The Paradox of Constitutional Amendments

Michel Robert

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/sclr

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Citation Information
http://digitalcommons.osgoode.yorku.ca/sclr/vol54/iss1/2

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.
The Paradox of Constitutional Amendments

Hon. J.J. Michel Robert

I. INTRODUCTION

In 2012, we will celebrate the 30th anniversary of the patriation of the Canadian Constitution (“Patriation”). The Romans used to say, 21 centuries ago, “Tempus fugit et ne varietur.” If you are not familiar with Latin, this proverb may be translated as follows: “Time passes, but nothing changes.” My purpose today in sharing some reflections on the Patriation is to illustrate how this maxim does not apply to these last three decades. Rather, in our case, “Time passes and everything has changed.”

It is also to illustrate what I see as the paradox of constitutional amendments. In the case of the Constitution Act, 1982,¹ it seems that what the drafters spent the most time on gave the least results, while what they spent the least time on was revealed to be the most fruitful. And by fruitful, I mean that Patriation has been the occasion for a peaceful revolution from parliamentary to constitutional primacy. To do so, I will focus on four main aspects:

1. the amending formula, or rather formulae;
2. the Canadian Charter of Rights and Freedoms;²
3. First Nations’ rights; and
4. natural resources.

Before doing so, let me call to mind some events of the years 1980 to 1982 that will situate the constitutional text in its context.

¹ Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
² Part I of the Constitution Act, 1982, id. [hereinafter “Charter”].
II. CONSTITUTIONAL PATRIATION IN CONTEXT

1. The 1980-1982 Amending Process

One could say that constitutional debates occupied two entire decades, the 1960s and the 1970s. By the end of this period, Canadians were almost suffering from some kind of indigestion or chronic inflammation of this disease called constitutionitis. It seems that our focus then was not as directed towards the economy as it is today, because there was even talk at some point of the constitutional industry. And some people used to say that this industry was the only one that really worked!

I had the exceptional opportunity to play an important role in the process of amending the constitutional text between 1980 and 1982. This is not necessarily a reflection of my talent, but rather of the fact that I happened to be at the right place at the right time. Moreover, I was not alone. Many great Canadians took part in this fundamental stage of the development of the Canadian nation.

We must not underestimate the importance of the amendments made to the proposed constitutional text during this period and their impact on our country. Curiously enough, it seems that most of the actors involved have not fully grasped it.

It must be remembered that the treatment given to the Canadian Bill of Rights by the Courts during the 1960s, and especially by the Supreme Court of Canada, was still preying on our minds. The failure of the Victoria Charter was also not far away in the collective memory of Canadians.

2. The Dynamics of Negotiation

Negotiations between ministers responsible for federal-provincial relations took place in Ottawa during the summer of 1980. Various committees were put in place and I had the chance to be a member of three of them, one of which was responsible for the Preamble. We were called to reflect on the notorious concept of a “distinct society”. I should point out that discussions among ministers were making good progress and that agreement on the proposed amendments had almost been

---

3  S.C. 1960, c. 44.
reached. The version we produced is in fact contained in the text of the “Unilateral Resolution” ultimately adopted.

September 1980 brought the first ministers’ constitutional conference. Both in terms of media relations and in terms of substantive discussions, it was a disaster. Two talented characters opposed their contrasting style and conflicting conceptions of Canada: Prime Minister Pierre Trudeau and Premier René Lévesque. The performances were impressive, but the gains were marginal, if non-existent. It was a gloomy day and all parties returned to their headquarters long-faced. So many efforts and compromises had been wasted in a few minutes of verbal jousting. But the Constitution is tougher than individual politicians, and the battle was not completely lost.

Ultimately, the federal cabinet decided to act alone and introduced before the House of Commons and before the Senate the *Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada*, asking the United Kingdom’s Parliament to amend the Canadian Constitution.

3. The References

In the fall of 1980, the Government of Manitoba, followed by those of Newfoundland and of Quebec, referred various questions to their respective courts of appeal regarding the constitutional validity of the federal initiative. All three courts gave different answers: the Manitoba and Quebec courts ruled that the federal government could act without the unanimous consent of the provinces, while the Court of Appeal of Newfoundland arrived at the opposite result. Appeals were brought before the Supreme Court of Canada and heard in May 1981 before judgment was rendered in September of the same year.

Before the Supreme Court, the Government of Canada, with the support of Ontario (represented among others by the Honourable Roy McMurtry) and New Brunswick, faced their adversaries, the “Gang of

---

5 Tabled in the House of Commons and the Senate, October 6, 1980.
Eight” led by Alberta and Quebec. Of these, history showed that one lacked loyalty and that another lacked subordination.

