

"A CONSTITUTIONAL CONFERENCE ... SHALL BE CONVENED ...": LIVING WITH CONSTITUTIONAL PROMISES

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...our period is obsessed with the desire to forget, and it is to fulfill that desire that it gives over to the demon of speed.

Milan Kundera, *Slowness* (1995)

THE JUNE 1996 FIRST MINISTERS' MEETING

The First Ministers' Meeting held in June 1996 was neither auspicious in conception nor of great consequence in result. It is difficult to pinpoint the reason for it being held. One of the reasons given in the February 1966 Throne Speech was to allow first ministers to consider the new blueprint for federal-provincial co-ordination over social programs that had been devised by provincial ministers responsible for social services.¹ But the proposed shift from conducting federal-provincial relations through the spending power to a system involving intergovernmental consent will inevitably be slow to develop and, as might have been predicted, it was impossible to discern the contribution that June's meeting made to this process.

It is probable that the real reason for the Prime Minister overcoming his apparent antipathy to meeting with premiers may be found in the quiet release of the agenda for the meeting. It was announced that a very short period would be dedicated to a discussion of Canada's process for constitutional amendment. At first glance, the topic— and the time allocated for it — seem bizarre elements in the meeting's planning. Nothing raises such fundamental questions about a nation's understanding of its basic structures and its statecraft values than its procedure for constitutional amendment. The process for obtaining consent about how governmental power is to be organized, divided and constrained will reflect a nation's defining categories and divisions. Changing the process requires both deep

and widespread national consideration and a firm grasp of which communities of interest are foundational.

Such conditions — the conditions of "high politics" — were manifestly absent last June. It is true that the period since the Quebec referendum in late October 1995 contained a number of constitutional flashpoints. For example, there was the federal government's sub-constitutional tampering with both the amending rules² and recognition of Quebec as a distinct society.³ This was followed by its speculation over the need for extraordinary majorities in secession votes and, then, the possibility of conditioning Quebec's secession on partition of the province. However, no national discussion over how best to structure national consent for constitutional change was initiated in this period. Not only is the topic seemingly beyond the intellectual aspirations of national leaders, it is widely sensed that the topic would prove destructive to whatever spirit of unity exists within Canada. Furthermore, the disinterest of the current Quebec government in reforming any Canadian institution, including its amending formula, makes discussion about changing the constitutional amending rules an exercise that cannot lead to realization.

Yet the constitutional amending process was on the agenda and was possibly the real reason for convening the first ministers. As Prime Minister Chretien said at the press conference following the First Ministers' Meeting: "...to satisfy the legal advice I had received, it was on the agenda."⁴ The legal advice given to the Prime Minister was that he was obliged to convene a constitutional conference by mid-April 1997 to discuss

¹ Canada, *H.C. Debates* (27 February 1996) at 5.

² Constitutional Amendments Act, S.C. 1996, c.1.

³ Motion for Recognition of Quebec as a Distinct Society, found at Canada, *H.C. Debates* (29 November 1995) at 16971 adopted at Canada, *H.C. Debates* (11 December 1995) at 17536.

⁴ Transcript of Press Conference with the Rt. Hon. J. Chrétien, Prime Minister of Canada, Ottawa, June 21, 1996, 7.

constitutional amending rules. Section 49 of the Constitution Act, 1982 states:

A constitutional conference composed of the Prime Minister and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.

The "Part" referred to in this section is Part V of the 1982 Constitution which is entitled "Procedure for Amending Constitution of Canada."

The Prime Minister evidently wished to avoid holding anything so grand — and so visible — as a constitutional conference. A conference of that sort would trigger demands for participation by leaders of national aboriginal organizations, could interfere with the timing of the next federal general election, would generate unrealizable expectations of constitutional reform, would open the door to Quebec political leaders claiming that constitutional politics is in disarray and would buttress allegations that the conference's failure demonstrated that constitutional adjustment is not possible. The Prime Minister was, therefore, in the uncomfortable position of receiving legal advice that the constitutional obligation to hold a conference on the amending formula by April 1997 had not been satisfied while at the same time not wishing to engage in any serious way in constitutional politics. The expedient adopted was to convene a first ministers' conference for other, less volatile, reasons and, in the course of that meeting, satisfy the section 49 obligation.

