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Quebec and the 1982 Constitution Act

Zusammenfassung

Der Artikel behandelt die Haltung der Quebecer gegenüber dem Constitution Act von 1982. Es wird hervorgehoben, dass sich in diesem Gesetz nur eine der drei Richtungen in der Verfassungsdebatte findet, nämlich die von Pierre Trudeau. Allerdings war die Opposition gegen das Gesetz keineswegs einmütig, und zwar weder in der Quebecer Gesellschaft noch in der Nationalversammlung.

Résumé

Cet article fait le point sur les attitudes des Québécois face à la Loi constitutionnelle de 1982. Il souligne que cette loi reflétait les vues d'une seule des trois écoles de pensée dans le débat constitutionnel, celle de Pierre Trudeau. Néanmoins, l'opposition à cette loi fut loin d'être unanime, non seulement dans la société québécoise mais à l'Assemblée nationale elle-même.

Patriating the Constitution

To start with, it is useful to summarize what the Constitution Act, 1982 did. This was an Act of the British Parliament passed at the request of the Government of Canada following a joint address from both Houses of the federal Parliament. The British government and Parliament did not make any change to the substance of the joint address, which was the outcome of a political agreement between the federal Prime Minister and nine provincial premiers. Though this does not qualify as a new Constitution, it can be described fairly as the most important change ever brought to the Canadian constitutional structure since 1867. It sets out a procedure for future amendments to the Constitution, and it enacted a Charter of Rights and Freedoms that entrenched rights beyond the reach of Parliament and the provincial legislatures, thus making the courts the final arbiter on many issues, rather than a mere referee on jurisdictional disputes.

The formal involvement of the British Parliament in the process that resulted in the passage of the Act stemmed from the fact that the federation was created in a colonial context. The constitutional structure of a colony is normally decided by the colonizing state, so the Canadian Constitution, the British North America Act, 1867,

was passed as an ordinary statute by the British Parliament. In view of the achievement of responsible government in 1848, it was accepted at that time that the Canadian colonies were largely self-governing, and the BNA Act was the first Canadian constitution ever to be devised almost entirely by Canadian politicians. The intervention of the British Parliament was thus mostly formal, and in many ways simply officialized the support among British politicians for a move decided locally by their colonial counterparts.

Yet, except for some provisions that could be altered either by the Parliament of Canada or by provincial legislatures acting in their ordinary legislative prerogatives, the Act did not provide for its own amendment in the future (as the Australian Constitution of 1900 did). Subject to the exceptions noted above, changes to the BNA Act could be brought only through the same channel, i.e. an Act of the British Parliament, though it was an accepted convention right from the start that the British Parliament would act only at the request of Canadians.¹ Subsequently, no request from the Canadian Parliament was ever denied, though requests coming from a provincial legislature always were.²

When Canada became an independent country under the Statute of Westminster in 1931, Canadian politicians had been unable to agree among themselves on a procedure for amending the constitution in the future. As it was assumed that such an agreement would come soon, the issue was left in abeyance, and an Act of the British Parliament continued to be necessary for the Canadian Constitution to be altered, for example in 1940 (unemployment insurance), 1946 (rules for redistributing seats among provinces for elections to the House of Commons), twice in 1949 (partial patriation and admission of Newfoundland), 1951 and 1964 (pensions in both cases). This anomalous situation lasted until 1982, when a new amending formula was passed, thus severing one of the last remaining connections with Britain. The Canadian Constitution had been 'patriated' (Rémillard 1984).

After patriation or: two legends to be told

Later, two legends were born. We owe the first one to an admiring biographer of Pierre Trudeau, columnist Richard Gwyn, who wrote in January 1998 that patriation could be counted as "one of these marvellous occasions when, overcoming our regional and language squabbles, we felt as Canadians and we spoke and acted as Canadians". The reality is, of course, different. Patriation was the outcome of a bitter one-year struggle that pitted Canadians, through their federal and provincial governments, against each other within the country, in Parliament and in courts, as well as in London. The initial scenario, under which Ottawa intended to act with the

