



**Towards a New Canada:**  

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**The Moderate Option**

Proposals for reform of the  
Canadian Constitution

Alberta New Democratic Party

December 17, 1980

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*Towards a New Canada: The Moderate Option* was drafted by the Constitution Committee of the Alberta New Democratic Party.

This pro tem committee was struck by the Provincial Council of the Alberta NDP during its meeting of June 14-15, 1980, and was charged with reviewing the current Canadian constitution, the various concerns and formal positions that had been advanced to date (specifically including the federal government's constitutional initiatives), and with then drafting a formal position to be presented for adoption by the Alberta NDP.

The Committee was jointly chaired by Grant Notley, Member of the Legislative Assembly of the Province of Alberta, and Muriel McCreery.

Other members of the Committee were Anna Hemmingway, Larry Pratt, Peter Puxley, Garth Stevenson, Gerald Sutton and Davis Swan.

The Committee met over the course of the summer of 1980, and presented its first draft of this brief to the Executive Committee of the Alberta NDP on September 3, 1980. The Executive Committee approved the draft, and it was then widely circulated, both within the Alberta NDP and to the public generally, for comment and debate.

A day-long public discussion of the draft was held in Edmonton on December 13, 1980.

On December 14, the Provincial Council of the Alberta NDP formally adopted the amended draft as a policy document, and directed that it be submitted to the Parliamentary Committee currently studying the federal government's constitutional resolution.

**Forward**

5 Events of the past decade, pre-eminent amongst which has been the evident discontent of the people of Quebec with existing constitutional arrangements, have brought the question of constitutional reform to the front.

Unfortunately, discussions between provincial and federal governments on the subject of constitutional change have not always been carried out in a public-spirited and statesman-like fashion. Cynicism has all too often characterized the approaches of the Alberta and other governments at the provincial level, and of the Liberal government at the federal level.

The natural resource issue, for example, has been manipulated in a dangerous fashion by both sides for narrow political ends. The federal government's effort to isolate the Province of Alberta by misrepresenting its legitimate concerns over the erosion of its constitutional right to ownership and control of its natural resources, has amounted to crude "Alberta bashing". Such efforts to generate irrational animosity between different regions of the country are quite contrary to the Trudeau government's professed concern for Canadian unity.

At the same time, the Lougheed government's approach to constitutional reform has strikingly omitted any mention of a positive role for a federal government. At times, it almost appears to be an element of Alberta provincial policy to deny the existence of the national interests of Albertans. Amazing though it may seem, the constitutional position paper adopted by the Lougheed government, *Harmony in Diversity*, has nothing to say concerning the role of a federal government.

It is therefore essential that the people of Canada realize that the Lougheed position is not the position of all Albertans who see themselves as Canadians first and Albertans second. Such a stand does not demand the erosion of provincial control over natural resources or other areas crucial to regional autonomy. Nor does this stand require the denigration of the vitally

## **Introduction**

important interests we share with all Canadians represented through our national level of government.

We should not be misled into expecting too much from a revised constitution. It will not resolve the problems Canadians are experiencing with regard to a failing economy, inadequate social services, deteriorating housing conditions, declining education programs, inadequate support to farmers, racism, and the loss of political autonomy which stems from an economy dominated by foreign-owned enterprises. These are problems which, yesterday, today and tomorrow, are well within the abilities of the governments of Canada and the provinces to deal with, if they had the will to do so.

The following paper presents a reasonable and moderate approach to constitutional change for the people of Canada. It is not intended to be exhaustive but it does attack crucial areas of concern. It is hoped that all Canadians will become involved in this most important process, a process too important to be left to those who may exploit the constitutional issue for their own narrow ends.

## 7 The Preamble

The Preamble should indicate that authority flows from the Canadian people, rather than from the British Parliament in Westminster. The preamble should affirm the duality of Canada as a Union of two collectivities speaking English and French languages respectively, voluntarily united for common objectives on a basis of equal respect for one another's rights.

In addition, the preamble must acknowledge the special status of Canada's aboriginal peoples, such status deriving from formal recognition by the Crown pre-dating Confederation.

