

# What Is British Columbia's Position On the Constitution of Canada?

Presented by  
Honourable WILLIAM R. BENNETT  
Premier of British Columbia



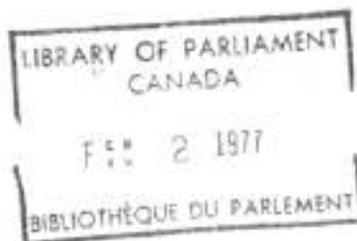
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November 1976 Victoria, British Columbia

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## FOREWORD

The Government of British Columbia is fully committed to the concept of a united Canada and to the basic principles of the Canadian Federation. Canada, one nation, from Atlantic to Pacific, comprised of five regions each with its own strengths and character brought together by common bonds.



To one of the regions, preserving a culture is of paramount concern; to others, unequal economic opportunity is the greatest problem requiring redress; to still other regions, developing a sound and lasting industrial base is of prime importance. The strength of the nation lies in recognizing its diversity and meeting the challenges it brings.

The relative strengths of the regions have dramatically shifted since British Columbia entered Confederation in 1871 and even in the last decade. That is why British Columbia, in the context of the current discussions to "patriate" the B.N.A. Act, calls for certain basic constitutional readjustments to recognize, in constitutional terms, the rightful place which British Columbia now occupies in Canada.

*W. R. Bennett*

*Premier of British Columbia*

## INTRODUCTION

The *British North America Act*, passed by the United Kingdom Parliament in 1867, created the Dominion of Canada by uniting the four original provinces and provides for the addition of other provinces on the same basis. It continues to be Canada's fundamental constitutional document and contains among its provisions the distribution of legislative powers between the two levels of government, a necessary part of any federal state.

While the B.N.A. Act has, by and large, served Canada well over the past 109 years, the absence of an express formula within the Act by which the distribution of powers may be amended has resulted in a degree of constitutional inflexibility and uncertainty that is detrimental to coping with contemporary problems. Beginning with the Dominion-Provincial Conference of 1927 and continuing to the present day, almost continual efforts have been made to arrive at an amending formula and thereby place fully in Canadian hands control over its constitutional development.

## CURRENT DISCUSSIONS

The current discussions were initiated by the Prime Minister in March 1976, at which time he expressed his desire to "patriate" or bring home to Canada from Britain the B.N.A. Act. Three options are put forward to bring this about.

The first option proposed is *simple patriation*. This could be achieved by the Canadian Parliament requesting appropriate legislation by the British Parliament to end its capacity to legislate in any way with respect to Canada and provide that all future amendments to the Canadian Constitution be made in Canada. While the Prime Minister indicated that unanimity of all the provinces would be desirable for this option, he

expressed the view that the Parliament of Canada *could* act without the consent of the provinces because the simple act of patriation does not of itself affect the distribution of powers between the Federal and Provincial Governments.

The second option proposed is *patriation with an amending formula*. The Prime Minister suggested that the amending formula might be a temporary one requiring that amendments to the distribution of powers could only be made with the unanimous consent of Parliament and the Legislatures until another amending formula is agreed upon or, alternatively, the amending formula set out in the *Victoria Charter*, 1971, or some variation thereof.

The third, and more extensive option proposed, is *patriation with an amending formula and certain substantive amendments to the Constitution*.

The ten Premiers of Canada have acted upon the suggestion of the Prime Minister of Canada to consider the options put forward and have deliberated at length on these matters both during the Annual Premiers' Conference at Edmonton in August and at their meeting in Toronto on October 1 and 2, 1976. Positive results were achieved and significant agreements reached among Provincial Premiers during these meetings.<sup>1</sup> For the first time all Premiers agreed that patriation of the Constitution was a desirable objective. Agreement was also obtained on a number of substantive items for constitutional change and still others were discussed. Although all provinces were not able to agree on what an appropriate amending formula should be, British Columbia is optimistic that future discussions will result in agreement. For reasons that will be developed below, British Columbia is of the view that its proposal for an amending formula is the one most likely to be agreed upon as reconciling the various proposals put forward.

