

The role of British Columbia in constitutional reform Why shouldn't British Columbia lead the way?

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It is a deep honour and a great pleasure to be able to deliver the first paper in honour of my friend, sometimes colleague and always soul mate Melvin H. Smith. In saying that, I'm conscious of the far that he might not wish to be so closely identified with a troublemaker like me!

Any who have read my current book *Canada: Is Anyone Listening* - and I'm sure it must be required reading in the university and all proper circles - will know that Mel and I have fought side by side for a long time to make this country better. In so doing, we've been targets of many ad hominem attacks and that, of course, goes with the territory. What is sad, however, is that this has meant that much of the fine contribution B.C. has made to the unity debate - and for that matter, the aboriginal issue - over the years has fallen on barren, soil. Beyond the Rockies, British Columbia does not enjoy a reputation for important thinking and that has meant that much has been rejected either out of hand, because British Columbia is considered to be sub-standard intellectually, or patronized because we're seen, at best, as willing children trying, oh so hard, to be helpful. This unwillingness of Ottawa to listen to British Columbia has, in my opinion, cost the country dear.

I remember so well the 1970s when Mel and I traveled right across this country trying to sell senate reform - we were mocked, patronized and trivialized. Mel, being the gentleman he is, bore this better than I... at least on the surface though I know he smoldered beneath the surface. I did that too but my volcano was less apt to be inert than his.

This paper is concerned with the role of British Columbia in the development of Canada. I think, therefore, I must start by saying that I am not a scholar like Mel is. Oh, I've read a lot and debated plenty. I've stood toe to toe with the best in the business. But I am a political animal in the very best sense of that term, I hope. I operate riding the scholarly engine Mel and others have provided but my fuel is the visceral feeling that all is not right in this great country and it is for the people, properly provoked and appropriately educated, to make the changes which will finally give us the sense of union which we have on paper but so sadly lack in reality.

With that said and I hope understood, let me commence by reminding us all that British Columbia is different. It is not an extension of Ontario. It was not and is not a result of an east west migration. This is important because we cannot escape our history.

I remember being asked some years ago by my friend Diane Francis, the very fine and provocative writer, how I expected B.C. to stay unique with people pouring in - as they were in those days - from other parts of Canada. My answer was simple. Just as Churchill was right when he said "first we shape our buildings, then they shape us," British Columbia was fashioned early on and has thereafter fashioned all who come to live here. Now, of course new people with new ideas and new culture alter British Columbia but it's in the same way one renovates one's home. Rooms change, pictures on the walls change and even the garden changes. But for all that, the essential structure remains.

This is important because virtually all the debate about where this country is to go has had as its underpinning the notion that the nation's fundament is really Quebec and Ontario with Quebec leading all other French speaking people and Ontario leading the rest like a mother duck leads her ducklings. I'm certain as I am of anything that Mel Smith will agree that the entire constitutional debate ... or unity debate if you prefer... has been seen by our political masters and many academics

as no more than an extension of the great Upper Canada/Lower Canada debate. This is why, 132 years after Confederation we are still debating how we should amend our constitution.

Mel and I were at the center of the Patriation exercise in the late 70s and early 80s - though I left government in early 1981 - and listened with amazement to Rene Levesque passionately defend the leaving of our constitution in London, England! How on earth could it be that a rank separatist would want that? The answer was simple - he feared that if it came to Canada he would no longer have the veto over constitutional change that he and many others thought belonged to Quebec.

It is this struggle which has this country in the preposterous situation it's in - where Mel Smith and others struggled so hard for a formula whereby Canada could change its constitution while Central Canada has always fought, successfully I might add, for a "veto" formula by which change can be prevented. By way of reminder you will know that the Patriation formula, the so-called "7 & 50 formula" - for which Mel Smith deserves so much credit - permits change in much of the constitution if you can get the consent of 7 provinces with 50% of the population plus the federal government. It's not worded that way but that's how it works out. That is a difficult threshold but an amendment can be achieved, under current population levels, without either Ontario or Quebec - though not both. The Gordian knot of Upper Canada/Lower Canada constitutional domination was cut by this ingenious arrangement. Then, in December 1995, Jean Chretien, in response to the near loss in, the Quebec referendum, effectively thwarted and circumvented this formula by saying that the federal government would not agree to an amendment if any one of four regions, the Atlantic region, Quebec, Ontario or the West objected. There was quite a row, to say the least, about British Columbia being part of "the West" and eventually she was given a veto of her own. Thoughtful British Columbians knew that the point was not who had a veto but that it was desperately wrong if any province had one. Vetoes constipate the body politic. But the amending formula is not my subject today and I only bring it up to demonstrate that it seems politically impassible for any federal government to acknowledge that anything or, either side of Quebec and Ontario really matters very much.

