A Collaborative Method to Overcome the Difficulty of Constitutional Amendment

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Constitutional politics hold a special place in Canadian political history. Demanding and difficult, the politics of the Constitution have been marked by disagreement and dissent for the entire brief history of this nation. Canada is both a multinational and territorially vast federation, thus it can only be expected that the views and demands of the diverse provinces and nations within will conflict. From this viewpoint, it seems a daunting task to unite this federation around a constitution meant to represent Canada as a harmonious and collective nation. This task has led to years of meetings concerning constitutional amendments that would properly represent and meet the demands of the provinces and Canadians as a whole, but the constitutional amendment process has proven to be extremely difficult and largely unsuccessful. In light of repeated failures, the question in discussion becomes: is constitutional reform necessary to tackle Canadians’ concerns about the performance and legitimacy of the Canadian federation? Performance and legitimacy must first be defined to contextualize the argument ahead. Performance and legitimacy are concerned with how effective the Canadian government is in the eyes of the average Canadian citizen. Also, these two benchmarks are used to measure how accountable the government is to Canadians and thus properly meets their demands and concerns. A second question arises from this: is constitutional reform necessary to maintain this accountability, or can non-constitutional reforms act as a less formal but equally, if not more, effective means to achieve legitimacy and performance? A constitutional amendment is necessary to satisfy the recurring demand for Senate reform, but, due to the unsuccessful history of constitutional reform, non-constitutional means including collaborative federalism, asymmetrical federalism, and open federalism have proven to be effective alternatives which meet Canadians’ expectations.

Before analyzing the issue of constitutional reform in Canadian politics, a brief historical overview of the difficulty of constitutional reform is necessary. Pierre Trudeau’s patriation of the Canadian Constitution in 1982 failed to garner Quebec’s support and signature, resulting in decades of Canadian politics focused on “bringing Quebec into the Constitution.” ¹ Quebec had several specific demands, including desires to control their own independent immigration policy and to be recognized as a distinct society, which had to be met in order to see Quebec sign the constitution.

The Meech Lake and Charlottetown Accords provide the best examples of why constitutional reform is so difficult in Canada. Both proposals failed and left Canadians with little or no appetite for constitutional politics; they also showcased that the problem is not that Quebec is not a part of the constitution, but that Canada is so large and diverse that provincial demands will never be harmonious nor unanimous. Canadian constitutional politics will continue to be deadlocked by virtue of Canada’s diversity, not solely in Quebec but throughout all Canadian provinces, territories, and nations.

The Meech Lake Accord was a proposal negotiated by Prime Minister Brian Mulroney in 1987 with the premiers of the provinces. It was designed to have Quebec sign an amended Constitution in exchange for the federal government meeting Quebec’s five specific demands. Mulroney sought to decentralize power to the provinces further, as evidenced by his willingness to meet Quebec’s five demands, most notably recognizing Quebec as a distinct society within Canada. ² The accord failed when both Manitoba and Newfoundland refused to ratify it by

² Russell, Constitutional Odyssey, 129-133.
the three-year deadline. In conclusion, the accord failed due to general public opposition to its terms and because it was written by “11 men in suits behind closed doors” without public dialogue and consultation. The result was that it discredited executive federalism as a legitimate form of negotiation and left a sour taste in the mouths of Canadians concerning constitutional reform. Meech Lake also taught politicians that Canadians have to be involved in the negotiations regarding the Constitution. The Meech Lake Accord tainted constitutional reform in Canada, opening the door for, and even necessitating, non-constitutional reforms in the coming decades.

The Charlottetown Accord was a package of constitutional amendments proposed in 1992 and was negotiated by the federal government, the provinces, the territories and Aboriginal peoples. Unlike the Meech Lake Accord, the Charlottetown Accord was conducted with broad public consultation, including seminars and meetings held within provinces; however, during the end of discussion concerning the Charlottetown accord, politicians reverted to the ways of Meech Lake by engaging in secretive processes and ignoring public consultation and the opinion that had been obtained. The Charlottetown Accord was defeated in a national referendum mostly because it was lengthy and most provinces found at least one proposal that they did not agree with, once again exhibiting the broad range of demands within Canada. Charlottetown was the last significant attempt at constitutional reform; it ended the era of executive federalism and opened the door for collaborative federalism.

