



*Modern portrayal of the Confederation meeting at Quebec City in 1864: a minimal agreement on the division of powers*

# The Roots Of Conflict

*The ghosts of ambiguity and omission haunt Canadian unity*



In the beginning, ambiguity was a refuge and a virtue. There were the 36 Fathers of Confederation, largely lawyers and businessmen, struggling to craft a constitution out of the conflicting demands of four provinces and two cultures. Throughout the dismal autumn of

1864, through hours of suspicion-tinged clashes, they carefully narrowed the focus of their talks from the visionary to the pragmatic. In the end, they left much out: they made no reference to two founding nations or equal provinces; they made no emphatic declaration on the strength of the central government; they did not incorporate an amending formula. Instead, they hammered out a minimal agreement on the division of powers and obligations—and on the composition of institutions. That agreement became the British North America (BNA) Act of 1867. Passed by the British Parliament, it outlined the bare structure of a new nation. The Fathers' ambiguous legacy was at once glorious and unnerving. They created Canada—and 124 years of constitutional struggle.

The ambiguities and omissions haunt the history of Canada's efforts to change its Constitution. Without an amending formula, changes to British legislation required the consent of the British Parliament. Without a clear constitutional vision, competing visions coexisted uneasily amid two unanswered—and perhaps unanswerable—questions: Did Canada evolve from two founding nations or four equal provinces? How powerful were those provinces and how strong was the central government? For the first 60 years of Canada's existence, there were no formal constitutional talks—but a constant battle for power between the provinces and Ottawa punctuated the decades.

From 1927 until 1980, there were 10 unsuccessful attempts to bring the Constitution home from Westminster with an amending formula. The first efforts at constitutional reform often dealt with Ottawa's demands for more power. By 1960, the focus had shifted. As the Quiet Revolution revitalized Quebec society, the Quebec government sought more economic and cultural powers, as well as the ability to pay for the exercise of those powers. Other provinces joined the chorus of demands

for greater power. In a dramatic climax, Quebec was the sole province to withhold its consent when Prime Minister Pierre Trudeau engineered an agreement that brought the Constitution home in 1982 with an amending formula and a charter of rights, but without significant additional powers for Quebec.

Nine years later, the same themes that haunted the Fathers are still dividing their heirs. The 1990 failure of the Meech Lake accord, a constitutional package designed to win Quebec's consent to the new Constitution, vividly underlined the unsolved constitutional issues that riddle Canada's history. Canadians, in fact, are arguing about the same issues that the Fathers sidestepped with deft ambiguity. The litany is familiar: Should Quebec be considered a "distinct society" or one of 10 equal provinces? Do Canadians receive better representation through a strong central government or through stronger provincial governments? Should Canada find a better amending formula?

Adding to the controversy is the fact that the 1982 Charter of Rights and Freedoms gave new recognition to long-overlooked voices: Canada's aboriginals, women, multicultural groups. Those voices have added new and often competing claims to the constitutional cacophony. In response, the politicians and academics of 1991—like the representative members of the *Maclean's* forum at the Briars—have no simple constitutional prescriptions. Observed University of Toronto political scientist Richard Simeon: "Not only do we have to deal with the unresolved issues that we inherited from the past, but we also must resolve a host of new issues which generate new constitutional agendas. This immensely complicates the current debate—and the range of possible answers."

The roots of the current debate lie in the conflicting aims of Canada's original constitutional negotiators. Appalled by the ravages of the Civil War in the American federation, Sir John A. Macdonald, who became Canada's first prime minister, concluded that federations in themselves were divisive creations. The solution that he sought was a strong central government. His chief francophone ally, Sir George Etienne Cartier, wanted to honor Canada's "diversity of races" and to preserve Quebec's language and Roman Catholic schools. The BNA Act was their ambiguous compromise.

Ottawa took control of such critical areas as trade and commerce. In addition, the federal government could cancel provincial legislation or declare a provincial undertaking to be under federal jurisdiction because it was "for the general advantage." But there was a catch: Ottawa's blanket control over "peace, order and good government" could be countered by the provinces' almost equally open-ended control over property and civil rights. Still, Macdonald was satisfied: "We thereby strengthen the central Parliament and make Confederation one people and one government." Cartier, too, was pleased: "Under the new system, Lower Canada will have its local government and almost as much legislative power as formerly."

