

enclosure

BRIEF PRESENTED TO THE SPECIAL
JOINT COMMITTEE ON THE
CONSTITUTION OF CANADA

By:

THE CANADIAN CONNECTION

Moving Towards a Community-Based Movement
for an All-Canadian Constitution

OTTAWA JANUARY 1981

Introduction

There is a recognizable feeling of uneasiness about the current process of constitutional reform among the Canadian population. While patriation and amendment are stressed by the government, the people sense that these are not the essential issues. While various governments have spent the past fifty-three years attempting to find a satisfactory amending formula, the people know that precious few months have been spent attempting to structure substantive constitutional change, with even less time spent attempting to ensure that the concerns of all Canadians are heard. Traditionally the Canadian population has been reluctant to take issue with their governments. As such their restrained disenchantment with the current process should not be construed as tacit approval of the proposed Resolution.

The Canadian Connection

The Canadian Connection is a diverse group of men and women, French and English, from all walks of life. Of direct interest to an all-party committee is the fact that we too, are all-party. Liberals, Conservatives and New Democrats are represented within the Connection, as are others with no party affiliation.

Further, we are religiously inter-faith, including not only a variety of Christian churches, but also a number of non-Christian faiths as well.

We are broadly national, bringing together a variety of ethnic groups and cultures, including representatives of our Inuit and Indian first citizens.

During the short period of our existence, we have established contact with a variety of groups and organizations across this country. We have 'connected', and it is our intention to continue to connect with concerned Canadians in pursuit of the principles and process which we feel must be inherent in the Canadian constitutional effort. We would of course, be pleased to work with the various governments in this endeavor.

Initially members of the Canadian Connection came together in the early summer of 1980, sharing a genuine interest in participating in the constitutional process. With the introduction of the Resolution before you however, there developed an immediate sense of frustration and anger. We were offended by the arbitrary and non-consensual manner by which our federal government intended to establish a so-called 'Canadian' Constitution. Therefore, our first efforts were directed to improving the process of constitutional consideration by strongly urging that your hearings be televised, that the Committee travel and that the deadline be extended. We feel that the public response to the improved hearing process has demonstrated the interest of Canadians and believe that this interest should be built upon.

Members of the Connection were very excited about the potential of a constitutional process within a different framework - a framework which encourages the participation of the Canadian people. Having entered into discussions about the actual content of the Resolution however, it became evident that the federal initiative would preclude such action. The divisive imposition of a charter of rights and an amending formula would sour any potential for a more positive phase of constitution building, subsequent to the patriation of the British North America Act. Furthermore the very notion of 'patriating' a British statute to serve as the 'Constitution of Canada' is contrary to the spirit of a Canadian constitution.

Having come to this recognition, we agreed that we could not limit our goals to developing an appropriate 'second phase' to be implemented subsequent to the proclamation of the Resolution. Rather, we set out to identify the essential principles in developing a new, more appropriate initiative toward constitutional renewal.

The Essential Principles

"The process of conceiving and formulating a written constitution in all its dimensions forces a people to a clearer realization of their distinctive character and aspirations. Once achieved, it provides a selfawareness which reinforces the fundamental institutions and personality of the people." (Report of the Special Joint Committee on the Constitution, 1972)

We as Canadians must ask ourselves:

What sort of a Canada do we want?

How do we wish to govern ourselves?

How do we wish to participate in the constitutional process?

What steps need to be taken to give Canada a new constitution?

The following are principles which we feel must be implicit in the answers to these questions:

1. A constitution is the most fundamental statement of a sovereign people, setting out not only relationships among states and levels of government, but also relationships of governments to people and of people to each other. Thus the people have a vital role to play in the framing of that constitution and must be involved in the process.

2. A process of constitutional change should be rooted in the best of our traditions and our history, building upon these to reflect our aspirations for the future.

3. Any acceptable process of constitutional change must attempt to build upon our communal strengths rather than to divide us from one another, imposing less than satisfactory solutions.

It is clear that the process of constitutional change being pursued by the federal government, does not respect these principles.

The Need for Consensus

A constitution is the most fundamental statement of a sovereign people who lay down in it the fundamental law by which they wish to govern themselves. Therefore the process of arriving at a constitution is unlike that of any other statute. It is the context within which all other laws will be passed. It is for this reason that consensus is of utmost importance.

The government has recognized the importance of obtaining this consensus.
The Preamble to the Resolution before you begins:

"Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty..."

Yet when did Canada consent? The truth is that to date, consensus has not been reached. Moreover this consensus, critical to our Canadian constitution, will not be achieved in a matter of months, nor can it be imposed under threat of unilateral 'patriation'.

