

OPPORTUNITY LOST: ENVIRONMENTAL COMMENTS ON THE AUGUST 1992 CANADIAN CONSTITUTIONAL ACCORD

**William J. Andrews
Barrister & Solicitor
Executive Director
West Coast Environmental Law Association
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INTRODUCTION

The following is a comparison of WCELA's October 1991 constitutional recommendations¹ with the August 1992 Charlottetown constitutional agreement² reached by Canada's first ministers ("the agreement").

Comments

Recommendation

1. ENVIRONMENT, ECONOMY AND HEALTH. We recommend that the Government of Canada revise its constitutional proposals by explicitly acknowledging throughout the package the inseparable connection between protecting the environment and the goals of economic prosperity and human health.

Comment

This recommendation is not reflected in the agreement or the publicity surrounding it.

Recommendation

2. BIODIVERSITY. We recommend that the Government of Canada incorporate into its constitutional proposals explicit acknowledgement of the intrinsic value of nature and the fundamental importance of maintaining and enhancing biodiversity, including the survival of threatened species, subspecies and their ecosystems.

Comment

This recommendation is not reflected in the agreement.

Recommendation

3. ENVIRONMENTAL PRINCIPLES. We recommend that the Government of Canada incorporate into its constitutional proposals the following key environmental principles:

- (1) that Canadians and their governments bear a personal and collective responsibility to protect the local, national and global environment,
- (2) that actions must be taken to protect the environment without waiting for conclusive proof of harm (the precautionary principle),
- (3) that whoever causes environmental degradation or resource depletion should bear the full cost (the polluter pays principle),
- (4) that a full assessment of the potential environmental consequences of proposed activities, policies and programs should be completed before irrevocable decisions are made, and
- (5) that reasonable opportunities for public participation in environmental decision-making by government is characteristic of Canada's democratic parliamentary system of government.

Comment

This recommendation is not reflected in the agreement. In its October proposals the federal government proposed enshrining sustainable development in the Canada Clause:

The Government of Canada proposes ... a Canada clause that acknowledges ... a commitment to the objective of sustainable development in recognition of the importance of the land, the air and the water and our responsibility to preserve and protect the environment for future generations ...³

In the Charlottetown agreement, however, this proposal has been dropped, (along with all but a short list of subjects). Instead, unenforceable environmental and sustainable development commitments are addressed in the proposed social and economic union section (discussed below). Recognition of the importance of our environment is a major, widely-shared Canadian value that should be enshrined in the Canada clause.

Recommendation

4. ENVIRONMENTAL EXTERNAL AFFAIRS POWER. We recommend that the Government of Canada revise its constitutional proposals by expressly enumerating a federal power to legislate as necessary to implement Canada's international environmental commitments.

Comment

This recommendation is not reflected in the agreement. The agreement lists this subject ("implementation of international treaties") among those which the consensus was not to pursue.⁴ Interestingly, however, support for a general federal external affairs power was expressed in the report of the House Standing Committee on the Environment.

Recommendation

5. RETAINING FEDERAL ENVIRONMENTAL AUTHORITY. We recommend that the Government of Canada revise its constitutional proposals by specifying that the federal government maintains its existing constitutional authority to legislate in relation to the environmental aspects of tourism, forestry, mining, recreation, housing and municipal/urban affairs.

Comment

This recommendation is not reflected in the agreement. On the contrary, the agreement includes the October federal proposal to declare these six areas to be exclusively within provincial jurisdiction. Moreover, the agreement provides that any province could require Ottawa to continue its spending in the particular area or to compensate the province for federal monies withdrawn at the request of the province. Presumably, this would eliminate Ottawa's power to insist on attaching environmental conditions to federal-provincial grants in these areas (such as silviculture requirements imposed under the Forest Resources Development Agreements).

Recommendation

6. PRECONDITIONS FOR INTERDELEGATION. We recommend that the Government of Canada revise its constitutional proposals by specifying that the federal government will not delegate legislative or administrative authority regarding wildlife conservation and protection, transportation of dangerous goods, soil and water conservation, environmental inspection programs or other environmental matters unless it institutes mechanisms to ensure:

- (1) strong federal leadership,
- (2) accountability, and
- (3) reasonable provisions for public participation in decision-making.

Comment

The agreement states that legislative interdelegation is an issue on which consensus was not reached.⁵

Recommendation

7. INTERPROVINCIAL MOBILITY. We recommend that the Government of Canada revise its constitutional proposals by adding environmental protection standards to the list of exceptions to the proposed constitutional provision (s.121) against barriers to inter-provincial mobility.

Comment

The subject of interprovincial trade barriers was dropped from the agreement, to be dealt with at a future first ministers conference. An appendix to the agreement headed "Political Accord(s) -- Possible Elements" states that the mobility principles "would not invalidate a federal, provincial or territorial law or practice respecting the following if its primary purpose is not to create a disguised restriction on trade: (a) public security, safety or health, protection of the environment, consumer protection..." (emphasis added).⁶

Recommendation

8. ENVIRONMENTAL TRUST. We recommend that the Government of Canada revise its constitutional proposals by giving legal validity to the declaration of a constitutional trust

regarding protection of the environment, specifying that:

- (1) the trustees are the federal and provincial governments of Canada,
- (2) the beneficiaries of the trust are past, present and future generations of Canadians,
- (3) the trust may be enforced in appropriate circumstances by the courts upon the application of any resident(s) of Canada,
- (4) in enforcing the trust, the courts have broad authority to impose current and future obligations on governments and persons,
- (5) the terms of the trust include the key environmental principles set out in Recommendation 2, above.

Comment

This recommendation is not reflected in the agreement.

