula.

In 1979, four different formulae were presented to the first ministers: the Toronto consensus, the Victoria formula, the Vancouver formula, and the Fulton-Favreau formula. None of these formulae were accepted by all first ministers. This may have been because Trudeau was almost finished his term as prime minister and it looked as though Joe Clark would win the

<sup>23</sup> Hurley, p. 45.

<sup>24</sup> Reesor, p. 133.

<sup>25</sup> Hurley, p. 47.

<sup>26</sup> Hurley, p. 49.

election. Clark was known to be more receptive to provincial concerns, and thus was a more attractive person with whom to negotiate.<sup>27</sup> Trudeau's process of negotiation through executive federalism was also a stumbling block as he was looking for consensus among the premiers. The subsequent trading of issues meant that the federal government had "almost given up the shop."<sup>28</sup> At the end of the conference, Trudeau suggested that he would be willing to participate in the trading if only he received a Charter of Rights in return.<sup>29</sup>

With the failure of this last constitutional conference, the stage was set for what would ultimately be Trudeau's constitution. It is important to note that victory was anything but a foregone conclusion at this point. After all, the Prime Minister was unpopular, about to lose an election, and most of the provincial premiers were both well-organized and against him. More importantly, the process of constitution-making had become increasingly complex over the preceding fifty years. Even when Trudeau became Prime Minister in 1968, the chief goal in creating a constitutional agreement was to attach an amending formula. By 1979, it had become a process of creating an entirely new constitution.

The process followed to this point had also been exclusively that of executive federalism. Even when the process was made more open (via televised proceedings), constitutional conferences still ended in failure. The data available do not point to a specific reason, but in the cases where the negotiations were televised, those provinces that reported to their Assemblies did not receive the permission they needed to agree to the formulae. Most notably, Québec's premiers tended to find agreement with the other first ministers, but the political climate of the province meant that accepting a constitutional package was political suicide. Clearly, executive

<sup>27</sup> Reesor, p. 135.

<sup>28</sup> Reesor, p. 135.

<sup>29</sup> Hurley, p.51.

federalism alone, or even when mixed with some public participation, would not work in the arena of constitutional negotiations.

Trudeau's defeat at the polls in 1979 meant that Conservative leader Joe Clark became Prime Minister. He showed no interest in opening up constitutional discussions in his first year in office. In the event, his minority government was defeated within nine months.

When Trudeau won the 1980 election, he set about in a flurry of constitutional activity. The separatist Parti Québécois had called a referendum, and Trudeau promised to support constitutional reform if it meant that Québec stayed in the federation. The CBS miniseries *Trudeau* characterized his motives as rooted in a desire to beat Levesque. In some respects, this is not far from the truth. Trudeau believed in a strong central government, and believed that all provinces should be treated equally. It was in this spirit that he started his final round of constitutional negotiations.

Trudeau laid out the federal government's bargaining position quite succinctly:

First, that Canada continue to be a real federation, a state whose constitution establishes a federal parliament with real powers applying to the country as a whole and provincial legislatures with powers just as real applying to the territory of each province. Second, that a charter of fundamental rights and freedoms be entrenched in the new constitution and that it extend to the collective aspect of these rights, such as language rights.

As for all the other outstanding issues, Trudeau promised that 'we consider everything else to be negotiable.'<sup>30</sup>

The federal position in 1980 was to take advantage of the "public euphoria" after the separatist defeat in Québec. Trudeau wanted two things out of any constitutional deal and left it

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<sup>30</sup> Roy Romanow, John Whyte, Howard Leeson, *Canada ... Notwithstanding*. (Toronto: Carswell/Methuen, 1984), p. 61.

up to the provincial premiers to put any further offers on the table.<sup>31</sup> In order to further improve his own negotiating position, Trudeau wanted the negotiations to take up two different phases. In the first, the premiers and prime minister would debate the “government package,” which was the division of powers between the two levels of government. The second phase was the “people’s package,” or the issues of patriation and the Charter.<sup>32</sup>

It is important to note that Trudeau started this round of discussions by engaging two different approaches to negotiation. First was executive federalism. On this he had no choice, as the first ministers had led all the other constitutional discussions. Although Trudeau could have chosen another route to reach agreement, it could very easily have meant accusations of violating a constitutional convention.<sup>33</sup> The second approach was public participation. Even before Joe Clark’s request to open the proceedings to special interest, Trudeau invited the media into the plenary sessions.

When the premiers met at 24 Sussex Drive in June 1980, they were facing a Pierre Trudeau who had won a referendum against a dangerous enemy, as well as one who had been through four separate rounds of constitutional negotiations. Trudeau wanted to see a final decision made by September, 1980. His desire for haste was motivated both by a desire to take advantage of the political situation, and to ensure that the premiers remained divided and disorganized.<sup>34</sup> Two of the premiers were brand new and had never been involved with constitutional discussions. A third – Levesque – had no political legitimacy in this forum.<sup>35</sup> He was a premier elected on a separatist platform, but the referendum to do just that had failed.