1 For an illuminating summary of the older procedure for amending the Canadian Constitution, see Forsey (1974).

2 This occurred in 1869 when the Nova Scotia legislature petitioned the British Parliament for being removed from the Canadian federation, and in 1965 when the Quebec Legislative Assembly asked for the abolition of the Legislative Council.

support of only two provinces, was highly controversial, and unilateralism was condemned by the public across all regions. The Supreme Court had to chastise the central government for proceeding in that way. The struggle was ended, following negotiations carried late into the night in a kitchen by a few politicians, by an unexpected compromise that few among the signers, starting with Trudeau himself, found entirely to their taste, and that was opposed by the government of the single province with a French-speaking majority, including one-quarter of the Canadian population. Canadians had not been invited to ratify the change through a referendum. The subtitle of a book published by a group of Canadian political scientists the next year reveals a distinct lack of enthusiasm: "And no one cheered" (Banting/Simeon 1983).

The second legend, which I will address more comprehensively below, is that the Constitution Act, 1982, born during the 'Night of the Long Knives', amounted to a rape of Quebec that met with unanimous opposition in the province. Indeed, reading some of the boldest statements in that direction, one is left to wonder why the United Nations did not at that time hold an urgent sitting in order to condemn the following crime: a sovereign federal country was securing the right to change its own constitution without another sovereign country being involved, was adopting an amending formula that originated with the provinces, as well as a Charter that protected the rights of citizens against encroachment by either the federal Parliament or the provincial legislatures, and the move was opposed by a single province that was governed by people who wanted to secede anyway.

Like all legends, this one contains some truth. It is undeniable that many Quebecers were deeply offended by the move, and that this was not the kind of constitutional change that most would have wanted in Quebec. However, there is a danger in overlooking one of the central facts about Quebec: that it is a complex society sharply divided, then as now, over its constitutional future.

Constitutional visions after the Quiet Revolution

Three competing constitutional visions emerged from the Quiet Revolution. Trudeau followers wanted no substantial devolution of powers, either to all provinces or to Quebec only, but held that what mattered was that the federal government worked in both English and French and that the rights of language minorities, especially French-speaking minorities in English provinces, be protected (Trudeau 1967). This is the vision that prevailed in 1982. The opposite vision, championed by René Lévesque and his followers, was that Quebec should instead become a sovereign country, preferably with some economic association with an equally sovereign Canada (Lévesque 1968). The third vision, whose Liberal leader Claude Ryan was one eloquent promoter among many, was that Quebec should remain within the Canadian federation but with substantially enlarged powers, though the exact quantum requested has varied widely over time (Ryan 1995).

All three competing visions had deep roots in Quebec history and could count on a large number of supporters, though only the first two were championed by charismatic leaders. Any constitutional change was bound to leave the other two dissatisfied. For better or for worse, the Trudeau vision prevailed, at least in the constitution. In many ways, the constitutional deal of 1867 that established the Canadian federation had also left a substantial minority of Quebecers dissatisfied as well (Moore 1997). The difference is that opponents to Confederation (like Dorion and Laurier) later came to support the federal deal and were integrated into the political mainstream, while the same has not occurred for the Constitution Act, 1982, and seems unlikely to come in the near future. This is so because Canadians failed to ratify the Meech Lake agreement in 1990.

One of the constants about constitutional debate among Quebecers is that every time one of the visions is put forward, supporters of the other two join hands and successfully kill it. Every time Trudeau tried to patriate the Constitution, to impose an amending formula and to pass a Charter of Rights, both nationalist federalists and supporters of independence opposed him (Roy 1978). Every attempt to cut the Gordian knot by severing the links between Quebec and the rest of Canada met with determined opposition from both Trudeau-style and Ryan-style federalists. And the two attempts by the latter to have some version of their own vision passed (essentially the Meech Lake and Charlottetown Accords) were sharply opposed by an unholy alliance of Trudeau supporters and supporters of independence. The oddity about the patriation episode is that this time, one of the three visions carried the day. The reason why the operation still remains controversial is that neither of the other two visions secured much, and that later attempts to broaden support for the new order by making concessions to nationalist federalists all failed.

