<u>CONSTITUTIONAL CONTINUITY: Bill C-60 and Canadian History</u>

Despite predictable surgery, Bill C-60 will result in historic legislation. Such legislation should consciously conform to the experience of our past. It should employ language, ideas and assumptions which avoid the merely trendy and which accomplish its limited purpose of adjustment to evolving conditions in ways and words immediately familiar to Canadians. It should call us Canadians and not members of the public - just to take a minor example of the legal technocracy that disfigures the present draft. Above all, it should shun the temptation to dress up in the heavy rhetoric of new nations what, after all, are practical requirements deriving from our own lengthy experience. We are not a new nation and do not need to have written out for us the self-evident truths of our condition and purposes.

Canadians, even before we were all known by that term, have understood well the value of continuity. Any endeavour to make us over into a standardized North American democracy with a merely vestigial 'monarchy' will founder on the rocks which have always shattered such attempts in the past. But, tinkering with the monarchy is only the most evident of several dangerously divisive thrusts in a bill which could, and I hope will, be an important reformation of some aspects of our federal system. The philosophy which hovers hazily behind the statement of aims, as well as behind the potent mixture of democracy and patronage in the House of the Federation and some other proposals, seems more consonant with the notions of Jefferson and Jackson than with those of Macdonald and

Laurier. In some other sections there is evident an understanding of the roots of our individuality as a people which is perfectly in tune with our history. One instance of this comes, not surprisingly, as a limitation on the 'new' Canadian Charter of Rights and Freedoms. That instance is at section 26 where it is declared that the Charter shall not restrict "any right or freedom that may have been acquired by any of the native peoples of Canada by virtue of the Royal Proclamation of 1763." This is not the sort of prescription usually found in the documents of a 'new' nation. For more than a few Canadians freedom wears a crown; and this is a pertinent comment upon the Jacksonian democracy which was so specifically discountenanced by the authors of the Act of 1867.

Much of the curiously American colouration of Bill C-60 might have been suppressed had its authors reflected still further upon the implications of the 1763 Proclamation. That decree delineated not only vast Indian territories with particular protections for the inhabitants, it also sought to provide for the standardization of the new province of Quebec. Despite the Proclamation's legal, linguistic and religious stipulations, the laws of the province were to be "as near as may be agreeable to the laws of England, and under such regulations and restrictions as are used in the other colonies." Quebec was to become a colony <u>comme les autres</u>. That it did not is not only to the enrichment of all Canadians. It is a central expression of Canadian constitutional principle. From generation to generation we have rejected the post-revolutionary American allegiance to majoritarian democracy. Most of our constitutional arrangements, like much of our political debate, have been directed towards modifying the inexorable encroachments of mere majorities. John A. Macdonald summed up the Canadian appreciation

of continuity and cautious compromise during the Quebec Conference (characteristically *in camera*) when he predicted that with legislation based upon the sevety-two resolutions "we shall have a strong and lasting government under which we can work out constitutional liberty as opposed to democracy, and be able to protect the minority by having a powerful central government. Great caution, however, is necessary. The people of every section must feel that they are protected, and by no overstraining of central authority should such guarantees be overridden."

There is a need now, as there was in the 1860's, to particularize some of those "sectional" and "minority" rights. There is no more need now than there was then to concoct a "written" constitution, complete with embarrassingly derivative and gracelessy drafted freedom charters and definitions of purpose. These Americanisms imply that Canadians do not know the origins and extent of their general liberties. Implying such ignorance, together with ill-conceived efforts to remove it by "writing" a constitution, will unquestionably prove more divisive than would reliance upon approaches and assumptions that have withstood the test of time. Such Canadian attitudes do not embrace the various trinkets of 'direct democracy' which glitter and fade from time to time south of our borders, nor do they encompass a mechanistic perception of constitutions. As Mackenzie King remarked of Earl Grey, who tried to promote proportional representation in 1909, the Governor General was a "faddist." Let us not be seduced by pompous verbal flourishes and specious electoral 'solutions' which will only deflect our attention from serious discussion of the several practical problems we face as an experienced federation.

For greater certainty, but not so as to restrict the generality of the foregoing, let me suggest some of the surgery required by this sadly deformed bill. The statement of aims of the Canadian federation should be first to feel the knife. It is an intensely boring verbalizing of the obvious and an apparent indictment of the present generation of Canadians for not knowing why they choose to live together. It should be replaced by the simple statement that the purpose of our federation is to provide for the "peace, order and good government" of the country. This phrase, originated in a slowly evolveng British empire has, like the monarchy, been fully Canadianized. It has also a well-recognized meaning in addition to its refreshing brevity. If it must be altered to reflect modernity why not remain historically consistent and use the terminology of the 1763 Proclamation which described the purpose of the colonial governments it established as "peace, welfare and good government." Could any government achieve more? Elaboration of the possible ramifications of such a purpose should be left, as it has hitherto been left, to the diligent attention of our parties and politicians.

