B R I E F

to the

JOINT COMMITTEE ON THE CONSTITUTION OF CANADA

by

The Most Reverend Edward W. Scott

Primate

THE ANGLICAN CHURCH OF CANADA

OTTAWA

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I. PERSPECTIVE

It is a great honour and an even greater responsibility to have been invited to appear as an expert witness and to make a presentation to the Joint Committee on the Constitution of Canada. I should like to begin with a comment or two about the perspective from which I view the issues. I will speak and respond to questions as a person who is proud to be a Canadian, and who reflects upon Canadian life from the firm conviction that God is the Creator and Sustainer to whom all of us are accountable. Because of this belief, I am convinced of the inter-relationship between Nature, Human Beings, and God, and I believe we must seek to think and act in the combined context of space, time and eternity.

I regret that, because of the short time between receipt of the invitation to appear and today, copies of my submission were not available until now and that a French translation has not been possible. I deeply regret, also, that my capacity to speak and express nuances in French is so limited that I must speak only in English.

As one who stands in the Judeo-Christian tradition, I affirm that both our rights and our responsibilities as human beings derive from God and from the fact that you and I and all other people are created in the image of God. This affirmation focusses attention on the fact that it is persons who have rights and responsibilities. Governments have jurisdiction with the necessary legislative and executive powers to perform their functions, but they do not have "rights" in the same sense as people do - they are called to be the servants of people. They are systems developed by people to order their affairs. Because rights and responsibilities, in

the very nature of things, and because of the sinfulness of human beings, often come into conflict, one of the functions of Government is to provide processes for resolving those conflicts. In the development and ordering of Government, Constitutional Law is of fundamental importance.

II. THE IMPORTANCE OF CONSTITUTIONAL LAW

In 1968 a former Prime Minister of Canada, Lester B. Pearson, stated:

> "If a mistake is made in an ordinary statute, it can be remedied at a subsequent session of Parliament or the legislature. But a constitutional error may be almost irremediable, and the consequences serious in the extreme. The fundamental law is indeed fundamental and its examination and review must be so treated." *

It is because I agree so unreservedly with Mr. Pearson's statement that I, and many others in Canada, believe there is a vital need for much wider discussion of constitutional issues by people of every rank and in every part of our country.

As the most fundamental symbol of Canadian nationhood, patriation of our Constitution is an occasion of great moment - the collective, irrevocable assertion of our political independence and freedom. What is currently proposed is indeed even more than patriation: it is an essentially new Constitution in which basic rules of Parliamentary government and rights of citizens are altered, basic approaches to citizens' relations with government are changed, basic understandings of the country are revised.

The right of each citizen to become involved in such a process requires no defence. The opportunity presented to the nation by the fullest participation of our citizens ought to be equally evident. What value is there in elaborating a new blueprint for inter-action among the regions, the language groups, the heritages or beliefs of Canadians, and even between the sexes, when our citizens are not themselves committed to the spirit of accommodation? By leaving citizens as bystanders, we lose the precious opportunity to involve them in a process which begins with

* *Federalism for the Future: A Statement of Policy by the Government of Canada: The Constitutional Conference 1968*

exchange, grows into understanding, and should ultimately ripen to tolerance and/or acceptance. It is equally an opportunity to create a Constitution which captures, to the best of our abilities, Canadians' collective self-image of the heritage, life, and aspirations we share as a nation.

III. THE CANADIAN CONTEXT

No nation can deal with constitutional issues in a vacuum. Here in Canada we start with the recognition that the central focus of the Canadian Constitution is the British North America Act of 1867. I say "central focus" because that Act must be seen as giving expression to values affirmed in the British Colonial Policy and preceded by the Royal Proclamation of 1763. It has been succeeded by a number of revisions so that Canada's constitutional basis cannot be seen as residing only in that one Act. What the British North America Act did was to assign areas of jurisdiction to the Federal Government and the Provincial Governments with the appropriate executive and legislative powers. This was done to provide a way of ordering life and relationships in Canada that would protect the rights of people.

One clear reason why much wider discussion of Constitutional matters is urgently required is because of the evident disagreements between the position being set forward by the Prime Minister and those expressed by First Ministers in the Provinces.

In his comments concerning "formal" amendment of the B.N.A. Act in the Encyclopedia Canadiana, J.R. Mallory states:

> "It has always been recognized, however, that the initiative for such changes should come from Canada, and this requirement was included in Section 4 of the Statute of Westminster, which stated that Canada must have 'requested, and consented to' such enactments. In essence, the position is that until some Canadian amending procedure can be agreed upon, the Parliament of the United Kingdom enacts such amendments as are requested by Canada. The form of the request used is an address of both Houses of the Parliament of Canada. In matters affecting the legislative powers of the provinces, the agreement of all provinces is secured before an amendment is proceeded with. Such consultation is dictated both by the spirit of the constitution and by considerations of practical common sense, but it does not appear that there is any legal requirement either about the form of consultation or the necessity for it."

It is my hope, and I know that of many other concerned Canadians, that the Prime Minister and First Ministers should seek again, perhaps with a different approach*, to reach a meeting of minds. I believe constitutional law should stem from fundamental principles of justice and respect for the worth and dignity of every human being. It should not be determined by power struggles between different levels of government over issues which need to be resolved. Since political leaders are responsible to the electorate, wider public discussion and awareness may well assist a meeting of minds to come about.