Let me now turn to my main theme which is the system of governance under which we operate and a what role British Columbia can play in making things better.

And let me just start out by once more paraphrasing the great Churchill and say that democracy is the worst of all systems save those which, from time to time, have been tried. We cannot achieve perfection ... we can't even come close. But with all its many warts, it's my considered view that the United States of America has come closer than anyone else -- but I would be first to concede that they are many miles, or I should say kilometres from perfection. By the same token if that's how far the Americans are from perfection we're that distance many times over.

The problem we have is called "responsible" government. We all remember how we were taught in school to marvel at this wonderful thing called "responsible government" - how Lord Durham gave it to us and how it, being the British parliamentary system, puts us in the bust of all democratic worlds.

Well, it's rubbish. I am tempted to be more direct but bearing in mind the piety of the institution I'm in and, I'm sure of this audience ... and also remembering that I'm in farm country... perhaps I can say it's barnyard droppings.

Now it is a wonderful system on the drawing board. No doubt it's ideal for Political Science 101. In theory, voters dutifully march to the polls to elect their legislators out of whom will be selected, at the pleasure of those legislatures, the Cabinet. The Cabinet, being the Prime Minister or Premier, and his chosen colleagues, are there on their good behaviour because we can depend upon those same

legislators to toss them out and put in a new bunch if necessary. And indeed this is how it worked in the early days. At the great conferences in 1864 in Charlottetown and Quebec City the maritime premiers brought their opposition leaders along because they knew that if they overstepped the mark, why, their legislatures would toss them out even though they had a majority of the seats.

What happened to this perfect-on-the-drawing-board system?

The party system. The party system, which developed so slowly in England where it was really, for the longest time the King's party, the Tories, and the other guys, the Whigs. The combination of "responsible government," a federal state and the party system has come very close to being Canada's ruination. The member of Parliament has become, unless in Cabinet, a nobody- a lickspittle who does what he is told, not by the voters, but by the Prime Minister or the Premier. Pierre Trudeau said that 50 yards off Parliament Hall MPs were nobodies and I only wonder why he attached the geographical limitation. Cabinet ministers are little better as they know only too well how they got into cabinet with its extra money, perks and social standing.

In the 18th century moving into the 19th it was not unusual to have a British administration made up of both Tories and Whigs ... then have it lose the confidence of the House and a new mixed administration formed. Because those were days when there wasn't much difference if any in philosophy, it was an issue-oriented parliament. As the Tories split over reform and the Corn Laws, and later at the end of the 19th century when the Labour Party arose, the parties in England began to take on very specific philosophies. Even then there were the Unionists, who opposed Home Rule for Ireland, and upon the Irish Question anyway, crossed party lines. Similarly, the question of free trade crossed party lines and made trouble for the party whips.

To this day party discipline is far less strict in the UK than in Canada as we have seen as the "Europe" question has divided the two major parties since the 50s and so split the Tories that they self-destructed in 1997. In part, this is because of the size of the parliament in Westminster but even more because of party tradition. The Labour Party caucus has long had the tradition of electing the cabinet or shadow cabinet members and the Tories have their 1922 Committee of backbencher which every Prime Minister since that year has been very chary of offending. We, on the other hand, have developed a top-down, one-man dictatorship limited only by the requirement that an election be held every five years.

As I mentioned earlier, the disciplined party system was slow off the mark in Canada and as late as 1873 a party with the majority, Sir John A. Macdonald's Tories, could lose the confidence of the Commons over the Pacific Scandal. It's not only difficult, alas, it is impossible to imagine such an occurrence today.

Perhaps the most gut wrenching issue of our time was the Partition exercise in 1982 and the passage through Parliament of the new Constitution Act. Yet, if memory serves me correctly, only three Liberals voted against the government and it's hard to believe even that would have happened if the fate of the government had been at stake. We all remember how quickly the Liberal backbenchers came to heel over the Hepatitis C matter. Very recently a bill was passed by Parliament giving aboriginal "nations" wide powers of expropriation. Dr. Edward McWhinney, a noted constitutional scholar and a Liberal MP harshly and publicly criticized this bill. When it came to a vote, of course, he voted for it with the government.

The consequence of this has been a reversal of roles. It is not the government that is at the mercy of the backbench but quite the other way around The Prime Minister selects, free of constraint, his cabinet and the parliamentary secretaries. Just as importantly, I would argue, he approves the chairs of various committees and which of his members will serve where. When you reflect for a moment

you'll recall that the parliamentary committee was supposed to be a device whereby the members held the cabinet's feet to the fire. In fact, it not only does no such thing it takes its orders from the government. Any time - as we have seen on several occasions with the Chretien government - a chairman or the committee cuts too close to the bone to suit the Prime Minister, they are disciplined. The last chairman of the Fisheries Committee displeased Minister David Anderson and was sacked. It's not hard to see who toes the line and who holds the feet to the fire.

