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IN JEOPARDY

**A REVIEW OF
THE FINAL REPORT ON REFERENDA
FROM THE STANDING COMMITTEE ON THE LEGISLATIVE ASSEMBLY**

A Dissenting Opinion from the Freedom Party of Ontario

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HISTORY:

In June of 1996 the Standing Committee on the Legislative Assembly was authorized to review and report on referenda. A consultation paper "Your Ontario, Your Choice: A Preliminary Look at the Referendum Alternative" was published in August 1996. After that they arranged public hearings. The Committee met with a number of groups for four days starting on September 9, 1996. An abbreviated set of public hearings took place on November 6, 1996.

Lloyd Walker (now party leader) and Robert Metz (president) addressed the Committee during hearings at Queen's Park on September 11, 1996. Walker focussed on the purpose of referenda within a free society and concluded that "referenda should not be a tool used to rule or constrain the aspirations, activities or lifestyles of individuals" and that "the sole purpose of a referendum is to allow citizens to rule or constrain their government." Metz focussed on the actual use of and methods for holding referenda. He stated that the two specific issues of political concern where referenda should be used were constitutional amendment and taxation.

In June of 1997 the Committee tabled its Final Report. They distributed copies to those who addressed the Committee in late July. This document addresses that final report.

RESPONSE TO THE FINAL REPORT:

Concept of Referenda:

Recommendation #1: *"The Government of Ontario should introduce legislation authorizing the holding of provincial referenda. Such referenda should be permissible on any topic within the jurisdiction of the Province of Ontario, but should occur within the legislative framework set forth in the recommendations which follow. The topic of the referendum must be a measure which requires the passage of a bill (with the exception of a constitutional referendum, where implementation would require passage of a constitutional resolution)."*

Perhaps the most telling factor in the entire report was in the description of referenda offered as background material: "For the purposes of our report, unless otherwise indicated, this form of direct democracy denotes both binding and non-binding votes." Although in some recommendations binding referenda are specified this description acts as a "notwithstanding clause" to the other recommendations.

Also in the background information was the assertion that referenda "serves as a means of improving public participation in the decision-making process, and enhancing the legitimacy of that process." Both claims had been made in the preliminary report and were refuted by Walker in his address. Walker agreed that referenda may increase the quantity of participation but countered that quantity had no correlation to the quality increase claimed. His statement that such claims were mere "salesmanship" stands both then and now.

Also they classify referenda in the document as including: 1) Discretionary (or permissive) referenda, where the "legislature has the discretion as to whether or not to hold the referendum"; 2) Mandatory Referenda, where under specified circumstances, a referendum is required by statute; 3) Citizen Initiatives, where "citizens by petition may propose and require the holding of a vote."

The paper also agrees with a point stressed by Metz in his part of Freedom Party's (Fp) address: referenda are not alternatives to or replacements for government, but a supplement to representative government. That agreement is broken in the actual recommendation when it suggests referenda could be on "any topic" and that virtually anyone can initiate them.

Initiation and Legal Effect of Referenda:

Recommendation #2: *"The Legislative Assembly should have the discretion to order the holding of a referendum on any matter of public concern."*

Again we must warn that there is no stipulation that the results any referenda held on any topic must be binding or not. That also is at the discretion of the Legislative Assembly.

The committee was unable to reach a "consensus on whether and when referenda should be mandatory" but did recognize that the topics should be kept to a minimum so that referenda remain a supplement to the parliamentary system, not a replacement of it.

Recommendation #3: *"The government should not introduce in the Legislative Assembly an amendment to the Constitution of Canada, unless a referendum has first been conducted with respect to the subject matter of that amendment, and approval of the voters has been obtained."*

With some dissent, Constitutional amendment appears to be one area where the majority of the committee favoured a statutory requirement. This is consistent with the practice in British Columbia and Alberta. The NDP members, while supporting the idea, stated that circumstances exist where "the public will could easily be ascertained without a referendum" and thus opposed the statutory requirement. Fp's presentation supported the use of referenda for approval of any amendment to the Constitution.

Recommendation #4: *"The government should not introduce in the Legislative Assembly a bill that imposes a new tax, unless a referendum has first been conducted with respect to the imposition of the tax in question, and approval of the voters has been obtained. An exception to this referendum requirement should apply in the case of revenue neutral changes in taxation."*

The committee also debated the difference between a tax and a fee knowing that would be a major point of contention. The definition provided by the report is: "A tax has a public purpose, namely to generate revenue for the government. A fee, on the other hand, bears some relationship to the service provided." These definitions are consistent with Freedom Party's own short definition: "A fee is a charge for using a service and a tax is a charge for not using a service."

