

THE REPATRIATION OF THE CONSTITUTION
&
ALTERNATIVE DISPUTE RESOLUTION

The Failure of Past Constitutional Negotiations and
Possible ADR Solutions for the Future

Raphael Feldstein

Civil Law Section

Faculty of Law

University of Ottawa

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Introduction

Constitutional negotiations are the essence of our Canadian federalism. Throughout the 134 years since Confederation, our union has been able to evolve and adapt to the growing needs and expectations of our society. This has been mainly achieved through the long and arduous discourses between the First Ministers of our provinces and the Federal government. The system and procedures of such negotiations have never been clearly defined nor limited by any statutes or regulations. Therefore, just like the trends in contemporary legislation, there is a dire need to stipulate Alternative Dispute Resolutions as possibilities in overcoming the arising difficulties in constitutional negotiations. The negotiations to repatriate the Constitution endured for over 50 years and were eventually a complete failure that may have been avoided had there been ADR alternatives entrenched in the Constitution.

CHAPTER I — THE ROAD TO REPATRIATION: HISTORICAL ASPECTS

The independence of Canada as a member of the British Commonwealth was officially established in 1931 with The Statute of Westminster. However, almost immediately after Canada was declared a self-governing dominion, the dilemma of negotiating a constitutional amending formula would prove to be the nation's greatest challenge on its way to self-determination.

Since all Federal-Provincial negotiations in 1931 failed to produce a new constitutional amending formula, section 7 of the Statute of Westminster would apply by default. This section stipulated essentially that the British would retain the legal power to amend the written Constitution of Canada as long as Canada's own respective legislatures failed to officially assume such responsibility. British interference into Canadian sovereignty would continue until both levels of the Canadian government could finally come to agree on the precise formula with which to assume these essential and fundamental constitutional powers. Prime Minister Pierre Elliott Trudeau would eventually bring the Canadian Constitution home, however, not before years of negotiations and even litigation.

SECTION I — National concerns

Since 1931, Canadian legal nationalists enthusiastically lobbied and voiced their desires to reaffirm Canadian sovereignty and independence by supporting constitutional reform that would end all legislative and judicial subordination to Great Britain. In the late 1960's, the Federal government under

the leadership of Pierre Elliott Trudeau, reluctantly gave into provincial pressure to renew the constitutional debate. Consequently, Trudeau would take this opportunity to confront the provinces with the constitutional phenomenon of guaranteeing fundamental rights for all Canadians.

"Government should not be an end in itself, but instead a means of promoting the well-being of the people. In the process of constitutional review we should therefore look to the needs of people before we look to the needs of government."

Pierre Elliott
Trudeau

A) Canadian sovereignty

The Canadian nationalists were demanding constitutional reform which would ensure that all judicial and legislative decisions would remain accountable to the Canadian people and not be exercised in the interests of the British Isles. One suggestion they advanced was to make the Supreme Court of Canada the final appellate tribunal in matters concerning constitutional questions so as to guarantee that any constitutional interpretation be made by a body in harmony with Canadian needs. Many attempts at negotiating a response to such demands were initiated with the provinces by the Federal government under Prime Minister Diefenbaker and later continued under Prime Minister Pearson. The only result of these extensive negotiations with the provinces was a vague announcement in 1964, that expressed the will and commitment of both the Federal and Provincial governments to proceed and conclude the repatriation of the British North America Act without delay.

B) Individual rights and freedoms

Prime Minister Trudeau accepted and understood the need of repatriating the Constitution however, he also had his own political agenda. He would reluctantly continue the constitutional debate initiated by his predecessors but with the condition that such negotiations also touch upon the issue of entrenching individual rights and freedoms.

Trudeau envisioned a different role for government. He saw the government as the key institution responsible for guaranteeing the sanctity and protection of all fundamental rights and freedoms of each and every individual in the country. His Federal government considered constitutional reform as a non-urgent priority and merely secondary to other constitutional endeavours. Trudeau believed that human rights had to be clearly established and entrenched before any determination of the division of powers could be attempted. Entrenched human rights, in his opinion, would stipulate preliminary limits to government powers which would seriously restrict any possible future division to remain within those fundamental boundaries.