Historical amnesia (and the myth of unanimous opposition)

The assertion that Quebec was unanimously opposed to passage of the Constitution Act 1982 is based on historical amnesia. If the issue was raised and pushed through, it is essentially because a politician from Quebec so decided and was willing to pay the price for it. It certainly cannot be said that Trudeau's vision found no support in Quebec, though it had very little within the Quebec government. At each federal election held from 1968 to 1980 inclusive, he secured a strong majority of Quebec seats and failed only once (in 1972, by a hairbreadth) to obtain an absolute majority of the vote, despite the presence of three other parties. Indeed, support from his home province proved determinant in his political career. Only in 1968 did he carry a majority of the seats outside Quebec: in all other elections, he was trailing outside Quebec and strong support in Quebec tipped the balance in his favour, failing to give him a plurality of seats overall only once (in 1979). Putting opinion poll figures together, Richard Nadeau has highlighted that this pattern of support merely reflected support for Trudeau as Prime Minister, both inside and outside Quebec, throughout the same period (Nadeau/Nevitte 1998). Throughout his pre-

miership, Gallup Canada polls consistently highlighted that his personal support was much higher in Quebec than elsewhere in the country.

Support for Trudeau's party in Quebec was higher than before he took over as leader in 1968, and tended to increase over the years. When he had to concede the premiership in 1979, after having been defeated in Ontario and routed in the West, his tally in Quebec was 62 % of the vote and all 75 seats in the province but seven. In February 1980, he reached an incredible 68 % of the votes, winning all Quebec seats but one. Since World War II, no Quebec politician, even Bouchard, Lévesque or Duplessis, has ever come close to such scores. Within the House of Commons that voted patriation, the Liberal caucus included more MPs from Quebec (74) than from all other provinces aggregated (73, out of a possible 207).

The legend that Quebec was unanimously opposed to patriation is based almost entirely on a vote that took place in the National Assembly on October 2, 1981. The Supreme Court had ruled a few days earlier that patriating the Constitution with the support of only two provinces, while not illegal, was unconstitutional in view of the convention that required a substantial degree of provincial consent.³ A motion by Premier Lévesque condemning unilateral patriation was tabled a few days later, was supported by Liberal leader Claude Ryan and carried, 111 to 9.⁴ All opponents were Liberal, and represented almost one-quarter of the caucus, the highest level of dissent within a party on a major issue ever seen in the Assembly in modern times. As we shall see, this unanimity among parties was new, and did not last very long.

There were three other divisions in the Assembly on patriation. On November 21, 1980 (seven weeks after the resolution patriating the Constitution had been tabled in the House of Commons, with the support of only two provinces), Liberal MNAs had also been invited to support a motion by Premier Lévesque condemning Ottawa's unilateral action. Yet, following protracted negotiations, Liberals refused to concur, and the motion was carried on division, not a single Liberal defying the party line.⁵ After the November 1981 Accord was concluded, Premier Lévesque tried again to rally the Liberal opposition behind him and tabled a motion condemning the accord. The vote took place on December 1: 70 PQ MNAs supported the motion, while all 38 Liberals present voted against.⁶ The unanimity had vanished after a few weeks.

That provincial Liberals did not see eye to eye with the government party on the issue was highlighted in June 1982, when the Assembly was invited to pass Bill 62, which inserted a notwithstanding clause in all statutes of Quebec, thus derogating to the new Charter in the widest way possible. Liberals voted against the Bill. Once in power, they stopped inserting such clauses on a routine basis and when the provisions of Bill 62 became spent in 1987 under the five-year sunset clause, the Bill

3 *Patriation Reference* [1981] 1 SCR 753.

4 *Procès-verbaux de l'Assemblée nationale du Québec*, October 2, 1981.

5 *Procès-verbaux de l'Assemblée nationale du Québec*, November 21, 1980.

6 *Procès-verbaux de l'Assemblée nationale du Québec*, December 1, 1981.

was never re-adopted, the government keeping however the power to use the derogatory power if needed. Even under Parti Québécois subsequent administrations, such a broad derogation appears to have never been contemplated.