Throughout the next 124 years, the provinces and Ottawa warily circled their ambiguous Constitution, scuffling for power and money on various stages. They sought constitutional interpretations in the courts.

They fought for their share of tax dollars. When Ottawa spent money on provincial affairs, the provinces tried to exclude Ottawa from administration of such programs—while keeping the money.

They faced off in formal constitutional talks. Less than 20 years after Confederation, the provinces found an unlikely champion. To Macdonald's chagrin, Canada's final court of appeal, the British Privy Council, began to limit federal power. In 1883, the council announced that "the local legislature is supreme and has the same authority as the Imperial Parliament or the Parliament of the Dominion would have under like circumstances." In that often rancorous climate, Quebec Premier Honore Mercier, with the support of Ontario Premier Oliver Mowat, hosted five of the then-seven premiers at an interprovincial conference in 1887. Their demands have a familiar ring: abolition of Ottawa's right to disallow provincial legislation; abolition of Ottawa's right to declare that provincial undertakings were in the national interest; the right to nominate half of the Senate's members; increased federal subsidies. Macdonald ignored them.

Nearly 40 years later, Great Britain encouraged Canada's first federal-provincial attempts at major constitutional reform. In 1926, the Balfour Declaration recognized that the dominions were independent countries. In response, a 1927 Canadian federal-provincial conference

launched the search for an amending formula. The premiers were sharply divided. According to the official conference summary, some opponents went so far as to contend "that if Canada had the right of herself to amend her Constitution, all sorts of demands for changes would be made." Four years later, when the British Parliament was about to adopt the principles of the Balfour Declaration in the Statute of Westminster, the premiers and the Prime Minister tried again. They failed. Canada asked Britain to change the statute so that Britain retained the power to amend the Canadian Constitution.

Throughout the next three decades, the constitutional amendment issue was almost forgotten. The times were dramatic: the Depression; the Second World War; the postwar boom. In that climate,

the extraordinary tug of war between Ottawa and the provinces was the stuff of legend, but it was largely waged on the judicial and fiscal fronts. Throughout the 1930s, as the Depression raged, Ottawa "disallowed" Alberta's bid to set monetary policy; the British Privy Council, in turn, ruled that Ottawa's proposed labor standards, its version of the American New Deal, were an intrusion on provincial powers. In wartime, Ottawa consolidated its fiscal strength, taking control over personal and corporate taxes, then transferring a portion of that revenue to the provinces.

In the postwar boom, throughout the late 1940s and the 1950s, Ottawa was a leader in the development of the welfare state, partly through direct programs such as unemployment insurance and partly through the device of shared-cost programs such as health insurance. Many provinces, including Ontario, resisted that intrusion of federal spending power. In the end, Quebec Premier Maurice Duplessis remained the sole dissenter: he refused to participate in several shared-cost programs, among them postsecondary funding. But because



*Simeon: a complicated agenda involving both old and new issues*



## THE PEOPLE'S VERDICT

Duplessis did not set up programs in competition with those of Ottawa, his opposition did not create significant national antagonism.

In 1935, Prime Minister Mackenzie King told the premiers that he would entertain proposals to amend the Constitution to extend Ottawa's authority to regulate wages and working conditions. The provinces largely ignored that offer. Instead, the federal government and eight of the nine existing provinces cobbled together an amending formula. When New Brunswick withheld its consent, the proposal was quietly shelved. In 1950, Prime Minister Louis St. Laurent and the premiers tried again to find an amending formula. They, too, failed.

That set the stage for the modern constitutional war. In June, 1960, the Liberals won the Quebec election—and the Quiet Revolution, Quebec's delayed entry into the modern world, was born. Ardently nationalistic, the new government wanted to use the Quebec government to defend francophone rights and interests. It shook off centuries of domination by the Roman Catholic Church and it concluded that the existing division of powers and financial arrangements did not allow Quebecers to become "masters in our own house."

its citizens that would become available elsewhere—funded by Ottawa.

