CANADA'S QUEST FOR CONSTITUTIONAL PERFECTION

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INTRODUCTION

This paper is entitled "Canada's Quest for Constitutional Perfection" because this accurately characterises our odyssey of constitutional reform. The referendum debate highlighted this reality. Perfection with respect to constitutional reform is not only an elusive objective but also probably something that will always remain just over the horizon. Why? Because what is perfection to some is deficient to others. Constitutional reform of necessity is based on compromise or accommodation which contradicts the demand for perfection.

The failure of both Meech Lake and the Charlottetown Accord have created a constitutional impasse in Canada with respect to constitutional change. The public are totally disenchanted with the subject and feel that governments must deal with more pressing subjects such as the economy. Despite the fatigue or disinterest with the Constitution, the problems that generated these discussions over the last 25 years have not disappeared and remain unresolved. There are three principal concerns:

- Québec's role in Canada
- Western Canada's sense of alienation from the center
- Aboriginal self-government

Of these three matters two have made headlines recently: for example, "Parizeau maps out route to sovereignty," "PQ predicts independent Québec by 1995," and "Natives look to themselves for new deal: Less talk more action in 1993."[1] Other news stories such as the prediction of 60 seats for the Bloc Québécois and the question of the authority of reserves in Manitoba to regulate gambling are further evidence that these issues remain smoldering. Less has been heard about Western grievances as these now appear to be championed by the Reform Party and more recently by the National Party. The call for Senate reform will probably be heard once more after the Prime Minister fills the current vacancies but this time the call may not be for a Triple E Senate but for its abolition. Despite our fatigue or disillusionment with the constitutional question, it must be recognized that this matter will resurface; when and under what circumstances are unknown. In my opinion this recurrence is not in the distant future but in the immediate future. A recent column in the *Edmonton Journal* includes the following comment: "Those who believe the October 26 referendum put an end to the national unity problem will soon have a rude awakening."[2]

Accordingly how are Canadians to deal with constitutional change in the future? The following remarks are based on two assumptions. The first is that the majority of Canadians want the country to stay together BUT they are tired of hearing predictions of imminent catastrophe if the issue is not resolved; that is, they no longer accept the notion that Canada is in the midst of a great crisis. They have heard this assertion more or less constantly since 1965. The second assumption is that if formal reform, for whatever reason, is not possible then Canadians will be forced to consider alternative means of achieving the same objective.

THE CHALLENGES AHEAD

Let me turn now to some of the challenges which face governments and the governed in the immediate future with respect to constitutional reform.

A. The first challenge I call the question of timing. If my first assumption is correct, constitutional reform will recur. The question is when. It must be remembered that when discussions first began they were in anticipation of a certain course of events taking place in Québec. In other words, discussions have been preventive or pre-emptive in nature. After so many failures and since the country has not broken up, many now believe a more prudent policy is to wait until Québec decides what it wants to do. The difficulty with this approach is by that time it may be too late and we will end up negotiating the terms of the divorce as opposed to constitutional renewal. There is a very real lesson to be learned from the events leading up to the partition of Czechoslovakia on January 1st this year.[3]

B. The second challenge is the mega-amendment versus the mini-amendment. Both approaches have been attempted and both have failed. Charlottetown was a mega-amendment while Meech Lake was more limited in scope. The dilemma is that over the past 25 years the agenda has constantly expanded. The idea of constitutional queuing was defeated with the demise of Meech Lake. If we are going to have reform on the scale previously contemplated it is difficult to see how one can avoid a mega-amendment because there are so many linkages and trade-offs amongst the three concerns I identified at the beginning.

An alternative is to accept the fact that amendments that are properly characterized as reforms are unlikely to find favour. Therefore the amending formula should be used for less grand purposes, for example, to solve a very specific problem such as inserting a clause protecting intergovernmental agreements similar to the one found in the Charlottetown Accord (s.126A).[4] Another example is s.92A of the *Constitution Act 1982* that was precipitated as a result of two Supreme Court of Canada decisions on natural resources.