IV. ENTRENCHMENT OF HUMAN RIGHTS

Although the Westminster Legislative Process which produced the B.N.A. Act exists without the entrenchment of basic human rights, I personally have come to support such entrenchment in a Canadian Constitution for four main reasons:

1. Because, unlike the British system, Canada has two levels of government - Federal and Provincial, each with areas of jurisdiction. An entrenched charter would have the effect of nullifying any Federal or Provincial legislation to the extent that it contravened the provisions of the charter.
2. Because the original inhabitants of Canada have special status.
3. Because we recognize two major founding groups which have different cultural and legal backgrounds.
4. Because, for a number of reasons including immigration policy, Canada has become a mosaic with many differing cultural groups.

In these realities it is possible for basic human rights (and their balancing responsibilities) to be lost sight of in the power struggles which can take place between different levels of government or in conflicting claims between different groups which together make up the mosaic which is Canada. Entrenchment of basic rights, which

* *One suggestion is that "the process of constitution-making be entrusted to a constitutional convention composed of representatives of all our governments and legislatures as well as native peoples and other members of the public."*

stands above other legislation when there is a concerned public opinion, would I believe provide much better protection for individuals and groups than does the present bill of rights.

V. AMENDING FORMULA

In a country with two inter-dependent levels of jurisdiction, in a world where there is constant and rapid change, an adequate amending formula is essential. I believe it should be part of the Constitution, and designed to preserve a balance between stability and flexibility, as both are necessary.

VI. NATIVE PEOPLES AND THE CONSTITUTION

One of my principal concerns in the proposed Constitution is its failure to recognize clearly that the aboriginal peoples of Canada have a special status. The British Colonial Policy in general, the Royal Proclamation of 1763, and the B.N.A. Act (Section 91/24) all recognize certain basic "aboriginal rights": hence the responsibility assigned to the Federal Government of entering into agreements with Native Peoples as the original inhabitants of territories now viewed as part of Canada.

These aboriginal rights pertain to more than land, although land claims are certainly an important issue. "Aboriginal rights" mean that the Native Peoples of Canada should be subjects of their own history and not the objects of paternalistic policies and actions. For this reason I contend that, as a matter of justice, the Native Peoples should have full opportunity to participate in decision-making relating to patriation and that they should give full consent to it. Insofar as this is clearly not the situation now, I strongly urge a delay in the patriation process to allow for the responsible participation of Native Peoples. If there is adequate reason why such a delay cannot be granted, then there should be specific entrenchment of the rights recognized by the British Crown together with guarantees that the Federal Government will negotiate in good faith with aboriginal peoples. This requirement might be achieved by re-wording Section 24 (or including an additional section) clearly setting forth the recognition of certain basic aboriginal rights and assuring the involvement of Native Peoples as full participants in all future constitutional talks.

VII. ISSUES REQUIRING FURTHER DISCUSSION

As we move forward in the process of Constitutional Reform, I contend that we need wider discussion on a number of essential questions:

1. How best can we affirm and protect basic human rights while at the same time emphasizing the responsibilities that are linked with each right?
2. What particular rights should be entrenched? How do we avoid the danger of creating "first-class" and "second-class" rights?
3. What form should the amending formula take so as to provide for both stability and flexibility?
4. How can we fulfil our basic obligation to the Aboriginal Peoples with justice?

In addition to these specific questions, there are more general concerns about the role and responsibility of Governments which I believe need examination. I have said earlier that it is my contention that people have rights and governments have jurisdiction. The purpose of the legislative process and the enactment of law should be the safeguarding of human rights and the regulation of relationships between persons and groups in a way that affirms both individual and corporate good. This involves dealing with claims based upon rights that come into conflict. In a country with many minority groups, great wisdom and sensitivity are required to deal with such conflicting claims. I contend that there are some basic moral principles which should be operative in dealing with these claims. I believe David Hollenbach is accurate when he suggests three strategic moral priorities which flow from the biblical record. These are:

1. The needs of the poor take priority over the wants of the rich.
2. The freedom of the dominated takes priority over the liberty of the powerful.
3. The participation of marginalized groups takes priority over the preservation of an order that excludes them.

These principles are not policies. They are normative ethical standards, not programmes. They are principles which I believe should play a vital part in influencing the decisions of governments as well as those of individuals when called upon to deal with claims in conflict.

VIII. CONCLUSIONS

What we have embarked upon in this constitutional examination is, I trust, not the imposing of a Constitution package by unilateral action in the face of great reluctance. I see it as a unique opportunity to involve individuals and groups in every part of the country in a process that can lead to a new vision of what Canada is and can become: a vision that will shape a Constituion which will help to make Canada a nation in which aboriginal peoples, descendants of the founding peoples, and immigrants from virtually every part of the world may live in freedom and dignity, and in which they will participate with deeper commitment and greater loyalty. In this process this Committee is playing and will continue to play a vital role. I can assure you that, as I move about in various parts of our country, I find that you and your work are being upheld by the prayers of many deeply concerned Canadians.

S U M M A R Y

1. The goal of the constitutional discussion should be the creation of a Canadian Constitution which will reflect the aspirations of both majorities and minorities in our land. This goal can best be achieved by encouraging the participation of as many individuals and groups as possible. It will not be achieved by unilateral legislation.

2. The Constitution should include both the entrenchment of basic human rights and an amending formula that makes possible stability and flexibility.

3. Particular attention should be given to the recognition of aboriginal rights and the involvement of Native Peoples in the process and decision-making. The recognition of the validity of basic rights should be set forth in the entrenched section.

4. Careful attention should be given to the role of the Government in dealing with claims in conflict.
