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# ***A "Push-pull" Plan For A Flexible Canadian Federalism***

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by Errol P. Mendes

*Driven by a large consensus in Quebec, at least among francophones, that the time has come for some sort of sovereignty, Canada will soon have to restructure its confederation bargain. For those in Quebec and elsewhere who believe in a Canadian confederation which includes Quebec, the Herculean task is to devise a restructured constitutional framework to allow Quebec to "push" away from Canada at this time, but then also to devise institutional structures which will in the future entice Quebec to "pull" towards Canada. English-speaking Canada will only become interested in such an enterprise if the institutional reforms are also beneficial to the various regional aspirations in the rest of the country. This article argues that federal institutions and processes must reflect certain new political principles that have emerged in Canada.*

**I**f a new Confederation is ever to arise from the ruins of the present one, there must be a coincidence of interests between Quebec and the various other regions in their search for security. With this goal in mind, I suggest the following proposal for a revised federalism and the means by which to achieve it.

First the federal government should begin to enumerate all federal powers that it considers essential for the country to be regarded as one, albeit considerably decentralized political unit, with national standards in various essential areas of jurisdiction. Section 91 of the *Constitution Act, 1867* should not be regarded as such a list because we exist in a different political reality today. The essential powers of the federal government may be

those which have been used to give Canada a distinctive identity and personality.

Second, the provinces and the federal government should attempt to agree that all provinces have what I call "sovereign capacity". This means that any province should have the capacity to repatriate any or all of the essential federal powers described above. This will guarantee equality of treatment between Quebec and other provinces. Furthermore provinces should be able to repatriate such powers through popular referendum. Depending on the percentage of powers that are repatriated, transfer payments from the federal government will be cut by the same percentage amount, and a proportionate amount of federal taxing room will also be moved over to such repatriating provinces. The western provincial governments are already demanding such an arrangement in the areas of health and post-secondary education, although I suspect the people of these provinces would reject such a move if put to a referendum.

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Third, federal seats in the House of Commons should also be cut according to the percentage of essential powers repatriated by a province. Referendums held to determine repatriation of federal powers should be done on the basis of federal constituencies. Those ridings with the highest vote for repatriation would lose their federal members until the requisite percentage is reached.

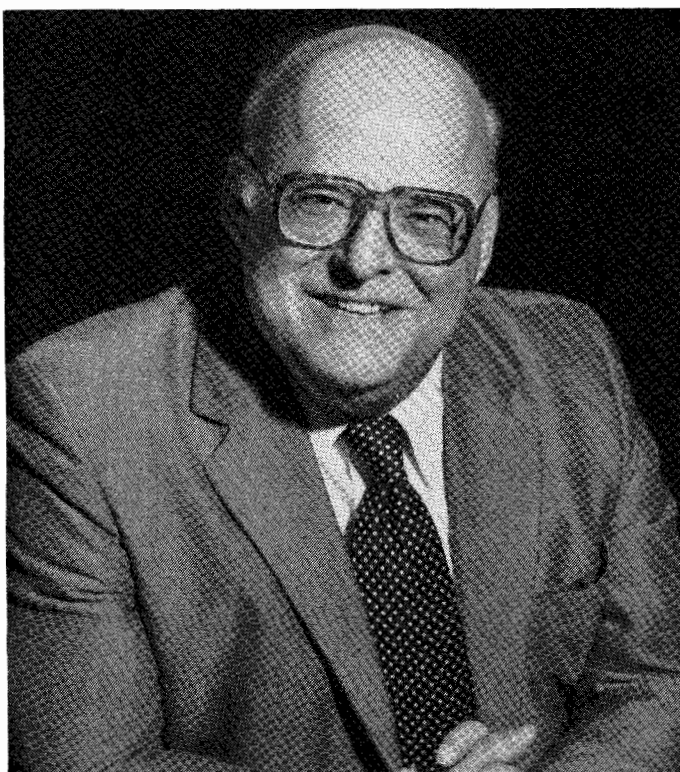
If a repatriating province opts for complete separation, repayment of that province's share of the federal debt should be amortized over time. Payment should take the form of continued payment of federal taxes. If only a limited number of powers are repatriated, the appropriate federal taxing room will be shifted over to the province, with a proportionate reduction in federal transfer payments to the province. There will be a sizeable financial incentive not to opt for complete sovereignty or to demand repatriation of powers not necessary for the protection of the vital interests of a particular province.

