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# *Newfoundland and the Constitutional Process*

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by Christopher Dunn

The constitutional package suggested recently by the Premier of Newfoundland consists of four distinct elements which are considered to be a linked package. The four elements of the package are:

- Adherence to the general amending formula (GAF) with the three year limit removed. The unanimity provision would be abolished.
- Elimination of the section 47 Senate suspensive override from the 1982 *Constitution Act*. This is replaced by a requirement for a double majority in the Senate for the passage of amendments affecting culture, language and the civil law system. One majority is Quebec and the other is the collectivity of the other provinces.
- The use of a referendum following a resolution approved according to the general amending formula or both federal houses plus five legislatures or seven legislatures out of ten, having fifty percent of the population. The Governor General is required to issue a proclamation after the requisite approval by referendum. Referenda are to be used in cases of substantial amendment, uncertainty as to public opinion, failure of legislatures to act, "or when any political, economic or social circumstances warrant".
- The use of a constitutional convention (constituent assembly). Premier Wells is flexible on the organizational characteristics of this assembly; he is willing to compromise on representation and choice. Half of the convention would be chosen on a population basis; the other half of its membership would be divided equally between provinces. As to method of choice, it would be partly elected and partly appointed. Proposals from the convention would go either to parliaments and legislatures under the GAF, or to a referendum. Constitutional conventions would be used where there is lack of consensus on how constitutional issues are to be addressed and where legislative discussions are not an option because of lack of agreement on the structuring of proposals.

There are several attractive elements to this package. It leaves politicians relatively more free to deal with "real" problems like the economy, the environment and social issues. It allows for a range of interests to be represented and provides for broad public involvement, contrary to

the unfortunate Meech process. It provides relatively little disruption of the 1982 *Constitution Act* process, which Canadians are, at least, familiar with. It purports to value national integration. It has certain similarities to the historical process which led to the *Constitution Act, 1867*, providing for a sense of historical continuity. Lastly it has proved relatively successful where used, namely the drafting of the American Constitution and the Bonn Constitution. Yet I shall argue that it is not a good idea in the contemporary Canadian context.

Before I begin a critique of the Newfoundland proposals, let me review the significance of process. The Canadian constitutional industry is now preoccupied by process. We are attempting to outline a set of decision-making rules which will identify who has a say in redrafting our constitution – and when and how. Later we will supposedly decide on the actual content of the constitutional package. It all seems so linear and clear. However there are a multitude of subterranean factors which have not been clearly thought out in the present debate, most notably the relationship between process and outcome (that is, content).

These are some of the factors to which reformers of the constitutional process must turn their attention:

- *Philosophic values*: There should be agreement with regard to basic values to be sought in the process. This is a simple yet complex task. Possible values in question may be unity, debate, representation, balance, technical competence, constitutional continuity. Yet discussion of values is not preminent.
- *Sovereignty*: The nature and locus of sovereignty must be identified. This seems to be a missing element in the contemporary debate. We have long worked on the assumption of parliamentary sovereignty coupled with indirect popular sovereignty. Contemporary discussions are vague as to shifting balance of these two items.
- *Responsible Government*: Related to this is the discussion of the meaning of responsible government. Responsible government can be defined narrowly or broadly. There is a possibility that a broad definition of responsible Government may be arrived at which takes into consideration the aims of the more populist of reformers. But there is no consensus on this currently.
- *Process determines outcome*: This fact has been seized upon by the more astute observers of the constitutional process. Quebec, for example, insists on

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"nation-to-nation" discussions coupled with a continuation of the current amendment procedures because it wants to be relatively certain of the outcome. Those who push for a greater element of populism in the constitutional process may be betting that this will beget sympathy for strong central government. We have to have some general picture of outcome before we start dealing with process.

- *Process affects the degree of change:* Certain processes, for example executive or legislative federalism, are more likely to yield proposals for incremental change than are other processes, like constituent assemblies. We must have a fix on the degree of "shake-up" we want in our constitutional arrangements.