So we have four votes in the legislature, three of them with both parties voting against each other, and unanimity among parties being acquired on the fourth one subject to a substantial level of dissent within one of them. This vote was not on the Constitution Act, 1982 as finally passed. It was on the initial Trudeau package, which provided for a totally different amending formula, a Charter that was more threatening for Quebec's policy on the language of schools, and that could not be derogated in any way. Here is what René Lévesque, in his memoirs, had to say on the final draft: "Un plat foncièrement médiocre où se trouvaient pas mal diluées les grandes visées initiales de Trudeau. Le seul embêtement vraiment grave qu'il nous créait, c'est qu'Ottawa aurait maintenant le pouvoir de réduire, au profit des Anglo-Québécois, la portée de la loi 101. Nullement au point, cependant, de mettre en danger nos positions essentielles" (Lévesque 1986, p. 448).

Why provincial Liberals did not side with the incumbent government? Quebec was just coming out of a bitter referendum campaign where the provincial Liberals were leading the NO forces. There was a basic disagreement between them and the Parti Québécois: they wanted to remain in Canada. They did not oppose the principle of a Charter of Rights, having passed one for Quebec in 1975, while René Lévesque was against entrenchment of rights *per se*, as his memoirs make it clear. Their supporters at provincial elections were also supporters of Trudeau at federal elections. Many were far more fond of Trudeau as a man than of his rival Claude Ryan. They felt that by inviting them to side against their federal cousins, Lévesque was merely trying to drive a wedge between the two wings of the Liberal family (MacDonald 1985). After the November Accord, few among them were willing to come to the rescue of a constitutional loser who happened to be their chief opponent in the provincial arena.

In subsequent polemics, Trudeau argued the Constitution Act 1982 had been opposed by the 70 Parti Québécois MNAs, but supported both by the 67 Liberal MPs from Quebec who voted for the Accord on December 2, and by the 38 provincial Liberal MNAs to refused to concur with the opposition of their PQ counterparts. I am far from convinced by the acrobatics that underlie such numbers. Yet the basic point remains: rejection of the accord was not unanimous in the Quebec Assembly, to say nothing of Quebec as a whole.

I have checked personally all Gallup Canada opinion polls on federal party support during the patriation crisis. Trudeau kept majority support among Quebecers throughout the episode. There is no evidence that patriation engineered a backlash against him. Even in May 1984, when he was on the verge of retirement after two years of recession, his party, while trailing everywhere else, was still leading in the polls in Quebec. We are left to conclude that the collapse of support for the Liberals in Quebec that occurred in the September 1984 election dated not from patriation

(which would have suggested genuine anger over the issue among Quebecers) but from Trudeau's retirement almost three years later. Up until the very end, Trudeau seems to have kept strong personal support among the Quebec electorate.

A Quebec referendum on patriation?

In my view, the best piece of evidence that patriation far from met with unanimous opposition in Quebec comes from a major decision René Lévesque chose not to make. He had the option of calling a snap referendum on the issue and to invite the electorate to show how disgusted it was with the November agreement. The legislative and administrative machinery was there, and all the Assembly had to do was to adopt a referendum question following a 35-hour debate. What impact a negative referendum in Quebec would have had on British decision-makers is uncertain, but there is no doubt that the people's attitude towards the package would have been expressed unequivocally, and the legitimacy of patriation in Quebec would have been severely damaged.

In 1995, I asked publicly Claude Morin, who was Lévesque's chief constitutional strategist throughout the patriation debate, why such a referendum had not been called at that time. His answer was threefold. First, he said, the voice of the National Assembly was enough, and did not need to be backed by popular support. Second, Quebec had requested the courts to check whether it had a veto over the package, and preferred to wait for the answer. Finally, it seemed to him inappropriate to call a referendum some 20 months after the May 1980 referendum on sovereignty.

On reflexion, all three alleged motives appear weak. There is no doubt that a majority vote of all Quebecers against patriation, meaning a defeat for Trudeau on his home turf and on his most cherished achievement, would have crippled the accord far more effectively than a mere motion of the National Assembly supported only by Members from a secessionist party and rejected by the federalist party sitting in opposition. Second, the outcome of the reference to the courts on the Quebec veto hardly deserved to be waited with impatience, as it was bound to be negative: in its decision on patriation, handed barely three months earlier, the Supreme Court had already and explicitly rejected the doctrine that all provinces had to agree to a constitutional change of that nature, and there was no hint in the decision that Quebec needed to be among the provinces consenting. The verdict was so predictable that patriation was voted by the British Parliament eight months before the Supreme Court had the time to answer the question with a predictable 'No'. As to the verdict of the Quebec Court of Appeal, to which the reference was directed first, it was even more predictable because in April 1981, the same court had found acceptable unilateral patriation at a time it was opposed by eight provinces. The reference was nothing but a delaying tactic that failed. Finally the assertion that two referendums in a row would be too much equally strikes me as odd, in view of the fact that the mandate sought by the Parti Québécois at the 1980 referendum explicitly provided

