

CHALLENGING ENGLISH-CANADIAN ORTHODOXY ON DEMOCRACY AND CONSTITUTIONAL CHANGE

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In English Canada it is routinely argued that constitutional change in Canada is neither desirable nor even possible. This article challenges this view. The decline of support among Québécois for sovereignty should not blind us to the fact that the official position of the Parti Libéral du Québec (PLQ) is that while Québec should remain in Canada, constitutional change will eventually be required. Some Aboriginal leaders take a similar position. Faced with the prospect of constitutional change, three claims are central to the prevailing orthodoxy in English Canada: that the constitution is now exceedingly difficult to amend, that private negotiations and elite accommodation have been replaced by a more open and democratic process, and that substantive change to the Canadian constitutional settlement must be by means of a constitutional "conversation." This article challenges this prevailing orthodoxy by arguing that the Canadian constitution is, in fact, amendable, often by means of bilateral amendments that continue to rely on traditional elite negotiations. Moreover, while an ongoing constitutional conversation is desirable in theory, this article presents a series of considerations that must be addressed if we are to construct the kind of constitutional conversation adequate to the task of achieving meaningful constitutional change in a multinational context.

Dans le Canada anglais, on soutient régulièrement que la modification de la Constitution n'est ni souhaitable ni même possible. L'auteur de cet article conteste ce point de vue. Le fait que l'appui des Québécois à la souveraineté soit en baisse ne devrait pas nous faire oublier la position officielle du Parti Libéral du Québec (PLQ) : bien que le Québec devrait continuer de faire partie du Canada, un jour une modification de la Constitution sera nécessaire. Certains chefs autochtones ont adopté une position similaire. Devant la perspective d'une modification de la Constitution, l'orthodoxie courante du Canada anglais comporte trois affirmations principales : il est extrêmement difficile de modifier la Constitution, les négociations privées et les accommodements à l'élite ont été remplacés par un processus plus ouvert et démocratique et enfin, une modification importante à l'accord constitutionnel doit se faire au moyen d'un dialogue constitutionnel. L'auteur de cet article conteste cette orthodoxie courante en soutenant qu'il est en fait possible de modifier la Constitution canadienne, le plus souvent au moyen de modifications bilatérales qui reposent toujours sur les négociations traditionnelles de l'élite politique. En outre, bien qu'un dialogue constitutionnel continu soit souhaitable en théorie, cet article présente une série de considérations à aborder si nous désirons avoir un dialogue constitutionnel à la hauteur de notre tâche, c'est-à-dire d'arriver à une modification constitutionnelle utile dans un contexte multinational.

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I. INTRODUCTION

For several days in June 1990 dozens of Canadians gathered outside the old railway station in downtown Ottawa which, some years before, had been converted into a conference centre.¹ They gathered to bear witness to efforts by the Canadian prime minister and the provincial premiers and territorial leaders, the so-called “first ministers,” to come to an agreement on changes to the Meech Lake Accord, a package of amendments to the Canadian constitution.² In the face of fundamental disagreement over critical issues, most importantly, the implications of a proposed interpretative clause recognizing Québec as a distinct society, the meetings were repeatedly extended in an effort to forge a consensus. Rather than meet publicly to ratify an agreement, first ministers met in private to allow for hard bargaining. As the meetings, originally envisaged to last a few days, dragged on and on, citizen interest and concern became increasingly apparent. Not only did crowds gather outside the conference centre, but letters, faxes, and telephone messages poured in with offers of support, assistance, advice, and of course, criticism. While Canadians were divided on what it is they wanted from the meetings — the merits of the accord were hotly debated — the simple fact that curious citizens gathered to witness the constitutional deliberations demonstrated in a very tangible way that a significant and vocal minority of the Canadian public wanted to play a part in the process of debating the constitution. This somewhat spontaneous gathering of Canadians located on the outside of constitutional negotiations signalled, in a tangible way, a major challenge to the traditional style of constitutional negotiation. What some have called constitutional change by elite accommodation was once again under attack in favour of an approach to constitutional change that directly involved Canadians.³ In fact, within a few years it became clear that the process chosen to achieve major constitutional change would require a major role for citizens including ratification by means of referendum.

This critical milestone in Canadian constitutional history raises the larger question of what, in fact, is the relationship between constitutional change

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- 1 The following is something of a first-person account. The author served with the Government of Ontario during the Meech Lake negotiations and was part of the provincial delegation to the June 1990 First Ministers' Conference.
 - 2 Patrick Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991).
 - 3 Alan C. Cairns, *Reconfigurations: Canadian Citizenship and Constitutional Change*, Douglas E. Williams, ed. (Toronto: McClelland and Stewart, 1995) at 149-50.

and public participation? More pointedly, in a multinational federation like Canada, is extensive public engagement conducive to constitutional agreement? This article seeks to shed some light on these questions. It focuses on the Canadian experience with constitutional change since the last round of mega-constitutional change that came to an end with the defeat by referendum of the Charlottetown Accord in 1993.

The defeat of the accord has given rise to three linked claims about constitutional politics in Canada outside of Québec. As described in greater detail below, many in English-speaking Canada believe first, that the Canadian constitution is now exceedingly difficult to amend and/or that attempting constitutional change would be incredibly divisive. Second, we are routinely told that private negotiations and elite accommodation are no longer viable means of pursuing constitutional change. Rather, the claim is that there has been (or at least there should be) a “democratization” of the Canadian constitutional reform process and it is often assumed that any real changes to the constitution must be approved by a pan-Canadian referendum. The third and final claim is less a matter of conventional political wisdom and more a claim by political and constitutional theorists. Here the argument is that it might be possible to imagine substantive change to the Canadian constitutional settlement by aiming not for an overarching constitutional agreement but rather for a constitutional “conversation” which may or may not eventually lead to constitutional change.

None of these claims has been subject to a sustained critical examination, particularly when examined as a group. Thus, this article seeks to critically evaluate each of these claims and suggests that they are overdrawn; the current reality is considerably more nuanced and complex. To summarize, the core arguments presented here are, first, that contrary to the prevailing English-Canadian orthodoxy, the Canadian constitution is amendable, often as a result of traditional elite negotiations where the public is not directly consulted or engaged. Second, I argue that while an ongoing constitutional conversation is desirable in theory, in practice the preconditions may not yet be in place. If nothing else, such a conversation requires sustained and far-sighted political leadership. This leadership is currently lacking. Nevertheless, if the existing literature on the merits of a Canadian constitutional conversation is quite abstract, our real world experience with deliberation offers some suggestions as to how begin such a conversation.

Before proceeding further it is necessary to address the question of whether or not any of this matters. Given the constitutional events of the past half

century, is there now any point in even discussing constitutional change in Canada? Many observers of Canadian politics simply do not want to broach the matter of constitutional change.⁴ Some argue that the Canadian experience over the past fifty years demonstrates that constitutional debate is very divisive and destabilizing, and should be avoided at all costs.⁵ Others argue that some of the challenges that constitutional change was designed to address can be, and in some cases are being addressed by other means. So, for example, the Conservative government of Stephen Harper introduced a resolution of the House of Commons recognising the Québécois as a nation, issued a formal apology to those victimized by residential schools, and is seeking to incrementally reform the Senate by legislation rather than a formal amendment to the *Constitution Act, 1867*.⁶ Still others argue that, in the case of the demands of Québec, the decline of support for sovereignty suggests that a constitutional fix is not required.⁷ More dramatically, some observers outside of Québec even go on to argue that, for structural reasons, the Québécois will never vote for a fully independent Québec state so there is no need to minimize the risk by means of constitutional amendment.⁸

This article starts from a quite different premise. Two critical minorities, the Québécois and Aboriginal peoples, remain unsatisfied with the constitutional settlement. In the case of Québec, the official position of the Parti Libéral du Québec (PLQ) is that while Québec should remain in Canada, significant change up to and including constitutional change will be required.⁹

4 When an earlier version of this article was presented to a largely European audience, it was taken as given that constitutional change in Canada was inevitable (perhaps because they were all analysts of the recent attempt to craft a European constitution). In sharp contrast, when this essay was presented to a mixed audience of Canadian scholars and former public servants, there was little support for the premise that further constitutional change is an inevitable, if partial response to the ongoing concerns of Québécois and First Nations.

5 Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People*, 3d ed. (Toronto: University of Toronto Press, 2004) [Russell].