## The Role of the National Government

Canadians require a central government with adequate legislative powers and economic resources to safeguard national independence and to ensure that all citizens have fair access to social and economic justice. In the absence of such a government, the wealth of the country will be increasingly concentrated in a few regions and groups, and Canadians could be dangerously divided along have and have-not lines.

The federal government must also have sufficient powers to preserve the Canadian federation; to conduct foreign policy and ensure defence; to oversee interprovincial and international trade; to regulate foreign investment; to implement broad economic, fiscal and monetary policies; to conduct essential programmes of economic stabilization and equalization; and, wherever consistent with the constitutional prerogatives of the provinces, to promote a progressive economic union of all Canadians.

# **Specific Suggestions for Revision of Canada's Federal Constitution**

## The Role of the Provinces

A revised constitution must acknowledge

that the provinces are not subordinate or inferior, but, *within* their jurisdiction, are the full equals of the federal government.

Provinces have responsibility for the development of their respective communities, including economic development and the management of their resources, and for the administration of property and civil rights.

Because of the growing number of areas over which the provinces have exclusive or concurrent legislative responsibilities, they also require correspondingly adequate powers to tax and to derive income from the development of their resources.

The capacity of the national government to encroach upon provincial powers and to frustrate legitimate provincial development must be limited by a careful definition of powers. For their part, the provinces' ability to discriminate against other Canadians and to erect barriers to a strong economic union must also be limited.

## Language Rights

The right to use either official language should be protected in all provinces, and not just in Quebec and Manitoba, and this should create binding obligations on both levels of government.

For example, in Alberta, Franco-Albertans should be entitled to education in French, the right to use French in the courts, and the right to correspond with either level of government in French and receive a reply in that language. Similarly, Anglo-Quebecers should be entitled to the same rights in Quebec.

## Aboriginal and Treaty Rights

The vulnerability of the rights of native people to unilateral reinterpretation by the federal government, provincial governments and the courts must be removed by enshrining such rights in the

constitution.

To this end, it is essential that such constitutional documents as the Royal Proclamation of 1763 and all Treaties between aboriginal peoples and the Crown be given constitutional status.

Such status will guarantee to native people the right of negotiation prior to any change in their status taking place.

The rights of native people must not be defined unilaterally by the federal government or through any other process from which native people are excluded.

## Entrenchment of Other Rights

A bill of rights should be entrenched in the constitution, binding on both levels of government and enforceable by the courts. However, care should be taken not to include phrases that will benefit corporations more than individuals, or else the bill of rights should specify that rights belong to natural persons only.

Provinces should be prevented from discriminating against residents of other provinces (as in the Australian constitution).

## The Supreme Court

The Supreme Court should be provided for in the constitution, not in an ordinary statute. However, its structure and terms of reference should remain unchanged. Appointments should continue to be made by the federal government but should be subject to ratification by the newly created Council of the Provinces.

## The Senate

The Senate should be abolished, and no such second house providing lifelong sinecures should take its place.

## The Council of the Provinces

The Council of the Provinces will bring representatives of all provinces together in a national context, as a national body.

The Council will represent the interests of the provinces at the federal level. As such, it will rule on questions requiring consent by both Parliament and the provinces.

Matters requiring Council consideration will be those affecting areas of concurrent powers, the definition of issues justifying use of federal emergency powers, the exercise of federal emergency powers, treaties relative to provincial jurisdiction, shared-cost programs, and ratification or rejection of federal appointments to the Supreme Court.

Seats in the Council will be divided equally amongst the provinces. Seats will be allocated in the name of the province and not to individual delegates.

Provincial representatives would not be permanent, but would be appointed by their respective governments according to their appropriateness to the matters at hand. This flexibility will permit provincial cabinet ministers and provincial Assembly members to act as provincial representatives on the Council. Similarly, it will allow non-elected officials to so act as representatives.

The Council's deliberations will be governed by Parliamentary procedure designed to facilitate decision-making. Decisions of the Council will be made by a majority of the provincial delegations, except in the case of proposals for constitutional amendments.

The Council would be called into session by order of the Governor-General in Council, at the initiative of the federal government, or by request by a majority of the provinces.

