

Views of
The Council for Canadian Unity
on Constitutional Reform

In April 1971, the Council for Canadian Unity (at that time the Canada Committee) presented a brief on the Constitution to a special Joint-Committee of the Federal Parliament. Since that time, the Constitution has provoked so much public debate and specific proposals that a new statement by the Council becomes imperative.

The Council has noted with increasing interest the growing number of voices for change that have arisen in various parts of the country. It has given much attention to the several documents which have been presented for public scrutiny by provincial administrations such as Alberta, British Columbia and Ontario; by private bodies such as the Canada West Foundation and the Canadian Bar Association; and finally by the Pepin-Robarts Task Force on Canadian Unity and by the Quebec Liberal Party in the Ryan proposals.

The Council wishes to make its own contribution to the process of constitutional reform. In the document which follows, the Council presents a summary of the principles which it finds are important to the process of revision, in the various proposals it has reviewed. The Council believes that, as discussion of constitutional changes proceeds, adherence to these principles would ensure a united federal Canada.

In addition, the Executive of the Council has agreed that the proposals of the Pepin-Robarts Task Force and the proposals of the Quebec Liberal Party together form a good basis for commencement of negotiations on constitutional reform in Canada.

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A - Introduction

For several years now, the rush of events has made urgent the reform of our political and constitutional structures. The election of a secessionist party in Quebec on the 15th of November 1976 indicated that the constitutional status quo was no longer acceptable there. In several other parts of Canada, there has been a sense of alienation from the central power and a recognition of the necessity to make some changes in constitutional matters. This has been evident in the western provinces and for other reasons in the Atlantic region. Alberta has published a document entitled "Harmony in Diversity: a new federalism for Alberta". In September 1978 British Columbia made constitutional proposals concerning the Senate, the Supreme Court, fundamental rights, linguistic rights and an amending formula. At the same time, the Canada West Foundation was getting into the debate and making an analysis and proposals which attracted attention. Ontario also was proposing reforms. In April 1978 its Consultative Committee on Confederation published its first report and suggested a second federal house: a House of Provinces composed of delegates appointed by the provinces.

On January 25, 1979, the Pepin-Robarts Commission recommended the adoption of a new federal constitution for Canada. The Quebec Government, on November 1, 1979, brought out its white paper on sovereignty-association; on December 20, 1979, it unveiled the wording it proposed for the referendum question. The ball had been tossed into the federalist court. On January 10, 1980, Mr. Ryan, head of the Quebec Liberal Party, unveiled his constitutional proposals.

The Council for Canadian Unity can hardly remain silent. Following several reports presented over the last few years, and more specifically perhaps, the report of the Canadian Bar in August 1978, the Pepin-Robarts report in January 1979 and the Ryan proposals of January 1980, The Council for Canadian Unity wishes through this document to make its own contribution to the process of constitutional reform and proposes some basic principles.

B - A necessity: total revision of the constitution

Reform of the constitution has now become a total task. It is more and more evident that piecemeal amendments will no longer suffice. A new Constitution has become necessary. Furthermore, several questions have become of vital concern at the same time, including the division of powers, the reform of the Senate and the Supreme Court, the entrenchment of linguistic rights, the integration of fundamental rights into the constitution, a more inspiring preamble more descriptive of the present power relationships in Canada, and a general amending formula.

All these areas we must now tackle if we want a "future together", and if we want Quebec, at the time of the referendum, to remain by its own will in a new Canadian federal fabric.

In short, it is no longer any good wondering whether we should repatriate the Constitution first and make constitutional amendments afterwards. It is now obvious that we must do the two things at the same time. In a word, we have to adopt a new Constitution, just as

in January 1979 the Task Force on Canadian Unity, with such good judgment, pressed us to do.

The alarm sounded by André Laurendeau in 1964 and echoed by the Pepin-Robarts report leaves no doubt about the urgency for us to adopt a new federal Constitution.

C - The basic criteria for constitutional revision

If our country is in crisis, and if a provincial government representing 28% of the population rejects the federal framework and is advocating political sovereignty, it is because the constitutional compromise of 1867 no longer meets our actual needs.

