CONSTITUTIONAL OPTIONS

THE AGENDA FOR CONSTITUTIONAL REFORM

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It is obvious from reading *Shaping Canada's Future Together*[1] that the government has learned a number of lessons from the Meech Lake experience. The public is encouraged, indeed urged to become involved in the debate: "Every Canadian will have the right — and the responsibility — to participate."[2] Individuals can phone a toll-free number to make their views known, a technique first used by the Spicer Commission.

What does the federal proposal contain? It has 28 separate recommendations, and, among other things, touches on institutional concerns, aboriginal issues, the economic union, the division of powers, and the distinct society of Québec. In some instances draft constitutional language has been provided; in others only an idea has been presented. The process appears to be completely open-ended with respect to its content and is limited only by time constraints. There is certainly no "take-it-or-else" approach this time around. Questions I have heard asked are whether there is now too much on the table and whether the public will be able to digest the entire package. It should also be noted that none of the recommendations requires unanimity, another lesson learned.

Some see the document as centralizing, others as decentralizing. The reality is that both tendencies can be found. There are elements of the Meech Lake agreement in the proposal, recognition of the 1991 Allaire report of the Québec Liberal Party, recognition of western demands for Senate reform, and recognition of a federal concern for strengthening the economic union. The document is a hybrid mixture of constitutional proposals and ideas. There is little that is new in the federal proposal although there has been some repackaging. Thus to a certain extent many of the issues have been discussed before, while a few have not.

Time does not permit a detailed analysis of the proposal. I would like to comment briefly on the recommendations on the distinct society clause, Senate reform, the Council of the Federation, the economic union, and the proposed new federal legislative authority on the economy.

A. DISTINCT SOCIETY

One recommendation which has drawn considerable attention thus far is that on the distinct society clause. This is not surprising because that part of the Meech Lake agreement was probably the most scrutinized and criticized provision of all. Instead of being a free-standing clause in the constitution it is now to be incorporated into the *Charter of Rights* as one of several interpretation clauses. Distinct society reflects the reality of the Canadian polity and the 1867 Confederation agreement. As part of the *Charter*, it is subject to all *Charter* interpretations and limitations such as the other interpretation clauses. The clause is not given primacy of place within the *Charter* and does not give Québec special status. While often debated, there also appears to be a growing recognition that this clause, or something equivalent to it, is necessary if an overall agreement with Québec is to be reached. Recent supportive comments by both Premier Clyde Wells and the National Action Committee on the Status of Women suggest that this time the phrase has a better chance of being accepted. In my view, this clause, given its now symbolic importance in Québec, is a deal-maker or breaker.

B. SENATE REFORM

The federal government's position on Senate reform suggests it is in favour of change but it has not fully embraced the Triple-E concept (equal, elected and effective). The parliamentary committee has considerable latitude in developing the final position. One of the key references in the document is the following statement: "... the reality of contemporary Canadian politics is that *provinces and territories, and not regions*, are basic to our sense of community and identity."[3] While the proposal clearly supports equitable representation, it does not completely rule out the idea of equal representation.

There can be little doubt that Senate reform appears far more probable today than it did a few years ago. The federal proposal suggests that Senate elections should coincide with elections to the House of Commons. I disagree because Senate election results would mirror those in the House of Commons. The justification for a second chamber in a federation is that provincial interests should be reflected there. Elections to the Senate could coincide with provincial elections as was proposed by the Alberta Select Committee on Senate Reform. Another alternative is fixed term elections with part of the membership being elected at set intervals, e.g. a six-year

term with half the members selected every three years. Whatever model is chosen, I feel that every effort should be made to avoid a situation where the two houses are elected simultaneously.

How effective is the Senate to be? Is it to be a legislative chamber with authority comparable to the House of Commons? At first glance it would appear to have major responsibilities. Closer inspection suggests there may be some significant limitations to this authority.

The federal proposal identifies three degrees of legislative activity for the Senate:

1. areas where the Senate must give its approval, i.e. an absolute veto (which it has now),
2. areas of "national importance" such as national defence and international relations where there would be a six-month suspensive veto, and
3. money bills where the Senate would have no say at all.

There are a number of problems here which require further analysis. As long as we adhere to a parliamentary system of government, it stands to reason there can only be one confidence chamber, the House of Commons. But, that should not preclude debate in the Senate on money bills. A suspensive veto of 30 days, a delay comparable to that of the House of Lords in the United Kingdom, is not an unreasonable limitation. What is more problematic is defining a money bill. For example, the 1980 National Energy Program was introduced as part of the federal budget. Was it therefore a money bill and as a result a matter of confidence? Moreover, even when a definition is agreed to, some kind of mechanism for dispute resolution will be required. To me, resort should be to a parliamentary committee of some kind, and not the courts.