Fourth, the Senate should be abolished, and replaced by a Council of the Canadian Economic Union. An equal number of representatives of the Council should be elected by the Legislatures of each province, including Quebec. The Yukon and the Northwest Territories should also have representatives. There should also be

representatives of the First Nations of Canada in the Council. The Council should have a suspensive veto over all legislation. If three-quarters of the members of any of the six regions of Canada vote against any legislation, a Commons-Council conference must take place. Representatives of a province in the Council should be permitted to only vote on legislation, the subject-matter of which has not been repatriated by that province. The six regions for the purposes of the permanent veto should be as follows:

1. Pacific Canada (British Columbia)
2. Western Canada (Alberta, Saskatchewan and Manitoba)
3. Ontario
4. Quebec
5. Atlantic Canada (Nova Scotia, New Brunswick, Newfoundland, Prince Edward Island)
6. Northern Canada (Yukon and Northwest Territories)

Any legislation which involves the vital interests of the First Nations of Canada, should have the consent of at least three-quarters of the First Nations' representatives. The Council should vote to designate any legislation as



The task of determining whether a new amending formula is necessary has been confided to a Joint Committee chaired by Senator Gerald Beaudouin (left) and Jim Edwards MP.

being of "vital interest" to the First Nations on a motion for such designation by three-quarters of the First Nations' representatives.

The Council should also have responsibility to recommend to the Commons measures to dismantle all trade, investment and services barriers within the Economic Union of Canada. The representatives of the six regions of Canada should also have responsibility for proposing measures to the Commons for regional industrial policies and economic development. Similarly, the Council should be responsible for proposing national industrial policies to promote Canadian global competitiveness. A secretariat, called the Canadian Economic Commission, should be attached to the Council.

*Any province should be able to reverse a previous decision to repatriate powers by another popular referendum and become fully integrated back into Canadian confederation, with full restoration of Commons representation and federal transfer payments.*

This, in essence, is a blueprint for implementing a "push-pull" restructuring of Canadian federalism. It gives Quebec the sense of and potential for sovereignty, while giving it every incentive to remain in Canada voluntarily and become involved in the "superstructure" of a new Canadian confederation. At the same time, the above restructuring of confederation will draw all of the regions and the First Nations into a framework for economic and political co-operation on the basis of mutual interest and benefit.

#### The Means and the End

Having described a new form of Canadian federalism let me now turn to the question of how this could be done. The first step is adoption of a new process for amending the constitution.

With the demise of the Meech Lake Accord a vacuum exists because our constitutional amendment procedure is no longer functioning. Reforms in areas critical to the political and even economic life of the country are suspended, until Quebec is willing to come back to the constitutional table. These areas include Senate reform; First Nations self-government and other aboriginal

claims; constitutional clarification of the resolution of conflicts between the collective rights of the francophone majority in Quebec and the individual rights of all residents in Quebec under the Canadian Charter of Rights; jurisdictional conflicts and power-sharing in the vital financial and telecommunication sectors; devolution of jurisdiction in the areas of immigration, refugees and manpower training; the dismantling of barriers to trade in goods, services and capital between provinces; harmonizing government procurement policies and more generally setting the constitutional framework for Canada to compete more effectively in the global economy. Tied up with this last issue, is the potential linkage of the debt-load of the federal government, equality of treatment between provinces as regards federal transfer payments and the transfer of federal powers to Quebec and other provinces.

In the absence of a working constitutional amending process, all provinces, and Quebec in particular will seek to advance their interests in the above-mentioned areas through bilateral negotiations with the federal government leading to administrative agreements for power-sharing. Quebec has already initiated this process in the area of immigration selection and settlement. At least one other province has stated that it would ask for similar treatment as regards any transfer or powers that Quebec receives. Such a situation, is a certain recipe for the slow disintegration of the Canadian federation, both in reality and in spirit.

