POLICY
OPTIONS
POLITIQUES

"WE THE PEOPLE": REINFORCING LIBERTY IN CANADA

Tom Velk
and Irving Brecher

A prime minister with a majority in Parliament exercises enormous power. If Canadians' are to remain free in the face of such power, some fundamental political reforms are needed. The most important is to establish a greater separation of powers. We need: a president as well as a prime minister; an elected Senate; judges and other officials whose nomination must be vetted by the legislature; term limits; elimination of the "notwithstanding clause" from the constitution, and a number of other constitutional reforms. Our new institutions could be crafted with distinctively Canadian features, but their goal should be to provide US-style checks and balances against the arbitrary exercise of political power.

Le premier ministre canadien, quand il dispose de la majorité au Parlement, détient un énorme pouvoir. Pour demeurer libres face à celui-ci, les Canadiens devront mettre en œuvre des réformes politiques fondamentales. La plus importante consistera à adopter le principe de la séparation des pouvoirs. À cette fin, il nous faut : un président en plus d'un premier ministre; un sénat élu; des juges et certains hauts fonctionnaires dont la nomination aura été approuvée par le Parlement; des limites à la durée des mandats. Il nous faut aussi éliminer de la Constitution la clause dérogatoire et mettre en place un certain nombre d'autres réformes constitutionnelles. Nos nouvelle institutions pourraient comporter des traits proprement canadiens mais elles devraient viser à fournir, comme aux États-Unis, un système de poids et de contrepoids capable de faire échec à l'exercice arbitraire du pouvoir politique.

Government is not reason, it is not eloquence, it is force. Like fire, it is a dangerous servant and a fearsome master.

Attributed to George Washington

Quoting George Washington does not foreshadow an essay on anti-government. Government is omnipresent, ancient, inescapable and necessary. Liberty is scarce, novel, fragile and dispensable. We are a herd species: incapable of surviving in isolation, able to thrive only in integrated communities, where specialization, trade and law generate, distribute and protect the dividends that flow from organized co-operative human effort. But we are not happy when forced into participating in organized projects against our will, especially so when more value will be obtained from alternative uses of our time.

Liberty—major fields of human action from which the commanding and controlling power of the State is constitutionally excluded—protects vital classes of civil intercourse that occur among voluntarily co-operating individuals. During the tumultuous 1960's, a university student criticized one of the authors for having politically incorrect views: She charged "You don't believe in majority rule!" The reply was "Of course not—liberty means that no majority, acting through government, may constitutionally suppress free speech, prevent peaceable assembly, or censor the press." Thus at one level, freedom or liberty is the absence of government.

There is, however, less conflict between the need for government and the blessings of liberty than first appears. Material prosperity, protected by laws of property and contract, follows upon co-operative efforts organized and given a legal existence. But prosperity is made even greater, the less coercion is imposed on the citizens who join forces to earn the extra dividends of specialization. While riches may sometimes buy freedom, especially for an élite, freedom for all will more dependably bring forth a general plenitude of wealth.

So while this essay will argue for added protections for our liberty, it is not an anti-government case that we are making. Edmund Burke warned, long ago, against the hubris of utopian schemes that promise enormous gains in justice or material status in exchange for equally stupendous rearrangements of the social and political architecture of the State. To paraphrase Burke's position, the plan of a

great state's constitution (the whole of its governance) is like that of a cathedral 600 years in the building. When it has been wrecked in a day of rebellious riot and turmoil, we cannot expect the apprentice bricklayers who eagerly took part in its violent destruction to be capable of reconstituting it anytime soon. Although the original edifice may have been decayed in part, in need of an airing-out—even, perhaps, requiring some added support to its foundations—it should never be forgotten that 600 years of refinement have already been expended upon it. A certain general magnificence, dignity and fitness to its purpose is likely to have evolved. The inability of the apprentices to comprehend that purpose, or to understand the relation between structure and performance, does not give them leave to overturn the designs of their fathers, or to dissipate a property which is properly understood to be entailed to their children, and so is not theirs to desecrate. The apprentice bricklayers are unlikely to have the wisdom needed to recapture all that was well, or to avoid creating new sources of complaint, when laying out their scheme of rebuilding.

In a sense, we are all apprentice bricklayers, inadequate to the task of recreating even an imperfect alternative to the totality of the immense and complex social system that we currently inhabit. We may not even have the skill needed for a major renovation. And so, in the words of Jefferson, "Prudence, indeed, will dictate that governments long established should not be changed for light and transient Causes; and accordingly all Experience hath shewn, that Mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." This Burkeian humility does not mean that no major reformations of failing political systems should ever be warranted or attempted—only that such tasks be undertaken with great care.