An equally difficult challenge will be to define and secure agreement on what constitutes a matter of "national importance" and, therefore, is not subject to a Senate veto, but only a six-month delay. One assumes from the very beginning that most federal legislation is of national importance. Examples would be the *Criminal Code*, *Supreme Court Act*, *Elections Act*, *Official Languages Act*, *National Transportation Act*, *Canada Health Act*, and *Fiscal Arrangements Act* to mention but a few. The limitation on international issues would likely prevent the Senate from reviewing matters such as the *Free Trade Act* which was essential to implementing the Free Trade Agreement. While these questions need clarification, they are certainly capable of resolution. The net result will be a more effective second chamber.

What must be recognized is that any new chamber will have an enormous impact on the legislative process and hence public policy. It will take several years before working relationships between the two houses become fully established. Giving greater weight to western and Atlantic regions will create a much stronger regional influence in decision-making at the centre.

If equal representation becomes a reality, influence from outer Canada will be that much greater. The most contentious issue of Senate reform is the question of provincial equality. The federal paper has pushed for more "equitable" treatment of provinces, which suggests there will be some redistribution of seats but not necessarily equal treatment of the provinces. As one can see from the foregoing, there is much to debate and discuss on this recommendation, and I have not even mentioned the proposed power to approve certain appointments!

C. COUNCIL OF THE FEDERATION

Another major institutional change under consideration is establishment of a new decision-making body called the Council of the Federation. The proposal under discussion today is tantamount to entrenching a system of executive federalism in the constitution, an approach I certainly support.

The reality of Canadian federalism is that succeeding federal and provincial governments have worked together to solve many of our country's problems. While we may tend to think in terms of "watertight compartments" in the constitution, the reality of modern government is a growing interdependence. As reported by the Spicer Commission and reflected in the federal proposal, the public favours elimination of program duplication and disentanglement of overlapping jurisdiction. But, this is not always possible. In some areas such as fiscal policy, environment, or economic development, intergovernmental discussion and co-operation are essential to produce harmonious policies. The fact of the matter is that despite our differences and conflicts we keep returning to the model of executive federalism because it has been an effective way of resolving intergovernmental disputes and a means of seeking common ground.

The question which inevitably arises is, can our constitution and political system sustain both Senate reform and a Council of the Federation? In my view the answer is yes because they do not overlap with respect to their responsibilities. A reformed Senate as outlined in no way diminishes provincial legislative responsibilities under the constitution. It makes the government of Canada more sensitive to provincial and regional interests in developing its legislative program, but always within its constitutional sphere. I agree that there is always the potential for a clash between the representatives of the

provinces in the Senate and provincial governments. But, the responsibilities of the Council are clearly linked with spheres of provincial legislative authority and do not depend upon actions taken by the Senate. The possibility of competing interests will need to be taken into consideration when both institutions are examined.

D. SECURING THE ECONOMIC UNION

Of the various provisions contained in the federal proposal I suspect those relating to the economic union are among the most important to the federal government. First of all, what is an economic union? Essentially, it is seeing Canada as a common market where there should be the free and unimpaired movement of goods, services, capital, and people throughout the country. But, Canada is a federal system, and both the federal and provincial governments have responsibilities to manage their respective economies. Over time provinces have established a variety of policies and practices which impede free market forces. While Parliament's authority over trade and commerce is extensive, it is not sufficient to curb many of these practices.

While there is a common market clause in the constitution — s. 121 — it has not served as the kind of constitutional restraint to provincial activity one might expect. As a result of its rather limited scope the federal government has recommended an expansion of this clause to prohibit any barrier to the free movement of goods, services, capital, and persons. This sweeping constitutional provision would apply to both the federal and provincial governments. There are to be exceptions, however, for federal laws "enacted to further the principles of equalization or regional development." Provinces also get a measure of relief with respect to their efforts to eliminate regional disparities within the province provided there is no extra-provincial advantage established. Finally, there can be other federal or provincial exceptions if sanctioned by the Council of the Federation.

This new clause will have enormous implications for a wide range of provincial government policies including agricultural supply marketing boards, procurement, product standards, and licensing of professions, to mention some examples. While few would find fault with the principle behind the desirability of such a clause, i.e. economic integration, the question arises whether there are non-constitutional alternatives such as uniform legislation or commitments to reduce such barriers. The answer is yes, and they need to be weighed against such a sweeping clause in the constitution. While the exceptions are understandable, they lay the foundation for a great deal of controversy and future litigation. For example, I don't see how federal procurement policies could be challenged as long as they were linked to regional development.