Since his minority victory in the 2006 election, Stephen Harper has attempted to reform the Senate in order to make it a more effective and democratic body. Harper has specifically aimed to reform the Senate through legislation. Most intellectuals reject the Conservatives’ argument that the Senate can be reformed solely by parliament and without a constitutional amendment; however, Harper and the Conservatives are clearly trying to avoid the difficult process of constitutional amendment. Legislative constitutional reform, although difficult, will be the only way to achieve Senate reform in Canada.

Bill C-7, the vehicle of Harper’s attempted constitutional reform, was first read in Parliament in June 2011. The two main reforms it called for were a limit of nine years on senators’ terms, and selection of senators through elections to be conducted by the provinces. Matthew Mendelsohn argues several points against Bill C-7’s attempt at Senate reform in his essay, “A Viable Path to Senate Reform.” First, under the Constitution, the Senate has power equal to that of the House of Commons; however, it does not exercise these powers because it has no legitimacy as it is an appointed, and not democratically elected, body. By creating an elected Senate, senators would gain legitimacy and an obligation to exercise their powers. This in turn could produce deadlock in government without a mechanism to address the equal nature of the two bodies. Second, the current distribution of Senate seats creates a power imbalance directed in favour of the small Atlantic Provinces, who have more seats than some of the larger provinces. For example, New Brunswick has ten seats while British Columbia has only six seats. Mendelsohn argues that not only is reforming the Senate through legislation unconstitutional, but, in order to avoid deadlock in government, reforming the powers of the Senate must be at the center of the proposed reform. Reform must also address the distribution of senators to the provinces.

Based on the Supreme Court Reference Case on Senate Reform in April 2014 Senate reform must occur through constitutional reform. The Supreme Court ruled that constitutional amendment is required for all planned Senate reform, except for requirements of property and net worth, which the federal government may amend through legislation. The important question is not whether or not Senate reform is

3 Ibid., 152
5 Ibid., 99.
8 Ibid., 3.
9 Ibid., 6.
10 Ibid., 9-10.
necessary, but rather, whether or not it is possible. Senate reform has been at the forefront of Canadian politics in recent years, but the Supreme Court ruling that it must happen through constitutional amendment may deter the process. As exhibited by the failure of mega-constitutional politics in the 1970’s through to the 1990’s, provincial governments have a difficult time coming to mutually satisfactory conclusions. Therefore, it may be argued that Senate reform will never come about, as it requires the amending procedure of consent of seven of the ten provinces or 50% of the population. Furthermore, the abolishment of the Senate altogether is unlikely, as the Supreme Court ruled that it requires consent from the Senate, House of Commons, and every province/territory. Senate reform may not be an attainable dream as it requires changing the Constitution. Canadians are not eager to engage in constitutional politics, nor is it likely that the provinces will ever come to a consensus concerning a political body designed to represent the regions. Despite the federal government’s attempt to use non-constitutional means to reform the Senate, it is not possible; however, non-constitutional means do offer a solution to other concerns held by many Canadians.

Collaborative federalism emerged following the era of mega constitutional politics, which was dominated by executive federalism. An example of executive federalism is when provincial premiers take it upon themselves to be spokespeople for their provinces, without the aid of the provincial legislatures. Premiers advocate their causes directly with the prime minister and Cabinet, and most negotiations occur behind closed doors. Executive federalism was generally disapproved of following the failures of the Meech Lake and Charlottetown Accords due to its lack of citizen inclusion in political dialogue. Executive Federalism can be considered a reason why constitutional reform was not possible, as it did not include citizen input in affairs concerning Canadians. Executive Federalism promotes negotiation behind closed doors and generally deadlocked constitutional reform in Canada. Collaborative federalism emerged as a new form of Canadian federalism in response to the failure of executive federalism. Collaborative Federalism brought to Canada non-constitutional reforms including The Social Union Framework Agreement (SUFA) and The Agreement on Internal Trade (AIT).

