

Are Canadian divisions best resolved through constitutional means or through other means?

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2013-FEB-13

1 Which divisions?

Literally and metaphorically, Canada's constitution represents a compact between the various parties that comprise Canadian political life, including French and English Canadians, the provinces and territories, and the First Nations. Through challenges that have included rebellions, invasions, and provincial sovereignty movements, Canada's constitutional documents have been required to mediate the differences between these groups. Such examples highlight the important role of Canada's constitutional documents in maintaining national integrity; at the same time, they illustrate how the Canadian approach is rarely based on the 'resolution' of differences. Rather, Canada gets by with differences intact, despite changing economic and political circumstances. In the *Reference re Secession of Quebec*, the Supreme Court of Canada defined federalism in the Canadian context as a means to "reconcile diversity with unity".¹ This balance has been maintained partly through the content and application of Canada's constitutional documents, alongside other factors like the policies of governments at different levels and the unifying effect of adjacency to the United States.

The depth of Canada's divisions is reflected in political scholarship. Kenneth McRoberts argues that the failed attempts at constitutional reform at Charlottetown and Meech Lake represent not just a failure of negotiation, but the existence of a "profoundly different conception of political community" held by French and English Canadians.² Peter Russell goes so far as to make the provocative claim that "at Canada's founding, its people were not sovereign, and there was not even a sense that a constituent sovereign people

¹[3] section 43

²[4] p.249 McRoberts also argues that "most constitutional proposals from English Canada were framed in terms that precluded, implicitly or explicitly, the type of differentiation between Quebec and the rest of the country upon which Quebec's project rests." p.258

would have to be invented”³ and that “Canadians have not yet constituted themselves a sovereign people”.⁴ These claims may go a bit too far, especially as the Trudeau-fostered notion of Canada as a relationship between a central government and individual citizens has become widely accepted and entrenched and as the Quebecois sovereignty movement was fallen back from its 1995-era level of intensity. Still, the divisions that persist in Canadian life continue to be a defining feature of Canadian society and politics — a feature that is more amenable to management through various means than to resolution through any means, constitutional or otherwise.

2 Canada’s constitutional documents

The *British North America Act* (1867) (largely incorporated into the repatriated *Constitution Act* in 1982) is not the only document to consider when studying Canada’s constitution.⁵ Other key constitutional documents include the *Royal Proclamation of 1763*, which continues to mediate the relationship between the crown and First Nations, as re-affirmed in section 25 of the *Canadian Charter of Rights and Freedoms*. They also include the *Peace of Paris* (1763) and *Quebec Act* (1774): possibly the single most important example of the choice to mediate rather than abolish divisions, serving as what Peter Russell calls “the foundation of a regime of cultural coexistence” between English and French.⁶ Exhausted by the conflict in North America and Europe, the British conquerers chose to leave the structure of Quebecois society largely intact, including the seigniorial system of landholding and the powerful Catholic church hierarchy. This decision echoes in subsequent government policies and legislation, including the continued application of civil law in Quebec, as well as in the persistence of Quebecois identity. Thus, this initial decision to preserve much of the *status quo* in Quebec upon conquest may have ensured both the survival of Canada as an entity distinct from the United States and ensured that Canada’s polity will always be a divided one, in which difference must be managed rather than extinguished.

Canada’s federal system comprises another key division in Canadian life, as well as an important distinction between Canada’s democracy and its British predecessor. The respective powers of the federal and provincial governments have been defined by the *British North America Act* and sections 91 and 92 of the *Constitution Act*.⁷ The Supreme Court of Canada has held that Canada’s federal structure was not intended

³[2] p.33

⁴[2] p.5

⁵The *Constitution Act* was included in both official languages as schedule B of the *Canada Act*, granted Royal Assent in Britain on 29 March 1982. Notably, section 3 of the act declares the English and French versions of the text to have the same authority. See: [2] p.107-126

⁶[2] p.12

⁷See: [1] p.249

to:

weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.⁸

In the same decision, the court held that “a functioning democracy requires a continuous process of discussion” and that “our system is predicated on the faith that in the marketplace of ideas” — both concepts that support the view of Canada as a manager rather than a resolver of divisions.⁹ Like the political process of confederation itself, the division of powers between Canada’s provinces and federal government represents a compromise between the perspectives and interests of Canada’s various provinces, as well as linguistic, religious, and economic groups.¹⁰ The proper application of the division of powers has often been controversial, characterized by a back-and-forth between the levels of government as each seeks to apply their authority, with the courts in the role of interpreter. Notably, the federal government has sought to assert an expansive understanding of the powers granted to it through the ‘Peace, Order, and Good Government’ and ‘trade and commerce’ clauses of the constitution, while provinces have sought to extract maximum leverage from their assigned power over ‘property and civil rights’.¹¹