A fair majority of Quebecers agree on one point: we must change the present situation. The reform federalists are of the opinion the solution lies in the adoption of a new federal constitution, while the advocates of sovereignty question the federal system itself, as far as Quebec is concerned.

English Canada has already reacted to the proposal of sovereignty-association, as set out in the White Paper of November 1, 1979.

The Quebec Liberal Party in its constitutional proposals of January 10, 1980, has adopted an attitude which is closely related to that of the Pepin-Robarts report in many areas.

We are of the opinion that the reaction of English Canada would be favourable to constitutional propositions based on the needs of all the people in Canada.

It is in this spirit that the Council now make its own proposals. What should be the basis of the proposals? The three basic criteria adopted by the Pepin-Robarts Report appear to be very well founded: dualism, regionalism and sharing of powers.

Canadian dualism comes first. Dualism existed before Confederation and is the main feature of Canada. A negation of that fact and that value would rapidly destroy the federal system. To deny dualism is to invite Quebec squarely and surely to go its own way.

Regionalism, which is also a fact as well as a value, constitutes a second characteristic. Its importance should not be a surprise in a country as vast as our own. It should be taken into account in the distribution of legislative powers and in the constitution of a second central chamber in Ottawa, which, as we know, must in any federation represent the regions.

Let us say at the outset that regionalism is not necessarily synonymous with provincialism. We do have ten provinces in Canada; nevertheless, we agree that we have four or five large regions. Up to now, regionalism and provincialism correspond only in the case of Quebec and Ontario.

The third basic criterion is the sharing of powers. We cannot talk of a united federal Canada if the several elements which compose our country have no voice in the chorus. Each element, starting with the two basic linguistic groups, must have the feeling and the certainty of sharing power. No one must have any reason to feel alienated at the levels where the major policy decisions of the country are taken.

D - A preliminary task

Before recommending amendments in one or the other of the major sectors of the Constitution, we must set aside the provisions which have become obsolete and strike out the unitary elements of our Constitution, which exist, few though they may be. We should adopt as a general rule that any new Constitution (which, of course, must be drafted in both official languages) is destined to endure and should be conceived accordingly. Normal evolution, interpretation by the Courts and, where necessary, basic constitutional amendments, will do the rest.

We must also respond to the silence of the Constitution in spheres of primary importance and to its omissions in a century of rapid change.

From now on, we should no longer speak of levels of government, which leaves the impression that the provinces are inferior to the central government. The decisions of the Judicial Committee of the Privy Council have established several times that each government is sovereign in its own sphere, and that the action of both governments is coordinate. In a true federalism, it is essential that the Constitution be supreme and that each government in the domain allocated to it by the Constitution have a plenary power. So, it is convenient to speak of the two orders of government rather than of the two levels of government.

E - The parliamentary system should be kept

Some in Canada have raised the question of the merit of the congressional system created with great success by our neighbours to the south, and the merit of the parliamentary regime which we have inherited from the United Kingdom.

It is not within the scope of the present brief to expand at length on the advantages and disadvantages of both systems. On balance, it is apparent that the best system is the one which suits us best; each country must adapt its political regime to its particular needs if its system is to endure. Furthermore, nothing stops a system from borrowing some elements from another.

Indeed, in adopting the federal formula our country got inspiration in good part from the Americans. In retaining the parliamentary regime, Canada remained faithful to the model of the Mother of Parliaments in London.

In conclusion, it seems advantageous to keep the parliamentary regime, within the framework of which Canadians of French and English linguistic backgrounds have been able to work with ease and efficiency.

F - The electoral system

In the provincial order of government, we have "unicameralism". Each Legislature is composed of only one Chamber; an elected chamber. We have universal suffrage. In the federal order of government, we have "bi-cameralism" (two houses), as is usual in a federation: but, in Canada, contrary to Australia and the United States, our second central legislative chamber is composed of appointees: our Senators are not elected. We will come back later to the constitution of the second central house. At the level of the House of Commons, we have a house elected by the Canadian people. We are in favour of such a system. The lower house is elected according to the single member constituency plurality voting system.

The Pepin-Robarts Commission has suggested a remedy to solve the difficulties for our major federal parties in obtaining a truly national representation; proportional representation would fill in the gaps in our present system. While retaining our present system of 282 members of Parliament, elected under our present voting system, we would add sixty more members elected according to pre-established lists, in accordance with a limited proportional representation.

