

SUBMISSION OF  
PREMIER WILLIAM R. BENNETT  
ON BEHALF OF BRITISH COLUMBIA  
TO THE  
SPECIAL JOINT COMMITTEE  
ON THE CONSTITUTION OF CANADA

OTTAWA

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## INTRODUCTION

Canadians live in a country that is unparalleled in the world for the opportunities provided to its citizens, for the freedoms and the democratic institutions which undergird our society and for the great and exciting potential which is available to all of us for the future.

It is well to remind ourselves that these accomplishments have been brought about under a federal form of government.

There were other choices open to the Fathers of Confederation. They could have followed the concept of a unitary state such as Great Britain, or the republican form of government of the United States. But they deliberately chose a federal form of government under the Crown, one designed to provide a maximum of autonomy at the provincial level on a wide range of issues of local concern.

The basic characteristic of a federal democracy is that two coordinate orders of government exist, each exercising its own responsibilities and neither one subordinate to the other. This concept of partnership is the very essence of Canadian federalism. This is the basis on which British Columbia entered the federation in 1871. The Terms of Union of that entry have been described by judicial authority as "a transaction ... being of the nature of a treaty between two independent bodies ..." <sup>1.</sup>

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1. Attorney General of British Columbia vs. Attorney General of Canada (1887), 14 S.C.R. 345 at 372.

It was on the basis of this kind of Canadian partnership, and in a spirit of goodwill, that the Government of British Columbia undertook the extensive efforts towards constitutional renewal over the past four years.

HISTORY OF RECENT EFFORTS FOR CONSTITUTIONAL REFORM

The current round of federal/provincial discussions dates back to a proposal set forth by Prime Minister Trudeau by letter of March 31, 1976 when he sought approval of all provincial governments to renew negotiating processes for constitutional change and proposed three options:-

- a) simple patriation
- b) patriation with an amending formula
- c) patriation with an amending formula and substantive changes

The Prime Minister's letter clearly recognized that patriation with an amending formula could be accomplished only "when approved by the legislatures of all provinces" and by the federal Parliament.

I would like to refer to certain constitutional initiatives taken since then.

The Government of British Columbia was prepared to support the Prime Minister's first two options, that is, simple patriation with or without an amending formula, provided the approval of all the legislatures of all the provinces was obtained. The Government of British Columbia again offers full support to that course of action.

Most provinces also took the position that they wished to consider substantial changes to the Constitution, as well as patriation and an amending formula.

Constitutional reform then became the main subject for discussion at the 1976 Annual Premiers' Conference in Edmonton. Such was the progress among provincial Premiers at Edmonton (and I would emphasize the fact that the provinces are able to reach agreement on constitutional matters), that an additional two-day meeting of Premiers was held in Toronto on October 1st and 2nd, 1976 to further our efforts.

On October 14, 1976 the chairman of the Provincial Premiers' Conference informed the Prime Minister, by letter, of the substantial progress that had been made.

In November, 1976, as our government's constitutional position evolved, I published a document re-stating British Columbia's willingness to accept the patriation of the Constitution and advocated that, if patriation were to be accompanied by an amending formula, it ought to be an amending formula that recognized the realities of contemporary Canada.

It is to be noted that the Victoria Charter 1971 amending formula would have provided both Quebec and Ontario with a separate voice on constitutional amendment, but all four western provinces notwithstanding their size and present status in the country, would be given only one voice. We considered that this formula failed to reflect

the importance of the West in Confederation. In terms of labour force, population, capital investment, provincial product, it is readily apparent that any effective or realistic amending formula should give greater credence to the West than one voice out of five which is what the Victoria amending formula would have provided. (The other four being Quebec, Ontario, the Atlantic region and the federal government.)

British Columbia then developed an amending formula which would have furnished the West with two voices out of six - in keeping with the importance of western Canada to the nation as a whole. (The six would have been British Columbia, the Prairie Region, Ontario, Quebec, the Atlantic region and the federal government.)

The federal government then established the Pepin/Robarts Task Force on Canadian Unity comprised of nine outstanding Canadians who were given a broad mandate to obtain and to publicize the views of Canadians regarding the state of our country and "to discover the basis for a fresh accommodation which will permit the people who inhabit this vexing and marvellous country to live together in peace, harmony and liberty."

On behalf of the Government of British Columbia, I made a formal submission to that Task Force on February 8th, 1978. That submission developed the view which has been, and is, the underlying theme of our proposals for constitutional change, namely, that the

central institutions of our country - including the Senate of Canada and the major boards and commissions of Canada - must be restructured to be made more effective in recognizing and addressing regional concerns and aspirations in order to better incorporate those views in the central decision-making processes of Canada.

