Constitutional Capers: Wheeling and Dealing with the Charter of Rights

By Chris Hartt and Paul Creelman

Suppose that we start from the position that Trudeau is indeed unfairly forcing the constitutional proposal through Parliament by means of legal trickery. After over ten years of negotiations, he has decided that the only way to get his name in the history books and his mark on the nation is to railroad a constitution by unilateral action. In actuality, of course, the only point of the whole exercise is to make sure that Pierre is the newest, and last, living father of Confederation. (Sorry about that, Joey.)

Trudeau obviously wants to be remembered in the history books of his revamped Canada, but whether or not he is using 'legal trickery' to ensure this is a debatable question. One could take the fact that the Supreme Court was unwilling to give him Carte Blanche and in fact found it necessary to split the issue as evidence of trickery, but one could also explain the split as a desire to explain the issues more clearly. By saying there is a convention, the court tells us that history provides for participation by the provinces in the amendment process. But by saying that this is not a legal necessity, the court refers to a lack of legal evidence for the convention.

How could the fact that the Supreme Court found it necessary to split the question concerning the constitution have been regarded as trickery?

The fact that they had to split the question could be interpreted to mean that it was so vague to begin with that the Court was forced to define the question before they could answer it. It was ambiguous. Trudeau has tried to include two questions in one, and tried to get them to answer them both in one. He wants them to say, because the question of legality is self contained, that therefore convention is not legally binding, and the federal government can move unilaterally. If they tell him that, then he can say that its not conventionally binding either. But what they did is say that the consent of the provinces is not legally binding, but it is binding by convention. There was never any necessity for them to answer whether or not the consent was conventionally binding or not. All they had to consider was the question of law.

This would seem to vindicate Allen Fotheringham, who wrote a blistering attack on Trudeau's tactics for the Montreal Gazette last Tuesday.

"As was expected, the stern judges didn't much appreciate being tossed what is essentially a political problem - Trudeau's inability to work with the provinces...!" He also quotes the Supreme Court decision with glee, as proof of Trudeau and Chretien's Machiavellian schemes:

"Conventions by their nature develop in the political field and it will be for political actors, not this court, to determine the degree of provincial consent necessary."

The obvious interpretation is that the Court took the consititutional package with the same degree of caution one accords a live snapping turtle. After ruling on the most tightly drawn legal questions, they threw the hot potato back to the politicians as quickly as their dignity allowed.

Given that the Liberal administration was hoping for a legal decision which would support unilateral patriation, and the Conservatives wanted the opposite, what was the role of the provinces in the debate? Given the protests against patriation without inclusion of the statements concerning off-shore minerals and other natural resources, can it be said the provincial premiers were grabbing for loot instead of glory?

From the beginning of the discussions on constitutional amendment in 1927 there have been two speres of thought among the bargainers. Some desiring more central authority, some desiring more provincial authority. In the earlier years it was only Quebec that fell into the latter category. Other provinces were on the federals side. This is exemplified by the statement of Premier Thatcher of Saskatchewan in 1971.

"If Ottawa gave up the powers requested (by Quebec), Saskatchewan believes that confederation could not continue to operate in an effective way." Today, however, eight of the provinces are vying for provincial power, while only two support the centralist idea, and their motives are questionable. (They probably expect to get good deals from the federal government.) So the question boils down to a simple matter of how many constitutional apples the federal govenment is willing to throw to the provinces. If they throw enough, the provinces will agree. If they don't, or aren't willing to, they have to find another way to reach their goal, their goal being a *Canadian* constitution. Obviously they think the courts are the alternative.

Considering the idea of throwing apples (or should it be pork barrels) to the provincial governments, the federal government may have to throw a lot of apples at Newfoundland to persuade their Legislative assembly to consent to change to the 1949 Terms of Union. Perhaps this is why Lalonde and Trudeau have not been negotiating with Brian Peckford despite his recent statements that Newfoundland is now willing to settle on the question of off-shore oil. They want a carrot to hold over Newfoundland, because Newfoundland may be the very last legal obstacle to patriating a constitution with the Charter of Rights.

Perhaps the analogy should be changed from pork barrels to oil barrels. Obviously the infamous petro-dollar is going to be the incentive Ottawa offers to Newfoundland to agree on the constitutional act of 1981. This clears the last Canadian stumbling block before the final hurdle at Westminster. It is interesting to note that Trudeau is willing to ignore a constitutional convention but expects the British parliament to follow another constitutional convention, the one requiring that they pass any amendment proposed by the two Federal Houses of Parliament.

After over a decade of constitutional capers in Canada, we may be finally exporting our act to Great Britain for one last display. If the British Parliament passes the amendments called for by the federal government, ('holding its nose', as Trudeau puts it) then the British MP's can blame one another for helping to dictate Ottawa's terms to provinces. Actually campaigning against the passage of the constitutional package is equally abhorrent, however, for this would be interference in the internal affairs of a sovereign nation. The British will be caught between the horns of a truly Canadian dilemma. Let's hope the British people get as much fun out of the debate as we have had for the last thirteen years.