

Letter sent to Deputy Attorneys General

EAD/LM

Ottawa, February 4, 1961.

187574

Dear Mr.

With further reference to my letter of January 20th, I have now been able to complete a redraft of the Constitutional Amendment Act, two copies of which are enclosed.

Subject to the comments below, in preparing this draft I have tried to reflect as accurately as I could the consensus of the conference in so far as that was ascertainable from available documents and records and my recollection of the proceedings.

The Minister of Justice wishes it to be understood that the enclosed document is a draft only, and that it must be regarded as being subject to correction or amendment, either as to substance or form, in order to express, or express more clearly, the understandings arrived at during the discussions. The Minister also suggests that it might be desirable ultimately to convene a meeting of officials in order to discuss points of detail with regard to the form or draftsmanship of the proposed statute.

You will observe that in the attached draft I have provided that the provisions concerning delegation will form part of the British North America Act of 1867. This, you will recall, was the suggestion made by Quebec. It was not too clear to me whether the proposal was that the delegation clause should replace the present section 94 or should be an addition to it. On reflection, it appeared to me to be more appropriate that the delegation clause should be an additional provision in the British North America Act; there being already a section 94A it seemed to me that, technically, the simplest way of inserting the delegation clause would be to re-number the present section 94 as number 93A and insert the delegation clause as section 94.

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You will also recall that during the conference the Chairman expressed a reservation whether his colleagues would be willing to accept the principle of delegation on the basis that delegation could take place to or from single provinces, and in the previous draft it had been provided that a delegation to the Parliament of Canada could take place only if a majority of the provinces had consented. After discussion of this provision with his colleagues it was still felt that it would not be desirable to have a law made by Parliament under the Constitution applicable only in one province, but it was agreed that the consent of a number of provinces less than a majority would be acceptable. Four was the suggested figure. Thus, some measure of applicability beyond one province would be essential, but the requirement of four is felt to be reasonable as permitting arrangements, for instance, on a regional basis. It will be remembered that Alberta, for instance, had expressed serious apprehensions as to whether a law enacted for one province might nevertheless have unforeseen effect in another. The draft accordingly provides for the consent of at least four provinces to a delegation from the provinces to Parliament, and also from Parliament to the provinces.

On the other hand, the Minister and his colleagues were prepared to accept the objections that had been voiced to the provision in the previous draft that if a province withdrew its consent the delegated law would cease to have effect if the number of consenting provinces were thereby reduced below the number required for the enactment of the delegated law. You will note, therefore, that this provision has been deleted in the enclosed draft. This deletion, it is felt, should go far towards meeting the desire of some of the provinces for flexibility, in that no one province will be able, by a unilateral withdrawal, to vitiate an arrangement in other provinces.

In the previous draft, the entrenching provision referred to "the rights or privileges granted or secured to the legislatures or the governments of the provinces." You will note that I have altered this to "the assets or property of the provinces", which, in my own view at least, expresses more clearly what is intended.

The arrangement arrived at at the conclusion of the conference was, I believe, that the provinces would endeavour to let the Chairman have their comments on this draft within two weeks of its receipt. It was also agreed that any province which felt that, in addition to the consideration of the

proposed amending formula, consideration should be given to amending section 91(1) at this stage, should have the opportunity to submit their views accordingly.

I would therefore request that the views of your province be forwarded in accordance with the above understanding.

Yours truly,

(E.A. Driedger)

Deputy Attorney General  
of Canada.

January 30, 1961.

An Act to provide for the amendment  
in Canada of the Constitution of Canada.

WHEREAS the Senate and House of Commons of Canada in Parliament assembled have submitted Addresses to Her Majesty praying that Her Majesty may graciously be pleased to cause a measure to be laid before the Parliament of the United Kingdom for the enactment of the provisions hereinafter set forth:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Part I

1. Subject to the provisions of this Part, the Parliament of Canada may make laws repealing, amending or re-enacting any of the provisions of the Constitution of Canada.

2. No law made under the authority of this Part affecting any of the provisions of this Act or section 51A of the British North America Act, 1867, or affecting any of the provisions of the Constitution of Canada relating to

- (a) the powers of the legislatures of the provinces to make laws,
  - (b) the assets or property of the provinces,
  - (c) the use of the English or French language,
- shall come into force unless it is concurred in by the legislatures of all the provinces.