3 Non-constitution division management

Canada’s divisions are also managed to a significant degree through legislation and policy aside from the constitution. This includes the system of fiscal transfers, in which funds are transferred between provinces in order to maintain the situation in which residents of all provinces receive reasonably comparable public services while being subjected to reasonably similar levels of taxation. The division between ‘have’ and ‘have-not’ provinces is regularly mediated through this means. Similarly, the federal government plays a direct role in mitigating economic inequalities between individual citizens. It does so through the employment insurance system, the administration of the Canada Pension Plan, through tax deductions and rebates, through support for education (such as the federal student loan program, and funding provided to universities), and the direct provision of services like the postal service, national defence, transportation infrastructure, etc.

⁸[3] section 58

⁹[3] section 68

¹⁰See [2] p.28

¹¹[1] p.263

While many of these activities take place by means of non-constitutional legislation or executive policy decisions, they are nonetheless tied to Canada's constitutional structure. For instance, the commitment to equalization payments was part of the 1982 constitutional package.¹² Similarly, the constitution was amended in 1940 to grant the federal government the power to manage unemployment insurance, and in 1951 to establish old-age pensions as a joint federal and provincial power.¹³ While these activities are undertaken within Canada's constitutional framework, the degree of latitude granted to Canada's governments in determining how they should be undertaken makes them most usefully analyzed in a non-constitutional context. Deciding which level of government bears primary responsibility for an issue-area does little to determine the substantive content of the policy that will result, the objectives that will be highlighted, or the resources that will be dedicated. Furthermore, even in areas where the federal government is constitutionally barred from playing a directing role, it has considerable scope to influence policy-making by providing funds. The constitution may constrain the decisions of government — either by prohibiting certain courses of action or by mandating others — but it does not follow that all the decisions that are made within the scope of constitutional acceptability are therefore constitutional matters. Canada's federal government and provinces have considerable scope to attempt to manage or resolve divisions through the exercise of their own authority, and the study of such attempts is important for evaluating the general question of how Canada's divisions are addressed politically. Alternatively, it can be said that while an understanding of the constitutional means through which divisions are managed is necessary for a comprehensive understanding of political divisions in Canada, such an account is not sufficient to address the complexity of the question.

Canada's court system is also an important mechanism through which the divisions in Canadian society are managed.¹⁴ Through their role as interpreters of law, the courts have the power to effectively amend Canada's constitutional documents through interpretation. As Ian Greene explains: “The judicial amendment of the constitution has arguably had as much impact on the day-to-day reality of the division of powers as all the formal amendments put together”.¹⁵ The courts facilitated the patriation of the constitution and the enactment of the *Charter* through the 1981 *Reference re a Resolution to amend the Constitution*, which held that only a “substantial degree” of provincial consent was required, not unanimity.¹⁶ One key role of the courts in the post-*Charter* era is to interpret exactly how the rights contained therein constrain gov-

¹²[1] p.251

¹³[1] p.253

¹⁴Interpreted broadly, Canada's court system has included the Judicial Committee of the Imperial Privy Council, which long served as Canada's final court of appeal. Notably, the committee overturned a reference case decision of Canada's Supreme Court and determined women to be ‘persons’ for the purpose of appointment to the senate in *Edwards v. Canada (Attorney General)* (1929). See also: See [2] p.41

¹⁵[1] p.261

¹⁶See: [1] p.255, 259

ernment policy, as well as what remedy should be provided in cases where they are unacceptably breached. The courts have also played a major role in evaluating claims about the possibility of Quebecois secession, most dramatically in the 1998 *Reference re Secession of Quebec*.¹⁷ This decision went beyond the scope of the three questions about unilateral secession referred to the court by the Governor in Council, going on to discuss the history of confederation and to elaborate “four fundamental and organizing principles of the Constitution” including “federalism; democracy; constitutionalism and the rule of law; and respect for minorities”.¹⁸ The courts have also issued important decisions on the legal rights of aboriginals and the acceptability of government policies toward them.