<sup>1</sup> For a more detailed list of progress made at these meetings, see Appendix I.

## BRITISH COLUMBIA'S POSITION

First, it is British Columbia's view<sup>2</sup> that patriation ought not to be undertaken without the consent of all the provinces. Even though constitutional convention might permit the Government of Canada to proceed with the first option without the unanimous consent of the provinces, for the Government of Canada to do so would, in British Columbia's view, be unwise. The act of patriation is largely symbolic and ought to be conducive to engendering national unity. Any unilateral move would lead to national disunity and unnecessary divisiveness throughout the country, and therefore be contrary to the aim and purpose of making the *British North America Act* a truly Canadian document. Moreover, if simple patriation is the option which is taken, the Bill to be passed by the British Parliament should contain a provision that until an amending formula is decided upon in Canada, unanimous consent of all the provinces would be necessary to any constitutional change affecting provincial rights or the distribution of powers.

Any consideration of an appropriate amending formula must take full account of the place which British Columbia now occupies in contemporary Canada.

## A RECOGNITION OF TODAY'S REALITIES

In terms of geography and population and any other criteria for growth, the position of British Columbia in Canada has dramatically changed since its entry into Confederation in 1871. Yet, in large measure, British Columbia is afforded to-

day the same degree of importance in constitutional terms as it was in 1871.

In 1871 British Columbia's population was 36,247 or 1 per cent of the total Canadian population. Today the population of British Columbia is 10.8 per cent of the total of Canada, the labour force is 11.2 per cent, the Provincial product is 11.5 per cent, retail sales are 11.8 per cent, and investment in British Columbia is 12.2 per cent of the total of Canada.<sup>3</sup>

Although British Columbia is now the third-largest Province in Canada by almost all growth indices, it is woefully under-represented at the national level. Only 5 per cent of the Senators of Canada are from this Province and there are no Judges on the Supreme Court of Canada from this Province. By contrast, Ontario and Quebec each have 24 per cent of the Senators and each have three of the nine Judges on the Supreme Court.

It is equally true that the increasing importance of the other western provinces is not properly recognized in the Constitution. In 1871 there were no Provinces of Alberta and Saskatchewan at all, Manitoba was little more than postage stamp size, and Newfoundland had not entered Confederation. It is readily apparent, therefore, that the distribution of representation at the national level of 1871 is not appropriate for today. Today the population of Western Canada is 27.1 per cent of the total of Canada, the labour force is 27 per cent, the provincial product is 28 per cent, retail sales are 29.1 per cent, and investment in Western Canada is 33.1 per cent of the total of Canada.

In 1867 the B.N.A. Act quite properly recognized only a three-region Canada—Ontario, Quebec, and the Maritime Provinces. With the subsequent entry into Confederation of British

<sup>2</sup> It is important to note that the constitutional discussions now being conducted are within the context of the three options proposed by the Prime Minister and are not constitutional discussions of an all-embracing nature meant to consider wholesale amendments to the distribution of powers. It is in this limited context that British Columbia has formulated its position. If, at some later date, a more extensive review of the Constitution takes place, British Columbia's proposals would be more comprehensive than in the present context.

<sup>3</sup> For future population projections of Western Canada, by province, see Appendix II.

Columbia, the establishment of the Provinces of Alberta and Saskatchewan in 1905, and the enlargement of Manitoba in 1912, the B.N.A. Act was amended in 1915 to reflect a four-region Canada. British Columbia is now proposing that the regional concept be once more updated to reflect the realities of 1976 by making British Columbia the fifth region. To do so would also strengthen the fourth region comprising the three Prairie Provinces.