The system has now reached the point where every important appointment in the land is in the personal control of the Prime Minister. He may not officially appoint, for example, all the judges but you can be sure that the Minister of Justice makes no appointments without express approval of the PM. He appoints who represents you and me in the Senate and you can bet that British Columbia will never ever be represented by the likes of Mel Smith or Rafe Mair! All the federal boards, commissions and crown corporations are at his whim ... the Prime Minister is a one-man dictator whose only constraint is the Elections Act and even there, the Prime Minister has the final say - for the final and devastating power of a prime minister is that he can withhold approval of the party for any candidate he doesn't like. I need hardly tell you that every MP knows about and keenly feels this ultimate power. If he doesn't, he soon learns about it from the party whips if he shows the slightest inclination to move off the party line.

In the United States; where the executive and legislative functions are at arms length, senior judicial appointments and indeed senior executive positions such as cabinet members and under secretaries must be approved by the Senate. Think of that. The president must present, often to a hostile Senate, his nominations for senior office and the Senate can deny him if they wish. You might think that a Democratic President, under such a system, might never get any appointments through a Republican dominated Senate but the magic of the separation of powers system is that because of the lack of enforceable discipline and because every Congress knows that the situation can be reversed very quickly, the vetting process works. It doesn't always work to everyone's complete satisfaction of course - the refusal of the Senate to confirm Robert Bork to the Supreme Court some years back rankles conservatives like George Will to this day. The fact remains, however, that all senior judicial and executive appointments see the light shone on them by Congress and I know of no American who would dream of changing this. Their system may have its downsides like the occasional media circus over an appointment but I would argue that this is more than offset by the fact that the voter has an almost direct say in who shall be appointed to govern or judge him.

In fact Americans are bewildered that we would let Prime Minister Chretien load up the Supreme Court of Canada before the Quebec separation issue reached the court - which he did. Let me pause to remind you that after that matter was set for trial and prior to the hearing Jean Chretien appointed two new members of the Court. Now it goes without saying that everyone in this room very much including me wanted the court to rule against the right of Quebec to separate. But that doesn't mean we wanted the court packed so as to achieve that end. Justice must always be seen to be done. Yet in one of those appointments the reason given was that the candidate was a loyal Canadian as he had proved by being co-chair of the National "Yes" committee for the Charlottetown referendum! Imagine yourself a Quebecker looking to a fair and impartial hearing given that reason for appointing one of the judges. And what does that say to the 67.9% of British Columbians who voted 'no' - including I daresay many of you, and certainly including Mel Smith and Rafe Mair!

There is one more matter of great consequence I must refer to before I answer, as best I can, the question posed. I speak of the electoral system that sees the first past the post win, often with a third of the vote or less. I haven't the time today to set out all the problems with this system or try to offer all the solutions, but suffice it to say that our system invariably provides a majority government based upon a minority of the votes. Sometimes, as here in 1996, a party can gain power with fewer votes than the leading opposition party.

Nick Loenen, well known I daresay to most of you, has written a very useful book about Proportional Representation or PR which, in its pure form, elects MPs based upon the percentage of the popular vote achieved by each party. In most jurisdictions with what we call PR, there is a threshold, often five per cent which must be reached before a member is elected. Some countries, Germany and New Zealand to name two, have a mixed system of some first past the post, some off the list. I must say that I'm not as big a fan of PR as many and would prefer to have a first past the post with a preferential ballot system, but for many brighter and more learned than I, that's not sufficient reform. (Just, byway of aside, my concerns about PR can be seen in New Zealand where the "first past the post" MP's are almost universally thought better parliamentarians than the "listers" who are usually party hacks chosen more for dead ability to raise money than to legislate.

Now that we've got all that behind us, let me answer the question. What is British Columbia's role in the development of Canada?

I don't think, if we proceed as we have since 1871, it has any role except to threaten secession every so often to get Ottawa's attention. However much this technique has worked for Quebec, it is hardly constructive. I say this because it's not getting any better. I would argue that Ottawa pays less attention to British Columbia now than it ever did. Patronizing though it certainly was, at least in the olden times of Mackenzie King there was a "western" cabinet minister and in Jimmy Sinclair's day, one from B.C. who held some importance in Canada. In those days the liberal Party took very seriously what they perceived their mandate as representing all regions of Canada. Ever since Pierre Trudeau discovered the simple truth that the Liberals could win it all in Central Canada, British Columbia has been without an effective voice for the simple reason it has no political clout either in the Commons or the Senate. One may claim that the Mulroney governments were exceptions but we must remember that the only way the Tories have been able to govern since World War II has been with an alliance of western protest with Quebec separatism.