That proposal has been favourably received in more than one region in Canada. We endorse that idea since it allows each major region to be present in Parliament in each major national party.

G - The preamble of the new Constitution

A Constitution is a solemn document which citizens learn to venerate. It is the fundamental law of the land, the law of laws.

It is more important than any other document or law. As a consequence, the style of the Constitution matters greatly. So it is with its preamble. Who has forgotten, for example, the first words of the Constitution of the United States: "We the People...".

We would err in minimizing the importance of the preamble to a Constitution. Beside the fact that Courts of Justice do refer to the preamble from time to time, it is obvious that an inspired preamble has an educational value for a nation and may constitute a symbol of legitimate pride.

The preamble of our present Constitution is deficient in more than one respect. It does not describe Canada in all its components and falls short of elegance and inspiration. In a new preamble, we should affirm our faith in democratic values, our acceptance of the "rule of law", our dedication to fundamental rights. The preamble should refer to the founding peoples, the native peoples, and to those who came to Canada to join the anglophone and francophone communities in building the Canada we have today.

H - The entrenchment of fundamental rights

More than one author has written that the quality of a democratic state is to be judged according to the manner in which fundamental rights and freedoms are respected and protected in that State.

This is true in relatively homogeneous states (which are few), and, more so perhaps, in heterogeneous countries like Canada.

Since we have two major linguistic communities here, and since the Native Indian Nations were deeply rooted in our history long before the Europeans came to the New World, it is obvious that our future Constitution should consecrate in the fundamental law of the land certain collective rights.

Because each Canadian is primarily an individual, it is obvious that we should protect human rights. They are well known: political rights, legal rights, economic rights, social and cultural rights, to name those universally accepted in the free world.

Those rights may be protected in more than one way: sometimes by statute and by judicial decisions, sometimes by their entrenchment in the Constitution.

As is the case in many states, we adhere to this last method of protection. Such is the case in the United States and in France; the United Kingdom itself has agreed to be bound by the European Convention of Human Rights.

Several reports, the Canadian Bar Report, the Quebec Liberal Party Report, the Pepin-Robarts Report have all recommended the entrenchment of fundamental rights in the Constitution.

We, in turn, also recommend the entrenchment of fundamental rights in the Constitution, at least those rights which are more known and more universally accepted. For the others, their protection can be left to statutes to be enacted by provincial and federal legislative bodies in the various domains of their jurisdiction.

I - The protection of linguistic rights

Canada is composed of two great linguistic communities apart from the Indian and Inuit communities.

In our Constitution of 1867, there exists an embryo of institutional bilingualism. In the federal order of government it is incomplete. The Parliament of Canada, in 1969, rightly corrected that lacuna in adopting the Official Languages Act, the constitutional validity of which has been recognized by the Courts. The principle of the equality of the English and French languages for matters coming under

the jurisdiction of the Government and Parliament of Canada which is recognized in the statute of 1969 should, in our opinion, be entrenched in the Constitution.

All major reports on the Constitution published lately adopt the principle: the Molgat-McGuigan Report of 1972; "A Time for Action" of Mr. Trudeau; the Pepin-Robarts Report; the Ryan Report and others.

In the provincial order of government, the Constitution for Quebec and Manitoba protects linguistic rights in Parliament, in the Courts and in the statutes, as has been established in the Blaikie and Forest cases by the Supreme Court in December 1979. The B.N.A. Act does not refer to Ontario, New Brunswick or the other provinces. This was perhaps understandable in 1867. Today, in that sector, our Constitution is unbalanced. We must set aside the system of "two weights, two measures". Should we entrench linguistic rights in the provincial order of Government? If so, in what provinces? Shall we leave such protection to the provincial statutes? Two approaches are possible. The Pepin-Robarts Commission has suggested the entrenchment of linguistic rights in the federal order of government, and, in the provincial order, the adoption of provincial statutes, while waiting for an entrenchment by consensus. On the other hand, the report of the Canadian Bar Association has suggested the entrenchment of many linguistic rights in the provincial order of government. The Trudeau government in its document "A Time for Action" recommended the entrenchment of the judicial and legislative languages in three provinces: Ontario, Quebec and New Brunswick. In addition to these three provinces the Ryan Report has suggested the province of Manitoba.