Closely related to the statement of aims is the provision that if Bill C-60 is enacted the resulting document should be referred to as "the Constitution of Canada." That such a piece of legislation should be called our constitution creates a contradiction within the bill itself while revealing the authors' blinding predilection for a written constitution. Despite current shorthand the British North America Act is not the Canadian constitution. Nor could Bill C-60 become our constitution if enacted. For section 2 of the bill

reiterates the intention expressed in the Act of 1867 that Canada should have a constitution "similar in principle to that of the United Kingdom." There is a lot more included in the law and custom of the British and Canadian constitutions than can or should be written down in a single document. All references to Bill C-60, or any part of it, as the Constitution of Canada should be excised from the bill - which should be acknowledged openly and correctly as the Canadian re-enactment of the 1867 British law with appropriate amendments.

The political craftsmen of the 1860's assumed that their constituents were aware of the liberties secured by hundreds of statutes, precedents and customs - all of which were enshrined in the Canadian constitution by a simple phrase. Many Canadians were aware of the reality of such liberties by having read about such critical events as the libel trial of Joseph Howe. Probably even more of them were aware of the frailty of elevated declarations of purpose when such declarations were challenged by organized social-economic interests. After all, the Confederation debates took place as the American civil war was trying to right in blood what Thomas Jefferson had written only in ink. Are we now to assume that with the spread of public education in this country our entire history and heritage have been obliterated and that we must begin again with clumsy pens and a <u>tabula rasa</u>? Eliminate sections 5 to 10 and 23 to 29. We already possess the world's finest structure of constitutional liberty. Professor Frank Scott had no need of a written 'charter' when he prevailed upon the Supreme Court to strike down the Padlock Law. The security of our liberties rests upon the vigilance of legislators and the excellence of judges.

Well understood principles are more reliable and contain fewer unsuspected constrictions of legitimate evolution than closely written definitions. For this reason sections 51 to 54, which attempt to define the cabinet, should be jettisoned. Of all the elements in the proper functioning of Canadian responsible government the cabinet is most central and its nature the least susceptible of precise definition. When as unlikely a person as Woodrow Wilson recognized (in his book, Congressional Government) that "the essence of responsible government is resignation upon defeat" should we consider it necessary to write a legal definition? In any case, it seems illogical to define the federal cabinet while leaving the executive councils of the provinces, whose roles have certainly not been diminished since 1867, undefined.

Lack of a sense of continuity, let alone of the cumulative attachment of Canadians to their country engendered by a shared history, can provide the only reason for what must be called a calculated destruction of the symbols of our past. Such scandalous disregard for the importance of a continuum in human affairs has, I suppose, been encouraged by the steady erosion of familiar terms, symbols and usages over the past decade. The increasing irritation caused by this heedless vanadlism should have warned the authors of Bill C-60 that to seek unity and purpose by replacing venerable terminology with ticky-tacky modernisms is a fatuous and self-defeating procedure. The principal examples of this continuing endeavour to erase the past are the proposals to rename the Privy Council and the Senate. Unlike the decimal system, the new names, in themselves, connote no substantive change; they have merely the dubious distinction of being new. The House of the Federation and

the Council of State of Canada are both grandiose names and without historic significance to the country. The old names should be retained and, with respect to reform of the Senate, there should be much sober second thought.

Sections 63 to 65 provide for a cripplingly complicated procedure for selecting Senators, a mechanism which would produce a second chamber incapacitated by the fluidity of its membership. The convoluted process of involving provincial opposition parties in the selection of Senators is a half-way house between executive appointment and direct election. As such it would probably produce the worst of both worlds. In returning to history for guidance (as one hopes they may) the authors of Bill C-60 should consult John A. Macdonald again. "I do not think," he said, "there was a dissenting voice in the (Quebec) Conference against adoption of the nominative principle, except for Prince Edward Island.... And nomination by the Crown is, of course, the system which is most in accordance with the British constitution." A Senate which will represent more directly the interests of the provinces and regions is probably desirable, and there will likely be wide acceptance of the proposal that half its members be named by the provinces. But if nomination by the Crown (or by provincial and federal Crowns in consultation) is an acceptable procedure for manning the Supreme Court why not a similar procedure for naming Senators? The Court is (arguably) of more direct influence in the evolution of federal-provincial relations than would be even a reformed Senate. It would conform best with Canadian experience if the Lieutenant Governor in Council in each province were to name its alloted number of Senators.

Specific changes in the composition of the Senate and the Supreme Court and in the method of appointing the members of those institutions are perfectly proper objects of amendments to our basic federal act. To designate such legislation, in identifiably American constitutional language, the supreme law of the land, is not only to contradict specifically the terminology of section 2 of Bill C-60, it is to drag in a philosophical assumption about written constitutions entirely at variance with our historical experience.