C. The third challenge relates to process. Our recent failures suggest that the amending formula is flawed. I respectfully disagree with this argument. The real issue is that of public involvement and when and how that involvement manifests itself. A referendum, as we know, is one very real method of public participation. I am not convinced that referenda will automatically be used in the future although it should be remembered that Alberta continues to have referendum legislation on the statute books. A referendum is a process for ratification only and not a means for negotiation or for seeking compromise. It is in these latter areas that the public wants greater and consistent involvement. It is now perfectly clear that for any chance of success in the future the public must be involved throughout the negotiations. What is more important, they must feel that they have had an opportunity to discuss all the issues before an agreement is considered final.

There may be many reasons advanced for the failure of Charlottetown but the one that is continually emphasized is the fact that late in the negotiations new ideas were advanced and accepted by First Ministers and Aboriginal leaders. The example most frequently cited is the guarantee of 25% of the seats in the House of Commons for Québec.[5] Whether or not this compromise was necessary to secure an agreement is irrelevant, as is whether or not it was a good idea; what mattered was that the public felt excluded from that particular decision. Until the final days of the negotiations there had been few criticisms of the process. Indeed there had been wide consultation until the end. The compromises reached in the final days, which meant an overall agreement was reached, had not been given public scrutiny and herein lies the problem.

The final package was again seen as a seamless web that needed to be ratified by October 26 because of pressures from Québec. The primary lesson of Meech Lake was ignored. That lesson is that before any final agreement is reached and the champagne bottles uncorked, the public must be given one final opportunity to examine critically its content. Most individuals are less concerned with ratification, which remains with the legislatures, than with specific provisions that require either explanation or justification. After due consideration on the part of the public, I would argue that most changes will be perfectly acceptable to the vast majority. Those that are not should be subject to reconsideration.

A final question which falls under process is the role of special interest groups. They have had a significant impact thus far. An analysis of their role in the weekend assemblies held in early 1992, their participation in the various public hearings and in the referendum would provide valuable insights into their influence. That they will play a part in future deliberations can be taken for granted.

D. The fourth challenge is to consider the answer to the following question. If the formal amending process has become impossible to use, what other alternatives are available to change the constitutional boundaries? One must consider the means by which the Constitution been changed in the past. What are the instruments of flexibility? There are essentially three ways in which the constitutional frontiers can be shifted: convention, statute, and judicial decision. Let me examine each of these in greater detail.

i. Convention

If parliamentary reform is thought to be desirable then change here can be brought about very easily by modifying the basic conventions by which parliamentary government operates. It should be recalled that this subject was addressed in the federal government's position paper published in September 1991.[6] Despite this reference, the Charlottetown Accord had no provision for change in this area. It should be understood that there is no reason why, other than political unwillingness, the rules on votes of confidence, budget secrecy, or the functions of parliamentary committees cannot be changed. Indeed, the Liberal Party of Canada recently made a number of proposals in this area.[7]

ii. Statute

Here a number of possible changes come to mind. The leading contender is reform of the electoral system, something discussed by the Lortie Royal Commission on Electoral Reform in its report of June 1992. There is nothing in the Constitution that requires single member districts and a single non-transferable vote. We could institute a system of proportional representation or an alternate ballot. Either change could fundamentally alter the composition of Parliament and presumably how it functions.

Another example would be to take the Charlottetown Accord and see which of its many provisions Parliament could incorporate into statutes. The *Supreme Court of Canada Act* could be amended to provide for a provincial nominating process. The *Bank of Canada Act* could be amended to have the Governor's appointment ratified by either house. Another possibility is an act guaranteeing the sanctity of intergovernmental agreements.