6 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. What is not clear is whether these non-constitutional approaches are sufficient, appropriate, or, in the case of Senate reform, strictly constitutional. With respect to the constitutionality of legislative approaches to Senate reform see Andrew Heard, *Constitutional Doubt about Bill C-20 and Senatorial Elections* (Kingston: Institute of Intergovernmental Relations, Queen's University, 2008); Vincent Pouliot, *The Constitutionality of Bill C-20* (Kingston: Institute of Intergovernmental Relations, Queen's University, 2008); and the comments of the then-Québec Minister of Intergovernmental Affairs, Benoît Pelletier, in Gary Mar, Mary Bountrogianni & Benoît Pelletier, "Round Table on Senate Reform" (2006-07) 9 *Canadian Parliamentary Rev.* 9.

7 See for example, Ian L. Macdonald, "Quebec's wounds have healed" *National Post* (8 May 2008), online: <<http://www.lianmacdonald.ca/columns.html>>.

8 Barry Cooper, "Cultural Myths and Political Realities or Why Québec Will Never Separate" (2002) 7 *Rev. of Constitutional Studies/Rev. d'études constitutionnelles* 231.

9 In 2001 the Quebec Liberal Party (QLP) released an electoral platform, *Affirmation, Autonomy,*

Moreover, there is little reason to think that the simple decline of support for Québec sovereignty also means a decline in the demands for constitutional recognition of Québec. Moreover, such a decline does nothing to address the calls, admittedly more muted, for greater constitutional recognition of the Aboriginal reality of Canada.¹⁰ More generally, it is deeply unsettling that the constitutional settlement is deemed unacceptable by much of the political leadership of upwards of one million Aboriginal peoples and 7.5 million Québécois, in a country of only 33 million souls. The very fact that Canadian political leaders routinely go out of their way to say that they are not interested in pursuing constitutional change, at least right now, suggests that they acknowledge that there is some unfinished business to attend to with respect to the Canadian constitutional order even if they do not believe it is appropriate to pursue it in the near term.¹¹ Be this as it may, one of the claims being made in this article is that constitutional change will be a long process of conversation, dialogue, debate, and discussion. Better to start now in a period of relative calm than wait for a crisis.

This article is organized into three substantive sections. The next section,

Leadership, commonly referred to as the Pelletier Report after the main author Benoît Pelletier. The report argued that constitutional change should be the long-term goal of the Government of Quebec. In 2008 the QLP asserted that the Pelletier Report remained “the basis of our political and constitutional position on Canadian federalism.” See Quebec Liberal Party, *Together We Can Build a Successful Future for Québec: 2007-2012 Action Plan, Second Term of the Quebec Liberal Party Government*, online: <http://www.plq.org/pdf/plateforme_PLQ_Ang.pdf>.

- 10 It is not clear whether or to what extent changes to the constitutional text are required to advance the interests of Aboriginal peoples. On the one hand, in a broad overview of the future prospects of Aboriginal self-government in Canada, Bélanger states flatly that “contemporary Aboriginal leaders continue to advocate for the Constitutional entrenchment of the inherent right to self-government.” See Yale Bélanger, “Future Prospects for Self-Government in Canada” in Yale Bélanger ed., *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3d ed. (Saskatoon: Purich, 2008) at 405. Yet, as the other chapters in the same volume make clear, Aboriginal peoples in Canada and their leaders are interested in achieving self-government and structural change through the courts, by means of self-government and treaty negotiations, or by means of economic and social development, often with little or no reference to constitutional change. Alternatively, some Aboriginal scholars argue that the inherent sovereignty of Aboriginal peoples is recognized in the original treaties they signed with the British Crown and a constitutional amendment is not required to constitutionally recognize the inherent status of Aboriginal peoples as self-governing, and Canada as a multinational state. On this point see, for example, James (Sákéj) Henderson, “Treaty Governance” in Yale Bélanger, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3d ed. (Saskatoon: Purich, 2008) at 20.
- 11 So, for example, in June 2009 the newly confirmed leader of the Liberal Party of Canada, Michael Ignatieff, made it clear that, if elected, a Liberal government would not pursue constitutional changes to the division of powers but did not reject such changes out of hand. See Fanny Olivier, “Ignatieff n’accorderait pas plus de pouvoirs au Québec” *La Presse* (4 June 2009), online: <<http://www.cyberpresse.ca/le-soleil/actualites/politique/200906/04/01-863120-ignatieff-naccorderait-pas-plus-de-pouvoirs-au-quebec.php>>.

Part II, suggests that in order to make sense of the merits of, indeed the very possibility of major constitutional reform in Canada, we must be much more precise when referring to “the constitution” and to “democratization” of the constitutional change process. The next and much longer section, Part III, describes in greater detail each of the three claims introduced earlier and subjects them to a critical evaluation. The final section, Part IV, concludes.

II. WHAT DO WE MEAN BY THE “DEMOCRATIZATION” OF “THE CONSTITUTION”?

What is the Constitution?

In the simplest terms we use the word “constitution” to refer to the written constitutional text, most importantly the *Constitution Act, 1867* and the *Constitution Act, 1982*.¹² Similarly, the terms “democratization” or “public participation” have been implicitly defined with reference to referenda and perhaps something more inclusive and engaging than the public consultation that comes with parliamentary or legislative hearings.

However, these implicit definitions are far too narrow or overly vague. At a minimum, in a Westminster system of parliamentary government, the constitution is both that which is codified in the written constitution and a larger body of constitutional conventions.¹³ The importance of such conventions was indeed underlined in December 2008 when Canadians were reminded of the critical role of the governor general, and the discretion exercised by the Queen’s representative in Canada in deciding whether or not to prorogue the House of Commons or call an election in the event of the defeat of the government in the House of Commons.¹⁴

Moreover, the constitution in the Canadian federation has two elements — those provisions that apply to all of Canada and can often, but not always, be modified only with the consent of all provincial and territorial governments, as distinct from those provisions that apply to only one province, sometimes referred to as the “provincial constitutions,” that form part of the

12 Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

13 Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991).

14 Peter Russell and Lorne Sossin, eds., *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009).

constitutional text and can generally be amended based on the mutual agreement of Parliament and the provincial legislature.¹⁵

However, beyond the written constitutional text and constitutional conventions, there are a number of pieces of core legislation that are quasi-constitutional in nature. The *Official Languages Act*¹⁶ and the *Supreme Court Act*¹⁷ are good examples of legislation that is used to amplify a key part of the constitutional text (e.g., official languages) or as a substitute for formal constitutional provisions (e.g., Supreme Court of Canada). Moreover, while in some countries at least the broad lines of the electoral process are included in the written constitutional texts, in Canada these rules are established by statute — the *Canada Elections Act*¹⁸ for federal elections and broadly similar statutes in each of the provinces and territories. Thus, the constitution is properly understood to be much more than the formal constitutional texts. To perhaps oversimplify, it is necessary at a minimum to distinguish between the written constitution, constitutional conventions, and quasi-constitutional statutes.¹⁹

What is Democratization?

The suggestion that the constitutional amendment process needs to be “democratized” could be interpreted as a statement that, absent such democratization, the process is undemocratic. Of course, this is to overstate the case. In Canada, at least, the codified current constitutional amendment process

15 Nelson Wiseman, “Clarifying Provincial Constitutions” (1996) 6 *National J. of Constitutional Law* 269; Campbell Sharman, “The Strange Case of a Provincial Constitution: The British Columbia Constitution Act” (1984) 17 *Canadian J. of Political Science/Rev. canadienne de science politique* 87.

