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19th ANNUAL PREMIERS' CONFERENCE

# THE CONSTITUTION OF CANADA

## A Background Paper

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This paper has been compiled by Saskatchewan's Office of Intergovernmental Affairs. The commentary does not necessarily reflect the official view of any government, nor does the paper purport to be comprehensive in its review of recent constitutional proposals.

This paper seeks to give a general description of the existing constitution of Canada, and to put the present proposals into their proper perspective, in particular in relation to previous constitutional discussions.

## THE CONSTITUTION OF CANADA

A constitution may be defined as the fundamental law of a state, setting out the basic principles upon which the government is founded, regulating the exercise of sovereign powers, and directing to what bodies and persons those powers shall be confided.

The Canadian "Constitution" is not to be found in any one document. The British North America Act of 1867 (an Act of the Parliament of the United Kingdom) brought the Canadian federation into existence on July 1 of that year. But the B.N.A. Act of 1867, and later Acts amending it, do not constitute the whole of the Canadian Constitution. Included in the Constitution are other Acts of the United Kingdom and Canadian Parliaments, constitutional custom and usage, common law principles, certain Orders-in-Council, the rules and privileges of Parliament, and judicial decisions on constitutional matters. Some of these elements of our constitution are "unwritten", in that there is no one authoritative statement of them, and are often not amenable to precise definition.

The B.N.A. Act itself incorporates this wider body of constitutional doctrine in its reference, in the Preamble, to a federal union with a "constitution similar in Principle to that of the United Kingdom".

While the Act of 1867 does not purport to be an exhaustive written constitution, it does nevertheless set out many of the vital rules respecting the functioning of government in Canada -- the division of legislative powers between the federal government and the provinces, the principles of the executive and the judiciary, provision for the Parliament

of Canada and for provincial legislatures, as well as numerous items related to transition to the newly created federation. Just as noteworthy are the matters not expressly dealt with in the B.N.A. Act -- general statements of aims of the federation, fundamental rights and freedoms, the system of responsible government and constitutional monarchy, federal-provincial co-operation and agreements, and an entrenched Supreme Court.

FEDERATION AND THE DIVISION OF POWERS

In the Canadian federation it is now a settled constitutional principle that power to make laws is, subject to a few exceptions not relevant here, exhaustively divided between the Parliament of Canada and the legislatures of the provinces. (One of the usual features of a federation is that each order of government exercises power in its area of jurisdiction without being subordinate or inferior to the other. To some extent this feature is not fully present in Canada because of the federal powers to disallow or reserve provincial legislation.)

The division of power in the Canadian constitution is set out, primarily, in sections 91 and 92 of the B.N.A. Act. The division of powers is an essential part of Canada's system of government, and serves to distinguish a federation from a unitary state in which all power ultimately reposes in one government. Which powers are allotted to which order of government affects the balance between the two orders of government and has an important impact on the daily lives of every individual in the state.

In cases of controversy over the division of powers, the courts are called upon to interpret the relevant constitut provisions.

The federal government does not intend to deal with the division of powers in "Phase I" of its proposed course of action for constitutional reform; it would leave this matter open for discussion at a later time ("Phase II"). That is not

to say, however, that there have not been proposals with respect to this subject. A summary of some important recent proposals on this topic is attached.

ENTRENCHED RIGHTS AND FREEDOMS

The B.N.A. Act is, with a few exceptions, such as sections 93 and 133, silent on the question of constitutionally guaranteed rights. There are federal and provincial Acts dealing with rights and freedoms, as well as elements in the unwritten Constitution and in the common law dealing with these matters, but they do not, generally speaking, amount to entrenched rights of such a nature that they may not be superseded by the exercise of legislative power. Entrenched rights, by their nature, imply a limitation of power to legislate which will be overseen by the judiciary. The present federal proposals include a Charter of Rights and Freedoms covering political, legal and language rights. Somewhat similar proposals have been made in the past, most notably in the Victoria Charter of 1971. Commentators on these subjects have mounted substantial arguments both for and against entrenched bills of rights.

FEDERAL INSTITUTIONS

The B.N.A. Act in Section 9 vests the executive government of Canada in the Queen and provides in sections 10 to 57 for a Governor General, a Privy Council and a Parliament consisting of the Senate and House of Commons. The details of the monarchy and other institutions are not fully spelled out in the Act itself, but are contained in other parts of the Constitution.