for the holding of a second referendum thereafter if the talks on a new association with the rest of Canada failed.⁷

I am afraid that the reason why a referendum was not held should be sought elsewhere, and is likely the following: it would have exposed the incumbent Quebec government to another and even more humiliating defeat, this time at the hands of its own electorate. Signs abound that the Parti Québécois government, and its own leader personally, had been utterly devastated by the unexpected accord between Ottawa and the other provinces (Godin 2005). A triumphant Trudeau would have faced an opponent he had defeated twice within less than eighteen months, once at a referendum and once at constitutional talks. Even opponents of Trudeau later conceded in their writings that though supporters of sovereignty were outraged while some federalist nationalists (like Claude Ryan) disappointed, the population of Quebec was unlikely to be mobilized against an accord that after all had secured the support of all other provinces after being substantially amended in order to placate their reservations (Laforest 1992, p. 70; Lisée 1994, p. 116).

It is not difficult to understand why mobilization was difficult. Quebec was only 18 months away from a bitter referendum debate that had pitted federalists against supporters of independence, with the former prevailing 60 to 40. Few among the federalists were willing to join hands with a Parti Québécois government whose ultimate objective they disagreed with. How central that goal had remained was highlighted by the moves made by the Parti Québécois congress in December 1981: the party resumed its pre-1974 position that a mere election victory would be enough for independence to be declared, and the very notion of an economic association with the rest of Canada was jettisoned entirely. This at a time when by every possible indicator, sovereignty was a minority position among Quebecers.

Finally, it was difficult not to see how inept the Quebec government's constitutional strategy had been. They had called a referendum proposing an option that had no majority support among the electorate, and winning was highly uncertain. Claude Morin (1994, p. 434-5) later disclosed that he was so pessimistic in December 1979 about the prospects of victory for the Yes option that he thought of advising Lévesque to postpone it. It appears he was the only one within the ruling circle not to believe that Quebecers could even think of rejecting becoming an independent country. The referendum had been won, for the most, not by Liberal leader Claude Ryan, but by Trudeau himself. The federal leader thereafter had all cards in his hands, while Lévesque lost his credibility as the spokesman for Quebec. Throughout the debate that followed, Lévesque tried to position himself as a defender of Quebec's autonomy and built an alliance with other provinces that led him to abandon Quebec's traditional claim for a constitutional veto, something he was bitterly criti-

7 Reviewing the contemporary newspapers, I later found that, asking the people of Quebec to reject the November Accord at a referendum had actually been proposed to the cabinet by Minister Claude Morin himself, but rejected (*Le Soleil*, January 9, 1982, p. B1).

cized for by provincial Liberals. During the November conference, he impulsively jettisoned his provincial allies in order to accept Trudeau's proposal for a referendum on patriation: there was little surprise then that his former allies jettisoned him in turn a few hours later. It was not known at that time that Quebec's chief constitutional strategist was imprudent to the point of having in the past accepted money from the Royal Canadian Mounted Police, as was revealed in 1992.

Among the obstacles against a mobilization against patriation as decided in November 1981 was the substance of the package itself. Trudeau had paid a high price for securing provincial consent. How could people be horrified by the severance of Canada's links with Britain, the survival of which had always been a sore point for French Canadians? There was no opposition to French and English being entrenched as the country's official languages, or guarantees given to Francophones outside Quebec. The chief concern raised by the proposed Charter was about the right of the English minority in Quebec to its own schools, but Trudeau, at the request of Ryan, amended the proposed section 23 so that it squared with the position that René Lévesque himself had adopted during the discussion of Bill 101: access would be reserved to children whose parents had been schooled in Canada (rather than in Quebec, as the Charter of the French Language provided). Polls further suggest that the principle of a charter of rights was popular in Quebec as everywhere in the country, though it is dubious that all its consequences were understood and agreed.