I am sceptical about the chances of this clause being approved in the time available. It is so all-encompassing that I would be surprised if most provinces did not demand an opportunity to discuss it in greater detail if for no other reason than to seek clarification. Whether or not there should be other exemptions was left to the parliamentary committee to explore. While it is clear that barriers to trade should be eliminated or curtailed, it must be remembered that many provincial policies are often developed for social reasons and not for purposes of economic efficiency. To me this is a highly centralizing feature of the federal constitutional package. In my view, the effect on the provinces is far greater than on the federal government and, accordingly, one can expect them to question the clause.

E. SECTION 91A

The companion provision to the new common-market clause is one which would give Parliament an exclusive authority to "make laws in relation to any matter that it declares to be for the efficient functioning of the economic union." Before Parliament could exercise its authority it would first need the approval of two-thirds of the provinces representing fifty percent of the population. The forum for securing approval is the Council of the Federation. It must be appreciated that the threshold of support is identical to that found in the amending formula. Consequently one might conclude that the new federal authority will be used infrequently and when it is, the same objective could be achieved through the amending formula — so why worry?

There is a worry, however, and a word of caution. To insert this amendment into the constitution will require two-thirds of the provinces representing fifty percent of the population. That means at least seven provinces must agree to it, and one must assume those seven have fully considered its implications. But what about the other three? Unless they specifically register their dissent under the provisions of the 1982 amending formula they will be subject to s. 91A. In other words, if a province wishes to object to this new federal legislative power the time to register its dissent is before the proposed amendment is proclaimed. Dissenting provinces then have available to them the opting-out provisions of the amending formula found in s. 38(3). There is no way whatsoever that Québec will accept this clause as it is now drafted. This fact means that Ontario will have the final say on its insertion into the constitution since without it the fifty percent threshold is not fulfilled.

The draft which is being considered provides for a province to opt out once for a three-year period. After

that the objecting province would be subject to the federal authority whether it liked it or not unless it had previously exercised its right to declare the amendment non-applicable. Those who accepted the amendment will have waived that right by accepting it.

If the federal government expects the clause to be accepted it will need to make at least two modifications to the proposal. First, allow for provinces to opt out for a fixed period and agree that opting out can be renewed an indefinite number of times. Second, require the federal legislative authority to be renewed periodically, say every five years. Why? One reason is that it will allow those provinces which have agreed to a transfer to change their minds — particularly after a change in government. It will also allow for fine-tuning of the federal legislative authority. It also means that there is clear recognition that the provincial legislative authority is only temporarily borrowed. There are some strong parallels here to fiscal arrangements which have been the subject of five-year reviews over the past fifty years. Unless changes along the lines I have suggested are added, section 91A has no chance of being adopted. Few, if any, provinces will be prepared to write a blank cheque.

Assuming good intentions on the part of the federal government, I am gradually coming to the conclusion there is simply too much on the table at this time. Moreover, the agenda is expanding, with matters such as a social charter being added by Ontario and equalization and Established Programs Financing being added by Manitoba. There has been no mention of removing the federal government's powers over disallowance and reservation or of providing a provincial role in international affairs, all of which have been discussed before. It is difficult to see when agenda-building will end. Everything cannot be discussed at once and everything cannot, and should not, be in the constitution. We are better off leaving things out and leaving them to the political process than inserting them into the constitution. The constitution cannot solve all our problems.

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1. (Ottawa: Supply and Services Canada, 1991).
2. *Ibid.* at 50.
3. *Ibid.* at 18.

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2. Richard Johnston, *Public Opinion and Public Policy in Canada* (Toronto: University of Toronto Press, 1985).
3. Canada, Royal Commission on the Economic Union and Development Prospects for Canada, *Report, Volume Three*, (Ottawa: Minister of Supply and Services Canada, 1985) at 86-92.
4. R. H. MacDermid, "Regionalism in Ontario," in Alain G. Gagnon and James P. Bickerton, ed., *Canadian Politics: an introduction to the discipline* (Toronto: Broadview, 1990).
5. Alan C. Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake" *Canadian Public Policy*, Vol. XIV, Supplement (1988).
6. Donald V. Smiley and Ronald L. Watts, *Intrastate Federalism in Canada*, (Toronto: University of Toronto Press, 1985).
7. See Alberta, Select Special Committee on Upper House Reform, *Strengthening Canada: Reform of Canada's Senate*, (Edmonton: 1985); Peter McCormick, Ernest C. Manning and Gordon Gibson, *Regional Representation: The Canadian Partnership*, (Calgary: Calgary West Foundation, 1981).

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