Proposed constitutional changes must ultimately be ratified by the people only after they have given the full opportunity to participate in their development, and to review and modify them within the renewal process.

The Alternatives

It is not governments but people which legitimize a constitution. The Canadian people are ready, willing and able to consider the constitutional issues which confront us and are anxious to be given the opportunity to do so. Only through such an opportunity can we mandate a process of constitutional renewal which respects our heritage and addressed our future.

To date, four models have been discussed as options for constitutional reform. (See Appendix 'A') The first is unilateral action by the federal government, represented in the Resolution which is before you for consideration. The second is a continuation of the traditional round of First Ministers' Conferences, attempting to attain the unanimous approval of Parliament and the legislatures. The third model is the constituent assembly which would draw up a new constitutional proposal for ratification. The fourth model is that of a referendum requiring the support not only of a majority of Canadians but also a majority of the electorate within each of the constituent regions of Canada.

We are not satisfied with any of these four models, though there are beneficial characteristics in each. We have therefore identified some features of an alternative approach which would encourage a community-based movement to develop an all-Canadian constitution. We are convinced that such a process would be both feasible and fruitful. (See Appendix 'B')

Conclusion

The Canadian Connection after long and serious discussion, and after having considered the various alternative models, has reached the conclusion that this Committee should recommend to Parliament that the process which is aimed at amending the British North America Act should be abandoned in its entirety. In its stead, a process which encourages each and every Canadian to participate and help to develop an all-Canadian constitution must be found.

Given the uniqueness of the Canadian federal experience, we have an opportunity to make a real contribution to the capacity of humankind to govern themselves. This opportunity can only be realized if the people are given their right to be heard and listened to...

"Without the understanding of its people a constitution is meaningless. Without their affection it is dead".
(Report of the Special Joint Committee on the Constitution, 1972)

APPENDIX "A"

The Four Traditional Models for Reform

I Unilateral action by the federal government is clearly not the preferred option of those who had met in negotiations with the provinces nor of the Canadian people (as demonstrated in recent polls). Proponents of the federal initiative saw it as reflecting the will of the Canadian people, fulfilling a commitment made to the electorate of Quebec for progress toward constitutional reform. They stated that the time was ripe for action; that without a break in the impasse, the momentum for reform would be lost. Moreover, the Resolution was portrayed as providing a useful - almost neutral - first step without prejudicing future negotiations or resolutions.

Opponents to unilateral action dispute each of the above contentions, noting that in a democracy the means are as important as the ends, and that in a federation, the principle of minority rights cannot be ignored. For the past two decades, unanimity has been accepted as a requisite to reform yet now, the federal government has repudiated this approach, citing a mandate for action upon which no election had been or would be fought. Critics also note that far from addressing the concerns of Quebec, the current action reinforces them, with near unanimous opposition by provincial leaders to the unilateral imposition of a charter of rights and amending formula. In every case, the concerns of the Parliamentary opposition, the Provinces, communities of interest and many individual Canadians have been heightened by the imposition of closure, and the limited time frame of this non-consensual approach.

II The second option - a further round of First Ministers' Conferences - is the stated preference of most of the provincial premiers and certain others who believe that the methods employed to date in reforming the constitution, while not always successful, are most appropriate. They suggest that progress was made in the September round of talks and that this progress could be built upon. Moreover, they believe that such a forum is the best method of developing consensus on constitutional reform, respecting the sovereignty of the Crown and the principles of responsible parliamentary government. As the First Ministers of their respective governments they recognize their responsibility to represent the views of their jurisdictions, ensuring that any revisions to our current

system of government will not be to their disadvantage. In particular, the provincial First Ministers see the constitutional conference as an important reflection of the fact that Canada is a federation and that decisions should not be seen as unilateral but bilateral, respecting the rights and powers of the Provinces, which better reflect their regional interests.

The disadvantages of the First Ministers method, besides its lack of success, are intrinsic in the nature of the discussions. Rather than providing Canadians with a forum to discuss the history and future of our federation, they have provided an opportunity for governments to negotiate the distribution of power. Eleven representatives, of 954 MP's and MLA's from some 28 party organizations, meet to protect the interests of their institutions rather than balance the interests of their citizens. The forum invites confrontation rather than collaboration, exaggerating regional differences while obscuring areas of common understanding. In almost no case was the government, nor certainly the First Minister, elected on the basis of their proposals for constitutional renewal; in some instances, they were elected in spite of their positions. Yet little opportunity is given to citizens - indeed to the opposition within the legislatures - to participate in or legitimize the positions taken by their representatives. Finally the turnover in participants and the evolving priorities of governments, for example, from linguistic rights to regional economic expansion to energy, erodes the progress of these talks and obscures long-range objectives.