The constitutional amendment in comparative perspective

Few Quebecers were pleased that the opposition of their provincial government had been ignored. Yet, when viewed in international perspective, the non-concurrence of a subnational government within a federation to a constitutional amendment hardly qualifies as a scandal of worldwide proportions. I reviewed the procedures for constitutional amendment that existed in all federations at the turn of the millennium (Massicotte/Yoshinaka 2000). Unanimous consent as a standard method existed only in federations with two partners. The most frequent requirement is for a majority (Australia) or a supermajority (the United States) of states to support the change. There are even federations where the concurrence of state governments or legislatures is not required at all. The Swiss constitutions of 1848 and 1874 were rejected at a referendum in Catholic cantons (including Ticino, the only Italian canton), and the Constitution of 1999 was rejected by many small cantons. Bavaria did not ratify the Basic Law, choosing rather to be bound by its provisions if two-thirds of the other *Länder* consented to it (Schwarz 1995, 438). I need not add that requiring the concurrence of *specific states* to a constitutional amendment is almost nowhere demanded, except, ironically, now in Canada under the Regional Vetoes Act passed in 1996, while the possibility for a minority province to opt out of an amendment concurred in by all others does not exist anywhere else. That Quebec does not have a veto under the Act of 1982 is almost universally re-

gretted, yet, Pierre Trudeau's answer to René Lévesque strikes deep: "From 1971 to November 5, 1981, all governments I headed supported an amending formula with a veto for Quebec. We abandoned the idea only after you did so yourself" (Letter from Trudeau to Lévesque, Dec. 1, 1981).

High hopes and deep disappointment

That the Constitution Act, 1982 did not square with the aspirations of supporters of independence should not come as a surprise. Even proposals like the Meech Lake Accord and the Charlottetown Accord have been rejected on that side. Yet, it did not satisfy the aspirations of a sizable group within Quebec federalists either. The Act does not increase in any way the legislative powers of the provinces, nor their resources. Rather, the Charter curbs, to an extent that still remains to be decided by the courts, the legislative powers of both the federal Parliament and the provincial legislatures, including Quebec.

The only provision of the Act that acknowledges Quebec's difference is the above-mentioned qualification brought by section 59 to the language minority educational rights set out in by section 23: a criterion that is less favourable to the minority prevails in the case of Quebec, as a concession to those who feared an increase in the number of students (essentially: new immigrants) who could choose to be educated in English. It is ironic that Trudeau, a perennial opponent to any special status for Quebec, had to agree to such asymmetric treatment. This qualification was introduced during the weeks that elapsed between the conclusion of the November 5 Accord and its adoption by the House of Commons on December 2.

This is obviously far behind the ambitious proposals put forward by Quebec provincial Liberals in the Beige Paper in 1980, or by the federally-appointed Pépin-Robarts Commission in 1979. True, the Charter introduces new constitutional protections for the French language in the federal government and in other provinces, thus acquiescing to some of the claims made by Henri Bourassa-style French-Canadian nationalism. But the modern strand of Quebec nationalism, that demands either full independence or a substantial increase of Quebec's powers, came empty-handed.

This helps to explain why, twenty-five years after its adoption, the Constitution Act, 1982 still remains controversial as far as Quebeckers are concerned. Instead of healing, the grievances and frustrations that the Act did not address have persisted to this day.

Quebec provincial Liberals, who had failed to oppose the 1982 unequivocally, continued to claim that further constitutional change was needed. Indeed, consenting to the Act replaced consenting to patriation as their chief bargaining chip in the constitutional debate. Few partisans of the status quo can now be found within their ranks.

Trudeau's role in the failure of Meech Lake

What I think did the greatest damage to the Constitution Act of 1982 in Quebec was not so much its contents or even the way it was enacted, for there is no record of near-unanimous indignation within the public at that time. What really incensed Quebecers of all stripes was the failure, in 1990, of two provinces to ratify the Meech Lake Accord. And, ironically, Pierre Trudeau bears heavy personal responsibility for this.