3. (1) No law made under the authority of this Part affecting any of the provisions of the Constitution of Canada that refer to one or more, but not all, of the provinces, shall come into force unless it is concurred in by the legislature of every province to which the provision refers.

(2) Section 2 of this Act does not extend to any of the provisions of the Constitution of Canada referred to in subsection (1) of this section.

4. (1) No law made under the authority of this Act affecting any of the provisions of the Constitution of Canada relating to education in any province other than Newfoundland shall come into force unless it is ratified by the legislatures of all provinces other than Newfoundland.

(2) No law made under the authority of this Act affecting any of the provisions of the Constitution of Canada relating to education in the province of Newfoundland shall come into force unless it is ratified by the legislature of the province of Newfoundland.

(3) Sections 2 and 3 of this Act do not extend to any of the provisions of the Constitution of Canada referred to in subsections (1) and (2) of this section.

5. No law made under the authority of this Part affecting any of the provisions of the Constitution of Canada not coming within section 2, 3 or 4 of this Act shall come into force unless it is concurred in by the legislatures of two-thirds of the provinces representing at least fifty per cent of the population of Canada according to the most recent decennial census.

6. Nothing in this Part shall be construed as affecting any power of the Parliament of Canada or of the legislatures of the provinces, existing immediately before this Act came into force, to make laws in relation to any matter.

7. No Act of the Parliament of the United Kingdom passed after the coming into force of this Act shall extend or be deemed to extend to Canada or to any province or territory thereof.

8. In this Part, the expression "Constitution of Canada" includes the following enactments and any order, rule or regulation thereunder, namely,
- (a) the British North America Acts, 1867 to 1960;
  - (b) the Rupert's Land Act, 1868;
  - (c) the Manitoba Act, 1870;
  - (d) the Parliament of Canada Act, 1875;
  - (e) the Canadian Speaker (Appointment of Deputy) Act, 1895;
  - (f) the Alberta Act;
  - (g) the Saskatchewan Act;
  - (h) the Statute of Westminster, 1931, in so far as it is part of the law of Canada; and
  - (i) this Act.

Part II

9. The British North America Act, 1867, is amended by re-numbering section 94 thereof as section 93A, and by adding thereto, immediately after the said section 93A, the following section:

"94. (1) Notwithstanding anything in this Act

- (a) the Parliament of Canada may make laws in relation to any matters coming within the classes of subjects enumerated in heads (6), (7), (10), (13) and (16) of section 92 of this Act, but no statute enacted under the authority of this paragraph shall have effect in any province unless the legislature of that province has consented to the operation of that statute in that province; and
- (b) the legislature of a province may make laws in the province in relation to any matter that is otherwise within the exclusive legislative jurisdiction of Parliament, but no statute enacted under the authority of this paragraph shall have effect unless the Parliament of Canada has consented to the enactment thereof by the legislature of that province.

(2) The Parliament of Canada shall not have authority to enact a statute under paragraph (a) of subsection (1) of this section unless the legislatures of at least four of the provinces have given consent thereto under that paragraph; and a statute enacted by the legislature of a province under paragraph (b) of subsection (1) of this section shall not have effect in that province unless it has been enacted by the legislatures of at least four provinces.

(3) The Parliament of Canada or the legislature of a province may, at any time, revoke any consent given by it under this section, and

- (a) if the Parliament of Canada revokes any consent given by it under this section, any laws made by the legislature of a province to which the consent relates shall thereupon cease to have effect, and
- (b) if the legislature of a province revokes any consent given by it under this section, any law made by the Parliament of Canada to which such consent relates shall thereupon cease to have effect in that province."

ONTARIO  
THE ATTORNEY GENERAL

Toronto 2, Ontario,  
February 15, 1961.

Dear Mr. Fulton:-

Re: Constitutional Conference  
Your file 187574

I have received through Mr. Driedger a redraft of the Constitutional Amendment Act following the Conference on January 12th and 13th.

I hope to be in a position to let you have my comments on this draft as a whole very shortly.

However, in the meantime, I desire to put forward my views at this time on the desirability of amending Section 91 (1) of the B.N.A. Act.