In 1964, Ottawa and the provinces concocted the Fulton-Favreau amending formula. Two years later, Quebec again withheld its consent, arguing that the formula was inflexible and that it could limit the province's struggle for more power. Observed the University of Toronto's Simeon: "Quebec did not really begin to make constitutional demands until the election of Premier Daniel Johnson in 1966. In part, Johnson's demands were a response to [then-federal Justice Minister] Trudeau's view on the transfer of tax points. Trudeau said that Quebec's emerging special status was a slippery slope to separatism and that there should be no more special treatment for one province. That stand helped to catapult Quebec's demands away from fiscal and policy issues onto a constitutional level."

There were four more unsuccessful attempts to bring home the Constitution between 1967 and 1980. As each attempt failed, and as Ottawa and the provinces waged increasingly bitter struggles over scarce fiscal resources, more provinces, such as Alberta and Newfoundland, supported Quebec's demand for more powers. The pattern was set:



*Mulroney and premiers during 1987 talks leading to the Meech Lake accord: citing Quebec as a distinct society*

In 1964, at a stormy federal-provincial meeting, Premier Jean Lesage forced Ottawa to accept Quebec's withdrawal from several federal-provincial cost-sharing programs, such as hospital insurance, but to provide critical financial compensation. As a result, Quebec "opted out": Ottawa gave 44 per cent of the personal income tax collected within the province to Quebec, while the other provinces received only 20 per cent. Lesage also won the right to establish a Quebec pension plan.

Meanwhile, constitutional reform remained stalled. In 1960, Ottawa and the provinces drafted the so-called Fulton amending formula, which included provisions for each level of government to delegate power to the other. The ensuing draft bill did not receive unanimous approval, largely because the Quebec government feared that its fellow provinces would delegate power whenever Ottawa suggested new social programs—because Ottawa had the ability to pay for those programs. If Quebec wanted to run its own competing programs, there was no guarantee that it would receive federal funds. As a result, Quebec feared the new amending formula would bring two unpalatable choices: cede power to Ottawa or remain isolated, unable to pay for social benefits for

the provinces tugged; Prime Minister Trudeau tugged back. In 1971, after four years of negotiations, Ottawa and the provinces produced a major package to patriate the Constitution with an amending formula and a bill of rights.

A week later, Quebec backed away from the proposal, arguing that there was no constitutional guarantee of financial compensation if the province substituted its own social programs for federal-provincial shared-cost programs. In 1975, Trudeau said that Ottawa and the premiers should concentrate on the quest for an amending formula and several additional guarantees of language rights. The premiers replied that they could not agree on a patriation package that did not involve transfers of federal authority to the provinces.

In the third round, from October, 1978, to February, 1979, there was an agenda of 14 items including resource ownership, communications, a charter of rights, the amending formula and Ottawa's spending power. There was no agreement. There were deep divisions between Ottawa and the provinces, and among the provinces themselves. Fifteen months later, Quebecers rejected independence, or sovereignty-association, by

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a 19-point margin. Anxious to launch a campaign for renewed federalism, Trudeau called another federal-provincial conference. When that meeting failed to reach agreement on 12 items including an amending formula, the Prime Minister introduced a parliamentary resolution to bring home the Constitution unilaterally with an amending formula and a charter of rights.

Two provinces—Ontario and New Brunswick—supported him; eight opposed him. On Sept. 28, 1981, the Supreme Court of Canada ruled that Ottawa had the legal right to patriate the Constitution unilaterally. But it added that unwritten constitutional convention required Ottawa to obtain an unspecified "consensus" among the provinces before it proceeded. Five weeks later, after a dramatic night of constitutional bartering, Ottawa and all provinces except Quebec agreed to patriate the Constitution with a charter of rights and an amending formula. That formula required

the consent of Ottawa and seven provinces with at least 50 per cent of the population to change the Constitution. Several key areas, such as changes to the office of the governor general, required unanimous consent. Said a shattered Quebec Premier Rene Levesque: "Quebec finds itself all alone."