The report also recognizes that "the level of taxation is fundamental both to the health of the economy of the Province, and to the economic well being of the individual." Again the NDP disagreed ("strongly") with the recommendation stating that "taxation policy cannot and should not be separated from social and justice policy." Again, at odds with the NDP, Fp supported the use of a "taxpayer protection

act" to force the government to get the permission of the people to increase taxation. We are also hard pressed to find any activity of taxation that could be considered "revenue neutral." Other than a name change (a waste of the legislature's time) any change in taxation has a reason and you can be guaranteed it isn't to be revenue neutral.

Recommendation #5: *"Statutory authority should be provided for the holding of citizen-initiated referenda, whereby citizens by petition may require that a referendum be conducted on any matter within the jurisdiction of the Legislature."*

Fp's presentation emphasized one point several times: a referendum is "a tool to be used by the electorate to control or constrain their government" not to constrain their fellow citizens. Any matter within the jurisdiction of the Legislature is a dangerous allowance. Fp's position would be that there are far too many matters needlessly within that jurisdiction. Allowing more avenues to enforce government or majority decisions on individuals is not a solution but a call for more problems.

Fp has endorsed the use of the Single Transferrable Vote (STV) for elections and during the hearings both Walker and Metz pointed out the value of such electoral reform. Metz stated that the use of the STV should eliminate the need for citizen's initiatives by providing greater input at the voting booth.

Recommendation #6: *"An application for the issuance of an initiative petition should be made to the Office of the Chief Election Officer of Ontario (Elections Ontario). The application procedure should require a declaration that the applicant is eligible to vote in a referendum in Ontario."*

Fp's concern with the extension of Elections Ontario's mandate was stressed by Metz during his presentation. Elections Ontario's history of arbitrary decisions in its dealings with the smaller parties points toward great peril and bureaucracy facing anyone trying to participate in the referenda process. Metz stated he was not surprised that Elections Ontario has, in its dealing with the alternative parties, "regulated (them) to the point of ineffectuality." Metz fears the same fate for any group, other than the major political parties, involved in any referenda.

Recommendation #7: *"An initiative petition must be signed by at least 10% of the eligible voters in the province in order for the initiative to be put on a referendum ballot."*

Recommendation #8: *"There should be a maximum period of 180 days to gather the signatures on a petition from the date of its issuance, and to submit it to the Legislative Assembly."*

Recommendation #9: *"It should be an offence for signature canvassers to receive any remuneration for the gathering of signatures or to provide any kind of inducement to an individual to sign, or to refrain from signing, a petition. A related offence should state that an individual must not accept an inducement to sign, or to refrain from signing, a petition."*

Given Fp's dismissal of citizens initiatives these points are moot. However, combined they almost serve the same function. It will be very difficult to get 10% of the electorate to sign a petition in 180 days. The only time it may be achievable is if the issue is very one-sided and takes place in Toronto. The issue would also likely have to be one that is highly emotional to motivate such an effort by unpaid individuals. Urban issues, because of population distribution, are favoured over rural ones. The NDP in their dissenting

opinion echoed this criticism which criticized the recommendations for making allowance for regional differences and supporting a lower level of support than 10% in areas other than Metro Toronto.

Recommendation #10: *"Where they approve a measure in a referendum, the government must introduce a bill to start the results of the vote, as follows:*

in the case of a simple question, the bill must be introduced for first reading;

in the case of a referendum on a more defined proposition, the bill should be placed on the Orders and Notices paper for second reading. In accordance with the Standing Orders, the bill must previously have been printed and distributed.

In both cases, the referendum-inspired bill should be considered a government bill, and should be pursued by the government at the earliest reasonable opportunity.

This procedure should apply whether the referendum is initiated by the Legislative Assembly or by citizens."

A reasonable recommendation but it fails to allow for one situation that has already been identified and endorsed by the committee. This recommendation does not allow for any vote to be a plebiscite. This is contrary to the text of the final report that specifically identifies the following as one possible consequence of a referendum vote: "the vote is purely advisory - no legal obligations are imposed - in which case the vote would be a plebiscite." On face value it would appear that the government only seeks binding referenda. In the limited scope (Constitutional issues and taxation) Fp would agree. If the government seeks to open referenda up to "any topic" via initiatives then the door has been opened to great disagreement and a definite increase in new (referendum created) legislation being opposed in the courts.