16 R.S.C. 1985, c. 31 (4th supp.).

17 R.S.C. 1985, c. S-26.

18 S.C. 2000, c. 9.

19 The approach used in this paper — the constitution is made up of the constitutional texts, key statutes, and constitutional conventions — is a relatively narrow and quite conventional definition. Much more expansive definitions are also possible. For example, some have argued that in addition to the constitution as legal text there is an “economic” constitution embodied in trade agreements. See Stephen Clarkson, *Does North America Exist? Governing the Continent after NAFTA and 9/11* (Toronto: University of Toronto Press, 2008); Stephen McBride “Quiet Constitutionalism in Canada: The International Political Economy of Domestic Institutional Change” (2003) 36 *Canadian J. of Political Science/Rev. canadienne de science politique* 251; and David Schneiderman, “Constitution or model treaty? Struggling over the interpretive authority of NAFTA” in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 294. However, as Agustín José Menéndez has argued, “The concept ‘constitution’ is used in many different (and sometimes even contradictory) ways in political and legal discourses.” See Agustín José Menéndez, “Three conceptions of the European constitution” in E. O. Eriksen, J. E. Fossum & A. J. Menéndez, eds., *Developing a Constitution for Europe* (New York: Routledge, 2004) at 110 [Eriksen et al.].

relies on the initiative, leadership, and judgment of the elected politicians who serve as first ministers and members of their respective cabinets, all of whom are accountable to the federal Parliament and the provincial and territorial legislatures. In a formal sense, the current constitutional amendment process is very democratic, based on basic principles of representative government. Thus, to democratize the constitutional reform process is ostensibly to make the process more democratic where “more” is defined as something other than the normal functioning of the institutions of representative democracy. The reason why something more is required is clear. Executive dominance, combined with weak parliamentary and legislative oversight, does not allow for citizens to have effective input into constitutional reform except in the most extraordinary of circumstances. In this vein, Alan Cairns has argued, at least in the case of the Meech Lake Accord, that asking citizens to participate by means of parliamentary or legislative hearings amounts to groups presenting, “ineffectual briefs before impotent committees.”²⁰

The written Canadian constitution does not provide for the use of any process other than the normal institutions of representative democracy when it comes time to amend the constitution. Amendments are the purview of Parliament and the provincial and territorial legislatures. However, what is striking about the constitutional reform process that produced the 1992 Charlottetown Accord — the so-called “Canada round” — is that it took seriously the growing public interest in the constitution that became apparent over the course of the 1980s. This public interest crystallized somewhat at the time of the collapse of the Meech Lake Accord, and as a consequence governments felt increasingly compelled to engage with citizens in constitutional deliberations. Thus, the Canada round included a great deal of popular consultations in the form of legislative hearings, a travelling commission of inquiry, a series of semi-public conferences,²¹ and, ultimately, two simultaneous referenda, one organized by the Government of Québec pursuant to provincial legislation and a second referendum in the rest of Canada organized by the Government of Canada. In those referenda, the Charlottetown Accord was defeated. In Québec 55.4 percent of the voters said no and in Canada

20 Alan C. Cairns, “Citizens (Outsiders) and Government (Insiders) in Constitution-Making: The Case of Meech Lake” in *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, Douglas E. Williams, ed. (Toronto: McClelland and Stewart, 1991) 115.

21 Simone Chambers, “Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis” (1998) 26 *Politics & Society* at 159 [Chambers]; Russell, *supra* note 5 at 17; and Ian Peach, *The Death of Deference: National Policy-Making in the Aftermath of the Meech Lake and Charlottetown Accords* (Regina: Saskatchewan Institute of Public Policy, 2004).

overall, 54.2 percent voted against the accord.²²

Thus, by constitutional convention any “major” changes to the constitution must be approved by Canadians by referendum. Moreover, following the lead of Québec several provinces initiated a statutory requirement that any formal constitutional changes be put to a vote in a provincial referendum.²³ These statutes reinforce the reality that referenda are now an integral part of the constitutional amending process in Canada.

Yet in the Canadian context, referenda have a mixed reputation. Some, such as the 1980 Québec referendum on sovereignty-association and the much earlier pan-Canadian referendum on conscription, were quite divisive and reinforced or at least amplified the strong differences of opinion between Québécois and Canadians.²⁴ More generally, both the Canadian and European experiences with referenda suggests that they are, at best, a blunt instrument of citizen engagement with the constitutional reform process.²⁵ At worst, the European Union experience suggests that referenda on constitutional issues are decided on the basis of any number of non-constitutional considerations not the least of which is the popularity of the incumbent government.

If the institutions of representative democracy are insufficient and referenda are too blunt an instrument for effective constitutional reform, what then? At a theoretical level, the process of constitutional change can potentially be informed by much of the scholarship over the past twenty years which seeks to flesh out what a more “deliberative” approach to both democracy in general, and policy making in particular, would look like. The strengths and limits of this approach are taken up below.

22 Russell, *ibid.* 5 at 227.

23 See *Constitutional Referendum Act*, R.S.A. 2000, C-25; *Constitutional Amendment Appeal Act*, R.S.B.C. 1996, c 67.

24 Jack Jedwab, ed., *À la prochaine? Une rétrospective des référendums québécois de 1980 et 1995* (Montréal: Éditions Saint-Martin, 2000); J. Patrick Boyer, *Direct Democracy in Canada: the History and Future of Referendums* (Toronto: Dundurn Press, 1992).

25 Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997) [McRoberts]; Curtis Cook, ed., *Constitutional Predicament: Canada after the Referendum of 1992* (Montreal McGill-Queen's University Press, 1994) [Cook].

III. EVALUATING CLAIMS ABOUT THE CANADIAN CONSTITUTION

As suggested at the outset, in English-speaking Canada²⁶ there would appear to be three broad generalizations that capture much of the contemporary Canadian experience with constitutional change: first, the constitution is all but impossible to amend; second, any attempt at amendment cannot be limited to political elites and must involve the public in a meaningful way up to and including a referendum; and therefore third, the best that can be hoped for is no longer a set of changes to an overarching constitutional settlement but rather an ongoing constitutional conversation. In what follows, each of these claims is described in somewhat more detail and then evaluated with a view to making a case for a more nuanced understanding of the possibility of public engagement with constitutional reform in Canada.

The Canadian Constitution is Unamendable

A comprehensive package of constitutional amendments — the Charlottetown Accord — was defeated in 1992 following simultaneous referenda in Québec and in the rest of Canada. This experiment with public participation, both the final referenda as well as the earlier attempts to engage with citizens by means of conferences and a travelling commission, is seen by some as the proximate cause of the defeat of the accord.²⁷ Public participation, particularly combined with a constitutional politics that is about recognizing different communities, will inevitably lead to failure. Janet Ajzenstat, for example, has argued that “the participation of political groups, interests, and individual Canadians in the negotiations is heightening contestation in the constitutional arena and hastening the country’s breakup.”²⁸ Michael Lutzig, for his part, argues that extensive public participation in constitutional change

26 It is important to emphasize that in Québec the predominant reading of the Canadian constitutional predicament is quite different. The emphasis is on the inherent unfairness of the 1982 constitutional settlement, the importance to Québec’s long-term interests of a certain constitutional guarantees in respect of language, culture, the division of powers, and key national institutions such as the Senate and the Supreme Court of Canada. See, *inter alia*, Guy Laforest, *Trudeau et la fin d’un rêve canadien* (Sillery: Septentrion, 1992); Eugénie Brouillet, *La négation de la nation* (Sillery: Septentrion, 2005); and Michel Seymour, “La proie pour l’ombre. Les illusions d’une réforme de la fédération canadienne” in Alain-G. Gagnon, ed., *Le fédéralisme canadien contemporain* (Montréal: Les presses de l’Université de Montréal) 221 [Seymour].

27 Michael Atkinson, “What Kind of Democracy Do Canadians Want?” (1994) 27 *Canadian J. of Political Science/Rev. canadienne de science politique* 714 [Atkinson].

28 Janet Ajzenstat, “Constitution Making and the Myth of the People” in Cook, *supra* note 25 at 112.

makes agreement all but impossible — not only does it make elite accommodation very difficult, but opening up the constitutional reform process actually leads to the creation of a multiplicity of competing constitutional interest groups that make it exceedingly difficult to come to agreement on a package of amendments.²⁹ Alain Noël summarizes this widely held view by arguing that “[i]t is now taken as self-evident that the country’s constitution and basic institutions cannot be amended, except at the margins. Merely evoking the possibility of such changes tends to be seen as futile, if not irresponsible.”³⁰

In fact, the Canadian constitution can be amended, has been amended several times since the defeat of the Charlottetown Accord, and while some have been relatively minor changes, others have been substantive amendments and more than just at the margins. Whether it be changes to the constitution text (e.g., bilateral amendments under section 43 of the *Constitution Act, 1982*³¹) or changes to quasi-constitutional statutes, the constitution has been amended repeatedly since 1993.