The conditions prevailing in the mid-1980s were encouraging for an honourable compromise that would have satisfied most of French Quebec, much like the advent of responsible government and abolition of English unilingualism had made the Union Act palatable to most French Canadians in the 1840s. The sovereignty movement was running out of gas, and the PQ had just elected as its leader a man whose commitment to the idea was dubious. The Mulroney government had swept Quebec thanks in part to a promise to bring Quebec back to the constitutional fold. The Quebec government under Bourassa had come up with an unusually short list of demands, and other provinces had agreed to prioritize these demands for the next round of constitutional talks. To the surprise of many, the Meech Lake Accord was concluded in April 1987, with the support of all provinces.

The Meech Lake Accord did not purport to destroy the Act of 1982. It simply added to the Canadian constitutional structure the core element that Quebec nationalists wanted to include: the acknowledgement that Quebec was a distinct society within Canada, as one of the rules governing the interpretation of the Constitution. Yet, for Trudeau, this was too much. In what appears with the benefit of hindsight to be the worst blunder of his political career, he raided against the Accord and hampered its ratification. His opposition to the Accord was important because for many outside Quebec, Trudeau was seen as highly representative of public opinion in the province in view of his past victories. Appearing as a witness before a joint committee of Parliament in August 1987, Trudeau was asked by an MP how he thought Quebecers would react to the demise of the Accord. He answered that little could be expected, as no more than 5 % of Quebecers cared about constitutional issues.⁸ This was a serious error.

Actually, when the Accord floundered three years later, support for sovereignty was rejuvenated and reached as much as 70 %. Trudeau had won, but his was a Pyrrhic victory. Starting from the late 1980s, with his bitter campaign against Meech Lake, his personal standing among Quebecers fell to historic lows while his credit elsewhere increased. The disappearance of his former magic was such that federalist leaders in 1995 insisted on him staying away from the referendum campaign. To this day, federal Liberals have never been able to secure a majority of Quebec seats. Instead, the majority of Quebec's federal seats have gone to Progressive Conserva-

8 Special Joint Committee of the Senate and of the House of Commons on the 1987 Constitutional Accord, *Minute of Proceedings*, August 27, 1987, p. 14:126.

tives (1984 and 1988) and to the separatist Bloc Québécois (since 1993). The first ones were committed to change the constitution, while the latter wanted to abolish it. It might be said at the beginning of 2008 that those who supported the constitutional order established in 1982 without qualification have been reduced to a rump in French Quebec. In 2006, they secured only 19 % of the vote province-wide (down from 44 % in 2000). Nationalism in Quebec is more strident than ever. The adoption by the House of Commons in 2006 (with the support of most federal Liberals) of a motion recognizing that the *Québécois* are a nation within a united Canada may be seen as a symbolic acknowledgement of the futility of Trudeau's obstinate rejection of any shade of Quebec nationalism.

The adoption of a new amending formula in 1982 opened interesting prospects for future change by clarifying the rules of the game. Yet the formula so painfully reached has since then proved so unsatisfactory that twice later (in 1987 and 1992) all governments agreed to modify it (unsuccessfully). It has been changed informally twice. Since 1996, a federal statute mandates Ottawa to kill any amendment that would not have the support of Quebec, Ontario, British Columbia, two Atlantic provinces and two Prairie provinces, thus endowing Quebec with a veto of sorts. Further, based on the Charlottetown precedent, a convention has arguably emerged that should all governments by chance agree on a major reform, democracy requires nothing less than the endorsement of the proposal at a referendum *in all provinces that must concur with the deal*. Some provinces indeed mandate the holding of such a referendum within their boundaries before their legislative assembly concurs with an amendment.

The constitutional settlement: an impregnable fortress

As a result, the constitutional settlement of 1982 has become an impregnable fortress. Politicians who want, for example, to reform the Senate by making it elective have to tiptoe around the Constitution by proposing consultative province-wide elections whenever a vacancy arises in the Senate, provided that the Prime Minister remains free to ignore the popular will. Only very modest changes have been brought since 1982 or are likely to pass in the near future. The vast majority of Canadian politicians are unwilling to re-open the constitutional file for fear of unleashing forces that would ultimately destroy the federation. Judging on the outcome of previous attempts, such fear is not groundless.

