An Attempt to Reconcile the Irreconcilable

by Greg Marchildon
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You have to respect Richards and Milner's courage in building a Plan A ship at a time when Plan B has become the vessel of choice and the destination one of preparing for national breakup. Given our constitutional failures in 1990 and 1992, and the "near-death experience" of the 1995 Quebec referendum, it would indeed be unusual if attitudes of inevitability about Quebec's secession were not ascendant. As normal as this psychological reaction is, however, it has the dangerous potential to become a self-fulfilling prophecy, fuelling the growing frustrations and misunderstandings currently dividing the two solitudes.

I agree with Richards and Milner: it is too early to write off the country. Instead, we must put our energy into finding a solution that will keep Canada together, and to do this, we must carefully examine our options. In this article, I shall review the two main recommendations of their article in terms of ends, means and underlying assumptions. I shall follow it with a critique of the means proposed.

The Quebec clause

Richards and Milner propose a constitutional Quebec clause that would give the Quebec government exclusive jurisdiction over language and culture. The objective is clear: to guarantee the Quebec government and, by extension, Quebec francophones, the legislative power to protect the French language and culture in perpetuity. Is such a guarantee necessary? Probably it is. Aware of the dismal statistics concerning linguistic assimilation of francophones outside Quebec, francophone Quebecers constantly fear for their own linguistic survival, often likening themselves to a cube of sugar within a North American cup of coffee.

I know what this means in personal terms. My ancestry is "pure laine;" my forbears were among the original settlers of New France. My paternal ancestors left Quebec immediately following the Patriotes rebellion of 1837 to help found a tiny francophone community in Ontario; subsequently, my grandfather and his younger brother came west in 1910 to establish yet another francophone community, this time in Saskatchewan. My maternal ancestors lived in Quebec from about 1660 to 1920, when my grandfather left to homestead in Saskatchewan. Those members of my paternal family who stayed within the protective womb of their community or moved back to Quebec have remained resolutely francophone, but those who moved to other parts of Canada assimilated within one generation. My paternal family, outside the protective cover of a francophone community after 1920, has now been completely assimilated.

I do not need to be convinced that strong measures are necessary, but I also know how difficult it is for non-francophones to understand Quebecers' fears, and the extent to which language policy continues to be at the core of the misunderstanding between the two solitudes. Take, for example, the conflict surrounding unilingual commercial signs. In 1977, René Lévesque's government passed Bill 101 making French the sole official language within Quebec – albeit the legislation still afforded a considerable role to English within the provincial jurisdiction. After passage of the 1982 Constitution Act it was only a matter of time before the Supreme Court of Canada would be called upon to determine whether sections of Bill 101 contravened the Charter of Rights and Freedoms.

In 1988 that happened. In December of that year, immediately after the general election, the Supreme Court ruled those provisions of Bill 101 requiring unilingual French commercial signs (Ford v. Attorney General of Quebec) violated the freedom of expression provisions (section 2(b)) of the Charter. I was living in a francophone neighbourhood of Montreal at the time, and I well remember the sentiment that decision provoked. How dare les Anglais tell us Quebecers what we could and could not do in matters of language! My roommate, a journalist, hung a sign from our balcony proclaiming the sentiments of the great majority of francophones: "Ne Touchez Pas à la Loi 101."

Five days after the Supreme Court decision, then-Premier Bourassa enacted Bill 178, a compromise that amended Bill 101 to allow bilingual signs inside, but reinstated the requirement of unilingual French signs outside. He protected Bill 178 from further court challenges by invoking the notwithstanding clause of the Charter (section 33), which allows for legislatures to override certain Charter decisions. Ironically, to the extent section 33 has allowed Quebec to preserve its language laws, Quebecers must thank the four western premiers who participated in Charter negotiations. Section 33 is present due to their insistence on preserving a measure of parliamentary supremacy.

Overriding the Supreme Court via Bill 178 prompted the resignation of three of Bourassa's English-speaking cabinet ministers, and shocked English-speaking Canadians outside Quebec. Francophone Quebec opinion was divided between those who agreed with Bourassa's compromise and those who thought he should have reinstated Bill 101 with no change. Francophone Quebecers were united in believing Bill 101 essential for the future viability of their community, that the unilingual sign provision was important as a symbol of the francophone nature of Montreal and that it imposed at most an inconvenience on anglophone Quebecers. Most non-francophones saw in it the imposition of a double standard – bilingualism in the rest of the country, and unilingualism in Quebec. To break through the two solitudes in 1988 appeared impossible. It would have required francophone Quebecers to understand that some provisions of Bill 101 were more than an inconvenience and that the Charter had assumed great symbolic importance for Canadians outside Quebec. It would have required Anglophone Canadians to understand that, with the exception of regions of New Brunswick and eastern Ontario, the rest of the country is hardly bilingual, and that outside these bilingual belts official bilingualism has not reversed linguistic assimilation.