As we saw with both John Diefenbaker and Brian Mulroney, when the wheels come off that vehicle there is a resounding electoral crash. No need to mention Joe Clark because he didn't have half that power base, Quebec, and only lasted 7 months. This, incidentally, is why Joe Clark refuses to have anything to do with the Reform Party. Joe has finally learned how to count and he knows that whatever he gets west of the Lakehead will not get the job done and he would rather mend fences in Ontario and Quebec than risk their displeasure by a deal with western cowboys, as Reform is seen through the eyes of the eastern media.

Moreover, in effect, the Constitution of Canada is unamendable. This means that there will be few meaningful discussions of change. Why discuss change if it can never be effected? British Columbia, which will for the foreseeable future want to see changes is not even going to have talk shops available, for what's the point if change is foreclosed from the start by the Constitution as abused by Ottawa?

In years gone by Mel Smith would go to several important conferences during the year to discuss needed change. Because, until Chretien's time, change was seen as possible there was a yeasty constitutional debate going on in the country at all times. That is no more. The constitution of Canada needs an enema - or at the very least a good dose of ex-lax. And without the yeast of debate of change and the actuality of change, countries like ours show the fault lines. And sooner or later one of those fault lines has to become an open fissure.

I have this thought which I expressed to the provincial government a couple of years ago, and if nothing else it did get me a tax paid lunch with Andrew Petter, the Intergovernmental minister, a man I like and respect. I suggested that British Columbia ought to move within its own constitution

to make changes,. It is in a position - and here Mel will correct me if I'm wrong - to make any or all of the changes I have suggested above and can do so by a simple amendment to our own Constitution Act or by adding new legislation. And this, you'll be relieved to know, brings me to my point.

Why not put together a permanent Constitution Committee to examine all that Mel and I and many others have said and make suitable recommendations for changes to how British Columbia governs itself? This Committee need not be fully representative of the Community - this business of every sex (one used to be able to say both sexes) every hue, every religion and every region has gone far enough. There are within our midst, surely, two or three men and women whose integrity is not questioned by anyone.

There will be objections, of course. So-and-so will be too political. It's too expensive. And so on. But if British Columbia could do this it would attract the attention of the nation. Other provinces and perhaps even the federal government - no, I go too far there - will take notice. Fellow Canadians may well demand the same thing from their provincial capitals.

It must be a serious exercise. It must have in its chair a man or woman of considerable stature in the community - a name like Gordon Gibson comes readily to mind ... so does our Attorney-General the Hon Ujjal Dosanj whose politics are very different from many of us but who has shown himself to be intelligent, articulate, and a man of integrity. But there are others I'm sure.

The terms of reference should be extremely broad, though not vague. Some of the issues should be spelled out, not so as to direct a finding but to make it clear to the Committee and the public alike that everything is on the table. The expense would surely not be great, especially when one thinks of what governments spend our money on these days.

I would envisage that at the end of the exercise it might well be time to convoke a constituent assembly to debate and make final recommendations to the people who would ultimately deal with the recommendations by referendum.

No one wants to say it but many will think - how can the public, which is, after all, pretty stupid and ill-informed, be trusted to make decisions like this? That thought betrays a fundamental distrust of the thing we boast about so much - democracy. Mel Smith and I both fought in the trenches of the Charlottetown Accord battle and I suspect he would join me in praising the ability of the average person - like the average juror in a court case - to get to the meat of the matter and make an intelligent decision. Even if they're wrong, that's what democracy is all about. But I don't think they will be wrong. Moreover, after the recommendations are in, the legislature must do what the parliament of New Zealand did - make the changes and select a time, say ten years hence - to revisit what has been done.

It is said that we will lose efficiency if we move to a republican style government. Really? Are we saying that the Canadian parliamentary system is efficient? Is it democracy when a Prime Minister or Premier can get supply - the money he needs - through a captive Parliament or is it democracy when a President must go to his legislature and make his case for supply.

Some say we don't want the kind of open government where lawyers are examined carefully before they're made judges. Or one where leaders who misbehave have their conduct carefully examined and reported upon. Well, I disagree with those people. I would rather have our system undergo the pain of openness than the pain of secretiveness. Moreover, reforming our system doesn't by any means compel us to adopt what is bad in examples we look at.

The country cries out for reform. We are in danger of splitting and not just at the Quebec border either. We have lost all respect for our politicians because we can no longer relate to them. They don't do our bidding, but that of their leader.

We must change but we think that there is little if anything we can do because no one will listen to us. Very well then, they must be made to listen. And I can assure you that if we proceed as I suggest and begin our reform here in British Columbia, there will be curiosity. And with curiosity will come the slow grinding of brain cells in other parts of the country. We will - not immediately - become beacons for reform not just for Canada but other countries as well.

Why not? Looking at our troubles in this wonderful country, have we any right not to try to set an example?

And, when all's said and done, what do we have to lose?