SECTION II — Keeping Quebec in the union

Among the major obstacles, such as conflicting interests and contradicting ideology that existed between the Federal and Provincial governments, it was evident that no renewal of Canadian federalism could be initiated without first debating the "Quebec problem." Quebec's Quiet Revolution during the 1960's would modernize its institutions while simultaneously altering the older pattern of relations between Anglophones and Francophones. The most significant outcome from the modernization of Quebec was the renewed manifestation of Quebec nationalism that would emerge. Certain events would see to the birth of a new separatist movement that would initiate a new political "Parti-Quebecois" that would base its primary platform on negotiating a new sovereignty-association with Canada.

A) October Crisis

On October 5, 1970, James Cross, the British Trade Commissioner to the Province of Quebec, was kidnapped by Quebec terrorists who believed in promoting the independence of Quebec through coercive measures. The FLQ initiative would spark a siege upon the city of Montreal that would last for several months. The October Crisis became a lingering factor that would further contribute to the deteriorating relations between Quebec and the rest of Canada.

B) Quebec Referendum of 1980

Referendum night in Quebec on the 20th of May, 1980, would prove to be a pivotal moment in Canadian history that would provide the final push of pressure on the leaders of Canada to move forward and resolve the ongoing constitutional negotiations. Pierre Trudeau would make his referendum campaign promise of constitutional change. A promise that may have been so vague and ambiguous to actually define, yet enough to inspire the people of Quebec to throw their support behind his vision. René Lévesque, reluctantly accepting the defeat of his dream, looked forward and reassured the people of Quebec that he will demand delivery of Trudeau's vague promise and realize constitutional change for Quebec .

CHAPTER II — CONSTITUTIONAL NEGOTIATIONS

Fifty years of ongoing negotiations, between the Federal government and the provinces, proved to be very slow and ineffective in producing significant and timely changes to the Canadian Constitution. Following the Quebec Referendum of 1980, the First Ministers of Canada would hold several intense constitutional conferences that were intended to eventually produce a compromise on the debate and provide a solution that was acceptable to all parties involved. However, even with extreme political pressure and public scrutiny, the negotiations were plagued with various unavoidable factors that would contribute to the utter failure of the talks.

SECTION I — The key political players and their conflicting agendas

It is obvious that the First Ministers Conferences, held in the years of 1980 and 1981, involved the Prime Minister of Canada and each of his provincial counterparts. However, it must be emphasized that

the success of these talks would entirely rely on the cooperation and good will of two prominent figures, Pierre Elliott Trudeau and René Lévesque. Negotiations occur when one party's goal can only be reached through the cooperation of others, even when those others retain their own personal conflicting views on the situation. The real test in the constitutional debates that would follow the Referendum was to determine whether Trudeau and Lévesque could come to terms with their differences and learn to compromise their own personal aspirations for the greater good of Canada and Quebec.

A) Pierre Elliott Trudeau

Trudeau was one of the most outspoken advocates for the concept of One Canada. He would devote a significant part of his private life and practically all of his public life to promote his vision of one country, two languages, two cultures and one people. He believed that any special considerations or powers for Quebec was to be taken as nothing less than an insult to him and each and every other Quebecer. Therefore, Trudeau could not see Lévesque as anything else but an antagonist to his legacy. Throughout the constitutional negotiations of the 1970's and early 80's, Trudeau and his government would praise the hard-line stance it took during the October Crisis and the Quebec Referendum, and would then implement these same tactics to negotiate at the table. This would have the profound effect of putting Quebec in the unfavourable no-win situation of refusing one agreement after another.

B) René Lévesque

Lévesque celebrated Quebec's unique culture and language and emphasized that absolutely everything else must revolve around the preservation of this distinct society. All of his political assumptions and conclusions would be clearly presented in his manifesto entitled "A Country That Must Be Made." In this writing, he would describe the evolution of Quebec society and how it was previously protected when it was a rural society prior to the Quiet Revolution of the 1960's because such a situation would keep the province isolated from an industrialized North America. However, since the modernization of Quebec society, the danger of assimilation has increased significantly, and therefore, Lévesque would come to his final conclusion that "...Quebec must become sovereign as soon as possible." Following the defeat of his vision in the 1980 Referendum, Lévesque would proceed in further constitutional negotiations with the Federal government and his provincial counterparts. However, he would proceed with many doubts and much scepticism when it came to dealing with Trudeau. Lévesque despised the fact that Trudeau was merely acting in order to hastily repatriate the constitution and implement his "pet project," the Charter of Rights.