As it happened, only a few minutes were given to the matter of the constitutional amending process at the meeting of first ministers. The discussion seems to have consisted of several comments from premiers directed to stopping any such review before it began. Nevertheless, at the press conference following the meeting, the Prime Minister declared that the constitutional obligation had been satisfied.⁵ What is not at all clear from the Prime Minister's statement is why he felt that the section 49 obligation to review Part V of the Constitution Act, 1982 was satisfied by a session consisting of a handful of comments that took only minutes. Clearly no review of the provisions of Part V was actually conducted. There are three possible bases for the Prime Minister's declaration. First, he may have believed that the heart of the section 49 obligation is the convening of a meeting to conduct a review and is not the actual process of reviewing the provisions of Part V. Second, he may have believed that since

Premier Bouchard of Quebec left the first ministers' session as soon as this agenda item came up, the review could not take place; the constitutional obligation was, in effect, frustrated. Indeed, in his post-meeting statement, Prime Minister Chretien said: "[The discussion] was necessarily very short because as we need unanimity, already when we started to talk about it, Mr Bouchard quit."⁶ Third, some premiers took the view both before the first ministers assembled, and at the meeting in Ottawa, that the review mandated by section 49 had been satisfied by the discussions about changes to the amendment formula during the 1992 constitutional reform process that resulted in the Charlottetown Accord.⁷

None of these explanations for the Prime Minister's conclusion that "the obligation had been discharged" is convincing. The essential commitment made in Section 49 is to review the operation of Part V. The section's most obvious reading is that a meeting must be convened at which a review takes place. The obligation cannot be met through calling a meeting and then not conducting it. Likewise, the decision by one or more premiers not to participate can neither excuse the constitutional obligation on the others to conduct a review, nor block proceedings that are designed to satisfy that obligation. The logical way to read section 49 is that the convening be directed to all premiers and that the meeting that results from that convening (with or without every first minister) shall engage in a review of the provisions of Part V. Finally, if the Prime Minister's legal advisors decided in early 1996 that section 49 had not been satisfied, the claim by two or more premiers that it had been met in 1992 should not alter that underlying legal assessment. Of course, legal opinion can change on the basis of new argument but there is no indication that federal legal officers altered their opinion, or were even consulted before the Prime Minister made his statement. Rather, in the face of some provincial opposition, he chose to ignore the advice he received. In any event, the historical record of 1992 constitutional meetings, of which only two were meetings of first ministers (held in late August, 1992 in Ottawa and Charlottetown), does not disclose a review of the provisions of Part V but, rather, the introduction of new amending provisions in response to specific political concerns.

THE ORIGINS OF SECTION 49

Section 49 calls for a review of the provisions of only Part V of the 1982 Constitution. That Part contains formulae for eight different amending contexts. (The

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.* at 15-16.

Part is not, however, exhaustive of the Constitution's amending rules; Part II of the 1982 Constitution created further standards with respect to amendments that relate to the constitutional interests of Aboriginal peoples.) It is the complexity of Part V and the nature of the political compromises that went into its construction that allows one to see the underlying purpose of section 49.

The framers of Part V sought to reconcile seemingly competing goals. They wished to remove the privileged position of some large provinces through not granting any specific province, or provinces, the capacity to veto constitutional amendments. They also tried to meet the historic aspiration of Canadian federalism not to allow national majorities to weaken or eradicate provincial powers vital to sustaining the essential character of minority communities, especially Quebec. An amending plan that achieved the first purpose, and went a long way to guaranteeing provincial integrity was unveiled in April 1981 by eight provinces⁸ — the eight provinces that were opposed to Prime Minister Trudeau's plan to have the Canadian constitution amended by the U.K. Parliament on the basis of a unilateral request from Ottawa. In the provinces' plan amendments could be effected by the consent of any seven provinces with a combined population representing a majority of Canadians. In this way the plan realized the values of federalism and democracy. In order to capture the added element of protecting the vital interests of individual provincial communities, the amending process also allowed provinces to opt out of amendments that would erode provincial powers and proprietary rights. A further device for protecting essential provincial interests in national arrangements was the introduction of a list of matters that would require the approval of all provinces as well as approval at the federal level. Also included were other rules concerning time limits, bilateral amendments, unilateral amendments, overcoming the opposition of the Senate to an amendment and the matter of making compensation to provinces that opt out of constitutional amendments.

This amending scheme was the one adopted by the Prime Minister and premiers of nine provinces in Ottawa on November 5, 1981 and which came into force on patriation on April 17, 1982. During the time this proposal was being developed by the eight provinces opposed to unilateral patriation a number of

serious concerns were raised. In fact, the level of disagreement among the representatives of the eight governments over the terms of the amending formula was very high. Some provinces felt that abandonment of an amending formula based on the Victoria formula (that is, a formula that required the consent of Ontario, Quebec, two Atlantic provinces and two Western provinces, as well as federal approval) was a serious mistake because it denied the defining historic saliences of the Canadian federation. Some provinces were also alarmed at the implications for national politics, as well as for the structure and operation of Parliament, of permitting provinces to opt out of constitutional amendments. It seems to have been in light of these misgivings that the March 16, 1981 draft of the provincial amending plan (prepared following a meeting of the eight provinces in Montreal on March 13) contained an early version of what is now section 49. The record of conflict strongly suggests that the idea of a fifteen year review was included in order to provide comfort to those who were in substantial opposition to the basic structure of the provincial patriation plan. In other words, a constitutionally mandated review was an element of the inter-provincial deal over the terms of patriation and, then, of the federal-provincial agreement that was reached in November.