Our theme has been for greater representation in these central institutions. We do not want continued isolation. We do not want alienation continued or compounded. We do not want separation. We want to be more involved in the councils of decision-making in Ottawa. These are sentiments not unique to British Columbia. Such a course would strengthen our federation. A position at the centre for the provinces is far from divisive. It is unifying, and it is necessary for this country.

Notwithstanding the provinces' meetings and commitments in Edmonton and Toronto in 1976, and their additional concerted efforts, and even though the Pepin/Robarts Task Force had not yet reported, in June, 1978, the federal government, without any substantial consultation with the provinces, introduced into the Parliament of Canada Bill C60 proposing many basic changes to our Canadian constitutional structures.

On June 27, 1978, I wrote to Prime Minister Trudeau expressing my serious concerns about the nature of the process of constitutional review that his government proposed to follow. The Prime Minister replied to me by letter of July 10th, 1978, stating in part:-

"The process, as I see it, is certainly not limited to the federal government seeking "merely your reaction" to federal proposals. I have said repeatedly that we will welcome alternative suggestions for the various proposals contained in the constitutional Bill, and while our own ideas have been put forward after a good deal of thought and represent our considered views, we do not in any way preclude the possibility that other ideas may be presented which could, after discussion and reflection, seem even better."

and going on: -

"The technique of using a Bill as a basis for discussion is not in the least intended to shut off debate, but is intended, rather to facilitate a deeper discussion, with a greater chance of producing results of lasting value."

Two Parliamentary Committees were next established in Ottawa to consider the provisions of Bill C-60. Our government filed a brief before each of those Committees.

In late September, 1978, in advance of the First Ministers' Conference on the Constitution in Ottawa on October 31, 1978, British Columbia published comprehensive constitutional proposals as follows:-

1. An overview of constitutional reform.
2. The concept of British Columbia as the fifth region of Canada.
3. Proposals for major reform of the Canadian Senate.
4. Proposals concerning the Supreme Court of Canada.
5. Proposals for improved instruments for federal/provincial relations.
6. A Bill of Rights and the Constitution.
7. Language rights and the Constitution.
8. Proposals regarding the distribution of legislative powers.
9. Proposals for an amending formula.

Commenting on British Columbia's constitutional proposals, the Prime Minister of Canada in his letter to me of November 20th, 1978 stated:-

"The range and depth of the work you have done are really most impressive, and I do congratulate you on making this major contribution to the national debate which is now underway."

At the First Ministers' Conference on the Constitution held in Ottawa in late October, 1978, the Continuing Committee of Ministers on the Constitution was established to make a concerted effort toward agreement on a range of constitutional subjects over the course of a three-month period. Meetings of this Committee were held in Mont Ste. Marie, Quebec, Toronto and Vancouver leading up to a further First Ministers' Conference in Ottawa in February of 1979.

It became apparent to those who were involved that the time-table was too short given the complexities of the issues involved. Had there been further meetings of the Continuing Committee of Ministers and First Ministers, I feel there might well have been further agreement amongst all governments on a wide range of constitutional issues.

Two federal elections then intervened and it was on June 8th, 1980, the Prime Minister requested a meeting with all ten Premiers at 24 Sussex Drive. At that meeting, the Prime Minister proposed a further round of constitutional discussions and twelve items for discussion were agreed to. They were:-



1. Natural Resources and Interprovincial Trade
2. Communications
3. The Upper House
4. The Supreme Court of Canada
5. Fisheries
6. Charter of Rights
7. Offshore Resources
8. Equalization
9. Family Law
10. Patriation and Amending Formula
11. Preamble or Principles of a Constitution
12. Powers over the Economy

All of these subjects, except "Powers over the Economy", had been subjects of discussion at the previous meetings of the C.C.M.C.

The Government of British Columbia reviewed its policy position on each of these items.

British Columbia worked hard in the honest belief that a federal/provincial agreement was possible. During this past summer, four weeks of meetings of the C.C.M.C. were held in Montreal, Toronto, Vancouver and Ottawa.

We, and others demonstrated flexibility. We were prepared and did move away from positions that we had previously taken in the attempts and interests of reaching an accord. We did so in the Canadian Way, in the interest of a stronger Canada.

This intensive summer round of meetings was preparatory to the First Ministers' Conference held in Ottawa between September 8th and 12th, 1980. At the end of the conference agreement was not achieved.

Agreement should and could have been achieved.

There was great willingness on the part of the provinces to seek agreement. The provinces concurred on a large range of issues. Unfortunately, however, the federal government did not add its support to the substantial provincial consensus that had been reached on most of the twelve items.

The requests of many Premiers around the table on the closing day to extend the Conference or meet again at an early date were not heeded. That was, and still is, regrettable.

