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Parliamentary Government and Constitutional Amendment

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Discussion papers are intended to provoke thought not to provide definitive answers to complex issues. Nevertheless the recent Papers produced by the federal government and the government of Ontario are a disappointment to those looking for leadership on constitutional matters. The federal paper assumes that the 1982 amending process does not work; that the Meech Lake Accord made use of the 1982 procedure; that the success of constitutional amendment depends primarily on intergovernmental consultations at First Ministers' conferences and that Quebec remains outside the constitutional family. The Ontario position paper reflects Premier Rae's assumption that "Canada is not negotiable." This submission examines these questionable assumptions and suggests we need different questions and different assumptions if we are to resolve our constitutional difficulties.

The Federal Discussion Paper

The 1982 constitutional settlement left Canada with a complex amending procedure. Most amendments fall under section 38 of the *Constitution Act* and require the consent of Parliament and legislatures in two thirds of the provinces having at least fifty per cent of the population. The maximum time limit for amendments under this section is three years. It is possible for any province to opt out of section 38 amendments.

Amendments in five special areas involve the use of a different formula (section 41) requiring the consent of all legislatures. There is no opting out and no time limit for these amendments. The specified areas are: the Monarchy, the use of the French and English language, the composition of the Supreme Court, the right of a province to have at least as many members of the House of Commons as it has Senators, and changes to the amending formula itself. A third formula outlined in section 43 is for matters that affect one or more but not all provinces. Such amendments require only the consent of Parliament and the legislature of the province or provinces concerned.

With so many different formulas there is much room for confusion. For example, one could argue that a distinct society clause as in the Meech Lake Accord would require the consent of seven out of ten provinces. Others could claim that it pertains to the use of the French or English language and therefore would require unanimity. Still others might maintain it involves only one province and the federal government so could be adopted by those two alone.

An amendment process that fosters ambiguity cannot be considered a resounding success.

But has it been a total failure? The federal Discussion Paper examines the experience gained since 1982. It notes that only one successful amendment involving more than one province (the establishment of a conference on aboriginal rights) has been adopted. It was approved following a first ministers conference that had been preceded by a series of private preparatory meetings at the level of officials. There were no public hearings before the amendment and legislative debate on the amendment resolution ranged from a maximum of five days in the Senate to a minimum of one day in several provinces. In no case were public hearings held.

Among the failed amendments were three attempts to entrench property rights in the Charter by British Columbia (1982), New Brunswick (1983) and Ontario (1986). Based on this record the federal Discussion Paper concludes that: (a) lack of public involvement is the key to success and (b) "in the absence of a prior executive agreement among first ministers in Canada's federal and parliamentary system, unilateral action by one legislative body would be unlikely to lead to the required approval by the other legislative bodies and, hence, proclamation of an amendment."[1]

The second conclusion is consistent with a basic precepts of parliamentary government, the confidence convention. There may be good reason for executive dominance in the normal exercise of parliamentary government but the question is whether the same attitudes and conventions ought to apply to constitutional amendments. Or does the constitution belong to all the people and therefore lend itself to a completely different relationship between the executive and the legislature.

Nor can one argue, as does the federal Discussion Paper, that because three amendments have failed in the last decade there is something wrong with our amendment process. Perhaps there was simply insufficient support in the country for these amendments. In the United States some 10,000 constitutional resolutions have been proposed since 1791 but only 16 (aside from the original ten) had the necessary support to become law.

This brings us to the third and most serious weakness in the federal Discussion Paper, its contention that the Meech Lake Accord was done under the 1982 amendment process and that it too failed. This proposition is only half right. The Meech Lake Accord failed but it was a direct violation of the 1982 formula! This argument was put most forcefully by Tom Berger in testimony to a Special House of Commons Committee studying the New Brunswick Companion Resolution to the Meech Lake Accord (The Charest Committee).

Berger noted that section 52 of our constitution specifically requires that all amendments be made in accordance with authority contained in the *Constitution Act*. But the Meech Lake Accord was a special deal. He argues, "Under section 41 where unanimity is required there is no time limit. The Parliament of Canada and the legislatures can take as many years as they want before they pass an amendment. The three year time limit does not apply. But the Meech Lake resolution violates this provision of the constitution. It gives Parliament and

the provinces only three years. It purports to deny them what the Constitution gives them."[2]

Similarly under section 38 an amendment must be proclaimed as soon as the requisite number of provinces (seven) have agreed. Therefore, he maintains, "It is not a matter of the first ministers' agreeing, by a procedure of their own inventing, that the deadline can be deferred indefinitely until unanimity has been achieved . . . That is a breach of the Constitution that occurred as soon as the consent of seven provinces was obtained and no proclamation was issued. It is my view that our constitution does not authorize the first ministers to adopt a hybrid amending procedure and say to Parliament, the legislatures, and the country that their amendment must be passed "all or nothing "nor does it authorize them to add that it must be done within three years."[3] The demise of Meech Lake Accord seems to render academic the Berger argument, although the federal Discussion Paper continues to insist that the package approach was correct.

I submit the following suggestions, based on the lessons of the Meech Lake debacle and in the belief that correct process is an indispensable prerequisite to constitutional legitimacy.