Critics of interventionist government are not unable to appreciate what good may be done by wise and timely applications of state power. Even "conservative" political leaders have, at moments of rare opportunity or great crisis, stretched their legitimate authority well beyond constitutional limits, sometimes in alliance with traditional foes, to achieve significant reversals of fortune and win victories over adversaries otherwise unconquerable.

We do not propose undoing the design or shrinking the potential of modern government. Arguments have been advanced in favour of diminishing the state's power to redistribute income, reducing governmental power to regulate the economy, limiting the government's power to tax and borrow, and giving the citizenry a veto over new taxes and public borrowing and spending programs. Such arguments are not our concern here. Nor are the relevant counter-arguments. Our basic aim is to nurture a fragile, uniquely precious plant—liberty.

The plain fact is that parliamentary power has long been weak; that provincial power has become excessive; that the executive branch—personified in a prime minister with a majority government—comes closest to exercising supreme power in Canada; and that the Supreme Court is now the strongest countervailing force.

Over the past 50 years, Canada's federal government has played a necessary and vital role: in defence, justice, nation-building and foreign policy; in social and economic spheres—public health, education, unemployment—where market forces fail or come up short; and, indeed, in promoting individual and community rights. By the same token, however, we suggest that Ottawa and the provinces have often been overly interventionist *vis-à-vis* the Canadian people—restricting our privacy and language rights, curbing our "need to know," constraining our freedom to compete, and so on. It is on this dimension that our essay is focused. Two aspects will be front and centre here: the constitutional structure of Canadian government; and linkages between government and "we the people."

Let us begin by debunking some myths about Canada's political system. The mother of all such myths is that the supremacy of Parliament is the lifeblood of Canadian democracy. The plain fact is that parliamentary power has long been weak; that provincial power has become excessive; that the executive branch—personified in a Prime Minister (PM) with a majority government—comes closest to exercising supreme power in Canada; and that the Supreme Court is now the strongest countervailing force, thanks to the constitutional entrenchment of the *Charter of Rights and Freedoms* in 1982. The indispensable core of our parliamentary democracy is universal suffrage, representative government and an executive cabinet drawn from the elected legislature. Total supremacy does not in fact, and should not, reside in any single branch of the Canadian polity.

A second myth is that the British monarchy is the best constitutional mechanism for ensuring stability and continuity in Canada's parliamentary system. This lingering worship of "the divine right of kings" is patent nonsense. Experience around the world makes it crystal-clear that there is no inherent conflict between an elected president and parliamentary democracy.

No less wrong-headed is the notion that the monarchy is a major badge of distinction which

prevents Canada's assimilation into the United States. Bluntly put, if the fabric of Canadian nationhood were that tenuous, it would not be worth preserving. Indeed, we submit that for those who seek a revitalized liberty in an independent Canada, there is much to learn from US constitutional history—warts and all.

Finally, there is the Quebec separatists' myth that any number of referendums on secession may be held until one of them yields a "yes" vote. This not only makes them a global laughingstock; it is a serious affront to the democratic system. The indivisibility of the state—so critical in ensuring stability—is, in fact, a hallmark of many Western democracies, including the United States (which, of course, fought a bloody Civil War to make that case).

Political philosophers have long been mindful of the dangers of what Jefferson called "energetic government." Montesquieu's solution, formally embraced in the US Constitution, was a balanced distribution and careful separation of political power among the three branches of government.

The logic of the connection between separated powers and limits on interventionist government is simple: One branch may prevent another from undertaking specific action; or at least the competing branch may powerfully affect the vigour and duration of the other's "offensive" action. The process may be the familiar judicial one, where the US Supreme Court may declare that some particular law, regulation, executive action or administrative procedure is disallowed by the Constitution. But other balances operate as well. The US legislative branch raises tax revenues and supplies—or delays—revenue needed if the executive branch is to fund its operations. The executive names members of the federal courts with the advice and consent of the Senate, and therefore—insofar as their future decisions can be foreseen—the courts' long-run direction is influenced and balanced by the other branches. The Supreme Court is limited in that it depends on the executive to enforce its rulings. President Jackson, who did not like the Court's ruling in the matter of resettling certain Indian tribes, remarked that the Court had indeed made a ruling, and now it was free to enforce it—the Court having no such power, of course.

The US Constitution has other fundamental safeguards against overly interventionist government. The first ten amendments, forming the *Bill of Rights*, declare certain fields of action—speech, the press, religion, assembly—to be reserved to the people. Congress is prohibited from making laws that infringe upon these freedoms, over which sovereignty is forever to remain with the people. Canadians now enjoy such protections under both the federal *Charter of Rights and Freedoms* and the various provincial charters. But there is plenty of room for improvement.