David Cameron and Richard Simeon define collaborative federalism in their article, “Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism” as the process by which national goals are achieved, not by the federal government acting alone or by the federal government shaping provincial behavior through the exercise of its spending power, but by some or all of the 11 governments and the territories acting collectively.

Collaborative federalism allows for non-constitutional reform because it creates flexible agreements, such as the Agreement on Internal Trade, and the Social Union Framework Agreement. Agreement is the key word in collaborative federalism; agreements are not as constricting as constitutional changes. Constitutional changes are comprised of what Cameron and Simeon call “uncompromising language.” Constitutional changes are entrenched in the constitution and the results are concrete and restricting, whereas agreements allow for compromise in their language, as they are not as formal as constitutional reforms.

The Agreement on Internal Affairs (AIT) is an agreement between the federal government and the provinces which reduced the restrictions on mobility of people and goods between the provinces. It was created following the failure of the Charlottetown Accord and the failure of the federal government to extend their powers concerning the economic union. It is restrictive in practice as it fails to allow public access, but it is a breakthrough in intergovernmental relations. It is also a non-constitutional reform that shows that it is possible for the provinces and the federal government to work in a collaborative method in order to achieve reform.

12 Ibid.
13 Ibid.
14 Inwood, Understanding Canadian Federalism, 84-86.
16 Ibid., 55.
17 Ibid., 55-56.
The Social Union Framework Agreement (SUFA) is concerned with the process of how governments (provincial and federal) relate to each other and their citizens concerning social policy. SUFA calls for joint federal-provincial planning in social policy and calls for a larger role for citizens in decision-making. It is an example of collaborative federalism because the provinces created it by working towards making common policies and proposals for the federal government. It showcased that, despite having different and conflicting interests, the provinces remained consistent to the federal government and proved they could achieve consensus. Both SUFA and AIT acted as broad frameworks that collaborative federalism could work within. They were general rules of conduct that showcased that reform was necessary but had to be done in loose, non-legal binding means and not through drastic constitutional changes. These reforms, however, were not perfect; they lacked public consensus and encountered a lack of commitment to their use in joint problem solving.

Jennifer Smith defines asymmetry as: “the differential treatment of the units of the federation under the constitution or in national public policy.” Canada is not only multinational but also a territorially large country; therefore, it is doubtful that there will be a consensus among the provinces concerning demands. Asymmetrical federalism offers a solution to accommodate the differences of multinational Canada without amending the Constitution. Asymmetry can be a major political instrument that can affectively accommodate the political desires of minority nations.

The strongest example of how asymmetrical federalism offers a solution for Canadian constitutional politics is by observing the demands of Quebec. Asymmetrical federalism can accommodate the political demands of the francophone minority nation because legislation and agreements can be constructed that meet Quebec's unique demands without imposing themselves upon other provinces. This process can be extended to other provinces but, for simplicity, Quebec will be the only province observed in this example. Alain Gagnon argues that the provinces are fundamentally different and they occupy their jurisdictions in different ways. For example, Quebec has consistently demanded asymmetrical policies but has demanded them through constitutional change. There is a way of appeasing these demands by constructing asymmetrical policy, which can be modified while leaving room for change in the long term. Policy that is asymmetrical in Canada is what Jennifer Smith calls “asymmetrical in practice.” For example, the opting out mechanism allows provinces to opt out of federal programs and design their own. Quebec used the opting out mechanism to form their own pension plan: the Quebec Pension Plan. Asymmetry in this means allows provinces to run programs that they feel can best represent their unique provincial concerns. The Quebec Pension Plan exhibits how asymmetrical federalism is flexible; it can be a means of accommodating the demands of Quebec by offering them a way to display and encourage their French culture. Quebec gaining control of areas of social policy demonstrates that asymmetry works. The most important argument to make is that provinces may be more able to meet demands of citizens because they are more accessible than the federal government due to the sheer size of Canada. This argument, combined with the fact that Quebec is predominantly francophone and the federal government hosts representatives from the other nine provinces, makes the most sense: to promote asymmetrical policies without reforming the constitution.