The *Indian Act* might also be considered a form of ‘managing divisions’, albeit, one with a very problematic history and many undesirable ongoing consequences. Even prior to confederation, Canada’s various governments legislated on the treatment of aboriginal groups. For instance, the Province of Canada passed the *Gradual Civilization Act* in 1857 (“Act to Encourage the Gradual Civilization of Indian Tribes in this Province, and to Amend the Laws Relating to Indians”). Insofar as such legislation was intended to scatter and disempower aboriginal groups, it can often be considered successful.

Canada has failed to respect the promises made to aboriginal people in the constitution and in treaties. Furthermore, it has failed to provide aboriginals with treatment equivalent to non-aboriginal members of the Canadian population, perpetuating poverty, social marginalization, and other ills. The rift between aboriginal and non-aboriginal outcomes in areas like health, education, and employment may be one division that Canada can and should resolve — at least partly through the good-faith implementation of the promises made in Canada’s constitutional documents and treaties between the crown and aboriginal groups.

4 Sleeping with an elephant

Arguably, a large part of Canada’s unity and sense of identity arises from negative definition: Canada is not the United States. Concern about annexation by the United States, as well as the race for territory in the west, was one of the spurs for Confederation in 1867. Earlier, Ontario and Quebec were presented with a real opportunity to join the American Revolutionary War and sever their ties with Great Britain. Rather than do so, even the population and power structure in Quebec chose to fight to remain British.¹⁹ A convincing case can be made that this decision on the part of the Quebecois — which can itself be explained largely in terms of the settlement of the Seven Years War — was the critical choice that preserved Canada.

¹⁷See: [1] p.260-1

¹⁸[3] section 49

¹⁹[2]

Canada’s national identity continues to be defined in contrast and comparison with the United States, including in terms of a more robust government-provided social safety net, a greater willingness to intervene to reduce economic inequality, different perspectives on foreign policy and the use of force, and social legislation that is generally more progressive. Canada’s internal divisions are therefore set against the differences between Canada and the U.S., which are often perceived to be larger. Concern about Canada being able to hold out and retain its distinctiveness despite being adjacent to the American hegemon has fostered support for national institutions and undertakings, from ‘Canadian content’ media requirements to the Canadian Broadcasting Corporation to the federal ‘heritage’ department.

5 Conclusions

In the United States, the response to divisions has often been attempts at their elimination. This dramatically included the assertion of federal power over the states in the U.S. Civil War. It also includes America’s assimilationist civic identity and immigration policy. It is possible for anyone to become an American, largely by conforming themselves to a particular template of behaviour and self-identity. Canada, by contrast, is a place where English and French have largely maintained their evolving cultural identities and where immigrants are incorporated into an explicitly multicultural society.

In addition, the means of Canada’s constitutional repatriation — and the ongoing tensions between Quebec and the federal government — make constitutional amendment highly challenging (though some like Ian Greene argue that it is less challenging than Canadians now assume).²⁰ This is demonstrated by the failures at Charlottetown and Meech Lake, and by the degree to which substantial constitutional change has generally dropped from the political agenda.²¹²² Canada must continue to manage some divisions using the functional tools available, while working to close the gap on the divisions that contradict our basic values and ethical obligations (most importantly, in terms of the treatment of aboriginals). Canada also needs to manage new divisions. For instance, it will be necessary to adjudicate between those who assert an unlimited right to extract and burn fossil fuels, producing greenhouse gas pollution, and those who argue that such activity must be restricted either unilaterally or as part of an effective international agreement.²³ The means through which this can plausibly be achieved include both the more effective application of the promises

²⁰Greene highlights how relatively minor constitutional amendments have been enacted many times, before and after the *Charter*, but that “complex omnibus proposals, such as the 1982 constitutional accord and the Charlottetown Accord, are epic constitution-making events that can rarely succeed”. p.257

²¹[4] p.249, 261

²²[1] p.257

²³The obligations under consideration here likely include the sort of intergenerational duties discussed in [2] p.10

already enshrined in Canada's constitutional documents and through the reform of non-constitutional policies and legislation.

References

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- [3] Supreme Court of Canada, *Reference re the Secession of Quebec*. [1998] 2 S.C. R. 217 <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/1643/index.do>
- [4] Kenneth McRoberts, "Disagreeing on Fundamentals: English Canada and Quebec," in McRoberts and Patrick Monahan, eds, *The Charlottetown Accord, The Referendum and the Future of Canada* (Toronto: UTP, 1993)