Reforming the Constitution: Part III

The Case Against the Accord

This is a slightly edited version of a brief presented to the Special Joint Committee on the Constitution. For the complete transcript see Proceedings of Minutes and Evidence of the Special Joint Committee on the Constitution, No 2, August 11, 1987. Ramsay Cook is a professor in the Department of History at York University.

The proposed Constitutional accord of 1987, if implemented, would alter the Canadian Constitution radically and fundamentally in at least two respects:

For the first time since 1967 specific constitutional amendments are proposed which reduce the powers of the federal government. These include provincial participation in appointments to the Senate the Supreme Court and a significant, if ambiguous, limitation on the so-called "spending power" of the federal government. The doctrine of provincial sovereignty, so vigorously rejected in 1867 and since, has gained increased recognition in this proposal.

For the first time since 1867 one province is recognized as occupying a different, special status in the Canadian federal system. Making Québec a "distinct society" though the term is undefined, clearly implies that it is *une province pas comme les autres*. This, too, represents a radical departure from the past understanding of Canadian federalism, one in which all provinces were equal in constitutional power (i.e. the same division of powers existed between the federal government and each of the provinces), even though differences among the provinces were sometimes recognized in the formulation of certain policies.

That these proposed changes imply a radical revision of our federal system is an argument neither supporting the proposals nor against them. It is merely to say that they are not merely cosmetic and should be examined thoroughly and deliberately before they are adopted. To change them after their adoption will prove as difficult - or nearly - as changing the laws of the Medes and the Persians.

It is important to establish at the outset that these proposals should be considered on their *constitutional* merits alone, and not on grounds that they may or may not achieve some extra-constitutional or political objective. By this I mean that the only justification for these proposals must be that they improve Canada's constitution. It cannot be that they will "bring Québec into the constitution". As is well enough understood, Québec has never been outside the constitution though it has been unhappy about some of its provisions. Québec's acceptance of these proposals does not make them either good or bad in a constitutional sense; nor does it demonstrate that these are the only proposals that would remove Québec's dissatisfaction. To criticize these proposals, then, cannot be represented as being "anti-Québec" or even less anti-French Canadian. In my criticisms it is my desire to make suggestions that would improve that constitutional accord for all Canadians and that would improve the constitutional accord for all Canadians and that certainly includes the people who live in Québec. That surely is also the goal of a Joint Committee of the Parliament of Canada, a body which represents the national interest of all Canadians. Though there are several sections of the 1987 constitutional accord which I believe could be improved. I wish, respectfully, to draw the Committee's attention to two sections - namely Section 2, subsections 1-4, and Section 16, which seem especially in need of attention.

The proposed 1987 constitutional accord gives "recognition that Québec constitutes within Canada a distinct society" and then affirms "the role of the Legislature and Government of Quebec to preserve and promote the distinct identity of Quebec".

The problem with this declaration is not what is said, but what is left unsaid: what does the term "distinct society" which is apparently interchangeable with the even vaguer term "distinct identity", mean? These are not legal or constitutional terms, but rather sociological and psychological terms. If the courts are to interpret these sociological and psychological terms, surely the authors of the terms should supply the courts with definition of what is intended.

In a sense, of course, each Canadian province is a "distinct society". Otherwise we would have a unitary rather than a federal system of government. Since 1867 Québec's distinctiveness has been recognized in a number of specifically defined ways, most notably in its civil code and its bilingual character. If that distinctiveness goes beyond what is already provided for, then the nature of that distinctiveness should set out as clearly now as it was in 1867. Does preserving and protecting that "distinct society" include a role in international affairs denied other provinces, as it will include a role in immigration policy? Does it imply manpower or child care policies different from other provinces? Could it imply a special role in making economic policy? Could the civil liberties that Quebeckers now enjoy as Canadians be modified to distinguish Quebeckers from other Canadians? (Given the content of Section 16 of the 1987 accord, this is more than an academic question.) Finally, could successive challenges to federal powers under the claim of preserving and promoting Quebec's distinctiveness lead, though *étapisme*, to a very special status for Quebec? Given the opting out provision s established in Section 106 a (1), this seems a legitimate concern. I would remind the members of the Committee that the former premier Québec, M. René Lévesque, whose party was committed to a form of special status known as sovereignty-association, wrote in his recently published Memoirs that: "For Québec, which in all likelihood would have to use it more than other, the exercise of the opting out provision should be made as easily as possible. This way, I speculated, might we not, little by little, be able to build the associate state we had been refused?" (325). It was, of course, his fellow Quebeckers who, in the 1980 referendum, had refused that "associate state."

By failing to define clearly the terms "distinct society" and "distinct identity", the proposed constitutional accord, instead of resolving the sensitive issue of Québec's place in the Canadian federal system, only opens that question to further claims and counter claims about

the meaning of terms which as they stand are at best calculated ambiguities, at worst a long, irreversible step into a quagmire. Quebeckers, and all other Canadians, need a precise definition of that province's place in our constitution before any sensible judgement of this constitutional accord can be made.