There is one other matter that deserves mention and that is constitutional amendments made by Parliament acting alone using its authority under s.44 of the *Constitution Act, 1982*. The one that comes to mind is an amendment to s.51 of the 1867 Act that changes the composition of the House of Commons. Parliament last amended this section in 1985 and I am willing to bet that few were aware that as this proposal went through the legislative process it was in fact a constitutional amendment. I raise this particular example because the composition of the House of Commons received considerable attention during the referendum debate.

iii. Judicial interpretation

While the first two proposals pertain to the operation of the federal government and Parliament, judicial interpretation had a profound impact on shaping the federal system when there was no amending formula. Will it have the same impact in the future when the amending formula appears not to be the instrument of choice?

While one cannot be certain, it is probable that, if we are either unwilling or unable to amend the constitution by using the amending formula, the courts may then be turned to as the dispute resolution mechanism. Do the courts wish to assume this role? There is simply no way of predicting at this point. Besides they

have their hands full with the *Charter*. Let me mention four examples to give you a better appreciation of the issues involved.

Canada Health Act (1984)

There was no direct challenge to this Act by the provinces even though provinces such as Alberta had traditionally challenged the federal spending power. Moreover the Act prohibited practices such as extra billing which Alberta then permitted. Despite the concern, it was not in the provinces' interest to go to court. Why? Because it was a lose-lose situation. If the provinces won the case they might have succeeded in dismantling the national health care system and ending up by paying 100% of the costs. If the provinces lost the case, a more likely scenario, then the federal spending power would have been permanently established within whatever limits were set by the courts. It should come as no surprise therefore that the topic of limits to the federal spending power was a controversial one during the recent constitutional discussions.

The Free Trade Act (1988)

While there were federal-provincial discussions leading up to the Free Trade Agreement between Canada and the United States, the Agreement itself was implemented by means of a federal statute. Speaking to this issue in 1987 the then Attorney General of Ontario, the Honorable Ian Scott, said: "In short, whether or not the agreement amounts to a constitutional amendment in any formal sense it represents, in my view *de facto* constitutional change and a constitutional change of very significant magnitude." Despite his concern, there was no court challenge. Why? While there may be a number of reasons, the most likely one is that there is a good chance the 1937 Labour Conventions decision might have been overturned and this would not have been in Ontario's interest. In other words political sabre rattling was as far as Ontario was to go.

The Canada Assistance Plan (CAP)

In the 1990 federal budget the government introduced a ceiling on CAP for the three wealthy provinces of Ontario, British Columbia and Alberta. Parliament approved this policy by statute. The provinces affected took the federal government to court and lost.[8] The difference between this situation and that of the *Canada Health Act* is that the decision to reduce payments was made. The provinces could either accept it or take the federal government to court. The genius of post-war Canadian federalism has been the development of a series of federal-provincial agreements covering a wide range of policy fields, from health care to social assistance. The federal decision has seriously undermined the sanctity of these agreements. It should come as no surprise that throughout the negotiations leading to Charlottetown the provinces pressed for a provision that would protect such agreements from unilateral changes.

The Oldman Dam decision (1992)

My reasons for raising this case are twofold; first, the decision is an excellent example of the courts coming to grips with the difficult jurisdictional questions of the environment and second, the parties to the case are of signifigance. The full citation is *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*.[9] The case was initiated by an interest group which was saying to the Government of Canada—Do your job! Thus intergovernmental understandings or agreements may no longer provide adequate assurance of a firm policy foundation.