The present federal proposals would change the status and role of the Queen and constitute the Governor General as the repository of executive government, on behalf of and in the name of the Queen. The present Senate would be replaced by a "House of the Federation", selected in part by provincial

legislatures and in part by the federal government. The new upper house would have somewhat different powers from the Senate; the principle of regional representation in the upper house would be retained.

Further, certain constitutional conventions respecting the Cabinet would be codified.

These proposals have not previously been the subject of substantial intergovernmental discussion.

The Senate was intended, by the Fathers of Confederation, to be a safeguard for regional interests; that is reflected in the provision for fixed representation from the regions. For that reason, some commentators have argued that the agreement of the provinces would be required before changes could be made to the Senate. Similarly, any change in the role of the monarchy, it is argued, would directly affect the provinces and their internal constitutions and could, therefore, be made only with their concurrence. (The present procedure for amending the constitution is dealt with below.)

THE SUPREME COURT

The Supreme Court of Canada is now constituted under an Act of Parliament pursuant to the authority given to Parliament in section 101 of the B.N.A. Act to establish a General Court of Appeal for Canada. Parliament established the Court in 1876, but it was not until 1949 that it became the court of last resort in Canada. Cases prior to 1949 could be appealed to the Judicial Committee of the Privy Council in the United Kingdom. With the abolition of appeals to the Privy Council, the Supreme Court became the final arbiter of constitutional cases involving, among other things, the division of powers between the federal government and the provinces. For that reason, it has been suggested that the provinces should have a substantial role in the process of appointment

to the Court.

The Supreme Court Act now provides for nine judges, three of whom must by law be appointed from Quebec. (The practice has developed of appointing three judges from Ontario, two from the Western provinces and one from the Atlantic provinces.) The present federal proposals would expand the Court to eleven judges, with four from Quebec and the rest from the other regions. An elaborate procedure is proposed for provincial involvement in the appointment process, and for affirmation of appointments by the House of the Federation.

It may be noted that the entrenchment of rights and freedoms proposed by the federal government, would substantially enhance the role of the Supreme Court as final arbiter on constitutional matters.

PATRIATION AND AN AMENDING FORMULA

The B.N.A. Act, 1867, did not contain any provision for the amendment of the Constitution other than section 91(1), which allows a provincial legislature to amend the provincial constitution except as regards the office of Lieutenant Governor. In 1949 the U.K. Parliament, at Canada's request, passed an amendment to the Act allowing the Canadian Parliament to amend the Constitution, except for those parts relating to the distribution of powers, the rights of the legislature of a province, certain rights in relation to denominational schooling, use of language, and certain requirements for sittings of the House of Commons. In those cases, amendments would require legislation by the U.K. Parliament.

The constitutional convention that has developed for such amendments is summarized in the following extract from The Amendment of the Constitution of Canada, a federal government paper published in 1965, under the name of the Honourable Guy Favreau, then Minister of Justice:

*The first general principle* that emerges in the foregoing resume is that although an enactment by the United Kingdom is necessary to amend the British North America Act, such action is taken only upon formal request from Canada. No Act of the United Kingdom Parliament affecting Canada is therefore passed unless it is requested and consented to by Canada. Conversely, every amendment requested by Canada in the past has been enacted.

*The second general principle* is that the sanction of Parliament is required for a request to the British Parliament for an amendment to the British North America Act. This principle was established early in the history of Canada's constitutional amendments, and has not been violated since 1895. The procedure invariably is to seek amendments by a joint Address of the Canadian House of Commons and Senate to the Crown.

*The third general principle* is that no amendment to Canada's Constitution will be made by the British Parliament merely upon the request of a Canadian province. A number of attempts to secure such amendments have been made, but none has been successful. The first such attempt was made as early as 1868, by a province which was at that time dissatisfied with the terms of Confederation. This was followed by other attempts in 1869, 1874 and 1887. The British Government refused in all cases to act on provincial government representations on the grounds that it should not intervene in the affairs of Canada except at the request of the federal government representing all of Canada.

*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. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definition.