For both Richards-Milner and proponents of "distinct society" is the assumption that the Quebec government requires more constitutional authority to respond to the inherently tough challenge of promoting and preserving French as a viable language and culture in the province. I accept this assumption, but I foresee difficulties with both of these means to the end. The Richards-Milner proposal has the advantage of addressing the central issue directly and honestly, but it does not address the problem of the limits imposed by the Charter of Rights. Any proposal that does not effectively address the Supreme Court's decisions on Bill 101 cannot solve the problem, at least not to the satisfaction of Anglophone Canadians. In addition, their proposal grants the Quebec government special powers, which makes it difficult to envision a sufficient number of provinces agreeing to the required constitutional amendment. Avoiding special powers to Quebec by granting jurisdiction over public use of language to all provinces would still not address the Charter issue, and it would evade the fundamental thesis motivating these proposals: that Quebec needs explicit cultural/linguistic jurisdiction because of its unique responsibility as the one province in which a majority of its citizens speak a language other than the dominant language of North America.

The Meech Lake version of the distinct society clause can overcome the Charter problem if it functions as its proponents intend: as an interpretive provision that will affect the reading of the entire Constitution, the Charter included. Furthermore, it symbolically recognizes something of the nationalist sentiment among Quebecers that they are "distinct." But the distinct society solution comes at a high price. It is a provision framed in broad, nebulous terms. The generality of the provision (see Appendix for the text of the Meech Lake version) allows those committed to equality of the provinces to argue that a distinct society clause will give Quebec special powers unavailable to the other provinces.

Is there a solution to this dilemma? Perhaps.

We need creative thinking to address both Quebec's need for - fairly narrow - legislative jurisdiction to protect and promote its language and culture and for a Charter of Rights that is more sensitive to the challenges faced by Quebecers to assure they do not dissolve like the proverbial lump of sugar in an English cup of coffee. We also need to reassure the rest of Canada that we are not giving an open-ended ill-defined set of special powers to Quebec. One suggestion that may address both Quebec's need for more secure linguistic/cultural jurisdiction and yet respects the right of provinces to equal powers under the constitution is the following:

- We could grant the provinces exclusive jurisdiction over public use of language (as proposed by the Pepin-Robarts Task Force), with that power subject to limits imposed by the Charter.
- To assure Quebecers that the Charter does not take away with one hand the jurisdiction afforded by the other, the Charter itself could be amended by addition of a qualified distinct society - or equivalent - clause. The clause would specify that Quebec is distinct with respect to its language, culture and civil law tradition, and provide an interpretive lens through which Charter cases should be viewed. The application of the clause would be limited to the Charter alone. This would, at least partially, reassure those concerned about an open-ended distinct society clause as contained in the Meech Lake Accord.

As Stéphane Dion has on occasion argued, we already have a precedent in Section 27 of the Charter for an interpretive clause. Section 27 reads as follows: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." A limited distinct society clause could perform for francophone Quebecers a similar function to section 27 for those concerned with the multicultural aspects of the country.

Rebalancing the federation: some decentralization accompanied by some institutional reform

Federalism was the chosen form of Canada's new government in the 1860s, not simply because of Canada East's desire to protect its national minority by making it a majority within a province. The choice of a federal form of government was due also to the strongly held identities among citizens of the Atlantic colonies. Indeed, Prince Edward Island and Newfoundland initially rejected Confederation, in part because of a fear their identities would be lost in the new much larger nation. Canada's first separatist was Joseph Howe: elected Premier of Nova Scotia in 1868 with a mandate to get out of Confederation.

Dicey was right when he observed that "a federal government will hardly be formed unless many of the inhabitants of the separate States feel stronger allegiance to their own State than to the federal state represented by the common government." Federalism is all about multiple loyalties and accommodation of historical identities within a larger entity. A country like Canada could never have been built successfully as a unitary state; indeed, ending the legislative deadlocks arising from the legislative union imposed on Lower and Upper Canada by the 1840 Act of Union was one of the major motives of the Fathers of Confederation in the 1860s.

The British North America Act has been accurately described as a constitution for a "quasi-federation" rather than a "classic federation." Classic federalism is, by definition, two orders of government with relatively precise powers and responsibilities, neither order having the right to usurp the other's jurisdiction. The framers of the BNA Act tipped the balance in favour of the federal government, primarily through the Peace, Order and good Government preamble to section 91 which enumerates exclusive areas of federal jurisdiction. Many other provisions also tip the balance toward the centre: federal power of disallowance of provincial legislation; allocation of residual powers to the centre; central control of appointments to the Senate and the Supreme Court; plenary taxation powers at the centre with only restricted powers in the provinces; complete control of trade and commerce; appointment of lieutenant governors, who have the power to reserve Royal Assent to provincial legislation; and a declaratory power allowing Ottawa to assume jurisdiction over local works and undertakings.