Whereas all the provinces comprising the Gang of Eight argued that unanimous consent was necessary, Saskatchewan, represented among others by the honourable Ken M. Lysyk, proposed the “substantial compliance test”. In doing so, he refrained from specifying the number of consenting provinces necessary or raising the question whether the consent of the founding provinces (Quebec included) should be obtained. Later, in the Quebec Veto Reference, the Supreme Court answered this question negatively, and added that nine provinces out of 10 was sufficient to respect the constitutional convention.10

The insubordinate one was the province of Quebec, which Premier Lévesque claimed had been let down by the other provinces during the “Night of the Long Knives” of November 4, 1981.11 In the years after Patriation he would argue that Quebec had never signed the amendment to modify the Canadian constitution. Yet it should be noted that, in fact, there was no document to be signed. All this, as you know, led to the Meech Lake Accord12 and its rejection, but is in itself a topic for another conference.

Mr. J.J. Robinette was chief counsel for Canada and I pleaded immediately after him. Part of my argument was presented in French, including my point about Parliament’s right to ask the United Kingdom to amend the constitution without the provinces’ consent. Justice Beetz, after having heard my position, asked me a question quite difficult to answer and I must admit that it threw me off balance. He had been my constitutional law professor at Université de Montréal from 1958 to 1961. His point was the following: if you are right, he said, then Parliament could also ask the United Kingdom to abolish federalism. My immediate thought was that the government would never make such a demand. In fact, a more satisfactory answer was formulated by the Supreme Court a few years later, in the Quebec Secession Reference,13 which identified federalism as being among this country’s fundamental

---

12 Federal-Provincial First Ministers’ Conference, The 1987 Constitutional Accord (Ottawa: June 3, 1987). The accord was originally made on April 30, 1987 at Meech Lake, Quebec.
values, alongside democracy, respect for the rule of law and the protection of minorities.


One must realize that, while the federal and provincial governments had referred one question to the Supreme Court, we got two answers, or rather two judgments, for the same price; this is somewhat unusual in our trade. The “legal judgment” rendered was amply sustained by the jurisprudence and the state of the law. The Court reached the conclusion that the federal government has no legal obligation to obtain the consent of all provinces before asking the British Parliament to amend the constitution.14 The “conventional judgment” had a much more limited legal and factual basis, because as many as 23 constitutional amendments had already been made without the consent of the provincial governments or of their legislatures. However, the political wisdom of the conventional judgment was superior to that of the legal one. After concluding that there was no crystallized convention requiring that the provinces’ consent be obtained, the Court concluded however that “at least a substantial measure of provincial consent is required”.15 Between the two extreme positions of Ottawa and the provinces, and faced with the fact that searching for unanimity had caused constitutional immobility and sclerosis since 1927, the Court chose the middle way suggested by Saskatchewan. The Supreme Court’s answer was to force the parties to agree and, in William C. Hodge’s words, “could be declared a legal victory for Ottawa, but a moral victory for the provinces”.16

III. The Paradox of 1982

In retrospect, it can be said that although the Supreme Court justices cannot be counted among the Fathers of Confederation, they are the stepfathers of a new federalism. The influence of the 1982 amendments on the structure and character of this country is immeasurable. For this reason, I consider the following three constitutional documents to be of

14 On this point Martland and Richie JJ. dissented, making the split 7-2.
15 Supra, note 9, at 905 S.C.R. On this point Laskin, Estey and McIntyre JJ. dissented, making the split 6-3.
the same relevance and appropriately placed in the following order of importance:

- *Quebec Act, 1774.* It struck a fundamental compromise between two great legal traditions, the French civil law and the British common law, and by implication between our two official languages.
- *Constitution Act, 1867.* It established the Canadian federal regime.
- *Patriation and Constitution Act, 1982.* The 1982 amendments altered the foundations of this country and its very operational principle.

Patriation was a revolution, fortunately peaceful, because it transformed our regime from parliamentary to constitutional primacy. I will attempt to illustrate by commenting on the themes alluded to earlier: the amending formulae, the Charter, First Nations’ rights and natural resources.

As I have noted, however, I find it paradoxical that the sections of the Constitution that took the greatest effort have contributed the least to this revolution, while those we agreed upon have been less disappointing. I do not know if this observation is verifiable in all negotiation contexts, but I hope that it can encourage greater humility and research for compromises in any complicated negotiation into which we engage in the future.

1. The Amending Formulae

Canadian politicians have invested an incredible amount of time and effort to negotiate and settle upon a single amending formula. This goes back to 1927 and was an uninterrupted process up until 1982. No less than 10 unsuccessful attempts were made. Politicians, senior officials and constitutional lawyers fared so well that we are now equipped with four amending formulae. What is more, the general clause distinguishes between various possible scenarios.