It is significant that early in British Columbia's history the area now comprising the Province of British Columbia was contained in four separate political units. The Mainland of British Columbia and Vancouver Island were separate Crown Colonies which united in 1866. The third area was the Stickeen Territory created in 1862 to the north of the then Mainland Colony. The fourth territory was Queen Charlotte Island, which was under Imperial control until 1852 when a separate Imperial Commission was granted to James Douglas as Lieutenant-Governor of Queen Charlotte Island. In 1858, by Imperial Statute, Queen Charlotte Island became part of British Columbia.

The significance of this bit of history is that there is some parallel to the state of affairs that existed on the West Coast in the 1850's to that which existed on the East Coast at that time. The substantial difference is that British Columbia merged all its interests into one political unit before it entered into Confederation in 1871, whereas the Maritime Provinces on the East Coast did not develop in that way. In terms of representation at the Federal level the Atlantic Region has fared much better than British Columbia.

## THE AMENDING FORMULA

In order to reflect today's realities, British Columbia believes that the amending formula for our Constitution ought to reflect the importance of British Columbia and the rest of Western Canada in the Canadian Confederation. It rejects the amending formula contained in the *Victoria*

*Charter* as not properly reflecting those realities. Instead it proposes that British Columbia be treated as a separate region.

The statistics previously set out clearly show that the weight that ought to be given in an amending formula to Western Canada should be approximately one third of the country as a whole. The five-region concept would do this for it would require the approval of each of Ontario, Quebec, two of the three Prairie Provinces, two of the four Atlantic Provinces, and British Columbia for constitutional amendments. The five-region proposal would give the West two of six voices in matters involving constitutional change. Two of six is a reasonable reflection of the importance of the West in today's Canada. On the other hand, the *Victoria Charter* amending formula does not recognize the emergence of the West. It would give the whole of Western Canada only one voice out of five.

British Columbia's proposal on the amending formula represents a compromise point of view to the several amending formula proposals put forward. On the one hand, Alberta proposes a rigid amending formula that would require the unanimous consent of all 11 governments to constitutional change diminishing provincial rights, whereas, on the other hand, the *Victoria Charter* amending formula would give an effective voice to only four provinces, or groups of provinces, and the Federal Government. The British Columbia proposal provides more flexibility than the Alberta proposal and yet retains a measure of stability from frequent change, necessary to a viable Constitution.

Moreover, the regional concept is more able to reflect the strengths and weaknesses of the country, and the various points of view that ought to be brought to bear on the question of constitutional change, than is a purely provincial viewpoint. Finally, the measure of agreement necessary under the five-region concept would approximate the measure of agreement necessary in other federal states. For example, in the United States, three quarters of the states must agree.

The amending formula in any constitution must be a happy balance of flexibility so as to permit the constitution to keep abreast with contemporary needs and yet be sufficiently stable and fixed to provide some measure of constitutional certainty. British Columbia's proposal seeks to strike that balance.

## SUBSTANTIVE CHANGES

The current discussions have included a consideration of various substantive changes to the Constitution that some provinces have viewed as necessary to accompany patriation and an amending formula. British Columbia sees a danger in adding to our Constitution detailed provisions that may lead to differing interpretations in future years. Our Constitution ought to state broad principles cast in ennobling terms and be sufficiently flexible to meet changing needs. Be that as it may, in the context of a consideration of substantive changes to the Constitution, British Columbia will continue to press for the recognition of certain legitimate needs of its own that will have to be met. These are as follows:

(a) *The Senate of Canada*—The Terms of Union of British Columbia's entry into Confederation in 1871 gave British Columbia three Senators out of a total of 77 Senators at that date. With only 1 per cent of the population of Canada, British Columbia could be considered to have had a fair degree of representation. By amendment to the *British North America Act* in 1915, British Columbia's representation was increased from three to six out of a total of 96 Senators. Again, the 1915 adjustments recognized the realities of British Columbia's place in Confederation at that time for the Provincial population in that year was approximately 5.4 per cent of the nation's total.

