



Recent Publications and Documents

Constituent Assemblies: A Comparative Survey by Patrick Fafard and Darrell Reid, Institute for Intergovernmental Relations, Kingston, 1991, 52p;

Constituent Assemblies: The Canadian Debate in Historical Context by Patrick Monahan, Lynda Covello and Jonathan Batty, York University, Centre for Public Law and Public Policy, 1992, 52p;
What If The Wheels Fall Off The Constitutional Bus, by Gordon Gibson, Canada West Foundation, 1992, 15p.

The demise of the Meech Lake Accord in 1990 was widely interpreted as a failure of executive federalism (First Ministers Meetings) to provide the mechanism for serious constitutional negotiation. The August 1992 agreement by First Ministers plus aboriginal and territorial representatives has bolstered the argument of those who say executive federalism was not dead but merely sleeping. Nevertheless during the two year intermission some Canadians began to dream unCanadian dreams about a new constitution worked out not by leaders of governments with vested interests in the outcome but by a wider and representative body of Canadians chosen specifically for the task of devising a new constitution.

The proponents of a Constitutional Convention or Constituent Assembly included at one time or another Premiers like Clyde Wells, parliamentary committees like the Manitoba Task Force on the Constitution, private members of Parliament like the NDP members of the Beaudoin-Edwards Committee on Constitutional Amendment, or David Kilgour of the Liberals, Keith Spicer of the Citizen's Forum, newspapers like the *Toronto Star* and a throng of academics and ordinary citizens across Canada.

Major obstacles in the way of a constituent assembly, besides the unexpected resilience of executive federalist forces, were the innate conservatism of Canadians and the absence of any serious study of how a constituent assembly might work and whether it would be appropriate to the contemporary Canadian political context. It is unlikely anything will change centuries of Canadian political culture but the absence of literature on the subject has been addressed, to some extent, by three recent studies.

The Fafard-Reid and Monahan Covello-Batty studies are peas in a pod. Both claim to be neither for or against the idea of constituent assemblies; both begin by raising some of the questions that need to be addressed in contemplating constituent assemblies, both use

case studies of other countries to attempt to answer the questions; both conclude that Canada is not ripe for such a radical step. The Fafard-Reid manuscript is based on a report originally prepared for the Federal-Provincial Relations Office of the Government of Canada. The Monahan-Covello-Batty paper was one of eleven background studies of York University's Constitutional Reform Project.

The York document looked at four case studies: Spain 1977-79; Australia 1972-85; Germany after the Second World War; and Newfoundland 1947-49. The Queen's study looked at these as well as the United States 1787-88, Canada, 1864-1866, Switzerland 1848, India 1946-47, Pakistan, Malaysia, Nigeria, the West Indies Federation. Rhodesia and Nyasaland, Nicaragua, and Namibia. Among the significant features compared in the Queen's study were the background and origins of the constituent assembly, the overall structure and mandate, the operating procedures and styles, the disposition of the results and the contextual factors. The York Study reduced these to four: the catalyst for the Constituent Assembly, its operation, consensus and public participation in the process.

Both conclude with lessons for Canada. The lesson, in the words of Monahan-Covello-Batty is that "a constituent assembly would appear

to be an unlikely way to achieve a successful resolution of the current constitutional debate in this country" (p. 46). Fafard and Reid conclude much the same although the tone is more pedagogical and open to some interpretation.

The essay by Gibson takes a completely different approach. He admits a constituent assembly goes against all Canadian political traditions. But he points out that the post 1982 mechanism for negotiating constitutional change has not worked well. Still, he does not say we absolutely need a constituent convention to resolve our constitutional differences he merely points out that if the present round of modified executive federalism (First Ministers plus referenda) does not work better than the Meech Lake round of pure executive federalism we better be

prepared to have a backup plan. Unlike many advocates of constituent assembly he goes into some detail as to exactly how it should work. Gibson is not a scholar and he does not spend much time comparing apples and oranges. He is a businessman, a former leader of the Liberal Party in British Columbia who addresses most of the concerns raised in the other two studies, many of which he dismisses as "scarecrows" intended to keep the constitutional agenda squarely in the hands of those who have always made these decision.

Gibson's work has to be read in conjunction with the increasing body of literature claiming that Canadians, English Canadians at least, consider themselves shareholders in the constitution and want to have a say in any important changes. A referendum on the First Ministerial agreement will go part way to satisfying these people. But taken to its logical conclusion this desire to be involved could be much better satisfied by a constituent assembly of the kind advocated by Gibson.

Thirty years ago the late Frank Underhill observed that our national cohesion was much less than it would have been if the *British North America Act* had been subject to some form of popular consent. The constitutional amendments negotiated by the Premiers and presumably going to be ratified by the people and the legislatures will obviously have a degree of legitimacy. On the other hand, if the agreement does not obtain popular approval or if the vote is ambiguous both politicians and citizens generally may wish that they had made a sharper break with political tradition and gone the route advocated by Gibson.

The Editor