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The Fair Deal Panel Report – and the *British North America Act*?

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Report Commented On: [Fair Deal Panel, Report to Government, May 2020](#)

The Kenney government has now released the Report of the Fair Deal Panel. It is not a good read. Many sections are poorly written and poorly reasoned. But since ABlawg is a blog on legal developments, let's start with the title to this post and the decision of the authors to refer to Canada's founding constitutional document as the *British North America Act* (BNA Act) of 1867.

While the authors concede (at 13) that the *BNA Act* is also known as the [Constitution Act, 1867](#), they consistently refer to the *BNA Act* throughout the report. This is simply *wrong*, and it has been wrong since 1982 when Canada adopted the [Constitution Act, 1982](#). That Act includes a Schedule entitled “*Modernization of the Constitution*” (emphasis added) which serves to rename elements of the Constitution. In particular, item 1 in the Schedule renames the *BNA Act* of 1867 the *Constitution Act, 1867*. It *repeals* the title to the old *BNA Act*.

This may seem, especially to non-lawyers, a relatively trivial point (perhaps the Panel members just made an elementary mistake, despite having two lawyers on the Panel), but perhaps there is something deeper going on. Perhaps the Panel, consciously or unconsciously, is hearkening back to the “golden” days of Empire and reaffirming the institution of the Monarchy; or perhaps the Panel is somehow questioning the legitimacy of the patriation of the Constitution and its (Pierre) Trudeau *Charter*? But none of that makes any sense. As the statue topplers remind us, there was nothing especially golden about the Empire, and there is one element of the 1982 constitutional package that Alberta continues to rely on heavily. That is the addition of section 92A, the resources amendment, to the *Constitution Act, 1982*. That amendment afforded the provinces greater powers over the regulation of oil and gas, electricity, and other natural resources.

In any event, whatever the source of the ‘mistake’, insofar as the Panel purports to provide basic information on the Constitution to inform the discussion that follows (and possibly any subsequent referenda), one would expect the Panel to get the basics right, starting with the names of our key constitutional documents.

There are also a good number of other legal issues that we could take up for discussion. For example, there is the claim at various points in the Report (especially at 19 and 20) that the combination of section 91(2) (regulation of trade and commerce) and section 121 (the ‘free trade’ provision) of the *Constitution Act, 1867* imposes on the federal government a *duty* to enforce free trade. But the power to make a law under section 91(2) does not impose a duty to legislate. Neither does it (or anything in section 121) impose a duty on the federal government to challenge a provincial law or practice that is inconsistent with the requirement of free admission

into one province of the “Articles of the Growth, Produce or Manufacture” of another province. The federal government would certainly have the standing to challenge a law that violated the requirement of free trade between provinces, but so would any provincial government or trade organization.

We might also take issue with the Panel’s claim (at 18) that it has identified a “clear question” for a referendum on equalization. The Panel proposes the following question: “Do you support the removal of Section 36—establishing the principle of equalization—from the *Constitution Act, 1982*?” But section 36 contains *two* subsections. The first subsection contains a collective commitment to a set of three principles:

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

It is only the second subsection that references equalization.

- (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

So, what would voters be voting for (or against) if the question was framed as suggested by the Panel? And if a majority of voters provided an affirmative answer to the question, and the Alberta government pursued its duty under section 4 of the *Constitutional Referendum Act*, [RSA 2000, c C-25](#), to introduce a resolution into the Legislature initiating a constitutional amendment under Part V of the *Constitution Act, 1982*, what would the Resolution provide for? There are at least three possibilities: (1) the repeal of the entirety of section 36, (2) the repeal of subsection 36(2), or (3) the repeal of paragraph 36(1)(c) and subsection 36(2). The rationale for the third option would be that the text of paragraph 36(1)(c) is linked to subsection 2 by the language of “essential public services of reasonable quality to all Canadians.” My point is simply that the proposed question, despite the Panel’s suggestion, is far from “clear”. It has at least three different possible meanings.

Finally, I made the claim in the opening paragraph of this post that many sections of the Report are poorly written and poorly reasoned. It would be tedious to dissect the entire Report, but here are two examples, taken fairly randomly, from the Report’s concluding section (at 50 – 51) entitled “Part III: Telling Alberta’s Story.”

The section begins by noting that Alberta’s story is increasingly “being told” by others. The Report goes on to observe that:

People lamented that facts about Alberta, particularly the province’s energy sector, are frequently inconsistent, hence confusing. For example, environmentalists emphasize

Alberta's carbon footprint, despite the energy sector's investments in innovation and improvements in environmental and social governance.

The first sentence conflates facts and opinions. Facts are facts. One fact cannot be inconsistent with another fact if both are facts. The second sentence offers an example of poor reasoning. In the first place, the emphasis of “environmentalists” is not an example of the claim made in the previous sentence. It cannot be, because it references a decision or judgment by environmentalists to *emphasise* a particular *fact* – the size of Alberta's carbon footprint. And, second, environmentalists are not inconsistent in choosing this emphasis just because the sector has made “investments in innovation and improvements in environmental and social governance.” Alberta can have (and does have) a large carbon footprint *and* an innovative energy sector at one and the same time; and environmentalists (and others) can chose to emphasise one or the other, or both, without contradicting themselves.

The second example is part of a paragraph detailing the ways in which Alberta can “collaborate with others to build public trust” (and what does the Panel mean by “public trust” in this context?). The Report offers three examples of this “collaboration”, including the following:

Respond directly and assertively to federal government constitutional over-reach in Alberta's economy. Investors need to see that Alberta is represented in national policy and decision-making, and that Albertans can protect themselves from bias.

It is not clear to me how anything in this example involves *collaboration with others*. Rather, it speaks the language of combative assertion and the claim that it exemplifies collaboration is simply sloppy reasoning.

The misnaming of foundational constitutional documents, and the pattern of sloppy reasoning exhibited in the Report (as exemplified above), do not inspire trust in the Panel's recommendations.

Thanks to my colleagues for comments on a draft of this post and especially comments on its organization. For other thoughtful assessments of the Panel's Report see Emma May and Ted Kouri, “[Alberta Needs to Ask a Different Question](#)” and Trevor Tombe, “[Political Games Won't Solve Alberta's problems](#)”.

This post may be cited as: Nigel Bankes, “The Fair Deal Panel Report – and the *British North America Act*?” (June 25, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/06/Blog_NB_FairDealReport.pdf

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