British Columbia's population is now 10.8 per cent. It has doubled in percentage terms over the rest of Canada since 1915 and the time has come for major adjustments in representation in the

Senate. It is no longer acceptable for the first and second of Canada's provinces to have 24 Senators each whereas the third-largest Province has only six. British Columbia calls for today's realities to be recognized and that this manifestly unfair imbalance be rectified by increasing its representation in the Senate to 12.

Quite apart from the need for more representation from British Columbia in the Senate, there is a need for other Senate reforms to make it a more viable part of the federal law-making process. In most confederations, one of the chief functions of an Upper House at the national level is to ensure that the point of view of the various regions of the federation are properly brought to bear on the federal law-making process. Because of inequitable representation and an inappropriate method of appointment, the Senate of Canada is not performing the role it was intended to have. In the Federal Republic of Germany, the Second Chamber, the Bundesrat, is directly representative of the state governments and has extensive powers of veto over all matters affecting state interests as well as a suspensive power over national matters. In the United States, each state has equal representation in the U.S. Senate. Both of these instances exemplify more effective regional and state representation than is the case in Canada.

British Columbia believes that the role of Senate, the means of appointment to the Senate, and the tenure of appointees ought to be carefully and comprehensively reassessed and constitutional changes made so as to have the regional points of view reflected in the national law-making process.

(b) *The Supreme Court of Canada*—The *Supreme Court Act*, R.S.C. 1970 s-19, is the present federal legislation which governs the Constitution, maintenance, and organization of the Supreme Court of Canada. The only provision in that Act which sets out the requirement for regional representation is that at least three of the Judges shall be appointed from the Bench or the Bar of the Province of Quebec. However, the practice invariably has been for a great many years

that, because Quebec is legally entitled to three Supreme Court Judges, Ontario is likewise entitled to the same number as the other dominant provincial partner in Canada.

Since the 1949 amendments which increased the Court's size to nine, the practice has variably been to have at all times three members of the Court appointed from Quebec, three members from Ontario, one member from the Maritime Provinces, and the remaining two members of the Court from the four western provinces. The last member on the Court from British Columbia was appointed on June 3, 1947, and retired on attaining the age of 75 on September 16, 1962. If past practice is followed, the next western appointee to the Court will be from British Columbia, but not until 1982.

It is no longer acceptable to British Columbia that the first and second largest of Canada's provinces should at all times each have three Judges on the Supreme Court of Canada from those Provinces, whereas the third-largest Province, British Columbia, rarely has one. It is manifestly unfair to British Columbia to only expect one appointment approximately every 35 years, whereas the Provinces of Quebec and Ontario at all times each have three Judges on the Court.

It was quite reasonable in 1875, when the Supreme Court of Canada was established, to have four of the six Judges from the Provinces of Ontario and Quebec. As is stated above, at that date Saskatchewan and Alberta did not exist and Manitoba was very small. The total population of Manitoba, British Columbia, and North West Territories in 1871 was 3 per cent of the total of Canada. It was not surprising, therefore, that the West was only given one seat out of six on the Court.

The map of Canada has dramatically changed since that date. British Columbia believes that those changes ought to be reflected in representa-

tion on the Supreme Court of Canada. It is our proposal that the Court be increased to 10 Judges and that at all times at least one of the Judges be appointed from the Bar or the Bench of the Province of British Columbia, two Judges appointed from among the three Prairie Provinces, three from Ontario, three from Quebec, and one from the Atlantic Provinces.

*(c) Representation on federal bodies—*

There are at the present time a number of federal bodies which have a profound effect in establishing national policy but which are little more than national government institutions rather than being genuinely federal in nature. The following are some, but not all, such institutions:

- Canadian Transport Commission.
- Canadian Radio and Television Commission.
- Canadian Development Corporation.
- Canadian Broadcasting Corporation.
- Bank of Canada.

