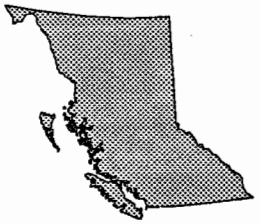
Approaching Constitutional Reform: A British Columbia Perspective

by Glen Clark, MLA and Chris Harris



It is evident that Canada is presently in a constitutional crisis that is perhaps the most serious in our country's history. The circumstances surrounding the failure to obtain ratification of the Meech Lake Constitutional Accord bring into serious question the manner in which we should approach constitutional reform in future. The purpose of this short article is to focus on how the province of British Columbia should approach the process of constitutional revision in the "next round".

Although there have been many misunderstandings about both the purpose and the substance of the Meech Lake Accord, in large measure its failure came about as a result of problems with the process of constitutional reform, rather than objections to any specific clause. Arguably, if the Meech Lake debacle has taught us anything, it is that from the perspective of the public, the process undertaken was seen to be illegitimate. The fact that the requirements for constitutional amendment are set out in Part V of the *Constitution Act, 1982* is not sufficient answer to those who believe that the process itself was, nevertheless, fundamentally flawed. The difficult task ahead is one of trying to address the need for constitutional renewal within the strictures of the present amending formula while, at the same time, attempting to bring the public into the process. This presents a very challenging problem.

Four aspects of the Meech Lake experience should inform our thinking about future attempts at constitutional change: 1) A number of the problems which occurred, did so due to conflicting and almost irreconcilable public demands made by respective provincial political leaders, in advance of the initial Meech Lake agreement; 2) There was often substantial incongruence between the goals of individual provincial politicians and those of their respective publics; 3) Sole reliance on elite accommodation via the process of executive federalism to arrive at tradeoffs ultimately proved to be illegitimate in the eyes of many of our citizens; 4) The public now expects, and indeed demands, the right to participate through some form of genuine input in future rounds.

British Columbia can draw some lessons from the circumstances surrounding the failure of the Meech Lake Accord. In particular, the province has never demonstrated genuine concern about the "process" by which constitutional positions are developed. As well, throughout the period during which British Columbia has been a party to Confederation, its attitude toward the federal government in relation to constitutional matters has always been marked by a high degree of antagonism.

This adversarial posture has served two purposes. First, it has been useful in attempting to extract greater provincial jurisdictional authority at the expense of federal power. Secondly, it has provided a convenient foil to divert public attention from problematic domestic issues.

Historically, as R.M. Burns noted almost twenty years ago, "British Columbia has been remarkably consistent in its attitude to federal issues and relationships."[1] From the very beginning, tension existed between federal and provincial politicians. During the first ten years of British Columbia's provincehood, the demand from Victoria was for the "fulfillment of the terms of union."[2] Later, particularly during the premiership of Duff Pattullo, this changed to a campaign for "better terms"[3] for British Columbia in Confederation. More recently, the argument has been that British Columbia does not receive its fair share.

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Norman Ruff has noted that, despite changes in rhetoric or language, successive provincial governments have used "common arguments concerning the province's position within Confederation"[4] and have successfully used those arguments to "gain domestic electoral advantage."[5]

With respect to constitutional matters in particular, British Columbia premiers have tried to play to the populist political sentiment of the province's population. Importantly, the positions they have taken have largely been developed by politicians and bureaucrats with little or no genuine consultation.

In one well-known instance, Premier W.A.C. Bennett argued that all boundaries between the other western provinces, as well as those in Atlantic Canada, should be eliminated so as to create a five-province Canada.[6] This "reorganized" Canada would have been one in which each of the five provinces, irrespective of population size, would have been granted the same powers in a reformed Senate as well as in the process of constitutional amendment.

Arguments for a five-province rearrangement of Confederation were reformulated by Premier W.R. Bennett in 1976. He argued that a "five-region" approach should be taken whereby British Columbia would be treated as a separate region distinct from the rest of Western Canada and equal to Quebec and Ontario in any agreed upon constitutional amending formula.[7] In addition, he argued for explicit representation on such federal bodies as the Supreme Court of Canada, the Board of Directors of the Bank of Canada and the governing boards of a number of federal crown corporations.[8] Although, this position was not ultimately maintained, it represents one more instance in which the B.C. contribution was primarily directed to focusing on its rather unique claims.

The position of the current British Columbia government is consistent with those of its predecessors. Notwithstanding its relatively co-operative attitude at the time of the Meech Lake round, it has since reverted to a more traditional adversarial posture. Its present stance is one that emphasizes the need for a dramatic financial redistribution of power from the federal to provincial governments, the ending of federal involvement in jointly-funded programs, and a demand that the federal government get its "house in order". At the same time B.C. rejects completely new federal initiatives to raise revenue.[9] Once again, the position taken by the present government has not had the benefit of public consultation. Furthermore, the recent decision to rely upon a "Cabinet Committee on Confederation" to work out B.C.'s constitutional position does not appear to address this concern.

Unquestionably, "fed-bashing" has long been a favourite pastime of British Columbia premiers. Indeed, this has assisted a number of governments in their re-election strategies. Unfortunately, at this critical juncture in Canada's constitutional history, this approach is at best unhelpful and at worst highly destructive.

Canada now finds itself in a situation where there seems to be little agreement among both the politicians and the public at large over what kind of country Canada should become in the future. This problem is complicated by an apparent lack of consensus both within "English-speaking Canada" as well as between Quebec and the other provinces.