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<sup>31</sup> Edward McWhinney, *Canada and the Constitution 1979-1982: Patriation and the Charter of Rights*. (Toronto: University of Toronto Press, 1982), p. 40.

<sup>32</sup> Robert Sheppard, Michael Valpy. *The National Deal: The Fight for a Canadian Constitution*. (Toronto: Macmillan of Canada, 1984), p. 40.

<sup>33</sup> McWhinney, p. 41.

<sup>34</sup> McWhinney, p. 90.

<sup>35</sup> Sheppard and Valpy, p. 40.

Levesque did *not* have a mandate to negotiate a new constitutional deal within Canada, but he did not have one to stonewall discussion, either. As one premier put it, “Levesque was a political eunuch.”<sup>36</sup>

Even so, Trudeau had promised Quebecers a new deal just a few weeks earlier and the constitutional negotiations were a way to fulfill that promise. With Levesque unable to truly negotiate a settlement, the discussions were not about satisfying Québec’s needs within the federation. Instead, they were about negotiating with the English-speaking premiers, all of whom had very different needs and desires.

The position of the federal government when the constitutional negotiations opened was simple: no loss of federal power, patriation and a Charter. Beyond that, the floor was open for discussion with the other provincial premiers. It is possible that by leaving the agenda open, Trudeau was trying to play the provinces off one another. After all, the provincial special interests were dissimilar and the only point of agreement was that they were against Ottawa.<sup>37</sup> For example, Alberta’s was looking for a greater say in energy production; British Columbia wanted assurances about natural gas taxes; Newfoundland wanted fisheries under its control.<sup>38</sup>

With these divergent interests, it is no wonder that Trudeau felt that he could take them on or proceed unilaterally if he felt like it. He took this message to the three weeks of hearings scheduled over July and August, 1980, and – presumably – waited for the provinces to cave.

By September, the provinces had met to form a consensus among themselves as to what they wanted out of a constitutional package. Although unanimity was not achieved, the fact that Trudeau was appealing directly to the public meant that the provinces needed to agree on *something*. What they did agree on was that any package must be delayed until the provinces

Comment: How so?

<sup>36</sup> Sheppard and Valpy, p. 41.

<sup>37</sup> McWhinney, p. 42.

<sup>38</sup> Sheppard and Valpy, p. 41.

could agree on one of their own. They also agreed that they would be willing to discuss constitutional packages even if an agreement could not be reached in September. Moreover, they said that any attempt by the federal government to proceed unilaterally would be met with resistance.<sup>39</sup>

When it became clear that Trudeau was going to proceed unilaterally with patriation, the premiers once again gathered to hash out a common negotiating position. While the provinces only agreed on a few of the issues, it was at least a start.<sup>40</sup> When Ottawa reopened a number of items for discussion at the September conference, the premiers became convinced that Ottawa wanted the talks to fail so it could proceed unilaterally. With that in mind, the premiers met again and determined that they would go forward with the proposals “which carried the highest number of endorsements by the other provincial governments.”<sup>41</sup> This agreement became known as the Chateau Consensus. When Ontario and New Brunswick decided to leave the group and support the federal government, the remaining premiers were dubbed the “Gang of Eight.”

Three things stopped Trudeau from moving unilaterally: the House of Commons, the British Parliament, and unrest from interest groups. The House of Commons became a hotbed of dissent as the opposition Progressive Conservatives staged a filibuster to prevent the Liberals from moving unilaterally. In Great Britain, a series of hypothetical questions put to Prime Minister Thatcher asked whether the government of the day would honour a unilateral request from the federal government. While the Prime Minister refused to answer, a committee was put together to determine what might be done in the Commons. Although the Kershaw committee had no official standing, its existence, combined with a letter-writing campaign to British MPs

<sup>39</sup> McWhinney, p. 90.

<sup>40</sup> McWhinney, p. 90.

<sup>41</sup> McWhinney, p. 97.



and the questions before the Supreme Court of Canada “was bound to weigh heavily with the British House of Commons.”<sup>42</sup>

Interests groups also played a role in delaying unilateral action. Specifically, First Nations groups, who have their own special, if informal, constitutional status were able to block some of the federal government’s actions.<sup>43</sup> Other special interest groups, concerned that they were being ignored in this constitutional process, tried to block the government through committee testimony in the House of Commons.

The provinces moved their fight with the federal government to the courts when they launched actions in the provincial courts of Manitoba, Newfoundland, and Québec. The references were placed in these courts because these provincial courts were seen as being the most sympathetic to the Gang of Eight’s position.<sup>44</sup> Although the results were not favourable in all cases, the fact that Newfoundland’s court ruled unanimously in favour of the provinces provided a moral victory.