III The third option is that of constituent assemblies. While they have been employed successfully in other countries, there exists no precedent in Canada and as such, there are as many proposed formats for the constituent assembly as there are advocates of this option. In almost every scheme however, participants in the assembly are elected by the citizens of the different provinces or regions, with representation from each determined on a proportionate or 'first preference' basis so as to minimize partisan voting and maximize the representation of minority interests within delegations and the assembly as a whole. The assembly would be given a specific mandate to consult with the Canadian people and prepare a proposed constitution within a given time frame, this proposal to be endorsed by the electorate or Parliament and the provincial legislatures or both.

vein that the Federal government should be putting forward the referendum option.

The advocates of referenda believe that participatory democracy dictates that matters of such fundamental importance as a constitution should be subject to the approval of the population and that citizens should establish the constraints within which they operate. Because a constitution is not essentially an agreement among governments but rather among citizens, it is up to the citizenry to ratify its elements, empowering the people to make decisions rather than identifying responsibility with a particular government, party or individual. Referenda encourage public education and involvement, thereby reinforcing democracy and mobilizing the consensus which must necessarily accompany successful constitutional renewal. They can raise the debate above partisan lines, providing a satisfactory avenue to resolve deadlock if all parties have equal access to the timing, wording and publicizing of a referendum.

On the other hand, referenda can highlight differences as well as build consensus, isolating through the various systems of double majority, particular regions with opposing views on particular matters. They are as subject to manipulation as are elections. The experience of other countries would suggest that referenda may be expensive, both of time and money and tend to be conservative, endorsing the status quo over reform however necessary. Finally, and not to be under-estimated, referenda may make governments less 'responsible', as contentious items which should be determined by legislators are referred to the people while the electorate generally invest less respect and confidence in their elected representatives.

In exploring these four options, it has not been our intention to endorse a single one. Nor do we intend to conceal our opposition to the first option, that embodied in the proposed Resolution. Unilateral action by a single government is clearly the least appropriate model, whether as an isolated act or as a precedent for future reform.

We believe that the second option is little better than the first. Though the provincial governments would be better represented, it is not clear that their citizens are. First Ministers' Conferences are a relatively recent invention, not envisioned when Canada was first formed. Their intent was to

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provide a forum to address modern day problems, yet they have been unsuccessful largely because they are wedded to century-old interests. Perhaps the time has come that they be set aside in favour of a constituent assembly whose proposals would be subject to ratification by Parliament and the legislatures or by a referendum or both. Or perhaps they should be opened up to allow representation by communities of interest such as women and native peoples and new Canadians as your Committee has done, with their results subject to ratification by referendum.

Options three and four show potential, particularly if employed in concert. Indeed even if the proposed Resolution is adopted and the British Parliament patriates the British North America Acts, these options should be considered as integral parts of a 'phase two' whereby the process would be opened up to the Canadian people and an all-Canadian constitution is developed.

Features of an Alternative Approach

Out of our discussions, since early in the summer, we have become increasingly aware of the need for an effective and relevant community based process for developing a new Canadian Constitution.

Within the Canadian experience we all share examples of effective community based discussions at the local, provincial, regional and the Federal level.

On a number of occasions, governments, agencies, institutions and voluntary organizations have cooperated effectively in activities and actions that have enhanced our sense of the potential of the Canadian community. The celebrations of the Centennial of Confederation in 1967 and in a different way, the reception and settlement of South East Asian refugees in 1979 and 1980 are only two examples where the partnership between citizens, their groups, their organizations, their communities and their governments showed the potential to be gained by involving Canadians in their own community.

The 'Royal Commission on Rural Life in Saskatchewan', the 'Royal Commission on Bilingualism and Biculturalism' and the 'Berger Inquiry on the Mackenzie Valley Pipeline' are examples from the 1950's, the 1960's and the 1970's where there were concerted efforts to encourage community based discussions on issues, concerns and opportunities facing Canadians.

These, and other examples represented a relevant response to the particular needs of the time. They were, for the most part, positive and creative examples of Canadians becoming involved in a meaningful way. We believe that within these and other past experiences lie important features that need to be recognized in developing an appropriate community based process for the Canadian Constitution.

In our discussion we have begun to identify some of the assumptions upon which a community based process would be designed, such as:

- Canadians are becoming increasingly concerned about the kind of Canada they want and the nature of our constitutional arrangements with each other.
- Canadians are becoming increasingly interested in the role played by, and the relationships between, the provinces, the regions and distinctive cultures in Canadian life.
- Canadians are seeking ways to relate to each other in a co-operative and supportive manner, rather than through divisive or arbitrary means.