Open federalism offers another approach to meeting the demands of Canadians without constitutional reform. Inwood describes open federalism as an approach to intergovernmental relations articulated by Prime Minister Stephen Harper, which advocates a classical model of federalism in which each level of government restricts its activities to areas of its own jurisdiction. Harper also advocated limiting the use of federal spending power so as to not intrude

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18 Ibid., 56-58.
19 Ibid., 58.
23 Ibid., 2-3.
Open federalism recognizes that provinces are most able to deal with provincial affairs due to their experience and proximity to the people, thus promoting asymmetrical federalism. As discussed above, asymmetrical federalism is an effective means of meeting the demands of the provinces as it puts the power into their hands. Frédéric Boily makes the argument that the “openness” of Harper’s federalism allows the provinces to strengthen their responsibilities within their constitutional jurisdictions. One could argue that, since Stephen Harper’s open federalism promotes asymmetry, it is an effective means of remaining accountable to Canadians. Open federalism respects rather than amends the constitution, thus promoting asymmetrical agreements and legislation, which proves a more effective means of reform.

In November 2006, Stephen Harper proposed to recognize the Quebecois as a nation within Canada, thus recognizing the multinational character of the federation. It was a symbolic but non-constitutional recognition, as it did not recognize Quebec as an independent state within Canada but rather recognized the people of Quebec as a nation. This is important because the Conservative government did not cede any differentiated powers to Quebec; however, it was the closest concession in the history of Quebec’s constitutional politics to the original demand by Quebec to be recognized as a distinct society as in the Meech Lake Accord. Jean-François Caron and Guy Laforest argue that this motion was simply an example of symbolic multinationalism and not an example of multinational policy, thus it does not change the way asymmetrical policies are implemented within Canada. The argument could be made that open federalism simply promotes asymmetrical federalism symmetrically to all the provinces. This means that Quebec may get special concessions concerning policy, but they are not recognized as significantly different than any other province. Asymmetrical policy is promoted through open federalism and allows the provinces to choose what they want to control. This argument could be defended by the fact that Quebec was symbolically recognized as a nation but not formally. Harper – like Prime Ministers before him – has refused to grant special status to Quebec within Canada in order, one may suppose, to avoid the slippery slope of Quebec secession; however, despite the lack of special concessions to Quebec, open federalism does promote asymmetrical federalism, thus allowing the diverse territories of Canada to provide policy to Canadians via the most effective means without amending the Constitution.

Canadian constitutional politics of the past three decades have been defined by the difficulty in achieving constitutional amendment. The Meech Lake and Charlottetown Accords left no spirit for constitutional politics in the average Canadian; citizens began to associate amendment with the unsuccessful accords. Senate reform is a recent political issue in Canada defined by the government’s inability to accomplish reform that will properly meet the expectations of Canadians. As discussed, this is at the heart of constitutional amendments: expectations of Canadians must be met. Canada, however, has had a difficult experience with achieving strong multilateral consensus no matter the issue at hand. For this reason, it is unlikely that constitutional amendment will be a reliable and successful way to meet expectations of Canada. The impossibility of constitutional amendment opens the doors for a more collaborative system, comprised of non-constitutional amendments, for the Canadian federal government. Under the umbrella of collaborative federalism, asymmetrical policies and open federalism have evolved as a means to maintain the performance, legitimacy and effectiveness of the Canadian federation. One may confidently say that this collaborative model of federalism, along with asymmetrical policies, is the most effective means of meeting the conflicting demands of the people in a multinational and territorially diverse Canada.

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24 Inwood, Understanding Canadian Federalism, 100-101.
26 Ibid., 19.