The "separation of powers" doctrine has been much less prominent in Canadian political discourse—and with good reason. Complete separation would nullify the cardinal Canadian principle that the executive, that is, the Cabinet, must basically comprise elected members of Parliament. Separation need not be complete in order to be effective. But the Canadian shortfall is excessive.

Since the *Charter* became part of our constitution, the courts have had the power to disallow legislation that is in contravention of guaranteed rights. But Parliament and provincial legislatures may declare that such laws shall operate notwithstanding any claims that they diminish the scope of freedom. The House of Commons' control over the executive is virtually limited to the draconian measure of a vote of non-confidence. Even members of the party in power can do relatively little to affect government policy-in-the-making; indeed, they may even be expelled from their party if they contradict government policy once it has been determined. The Canadian executive branch therefore wields near-total power over Parliament. The Cabinet and the prime minister make most important policy decisions. The prime minister is far more than a first among equals. He or she not only names judges without being required to seek the advice and consent of the House, but also names the members of the Senate on his or her own authority. Senators may serve until the age of 75, and they have no direct obligation to any specific constituency.

We do not seek to create a Canada in the image of the US presidential system. For one thing, allowing the election of a chief executive who faces a congress controlled by an opposing political party is inconsistent with our parliamentary system. And while such a system can sometimes produce good legislation, it also opens the door to governmental gridlock; witness the US government shutdowns of the 1990's. Nor do we envisage a Canadian structure in which the head of state exercises predominant executive power. That said, we are attracted by (1) the basic US principle of republican government, (2) the fundamental concept of separation of powers,

The logic of the connection between separated powers and limits on interventionist government is simple: One branch may prevent another from undertaking specific action; or at least the competing branch may powerfully affect the vigour and duration of the other's "offensive" action.

and (3) the spirit of openness and transparency that pervades the US system. Accordingly, we recommend a set of constitutional reforms that combine adapted US features with ideas reflecting Canada's structural uniqueness:

- First and foremost, our constitution should contain a preamble which stresses that the "Canadian republic," like each and every province, is indivisible; and that it is "we the people", not Parliament or any other body, who are sovereign. We respectfully take issue with the Supreme Court of Canada on the crucial question of divisibility. It is, to be sure, possible to conceive of a situation in which a minority group is so oppressed that is may legitimately secede—after voting "yes" by a "clear majority on a clear question," and after good-faith negotiations with the rest of the country. But in a functioning democracy like Canada, the likelihood of such oppression is so remote as to be considered zero. The preamble should also declare that all Canadians respect the distinctness of both Quebec society and our aboriginal community.

A president elected by a super-majority in Parliament should be Canada's head of state. Both the president and the prime minister would hold office for a limited term, not to exceed eight years.

- A president elected by a super-majority in Parliament should be Canada's head of state. Both the president and the prime minister would hold office for a limited term, not to exceed eight years. On the recommendation of the Commons, and with the consent of the Senate, the president may prorogue a parliament and set timely elections. (Such elections would be rarely called.) Jointly with the prime minister, and with the consent of Parliament, the president would appoint ambassadors, Commonwealth high commissioners, and representatives to international bodies. The same process would apply to senior federal administrative and regulatory officials, except for those who may be elected in their own right The selection of such officials should be made in an open and transparent way that guarantees expertise and integrity. This is particularly important for key policy-makers like the governor of the Bank of Canada. With the exception of statements made in parliamentary debate, the president, the prime minister, other government officers, and all members of Parliament should be subject to the laws of the land. And the president, the prime minister and all senior officials should be impeachable and removable for high crimes contrary to their oath of office.

- Parliament should have two elected branches, the House of Commons and the Senate. Normally, election would be for a four-year term, with a lifetime limit of three terms in any one chamber or for any senior elected official. The Commons should continue to initiate all money bills; other bills may originate in either house. The Senate, like the Commons, should elect its presiding officer. Parliament should guarantee a representative form of government in every province, and should protect Canada against invasion, insurrection or secession. It should guarantee the free movement of goods and services across provincial lines. It should also have the sole power to accept or reject all treaties and other international agreements proposed by Cabinet. No other treaty-making, or tariff-setting power should exist; in particular, not among or within any of the provinces. Each province or territory should be represented in the Senate by the same fixed number of Senators, chosen, in an election, from a slate determined by the provincial or territorial legislature, or by a special rule devised by the appropriate legislature. The Commons and Senate should reflect a blend of general and proportional representation. Competing candidates for each seat should be selected in primary elections. Legislation may be proposed and enacted, and existing law eliminated or amended, by a direct, citizen-initiated referendum process, provided that participation and support are sufficiently large.