On April 15, 1997, the National Assembly followed the procedure set out in the 1982 Act and voted an amendment to the Canadian Constitution that abolished the protection granted to denominational schools. However, the preamble to the resolution stated: "Considérant qu'une telle modification ne constitue en aucune façon une reconnaissance par l'Assemblée nationale de la Loi constitutionnelle de 1982 qui fut adoptée sans son consentement."⁹

9 Procès-verbaux de l'Assemblée nationale du Québec, April 15, 1997.

The official position of the Quebec government remains opposed to the Constitution Act, 1982. Premier Bouchard stated this publicly in April 1997, when the Act turned 15 years old, and the provincial cabinet adopted a decree to that effect. In April 2002, the National Assembly reaffirmed that it had never ratified the Act, which had diminished the powers and rights of Quebec without the consent of its government and of the National Assembly, and that this Act still remained unacceptable to Quebec. The motion was endorsed by both parties. Yet, it is not difficult to see important nuances among parties. Jean Charest, then leader of the opposition, accused Premier Landry of having indulged in 'verbal inflation' in his criticism of the 1982 Act. Reasonable persons, he insisted, are aware that we are living in a very free society, and that he was himself proud to be both a Quebecker and a Canadian. While reiterating that 1982 remained unacceptable, he argued that public opinion at that time was favourable to the decision, that patriation and the Charter were widely supported by the population today. He added: "If you suffered a setback, it is not our setback, it is not Quebec citizens' setback, it is not Canada's setback. We are not obliged to share your own setbacks."¹⁰

Contemporary Perceptions of the Constitution Act

How do Quebeckers feel today about the Constitution Act passed in 1982? Although the final deal that led to its adoption is often referred to as 'The Night of the Long Knives', there is little evidence that Quebeckers stand massively against the Canadian Charter. Indeed, an opinion poll that was conducted last Fall suggests exactly the opposite (Nanos 2007). Sixty-one percent of Quebec respondents answered that the Charter was moving our society in the right direction (Canadian average: 58.2 %) and 24.3 % said it was moving us in the wrong direction (Canadian average: 26 %). Canadians preferred the courts (54 %) rather than Parliament (31.5 %) having the final decision related to rights issues. The highest percentage in the country favouring the courts over Parliament was found in Quebec (68.5 % to 31.5 %). Indeed, Quebec respondents, at 63.4 %, were the most willing in the country to add sexual orientation to the equality rights section of the Charter (Canadian average: 50.8 %). Most in Quebec (58.4 %) were unaware that Ottawa or the provinces may opt out of an element of the Charter through the use of the notwithstanding clause. Among Canadians, they were the least enthusiastic about that clause.

These are interesting findings because many feared in 1982 that the Charter would lead to the invalidation of a significant number of legislations that stroke at the heart of Quebec's identity. The invalidation of the so-called 'Quebec clause' in 1983 went almost unnoticed, as it was widely expected, and because Lévesque

10 *Débats de l'Assemblée nationale du Québec*, (my translation). Website of Québec's National Assembly, (http://www.assnat.qc.ca/fra/Publications/debats/journal/ch/020417.htm#_Toc_6903345), October 12, 2007.

himself had expressed sympathy for that idea earlier. However, when the Supreme Court struck down the prohibition on English signs in 1988, public concern led to the immediate adoption by the National Assembly of a law that derogated from the decision. Yet five years later, when the time came to re-enact this derogation, the Bourassa government chose not to do so, in view of a previous ruling by a human rights committee of the United Nations that such a law was excessive. Further, the government chose to accept the approach that had been suggested by the Supreme Court, that French be predominant on signs. Significantly, his successors from the Parti Québécois have never returned to the *status quo ante*, despite strong pressures from within to do so.

Twenty-five years after the passage of the Constitution Act, 1982, Quebecers remain bitterly divided on their constitutional future, and there is no end in sight. In this kind of context, it can be expected that emotions lead many, on all sides, to overlook the historical record. Ernest Renan once famously stated that the progress of historical knowledge is dangerous for a nation. I remain of the view that no nation gains very much through historical amnesia.

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