The provinces also took the federal government to court to, if not stop the process of unilateralism, to at least create a climate of support for negotiation. By April, 1981, this had occurred. Unfortunately, one element was still missing: an alternative to Trudeau’s proposals.<sup>45</sup> While the provinces had divergent views on the future of Canada, they were able to agree on a constitutional package. They agreed upon an amending formula (the 7/50 rule) and on an opting-out clause that allowed a province to opt out of federal plans that affected provincial rights.<sup>46</sup> This was an important development as it came after the Parti Québécois was re-elected in mid-April. Levesque once again had a mandate to deal with the rest of Canada on constitutional

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<sup>42</sup> McWhinney, p. 71.

<sup>43</sup> McWhinney, p. 73.

<sup>44</sup> McWhinney, p. 74.

<sup>45</sup> Romanow, Whyte, Leeson, p. 130.

<sup>46</sup> Romanow, Whyte, Leeson, p. 130.

matters. In any case, the Gang of Eight agreed to present a united front to Ottawa in any further negotiations.

Trudeau decided to end any dissent by referring the matter to the Supreme Court of Canada, where it would be settled once and for all.<sup>47</sup> When the decision came down, it was apparent that, although Trudeau *could* proceed unilaterally, it would be better politically to truly negotiate with the provinces. On the other hand, it was apparent to the premiers that they could no longer obstruct the constitutional package. If Trudeau could show that he had proceeded in good faith and that the provinces were unwilling to deal, he could certainly proceed unilaterally. The Gang of Eight needed to get what concessions they could before the federal government took unilateral action.

The last week of constitutional negotiations was the week of 2 November 1981. The first round of discussions, on the Monday, was designed around playing to the cameras, not substantive discussions. The premiers each stated the positions of their province, and these were speeches for the electorate of the particular province.<sup>48</sup> Over the next four days, negotiations were conducted in two stages. Most of it occurred behind closed doors, where the parties could discuss ideas freely without worrying about playing to the camera.

By Wednesday, no real headway had been made, although there had been a number of different proposals bandied about. Moreover, the Gang of Eight was less secure in itself than it had been at the beginning of the conference. The divergent interests of the provinces were beginning to show in their negotiating positions, although they were still presenting a generally united front at the bargaining table.<sup>49</sup> When Saskatchewan presented a plan that would result in the permanent loss of a Québec veto, however, Levesque rejected it out of hand, claiming that it

<sup>47</sup> McWhinney, p. 70.

<sup>48</sup> Sheppard and Valpy, p. 268.

<sup>49</sup> Sheppard and Valpy, p. 280.

was really a proposal from Ottawa.<sup>50</sup> When Trudeau prompted him further, taunting him with the prospect of a referendum, Levesque “takes the challenge on his own,”<sup>51</sup> effectively destroying the Gang of Eight.

At this point in the negotiation process, Roy Romanow of Saskatchewan and federal minister Jean Chretien met to try and salvage something out of the packages. The duelling referenda of Levesque and Trudeau made the both the other provinces and Chretien very uneasy. In order for each side to get something, compromises had to be made. Romanow and Chretien agreed to “marry the provincial amending formula, less the provision for fiscal compensation, with the charter, its effect minimized by the legislative override.”<sup>52</sup> Once the two ministers agreed, Romanow convinced the delegations from both Nova Scotia and British Columbia that this proposal was worth considering. British Columbia convinced both Newfoundland and Alberta, under the theory that if Alberta went along with the plan, the others would fall in line.<sup>53</sup> As each premier agreed to the plan, momentum built up and soon nine provinces agreed to the new constitutional package. The only exception was Levesque, who was nowhere to be found.

When the other premiers presented the plan to Levesque the following morning, he did not agree to the new accord. While he argued in the plenary sessions that it destroyed a number of Québec’s traditional demands, Levesque also felt betrayed by his fellow premiers.<sup>54</sup>

Trudeau, then, was able to forge a compromise among almost all of the first ministers. On the basis that a consensus had been reached by all governments in Canada, he was able to forward the constitutional package to Westminster. The *Constitution Act, 1982* could be made

**Comment:** How so counterpart? What was Chretien’s position at the time?

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<sup>50</sup> Sheppard and Valpy, p. 283.

<sup>51</sup> Sheppard and Valpy, p. 284.

<sup>52</sup> Sheppard and Valpy, p. 288.

<sup>53</sup> Romanow, Whyte, Leeson, p. 207.

<sup>54</sup> Sheppard and Valpy, p. 299.

into law. Patriation had been achieved. The Constitution was finally in Canadian hands, 115 years after the nation had been created.