In my opinion, Section 91 (1) is itself an amending formula and therefore it is quite proper that it should be considered along with the provisions of the redraft of the Constitutional Amendment Act.

This Section gives to the Parliament of Canada power to amend the Constitution of Canada, notwithstanding anything in the B.N.A. Act, in relation to everything except the five items expressly excluded, namely -

- (a) matters exclusively assigned to the provincial Legislatures, or
- (b) rights or privileges granted or secured to the Legislature or Government of a province, or
- (c) to any class of persons with respect to schools, or
- (d) as regards the use of the English or French language, or
- (e) as regards the requirement that there shall be a Session of Parliament at least once a year and that no House of Commons shall continue for more than five years; with a proviso for continuing the House of Commons in the event of war, etc.

This 1949 amendment (which is now Section 91 (1) was passed by the former Government without consulting the provinces and over the vigorous protest of a number of them.

In the 1950 Conference it was described by the Right Honourable Mr. St. Laurent as authorizing the Federal Parliament to amend the Constitution only in matters of purely Federal concern. It is quite apparent that it goes far beyond this.

The powers under Section 91 (1) cannot be compared with the power of the provincial Legislatures to amend the Constitution of the province under Section 92 (1): See Part V of the B.N.A. Act headed "Provincial Constitutions".

There is no objection to preserving the powers of Parliament as they existed immediately before the 1949 amendment. Nor is there any objection to Parliament having power to amend the Constitution in matters of purely Federal concern.

It is submitted that a section along the lines of that submitted in my letter to you dated November 21st, 1960, would do that and would preserve the rights of the province under the original Act for representation in the Senate and House of Commons.

For convenience I repeat it:

"The Parliament of Canada may from time to time amend, alter or repeal any of the provisions of the Constitution of Canada in relation to the Executive Government of Canada and the procedure, constitution and privileges of the House of Commons and the Senate except with respect to the representation of the Provinces in the House of Commons and the Senate and the requirements that there shall be a Session of the Parliament of Canada at least once each year and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House; provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the Members of such House."

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It would be helpful in our consideration of the redraft of the Constitutional Amendment Act if we had some indication of the attitude of the Federal Government in relation to amending Section 91 (1).

Yours very sincerely,

"A.K. Roberts"

The Honourable,  
E. Davie Fulton, Q.C.,  
Minister of Justice,  
OTTAWA, Ontario.

cc-C.R. Magone, Esq., Q.C.

OTTAWA 4, February 21, 1961.

The Honourable A. Kelso Roberts, Q.C.,  
Attorney General of Ontario,  
Department of the Attorney General,  
TORONTO 2, Ontario.

Dear Mr. Roberts:

Thank you very much for your letter of February 15th wherein you set forth your views on the desirability of amending Head (1) of section 91 of the British North America Act.

Yours is the first letter that I have received on this subject, and I am sure you will not mind if I delay commenting on your views until I have heard from the other provinces that indicated they would also express views and I have had an opportunity of discussing these suggestions with my colleagues.

Yours sincerely,

"E.D. FULTON"

DEPUTY ATTORNEY GENERAL  
ALBERTA

HJW/HS

EDMONTON, Alberta,  
February 17th, 1961.

Dear Mr. Driedger:

Re - Constitutional Amendments  
Your File 187574

I am in receipt of your letter of February 4th enclosing a redraft of the Constitutional Amendment Act.

We have considered the redraft of the delegation clause and while we are disappointed that the redraft provides that the consent of only four provinces will be necessary to enact a delegation from a province or provinces to Parliament and also from Parliament to a province or provinces, in view of the fact that we were the only province proposing this provision, we will somewhat reluctantly concur with the amendment recommended by the Minister of Justice.

You will recall that the Alberta delegation expressed the view at the last conference that the machinery for amending section 91 of the British North America Act should be made abundantly clear in the amending Act. We still feel that there may be some doubt on that point under the Act as presently drafted.

I think it will be agreed that any amendment to section 91 of the British North America Act would necessarily affect the provisions of section 92 of the Act and therefore it might be said to come under section 2 of the draft Act and require the concurrence of all the provinces and if section 2 stood alone that might be so but what is the effect of section 6 of the Amending Act?