My observations on these factors are as follows. I contend that the primary value we ought now to be addressing is national unity. The locus of sovereignty should of course be more clearly with the people – especially at the consultation stage. This was a "lesson of Meech." There is also a possible public role in terms of initiation. Responsible government is something which should be protected in this current process. Cabinet government and increasingly strong legislatures have proved durable and valued elements of the Canadian way. They should be maintained and strengthened in this trying time. They will surprise us with their vigour. Let us not have lay people negotiating the actual details of the constitution. As for process and outcome, let us undertake a process which is targeted toward the main problem here: Quebec. This is a Quebec round with a vengeance. It will probably end up, short of separation, with a new type of division of powers between Quebec and the "rest of Canada" (ROC). Let us also not muddy the waters with a wider range of constitutional changes. I argue constitutional changes are better done *seriatim*. Yet they should also be done so that measures to alleviate the alienation of the general public and of Canada's aboriginals are given pride of place in upcoming constitutional reforms.

The Newfoundland process proposals do not clearly enunciate many of these subterranean issues. The implications of Newfoundland's proposals must be clarified and critically examined.

Premier Wells emphasizes debate ("dialogue") as a primary reason for choosing the constituent assembly idea. However this is highly improbable; Quebec has denounced the constituent assembly idea. It has chosen its preferred approach in Bélanger-Campeau: legislature committees for referendum-drafting and negotiations with the rest of Canada, and ultimately a referendum on sovereignty (or renewed federalism). A two-stage process seems inescapable if Quebec maintains this stance, which seems very probable. Paradoxically, such a process may even be less destabilizing than past ones in which Quebec has lost face by submitting initial

agendas for English Canadian "approval" and having them rebuked.

Wells speaks often of popular involvement in the constitutional process. However he has not given the people of his own province an opportunity to speak to a made-in-Newfoundland legislative committee or constitutional commission. The constitutional industry is a one-man show in Newfoundland. Thus both popular sovereignty and broadly-defined responsible government are given short shrift. He maintains that provincial committees or conventions are likely to be (1) overly provincialist and (2) not conducive to a national debate. The provincial "Meech Committees" of course showed this first contention to be false. As for the second, I intend to demonstrate later how they may in fact be essential elements of a national debate.

Mr. Wells understands that process determines outcome. Implicit in his January 1991 talk at the University of Calgary was a belief that the "remainder of Canada" outside Quebec will accept only symmetrical federalism ("equal jurisdiction for all provinces") and a strong federal government. However, a constituent assembly may be the wrong way to ensure this. It will muddy the constitutional agenda.

There are significant disadvantages to the Newfoundland package. One is that constituent assemblies tend to work best where there is significant consensus on the nature of needed political and constitutional change. This is plainly not the case in Canada. Another is that a constituent assembly does not necessarily ensure the avoidance of constitutional impasse; on this point Mr. Wells demonstrates a willing suspension of disbelief. There may be significant disagreements on the methods of choosing members of the convention, and disagreement on the linkages of the convention to other elements of the constitutional process.

There are other problems with the Newfoundland package. To those dissatisfied with the seemingly interminable Canadian constitutional process, the lengthy discussions of a constitutional convention may be just as aggravating. Elitist constitutional conventions might be just as alienating an experience as was the so-called "Meech Process". A constitutional convention is complicated by its very nature: it would be hard to explain to the public and even to the members of the convention itself. As well, it may be unrealistic to expect convention participants to digest the mountains of material which are unavoidable parts of such undertakings.

Lastly it weakens the legitimacy of federal and provincial legislatures. It implies that representative and responsible government have failed and are unequal to

the task(s) before us. If I read the public mood correctly, it calls not for abolition of these two bulwarks of our political system, but for *additional* measures of direct democracy and consultation.