The Council's powers should not be such as to undermine the principle of the federal

9 government being responsible to the elected House of Commons. Nor should the actions of the Council prevent the federal government from carrying out its constitutional responsibilities. In particular, the Council should have no powers over the federal budget or estimates.

The Northwest Territories and the Yukon Territory, and any other future territory, should be represented in the Council of the Provinces, having the right to debate, but not to vote.

The existence of a permanent Council of the Provinces will ensure debate in public on national issues as they affect the provinces, and will formalize the responsibility for an effective federalism on the part of the provinces.

## Proportional Representation in the House of Commons

While by far the majority of representatives in the House of Commons should continue to be elected as at present, there is a need to guard against the occurrence of federal governments lacking in representation from significant regions of the country.

To this end, a certain number of members should be selected on the basis of proportional representation.

## Amendments

Future amendments to the constitution should require approval of Parliament and of seven out of ten provinces in the Council of the Provinces, the combined populations of which would constitute at least 85% of the population of Canada.

However, amendments affecting language rights, education, or ownership and control of natural resources would require unanimity in the Council of the Provinces.

This formula received considerable support from the Continuing Committee of Ministers on the Constitution, and has come to be known as the "Toronto consensus".

We would add one additional requirement: in accordance with the principle that authority flows from the Canadian people, any amendment approved by the Parliament and the Council of the Provinces would have to be ratified by a majority of Canadians voting in a national referendum.

## Foreign Policy

The executive power to make treaties should be exclusively federal, but might require the "advice and consent" of the Council of the Provinces. The legislative power to implement treaties should be divided between the Parliament and the Council of the Provinces, depending on the subject matter of the treaty. At international conferences dealing with subjects of provincial jurisdiction, provinces should be guaranteed the right to participate, but only as part of a single Canadian delegation.

## Oil and Gas

These powers should be abolished.

## The Spending Power

The right of Parliament to make grants to individuals and to provincial governments is fundamental to the redistribution of income and other objectives championed by the NDP. We should recognize that the well-orchestrated hostility to the spending power is motivated largely by a desire of public expenditure as such, particularly expenditure on health and welfare and income redistribution.

However, we could agree that shared-cost programs should require the approval

of the Council of the Provinces. Federal grants directly to individuals and unconditional grants to provincial governments should not.

## Equalization

In order that all provincial governments will be in a position to carry out their responsibilities and that all Canadians may expect a comparable standard of public services, regardless of where they live, the principle of equalization of provincial revenues must be entrenched in the constitution. The responsibility for implementing this principle must be shared by the federal government and the governments of the richer provinces.

## The Management of Resources

A revised constitution must clarify the nature of legislative powers as they apply to the management of resources. The following principles must be recognized.

First, the provinces should have the exclusive powers to legislate in relation to the exploration, development, conservation and management of natural resources in the province, including the right to control the rate of production.

Second, the provinces should be given appropriate legislative powers to legislate in relation to the export from the province of the primary production of resources; but, federal powers must prevail over provincial powers in the area of international trade.

Third, the use of the federal trade and commerce power must be restricted so that it cannot be used to abridge provincial powers over resources except in emergency situations of compelling national interest (such exceptions requiring approval by both Parliament and the Council of the Provinces).

Fourth, the provinces should be given the

power to raise money by any mode or system of taxation in respect of resources, provided that such taxation does not discriminate between production used in the province and production exported to another part of Canada.

Fifth, provinces should be prohibited from instituting price discrimination between resources used in the province and resources exported to other parts of Canada.

## Offshore Minerals

Because of the international implications, the federal government should act as the landlord but should be required to manage the development of such resources jointly with, and rebate the majority of revenues received to, the adjacent province.

## Division of Legislative Powers

The basic need is for clarification, particularly in relation to matters which did not exist or were not subjects of public policy in 1867. Both Parliament and the provincial legislatures should have more specified powers.

Section 93 of the BNA Act should be reconfirmed.