The amending rules contained in Part V were not, of course, part of the federal government's plan of patriation introduced in October 1980 and, therefore, they were not part of the extensive review process conducted by the Joint Parliamentary Committee on the Constitution in late 1980 and early 1981. The current form of Part V did, however, become part of the patriation plan following the November 1981 First Ministers' Conference and, as such, was debated in the House of Commons in late November. Although there seems to be no specific reference to section 49 in this debate, concerns over the complex amending rules form a major portion of that debate; it is clear that there were significant misgivings about the terms of Part V. The chief of these concerns was the failure to include in the amending process a veto for Quebec and, consequently, the abandonment of the idea that constitutional development should reflect the bi-national origins of Canada. Again, there were also concerns over the cost to national integrity of allowing opting out of some constitutional amendments and over the granting of federal compensation to provinces that opt out of amendments.

What this legislative record demonstrates is that the section 49 review seems to have been inserted into the amending provisions to provide a level of comfort to those who were minded to think that the plan the eight provinces endorsed in April, 1981 was misguided —

⁸ See R. Romanow, J. Whyte & H. Leeson, *Canada ... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at 129-131; R. Sheppard & M. Valpy, *The National Deal: The Fight for a Canadian Constitution* (Toronto: Fleet Books, 1982) at 174-196.

that it was, in fact, out-of-step with fundamental values of the Canadian state and would, in time, damage the process of national self-determination. The comfort of section 49, slight as it was from the perspective of 1981, was rendered meaningless by the 1996 political decision not to conduct any review at all of how Part V has operated and what problems have arisen in its application.

It is not as if the first ministers of 1996 could sensibly conclude that the experience of the past fourteen years has revealed no problems. On the contrary, there has been a considerable degree of doubt about the meaning and appropriateness of the 1982 rules. There has been confusion over the operation of how the time limits should apply to complex amendments involving elements that require unanimous consent and elements that require the consent of seven provinces with fifty percent of the national population. There has been unresolved debate over whether amendments that affect one or more, but not all, provinces but which do not amend existing constitutional provisions fall within the regime created for bilateral constitutional amendments. Following the making of the Meech Lake Accord and, again, during the process leading to the Charlottetown Accord, the territories have raised questions over the fairness of the rules for creating new provinces. Meanwhile, Quebec has suggested that the rules for creating new provinces do not adequately protect its interests. Quebec has campaigned to make the rules relating to federal compensation to provinces that opt out of amendments more generous. The absence of a Quebec veto over all amendments has been a constant grievance, so much so that the federal government has put into effect a legislatively-based Quebec veto (albeit, perhaps, a veto that can be side-stepped). Proposals to expand the range of Quebec's veto power through expanding the list of constitutional matters requiring unanimous consent for amendment also have been repeatedly advanced.

Although attempting to conduct a review of Part V's provisions prior to April 1997 may have proven to be politically foolhardy, it must be admitted that the years since patriation have done nothing but confirm the framers' sense that a period of experience under the 1982 amending formula would disclose a number of amendment issues deserving of careful reconsideration. Both the 1981 history of constitution-making and the history of constitutional politics since then provide support for the claims that section 49 was grounded in political agreements and anticipated genuine political needs. Neither the agreements of the past nor the needs of the present were satisfied at the July 1996 First Ministers' Meeting.