Many of the amendments to constitutional texts have been bilateral agreements between the Government of Canada and the government of a province pursuant to section 43 of *Constitution Act, 1982*. Over the past fifteen years this device has been used, *inter alia*, to change the name of a province (Newfoundland became Newfoundland and Labrador),³² change the structure of education in Newfoundland and Labrador and Québec,³³ allow for a bridge to be built connecting the province of Prince Edward Island to the mainland (the 1867 constitution explicitly provided for a ferry service),³⁴ and officially make English and French the official languages of the province of New Brunswick,³⁵ something that had been contemplated in the failed Charlottetown Accord. Some of these amendments are relatively minor (name

29 Michael Lusztig, “Constitutional Paralysis: Why Canadian Constitutional Initiatives Are Doomed to Fail” (1994) 27 *Canadian J. of Political Science/Rev. canadienne de science politique* 747.

30 Alain Noël, “Democratic Deliberation in a Multinational Federation” (2006) 9 *Critical Rev. of International Social and Political Philosophy* at 425 [Noël].

31 For a discussion and listing of these bilateral amendments see Joel Bakan et. al., *Canadian Constitution Law* (Toronto: Emond Montgomery, 2003) at 453. For an overview of the history of constitutional amendments see Peter Oliver, “Canada, Quebec and Constitutional Amendments” (1999) 49 *Univ. of Toronto Law J.* 519; and Russell, *supra* note 5.

32 *Constitution Amendment, 2001* (Newfoundland and Labrador), S.I./2001-117, C.Gaz. 2001. II.2899.

33 *Constitution Amendment, 1998* (Newfoundland Act), S.I./98-25, C.Gaz. 1998.II.339; and *Constitution Amendment, 1997* (Quebec), S.I./97-141, C.Gaz. 1997.II.1.

34 *Constitution Amendment Proclamation, 1993* (Prince Edward Island), S.I./94-50, C. Gaz. 1994. II.2021

35 *Constitution Amendment Proclamation, 1993* (New Brunswick), S.I./93-54, C. Gaz. 1993.II.1588.

change, bridge), several codify accepted practice (New Brunswick official languages), and a few have major repercussions beyond the province affected, but all required extensive negotiations between the federal and provincial governments even when, in some cases, the decision was also the subject to legislative hearings, referenda (e.g., education in Newfoundland and Labrador), or weak forms of public deliberation.

However, none of the successful amendments to the constitution since 1993 have focussed on the main driver of constitutional change in Canada: the fact that Canada is a *de facto* multinational state.³⁶ Of course the many nations of Canada are not easily named or geographically concentrated. While it is relatively easy to locate the Québec nation, the same cannot be said for Aboriginal nations or for “English Canada.”³⁷ Moreover, not all agree that Canada is, in fact, a multinational state or that, if there are several nations, this fact should be reflected in the overarching constitutional settlement. Better, so the argument goes, to strengthen attachment to a single Canadian nation or, at a minimum, overarching liberal values.³⁸

This may partly explain why constitutional change over the past fifteen years has avoided engaging the key constitutional tasks facing Canada. Thus, while the 1995 referendum was most certainly about the place of Québec in the federation, the proposal for Québec sovereignty was defeated, albeit by the narrowest of margins with an extraordinarily high turnout: 93.5 percent of eligible voters cast a ballot, 49.4 percent voting yes and 50.58 percent voting no.³⁹ However, the 1995 referendum is the exception. For the most part, Canadians have avoided talking openly or at least in a sustained way, about the place of Québec in the federation. While amending the constitution to allow Québec to “sign on” remains the clear long term objective of many Québécois and is the official position of the governing Quebec Liberal Party, talking about such an amendment, much less arguing for it, is rare in the rest of Canada. Similarly, since the defeat of the Charlottetown Accord, which would have given constitutional recognition and specificity to the inherent right of Aboriginal peoples to self government, constitutional change that

36 McRoberts, *supra* note 25; Will Kymlicka, *Finding our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: Oxford University Press, 1998).

37 Philip Resnick, *Thinking English Canada* (Toronto: Stoddart, 1994).

38 See for example, Hudson Meadwell, “Is a ‘True’ Multination Federation the Cure for Our Ills?” in Patrick James, Donald E. Abelson & Michael Lutzsig, eds., *The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada* (Montreal and Kingston: McGill-Queen’s University Press, 2002) 219 [Meadwell].

39 McRoberts, *supra* note 25 at 230; Robert Young, *The Struggle for Quebec: From Referendum to Referendum?* (Montreal and Kingston: McGill-Queen’s University Press 1999).

would address Aboriginal concerns has relied on the decidedly incremental and to some, unsatisfying, process of constitutional amendment by judicial interpretation of the meaning of Aboriginal rights, especially the right to self-government.

Thus, since 1993 Canadians have avoided engaging in a conversation about the place of Québec and Aboriginal peoples in the constitutional architecture of the country. Yet, as has been observed before, the irony of this avoidance is that while Canadian political and legal theorists have been at the forefront of contemporary debates about minority nationalism and the realities of managing multinational federations,⁴⁰ many Canadians would reject the very idea that Canada is a “multination.” Such is the power of the political culture unleashed by the *Charter of Rights and Freedoms*.⁴¹

A somewhat more optimistic account of recent Canadian political history would focus attention on the commitment of the governing Conservative Party of Canada to “open federalism”⁴² and the fact that in November 2006 the Canadian House of Commons voted in favour of a motion that the Québécois form a nation. Was this the beginning of a thaw in the willingness of Canadians to deliberate and discuss the multinational character of the country? Perhaps, but there are aspects of the debate which suggest not. First, the motion was a tactical move to forestall a vote on a divisive motion introduced by the Bloc Québécois, an opposition party committed to pursuing the sovereignty of Québec. The wording of the motion had not been discussed beforehand by the cabinet, and the minister of intergovernmental affairs resigned rather than vote for the motion.⁴³ Second, it would appear that the motion was, at least in part, designed to secure the position of the Conservative Party in Quebec. Yet, in the subsequent election in the Fall of 2008 the Conservatives did not get their hoped for breakthrough in Québec and, faced with the prospect of a coalition that included the Bloc Québécois, some Conservatives used rather intemperate language which alienated a large

40 Sujit Choudhry, “Does the World Need More Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory” (2007) 5 *International J. of Constitutional Law* at 607-608.

41 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra* note 12 [*Charter*]. McRoberts, *supra* note 25 at 251; Noël, *supra* note 30 at 426; Meadwell, *supra* note 38.

42 Eric Montpetit, *Le Fédéralisme d'ouverture: La recherche d'une légitimité canadienne au Québec* (Sillery: Septentrion, 2007) [Montpetit].

43 John Ivison, “Chong just the first casualty” *National Post* (28 November 2006), online: <http://www.nationalpost.com/scripts/story.html?id=6d8ee434-0b5a-4003-8246-2baff0b55266&k=25169&p=2>.

number public opinion leaders in Québec and elsewhere.⁴⁴ All of this is to suggest that the commitment of the Conservative government to an open federalism that accommodates Québec nationalist sentiment is to some extent tactical, designed to secure electoral support, and not the genesis of a constitutional conversation.

The End of Elite Accommodation/The Rise of Public Participation

Summarizing much the dominant view of contemporary Canadian constitutional politics, Alain Noël has argued that “constitutional politics had now entered a new era, marked by citizen involvement and demands for more open deliberations.”⁴⁵ This view reflects the general sentiment among most scholarly observers of the Canadian constitutional reform process.⁴⁶ In general, the consensus seems to be that the advent of the *Charter* in 1982 had the effect of transforming Canadian constitutional politics. No longer was the constitution primarily a concern only of governments (*e.g.*, disagreements over the constitutional division of powers); rather, the constitution was now a “people’s constitution,” a document that articulated the fundamental rights and freedoms to be enjoyed by all citizens of Canada. Of course, the contrast is easily overdrawn. The efforts by women’s groups to secure greater protection of gender equality by lobbying the federal and provincial governments for changes to the 1981 constitutional reform package suggest that there were elements of citizen involvement in constitutional change as early as the late 1970s and early 1980s.⁴⁷

The debate over the Meech Lake Accord described at the outset of this essay is usually taken to be a strong demonstration of this shift in constitutional political culture. Not only were some Canadians concerned about the substantive content of the proposed amendments to the constitution, but they

44 Jean Robert Sansfaçon, “Harper, le pyromane” *Le Devoir* (4 décembre 2008), online: <<http://www.ledevoir.com/2008/12/04/220788.html>>; Jean-François Caron and Guy Laforest, “Canada and Multinational Federalism: From the Spirit of 1982 to Stephen Harper’s Open Federalism” (2009) 15 *Nationalism and Ethnic Politics* 27.