With regard to other powers, a revised version of Sections 91 and 92 of the BNA Act follows, by way of example:

### Section 91

It shall be lawful for the Queen, by and with the consent of the House of Commons, to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the

- 71 exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say —
1. the public debt and property
  2. the regulation of trade and commerce
  3. the raising of money by any mode or system of taxation
  4. the borrowing of money on the public credit
  5. unemployment insurance
  6. postal service
  7. the census and statistics
  8. the armed forces and defense
  9. the fixing of and providing for the salaries and allowances of civil and other offices of the government of Canada
  10. navigation, shipping, and aids to navigation, including canals
  11. quarantine and the establishment and maintenance of marine hospitals
  12. seacoast and inland fisheries
  13. railways, other than municipal passenger railways which operate exclusively on or under municipal streets and roads
  14. aeronautics and air transportation
  15. all works and undertakings connecting two or more provinces, or connecting any province with a foreign country, including for example but not so as to restrict the generality of the foregoing terms: communications, pipelines, electric power lines, highway vehicles operating in regular service for hire, ships, boats and ferries
  16. currency and coinage, including the issue of paper money
  17. banking and the incorporation of banks including savings banks
  18. weights and measures
  19. bills of exchange and promissory notes
  20. interest
  21. legal tender
  22. bankruptcy and insolvency
  23. patents of invention and discovery
  24. copyrights
  25. the aboriginal peoples of Canada, and lands reserved for them
  26. naturalization and aliens
  27. regulation of the environment on an international basis

23. the control of radioactive materials  
 29. marriage and divorce  
 30. the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters  
 31. the establishment, maintenance and management of penitentiaries and any matters coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

#### Section 92

In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say —

1. the amendment from time to time of the constitution of the province, except as provided for in this Act
2. taxation within the province in order to raise money for provincial purposes, except that no province shall impose a tax on the import or export of any goods or commodities into or from the province
3. the borrowing of money on the sole credit of the province
4. the establishment and tenure of provincial offices and the appointment and payment of provincial officers
5. the management and sale of the public lands and national revenue belonging to the province
6. the establishment, maintenance and management of public and reformatory prisons in and for the province
7. the establishment, maintenance and management of hospitals, asylums, charities and almshouse institutions in and for the province, other than marine hospitals
8. municipal institutions in the province
9. shop, saloon, tavern and other licenses in order to raise revenue for provincial, local or municipal purposes
10. works and undertakings within the province, other than those expressly assigned to the jurisdiction of Parliament in section 91 of this Act

11. the incorporation of companies with provincial objects
12. family law, including the solemnization of marriage in the province
13. property and civil rights in the province
14. the protection of the environment in the province
15. juvenile delinquency
16. **holding**
17. public health within the province
18. social services within the province
19. manpower training
20. communications within the province
21. the administration of justice within the province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts
22. the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section
23. generally all matters of a merely local or private nature in the province.

### Declaratory Power

The federal declaratory power is obtained by the above clarification of jurisdiction.

### Concurrent Powers

Agriculture and immigration would remain concurrent jurisdictions with federal paramountcy. Regulation of foreign investment should be added to this category.

Pensions and survivors benefits would remain concurrent jurisdictions with provincial paramountcy.

While the foregoing proposals are not exhaustive, they do respond to the most pressing constitutional issues and they fill the moderate gap between the extremes represented by the Alberta provincial Conservatives and the federal Liberals.

They are intended to represent the vast majority of Canadians who truly wish to strengthen the Canadian national identity without giving up that degree of provincial autonomy essential to the achievement of regional aspirations.

These proposals give primacy to provincial ownership and control in the crucial area of natural resources, while recognizing that a very real national interest exists and must be represented in emergency powers at the federal level. Without this there is, quite simply, no Canada.

Nevertheless, the record of recent federal governments on the matter of respect for provincial rights does not engender confidence. For this reason, it is essential that emergency powers which overrule provincial paramountcy should only be used after a majority of provinces concur, hence the need for the Council of the Provinces. And this only after a House of Commons, revamped to reflect more accurately the different regions of the country, has so determined.

Finally, the question of which issues constitute matters of "compelling national interest" will also be subject to agreement both by Parliament and by the Council of the Provinces.

These safeguards are adequate to meet the task of protecting provincial rights from illegitimate erosion and intrusion. Those who would suggest otherwise should be challenged to present their vision of a viable national government in this country. The Loebchee government, for one, has yet to comply with this fundamental requirement.

## Conclusion