SECTION 49'S REQUIREMENTS

The phrases of section 49 that bear most significantly on its interpretation are "within fifteen years after this Part comes into force" and "to review the provisions of this Part." The first phrase reveals that the review is meant to be based on experience under the Part V amending process. Identifying fifteen years as the time frame for review can be compared with the requirement in the now spent section 37 of the Constitution Act, 1982 which required that a constitutional conference on "constitutional matters that directly affect the aboriginal peoples of Canada" be held within one year of the new constitution coming into force. This provision discloses an intention to postpone a difficult issue but, at the same time, guarantee that the topic will receive early attention. The fifteen year time-frame in section 49 is clearly not motivated by ideas about when time and patience should be found to address a difficult political matter. The section is not written with the interests of the political agents in mind but rather with a view to when the topic will be ripe for consideration. The only plausible reason for selecting the lengthy period of fifteen years before the review must be held is that it was hoped that actual experience under the amending rules would serve to clarify what adjustments need to be made. Section 49 was written in the context of misgiving about the amendment provisions and a review was ordered at a point at which experience would prove to be a better guide to refinement than would debate and abstract thought. In other words, from the perspective of statutory interpretation, the "fifteen year" provision expresses the clear intention that first ministers base their review on careful consideration of political experience. In this way, section 49 calls for scrupulous assessment of the past and careful deliberation about the lessons to be learned. First Ministers attending the June 1996 meeting seemed neither to prepare themselves for, nor did they conduct, such a review.

The phrase "to review the provisions of this Part" also suggest procedural minima. In a word, it suggests that First Ministers are obliged to be *comprehensive*. The section requires, first, that there be a review (that is, that consideration be given to both the text and experience by the meeting's participants) and, second, that all of the Part's provisions — or elements — be considered. The context in which the section was framed, adopted, resolved and, finally, enacted reveals the sense that at some future time a critical assessment of the whole Part — all of its provisions — be undertaken by the leaders of Canada's governments.

These are not strained readings of the section. They are, in truth, merely ordinary readings — the readings

adopted by the Prime Minister's legal advisers and then abandoned under the pressure from premiers and, it seems, from a deep fear of substantive constitutional debate.

One question remains. Was the requirement of section 49 met during the process leading to the Charlottetown Accord? Of course, it would have been permissible for officials to have conducted the sort of comprehensive review that section 49 calls for and have had first ministers meet simply to adopt the work of officials and endorse their assessments. For this reason, the fact that First Ministers did not review the provisions of Part V at the August 1992 Ottawa and Charlottetown meetings is not conclusive proof that a section 49 did not take place in 1992.

However, what is clear is that the changes that were proposed for the provision of Part V were changes that specific parties brought to the pre-Charlottetown meetings and were brought into discussion not as a matter of comprehensive review but as a matter of promoting specific interests. The Accord included two amendments which were part of the reform program of the federalist Liberal government of Quebec. It guaranteed compensation to provinces from Canada in respect of all changes to the constitution which erode provincial powers or proprietary rights and from which the province has opted out.⁹ Second, it added to the list of matters requiring unanimous provincial consent.¹⁰ Chief among these items, however, was not a Quebec sensitive matter but, rather, the restriction on any amendments relating to the Senate, except by unanimous consent, once the elaborate set of Senate amendments contained in the Charlottetown Accord came into effect.

There were also changes to the rule for making new provinces (in response to an intense lobbying effort by the Yukon and Northwest Territories)¹¹ and the addition to Part V of the requirement that amendments directly referring to Aboriginal peoples not be proclaimed until the consent of Aboriginal peoples is obtained¹² (as part of a complete set of constitutional provisions obtained through the efforts of national Aboriginal organizations to enhance the rights of Aboriginal peoples).

In the absence of any public record of a section 49 meeting being initiated or convened it is simply not convincing that because three aspects of the Part V amending package were changed, and one aspect added, that the first ministers, or their officials, actually conducted a section 49 review. This is especially so when every one of the Charlottetown proposals for altering Part V is an adjunct of the promotion of provincial, regional and special interests.

CONCLUSION

Prime Minister Chretien may have made the right political calculation about how to handle the outstanding constitutional obligation presented by section 49. What is clear is that the strategy which, at the end of the day, he adopted was not one which paid due respect to constitutional memory. Nor is it a strategy that expressed any confidence in the constitution process as a means for exploring the nature of the Canadian state, for identifying the deficiencies of our past exercises of statecraft and for discovering new senses of how our basic ordering might be conducted. While it may be correct to suspect that critical reflection and a common search for new methods for expressing national self-determination would have bogged down in narrow self-interest and proven to be destructive, the fact remains, the Prime Minister acceded to a reading of the text and of history that has denied Canadians an opportunity to think critically and creatively about how best to structure constitutional foundations. Denying both the relevance of our history and confidence in our will to conduct ourselves as a self-determining nation seem to be impoverished ways to conduct national renewal.□

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⁹ Draft Legal Text based on Charlottetown Accord of August 28, 1992, (October 9, 1992), s.32 amending *Constitution Act, 1982*, s.40.

¹⁰ *Ibid.*, section 32, amending ss.41 and 42, *Constitution Act, 1982*.

¹¹ *Ibid.*, section 32, adding section 42.1, *Constitution Act, 1982*.

¹² *Ibid.*, section 33 adding section 45.1, *Constitution Act, 1982*.