I, therefore, respectfully urge the Committee to recommend that this accord not be approved until a definition of the content and limits of the terms "distinct society" and "distinct identity" are agreed to the Conference of First Ministers.

I would also urge the Committee to recommend that, if definition proves impossible, these general declaratory statements about the sociological composition of Canada be placed in the preamble to the constitution.

While the Legislature and Government of Québec are given the role "to preserve and promote" Québec's "distinct identity", the Parliament of Canada and the provincial legislatures (no mention of any role for governments in this instance) are called upon to "preserve" what is described as "the fundamental characteristic of Canada", namely the existence of French and English-speaking Canadians in Canada. The difference in terminology is highly regrettable. It suggests that while Québec is expected to encourage and develop its "distinct identity", nothing is required of the federal parliament or the provincial legislature other than the preservation of the status quo so far as their linguistic minorities are concerned. Surely the historical record demonstrates conclusively that unless the Francophone minorities outside of Québec are "promoted", there will be little to "preserve". While the condition of the English-speaking minority in Québec has normally been more secure, it too may need some promotion if Quebec's "distinct identity" turns out to be a code word for the Francophone majority.

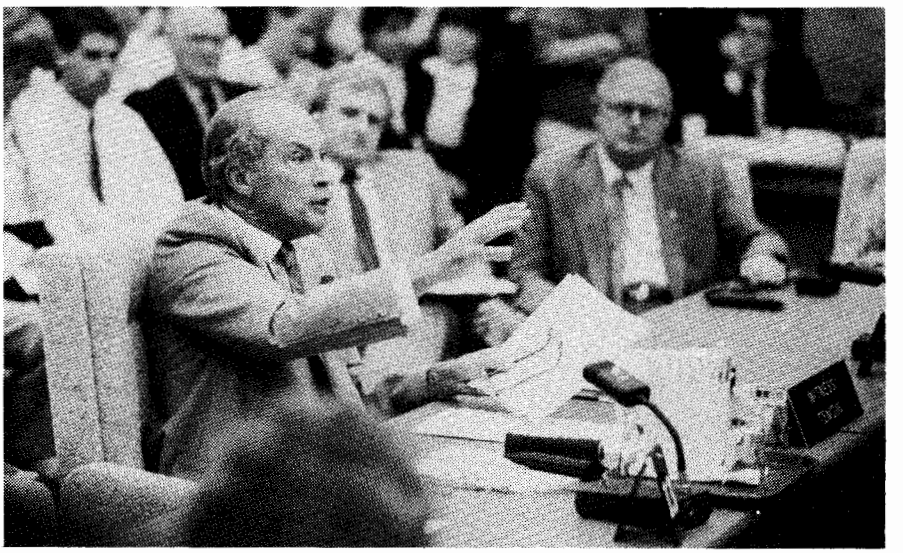
I would therefore respectfully urge the Committee to recommend that Section 2 (2) be amended to read "to preserve and promote".

The proposed constitutional accord, in my opinion, provides a serious possibility for judicial conflict between the "fundamental characteristic of Canada" and the "distinct society" of Québec - though this potentiality would be reduced if the latter term were defined. Which of these two terms takes precedence? Surely this should not be left to the courts to decide. I would therefore submit that the Committee should recommend the addition of a clause to the accord stating that in cases of conflict "fundamental" takes precedence over "distinct", thus making clear that the whole is more than the sum of its parts.

These last two recommendations, I submit, are necessary to ensure the future of what most Canadians now accept: the rights of the French and English-speaking minorities to equal treatment throughout Canada. It is, after all, minority rights that need protection; majorities take care of themselves. That axiom should be firmly entrenched in the Constitutional accord of 1987.

Section 16 of the 1987 Constitutional accord was obviously included to calm the justified fears of aboriginal Canadians and those whose linguistic heritage is neither English nor French about the implications of Section 2 of the accord. But the implication now exists that *only* Section 25 or 27 of the *Canadian Charter of Human Rights and Freedoms*, Section 35 of the *Constitution Act, 1982*, or class 24 of Section 91 of the *Constitution Act, 1967*, are free of restrictive interpretation. That freedom of speech, assembly, press, religion, the right of *habeas corpus* or sexual equality should be limited by the fundamental characteristic or the "distinct society" clause is, it seems to me, unacceptable.

I therefore submit that the Committee recommend that Section 16 of the 1987 Constitutional Accord be deleted. Constitutions, though they are rarely made for all eternity - or even for a 1000 years - are certainly best when designed to *la longue duré*. Unlike ordinary legislation constitutions can only, and should only, be changed, after careful deliberation and by unusual procedures. Haste is the enemy of good constitution-making. Moreover, it is especially important that in a modern democracy every opportunity be given to the people themselves to understand, debate and approve their fundamental law. Since none of the federal political parties can claim a mandate for such radical constitutional change as is implied in the Constitutional accord of 1987 I therefore strongly urge that this Committee recommend to Parliament that this accord not be implemented until the people of Canada have given it their approval in either a federal general election or a national referendum.



Another witness to oppose the Accord was former Prime Minister Pierre E.Trudeau (J.M. Carisse).