- The "notwithstanding" clause should be eliminated from the *Charter of Rights and Freedoms*. So, too, should the "reasonable limits" on freedom; the courts can be trusted to identify those rare instances of restriction like "shouting 'fire' in a crowded theater," knowing that it is dangerous. Commercial speech should be as free as private speech. Where numbers warrant, there should be no limits on Canadian citizens' or residents' choice of English or French as the language of education. Members of the federal court and senior provincial judges should be appointed jointly by the prime minister and the president, and they would take office with the advice and consent of Parliament. They should serve for life (not until 75), but should continue to be impeachable and removable from office. Citizen-initiated recall should be possible where significant numbers and majorities are involved. The Supreme Court of Canada should establish national standards for civil and political rights; clear procedures and rules of evidence, and a uniform respect for natural justice and due process should form the basis of such standards. When passing judgment on social programs, the courts should allow for reasonable experimentation and regional diversity.

● Federal-provincial conferences of first ministers and premiers' conferences have become a way of political life in Canada. They are a source of friction, confusion and disagreement between Ottawa and the provinces, and among the provinces as well. But they also inject a substantial amount of debate, competitiveness and compromise into our political system. In effect, these are valuable, home-grown mechanisms for checking and balancing executive power at both the federal and provincial levels. They are, therefore, important instruments for shoring up Canadians' liberty. And they should be fully enshrined in Canada's constitution, in terms of required sessions for resolving a variety of problems at regular intervals.

We believe that the reforms we propose are well designed to sustain and promote liberty in Canada. We also believe that a less-constrained process for amending the constitution would greatly enhance the value of those reforms. They are, of course, not cast in stone. But what should *not* be changed is their general thrust—to strengthen our structure of government; to make it more accountable to the people; and to give Canadians a stronger sense of freedom by sharply reducing the risk of governmental abuse of power.

We note that our essay is focused on civil and political liberties. Little has been said about the socio-economic dimension. Nor have collective rights been discussed. Those issues are for another time and another place—though in the latter connection, we cannot resist arguing that when collective and individual rights collide, it is individual rights that must prevail.

We are not unmindful of the extreme difficulties that beset efforts at constitutional revision in Canada. The well-intended Meech Lake and Charlottetown initiatives were disasters waiting to happen—the former because of the real danger that a textual clause on distinct status for Quebec could override the federal *Charter of Rights and Freedoms*; and the latter because by trying to please everyone in an incredibly complex way, it ended up satisfying virtually no one. Still, the constitutional challenge must be met; it will not go away.

The wisest route forward may well be through a constituent assembly—reflecting a broad range of interested parties and conducted in full view of the Canadian public. Needless to add, there has to be a clear and wide recognition that our suggested reforms represent only a single, by no means the last, exercise in constitutional revision.

Success will not come easily, but come it must. Harking back to Sir Wilfrid Laurier, the 20th century was expected to belong to Canada. Whether it did, or whether this country came close, is a matter for interesting debate. One thing is certain, however: The 21st century will *not* belong to Canada if Canadians are not more vigilant in reinforcing their liberty.

Tom Velk and Irving Brecher are, respectively, Associate Professor and Emeritus Professor of Economics at McGill University. Professor Velk has a PhD in economics, with a minor in law, from the University of Wisconsin. Professor Brecher has a PhD in economics from Harvard, and a JD from the Yale Law School.

We believe that the reforms we propose are well designed to sustain and promote liberty in Canada. We also believe that a less-constrained process for amending the constitution would greatly enhance the value of those reforms.

Politics The art of politics is learning to walk with your back to the wall, your elbows high, and a smile on your face. It's a survival game played under the glare of lights. If you don't learn that, you're quickly finished. It's damn tough and you can't complain; you just have to take it and give it back. The press wants to get you. The opposition wants to get you. Even some of the bureaucrats want to get you. They all may have an interest in making you look bad and they all have ambitions of their own.

Instinct A successful politician must not only be able to read the mood of the public, he must have the skill to get the public on his side. The public is moved by mood more than logic, by instinct more than reason, and that is something that every politician must make use of or guard against.

Cash The biggest difference between Trudeau and me in federal-provincial affairs was that he wanted to win the arguments but was willing to let the provinces run off with the cash, while I was happy to concede the arguments but wanted to keep the cash. The Trudeau years were a period of significant decentralization ... The importance of Ottawa in the Canadian economy diminished considerably.

Liberal I have never been doctrinaire on issues. That is one of the great things about being a Liberal; you can base your decisions on the circumstances without having to worry about your established public image.

Jean CHRÉTIEN, *Straight from the Heart*, 1985