It appears that some linguistic rights should be entrenched, as for example the right to a criminal trial in one or the other official languages anywhere in Canada. There appears to be a growing consensus on that point.

We must establish in the provincial order of government an equilibrium which actually does not exist in our Constitution. It would seem that the most appropriate measure would be a certain form of entrenchment of linguistic rights in the provincial order of government, such as rights concerning trials, and for the rest, freedom for the provinces to adopt statutory legislation concerning the protection of linguistic rights.

J - The general formula of amendment

Although Canada acceded to political independence in 1931, our country has not yet succeeded in repatriating its Constitution and in finding a general formula of amendment, in spite of continuous efforts since 1927.

Yet several formulas have been proposed, each deserving merit: for example, the Fulton-Favreau formula, the Turner-Trudeau formula, the Victoria formula. The Ryan proposals advocate a formula which is inspired by the Victoria formula.

So far, the most innovative formula put forward seems to be the one advocated by the Pepin-Robarts Commission. It gives to each order of government an equal right of initiative, which has a great democratic value because it involves a referendum and allows it to set aside the deadlocks created by a veto given by several governments.

The formula is as follows: the amendment to our fundamental law would take place by a bill introduced either in the House of Commons which represents the federal authority or in the second House which represents the provinces, and, when adopted by both Houses, would be ratified by a national referendum, with a majority of votes, in each of our four major regions: Ontario, Quebec, Eastern Canada and Western Canada.

Such a formula, which is very democratic and the least apt to lead to a deadlock, seems to respond adequately to the major criteria for an amending formula: it is flexible enough for all amendments, it is stiff enough to discourage attempts not sufficiently mature. We are inclined to endorse it.

K - The reform of the second central house

These past few years, nearly all memoranda on constitutional reform have advocated radical changes in the constitution and composition of our present Senate.

An elective Senate, like the U.S. Senate, has no doubt great advantages. An election confers great credibility on senators.

In a congressional system, an elective second Chamber is normal. An elective chamber may also exist in a parliamentary system of the British type, as is the case in Australia; however, it may generate a serious constitutional crisis, as we have seen in that country.

On second thought, it would seem that a second chamber composed at least partly of provincial delegates is gaining a certain acceptance in Canada at the present time. It allows the regions to be present right in the center of the country and at the same time it sensitizes the central legislative bodies to the needs of the regions.

Such a formula would permit the improvement of federal-provincial relations in Canada, relations which, as we know, have played a cardinal role for some years, particularly since the last World War.

Several proposals have been put forward.

As illustrated in the memorandum of the Canadian Bar Association in 1978, and in the Pepin-Robarts in 1979, the second Chamber would have definite powers in areas shared by both orders of government and in general in the field of provincial-federal relations. British Columbia and the Ontario Consultative Committee on the Constitution subscribe to the same idea.

The Ryan Report in turn follows in that field the path opened by the Pepin-Robarts Report. This second house is not a legislative chamber. It is a federal organism, a great federal council.

It is probably in that chamber that regionalism in Canada would be most in evidence. Such a recommendation may, in a large measure, avoid any sentiment of alienation from power by any region in relation to the federal authority.

L - The Supreme Court

In a country like Canada where two systems of law are applied (in itself an asset), and where two linguistic communities co-exist, the Supreme Court is probably the place par excellence where Canadian dualism should be reflected. This dualism, as we have seen, is the first basic criterion in the drafting of any new Constitution. And the Supreme Court, by its decisions, is in a very strong position to shape the federalism of tomorrow.

There is increasing general agreement that the existence of the Supreme Court, the mode of appointment of its judges, and their jurisdiction should be provided for in the fundamental law of the land. Suggestions, however, vary in respect to the number of judges (nine at present, of whom three must be from Quebec) and in the mode of participation of the provinces in the appointing process. It seems to us that the proposals of the Canadian Bar Association do not go far enough in that area and that those of Bill C-60 (the Trudeau proposal, "A Time for Action") and of the Pepin-Robarts Commission are going in the right direction. We adhere to them, in principle.