The decisions which these federal bodies make have a profound effect on the development of the country as a whole and upon provincial priorities. The Bank of Canada is a good example. The preamble of the *Bank of Canada Act* states that "it is desirable to establish a central bank in Canada to regulate credit and currency *in the best interests of the economic life of the nation . . . and generally to promote the economic and financial welfare of the Dominion*". With a mandate to dictate monetary policy for the country as a whole, one would expect some means by which the Provincial Governments could bring their points of view to bear on the decision-making process.

British Columbia proposes, therefore, that the Board of Directors of the Bank of Canada, and the governing body of other significant federal boards and commissions, be appointed by a process involving Provincial Governments as well as the Government of Canada.

## CONCLUSION

British Columbia favours patriation of the B.N.A. Act so as to place in Canadian hands control over its constitutional development. It would prefer patriation to be accompanied by an amending formula, but if an amending formula cannot be agreed to, then patriation must be accompanied by an express safeguard to provide that any amendments to the Constitution of Canada affecting provincial rights would require unanimous approval, until an amending formula is agreed upon.

As to the appropriate amending formula, British Columbia considers that its five-region

proposal reflects today's realities; it is the one that strikes a balance between constitutional flexibility and stability and it constitutes a compromise of the various amending formula proposals now being considered.

Finally, if substantive amendments are to be made to the Constitution at this time, certain basic constitutional readjustments must be made in British Columbia's representation in the Senate, on the Supreme Court of Canada, and Provincial representation on federal boards establishing national policy, so as to redress the constitutional imbalance of 1871 and give British Columbia the rightful place, in constitutional terms, which it now occupies in Canada.

## APPENDIX I

### BRITISH COLUMBIA'S STATEMENT ON THE PREMIERS' CONFERENCE, TORONTO, OCTOBER 1 AND 2, 1976

Premier Bill Bennett, on his return to British Columbia from the Premiers' discussions on the Constitution held in Toronto, expressed satisfaction with the positive results that were achieved and the agreements reached among Provincial Premiers.

The meeting was a historic occasion as it represents the first time that all Premiers agreed that the *British North America Act*, Canada's Constitution, ought to be brought home to Canada.

In addition, a number of items for constitutional change were agreed to. They are as follows:

- (1) A strengthening of jurisdiction of Provincial Governments in the taxation of primary production from lands, mines, minerals, and forests:
- (2) An assurance that the powers of the Federal Government to declare a project "for the general advantage of Canada" be only exercised when the province affected agrees:
- (3) That the creation of new provinces be subject to provincial approval:
- (4) A greater degree of provincial involvement in immigration:
- (5) A confirmation of the language rights for English and French generally along the lines discussed in Victoria in 1971, but without prejudice to the rights of other languages.

The Premiers agreed that there was a definite need for expansion of provincial jurisdiction and involvement in appointments to the Supreme Court of Canada, Senate representation for British Columbia, and the spending powers of the Parliament of Canada.

On the subject of an amending formula, although unanimous agreement was not reached on the subject, the Premier was pleased to report that there is substantial support for British Columbia's five-region concept. "Although we did not reach an agreement on an amending formula, I would point

out that such lack of agreement has been an outstanding issue since 1927 and I am confident that further progress will be made on this subject at a forthcoming meeting with the Prime Minister.

"I made it plain to my fellow Premiers that there must be a recognition of today's realities in Canada so far as British Columbia's position in Confederation is concerned. By almost every growth index such as labour force, population, provincial product, and investment, British Columbia is now the third-largest Province in Canada, yet it is woefully under-represented at the national level.

"In large measure, it is afforded today only the same degree of importance in constitutional terms as it had in 1871.

"British Columbia's proposal on the amending formula represents the best compromise to the extreme position of unanimous consent taken by Alberta, on the one hand, and the amending formula proposed five years ago," the Premier said.