Recommendation

9. ENVIRONMENTAL RIGHTS. We recommend that the Government of Canada revise its constitutional proposals by including entrenchment of environmental rights in the Charter of Rights and Freedoms.

Comment

The agreement does not provide for enforceable environmental rights. However, it does include an environmental commitment along with rights to health care, social services, education and workers' rights in a "social union" clause (formerly referred to as the "social covenant"):

The policy objectives set out in the provision on the social union should include, but not be limited to:

...* protecting, preserving and sustaining the integrity of the environment for present and future generations.⁷

In addition, the agreement provides that "sustainable and equitable development" should be included in an "economic union" clause:

The policy objectives set out in the provision on the economic union should include,

but not be limited to:

...* ensuring sustainable and equitable development.⁸

The agreement states that "A mechanism for monitoring [not enforcing] the Social and Economic Union should be determined by a First Ministers' Conference."⁹ The agreement explicitly states that "The provision should not be justiciable¹⁰ [sic]."¹¹

It is not clear whether these commitments by "governments" apply to the Aboriginal governments proposed in the agreement.

Recommendation

10. PROPERTY RIGHTS. We recommend that the Government of Canada revise its constitutional proposals by eliminating the proposal to entrench property rights in the Canadian Charter of Rights and Freedoms.

Comment

The agreement does reflect this recommendation.

Native Rights

In our October 1991 brief we stated :

As British Columbians committed to protecting our environment we are particularly aware that Native peoples in B.C. -- and throughout Canada -- have a history of what we would call 'protecting the environment' that greatly predates the arrival of the settlers who formed the country of Canada. The proposals in this brief for strengthening the ability of the Constitution of Canada to foster protection of the environment are predicated on the recognition that the Canadian Constitution will not be complete until the legal relationship between Canada and Native peoples is resolved on a basis of mutual trust and respect.

Comment

The agreement does address Native issues, apparently to the satisfaction of many Native leaders. Whether the agreement will lead to a satisfactory resolution of the constitutional relationship between Canada and Native peoples remains to be seen.

The agreement provides that Natives have an inherent right to self-government. The agreement gives federal and provincial governments and Native peoples five years to define self-government before the courts are allowed to intervene.

The effect of aboriginal self-government on responsibility for protection of the environment in areas governed or claimed by Native people is as yet unknown. Equally uncertain is the extent to which Canadian governments will provide opportunities for public input into the governments' decision-making regarding its negotiations with Native groups regarding self-government.

Quebec

In our October 1991 brief we stated:

We are Canadians whose home is in British Columbia and we bring this perspective to Canada's current constitutional discussions. We know from our extensive contacts with environmentally concerned residents of all of the other provinces and territories that they bring their own perspectives to these discussions. What we have heard from many people from Quebec is a particular sense of not being comfortable with the existing constitutional arrangements. This brief is offered in a spirit of cooperation with people from Quebec, Newfoundland, Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Manitoba, Saskatchewan, Alberta, the Yukon and the Northwest Territories. We know they all want essentially the same as we do: satisfactory constitutional arrangements and protection of the environment we all love.

Comment

The agreement does address a number of concerns expressed by the government and people of Quebec. The environmental implications of these provisions would not seem to be major, although a full review of that subject is beyond the scope of this paper.

Senate Reform

The agreement provides that a new 62-seat Senate would have authority to defeat by a simple majority legislation changing tax policy on natural resources.

Comment

The Senate natural resources tax veto could inhibit federal 'green tax' initiatives, such as the proposed carbon tax. However, even without this provision it is doubtful that the federal government would proceed with such a tax in the face of widespread provincial opposition.

Legal Text

Media reports indicate that the legal text of the agreement will be finalized shortly and that Constitutional Affairs Minister Joe Clark has promised to release it prior to the expected October 26 referendum.

Comment

Expeditious public release of the legal text is essential if the referendum is to reflect the informed views of all Canadians.

Conclusion

The proposals by WCELA and others to utilize the revamping of the Canadian constitution as an opportunity to enhance our ability to protect the environment have been largely rejected. Not unexpectedly, Native issues, the Senate and the 'social covenant' were the only major new subjects covered by the agreement.

Regarding the symbolic, educational purpose of the constitution, the agreement is startlingly negative on environmental concerns. Recognition of the importance of the environment and Canadians' shared respect for our environment was actually dropped from the Canada clause in the August agreement. This should be rectified: 'the environment' should be put back into the Canada clause.

For environmental protection, the main negative feature of the agreement is the extent to which it signals federal deferral to the provinces particularly regarding forestry, mining, recreation, housing municipal/urban affairs and taxation of natural resources. We believe that a strong federal role is essential to Canada's ability to respond effectively to the numerous global environmental challenges we now face.

The main positive aspect of the agreement from the perspective of environmental protection is simply that if it is ratified it may enable governments as well as citizens to devote more attention to solving Canada's critical environmental (and other) problems.

1. Enhancing Environmental Protection In The Canadian Constitution: Comments on the Federal Government's Constitutional Proposals, William J. Andrews and Lawrence Alexander, West Coast Environmental Law Association, October 23, 1991.
2. Consensus Report On The Constitution, Charlottetown, August 28, 1992, Final Text.
3. Government of Canada, Shaping Canada's Future Together (Ottawa: Minister of Supply and Services, 1991), p.vii.
4. Charlottetown Agreement, p.20.
5. Ibid.
6. Charlottetown Agreement, Appendix Political Accords, The Multilateral Meetings on the Constitution, August 28, 1992, p.1.
7. Charlottetown Agreement, p.2.
8. Ibid.
9. Charlottetown Agreement, p.3.
10. "Justiciable" is a new word apparently referring to something that the courts are allowed to review.
11. Charlottetown Agreement, p.2.

End of Opportunity Lost: Environmental Comments on the August 1992 Constitutional Accord