- Let us consider use of more inter-jurisdictional legislative committees along the lines of Belanger-Campeau. For example instead of every province having a committee on the constitution and hearing the same witnesses say the same things why do the four western (or eastern) legislatures not set up a single parliamentary committee. If such a committee, perhaps including some non political members, came up with an amendment acceptable to all governments in the region it would have more credibility than something worked out by the First Ministers at one of their brutal conferences.

- Whatever process we use for initiating constitutional amendments let us proceed with one amendment at a time. No packages please. For greater certainty let us indicate clearly which of the several formulas is being used. Constitutional amendments do not lend themselves to private negotiation in packages to be slipped onto legislators and the public. Proponents of Meech Lake will argue that without a package there would have been no agreement. This is circular reasoning at best and sophistry at worst. If there is no agreement than you do not have the basis for an agreement and packaging will not change this.

- Let us be creative within the letter of the law. Most things can and should be done without amendments or by agreement only of the jurisdictions concerned.

- The absence of a time limit for certain types of amendments is a real deficiency but let us overcome this by the relatively simple expedient of inserting a provision for a time limit in the text of the amendment as do the Americans whose constitution also sets no time limit for amendments.

- Let us recognize that executive federalism as a way of amending the constitution ended in 1982. Henceforth if any government (or indeed opposition) has a constitutional amendment

please put it in writing and get it debated and adopted in your assembly. Debates on constitutional amendments should not be subject to party discipline or the confidence convention. If adopted let us respect the ability and integrity of legislators in the other provinces to deal with a proposal on its merits rather than as a result of commitments made on their behalf by First Ministers at private meetings. Let us not be discouraged if some, indeed many, amendments fail.

The Ontario Discussion Paper

The document prepared by the Government of Ontario goes beyond the narrow question of amendment and attempts to "suggest some of the questions that individuals and communities might consider in thinking about our common future."[4] In this respect it is closer to the approach of the Spicer Commission.

The first task of your committee, if it is to be taken seriously, is to move beyond the sophomoric type question you have been given and address some real constitutional issues. For example, instead of asking Ontarians, "What are the values we share as Canadians?" let us ourselves if we think, as a matter of principle, that provinces should have the right of self-determination. If so how can this be best reflected in our constitution? One does not have to endorse self determination to realize what kind of constitutional and international law arguments are coming down the road. They deserve to be met with more than sentimentalism in favour of a united Canada.

Similarly, instead of asking "What Does Ontario Want?" let us ask how much Confederation costs Ontario and what benefits does it receive. Again, I suggest this not because you are likely to find a single definitive answer but because that is the type of analysis Quebec is going to be make. Are you prepared to accept their assumptions and their figures? Will you accept those of Ottawa or do you want your own? You will not find the answer to self-determination or the cost of Confederation in the few weeks available before you make your interim report but I think this must be your ultimate objective. I see only two general points that need be made in an interim report.

First, the Ontario Committee should take the initiative in calling for establishment of a National Joint Committee on the Constitution consisting of representatives of all legislatures. This idea was suggested in a brief to the Ontario committee on the Meech Lake Accord. I would add only a couple of refinements to that proposal. Since legislatures, not governments, have ultimate responsibility for constitutional amendments the heads of legislatures, the Speakers, should have a role in establishing this committee. For example you could recommend that the Ontario Speaker invite the Speakers of the other legislatures to consult with the party leaders in selecting members to serve on this National Joint Committee. Once established, the reports of such a Committee should be addressed to and tabled in each assembly by the Speaker and not by the Prime Minister thereby emphasizing that the constitution belongs to all the people not just to government

supporters. There would, of course, still be first Ministers' Conferences and in practical terms agreement at that level would be essential to any agreement. What we must do is constantly discourage the First Ministers from deluding themselves into thinking *la constitution c'est nous*. As Meech Lake demonstrated no such mechanism currently exists and we are badly in need of one.

Your second recommendation should be to advise the Ontario Premier whether the people of Ontario agree with his position that "Canada is not negotiable." If Ontario is to provide any leadership in the constitutional debate the Premier will have to be in touch with public opinion and your committee is the best means of accomplishing this.

If you agree that Canada is not negotiable this has to be made clear in plain language without doubletalk about renewed federalism. If Canada is negotiable, which strikes me as merely recognizing the obvious, you should set forth the areas where negotiation is possible and other areas which you see as non-negotiable. Parliamentarians, not First Ministers or bureaucrats or referenda, are the link between the people and the constitution.

No political party or government is beyond reproach for the present constitutional malaise. We wanted our constitution back from England. We got it, albeit not as neatly as some would have liked. Now the question is whether we have the political maturity, imagination and skills to use it. Let us eschew Meech Lake type arguments about whether Quebec is presently in or out of the constitution. Let us encourage Ontario residents to make an unsentimental evaluation of their political and constitutional future with, or if necessary, without Quebec.

Notes

1. Canada, Federal-Provincial Relations Office, *Amending the Constitutions of Canada: A Discussion Paper*, Supply and Services, Ottawa, 1990, p. 7.

2. Canada, House of Commons, Special Committee on the New Brunswick Companion Resolution to the Meech Lake Accord, *Minutes of Proceedings*, Issue 19 May 3, 1990 pp. 8-9.

3. *Ibid*.

4. Ontario, Ministry of Inter-Governmental Affairs, *Changing For the Better*, Toronto, January 1991, p. 4.