But enumerating these powers tells a misleading story. The country gradually evolved into a classic federation for a host of reasons. One was the history of provincial appeals to the Judicial Committee of the Privy Council in London. For the first eighty years after Confederation, it was the final court for constitutional interpretation. In general, these judges breathed life into those sections of the BNA Act specifying provincial powers, and limited the import of sections granting federal powers. The combined crises of the Great Depression and World War II accentuated the federal role but, since World War II, the provinces have assumed the primary role in provision of social programs. Ever since Quebec's Quiet Revolution of the 1960s, it has been the province consistently most aggressive in pursuit of autonomy.

At some point we should consider removal of some of the federal powers which have fallen into disuse (such as disallowance of provincial legislation), but of much greater import has been the power, nowhere specified explicitly, that Ottawa can spend on any matter Parliament approves - including in areas of exclusive provincial jurisdiction. This spending power has blurred the line separating provincial and federal jurisdiction ever since World War II. Its most marked application has been in the arena of conditional grants tied to social policy.

Ottawa deserves credit for using its spending power to accelerate the expansion of core social programs in the 1960s and 1970s, but I agree with Richards-Milner that we must also blame the spending power for sowing fiscal and policy confusion, and for serious inefficiencies. It must never be forgotten that the spending power also entails the power not to spend, and unilateral sudden withdrawals of cash by Ottawa can have severe impacts on the service delivery capacity of affected provinces. One factor forcing restraint on provincial governments is directly attributable to Ottawa: the unilateral decision in the federal 1995 federal budget to replace two longstanding intergovernmental transfer programs with the new Canada Health and Social Transfer (CHST). The CHST contains fewer conditions than the former programs, but also one third less cash. According to figures in the 1996 federal budget, the cash component of the CHST is projected to fall to $11.8 billion by 1998-99, $7.0 billion below the corresponding figure of $18.8 billion transferred to the provinces in 1994-95 under the two cancelled programs.

At the Premiers' Conference held in August 1995, the provinces and territories responded by establishing the Ministerial Council on Social Policy Reform and Renewal. The objective was to obtain a consensus (minus Quebec) concerning the principles that should guide social policy reform in the ensuing years, as well as a framework for administrative change. The December 1995 council report (Report to Premiers) has called for ongoing federal-provincial cooperation, elimination of overlap and duplication, clearer demarcation of roles and responsibilities, and some basic ground rules for the use of the spending power in health, education, labour market and social programs. Given that the report deals mostly in areas of exclusive provincial jurisdiction, not surprisingly it calls for some decentralization.

More surprising perhaps, at least to those who view any such exercises as provincial power grabs, is the extent to which the report argues for a continuing federal role, and the extent to which all provinces and territories support national – as opposed to unilateral federally imposed – standards. This simply means the provinces recognize the legitimate nation-building responsibilities of Ottawa. Our sense of nationhood depends, in part, upon our social programs, and national standards can encourage equality and mobility. If not service delivery, Ottawa should be involved at the policy level.

The Report to the Premiers should be welcome to Quebec federalists who, for years, have been urging Ottawa to recognize provincial jurisdiction in social programs. At the same time, national as opposed to unilateral federally imposed standards might be acceptable to Quebec federalists under certain conditions. The conditions would have to be that federal-provincial or interprovincial mechanisms establish and enforce standards, and that these replace federal edicts as the normal way of doing social policy business. Finally, when the notion of Canadian nationhood is in direct conflict with the Quebec sense of nationhood, there always remains the possibility of provinces opting out and running a comparable program on its own. The most important example is Quebec's opting to run its own occupational pension scheme independent of the Canada Pension Plan.

Biography and disclaimer
Greg Marchildon is currently Deputy Minister of Intergovernmental Affairs in the Saskatchewan government. This comment has been written in his personal capacity, and does not reflect the policy views of the government of Saskatchewan.

Appendix

The Meech Lake Accord (section 1)

The Constitution Act, 1867 is amended by adding thereto, immediately after section 1 thereof, the following section:
2. (1) The Constitution of Canada shall be interpreted in a manner consistent with
(a) the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada, and
(b) the recognition that Quebec constitutes within Canada a distinct society.
(2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristics of Canada referred to in paragraph (1)(a) is affirmed.
(3) The role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed.
(4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language.