There have been five instances - 1907, 1940, 1951, 1960 and 1964 - of federal consultation with all provinces on matters of direct concern to all of them. There has been only one instance up to the present time in which an amendment was sought after consultation with only those provinces directly affected by it. This was the amendment of 1930, which transferred to the Western provinces natural resources that had been under the control of the federal government since their admission to Confederation. There have been ten instances [1871, 1875, 1886, 1895, 1915, 1916, 1943, 1946, 1949 and 1949(2)] of amendments to the Constitution without prior consultation with the provinces on matters that the federal government considered were of exclusive federal concern. In the last four of these, one or two provinces protested that federal-provincial consultations should have taken place prior to action by Parliament.

Provincial views were not sought for a 1965 amendment respecting the age of retirement for senators, nor was there consultation with the provinces on a recent amendment increasing the size of the House of Commons.

"Patriation" of the Constitution - making the constitution a Canadian document, not requiring intervention by the United Kingdom for its amendment - requires agreement on a formula for amending it by action of Canada's federal-provincial governments. There have been a number of attempts over the past fifty years to find an acceptable amending formula, beginning with a Federal-Provincial Conference in 1927. Governments have not yet been able to reach agreement on a formula that would combine the necessary protection for all provinces, in areas of critical importance, with the desired degree of flexibility.

Agreement was almost reached at the time of the Victoria Conference in 1971, and the Victoria formula formed the basis for the federal proposal of 1975. In 1976 the provincial Premiers agreed that patriation should not be undertaken without agreement on a list of matters relating to the institutions of federalism, the division of powers, and other issues.

The most recent federal proposal does not deal directly with either patriation or the amending formula.

## APPENDIX

## CHRONOLOGY OF SOME IMPORTANT CONSTITUTIONAL DEVELOPMENTS, 1971 to 1978

### VICTORIA CHARTER, 1971

Agreed to by all provinces except Quebec and Saskatchewan. (An election campaign and change of government in Saskatchewan interrupted that province's involvement in the negotiations.)

1. General Amending Formula: Amendment would require approval of Commons and Senate and a majority of the provinces, including:
   (a) every province which at any time has had 25% of the population of Canada;
   (b) two of the Atlantic provinces;
   (c) two of the Western provinces with at least 50% of western population.

2. Regional Disparities: Declaration of intent (not binding) which asserts commitment to reducing inequalities.

3. Distribution of Powers: Avoided, though provision made for provincial consultation in Health and Welfare legislation.

4. Language Rights: Similar to the Official Languages Act.

5. Senate: No new proposal.

6. Supreme Court: Appointment procedure requiring Attorney General of Canada to make "all reasonable efforts" to reach agreement with Attorney General for the relevant Province in the choice of an individual for the court. In the absence of a reply within 30 days, the Attorney General for Canada would select unilaterally. Should agreement be impossible, mechanism for a nominating committee is provided. The only regional stipulation is that three judges must be from Quebec.

THRONE SPEECH, OCTOBER 2, 1974 -- MR. TRUDEAU

Indicating intention to resume constitutional talks: "I am confident that the people of Canada will agree with whatever action is required to settle this question once and for all."

The subject was raised again at a dinner for First Ministers, which was followed by Mr. Trudeau's letter of April 19, 1975, suggesting that governments proceed with patriation on the basis of the Victoria amending formula.

COMMUNIQUE OF ST. JOHN'S PREMIERS' CONFERENCE, AUGUST, 1975

> The Premiers felt that (patriation) was a desirable objective and felt that the issue should be dealt with in the context of a general review of the distribution of powers, control of resources, duplication of programs and other related matters.

This was a clear indication by Premiers that they were prepared to proceed, but wished to include a number of substantive concerns as part of the discussions.

LETTER OF MARCH 31, 1976 -- MR. TRUDEAU

Implied that Premiers had given a commitment on patriation with amending formula and no "substantive changes". Three options presented:

1. Patriation alone.
2. Patriation with Victoria amending formula, perhaps with modifications for Western provinces.
3. Patriation with Victoria amending formula and other issues, embodied in a "Draft Proclamation" enclosed.

The "Draft Proclamation" included the following:

(a) Preamble

(b) Part I - Amending Formula (Victoria Charter)

(c) Part II - Supreme Court Provisions (Victoria Charter)

(d) Part III - Language Rights (modified Victoria Charter)

(e) Part IV - Guarantee designed to protect French language

and culture against adverse action by Parliament (new article)

(f) Part V - Regional Disparities (similar to Victoria Charter)

(g) Part VI - Federal-Provincial Agreements (new article)

WESTERN PREMIERS' CONFERENCE, APRIL 1976

1. Decided to defer discussion on amending formula and other aspects of the Prime Minister's proposal.

2. Set up Western Premiers' Task Force on Constitutional Trends which has so far issued two reports (May 1977 and April 1978).