The situation is further exacerbated by the need to work within the confines of the present amending formula (with its reliance on the imperatives of executive federalism) while at the same time bringing the public into the process. These realities clearly call for new thinking as to the manner in which we undertake the "next round". Failure to learn lessons from the Meech Lake experience could have potentially devastating consequences for the future of the constitutional reform process and possibly for Canada itself.

The former approach – that of determining the province's constitutional position in a vacuum without public input and to suit the respective political agendas of incumbent premiers – must be jettisoned before the provincial government goes into the next round. The provincial government should not proceed in the next round simply by taking its own agenda into closed rooms and bargaining for its support.

To the extent that the problems which arose during the Meech Lake ratification process related to the lack of public support, in the face of positions taken by their political leaders, the method by which the public is brought into the process should be addressed. It is not necessary that our political leaders view their choices as being between "leading" or blindly "following". Rather, it is necessary to develop a dynamic that represents a creative synthesis between the two. There are many people among the general public who want to participate in thinking through the alternative options – and they should be given the opportunity to do so. We submit that a number of principles should guide the province as it undertakes its task in the future.

First, the provincial government should take all necessary steps to consider its position carefully, and should refrain from taking hard positions that unduly limit the opportunities for creative constitution-making. To say, for instance, that "anything Quebec 'gets', every other province must also 'get'," is to unduly limit the opportunities for creative constitution-making. Such a

hard and fast approach fails to take into account that a creatively-drafted constitution may well involve degrees of assymetry in Canadian federalism. Arguably, this position, initially taken by Premiers Vander Zalm and Getty prior to the Meech Lake agreement, was partly responsible for the failure to find an amending formula that could ultimately meet Quebec's insistence that it have a constitutional veto with respect to changes in federal institutions without, at the same time, creating undue constitutional rigidity and thereby making the prospect of further constitutional change in the future next to impossible. Hence, from the outset, British Columbia should avoid boxing itself into what are, in effect, non-negotiable corners. The B.C. government should decide in advance that its role is to assist in finding solutions, rather than add to problems that are already potentially insurmountable.

Secondly, while any constitutional resolution (if one can be found) will undoubtedly come about through the process of executive federalism (and bargaining), some lessons should be learned from the Meech Lake experience. Most significantly, we should understand by now that if politicians cannot bring the public along with them in the aftermath of their bargaining, the deal may ultimately unravel. Hence, there should be a process for public input into the general debate about constitutional change *before* formal bargaining begins. The government should, however, point out to the public that, at the bargaining table, there may be limits to what it is able to achieve.

One way of bringing the public into the process of constitutional reform is to establish a provincial body whose purpose is to seek out and listen to submissions from interested members of the general public. Such a body would also have an educative role and could be either in the form of a special legislative committee, or alternatively, a provincially-appointed commission. In either instance, we are of the view that it should involve provincial politicians from both of the main political parties in the British Columbia Legislative Assembly, and that it should see its task as an absolutely non-partisan one. It should also utilize specialized academic knowledge with respect to the problems of constitutional change in Canada.

This proposal is, of course, not unique. Various types of consultative bodies with respect to this matter have been established by the federal government and the provinces of Quebec, Ontario, Manitoba, Alberta, and New Brunswick. It is our view that British Columbia would also benefit from such a process.

Our purpose in recommending the creation of a consultative body to gather public opinion is, quite simply, to increase public understanding and assist in building consensus. The necessity of avoiding partisanship cannot be over-emphasized. The development of British Columbia's position and the subsequent fate of any agreement which may be ultimately reached between Canada's various governments must not depend on the popularity of the Premier of the moment. Hence it is incumbent upon the political leadership of both sides of the Legislative Assembly to encourage co-operation between the parties on this issue. In short, this should be seen as a process of consensus-building.

The failure of the Meech Lake Accord – along with the perceived failure of the amending process itself – present us with substantial challenges. Much of the misunderstanding and mistrust which enveloped the Meech Lake debate could have been avoided if Canada's political leaders had recognized early enough that the old processes of elite accommodation were no longer sufficient in the "Charter era". It is critical that governments develop new approaches which recognize the necessity for broad consultation if they are to be trusted to make almost irrevocable decisions about our national fate. This is particularly so in the case of British Columbia given the populist nature of its political culture and value system. The people of the province should at least have the opportunity to be heard and to have their views considered. Surely, this is a minimum in a democratic society.◆

Notes

1. R.M. Burns, "British Columbia and the Canadian Federation," in *One Country or Two*, ed. by R.M. Burns, Montreal, 1971, p. 253.

2. R.J. Nelles, *The Objectives of British Columbia Elites with Regard to Constitutional Reform*, unpublished M.A. Thesis, University of Victoria, 1985, p. 62.

3. *Ibid.*

4. Norman J.Ruff, "British Columbia and Canadian Federalism," in *The Reins of Power: Governing British Columbia*, ed by J. Terence Morley et al, Vancouver, 1983, p. 290.

5. *Ibid.*, p. 291.

6. Province of British Columbia, *Proposals of the Province of British Columbia on the Constitution of Canada*, Victoria, B.C., 1968, p. 13.

7. Province of British Columbia, *What is British Columbia's Position on the Constitution of Canada?*, Victoria, B.C., 1976.

8. *Ibid.*

9. Province of British Columbia, *Towards a Solution: Refinancing Confederation.* A pamphlet produced by the Government of British Columbia based on remarks made by the provincial Minister of Finance, August 1, 1990.