45 Noël, *supra* note 30 at 424.

46 Russell, *supra* note 5; Atkinson, *supra* note 27; Matthew Mendelsohn, “Public Brokerage: Constitutional Reform, Public Participation, and the Accommodation of Mass Publics” (2000) 33 *Canadian J. of Political Science/Rev. canadienne de science politique* 245 [Mendelsohn]; Jocelyn Maclure, “The Politics of Recognition at an Impasse? Identity Politics and Democratic Citizenship” (2003) 36 *Canadian J. of Political Science/Rev. canadienne de science politique* 3.

47 Penny Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women’s Press, 1983).

and others were concerned about the process by which the accord had been reached. The fact that “white men in suits” (*i.e.*, the prime minister and the provincial and territorial leaders) had the power to deliberate on amendments to the constitution was deemed unacceptable. The privileged position given to provincial and territorial governments as a result of the amending formula agreed to in 1982 seemed to many Canadians a reflection of the “old” constitution that was preoccupied with federalism and not the “new” (post-1982) constitution which, in their view, was about protecting if not advancing individual rights and freedoms.⁴⁸ Thus, to take but one example, women’s groups outside of Québec were vocal critics of the Meech Lake Accord because of what they saw as the risk to the equality rights provision of the *Charter* that would arise if a clause recognizing Québec as a distinct society were to be included in the constitution as an interpretative clause. However, these groups were also highly critical of the accord because the manner in which the package of constitutional amendments was developed did not, in the main, provide citizens in general and women’s groups in particular with many avenues or opportunities to have a say. Whereas women’s groups had been successful in forcing changes to the 1982 constitutional package, they were largely excluded from the process that led to the Meech Lake Accord.⁴⁹

However, it is an exaggeration to say that the critique of the Meech Lake Accord has led to an end to elite accommodation as a means of pushing constitutional change. In other words, the public engagement that was a hallmark of the process leading to the Charlottetown Accord has not meant that all constitutional change in Canada must have an equivalent degree of public participation. Notwithstanding the concerns raised in the 1980s about the secretive nature of the traditional Canadian executive-dominated approach to constitutional reform, elite accommodation is by no means gone when it comes to realizing constitutional change in Canada.

Elite accommodation continues to be a critical tool for achieving constitutional change. While a comprehensive package of amendments that would affect the whole country is no longer a priority, Canadian political elites, specifically the federal and provincial governments, have conspired to agree on a series of bilateral amendments. Elite accommodation persists because of the

48 Russell, *supra* note 5.

49 Beverly Baines “After Meech Lake: the Ms/Representation of Gender in Scholarly Spaces” in David E. Smith, Peter MacKinnon, John C. Courtney, eds., *After Meech Lake: Lessons for the Future* (Saskatoon: Fifth House, 1991) 205. For a somewhat different view see Alexandra Dobrowolsky, *The Politics of Pragmatism: Women, Representation, and Constitutionalism in Canada* (Toronto: Oxford University Press, 2000).

inherent dominance of the executive in Canadian politics. It is exceedingly rare for policy much less constitutional ideas to successfully originate in the federal Parliament or provincial and territorial legislative assemblies. This executive dominance is, to some extent, “hardwired” into Canadian constitutional practice by the various amending formulas which almost invariably provide for some form of negotiation between the federal and provincial and territorial governments.⁵⁰

Moreover, the conviction that the Canadian constitution cannot, or at least should not, be amended for fear of unleashing irresolvable disagreements means that those outside of government who are looking for enduring solutions to endemic challenges (*e.g.*, status of Aboriginal peoples, environmental protection, the decline in civic engagement) are actively discouraged from doing so. Non-constitutional solutions are preferred whether these take the form of fiscal (*e.g.*, allocating ever more public funds to address the plight of Aboriginal Canadians), legal (*e.g.*, litigation by the government of the Province of Québec seeking to constrain the ability of the Government of Canada to spend in areas of provincial competence), or simply legislative (*e.g.*, statutory efforts to pursue Senate or electoral reform) measures.

Evaluation: the Necessity of Public Participation

Canadian citizens are not routinely given an opportunity to deliberate on most constitutional amendments. While all amendments to the constitutional texts are subject to legislative or parliamentary debate, this is not an effective form of public engagement. Similarly, while most amendments to the constitution involve legislative or parliamentary hearings, once again, only a tiny fraction of the population is consulted and even then the “usual suspects” — interest groups, university professors, politicians — are predominant. Changes to the quasi-constitutional documents (*i.e.*, key statutes) do not usually involve, and do not require, anything more than legislative or parliamentary approval with the associated consultations by committee. In fact, when these statutes are amended as a result of decisions by the courts,⁵¹ neither the legislature nor the public are formally involved.

50 Donald Savoie, *Court Government and the Collapse of Accountability in Canada and the United Kingdom* (Toronto: University of Toronto Press, 2008); Richard Simeon and Amy Nugent, “Parliamentary Canada and Intergovernmental Canada: Exploring the Tensions” in H. Bakvis and G. Skogstad, eds., *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 2d ed. (Don Mills: Oxford, 2008) 89.

51 See for example, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

Moreover, as noted earlier, in several Canadian provinces a substantive amendment to the constitution must be approved by referendum. This does add a degree of public participation. However, while some referenda have been about substantive amendments (*e.g.*, the Québec sovereignty referendum and the British Columbia (B.C.) and Ontario referenda on electoral reform), since 1993 many of the provincial referenda have been about relatively uncontroversial matters (*e.g.*, Prince Edward Island fixed link; Newfoundland name change) or they have served to enshrine in the constitution a policy consensus (*e.g.*, Newfoundland schools).

However, the lack of citizen input into the amendment of quasi-constitutional statutes (beyond the occasional referendum) may be giving way to a more inclusive, deliberative process. Governments across Canada and indeed around the world are increasingly likely to experiment with deliberative processes and this includes situations where key pieces of quasi-constitutional legislation are being amended.⁵² Of particular interest are the more recent deliberative experiments in Ontario and B.C. with respect to electoral reform. These are remarkable in several respects. First, they represent two relatively rare examples of deliberative democracy in action where a representative group of citizens was asked to consider the merits of change to the electoral system and, having decided that change was necessary, what alternative system was preferable. In both cases the deliberative model involved a process lasting several months that included learning about elections and electoral reform, public hearings and other public engagement exercises, and expert facilitation of a deliberative process where the participants sorted through the issues and developed a consensus recommendation for a new electoral system.⁵³

Second, in both provinces the recommendations of the citizens' assemblies were submitted directly to the citizens of the whole province by means of a referendum held in conjunction with a provincial election. In the case of B.C., the proposal of the citizens' assembly was subject to two referenda

52 The literature on democratic deliberation is enormous. For a (selective) introduction see Dennis F. Thompson, "Deliberative Democratic Theory and Empirical Political Science" (2008) 11 *Annual Rev. of Political Science* 497; Archon Fung, "Democratizing the Policy Process" in M. Moran, M. Rein & M. E. Goodin, eds., *The Oxford Handbook of Public Policy* (Oxford and New York: Oxford University Press, 2006) [Fung]; and Frank Fischer, *Reframing Public Policy: Discursive Politics and Deliberative Practices* (Oxford and New York: Oxford University Press, 2003) [Fischer].

53 Mark E. Warren and Hilary Pearse, *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge: Cambridge University Press, 2008) [Warren & Pearse]; Jonathan Rose, "The Ontario Citizen's Assembly on Electoral Reform" (2007) 30 *Canadian Parliamentary Rev.* 9.

votes, one simultaneously with the 2005 election, a second at the time of the 2009 election. In effect, in both Ontario and B.C., proposed changes to a quasi-constitutional text (*i.e.*, legislation governing elections) were designed by a representative group of citizens and put directly to all citizens by means of referendum with little or no role for the members of the legislature. This last feature of the process is troubling. In effect, the decision was taken to allow an unelected body of citizens the right to propose changes to legislation with little or no reference to the elected members of the legislative assembly. This raises the very real possibility of a conflict between two bodies: the unelected citizen's assembly and the elected legislature.⁵⁴

Third, it is critical to mention that in both Ontario and B.C. the proposed changes to the electoral system were rejected by voters in the referenda. In both cases, a supermajority was required for the changes to become law and in Ontario only 37 percent of voters supported the change.⁵⁵ In the 2005 referendum in B.C., the result was much closer with 57.69 percent voting yes, just shy of the required supermajority of 60 percent.⁵⁶ Perhaps because of the close result, the proposal of the B.C. Citizens' Assembly on Electoral Reform was once again put to a province-wide referendum in conjunction with the provincial election of 12 May 2009. This time, only 39.08 percent of voters opted to adopt a single transferable vote electoral system.⁵⁷

While space does not permit a full analysis of these referenda results, it is likely that in both cases a lack of public understanding and a lack of political leadership explain the rejection of the proposed changes to the electoral system.⁵⁸ In both Ontario and B.C., the government of the day, wishing to ensure that the recommendations of the citizens' assembly were put to the voters directly, opted to say relatively little about the recommendations. The

54 See Patrick Fafard and Darrell Reid, *Constituent Assemblies: A Comparative Survey* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1991).