PREMIERS' MEETINGS, AUGUST 1976 (EDMONTON AND BANFF) and OCTOBER 1976 (TORONTO)

The Premiers in 1976 reached a number of agreements, as reported in Premier Lougheed's letter to the Prime Minister, October 14, 1976.

1. Patriation desirable.

2. Stipulations:

   (a) greater provincial involvement in immigration;

   (b) confirmation of language rights on lines of Victoria;

   (c) strengthen provincial jurisdiction in taxation of natural resources;

   (d) declaratory power to be exercised only when province concurs;

   (e) constitutional provision for an annual Conference of First Ministers;

   (f) creation of new provinces subject to amending formula consensus.

3. Victoria amending formula acceptable to all except Alberta and British Columbia.

4. Saw definite need for expansion of provincial jurisdiction, and disussions with federal government, in areas of:

- Culture
- Communications
- Supreme Court
- Spending Power
- Senate Representation
- Regional Disparities and Equalization.

TRUDEAU TELEX, JANUARY 20, 1977

1. Prime Minister said he was prepared to embark on extensive constitutional review, if the Premiers so wished.

2. Included a revised Draft Proclamation which met some points made in Premier Lougheed's letter, but avoided matters relating to distribution of powers.

| | Premiers | Prime Minister's Response |
|---|---|---|
| 1. | Amending Formula - 8 provinces accept, but not B.C. or Alberta | Victoria Formula, but Western provinces may choose Atlantic formula |
| 2. | Immigration - greater provincial involvement | Consultation through joint commission |
| 3. | Language Rights - on Victoria lines | Accepted |
| 4. | Resource Taxation - greater provincial jurisdiction | No (distribution of powers) |
| 5. | Declaratory Power - only with provincial concurrence | Consultation |
| 6. | Annual First Ministers' Conference | Accepted |
| 7. | Creation of New Provinces - in accordance with amending formula | Consultation |
| 8. | Culture - greater provincial control | Consultation |
| 9. | Communications - greater provincial control | Consultation |
| 10. | Supreme Court - greater provincial role in appointments | Possibility of agreement |
| 11. | Federal Spending Power - subject to provincial concurrence | No (distribution of po |
| 12. | Senate - increased B.C. representation | Accepted |
| 13. | Regional Disparities and Equalization | New draft same as previou |

CANADA WEST FOUNDATION DISCUSSION PAPER "ALTERNATIVES", MARCH 1978

1. House of Provinces: Similar to Ontario Advisory proposal. "Ordinary" legislation subject only to delay by this House, whereas legislation about grants, provincial proprietary interests, etc., subject to veto. A joint session of both Houses to resolve conflict. Special Quebec veto for linguistic and cultural legislation.

2. Supreme Court: 15 judges -- 6 of whom would comprise a constitutional court and the remaining 8 the regular appeal court, the Chief Justice being Chairman of each.

3. Division of Powers: Same as B.N.A. Act but transportation, communication, banking, education, health and social welfare to be concurrent powers.

4. Amending Formula: Same as Victoria, except each province with more than 20% of total population now or in the future is to have a veto. In case of deadlock in a particular region a referendum in that region might be called.

5. Provincial Constitutions: Lieutenant Governors to be appointed by Prime Minister and ratified by a majority of legislature of province concerned. Provinces to appoint judges to provincial courts.

6. Abolition of federal powers of reservation and disallowance.

FIRST REPORT OF ONTARIO ADVISORY COMMITTEE ON CONFEDERATION, APRIL 1978

This report supported the principle of a strong central government, with provision for consultation with the provinces. The main proposals were:

1. House of Provinces: Members would be appointed at the pleasure of the Lieutenant Governor in Council. They would be chosen so as to reflect geographic and population criteria. Members of the provincial governments could be

assigned to participate in debates. Powers to include suspensive veto for one year, approval of appointment of judges to Supreme Court and federal regulatory bodies.

2. Supreme Court: 9 judges -- 3 from Quebec. House of Provinces to approve appointments.

3. Fundamental Rights: As in Victoria. An emergency power applicable for six months at a time before review.

4. Language Rights: Constitutional entrenchment. Education in either English or French where numbers warrant.

5. Amending Formula: As in Victoria Charter.