Bill C-60 has proposed that the number of judges be raised from nine to eleven, of whom four shall be of civil law background, with also a civil law bench. The Pepin-Robarts Report also recommended a court composed of eleven judges, but with one modification, that is five

civilians, and, another modification, a Civil Law bench, a Common Law bench and a Constitutional bench. The Ryan Report, also desirous of reflecting the Canadian dualism in the structures of the Supreme Court, suggested a court of nine judges, but for cases involving constitutional law it advocates a possible extension of the Court, composed of judges selected from Quebec courts, in order to constitute a bench composed equally of common law and civil law jurists, sitting under a Chief Justice who, in turn, would be a civil law trained jurist and a common law trained jurist.

Those approaches designed to consecrate Canadian dualism in the structures of the Supreme Court appear to us to be in the right direction.

M - The distribution of legislative powers

It is in that area that the representations of Quebec and of several other provinces are the most pressing and most constant.

In any federation, the distribution of legislative powers constitutes the most important sector of the Constitution.

The distribution made in 1867 was in accordance with the needs of the times. Several judicial decisions, particularly those of the Privy Council over eighty years and those of the Supreme Court for more than a century, have clarified the original distribution and have contributed to its evolution. The Parliament of Canada was awarded other powers by constitutional amendments in 1871, 1886, 1931, 1940, 1949, 1951 and 1964.

It is more and more obvious that a constitutional revision is mandatory in the distribution of powers. It is a complex subject.

A distribution that would be clear cut and definitive is impossible. But an endeavour should be made to reach that goal. The first goal is clarification. As far as possible, duplications and grey areas should be avoided. Furthermore, many sectors which exist today could not have been foreseen by the Fathers of Confederation.

We need a list of the exclusive federal powers, a list of the exclusive provincial powers, a list of concurrent powers (which list should be as short as possible), with, in that last instance, an expressly stipulated paramountcy clause, which would be sometimes federal, sometimes provincial.

We might provide for a fourth list of powers, that is the federal overriding powers: the emergency power, the declaratory power, and the spending power, to which we will return later.

There is perhaps a fifth list of powers, that is, the federal legislative powers administered by the provinces. As a matter of fact, our Constitution actually contains one example only, that is criminal law, which is a federal responsibility but the administration and enforcement of which is provincial. In that area, we might retain the status quo.

It would be an advantage to regroup the legislative domains into large areas. Moreover, in any distribution of powers which is functional and based on our needs, we must at the outset identify what the major federal responsibilities and what the major provincial responsibilities must be.

Those responsibilities must serve as basic criteria. Furthermore, we should keep in mind the specific case of Quebec in the areas of language, culture and civil law, a specific case which does not raise any doubts and which should be reflected in the federal Constitution of tomorrow.

To put it differently, the distribution of powers should be devised in such a way that national defence, the monetary system, the general management of the Canada-wide economy, and overriding responsibility for the conduct of external relations will remain in federal hands, and the management of the territory, property and civil rights, welfare and health would devolve on the provinces.

We are inclined to adhere to the approach which was adopted by the Pepin-Robarts Commission in that field, and which has been adopted in a more concrete fashion by the Ryan Report; we also endorse the idea of providing in the body of the Constitution a clause permitting delegation of legislative powers, an opting out formula for shared cost programmes, and a stipulated paramountcy clause in certain sectors. In this way, by having recourse to one or two of these means, or by using all three means together, a province could to a certain extent create for itself a distinctive status, if it wished.

If the other provinces agree with such a scheme, then there is no need for Quebec to have a particular status.

It is probably in the area of the allocation of power that revision is more mandatory. However, it is in that field that the issues of centralization or decentralization make it more difficult.

The distribution of legislative powers is subject to evolution. Courts give life to the distribution of powers. Furthermore, governments make administrative arrangements. This being said, it becomes necessary at a given time, to think of constitutional amendments. This moment has come in Canada.