Recommendation #11: *"Where the petition requirements have been satisfied, the government should have the option of implementing the substance of the initiative through the introduction of a bill at the earliest practicable opportunity. An initiative vote would accordingly not be held."*

On the surface this is a prudent measure. Again Fp would not implement citizen initiatives. What is unclear is if the government, although it introduces a bill, would have to actually pass the bill. This could be a loophole allowing a government to head off an initiative and not do anything other than tabling a document (bill). One thing that is unclear throughout the report is if there is any obligation on all members of the legislature to support an initiative passed by the voters. For example, it is unclear if a referendum issue, if passed by the electorate obligates all parties to support the change, only the government party to support the bill, or even if local MPPs would support or oppose the bill based on riding results. (Obviously, having only the government party support the bill negates the existence of referenda in a minority government or could lead to the strange situation of a government being brought down by an issue that they may not support as a party but have supported due to the obligations placed on them by referenda.)

Recommendation #12: *"A Referendum Commission headed by justices of the Ontario Court (General Division) should be established. Its members should be appointed by the Legislative Assembly of Ontario."*

Recommendation #13: *"The Referendum Commission should have exclusive jurisdiction to hear any judicial proceeding relating to the proposed referendum legislation."*

Recommendation #14: *"All applications for the issuance of an initiative petition should be referred by Elections Ontario to the Referendum Commission for the following determination: the Commission must determine whether the proposed initiative, if implemented, would be in compliance with the Constitution of Canada, including the Canadian Charter of Rights and Freedoms and the distribution of legislative powers between the federal and provincial levels of government. It must also determine if there is compliance with the Ontario Human Rights Code. If these conditions are not satisfied, the application for the issuance of the petition must be refused."*

In the case of other referenda, with the exception of constitutional referenda, the Commission should make the same kind of determination. If the above conditions are not met, the referendum should not proceed."

The proposed body serves a purely legal function so it is understandable that the report suggests justices as the heads of the Referendum Commission. That is not the limit of the mandate (see below). It is not clear what vision the committee had for the rest of the body. It is only clear that they will be appointed.

The recommendations also make it clear that no citizens' initiative can seek an amendment to the Charter or Rights and Freedoms or to the Ontario Human Rights Code. For example, no initiative could ever suggest the elimination of Human Rights tribunals. However, a referenda on an amendment to the Constitution could violate the Charter or Human Rights. This may be another incidence of the government placing itself above the law.

This again limits possibilities for citizens' initiatives. We again must question why the report recommends citizens initiatives and then does so much to prevent them from occurring. A move to electoral reform is again Fp's proposed solution.

Defining the Issues for Voting:

Recommendation #15: *"Where the Legislative Assembly or the government initiates a referendum, there should be public consultation, after which there should be a report to the Assembly on the wording of the ballot question."*

Recommendation #16: *"After its tabling in the House, this report must be referred to the Referendum Commission, which would have the authority to either confirm or vary the proposed wording. The Commission should have the same powers of approval with respect to the wording of proposed initiatives, which would initially be drafted by the initiative proponents."*

Recommendation #17: *"The Referendum Commission should not give final approval to a referendum question unless it is expressed neutrally in clear and concise language, and unless it requires a Yes or No response."*

While this allows for all sources of referenda to propose a question, they make no guarantee that the wording will address the issue in the petitioner's terms. After being varied by the Referendum Commission or public input it is unlikely that a proposed question would be recognizable. Fp has long held that the

wording of a referendum question must be vague to succeed. Marc Emery stated, in his article No Referendums, Please (Consent #3): "Referendums have inherent weaknesses as well. For example, for any referendum to gain "popular" support (50.1%+), it will have to be as vague and with as little detail as possible. Details create questions, and questions create resistance and more questions. For a referendum to succeed, its backers must have the question phrased as vaguely as possible." Little doubt exists that public input by those favouring the proposal would seek to broaden the appeal by making it read more like a motherhood issue. While those in opposition would try to restrict the appeal of the idea by making it sound as controversial or radical as possible.