C) Clashing of egos and icons

These two prominent figures in Canadian politics would find it difficult to compromise their own agendas in order to invoke constitutional renewal. Trudeaumania and the separatist movement of Quebec would fuel the aspirations of their respective leaders and recommit their efforts to realizing their own personal goals, regardless of the costs. Trudeau would not budge an inch to accommodate Lévesque's Quebec, and therefore, Quebec would remain outside Trudeau's repatriated Constitution.

When you deal with interest-based negotiations, parties must look beyond their own needs and entrenched positions in order to obtain solutions that will satisfy everyone.

For instance, during a party congress in December of 1981, Lévesque clearly expressed the contempt he felt for his negotiation adversaries from the federal camp. Still bitter from the referendum loss, the delegates at the conference seemed to be quite agitated by the ensuing constitutional dealings. Lévesque would greet the crowd and fuel their outrage by stressing that the principle agents of their movement's misfortunes were none other than "those eminent Quebecois named Trudeau and Chrétien."

The motivation behind Trudeau's avid concern with a charter of rights is also quite questionable. The Charter may have only been a selfish attempt on his part to realize his legacy on Canadian politics rather than a genuine desire to serve the people. There is the possibility that it may have been an attempt to limit government powers, which is nothing short than astonishing coming from a politician. On the other hand, this would more likely be an attempt on Trudeau's part to make the Liberals the party of the Constitution, just as John A. Macdonald established his Tories as the party of Confederation. Therefore, as long as Trudeau and Lévesque refused to put aside their differences and personal aspirations, the constitutional negotiations would be destined for failure, where all parties involved stand to lose in the end.

SECTION II — Constitutional conferences

Prime Minister Lester B. Pearson envisioned constitutional review as a task that must be conducted with the utmost care. A structured system of negotiations must be implemented that would simultaneously respect the legitimate representation of the citizen while carefully undertaking the task with diligence. Pearson concluded that such a comprehensive review would be most effectively carried out if undertaken by all the First Ministers in a series of Federal-Provincial Conferences. He would emphasize that all parties would only participate of their own free will so as to ensure progress and the susceptibility to compromise. This is the system of negotiations used throughout the constitutional conferences of the 1970's and early 80's. The system proved to be too short sighted and simple for the future challenges of negotiations and can now be looked upon as inadequate and ineffective.

A. Expectations

According to Pearson, these discussions must be approached by all participating governments with "understanding and a common concern for Canada's future". In the end, no matter what differences arise during any of the deliberations, everyone must remember that all participants of the conference are there to represent the best interests of Canada and its people. It must be understood that the discussions will focus only on adjusting the established and existing relationships between the governments of the federation and not on creating a new model of association. Pearson would outline these expectations in order to ensure that these deliberations would facilitate the improvement of the union and not inadvertently give rise to a debate that could destroy it.

B. Organization

The constitutional debate must be approached with diligence by all concerned parties to ensure careful thought of the consequences and avoid the smallest ambiguity or error. Pearson would not establish any clear guidelines of how the process of these negotiations would unfold. He believed that each forthcoming issue would require different levels of organization and therefore, the process should be left open and flexible in order to accommodate those needs. The reluctance of Pearson to establish clear and concise rules of procedure for these conferences resulted in them initially being conducted by the Federal government in a somewhat chaotic and unprofessional way. To this day, there are no rules or procedures to govern intergovernmental relations at the First Ministers' level. There have been attempts to constitutionalize this federal mechanism along with essential guideline rules, however, until now those attempts have failed together with the rest of the Meech Lake and Charlottetown Accords.

C) Destined for doom

Without specific procedures and a more developed structure of negotiations, all the conferences on repatriating the Constitution following the Quebec Referendum would be destined to fail. One major aspect that contributed to this failure was Trudeau's reluctance to continue the revolutionary practice of Lester B. Pearson in dealing with First Ministers' Conferences.

When confronted with a Federal-Provincial Conference Pearson insisted that the Prime Minister of Canada "should often act more in a diplomatic capacity than in a political negotiating capacity." He believed that as Prime Minister, his role was to facilitate the dialog between the governments and ensure that the negotiations progressed and remained constructive. Pearson would let one of his other ministers represent and defend the contentious positions of the Federal government while he would play the part of what we call today a mediator.