At the closing session of the First Ministers' Conference, I made these observations:-

"I think we have a good chance, and the chance is not yet lost, Mr. Prime Minister. We will stay and we will talk and we will negotiate, but we will not sell out Canada - our vision of Canada, our Canada - or sacrifice any part of the country. I think we have a chance. We had a chance yesterday, when we had that agreement amongst the Premiers, and that is not lost."

However, that was not to be.

#### THE CURRENT FEDERAL PROPOSAL

The Prime Minister, on October 3, 1980, released the proposed Joint Resolution of the Senate and House of Commons which is now before your Committee.

I deplore this unilateral action by the federal government. It is contrary to the very essence of federalism for such basic changes as are proposed to be put forward without first having the consent and approval of the provinces.

relationships and seriously infringe upon or diminish the responsibilities and powers of provincial legislatures. The Charter of Rights, for example, represents a substantial alteration to existing constitutional arrangements and would be a sweeping limitation on existing provincial legislative authority. For the past 113 years the concept of parliamentary supremacy (at both levels of government) has been a cornerstone of our constitutional framework. These proposals would replace that fundamental precept and constrain parliamentary and legislative action.

Similarly, the unilateral imposition by the federal Parliament of an amending formula would constitute a serious erosion of the existing and historic rights of the provinces relative to constitutional amendment and represent a serious violation of well-established constitutional convention and practice.

I say again, it is wholly contrary to the spirit of Canadian federalism, and the concept of partnership, for one level of government to proceed unilaterally in this way. That is not federalism nor is it the Canadian way to do things.

From the beginning of our federation, leading public figures of Canada have recognized the necessity of securing the concurrence of the provinces before any amendments affecting their rights were requested from Westminster. These include Sir Wilfrid Laurier, Arthur Meighen, W.L. Mackenzie King, Prime Ministers and those who were to become Prime Ministers of this country, those who carefully guarded, preserved and protected the concept of Canadian partnership and our Canadian federal system.

In 1931 - the date of the Statute of Westminster - then president of the Canadian Bar Association and future Prime Minister, Mr. Louis St. Laurent, stated in his presidential address:-

"And if the United Kingdom and the Dominions are equal in status and in no way subordinate one to another in any aspect of their domestic or external affairs, does not the provision of section 92 of the Act of 1867, that in each province the legislature may exclusively make laws in relation to the amendment from time to time of its constitution, except as regards the office of Lieutenant-Governor, seem to indicate that the Houses of the Dominion Parliament would have no jurisdiction to request or to consent to enactments that might extend or abridge Provincial legislative autonomy."

The Rt. Hon. John G. Diefenbaker, at the Dominion-Provincial conference in 1960, said:-

"During the years I have advocated that when an agreement could be arrived at between the Dominion and the provincial governments, Canada should proceed, at the very earliest opportunity, to take those measures necessary to assure the amendment of our constitution in Canada."

The Rt. Hon. Lester B. Pearson said in 1964:-

"We will proceed with the preparation of a resolution, submitting the proposed act to Parliament as soon as we have received confirmation from all provinces regarding the accuracy of the text and their concurrence, by their legislatures, in the substance of the proposed act."

These public pronouncements over the years are fully supported by the practice that has been followed in seeking amendments to our Constitution. The crucial fact is, that on each occasion where the Government of Canada has obtained an amendment that would diminish provincial powers, the federal government has first sought and obtained the unanimous consent of all provincial governments.

This established constitutional convention became firmly recognized in a federal White Paper of 1965 which sets out the basic

principles to be followed in obtaining an amendment to the Constitution of Canada. It is stated at page 15:-

"The fourth general principle is that the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces."

Always, there has been agreement. Our country has been held together and built by agreement, not by this kind of unilateral activity.

During the First Ministers' Conference on the Constitution in Ottawa on February 6, 1979, in response to questions from the Premiers concerning the ground rules under which the process of constitutional reform was to proceed, Prime Minister Trudeau stated as follows:-

"So will there be unilateral action by the federal government regardless of the result of this conference? Our priority would be to seek agreement and move in areas of federal and provincial concern where we could move together. But if we are not successful, I repeat, we preserve our constitutional right to change our constitution - the federal one - just as the provinces keep their right to change their provincial constitutions, and I do not think either the provinces or the federal government would want to give up that right."

Mr. Trudeau goes on to say:-

"Our priority is to change this constitution collectively, federal and provincial. We will adopt a charter of human rights; we will constitutionalize it. We cannot force the provinces to do it. We are trying to convince them to do it.

I can answer unequivocally that the federal government intends to entrench a charter of basic human rights and of linguistic rights. Now this will bind the federal government; it won't bind the provinces unless they want to bind themselves."