Deciding the Outcome:

Recommendation #18: *"In order for a referendum question to succeed, it must be approved by a 50%+1 majority of votes cast."*

William Frampton (Fp vice-president) addressed the Special Joint Committee on the process for amending the Constitution of Canada in 1992. He stated (and was quoted by Metz to the committee investigating referenda): "safeguards must be in place to ensure that amendments enjoy the support of the great majority of Canadian citizens. It must not be possible for a minority or even a bare majority to impose them upon the entire country.... For this reason, the criteria for ratification should be based on the number of citizens eligible to cast ballots." In short, silence should not imply consent.

The main reason given for endorsing a simple majority by the report is that "this majority formula is basic to our legislative system." They make no attempt to deal with the idea of whether it is the right thing to do.

Referendum Operations:

Recommendation #19: *"When making an order for the holding of a referendum, the Legislative Assembly and the provincial government should specify whether the referendum will be held in conjunction with a provincial or municipal election, or on a separate date."*

Recommendation #20: *"Legislation should stipulate that an initiative vote must be held within a reasonable time after the petition requirements have been met-for instance, a maximum of 12 months could be prescribed. If at all possible, however, the vote should not be held on a separate date, but rather in conjunction with a municipal or provincial election."*

This allows both options open to the government but with the preferred method being one that could save an estimated \$22 million. (The estimated cost of a standalone referendum is \$28 million and the cost of one in conjunction with another election are estimated to be \$6 million.) Fp supported this measure in the written portion of the presentation to the committee.

Recommendation #21: *"Elections Ontario should have the responsibility to oversee conducting a provincial referendum. Administrative matters falling outside the traditional mandate of Elections Ontario should either be handled by that Office or by the Referendum Commission."*

It has been stated earlier that Fp has a great deal of difficulty with the bureaucratic Elections Ontario being granted a larger mandate. We can only hope that such powers are strictly defined and that nothing is left

undetermined. Given the problem of 'expanding mandates' that seizes many government bodies we need strict limits on both Elections Ontario and the Referendum Commission.

Recommendation #22: *"The council of a municipality should have the discretion to order the holding of a referendum on any matter within the council's jurisdiction."*

Recommendation #23: *"Where not otherwise authorized, voters in a municipality should have the statutory authority to require, by petition, the holding of a referendum on any matter within the jurisdiction of the municipal council."*

Recommendation #24: *"A successful municipal petition under Recommendation 23 should require the signatures of at least 10% of the eligible voters in the municipality."*

Recommendation #25: *"There should be a maximum of 180 days to gather the signatures on a petition from the date of its issuance."*

Recommendation #26: *"The municipal referendum question must receive the final approval of the Referendum Commission. Such approval should not be given unless the question is expressed neutrally in clear and concise language, and unless it requires a Yes or No response."*

Recommendation #27: *"The results of a referendum held under Recommendations 22 or 23 should be binding on the municipal council."*

The concern with recommendations 22-26 have been dealt with above. There is an irony in recommendation 27 when you consider how the report went out of its way to include plebiscites in the definition of referenda and that it now precludes them from the municipal arena.

Recommendation #28: *"The Referendum Commission should have the power to authorize electors to use an alternative voting method, such as voting electronically or by mail or telephone, that does not require electors to attend at a voting place in order to vote."*

This recommendation agrees with the Municipal Elections Act 1996 which allows such methods. Any alternative that is accurate and maintains the secret ballot would be acceptable to Fp. However, we are not sure that any such method exists at this time but favour the idea of allowing such methods in the future. Nevertheless, we believe that any alternate method must meet stated criteria for accuracy and privacy before being deemed acceptable.

Recommendation #29: *"Spending and contribution limits, as well as disclosure requirements, should be prescribed for a referendum campaign, and should mirror provisions applicable to provincial election campaigns in Ontario. More particularly, each recognized organization which seeks to participate in a referendum should have the same rights and obligations as a registered political party under the provincial Election Finances Act."*

Recommendation #30: *"The Commission on Election Finances should have the responsibility to regulate the financial aspects of referenda, including the supervising of limits on campaign expenses and contributions, and the recognizing of organizations referred to in Recommendation 29."*

Again, Fp has a problem with the methods of Elections Ontario. They have refused to allow Fp to solicit contributions for issue 'A' but, issue 'B', which meets some undefined criteria, is acceptable. Metz related the story of Elections Ontario informing Fp that contributions for our campaign against Human Rights tribunals could not be considered official contributions but that money donated to a cause such as "gender equality in the legislature" was acceptable. Given the sorry state of Elections Ontario's principles one can foresee a referendum campaign where only one side of the issue can raise money.