55 Elections Ontario, *Provincial Referendum on Electoral System Reform: Report of the Chief Electoral Officer* (Toronto: Elections Ontario, 2007) [Elections Ontario].

56 Elections BC, *Statement of Votes: Referendum on Electoral Reform, May 17, 2005*, online: <<http://www.elections.bc.ca/docs/rpt/SOV-2005-ReferendumOnElectoralReform.pdf>>.

57 Elections BC, "2009 Official Referendum Results," online: <<http://www.elections.bc.ca/docs/stats/2009-ge-ref/fres/REF-2009-001.html>>.

58 On the B.C. experience, see Warren & Pearce, *supra* note 53. On the Ontario experience see Laura B. Stephenson and Brian Tanguay, "Ontario's Referendum on Proportional Representation: Why Citizens Said No" *IRPP Choices* (September 2009), online: Institute for Research on Public Policy <<http://www.irpp.org/choices/archive/vol15no10.pdf>>; and Lawrence LeDuc, Heather Bastedo & Catherine Baquero, "The Quiet Referendum: Why Electoral Reform Failed in Ontario" (Paper presented to the Annual Meeting of the Canadian Political Science Association, University of British Columbia, 4-6 June 2008).

provision of arguments for and against the proposal was left to others. In both provinces, electoral reform was not one of the major issues of the election campaign, despite the fact that the election was the precursor to the referendum. Therefore, it is not surprising that the proposals for change were both poorly understood and ultimately rejected. At the outset of the 2007 Ontario general election campaign, for example, only 34 percent of respondents to a representative poll said they were aware of and felt very, or somewhat knowledgeable about the Ontario referendum on electoral reform. Similarly, only just over half of respondents (57 percent) reported being aware that there were proposed changes to the electoral system, and only 33 percent reported being familiar with the mixed member proportional alternative electoral system.⁵⁹

The political class signalled to the voters that electoral reform was not a priority. This, combined with the complexity of the recommendation — a single transferable vote system in B.C., a mixed member proportional system in Ontario — meant that many voters simply opted for the known, opted for the status quo. These results suggest that while deliberative and participatory mechanisms have proved feasible for constitutional change in Canada, to be truly successful, for citizens to well understand what it is they are being asked to endorse, considerable political leadership is required.

In summary then, is public participation (beyond the institutional arrangements of representative democracy) a necessary and integral part of constitutional change in Canada? The short answer is no. It remains possible and indeed quite common, however, for amendments to the constitution to be made absent anything resembling public consultation much less public deliberation. A slightly longer answer is that in a few cases, including changes to electoral laws, Canadians have experimented with deliberative processes.⁶⁰ These processes are by no means required and there is not yet an expectation that such deliberation will take place. However, public participation can be a means to ensure that, whatever changes are being considered to the constitution, the results are seen as legitimate. In other words, while public engagement is not required to secure at least some forms of constitutional change, such engagement may be necessary to secure constitutional change that is seen

59 Elections Ontario, *supra* note 55.

60 This does not mean that electoral laws in Ontario and British Columbia are a particularly important example of quasi-constitutional statutes. As one of the anonymous reviewers of this article perceptively pointed out, the list of statutes that conceivably merit the status of being quasi-constitutional is quite long indeed. Rather, the argument here is that the Ontario and B.C. efforts to amend electoral law are important examples of changes to quasi-constitutional statutes, yes, but they are important precisely because governments opted to experiment with deliberative processes.

by citizens as legitimate.⁶¹ Finally, to be truly successful, a model that includes subjecting the results of a citizens' assembly to ratification by referendum, considerable political leadership is required.

What is Needed is a Constitutional Conversation

If, as the argument goes, private negotiation between political elites is long gone and the process of constitutional change in Canada is now necessarily a public process requiring public participation, and the result necessarily means a political and constitutional impasse, what can be done? If Canadians are doomed to debate their constitution in the open but this very openness makes securing agreement all but impossible, what is the future of constitutional conversation, of democratic deliberation designed to foster constitutional change?

Alain Noël has provided a sophisticated and nuanced overview of the Canadian debate on the possibility of democratic deliberation on the Canadian constitution.⁶² It is difficult to do justice to his full argument here because he perceptively links the debates about democratic deliberation about the constitution with the reality of multinational federations like Canada, where there is not necessarily agreement on the nature of the *demos*. For the purposes of this article, what is perhaps most useful is that he sets out the views of a range of Canadian scholars, including himself, who share an interest in continuing the "Canadian conversation" about constitutional change, even if some of those views are more pessimistic (others are less so).⁶³

After acknowledging that some proponents of constitutional deliberation are rather sombre about the prospects for success, Noël goes on to make the

61 I am indebted to Patti Tamara Leonard for this critical observation.

62 Noël, *supra* note 30. For other extended accounts of constitutional politics as conversation see, *inter alia*, Chambers, *supra* note 21; Charles Blattberg, *Shall We Dance?: A Patriotic Politics for Canada* (Montreal and Kingston: McGill-Queen's University Press, 2003); James Tully, *Strange Multiplicity: Constitutionalism in the Age of Diversity* (Cambridge: Cambridge University Press, 2005) [Tully]; and Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal and Kingston: McGill-Queen's University Press, 1994) [Webber].

63 Noël, *ibid.*, places among the more pessimistic, political theorist Michel Seymour who has argued that the Government of Canada has effectively undermined the possibility of success for a constitutional conversation, a concept he supports, and argues the case for Québec sovereignty. See Seymour *supra* note 26 at 21. Another sombre outlook is provided by McRoberts, *supra* note 25. McRoberts is supportive of a constitutional conversation but is not optimistic about the likelihood of success as long as Canadians disagree on something as fundamental as whether or not their Canada is a multinational federation.

case for a continuing constitutional conversation by first citing the arguments of other observers of Canadian constitutional politics. For example, he cites Matthew Mendelsohn, a long time proponent of deliberative processes, who argues in favour of a wide range of participatory frameworks for thinking about constitutional change in Canada.⁶⁴ Similarly, Noël draws attention to the contribution of James Tully who argues that, in a multinational federation like Canada, a stable and widely accepted constitutional outcome is unlikely. Rather, Tully argues, “[i]t is now widely argued in theory and practice that the identities worthy of recognition must be worked out and decided on by the members of the association themselves, through the exercise of practical reason in negotiations and agreements.”⁶⁵ In a similar vein, Simone Chambers has argued that the heart of constitutional politics resides in a sustained conversation over time, where the parties commit to “talk to each other, respond to each other’s claims and grievances, consider new options and reevaluate old ones.”⁶⁶

However, Noël places even more emphasis on arguments for continued constitutional deliberation that focus on the inherent value of constitutional process, even at the expense of concrete constitutional outcomes, at least in the short term. Here he echoes Jeremy Webber, for example, who argues that continued public deliberation is to be valued not because it will necessarily, or even likely lead to a new constitutional settlement; rather, Webber argues, it public deliberation should be valued for the merits of the conversation itself.⁶⁷ More recently, Eric Montpetit has taken up the case for a constitutional conversation, in his case by focussing on what he calls “open federalism.” Montpetit argues that such a conversation would extend over a considerable period of time and could contribute to a transformation of the ways in which key actors understand the constitutional project.⁶⁸

Noël seeks to extend these arguments by taking seriously the realities of power politics but, like others, he comes to the conclusion that what should matter in a multinational federation like Canada is continued constitutional conversation, where the goal is not a single, final outcomes or settlement but rather continued conversation. Continuing public deliberation about the constitution is valuable, he argues, because “[i]n the give and take of arguments and of politics, new actors emerge, old ones are displaced or rejuvenated, and

64 Mendelsohn, *supra* note 46 at 271.

65 Tully, *supra* note 62 at 24.

66 Chambers, *supra* note 21 at 161.

67 Webber, *supra* note 62.

68 Montpetit, *supra* note 42 at 98-99.

social arrangements are remade.” This is especially important in multinational federations because, Noël argues, “[i]t means that peoples and social actors change themselves as well as others through their interactions.”⁶⁹ In other words, through a process of deliberation, the parties to a continuing constitutional conversation will, eventually, be themselves changed, and it is this process of change that sets the stage for eventual agreement.⁷⁰

Working Towards a Constitutional Conversation

Just as Canadians have made a significant contribution to contemporary scholarship about minority nationalism, they have contributed to making the normative case for “constitutional conversation,” drawing on the work of Jürgen Habermas (Chambers), John Dryzek (Noël), and Ludwig Wittgenstein (Tully).⁷¹ Yet, one might ask, is there any evidence that such a conversation is, in fact, possible in Canada? In a related vein, what might be some of the preconditions for such a conversation?