Trudeau considered himself to be the defender of Federal interests. He rejected the role of the Prime Minister in intergovernmental relations as perceived by Pearson and took on a more confrontational approach. Pierre Trudeau had a strong and determined vision of federalism and would not miss any opportunity to invoke or impose his firm convictions. In the end, Trudeau's stubborn persistence to remain directly involved in the negotiating process would only prove to further undermine the negotiations he led and contribute to their inevitable failure.

SECTION III — The failure of negotiations

From 1931 to 1981, Canada's Provincial and Federal governments made a substantial effort to negotiate the repatriation of the Constitution. Special conferences of the First Ministers were created and held with the specific intention of resolving this exact debate. However, the complexity of the situation and various factors, such as Quebec nationalism and personal political agendas, would eventually expose the current system of negotiations as simply being inadequate and ineffective. Without the necessary tools to conduct proper negotiations on Constitutional reform, the First Ministers' Conferences would eventually result in nothing less than complete failure.

A. Downfall of negotiations

Trudeau had to reluctantly conclude the First Ministers' Conference of September 1980 with an affirmation of its utter failure. The particular and stubborn views of its participants would be the key factor to blame for this inevitable disappointment. If Canadians actually believed that there was a chance for their political leaders to share a common spirit, those dreams would now be destined to merely fade into oblivion.

B. Threats of unilateral action

During the negotiation period, the Federal government threatened to unilaterally amend the Constitution itself if the negotiations failed to produce a compromise. Since the talks were considered dead, it was time for the government to make good on its threat and pursue a unilateral policy to realize constitutional change. Arguments for this potentially "unconstitutional" and definitely "unconventional" manoeuvre were quite numerous and convincing for the Federal government. The most persuasive of all of them would be to ensure that the charter was binding on the provinces so as to guarantee that individual rights and freedoms would become fully and universally protected. Therefore, Trudeau's government would proceed with the unilateral action that would officially end any possibility of further negotiations for the moment. From this point on, Quebec and its constitutional aspirations would remain unresolved thereby condemning the repatriation of the Constitution to be unconventionally and, in some views, illegitimately ratified. This is a clear indication that the process for intergovernmental negotiations are nothing less than deficient and must therefore, be completely revised.

C. Need for neutral third party intervention

Pearson's mediation model for the First Ministers' conferences was a brilliant attempt at facilitating the difficult and stubborn negotiations between the political leaders of our country. The personal practices of Pearson would be lost and forgotten during the years of the Trudeau administration. However, Trudeau's failure at negotiations would inevitably force him to submit to the intervention of a neutral third party anyways.

The antagonist provinces, who first dissented to the patriation package in negotiations, would continue to voice their opposition by challenging the Federal government's unilateral action plan in three provincial courts of appeal. On March 31, 1981, the Court of Appeal for Newfoundland would unanimously find the Federal government's actions illegal. Trudeau's plan would now have to wait for the Supreme Court of Canada to rule on the resolution. Therefore, the intervention of a neutral third party would now be realized through litigation. The independent judiciary would now determine the fate of the patriation package, a fate that is binding on all parties and may even disappoint some of them as well.

CHAPTER III — SUPREME COURT OF CANADA AND ITS DECISION

The most evident and undeniable indication of when negotiations have failed would have to be when the parties must reluctantly turn to litigation to resolve their differences. After years of failed attempts at an adversarial type of negotiating process, the Federal and Provincial governments would finally bring their constitutional dilemma before the courts. The Supreme Court of Canada would be approached to determine whether the Federal government could unilaterally pursue the repatriation of the Constitution.

SECTION I — Trudeau's attempt at unilateral action

During a nationally televised address, Trudeau would justify his choice for the painstaking process of unilateral action by emphasizing the overwhelming and fundamental need to "complete the foundations of our independence and our freedoms." His good faith and honest intentions would be met by political challenges and public scrutiny that would effectively undermine his government's efforts to begin the implementation of his unilateral action plan. Eventually, all efforts would have to be suspended pending the outcome of the Supreme Court's decision on the subject.