Another decade of constitutional fighting began. Legally, the Constitution applied to Quebec. But the province refused to endorse a package that did not meet its political demands. In 1987, Prime Minister Brian Mulroney and the 10 premiers signed the Meech Lake accord, which dealt with more than a century of familiar Quebec requests. It recognized Quebec as a "distinct society." It expanded the areas in the amending formula that required unanimity, giving Quebec, in effect, a veto. It guaranteed compensation to provinces that withdrew from federal spending programs in areas of provincial jurisdiction, if the provinces then launched a program that was "compatible with the national objectives." It also established a provincial role in Senate appointments.

That historic accord met Quebec's basic requirements, but it ran into stiff opposition in other parts of Canada. The so-called charter groups argued that the accord did not deal with their constitutional demands. Native people said that they also constituted a distinct society and that the Constitution should enshrine their right to self-government. Other Canadians objected to the very suggestion of a distinct society, claiming that it conferred spe-



Queen Elizabeth II signing 1982 Constitution in Ottawa: new focus

posed of delegates from Ottawa and the 10 provinces. Aboriginal peoples—if they wished—could also participate. If the constituent assembly emerged with a package, Ottawa and the provinces could use the current amending formula to adopt it. Still, Russell has stipulated that Quebec, natives and northerners should consent to amendments that affect them. Declared Russell: "We would then truly have constituted ourselves as a people."

**The amending formula:** The failure of the Meech Lake accord convinced many Canadians, including those in the *Maclean's* forum, that the current amending formula must be changed. There are at least three ways in which to achieve that objective: a veto for Quebec, the extension of veto power to all provinces or the adoption of entirely new procedures

### **BNA Act and other historical documents: legacy**



cial status on Quebec when all provinces should be equal. Still others denounced the process used to reach the agreement: the 11 First Ministers had produced a document behind closed doors, which they then refused to change. The accord died in June, 1990, when two provinces—Manitoba and Newfoundland— withheld their consent.

Now, all constitutional provisions, and Canada's constitutional process itself, are up for discussion. Quebec has expanded its demands. The charter groups are compiling their agendas. Across Canada, academics, politicians and Canadians generally, such as those at the *Maclean's* forum, are seeking new solutions to old problems.

**The process:** Many Canadians now insist that politicians consult the public, formally or informally, before they try to reach another agreement. In response, University of Toronto political scientist Peter Russell, for one, favors the formation of a constituent assembly, com-

posed of delegates from Ottawa and the 10 provinces. Aboriginal peoples—if they wished—could also participate. If the constituent assembly emerged with a package, Ottawa and the provinces could use the current amending formula to adopt it. Still, Russell has stipulated that Quebec, natives and northerners should consent to amendments that affect them. Declared Russell: "We would then truly have constituted ourselves as a people."

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The Meech Lake accord would have required unanimity for major amendments, even though many academics claimed that the system would be unworkable. Declared Donald Stevenson, the associate to the principal at Toronto's Glendon College: "Unanimity always gives the last person 'in' the power of blackmail. That was one of the main causes of the failure of Meech Lake." But an architect of the



current formula, Peter Meekison, a University of Alberta vice-president, countered that the formula was flexible. He pointed out that many Meech Lake provisions did not require unanimity: Ottawa could have proclaimed them. But Meekison said that large amendment packages may require a different formula—perhaps a constitutional referendum.

**The distinct society:** Quebec insists that any future constitutional arrangement must recognize that it constitutes a "distinct society." That insistence stems from the conviction that Confederation represented a treaty between two founding nations—and that Quebec has the right to preserve and promote its distinctiveness. In contrast, in the so-called Rest of Canada, the phrase often provokes anger: many Canadians contend that equality of the provinces is a fundamental principle of Confederation.