"The strength of Western Canada today is approximately one third of that of Canada as a whole. Our amending formula would give the West two effective voices out of six, whereas the 1971 formula would only provide the West with one out of five—totally unacceptable given today's realities.

"British Columbia has, therefore, achieved real progress in obtaining greater recognition of its present place in Confederation at this conference.

"As Premiers, we have, through comprehensive discussions over a period of two days here in Toronto and earlier discussion during the Premier's Conference in Alberta in August, more than met the suggestion of the Prime Minister of Canada that the Premiers attempt to reach agreement on substantive matters.

"A great deal has been accomplished and the ball is now in the Prime Minister's court," Premier Bill Bennett said.

## APPENDIX II

### POPULATION PROJECTIONS FOR THE WESTERN PROVINCES, 1971-75 ESTIMATES AND 1976-2010 PROJECTIONS

(thousands of persons)

Year	Western Canada				Total	B.C. as per Cent of Total
	B.C.	Alta.	Sask.	Man.		
1971	2,185	1,628	926	988	5,727	38.2
1972	2,247	1,654	916	992	5,809	38.7
1973	2,315	1,683	908	998	5,904	39.2
1974	2,395	1,714	907	1,011	6,027	39.7
1975	2,457	1,768	918	1,019	6,162	39.9
1976	2,481 <sup>1</sup>	1,769 <sup>1</sup>	912 <sup>2</sup>	999 <sup>1</sup>	6,161	40.3
1977	2,545	1,800	910	1,002	6,257	40.7
1978	2,612	1,834	909	1,006	6,361	41.1
1979	2,680	1,869	908	1,010	6,467	41.4
1980	2,750	1,904	907	1,015	6,576	41.8
1981	2,822	1,941	906	1,020	6,689	42.2
1982	2,894	1,979	906	1,025	6,804	42.5
1983	2,967	2,016	906	1,030	6,919	42.9
1984	3,041	2,055	906	1,035	7,037	43.2
1985	3,114	2,093	905	1,040	7,152	43.5
1986	3,188	2,130	905	1,045	7,268	43.9
1987	3,261	2,168	904	1,049	7,382	44.2
1988	3,334	2,205	902	1,053	7,494	44.5
1989	3,406	2,241	900	1,056	7,603	44.8
1990	3,478	2,277	898	1,059	7,712	45.1
1991	3,549	2,312	895	1,062	7,818	45.4
1992	3,620	2,346	891	1,063	7,920	45.7
1993	3,690	2,379	887	1,065	8,021	46.0
1994	3,760	2,412	883	1,066	8,121	46.3
1995	3,830	2,445	878	1,066	8,219	46.6
1996	3,899	2,478	872	1,066	8,315	46.9
1997	3,970	2,510	867	1,067	8,414	47.2
1998	4,040	2,542	861	1,067	8,510	47.5
1999	4,111	2,575	854	1,066	8,606	47.8
2000	4,183	2,607	848	1,066	8,704	48.1
2001	4,255	2,640	841	1,066	8,802	48.3
2002	4,333	2,675	836	1,066	8,910	48.6
2003	4,412	2,711	831	1,065	9,019	48.9
2004	4,493	2,747	825	1,065	9,130	49.2
2005	4,575	2,784	820	1,065	9,244	49.5
2006	4,659	2,821	815	1,064	9,359	49.8
2007	4,744	2,859	810	1,064	9,477	50.1
2008	4,831	2,897	805	1,063	9,596	50.3
2009	4,920	2,936	800	1,062	9,718	50.6
2010	5,010	2,975	795	1,061	9,841	50.9

<sup>1</sup> Projection B.    <sup>2</sup> Projection D.

Source: Statistics Canada *Population Projections for Canada and the Provinces 1972-2001*, Catalogue 91-514.

NOTE—1971-75 Actual Estimates; 1976-2001 Statistics Canada Projections; 2002-2010 Projections by Statistics Division, Department of Economic Development.