*We may not be able to head-off the looming crisis, but we must be politically and intellectually prepared to take on a leadership role in an attempt to either avoid it through creative solutions, or to at least prepare for the consequences to Canada once it is mired deep in crisis.*

The issues that must be addressed are the ones which precipitated the present constitutional vacuum. Even if it is still possible to obtain constitutional change for those amendments stipulated in sections 38 and 42 of the *Constitution Act, 1982*, requiring the consent of the Canadian Parliament and seven provinces representing 50% of the population, without Quebec's presence at the constitutional table such changes would not be politically feasible. Moreover the important changes requiring unanimous consent as stipulated in section 41 of the

*Constitution Act, 1982*, such as changes to the composition of the Supreme Court and changes to the amending procedures itself, are now legally impossible without the participation of Quebec. In addition, there was widespread dissatisfaction with the perceived private and exclusive nature of the last two rounds of constitutional negotiations.

The Joint Committee of the House of Commons and Senate has the unenviable goal of coming up with a new set of amending formulas and procedures which could be acceptable to Quebec and the rest of the country. One must question whether a new amending formula is possible in the present context. Perhaps we should investigate whether an alternative implementing procedure exists that would be so attractive that all the provinces would be willing to take a leap of faith to try it out. In recent statements, the Minister of Intergovernmental Affairs of Quebec has not ruled out the possibility of the other provinces and the federal government working out a possible amending formula which Quebec would look at without coming to the constitutional bargaining table, and then decide whether to accept or reject, thus providing or denying the necessary unanimous consent.

I believe there is a possibility that an alternative implementing formula can be crafted which would be acceptable to Quebec and the rest of the country and the following are some preliminary ideas as to the content of such an alternative.

I do not believe that unanimous consent can be obtained to change what areas need unanimous consent to be amended, and what areas can be changed by the so called "7/50" formula under sections 38 and 42 of the *Constitution Act, 1982*.

Therefore I believe we have to work with the present provisions in the constitution. Again, and with great sadness, I do not believe that unanimous consent can be obtained to shorten the three year maximum period for implementation of amendments made under the "7/50" formula under the provisions of section 39(2) of the *Constitution Act, 1982*.

I believe we must emphasize that any changes to the amending process will have as its essential rationale the promotion of democratic participation based on the principle that apart from questions of fundamental rights and freedoms the will of the majority, especially an overwhelming majority in a democracy should prevail. Any system of government can only exist if its leaders, who are charged with the responsibility to entrench the society's fundamental values, in the constitution keep their promises and bargains. Given the above analysis, the search is for an implementing formula which would

not change the present constitutional amending provisions, but add to them.

I propose adding to section 39 of the *Constitution Act*, the following provisions:

- The signing of a political accord by the first ministers for amendments under sections 38, 41 and 42 of the *Constitution Act* will bind those first ministers as individuals. This would mean that they and their administrations would be under a legal duty to do nothing to nullify or impair the binding nature of their signatures.
- If a new premier and administration is elected during the three year maximum period for implementation and the new administration wishes to cancel implementation of the political accord or rescind ratification of the accord by the provincial legislature, the administration must put such measures to a referendum in the province.
- The new administration will only have authority to cancel implementation or rescind ratification if at least fifty percent of the eligible voting population of the province vote in favour of such a measure.
- Even if a fifty percent eligible vote in favour of cancellation of implementation or rescinding of ratification of a political accord is obtained, if such a vote is at odds with the wishes of at least eighty percent of the other legislatures and the federal parliament in situations where unanimous consent is required, the amendments will still go into effect for the rest of Canada, but will not affect the dissident province(s).

The above proposed implementing formula will not by itself be sufficient for Quebec to accept. However if negotiated in conjunction with the restructuring of the entire constitution to allow provinces to "repatriate" certain powers from the federal government, with financial consequences attached, and, if necessary, to separate completely from Canada, I believe we have an opportunity to emerge from our current constitutional cul de sac. ♦