The piece de resistance in Bill C-60 is, of course, its attempt to disengage us from the past by chipping away at the coping stone of our constitutional structure. Not only is the sustained assault on the role, usages and terminology of monarchy an informing principle of the bill; the various prongs of the manoever are fashioned with an almost unbelievable lack of sophistication. It should be evident by now that this aspect of the bill has produced something less than a transcontinental accolade. Yet, despite the outburst of divisive emotion (apparently unexpected only by the bill's framers) the extent to which the anti-monarchical elements of Bill C-60 served as an integrating force amongst the other unhistorical and therefore alien features of the bill has not been universally apprehended. There is, for example, a clear relationship between the need felt to write into "the constitution" (section 97) a requirement for the annual convening of first ministers' conferences and the need to insert a clause (section 44) in the "constitution" declaring that "the Governor General of Canada shall have precedence as the First Canadian, and the office of Governor General shall stand apart from any other public office in Canada." Both these clauses are pitifully inadequate attempts to reduce to writing attitudes and practices

which have grown naturally as customs of our constitution. They reveal, like other similar passages in Bill C-60, an ill-founded faith in the formulae of republicanism. They spring, one must conclude in charity, from a profound misunderstanding of the evolution of constitutional monarchy. Indeed, they suggest nothing so much as the inverse of what Professor Frank Underhill used to call "our colonial complex." As a replacement for the great national parlour game, "I spy Dominión Status", which was so popular in the 1930's, we are now offered "I spy the Republic of Canada." Only people who believe that Canadians lack self-confidence could come up with such corrosive proposals to forget the past and make ourselves into real live Americans - whose hallmark is a perpetual sense of security.

Somehow the authors of Bill C-60 have managed to overlook the couple of decades which followed enactment of the Statute of Westminster - whose purposes, in any event, had been largely achieved before 1931. Canadianization of the monarchy in these decades was the overt expression of the ideas of constitutional liberty and of continuity. We have felt no need of a flowery declaration of independence, and even less of a badly written one. It has been sufficient for us, and entirely characteristic, to live in independence, to shape our own domestic and foreign policies and to choose our own monarch. To call into question the validity of all this, to dismantle the structure of our history, is to hobble our memory and prepare a vast new battleground on which those discontents and prejudices which are resident in any people may be reinvigorated amongst us.

The convolutions performed throughout the bill with respect to

the Queen, her representatives and the terms associated with monarchy suggest, perhaps, that the authors were vaguely worried by the possible impact of their self-conscious iconoclasm. In section 30 they write that "the sovereign head of Canada is Her Majesty the Queen, who shall be styled the Queen of Canada and whose sovereignty as such shall pass to her heirs and successors in accordance with law." In their next approach to the question of sovereignty, in sections 42 to 44 the authors take scalpel in hand, replacing the term "Queen's Privy Council" with the term Council of State of Canada and providing that the Governor General shall represent the Queen in Canada and "exercise for her the prerogatives, functions and authori belonging to her in respect of Canada." To intensify this obfuscation the bill then declares that "the executive government of ar over Canada shall be vested in the Governor General of Canada, on behalf and in the name of the Queen" and names the Governor General as the "First Canadian." It is possible, as shown by some responses to early criticism of Bill C-60, to defend this fancy footwork as in no way diminishing the authority of the Crown. But if it is not the intention to diminish the Crown, why all the new wording? Ambuguity does not tend to clarkfy. Moreover, these passages concernir sovereignty are consonant with an apparent hostility, pervading most of the bill, toward the customary growth of constitutional monarchy and are bolstered by the otherwise unnecessary removal of the Queen as commander-in-chief of the armed forces and her replacement by the Governor General, without qualification. (section 47)

One need not be superstitious about the 'magic of monarchy' in order to fear the transparent purposes of this essay in crypto-republicanism. For many Canadians the monarchy commands an intense

personal loyalty. For most, its major justification is that it works and is inextricably bound up with our ideas (not often articulated) about the relationship between order and liberty. Most of us understand perfectly well the present need for expert political workmanship on specific problems of our federalism. But we know also that it is in the Canadian character to solve those problems (however temporarily) with specific political answers - as Macdonald intimated when he noted that inclusion in the British North America Act of a promise to build an inter-colonial railway was a consequence of a "very political union." Canadians are aware that the protection of language and other minority and individual rights depends upon specific legislation and the strength of evolving political convictions, not upon a written constitution - however long and tortuous such a document may be. They will likely agree that, as with Macdonald's political railway, some additions and amendments are required in our present federal act - concerning the Supreme Court, the composition of the Senate, or the distribution of seats in the House of Commons - but they will want such specific changes to be understood for what they are. To try and circumnavigate the rocks of politics by hoisting the ill-fitting sails of a written constitution is to set us firmly on a course to national disaster.

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