What lessons can be learned from the constitutional process that preoccupied Canada over a period of fifty years? Why was Trudeau successful in this attempt when so many others had failed? How can another politician be successful in a similar endeavour in the future?

First, it is important to realize that the circumstances around the 1980 negotiations were unique. It was the first time that negotiations had to be undertaken. At all other times, the interest to discuss constitutional matters had been there, but there had been no requirement. Trudeau's promise to create a renewed federalism created the impetus for a deal.

Second, the most successful negotiations (the ones that resulted in a deal among the premiers) were the ones that looked at more than just an amending formula. Although discussion had taken place around just providing an amending formula in the 1982 Constitution, its success was in the give-and-take between the desires of each level of government. Ironically, the unanimity that had previously been sought was still not achieved with this Constitution.

In the end, Trudeau was successful in getting a constitutional package. While it did not provide *more* power to the federal government, it did not reduce Ottawa's role in government. Any further constitutional change would be harder because of the more rigorous amending formula. This was a problem that cut both ways. Ottawa would have a problem achieving its goals, but so would the provinces. Quebec, for example, would be unable to get "distinct society" status. Alberta would not get its desired Senate reform. Both these ideas were discussed in Mulroney's failed Accords.

The *Constitution Act, 1982* was a successful exercise in intergovernmental relations because it was both a game of brinkmanship and one-on-one negotiation. In the public eye, both

the federal and provincial governments were challenging the other to take the next step. Trudeau wanted a referendum, so Quebec challenged him to call it. When the federal government took unilateral action, the provinces took it to court. The public side of negotiations was pure politics.

The political nature of these negotiations was not limited to the elected elites around the negotiating table. Citizens, and representatives (elites?) from citizen groups came to the government to tell them what they wanted in a new constitutional deal. As all of this was on the public record, politics played a part. Each citizen group affected the public position of a government leader, and so affected the way in which negotiations went in each constitutional round.

Behind closed doors, however, these elites worked together and made deals. Both the Night of the Long Knives and the Gang of Eight are successful examples of provincial governments working together. Trudeau was successful where the premiers weren't because he tackled the premiers one on one. As each one fell, they were brought in to convince the next one of the rightness of their position.

Mulroney's version of constitutional reform failed because he tried to reach consensus. That is perhaps the chief lesson to be learned from the 1982 Constitutional negotiations. Meech and Charlottetown failed because they were designed to reach complete consensus, so all negotiations were played out in the open. In the case of Meech, the premiers' positions were stated at the negotiation table, not one on one. Charlottetown was both completely open and included a great deal more citizen engagement. In a sense, there was too much involved in both these accords. Trudeau's constitution was simple: a Charter and an amending formula. Mulroney's were designed to get all provinces on board, change the parliamentary system, and make everyone happy.

Constitution-making, by its very nature, is an intergovernmental process. Wheeling and dealing in that process is equally important, and that is why Trudeau succeeded in his deal. He was able to trade the premiers off one another while at the same time getting what he wanted. He did so at the expense of the provinces, whose amending formula has become essentially unworkable.

The success or failure of constitutional reform depends on a great many things. The 1982 constitutional negotiations were successful because it was not a process designed to reach consensus. Instead, one part of the negotiating team – the federal government – wanted to win. “Winning” meant securing a Charter of Rights. To do so, Trudeau was prepared to give the provinces a major concession; their amending formula. The provinces were less well-organized than Trudeau and more open to the pressures of his strong-arm tactics. Once one province fell, the others came around quite quickly.

In contrast to the cutthroat style of constitutional reform employed in 1981, both Meech and Charlottetown were designed to “right old wrongs.” However, to achieve success under the new amending formula, consensus had to be reached. To get 6 provinces to agree to a distinct society clause, the federal government had to give up a lot more. Although unanimity was not required legally, it was a *de facto* requirement because of what Mulroney was after. The interesting thing is that he achieved it: twice. Mulroney succeeded where Trudeau had failed by getting the leaders – or elites – of all the governments of Canada to agree on a constitutional package. Unlike Trudeau’s round, though, the public did not support them, and that is what led to its ultimate defeat.

In the case of Meech, this was because of public outrage that the discussions took place behind closed doors. The rejection of the Charlottetown Accord was almost certainly a reaction to the Mulroney government, not its constitutional package.

The 1982 Constitution was successful because it was negotiated openly – and therefore with politics in mind – but Trudeau also gave the politicians who needed to be re-elected some cover. He let them be lawmakers behind closed doors. When they came out, they announced with one voice: this is our Constitution. Because he combined both facets to lawmaking – openness and secrecy – he was successful in negotiating a deal with the elites and with the citizens. Mulroney tried to do one, then the other. That is the lesson to be learned from the *Constitution Act, 1982*.

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