SECTION II — Supreme Court reference to amend the Constitution

Following the summer of 1981, the Supreme Court would reconvene and render its much anticipated ruling. It essentially decided that the unilateral action of the Federal government to repatriate the Constitution by virtue of a Parliamentary resolution would be legal but not constitutional. In the end, the ruling would force the Federal government back to the negotiating table with the provinces in order to meet the obligatory requirements that were now clearly exposed and imposed by constitutional conventions. On April 17, 1982, Trudeau would finally bring the Constitution home with the support of nine provinces. Quebec's abstention would accentuate the failure of the First Ministers' Conferences and would forever cast a dark shadow on the repatriated Constitution.

CHAPTER IV — APPLYING ALTERNATIVE DISPUTE RESOLUTIONS

Due to the continuing failures in Federal-Provincial negotiations, legal scholars have become increasingly more susceptible to the idea of applying alternative dispute resolutions to constitutional negotiations. The remarkably flexible and adaptable characteristics of Canadian federalism make it adequately prepared for the incorporation and implementation of ADR principles as a means to improve and facilitate constitutional change within Canada.

One of the various reasons behind the emergence of these alternative pathways is the harsh reality that one of the necessary actors in Canadian constitutional negotiations remains unwilling to participate. This actor not only remains inactive in the current constitutional forum, but actually unilaterally pursues a completely different constitutional agenda, which we all know as secession. This frustrating situation, among other factors, has driven the Federal government to actually consider using an ADR alternative in future constitutional negotiations. The precise alternative pathway to be used is still in the process of being determined and adequately developed.

SECTION I — Conciliation in constitutional negotiations

Conciliation, a very flexible alternative, could be useful for constitutional negotiations when difficulties arise that would make it impossible to get all the parties involved to sit at the negotiation table together. In such a situation, a neutral party would be delegated as the conciliator of the negotiations. The conciliator would begin by first listening to each respective party's personal opinion individually and would then proceed to ease all immediate tensions and clear major obstacles to regular negotiations. The neutral individual would move on to encourage a dialog between the two or more governments in order to facilitate their return to the table together. Once at the negotiating table again, the parties can resume their regular negotiating practices.

SECTION II — Mediation in constitutional negotiations

Constitutional negotiations would work very well with the neutral assistance of a mediator. The role of a mediator would be to ensure that the negotiations would progress and develop into concrete compromises and solutions within a reasonable time. Governments always carry their political baggage with them, it would then fall on the mediator to deter efforts that would undermine the negotiations in order to merely serve one government's political interest. The biggest obstacle to establishing mediation between governments would prove to be convincing them that they need this outside neutral assistance. Once the involved parties agree to use the mediation alternative, much thought must go into first, a possible mediator that can be trusted and neutral to all parties, then second, time limits should be considered and are of the utmost importance to the negotiation's success.

SECTION III — Arbitration in constitutional negotiations

The first critical point of this alternative is to require the involved governments to express their voluntary submission to this form of dispute resolution before anything else. This commitment must have the legal or political force to bind the government to any decision that would eventually be determined. With this ADR principle, intergovernmental negotiations that concern sensitive and contentious matters would be resolved quickly and amicably. Most of all, the arbitrator under normal circumstances would render a decision that would tend to be favourable to all parties involved, rather than the winner/loser situation that dominates litigation.

When it comes to determining an appropriate arbitrator for intergovernmental disputes, one proposal suggests an arbitration panel consisting of the Federal government and two neutral provinces. However, the composition for an arbitration panel that would preside over constitutional questions is not so simple since all Provincial governments are involved along with the Federal government. Therefore, when a fundamental constitutional question arises that specifically requires the amicable judgement of a neutral

arbitrator, no one is better qualified and prepared to analyse and answer such a question than our very own Supreme Court.

CHAPTER V — Conclusion

In conclusion, First Ministers' Conferences are presently inadequate and ineffective in resolving constitutional differences. The unstructured and ambiguous proceedings have proven to fail everytime they have been put to the test. Political agendas and personal aspirations can easily obscure and manipulate the entire negotiation process. Therefore, it should not have come as a surprise that all negotiations towards the repatriation of the Constitution were doomed from the beginning to utter failure. The time has come to implement a new and effective structure to the negotiating process. Entrenched alternative dispute resolutions would provide the political actors with the necessary tools to implement real constitutional change that could benefit all parties involved.

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