In fact, there is very little evidence that, faced with the seemingly insurmountable challenge of amending the constitution as a way of addressing and recognizing the multinational character of Canada, Canadians have opted for a conversation. Or if they have, the conversation has not dealt with some of the key issues that require a *constitutional* conversation. While Canadians would appear to have abandoned, at least for the medium term, the search for a single constitutional outcome or settlement, it is by no means clear that they have opted for a give and take of arguments about the character of the polity. It is not clear that there is a true conversation that bridges the gulf between the constitutional aspirations of the Québécois and the constitutional change agenda of the rest of Canada (such as it is). Nor is there much evidence that we are witnessing an active process by which a new understanding of the constitutional settlement will organically emerge from conversation and delibera-

69 Noël, *supra* note 30 at 434.

70 This is a fundamental premise for most theorists and practitioners of deliberative democracy and deliberative policy making. See Fung, *supra* note 52; and Fischer, *supra* note 452. However, as my colleague Patti Leonard pointed out to me, the inherent value of political participation and, by extension, deliberation, is an old idea articulated at different times by Tocqueville and John Stuart Mill (and many others besides). The core idea is that deliberation is a form of citizenship education, which can build tolerance for others and enhance the capacity of citizens to think about their long-term and collective interests. For a critical survey see Jane Mansbridge, “On the Idea that Participation Makes Better Citizens” in Stephen L. Elkin and Karol Edward Soltan, eds., *Citizen Competence and Democratic Institution* (University Park, PA: Pennsylvania University Press, 1999) 291.

71 Chambers, *supra* note 21; Noël, *supra* note 30; Tully, *supra* note 62.

tion. To some extent this is neither surprising nor remarkable — promoting a constitutional conversation is a challenging enterprise.

It is not possible to fully develop this critique here. This article simply introduces five considerations that underscore the challenge of triggering a constitutional conversation. The first has to do with the role of intellectuals, the second has to do with the costs of promoting deliberative dialogue, the third has to do with the intensity of constitutional conversation that we ignore at our peril, the fourth relates to the challenge of numbers, and the fifth and final consideration has to do with the critical importance of leadership.

Implicit in much of the writing about a constitutional conversation is the idea that intellectuals, be they university-based or not, will contribute to the conversation, animate it, and nourish it. This claim is rooted in the fact that in most models of deliberation “experts” often play a critical role.⁷² In order for citizens to deliberate on complex issues they need to be provided with some more or less neutral information about the issues at stake and a roadmap that charts both the technical issues (*e.g.*, different kinds of electoral systems) and the value conflicts that are inherent in choosing among different policy options and institutional arrangements (*e.g.*, spatial representation that privileges locality versus proportional representation that privileges interests however defined). As Joseph Weiler puts it:

Deliberative models are often favoured by the deliberative class — primarily professors who are, naturally, empowered by any process which privileges that which they have and which legitimates, even aggrandizes, their status and actual or pretended *modus operandi*, and in which the model for ideal government is a well-conducted seminar.⁷³

Or, as Peter Russell has put it, constitutional conversation is one that is often supported by (if not dominated by) what he called “the chattering classes.”⁷⁴ However, for the chattering classes to contribute fully to a constitutional conversation they must be able to deliver a comprehensive account of the challenges that it is meant to address. The Canadian case suggests that few actually do so.

72 Frank Fischer, *Democracy and Expertise: Reorienting Policy Inquiry* (Oxford: Oxford University Press, 2009).

73 Joseph Weiler, “Epilogue: ‘Comitology’ as Revolution - Infranationalism, Constitutionalism and Democracy” in C. Joerges and E. Vos, eds., *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart, 1999) at 348, cited by H. Brunkhorst, “A polity without a state? European constitutionalism between evolution and revolution” in Eriksen et al., *supra* note 19 at 98.

74 Russell, *supra* note 5 at 99.

While it is true that intellectuals are common among recent Canadian political leaders, with one university professor, Michael Ignatieff, replacing another, Stéphane Dion, as leader of the Liberal Party of Canada, there is a striking lack of dialogue between intellectuals on either side of the linguistic divide. As François Rocher has recently demonstrated, English language Canadian political scientists generally ignore the work of their French language counterparts, even when the latter publish in English. Interestingly, the reverse is not true — French language scholars are more likely to cite the work of their English language colleagues.⁷⁵ Even in the narrower confines of federalism studies, it would appear that scholars who work in English rarely engage with their French language counterparts.⁷⁶ Moreover, the two language communities operate with quite different conceptions of the purpose of federalism, with efficiency being the watchword among many English language students of federalism in Canada whereas shared citizenship and accommodating minorities is the focus of French language scholars.⁷⁷

Of course, the disagreements and debates of university-based intellectuals matter little in the real world of politics. Yet constitutional politics may be somewhat different. At least in the Canadian case, academics have played a critical role in the past as advisors to governments, framers of the public debate, and as political leaders.⁷⁸ Moreover, if there is to be a constitutional conversation among Canadians writ large, it would be helpful if the academics who will be asked to animate and inform that conversation were themselves engaged in a dialogue rather than just talking past one another.⁷⁹ While there are venues in which academic dialogue does take place, what is less clear is the

75 François Rocher, "The End of the 'Two Solitudes'? The Presence (or Absence) of the Work of French Speaking Scholars in Canadian Politics" (2007) 40 *Canadian J. of Political Science/Rev. canadienne de science politique* 833.

76 Patrick Fafard and François Rocher, "The Evolution of Federalism Studies in Canada: from centre to periphery" (2009) 52 *Canadian Public Administration* 291 [Fafard & Rocher].

77 François Rocher, "La dynamique Québec-Canada ou le refus de l'idéal fédéral" in Alain-G. Gagnon, ed., *Le fédéralisme canadien contemporain* (Montréal : Les presses de l'université de Montréal, 2006) 93 [Rocher]; Patrick Fafard, François Rocher & Catherine Côté, "The Presence (or lack thereof) of a Federal Culture in Canada: The Views of Canadians" (2001) 20 *Regional and Federal Studies* 495.

78 Consider the role of professors of law in Québec politics, including Daniel Turp (Bloc Québécois and Parti Québécois) and Benoît Pelletier (Quebec Liberal Party); professors of political science in the Government of Ontario, including David Cameron and Matthew Mendelsohn (who both served as Deputy Minister of Intergovernmental Affairs); and the role of political scientists as senior advisors to the Government of Canada including Peter Leslie and Ron Warts, to name but two, both of whom served as Assistant Secretaries to Cabinet.

79 For a thoughtful discussion of this problem, see Alan C. Cairns, "Why Is It So Difficult to Talk to Each Other?" (1996) *McGill Law J.* 631.

extent to which conflicting world views confront one another.⁸⁰

More generally, if there is to be a constitutional conversation that involves all of the nations that make up the Canadian multination, a necessary (but by no means sufficient) condition is that the scholars who articulate the views of the different nations find ways to begin the dialogue.