Recommendation #31: *"The Standing Committee on the Legislative Assembly should be authorized to review and report on the issues of electoral reform and recall, in accordance with a schedule to be determined by the Committee. Public hearings must form part of the review process."*

Both Metz and Walker offered to participate in any moves toward electoral reform (Walker has since followed up with a personal letter to Premier Harris). During the question period they both stressed that a switch to the STV should eliminate the need for both citizens' initiative and recall. Metz asserted that the place to deal with legislators is at the election booth and via normal communications throughout their term.

SUMMARY:

Freedom Party praised the government for their courage in investigating the referendum alternative. Fp also stressed that a referendum is a tool with a limited and specific purpose. The committee has gone far past what Fp can endorse. While support for referenda for Constitutional Amendment and taxation issues was there from the beginning, we cannot endorse a package that forgets referenda are merely "a tool to be used by the electorate to control or constrain their government." The recommendations far exceed that and place freedom and individual rights at risk.

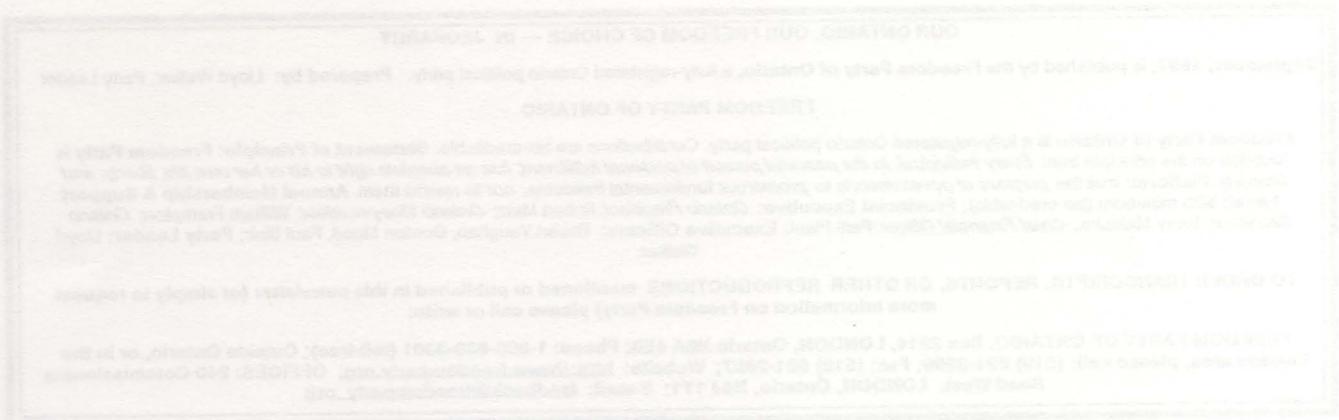
The report attempts to address the issue of rights via the Charter and the Human Rights Code. That is simply not enough. Those documents will only placate those who seek to entrench or endorse group rights. Surprisingly, it was not enough for the Liberal members who felt that those documents do not protect minority rights well enough. However, the Liberals are only partially correct. Minorities are recognized and protected by those documents (to some degree) and by other legislation. It is the individual who must fear the results of referenda held under the terms of the final report. Nowhere in the document were individual rights mentioned. Not even in the dissenting opinions from the Liberals and NDP was this concern raised. Sadly, that key part of Fp's submission was ignored.

CONCLUSION:

As submitted the Final report is a set of badly flawed recommendations. The extended use of referenda supported in the final report will not make Ontario a better place to live. It will only serve to place our freedoms and individual rights in jeopardy.

There are some good ideas buried in the document and it will take a focused and precise government to get the value out of these recommendations. We expect they will succumb to the lure of ideas that look and sound good but that will ultimately fail to meet the stated goals of making government more accountable, enhancing the "legitimacy" of decisions, increasing the quality of the decisions, and making people less cynical about government.

And there is only one final step left: the tabling of new legislation at Queen's Park. Given the Conservative majority (of both the Standing Committee that wrote the report and in the Ontario Legislature) there is no doubt that the proposed legislation will be as disappointing as the final report.



71

CONCLUSION

As submitted the first report is a set of early, broad recommendations. The extended use of referenda supported in the final report will not make Ontario a better place to live. It will only serve to place our freedoms and individual rights in jeopardy.

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