E. The fifth challenge is to consider or, perhaps more appropriately, rediscover and, where necessary, redesign the various instruments of flexibility of our federal system. To a great extent the federal system has evolved as much by convention as through the courts. National policies have been developed, not always harmoniously, but they have emerged: health care, energy pricing, and tax-collection agreements to mention three. As one observor remarked a few years ago: "This leads us away from the preoccupation with the lawyer's constitution to some analysis of the politician's or administrator's constitution."[10] The Charlottetown Accord had several provisions that could provide a basis for a fruitful federal-provincial dialogue. These include matters that formed part of the legal text as well as others that can be found in the political accord. I would strongly encourage governments and other interested individuals to examine the following:

i. The Canadian common market and the removal of interprovincial trade barriers

Agreement supporting this principle was reached last summer; what needed more discussion was the exceptions. I would also recommend close examination of the proposal for a dispute resolution mechanism which was patterned after the one contained in the Canada-US Free Trade Agreement. That this topic remains a very real problem is reflected in some remarks by Premier McKenna of New Brunswick in late November. He said: "Those provinces that want to put up barriers will have barriers put up against them. . . . We can't wait to have unanimity from 10 provinces, so let's introduce inter provincial free trade with those who want it."[11] Such language is the basis of a legal conflict.

ii. The Spending Power

If anything characterized the Charlottetown Accord it was the limitations to the federal spending power that were found in a variety of provisions including the following: the limits to new national shared-cost programmes,[12] the so-called six policy fields such as forestry,[13] and most importantly the agreement to establish "a framework to govern expenditures of money in the provinces of Canada in areas of exclusive provincial jurisdiction."[14] If one doubts the importance of the spending power and the increasing apprehension of the provinces they should pay close attention to Premier Rae's recent remarks in which he claimed the federal government owes Ontario $2 billion for welfare payments under CAP.[15] Nor should one ignore Premier Klein's comments about user fees for health care.[16] While one can dismiss both statements as only politics, they reflect the rather precarious nature of our social safety net and a potential area of federal-provincial conflict. If for no other reason than to restore public confidence, a review of the spending power appears timely.

iii. Labour market development and training

With the failure of the referendum the federal government was very quick in reasserting its authority over this field. Indeed of all the proposed changes to the division of powers this one was the most profound. To illustrate that there are alternative ways of achieving change this subject was discussed at a recent meeting of ministers responsible for labour market training and the need for cooperative and coordinated action was stressed.[17] It is a modest beginning.

iv. Duplication of services

Given the current pressure on all governments to reduce their deficits it comes as no surprise that there is also pressure for them to eliminate duplication of services. This issue was raised in the September 1991 federal document.[18] Care must be taken that neither order of government simply off-load its responsibilities under the guise of eliminating overlap.

Over the next few years economic pressures will force governments to cooperate and harmonize their policies. It is not inconceivable that some form of intergovernmental secretariat will emerge to act as the coordinating organization reporting to a First Ministers' Conference. Does this sound far-fetched? Not really if one considers that Senate reform is unlikely in the near future. Alternative structures or institutions to a secretariat do not come readily to mind. Devices such as administrative inter-delegation, mirror legislation and new areas for intergovernmental agreements such as telecommunications should be pursued. Two precautionary notes should be sounded; first, after the CAP experience, thought will have to be given to a means of protecting intergovernmental agreements and second, the question of transparency needs to be addressed. After recent experiences with constitutional reform the public will expect to be kept informed and possibly involved in some fashion.

F. The sixth challenge relates to Aboriginal self-government. Charlottetown almost made that dream a reality. Recent reports in the news indicate that expectations amongst the Aboriginal peoples are high. The Royal Commission on Aboriginal Peoples can focus its attention on this matter and presumably will make a number of recommendations.[19] A variety of models of self-government are available for consideration. The framework for negotiations developed during the recent negotiations can serve as the basis for future discussions.

G. There is a seventh challenge and I am almost afraid to mention it given the constitutional fatigue syndrome. In the *Constitution Act, 1982*, s.49 provides for a constitutional conference 15 years after proclamation. The purpose of this meeting is to examine the operation of the amending formula. That gathering is scheduled for 1997. In my opinion it is not too early to begin planning for that window of opportunity.