In fact, the ambiguous BNA Act makes no such claim. Provinces have often received different rights and different obligations: New Brunswick and Nova Scotia received more Senate seats than the western provinces; initially, bilingual rights applied only to the legislature of Quebec. Still, as University of Prince Edward Island political scientist David Milne observed, "The Canadian federation has seen a steady and growing movement towards [the equality principle]." Those conflicting views are probably the greatest barrier to agreement on a constitutional package.

**Division of powers:** The Quebec Liberal party now demands that Quebec receive exclusive authority over 22 areas of jurisdiction, including culture, manpower, language, communications and regional development. In response, suggestions have varied dramatically: centralize, decentralize, "rebalance," special powers for Quebec. At the root of the problem is the fact that Canadians are probably unwilling to establish special status for Quebec; they are probably equally unwilling to accept massive decentralization to all provinces. Some academics, such as University of Western Ontario political scientist Robert Young, have suggested that Ottawa transfer jurisdiction over language, culture and communications to the provinces. That might ease Quebec's concerns about the preservation of its language and culture. Other academics, including University of Toronto law professor Michael Trebilcock, have called for a "rebalancing" of Confederation in which social, language and cultural policies would be decentralized to the provinces while economic powers would be centralized.

Prince Edward Island's Milne had one of the more innovative recommendations: give concurrent jurisdiction in many fields to both Ottawa and the provinces to ensure that each province has equal powers. Provincial laws would have precedence in those fields over federal laws. Some provinces, said Milne, would likely choose to ignore their new powers, while others would use them to legislate according to their own needs, effectively shutting out Ottawa. But all provinces would remain theoretically equal. (Canada now has only three areas of concurrent jurisdiction: agriculture, immigration and pensions.)

**National institutions:** The *Maclean's* forum called for an elected Senate to ensure better representation for the regions within the federal government. That approach echoes the western provinces' call for a Triple E Senate: an effective, elected body with equal representation from each province. In contrast, the Quebec Liberal party has called for the abolition of the Senate. The Senate debate is heated because the West appears to be on a collision course with Quebec. Quebec would have only 10 per cent of the seats in a Triple E Senate—even though it has 25 per cent of the population. As a compromise, some analysts say that Quebec senators could exercise a veto over federal legislation on education or culture, and matters affecting the French language.

**Spending powers:** Spending is a central issue in the current debate. Provincial leaders fear that Ottawa will surrender constitutional control over programs but keep the revenue that funded those programs. The Quebec Liberal party has demanded the abolition of Ottawa's right to spend in areas of Quebec's exclusive jurisdiction. In an impressive response, 22 Canadians, including former Ontario premier William Davis and former Saskatchewan premier Allan Blakeney, recommended that Ottawa and the provinces "be restricted to spending in their own fields of jurisdiction unless by mutual agreement." The group added that Ottawa should transfer to the provinces the tax revenues that it now devotes to social programs.

**The charter of rights:** At the core of the debate is a fundamental disagreement over the proper balance between individual and collective rights. Individual rights were entrenched in the Charter of Rights and Freedoms. The result: charter groups, such as women and natives, now have a fervent interest in upholding their individual rights. In contrast, Quebec society has a historical attachment to its collective rights. The original BNA Act and the charter itself, in fact, recognize collective rights. The two views clashed in 1988



Ottawa crowd celebrates new charter, April 17, 1982: power

BRIAN WILLER/MACLEANS'S

—when Quebec Premier Robert Bourassa invoked the so-called notwithstanding clause to restrict the individual right to freedom of expression so that he could limit the use of English on commercial signs. To many Quebecers, Bourassa was simply protecting collective rights. To many charter groups, he was violating individual rights. As well, the premier has insisted that the charter cannot take precedence over a future distinct society clause.

Those issues haunt Canada's past, its present and its future. Since the proclamation of the British North America Act, they have underscored the struggle for power and money at the constitutional bargaining table, in the courts and during the division of the taxation revenues. Canadians may not solve those problems during the upcoming round of constitutional talks. The demands are numerous and conflicting; the divisions are deep. Still, as Canadians wrestle, once again, with familiar themes, they do it in the knowledge that 124 years of constitutional bickering did not prevent 124 years of often prosperous and sometimes proud nationhood.

MARY JANIGAN