

A NEW APPROACH TO THE QUEBEC QUESTION

David R. Cameron and Jacqueline D. Krikorian

With the departure of Mario Dumont and the collapse of the Action démocratique du Québec, Quebec has essentially returned to a two-party electoral system under which the Parti Québécois will inevitably form a government again. In their third consecutive term under Premier Jean Charest, the Liberals are already bucking a modern rule of Quebec politics: two terms and you're out. A fourth term seems unlikely. The authors suggest that it's precisely while "the national question" is off the radar that Ottawa and Quebec could negotiate bilateral amendments to the Constitution. This would not require constitutional conferences, or the unanimous consent required for some amendments, or the general amending "7/50" formula requiring the assent of Ottawa and seven provinces representing half the population.

Depuis le départ de Mario Dumont et l'effondrement de l'ADQ, le Québec a pour l'essentiel renoué avec un système électoral bipartite qui rend inévitable le retour au pouvoir du Parti québécois. En ce troisième mandat consécutif sous la direction de Jean Charest, les libéraux ont déjà fait mentir la règle de l'histoire récente du Québec selon laquelle tout parti se voit indiquer la sortie après deux mandats. D'où l'improbabilité d'un quatrième. Et c'est précisément en cette période où la « question nationale » bat de l'aile que Québec et Ottawa pourraient négocier bilatéralement diverses révisions à la Constitution, sans qu'il y ait besoin de conférences constitutionnelles ni du consentement unanime requis pour certaines modifications ou celui de sept provinces comptant 50 p. 100 de la population exigé par la formule générale d'amendement.

With the stunning collapse of Mario Dumont's Action démocratique du Québec (ADQ), Quebec is reverting to its traditional two-party political system. The Liberals and the Parti Québécois again confront one another across the aisle in the National Assembly, as they have done so often in Quebec's recent political history. The Liberals' June 22 by-election victory over both the ADQ and the PQ candidates in Dumont's former Rivière-du-Loup riding confirms the trend line; the Liberals beat the PQ by 12 points and the ADQ came in a sorry third.

Unless you believe that the Liberals can win an unlikely fourth term of office at the next election — and no one since Maurice Duplessis has done that — this means that the chances are very good indeed that we will see the PQ return to power in Quebec within the next five years. While the sovereignty issue has been on the back burner for some time, and remains so today, you can be sure that the PQ will not loosen its commitment to the independence of Quebec, and that the election of that party in, say, four years' time will put "the national question" front and centre once more.

The PQ leader, Pauline Marois, has been trying to keep the sovereignty embers burning, arguing implausibly

that Quebec would be better off in the current economic downturn if it were independent. The PQ has also been publicly exploring another strategy, which would have a PQ government making piece-by-piece sovereignty demands on Ottawa, demanding that it be given full control over critical policy fields, such as broadcasting or culture. If Ottawa were to reject the given demand, as it almost certainly would, this would become a sovereignty grievance for the PQ to use to stir up Quebec opinion; if, surprisingly, Ottawa acceded to the demand, the PQ government would swallow it whole, and go back with another demand. On the evidence of the recent by-elections, the PQ argument that it will demand sovereignty from Ottawa *à la pièce* is not touching a responsive chord with the Quebec electorate. However, it is likely that a future sovereigntist government, with all the levers of incumbency at its command, will find a way to disturb the country's tranquility when the time comes.

Now — while things are quiet on the unity front — may be a good time to tackle some of Quebec's traditional concerns. After all, we have tried to do it in the midst of constitutional crises, and have failed miserably. Maybe it would be easier to make progress while the province is not in the throes of a sovereignty debate.

Quebec's place in Canada has been unresolved since 1982, when Prime Minister Pierre Trudeau patriated the Constitution without the consent of Quebec's government and National Assembly. This was a slap in the face for Québécois who found themselves governed by a new constitution, including the Charter of Rights, to which they had not agreed through their legislature. The failures of the Meech Lake and Charlottetown constitutional accords made things even worse and set the stage for the near-death experience of the 1995 Quebec referendum. The lesson for many was that it was probably better to let sleeping dogs lie and not engage in further constitutional discussions. There was a real sense that continued attempts at reform might themselves lead to the dissolution of Canada.

Not too long ago, however, there was a successful initiative to offer a degree of recognition to Quebec. In November 2006, Prime Minister Stephen Harper received overwhelming support in the House of Commons (265 MPs to 16) for a resolution recognizing that the Québécois form a nation "within a united Canada." A similar resolution was then approved by the National Assembly of Quebec. This suggests that the country is not frozen into constitutional immobility.

Traditionally, Ottawa has attempted to address the Quebec question with constitutional proposals requiring the unanimous support of all provincial governments and sometimes a country-wide referendum. The 2006 Harper initiative, though, demonstrates there is considerable value in dealing with constitutional issues concerning *la belle province* in a bilateral rather than a national context.

It might make sense, in this context, for the federal government to discuss constitutional reform with the new Charest government. Don't get us wrong; we are far from suggesting another Meech or Charlottetown constitutional round. Instead, we believe

that issues could begin to be addressed by using a little-known provision in our constitution known as the bilateral amendment process.

Section 43 of the *Constitution Act, 1982* allows for a province and the federal government to address constitutional issues particular to one province without involving the rest of the country. Ottawa has used this approach to constitutional reform on seven separate occasions. Each time, a constitutional amendment that applied only to the province involved was adopted. For example, Prince Edward Island — when it wanted to build a fixed link to the mainland — used the technique successfully to remove the ferry requirements set up under the 1867 *British North America Act*; Newfoundland adopted a bilateral constitutional amendment to secularize its education system; and New Brunswick used it to grant equality of status to its French and English linguistic communities.