You will recall that at the 1950 conference most of the Provincial Premiers took exception to the 1949 amendment of the British North America Act on the ground that section 1 as amended gave the Federal Parliament power to make amendments to section 91 without reference to the provinces. The 1949 amendment was objected to by Mr. Manning, Premier of Alberta (see pages 42 and 43 of the Proceedings, 1950). Mr. St. Laurent, then Prime

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Minister, though not admitting that the amendment of 1949 No. 2, went as far as being an encroachment of provincial rights, nevertheless was prepared to consider an amendment or even a repeal of those provisions if the object could be accomplished in some other way (see pages 68 and 69 of the Proceedings, 1950).

If section 91 does give to the Federal Parliament the powers suggested by the provinces in 1950, then does not section 6 of the redraft preserve those powers when it says:

"6. Nothing in this Part shall be construed as affecting any power of the Parliament of Canada or of the legislatures of the provinces, existing immediately before this Act came into force, to make laws in relation to any matter."

In any event we suggest that it should be established beyond any doubt that no amendment to section 91 could be effected without the concurrence of all of the provinces. Perhaps this could be accomplished by adding the words "including section 91 thereof" after the words "any of the provisions of the Constitution of Canada" where they occur in lines 4 and 5 of section 2. No doubt as a draftsman you might accomplish this object in a more artistic manner. We would ask that you give more consideration to this point which we consider to be necessary for the purposes of clarification and certainty.

We have no objection to the other provisions of the redraft.

I may say that the Attorney General concurs in the views expressed in this letter.

Yours truly,

"H.J. Wilson"  
Deputy Attorney General

E.A. Driedger, Esq., *q.c.*,  
Deputy Attorney General of Canada,  
Department of Justice,  
OTTAWA, Canada.

Ottawa, February 22, 1961.

187574  
Re: Constitutional Amendments

Dear Mr. Wilson:

Thank you for your letter of February 17th commenting on the revised Constitutional Amendment Act. I have noted the views you have expressed and these will be considered along with the comments that may be received from the other provinces.

Yours truly,

"E.A. Driedger"

Deputy Attorney General.

H.J. Wilson, Esq., Q.C.,  
Deputy Attorney General of Alberta,  
Parliament Buildings,  
Edmonton, Alberta.

OFFICE OF ATTORNEY GENERAL

REGINA, February 22, 1961.

The Honourable E.D. Fulton,  
Q.C., P.C., M.P.,  
Minister of Justice,  
Department of Justice,  
Ottawa, Ontario.

Dear Sir:

Re: Constitutional Conference.

We have been studying the draft Constitutional Amendment Act which was enclosed with Mr. Driedger's letter of February 4.

I am not in a position to advise you at this time as to Saskatchewan's position with respect to the said draft as this whole subject is coming before the Legislature at the end of this week.

When the legislative debate on this matter has been concluded, I will advise you as to our views on the draft Act and with respect to section 91, head 1.

Yours truly,

"R.A. Walker"  
Attorney General.

PROVINCE OF MANITOBA  
LEGISLATIVE COUNSEL  
237 Legislative Building  
Winnipeg

23rd February, 1961.

E.A. Driedger, Esq., Q.C.,  
Deputy Minister of Justice,  
Ottawa, Ontario.

re: Constitutional Conference  
Your File 187574

Dear Mr. Driedger:

I have your letter of February 4th, with enclosures. I have spoken to the Attorney-General about this and he has been anxious to discuss the matter and reply to your letter. However, due to the fact the Legislative Session has begun, it has been quite impossible to find time to deal with the matter at present. I fear, therefore, that, much as we regret it, it will not be possible to reply to your letter for a few weeks. The Attorney-General asked me to write you and advise you as to this.

I can assure you that the matter will be dealt with at the earliest possible moment.

Yours faithfully,

"G.S. Rutherford"

Legislative Counsel.

COPY

T E L E G R A M

VICTORIA BC 27 1120A

E A DRIEDGER

DEPUTY MINISTER OF JUSTICE DEPT OF JUSTICE OTTAWA

PRESENT STAGE OF LEGISLATIVE SITTINGS PREVENTS  
DETAILED EXAMINATION OF PROPOSALS RE BNA ACT STOP  
EXPECT TO FORWARD REPLY BY END OF NEXT MONTH

GILBERT D KENNEDY DEPUTY ATTORNEY GENERAL