Without amending formulae, we were able to amend our Constitution 23 times over the last century. Regrettably, with four of them, we have not managed to do so once, except for the formula that only requires the consent of Parliament and of the Legislative Assembly of a single

---

17 (U.K.), 14 Geo. III, c. 83.
19 Supra, note 1.
20 Sections 38, 41, 42 and 43 of the Constitution Act, 1982.
province. This perfectly illustrates the popular saying “Best is the enemy of better.” And I think that it is time to ask ourselves seriously if we have slipped ourselves in to a straitjacket.

Will the inefficiency of the amending formulae, and particularly that of the general amending formula, also known as the “7-50” rule, remain with the passage of time? Obviously, 30 years is a short period in the course of the constitutional history of a country. But if this question deserves an affirmative answer and if Canadian federalism must evolve to face new economic and social challenges, we may have to consider alternatives to do so, such as judicial interpretation, delegation of powers or asymmetrical federalism. Because it is so arduous to attempt to predict the future, I will limit myself to raising the following question: how can we help Canadian federalism to evolve? Could the European experience and the principle of subsidiarity provide us with inspiration?

2. The Charter of Rights

In contrast to the amending formulae, the Charter of Rights and Freedoms was in relative terms the object of little discussion. This may be because its civilist style discouraged common law lawyers a little at first. Surprisingly, the Charter rapidly took its place in our nation’s legal universe, with some delays in Quebec because of the political opposition to Patriation. This has probably to do with the fact that judicial interpretation, under the auspices of the Supreme Court, was generous from the outset. Were we traumatized by the fate of the Canadian Bill of Rights in the 1960s and afraid of living a similar experience again? Probably.

The Charter and, most of all, its sections directing the courts to interpret it, are at the centre of 1982’s peaceful revolution. We argued in front of the Supreme Court of Canada that the Charter had no impact on the division of powers, which is true. But we also pointed out that it could limit the powers of both levels of government. In fact, the Charter gave the courts a new role to play in the governance of our country. This role both resembles and differs from that played by the legislative and executive orders of government.

Some consider that the judiciary’s new social function is anti-democratic, but I would simply answer by pointing to the danger of a tyranny of the majority and to its numerous past excesses. Rather, I

---

21 Section 43.
22 Section 38.
believe that we are gradually evolving towards a healthy equilibrium between all three orders of government, based on the existence of constructive dialogue. The following are selected examples of the rapid development provoked by Patriation.

It must be noted that “due process”, which was believed to be purely procedural, became substantive with the Reference on section 94(2) of the Motor Vehicle Act.\textsuperscript{23} Defence lawyers understood soon enough that “principles of fundamental justice” were nothing less than a promising constitutional gold mine. Advocacy and lobby groups determined to promote their cause also understood promptly the immense possibilities offered by section 15 with its non-exhaustive list of prohibited grounds of discrimination. They also appreciated the fundamental importance of section 24, which gave the courts sharp teeth allowing them to impose respect for rights and freedoms, and of section 52 of the Constitution Act, 1982, enabling them to pronounce instantaneous declarations of invalidity. Finally, the media understood that freedom of expression, guaranteed by subsection 2(b), could allow them to circumvent obstacles to their daily quest for truth in a world where investigative journalism serves an increasingly important function.

In conclusion, there is no doubt that the generous and vigorous interpretation of the Charter by the courts surprised even those most optimistic regarding its adoption. Canada has profoundly changed since 1982 and will never be the same again. The principal challenge we are now faced with is to decide how we will marry this commitment to the rule of law with the growing diversity of our society in terms of religion, language, culture and ethnicity. For example, Quebec’s Commission on Accommodation Practices Related to Cultural Differences has revealed that many question the Charter’s intervention in protecting the individual and collective practices of Canadian immigrants from all over the world.\textsuperscript{24} While I believe that the balance between individual and collective interests that has been struck to this date is generally sound, only another decade will show whether I am right.


3. First Nations’ Rights and Natural Resources

I will address both issues jointly, because they are interrelated. The development of natural resources is at the heart of the development of this country and is inseparable from our relationships with its first inhabitants. New projects concerning development in the North, such as the Plan Nord announced by the Quebec Government in 2009, 25 have made the question of First Nations rights all the more timely.

The Honourable Charles Gonthier, when Justice at the Supreme Court and once retired, frequently noted how our law was inconsistent in its reference to the three cardinal values of the French Revolution: Liberty, Equality and Fraternity. While we explicitly refer to the first two, for instance, in sections 2, 7 and 15 of the Charter, “Fraternity” is conspicuous in its absence. Patriation should also be noted for furthering the concept of collective rights in Canadian law, and as such the idea of fraternity. For instance, sections 23 and 27 guarantee minority-language educational rights and aim to enhance the multicultural heritage of Canadians. But section 35 of the Constitution Act, 1982 probably constitutes the most noteworthy advance in this direction.