Finally, Newfoundland may simply be the wrong province to take the lead in new constitutional proposals. Quebec will simply not forget its role in the demise of the Meech Lake Accord. Mr. Wells persists in an unrealistic call for the Senate, albeit reformed, to be the major protector of Quebec's distinct status, completely ignoring the role of the Quebec state.

A number of recommendations suggest themselves. A basic starting point is to identify the major national crises we are facing and to act accordingly. There are three: the duality (French-English) crisis, alienation from the process and the aboriginal crisis. There is also a domestic future of democracy in Newfoundland.

1) *The Duality Crisis*: At this point, two-stage negotiations seem unavoidable; perhaps we should make a virtue of necessity. We should structure a federal version of Bélanger-Campeau. This would, like in Quebec, involve the opposition parties, involvement in the choice of terms of reference and membership for a special parliamentary commission or committee. Membership would consist of both politicians and non-politicians. It would be advisable to have provinces involved also, sending representatives from their past or present constitutional committees. (Spicer might participate as well.) This arrangement would respond to multiple needs: national debate, legislative vitality, federal-provincial dialogue and use of the post-Meech public consultations. It would allow some consensus to develop in English Canada regarding acceptance or refusal of Quebec demands, which is in itself another need in the upcoming constitutional talks. Federal-provincial diplomacy should then enter the picture at the negotiation stage. Approval would be by the normal amendment resolution mechanisms of the *Constitution Act, 1982* (an approach that Quebec agrees with) but the rest of Canada needs help. We do not live and breathe constitutional politics the way our Québec compatriots do. We need a special federal-provincial fund to hold conferences, have speakers tours, issue special publications and videos. We should not be strangers to the process, as was the familiar complaint from the Meech era. This educative function becomes especially relevant in the second stage of my proposed constitutional process.

2) *Alienation from the Process*: The second crisis we are currently facing is alienation from the process. This can be partly addressed by a solemn commitment of governments to widespread public consultations before they initiate major constitutional changes.

Quasi-unanimity in the amending formula seems to be the only way of responding to both English Canadian Nationalists (who demand provincial equality) and Quebec Nationalists (who demand a Quebec veto). Difficulties in achieving consensus are generally overrated. The record of amendments prior to 1982, and of executive federalism in general, are indicative of consensual behaviour. Quasi-unanimity can also be dovetailed with a future populist element in the amendment process: consultations before negotiations. National constitutional referenda should generally be avoided. If deemed absolutely necessary, they should be non-binding, for the obvious reason that binding referenda could allow English Canada to override Quebec on divisive issues.

Parliament and the legislatures should ultimately abolish the time limit for approval of constitutional amendments. It seems to serve little purpose except to put needless pressure on federal and provincial decision-makers. Citizens however in future should be able to initiate or force decisions on constitutional matters by petitions which attain a sufficiently high threshold of numbers.

3) *The aboriginal crisis*: The aboriginal royal commission will no doubt consider major changes: self-government, a national treaty, or special parliaments. The work of this commission must dovetail with that of the above constitutional discussions. The royal commission will have a special role to play if a separation scenario seems imminent.

4) Finally, to turn to Newfoundland. The Premier should convene a special constitutional legislative committee or constitutional commission as soon as possible. Newfoundland should be brought into the mainstream of constitutional discussions. If not we will be increasingly marginalized, both as citizens and as a province.

All of this may seem overly negative regarding Mr. Wells' constitutional package which is, after all, a welcome and fresh view of how constitutions should be made. It is, nevertheless, fraught with practical and philosophical difficulties. Democracy is implied but not delivered. The Newfoundland package, in my view, is an idea whose time has not come. ●

**Editor's Note:** Since this article was written the Newfoundland House of Assembly has established a committee on the constitution. On September 24, 1991, the Government of Canada tabled its constitutional proposals entitled "Shaping Canada's Future Together". A special House-Senate parliamentary committee was established to hold hearings and consider these proposals.