This mechanism has even been used to adjust the constitutional status of religion and language in Quebec. In 1997, a bilateral constitutional amendment was passed that effectively abolished the religious or denominational school boards of Quebec and replaced them with linguistic boards.

If New Brunswick can employ the bilateral amendment process to address the standing of the French and English communities of that province, why can't Premier Jean Charest and his federal counterpart use the same process to address outstanding issues relating to French language and culture within Quebec? If Quebec can replace Catholic and Protestant school boards with French and English ones, why can't the same amending technique be used, let us say, to constitutionally entrench French as the official language of Quebec (with due protections for the English language)?

Building on the resolution recognizing the Québécois as a nation within Canada, the House of Commons and the

National Assembly could introduce a bilateral constitutional amendment that gives predominant status to the French language in the province of Quebec.

A bilateral constitutional amendment addressing language issues is expressly permitted under section 43 of the *Constitution Act, 1982*. Moreover, not only is a bilateral constitutional amendment pertaining to the status of a language legally permissible pursuant to section 43, as the New Brunswick case demonstrates, but the Supreme Court of Canada has already both accepted and endorsed the notion that French is the predominant language in Quebec. In the *Ford* case, it held that the National Assembly could adopt a law that would mandate the French language to have greater public visibility than English. It expressly provided that the government of Quebec could require the French language to be given predominance on signage, as it reflected on the "*visage linguistique*" of the province. In the process, the Court effectively acknowledged and endorsed the notion that the vitality and health of the French language and culture in Quebec are a valid public policy goal.

A bilateral amendment could reaffirm and constitutionalize Quebec's existing legislative authority and act as an interpretive provision that informs how the Constitution is to be read and understood in Quebec. We are not advocating a measure that allocates new powers or redistributes existing heads of power; such a proposal would change the nature and balance of Canadian federalism and require the consent of all of the provinces. Rather, we are suggesting a bilateral constitutional amendment that pertains only to Quebec. To this end, we believe there are at least two options worthy of consideration. The first is to introduce an amendment to section 16 of the Charter dealing with official languages, while the second is to introduce a provision similar in nature to section 27 of the Charter that requires that the Charter be "interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

Such a bilateral amendment would serve two important public policy objectives. First, the constitutional provision would have considerable symbolic importance for Canadians both inside and outside of Quebec. It

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would draw some of its symbolic power from the fact that the national status of the Québécois has been affirmed by the legislatures of Canada and Quebec. It would solidify the existing law and policy of Quebec as well as the jurisprudence of the Supreme Court of Canada. Moreover, it would provide a sense of security to francophones in the future who may be faced with challenges to their language rights that we cannot today anticipate.

A second rationale for this type of bilateral amendment is that it would be used as an interpretive aid in any future constitutional litigation that challenges measures promoting or protecting the French language in Quebec. Like the New Brunswick bilateral constitutional amendment, it would not provide any new rights or “goods” but rather would ensure that the courts would recognize that the French language and culture have constitutional value when they render decisions involving constitutional challenges to Quebec measures. Although Quebec legislation entrenching French rights might still be found to violate, for example, the Charter’s freedom of expression or equality measures, a bilateral constitutional amendment of this nature would, in effect, mandate the courts to carefully balance the language rights of the Québécois community within the province and the rights of the individual before striking a contested statute down.

The proposed amendment, moreover, would not limit existing language rights for anglophones in Quebec. Section 133 of the *Constitution Act, 1867* ensures that the English and French languages are

used in both the National Assembly and the federal and provincial courts operating in the province. Similarly, the education provisions in the Constitution under section 23 of the *Constitution Act, 1982* that provide access to English-language education for some students would remain in effect. And to avoid any confusion or uncertainty among the population on this issue, the bilateral constitutional amendment could specifically provide that it does not abrogate existing constitutional rights set out in these sections.

The Canadian and Quebec governments would need to satisfy themselves that the criteria utilized in previous bilateral amendments have been met in this case: namely, that broad consultation has occurred, that there is a strong measure of public support in Quebec for the measure, that minority opinion has been taken into account and that the proposed initiative is consistent with the spirit of the Charter. This initiative would only be of value if it could be introduced without provoking public contention.

It is worth noting that one of the main reasons why both the Meech and Charlottetown accords were so strongly contested was not simply the fact that the amendment required the consent of other provinces, but also that each purported to declare something about the country as a whole. Thus the notion of Quebec as a distinct society collided with Canada as a federal

society characterized by equal provinces, cultural diversity, gender equality and the presence of Aboriginal peoples. This is not the case with the suggestions we have put forward. The bilateral amendment involves

two governmental actors: the National Assembly and the Government of Quebec on the one hand, and the Parliament and Government of Canada on the other — not all the provinces and territories. Furthermore, the amend-

ment makes no attempt to capture a Canadian vision and situate Quebec within it. Rather, it offers a degree of constitutional recognition for one vital element in Quebec’s existing laws and complex reality.

The insertion of constitutional protection for the French language in Quebec into the Canadian constitution would be a powerful declaration that the health and majority status of French in its *foyer principal* is a constitutive feature of Quebec, and a legitimate object of Canadian public policy. Despite being an amendment not directly involving the nine other provinces, such a step, because of the necessary assenting role of the Parliament of Canada, would be regarded as a direct and powerful recognition of the enduring importance and legitimacy of the French fact in Canada. It could be a step toward remedying the country’s incapacity to recognize the reality of Quebec in an idiom the Québécois themselves understand and accept.

David Cameron is professor and chair of the Department of Political Science at the University of Toronto. Jacqueline Krikorian is an associate professor in the Department of Political Science at York University. This essay is adapted from “Recognizing Quebec in the Constitution of Canada: Using the Bilateral Amendment Process,” University of Toronto Law Journal 58, no. 4 (2008). By permission of University of Toronto Press.