This amendment entrenched the Aboriginal and treaty rights of First Nations, which include the Indian, Inuit and Métis peoples of Canada. These rights have an inherently collective dimension. For example, Aboriginal rights protect practices integral to a distinctive Aboriginal culture, and Aboriginal title guarantees the use and occupation of land according to the laws of the people concerned. Section 35 has thus invited the courts to explore the notions of fraternity, collective rights and what I would call “social solidarity” in a way that could have important implications for other areas of the law.

This amendment was also bold because the content of the rights entrenched is left undefined, except for what is provided by subsections (3) and (4), which were added by way of the June 21, 1984 constitutional amendment, and by section 35.1. 26 This has attracted much criticism, regarding the fact that their sui generis nature could be interpreted in restrictive ways, notably as limiting their content to what they included at the time of colonization. 27

26 These sections and subsections were included as a result of the Constitution Amendment Proclamation, 1983. See SI/84-102.
Nonetheless, the drafters decided to put their trust in the hands of the judiciary, not only to define the content of these rights but also to assist in the reconciliation of the claims, ambitions and respective interests of Aboriginals and non-Aboriginals. Prime Minister Trudeau had a pragmatic explanation and is said to have remarked: “Let us trust the Courts, for they could not do worse than politicians.” I think that the inclusion of section 35 should also be seen as a mark of confidence towards us and as an interesting way to make progress in an area that may have been too politically sensitive at the time.

The Supreme Court’s interpretation of these rights has completely changed the nature of the relationship between Canada, the provinces and First Nations. First, it solved with flexibility the obstacle posed by traditional evidence rules, posing for instance the principles of liberal interpretation of treaties and resolution of uncertainties in favour of Aboriginal parties,28 and of admissibility of oral history evidence in title claims.29 Second, it established the fundamental objective of section 35 as being the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown,30 which is meant to inform all aspects of the Crown-Aboriginal relationship. Third, it established a duty to consult and accommodate First Nations that extends to cases of risk of impact on potential Aboriginal or treaty rights.31

The extent of the duty to consult and accommodate is still open to interpretation and refinement by the Supreme Court. Does it include a duty to reconcile the potentially diverging interest of First Nations and of economic development based on exploitation of natural resources? Absolutely. Reconciliation entails sharing and the process itself may well reveal that these interests are not as divergent as they appear at first glance. Many Aboriginal communities are in desperate need of employment and development. Many Canadians want their grandchildren to inherit a liveable environment. However, continuing to develop the content of these rights in a way that neither traps Aboriginal peoples in their own traditions nor impedes economic development initiatives will

demand functional pragmatism, continuous attention and openness of mind.

It is worthwhile noting that the Inter-American Court of Human Rights has already recognized the rights of Aboriginal peoples to free, prior and informed consent to large-scale development projects that would have a major impact on their ancestral rights. Although Canada is still not a member of the American Convention on Human Rights, article 32 of the 2007 United Nations Declaration on the Rights of Indigenous Peoples expresses this same principle and we can anticipate that it will become part of our domestic law one day. One thing is certain: upcoming generations of constitutional lawyers and scholars will not be left without work.

The amendments pertaining to natural resources have drawn less attention. However, these are the basis for agreements between federal and provincial governments aimed at the development of natural resources, and their impact is considerable. For example, they have contributed to the development of less favoured provinces, such as Newfoundland and Labrador.

IV. CONCLUSION

Patriation has left no one unchanged. Some may find that the text finally adopted lacks important elements, such as the right of provinces to opt out with compensation or Quebec’s right of veto regarding constitutional modifications. Nonetheless, all recognize that it has been the starting point for a revolution that has transformed our country from parliamentary to constitutional primacy. While it is still imperfect, we must cherish the peaceful and progressive way this was achieved, at least when compared with the violence in the Arab world that began in the spring of 2011 and is still ongoing. Our challenge now is to continue the conciliation of the individual and collective rights of peoples from all across the world in the mark of our values of openness, harmony and pacifism.

Patriation also expresses the paradox that I have discussed: what the drafters spent the most time on produced the most modest results. Should this make us hesitant to invest energies in finding new ways in which our

“living tree” will continue its growth? Certainly not. Nonetheless, it should make constitutional negotiators mindful of the fact that simplicity may prove more durable in the long term and that it may be worthwhile to compromise instead of refusing to accommodate until only impracticable solutions are left.