These assumptions, and the experience we share have led us to identify the following features or characteristics which we believe would be crucial for an appropriate approach to community based discussion in developing a new Canadian Constitution:

1. The process would have to be based on a real partnership between the voluntary and private sector and governments, with shared objectives and goals, and mutual regard and respect.
2. Within the partnership, no one partner would have control so that the agenda for the process can emerge out of the concerns of Canadians as the discussion gets underway.
3. The process would need a timetable that sustains the momentum that presently exists and ensures adequate opportunities for learning as well as for seeking consensus.

4. The process would be designed to facilitate and encourage community based discussions; interpreting consensus and taking decisions would remain with those bodies with formal responsibilities.
5. The process would seek the broadest possible participation from present Canadian associations, organizations, institutions and communities, including perhaps those that have yet to emerge.
6. The process would need adequate financial and other resources from all governments, and from the private sector.
7. The Governor General and the Lieutenant Governors of each province should be invited to become patrons of the process.
8. The process would need to engage and involve existing media. Opportunities to use some of the new Canadian micro-electronic capacities in this regard would need to be explored.

We believe that Canadians have experience pertinent to the needs of the time that can be of assistance to Parliament, the Provinces and to Canadian organizations, associations, institutions and communities in developing an appropriate community based process for a Canadian Constitution.

We are excited by the challenges and the possibilities of developing with Canadians, a community based process that builds on the positive and creative experience of recent Canadian public and private initiatives and activities.

While acknowledging the significance of an effective and relevant community based process for the purposes of developing a Canadian Constitution we also recognize the opportunities in other areas of Canadian life for a more effective partnership between Canadians and their governments.

APPENDIX "C"

What Others Have Said

"To be meaningful the Canadian Charter of Rights will also be revolutionary. To be successful it must be founded on consensus. The need for a Charter is clear. The content is needed for the consensus to develop more fully. The value of consensus is inestimable. The price of haste will be a public perception - and a judicial perception - of this Charter of Rights as a political document - a simple statute and, despite its pretensions, not a constitutional Charter. The result can only be judicial treatment similar to the present Bill of Rights.

National Anti-Poverty Organization
Public Interest Advocacy Centre

"We cannot support the procedure adopted by the Government, i.e. unilateral action, or the contents of the proposed Charter of Rights. We appreciate that the constitutional process has been ongoing, as between the Federal Government and the various Provinces, for many years. This fact, however, does not in our mind justify the indecent haste with which this important legislation is being dealt... Parliament, however, must find legitimacy for the proposed constitution in the people of Canada. The Recital on page 12 of the proposed Bill 'whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom' we find to be misleading, as we see no evidence of this Consent from the people of Canada although, given the opportunity, following full discussion and amendment it may well be forthcoming...A democratic country cannot be conceived by any other than a democratic act..."

Canadian Federation of Civil Liberties and Human Rights Association

"Canadians have not been adequately involved in the current process of constitutional reform. Though we recognize the continuing efforts over recent years to resolve the issues surrounding patriation of the Constitution, we are dismayed by the sudden haste with which the process is now taking place. We are concerned that the undue urgency constructs nearly insurmountable barriers to the public's ability to understand, respond and take part in Constitutional renewal...We believe a new constitution must be more than political, and that the views of all Canadians who want to contribute should be received in the process...We believe that the development of our new Constitution is a task which must rise above intergovernmental relationships. Constitution-making is a larger task with greater obligation on parliamentarians than law-making. Its impact will be felt in this country, by each of us now, and by every person who lives here in the future. The constitution of a country is more than a statement which sets out relationships between governments. A constitution is also more than a legal framework. It must be an expression of our history, our character, our values as well as our aspirations."

Canadian Council on Social Development

"That is why when we talk to this Committee and discuss the constitution, we want to make sure that it is not construed as a politicians' constitution. It is a people's constitution; and we are part of that involvement as people."

Association of Metis and Non-Status Indians of Saskatchewan

"We feel it is important to put our position on the record and our position is simply this, we would prefer to have a constitution made in Canada through the process of constituent assembly."

National Association of Women and the Law

"We are suggesting that we have been, shall we say, dismayed with the tremendous amount of bitterness aroused by the process. While we are a 100 per cent in favour of the entrenchment of the Bill of Rights, we are dismayed about the fact that there has been so much controversy and confrontation and anger around it".

National Black Coalition of Canada

"How can we ever expect consent on an amending formula for this constitutional proposal, if we do not provide a framework for possible consent first."

German - Canadian Committee