Second, if a constitutional conversation is to be effective and have a meaningful impact on constitutional politics it must involve citizens in a meaningful way. In Canada we have increasing experience with a range of deliberative techniques like deliberative polls, citizen juries, and citizen dialogues.⁸¹ However, almost all of these experiments have either been initiated by governments or otherwise heavily subsidized by the state. Largely because of the cost, to this point governments have been a critical source of funding for deliberation processes on key public policy issues. Yet as long as Canadian governments labour under a phobia of constitutional talk or, in some cases, believe that constitutional talk is no longer required, they are unlikely to be willing to launch the deliberative exercises that would seem to be required if Canadians were to engage in a true constitutional conversation. In other words, a constitutional conversation does not just happen. It usually requires a financial commitment by governments which have the funds to create the deliberative spaces that allow for a constitutional conversation to get off the ground. Moreover, if the constitutional conversation is to begin to overcome the misunderstandings among Québec, the rest of Canada, and Aboriginal nations, a truly pan-Canadian approach is required.

Third, in multinational federations like Canada, the constitutional conversation must contend with the fact that Canadians have been debating their future together more or less intensely for the past fifty years. In the process, citizens, and especially the political class, have learned that, as with all negotiations, a constitutional negotiation is about advancing disparate interests and reconciling divergent views. When required, governments have not hesitated to play hardball. Certainly this is how one might interpret the two referenda on variations of sovereignty for the province of Québec, a reference question to the Supreme Court followed by a law, the *Clarity Act*,⁸² that tries

80 For example, Québécois scholars are much more likely to see the annual meeting of l'Association Francophone pour le savoir as "their" meetings, and many therefore choose not to attend meetings of the Congress of Humanities and Social Sciences. See also Rocher, *supra* note 77, and Fafard & Rocher, *supra* note 76.

81 François-Pierre Gauvin and Julia Abelson, in collaboration with Mary Pat MacKinnon and Judy Watling, *Primer on Public Involvement* (Ottawa: Canadian Policy Research Networks, 2006).

82 S.C. 2000, c. 26.

to establish a minimum set of rules for secession, and the countless claims and counterclaims of unfairness, selfishness, and small mindedness that mark Canada's constitutional experience. As Noël has argued, the Canadian constitutional debate "was never a nice and polite conversation, carried by well-meaning participants who had previously checked their interests and their advantages at the door."⁸³ Rather, he argues, constitutional discussion in Canada has usually required tough bargaining and has sometimes "verged on plain domination."⁸⁴ If we are to have a constitutional conversation, one of the first challenges must be to overcome the legacy of earlier constitutional debates and the ill will, hard bargaining, myth making, and misunderstanding that have developed over time.

Fourth, a true constitutional conversation has to deal with the challenge of numbers. To be effective in shaping how Canadians perceive their constitutional futures, a conversation about the constitution must involve reasonably large numbers of people. The citizens' assemblies in Ontario and British Columbia, while in some respects revolutionary, suffered from the fact that only a tiny percentage of the population was involved. Outreach by these assemblies was limited, and only a very small number of citizens understood the problem to be solved (*i.e.*, lopsided electoral outcomes) much less the solutions that might be proposed. The challenge of numbers is all the greater on a pan-Canadian scale and becomes daunting in light of the need to cross various linguistic and cultural divides.⁸⁵

One way to least partially address the challenge of numbers is to reframe the problem. Rather than seek to involve citizens in a constitutional conversation at any given moment in time, the better approach might be to engage citizens over time by means of education generally, and citizenship education in particular. The way we teach history, the way we identify and frame the content of that history, and the extent to which the history is debated, are all tools which can be used to engage larger numbers of Canadians, admittedly over a longer period of time, in a rough approximation of a dialogue about how the Canadian constitutional order might be amended to address outstanding issues of recognition. Of course, for this to happen, much needs to be done to foster debate and discussion of the points of agreement, disagreement, and indifference, regarding Canadians' shared history, and, critically, regard-

83 Noël, *supra* note 30 at 438.

84 *Ibid.*

85 Andrew Robinson, "Is Canadian Multiculturalism Parochial?: Canadian Contributions to Theorizing Justice and Ethnocultural Diversity" in Linda A. White, et al., eds., *The Comparative Turn in Canadian Political Science* (Vancouver: UBC Press, 2008) 53.

ing the kinds of citizenship values that are being (and could be) promoted by the education system(s), broadly defined. Moreover, there are particular challenges associated with citizenship education in a multinational federation such as Canada, where provincial and territorial education ministries and those responsible for on-reserve education do not always agree on what the Canadian experience is, and how it should be conveyed to students.⁸⁶

Finally, a more fully developed case for a constitutional conversation must take into account the critical challenge of political leadership. As suggested above, the Canadian experience with citizens fora designed to facilitate deliberation on electoral reform suggests that, for public deliberation to be successful, considerable political leadership is required. This is a major challenge. It requires, for example, that political leaders take a medium- to long-term view — indeed the constitutional conversation outlined above is, by definition, one that far exceeds the mandate of a single government. The required leadership also means avoiding the temptation to score short term political or partisan points that exacerbate rather than help resolve fundamental disagreements.

However, the leadership that is required to promote something resembling a constitutional conversation need not be, and indeed perhaps should not be, an overtly public leadership. To address long term, structural challenges, what it often required is a more subtle form of leadership, and that that means allocating time and financial resources to research, coalition and alliance building, and, in some cases, shifts in public opinion. Governments in Canada have demonstrated the ability to do this, for example, in pension reform⁸⁷ or in addressing the challenges of immigration and multicultural citizenship.⁸⁸ Specifically with respect to the relations between Québec and the rest of Canada, or between Aboriginal peoples and the non-Aboriginal settler majority, the Government of Canada and several provincial governments have, in the past, also demonstrated the ability to take the long view and invest in the long-term process of raising awareness and understanding as a necessary but not sufficient condition to dialogue.

86 Raffaele Iacovino, "National Diversity and Citizenship Education in Quebec and the United Kingdom" (Paper presented to the Annual Meeting of the Canadian Political Science Association, University of British Columbia, 3-6 June 2009).

87 Bruce Little, *Fixing the Future: How Canada's Usually Fractious Governments Worked Together to Rescue the Canada Pension Plan* (Toronto: University of Toronto Press, 2008).

88 In this case I am referring specifically to the work of the Metropolis Project, a multi-year research initiative on issues of immigration, globalization, and diversity funded by the Social Sciences and Humanities Research Council and Citizenship and Immigration Canada. See, John Biles, Meyer Burstein & James Frideres, eds., *Immigration and Integration in Canada in the Twenty-first Century* (Montreal and Kingston: McGill-Queen's University Press, 2008).

IV. THE CHALLENGES OF DEMOCRATIZATION IN A MULTINATIONAL FEDERATION

Despite claims to the contrary, the Canadian constitution is subject to amendment and change. Bilateral amendments to the constitution and a myriad of changes to quasi-constitutional statutes have allowed the Canadian constitutional order to evolve. Moreover, while there is now a constitutional convention that requires major changes to the constitution to be subject to referendum, much can and is accomplished using the traditional mechanisms of elite negotiations where the public is not directly engaged although some consultations may occur. Moreover, the very nature of public participation is also changing and Canadians are experimenting with a wide variety of tools beyond the relatively blunt instrument that is a referendum. Finally, while an ongoing constitutional conversation is desirable in theory, in practice such a conversation requires sustained and far-sighted political leadership and is hampered by challenges of cost, the lack of dialogue between and among the intellectual who would animate such a conversation, and the legacy of many years of often hardball constitutional wrangling.

The very possibility of constitutional change in Canada, broadly defined, is thus defined by three linked realities. First, any changes that seek to address the core definition of the polity (*e.g.*, two or three nations, a pact among provinces, a single national and civic project, or a rights-based citizenship regime) requires a multilateral amendment to the constitution,⁸⁹ and the result will be subject to ratification by referendum. Second, the very fact that the consent threshold for major changes to the constitutional order is so high means that such change should, ideally, be the result of an ongoing constitutional conversation, although the preconditions for such a conversation do not yet obtain. Finally the net result of this situation is that constitutional change does occur in Canada, and much of it involving innovative tools to consult if not engage citizens. While these incremental changes are, in some cases, quite important (*e.g.*, electoral reform), for the most part they sidestep the fundamental questions that constitutional change was meant to address.

89 For a contrary view that makes the case for a bilateral amendment to the constitution recognizing the Québécois nation in the Constitution of Canada, see David Cameron and Jacqueline D. Krikorian, "Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process" (2008) 58 *Univ. of Toronto Law J.* 389.

In this article I have proposed some considerations that cannot be ignored as we proceed to construct the kind of constitutional conversation adequate to the task of achieving meaningful constitutional change in a multinational context.