Prime Minister Trudeau's statement in 1979 was in keeping with the statements of every Prime Minister this country has had. It was in keeping with the spirit of the country. It was also in keeping with the established Constitutional convention.

The Prime Minister went on to say:-

"The final question was one of unanimity. We have the rule of unanimity, says Premier Bennett. I think it is clear from what we said ourselves on Sunday night that this conference has also accepted the rule of unanimity."

There appears to have been a dramatic change in position since those statements in 1979. Yet, our Canadian constitutional conventions have not changed. They have long been settled and they require the unanimous consent of all eleven governments in circumstances such as the present.

The reason for provincial consent is obvious. Sovereignty in any federation is divided between the two orders of government. Sovereignty is not the private preserve of just one order of government. The federal government has its areas of exclusive jurisdiction and the provinces have their areas of exclusive jurisdiction. It is contrary to the basic concept of federalism for one level to intrude upon another as is now proposed.

It is even more undesirable for the Government of the United Kingdom to be placed in the embarrassing position of having to look behind a request from the Government of Canada because the proper Canadian prerequisites have not been met.

PRESENT POSITION OF BRITISH COLUMBIA

As I said at the conclusion of the First Ministers' Conference in September, I very much regret that the Conference did not succeed.

Success can still be achieved, but we consider such success would be highly unlikely if we cannot get back to the conference table. That is why my Minister of Intergovernmental Relations telexed all governments on November 10th, 1980, reiterating my view calling for a return to the table and for a sixty-day cooling off period.

What I proposed then, I propose again now. I call upon the federal government to suspend further consideration of its constitutional proposals until additional federal-provincial meetings on these subjects are held and agreement reached.

Negotiation and compromise leading to accord is the Canadian way and I urge that further attempts once again be made.

What has British Columbia done in the meantime?

Reluctantly, but necessarily, we have combined with five other provinces before the Court of Appeal of Manitoba to seek a determination on the constitutionality of the federal proposals. Similar proceedings are being brought before the courts in Quebec and in Newfoundland, and it is my government's intention to be represented at those hearings also.

Additionally, reluctantly, but necessarily, we have tabled a brief before the Foreign Affairs Committee of the Parliament of the United Kingdom in response to an invitation of that Committee to all interested persons to make their views known as to what is the proper role of the United Kingdom Parliament in the circumstances.<sup>2</sup> Other provinces have done the same.

In addition, the Legislature of British Columbia on December 11, 1980, passed the following resolution:-

"That We, the Members of the Legislative Assembly of the Province of British Columbia, re-affirming our allegiance to the Crown, our commitment to a united Canada within the Canadian Confederation, and asserting the sovereign status of Canada as a free and independent nation, support

- (i) early patriation of the Constitution of Canada from the United Kingdom,
- (ii) a formula for the amendment of the Constitution of Canada in respect of matters affecting federal-provincial relationships,

with the consent of the Legislatures of all the Provinces and of the Parliament of Canada."

As part of this submission, I will be providing the Committee with copies of the British Columbia Hansard of the full legislative debate leading up to the passage of the British Columbia resolution. This debate sets out in more detail the reasons why the Government of British Columbia is diametrically opposed to the unilateral action taken by the federal government, and furthermore, points out our commitment to Canada and our desire to resume constitutional discussions.

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2. Copies of this submission have been filed with the Secretary of State for External Affairs and the Minister of Justice.



As the Resolution states, British Columbia continues to support patriation and further efforts to arrive at an amending formula, agreeable to all governments.

#### CONCLUSION

Substantial progress has been made in recent constitutional talks.

Agreement is within our reach.

What we need is a greater measure of goodwill and willingness on the part of the federal government to return to the conference table.

We urge the federal government to abandon its unilateral action which would impose upon the provinces, against their will, provisions which will basically alter the constitutional structure of Canada for all time and place upon provinces an amending process seriously opposed by the majority of them.

As we stated in our London submission:-

"Federalism is a fragile form of government. Its success is never assured even in the most stable and sophisticated countries. Success flows entirely from hard work, tolerance, a willingness to compromise and faithful adherence to the framework of federalism provided in the Constitution. Failure will flow inevitably from the diminution of these ingredients.

The remedy for political deadlock in a federal nation cannot be unilateral action by one level of government; rather, the remedy must be an even more dedicated search for compromise as expressed by Prime Minister Trudeau several years ago, "Co-operation and interchange between the two levels of government will be, as they have been, an absolute necessity."

The Government of British Columbia believes in the wisdom of those words and says that the federal government's current attempt to change unilaterally the fundamental principles of the Canadian constitution is folly and divisive and destructive."

We call upon the federal government to cease in this unwise course of action, to return to the conference table and to resolve our problems in Canada by Canadians. We want a "Made in Canada" constitution. We call upon this Committee to so recommend.