In the field of economics, it would be advantageous to entrench in the Constitution the principle of equalization payments and to empower the Parliament of Canada to fight regional disparities. The general management of the economy should continue to be the responsibility of the central Parliament. The monetary system, as well as the banks, should remain what they now are, that is, an exclusive federal responsibility. The Canadian common market must remain strong, which in any federation is normal. Section 121 of the British North America Act should be modified in order to secure more adequately the movement of persons, services and goods. In the fiscal area, the central Parliament should have access to direct and indirect taxation, as is the present case; on the other hand, we should allow the provinces to levy indirect taxes except in customs and excise.

In the social area, some decentralization seems to be imperative, which is quite compatible with the retention of a solid federal link. In matters of health and welfare, therefore, provinces might have exclusive competence. In cultural matters, the provinces, if the field becomes concurrent, might be given a paramountcy power.

The provinces could be awarded the residual power. This is the case in Australia and in the United States and in almost all federations. Depending upon the interpretation to be given by the courts, this competence may or may not

reveal itself as important. However, in any case, that power has a symbolic value. The Ryan Report and the Pepin-Robarts Report are of the same opinion.

The federal overriding powers in any new Constitution should be restricted, or circumscribed; some of them should be set aside.

The federal powers of reservation and disallowance contradict the very principle of federalism and in our view could very well be erased. The same may be said for the power of Ottawa to appoint Lieutenant-Governors. The Head of State should appoint them following recommendations by the provincial governments. One may raise the question whether it is necessary to retain the power for the federal Parliament to declare a local work to the advantage of Canada. A fair compromise would be to leave it in the Constitution but to subordinate its use in a given province to the assent of that province.

And then, there is the emergency power. Such power exists either in wartime or in peacetime. It is necessary to have an emergency power. Actually, at present such a power is recognized by the Courts. Its existence should be provided for explicitly in the Constitution, as well as the criteria of application, its length and its mechanism of enforcement. As a state of emergency may diminish the protection of fundamental rights, it is necessary to restrict the consequences of the emergency in that sector. Emergency powers in peacetime should also be provided for, as well as the criteria and the mechanism of enforcement. Emergency powers must remain something exceptional; they must have as little consequence as possible on the protection of fundamental freedoms, a protection which in any case must remain strong. Except in very rare circumstances, it is not necessary in peacetime to restrict fundamental freedoms.

The federal spending power should normally be restricted to federal areas, as for example the equalization payments. As far as the other areas are concerned, such federal intervention should take place only if two-thirds of the new second house ratify such recourse and, furthermore, any province should have the right to "opt out" of a shared cost programme, with fiscal compensation.

N - Mechanism for working out a new Constitution

The adoption of a new federal Constitution for Canada now seems to have become a priority. How are we to work it out?

So far, constitutional conferences have not been productive. The one instituted by Pearson in 1968 ended with the Victoria failure.

Should we revert to classic federal-provincial conferences? Many people doubt it. In certain circles, the idea of a Constituent Assembly has been put forward.

Constitutional conferences have produced very little because the rule of unanimity, although written nowhere, has been followed so far. We should make an endeavour to agree on a vote by region: Ontario, Quebec, East, West.

On the other hand, the idea of a Constituent Assembly has much merit. The difficulty, however, lies in its composition. Shall each province have an equal voice? Shall we have four blocks, or five? Is the proposed Assembly going to be composed uniquely of federal and provincial delegates? Should we designate or preferably elect representatives, special agents?

On further thought, it would seem appropriate to give to the eleven first ministers at the next constitutional federal-provincial conference the chance to debate further before thinking of calling a Constituent Assembly. The Pepin-Robarts Commission advocated such a policy for the present. The Ryan Report proposes an extraordinary constitutional conference specially convoked to solve our constitutional problems. After the Quebec referendum, a conference should be held, which could be vital for our country.

If the debate does not make any progress, it will become mandatory to establish a Constituent Assembly with the precise mandate to draft a new federal Constitution; such a Constitution should be submitted to the Canadian people for ratification by referendum.

O - Conclusion

For all practical purposes, the constitutional status quo seems to be rejected. In our opinion, Canada should adopt a new federal constitution if it wishes to remain strong and united in all its component parts.

The analysis of the Canadian constitutional dilemma made by the Pepin-Robarts Commission is based on facts. More than one organization has now made constitutional proposals. They should now be expressed in a document which will be our next Canadian Constitution.

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