CONCLUSION

If reform through the amending formula will be as difficult as I believe, then it is prudent for Canadians to pursue and consider alternatives, because if anything is certain it is that change is inevitable. Central institutions can be changed to reflect current political realities. When considering the division of powers one may tend to think in terms of water-tight compartments. The reality is that most federal and provincial policy fields are becoming increasingly interdependent. Accordingly governments can compete or they can cooperate. While I feel economic pressures will lead to cooperation, political pressures may lead in an opposite direction. Recent musings by Mr. Parizeau about political paralysis in Ottawa if the Bloc Québécois wins a large number of seats in the next federal election paint such a picture.[20]

In either event I believe the courts will become more involved in these questions than they have been in recent years. It may be a result of: a lack of political will, interest group intervention, governments feeling they have no other alternative or the constitutional boundaries becoming too blurred. For whatever reason no one can avoid examining constitutional questions.

Instead of contemplating the mega-amendment, other avenues need to be explored. As a result our quest may take us in different and new directions. Change will probably be incremental, and the grand design so recently pursued will be shelved while the country explores new instruments to accommodate constitutional change.

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AUTHOR'S NOTE:

An earlier version of this paper formed the basis of the remarks which was delivered at the Canadian Bar Association, Alberta Branch Mid-Winter Meeting, January 30, 1993.

1. *The [Toronto] Globe and Mail* (22 December 1992) A6; *The [Toronto] Globe and Mail* (25 January 1993) A1; and *The Edmonton Journal* (2 January 1993) A3.

2. Jean-Claude Leclerc, "No National party a match for need" *The Edmonton Journal* (12 January 1993) A7.

3. See William Johnson, "Canada has much to learn from the failure of Czechoslovakia" *The Edmonton Journal* (2 January 1993) A7.

4. References are to various sections contained in the *Draft Legal Text* of the Charlottetown Accord (9 October, 1993) at 27-28. Referred to hereafter as *Accord*.

5. *Accord*, s.51A (2)(b) at 13.

6. *Shaping Canada's Future Together* (Ottawa: Minister of Supply and Services, 1991).

7. See "Chretien proposes reforms" *The [Toronto] Globe and Mail* (20 January 1993) A7. See also an editorial in *The Edmonton Journal* criticizing their proposals, "Grits flunk Commons reform" (23 January 1993) A14.

8. *Reference Re Canada Assistance Plan*, [1991] 6 W.W.R. 1 (S.C.C.).

9. [1992] 2 W.W.R. 193 (S.C.C.).

10. D. V. Smiley, *Conditional Grants and Canadian Federalism; A Study in Constitutional Adaptation* (Toronto: Canadian Tax Foundation, 1963) at iii.

11. "McKenna takes aim at barriers" *The [Toronto] Globe and Mail* (24 November 1992) A3.

12. *Accord*, s.16 at 27. This section incorporates the same provisions as found in Meech Lake.

13. *Accord*, s.11 at 17-18. This section includes: urban and municipal affairs, tourism, recreation, housing, mining and forestry.

14. *Accord*, s.37.

15. "How Rae plans to get rid of the Tories in Ottawa" *The [Toronto] Globe and Mail* (22 January 1993) A9.

16. "Medical User Fees Pushed" *Calgary Herald* (13 January 1993) 1.

17. "Ottawa, provinces vow to improve job training" *The [Toronto] Globe and Mail* (21 January 1993) A5.

18. *Shaping Canada's Future Together* at 39.

19. See their publication called, *Overview of the First Round* (October 1992), especially at 36-48.

20. See "Vote Bloc to Weaken Ottawa: PQ Chief" *The [Montreal] Gazette* (18 January 1993) 1. The exact quote is: "It will be the weakest government Ottawa has ever seen, and all on the eve of elections in Quebec." See also "BQ doesn't want chaos in Ottawa Bouchard says" *The [Montreal] Gazette* (19 January 1993) B1. Mr. Bouchard said: "The best governments that we've had in Ottawa have been minority governments."