

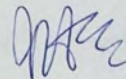
CONFIDENTIAL

October 23, 1978

MEMORANDUM FOR THE PRIME MINISTER

British Columbia Constitutional Proposals

-- Attached is a summary I have had prepared of the British Columbia papers. The first page and a half is a point-form summary of the major recommendations. The pages following that are brief condensations of each booklet (approximately one page for each of the nine B.C. booklets) using the language and arguments of the original so that the tone and quality of the B.C. work is apparent. You may find this of interest. The B.C. material is by far the most important contribution made yet by any province to the constitutional debate.



F.A.G. Carter

c.c. Honourable Marc Lalonde

Peter S. Jull/JV

- legislative flexibility, adaptability and supremacy should not be infringed by the entrenching of constitutional rights
- parallel federal and provincial legislation on rights should be put in place, but as ordinary statutes easy of amendment
- undesirable to leave important decisions to non-accountable appointed judiciary

Summary of Key Recommendations in BC Constitutional Papers

(Succeeding pages contain brief condensations of the nine BC papers, using the wording and argumentation of those papers to preserve their tone.)

Towards a Revised Constitution for Canada

- changes to federal institutions and distribution of powers should be considered simultaneously
- the Constitution should not be comprehensive or try to include all the elements of Canadian practice
- the Constitution should not be subject to "overstuffing" in an attempt to regulate too many problems better left to other means of resolution
- BC wants a stronger role in the Canadian federation

British Columbia: Canada's Pacific Region

- BC is unique economically, geographically, historically, etc. and should be regarded as a distinct region separate from the Prairies

Reform of the Canadian Senate

- all Senators to be appointed by provincial governments from among provincial legislators
- each of five regions (including BC as one region) to have equal number of Senators
- Senate to have absolute veto on various matters of concern to provinces, and to confirm or deny appointments to various federal boards, commissions and the Supreme Court, etc.
- Senate to have suspensive veto for other matters

Reform of the Supreme Court of Canada

- Constitution should provide for Court
- judges from each of five regions, for total panel of eleven
- Court to be final appellate court on all constitutional and non-constitutional matters and all federal and provincial statutes

Improved Instruments for Federal-Provincial Relations

- annual First Ministers conferences to be served by permanent officials committee to ensure follow-up, etc.
- much greater structuring of consultative and committee processes between governments, with more predictable and regulated provincial input to agendas, timing, chairmanship

A Bill of Rights and the Constitution of Canada

- legislative flexibility, adaptability and supremacy should not be infringed by the entrenching of constitutional rights
- parallel federal and provincial legislation on rights should be put in place, but as ordinary statutes easy of amendment
- undesirable to leave important decisions to non-accountable appointed judiciary

### Language Rights and the Constitution of Canada

- language rights should not be entrenched but left to provincial legislatures for action; present BNA Act provisions to be retained

### The Distribution of Legislative Powers

- constraints sought on federal declaratory, spending and emergency powers
- shared federal and provincial residuary power, depending on national or local interest
- more flexibility in constitution by possible use of concurrent powers (with paramountcy assigned to one level of government), delegation of powers and provincial administration of federal laws
- acceptance of provincial or regional redistribution for equalising public services, to be managed by federal government
- universal access to taxation fields by both levels of government

### Amendment of the Constitution of Canada

- federal government should not determine what is or is not a matter of provincial interest for amendment purposes
- subject matters to be amendable by action of the level of government concerned, or by the specific jurisdiction(s) involved
- reconstituted Senate à la BC to be forum for regional/provincial consensus on amendments rather than resolution of provincial legislatures

"Changes to the central institutions of federalism, which is a subject contained within phase one, interact with and only take on their full meaning if the distribution of powers between the two levels of government (a phase two matter) is clearly known." Both "institutional and jurisdictional changes" should proceed simultaneously.

BC does not agree with making the Constitution a comprehensive document which codifies the many constitutional elements now scattered in other statutes, Orders in Council, customs and practice.

BC argues against "Constitutional 'Overstuffing'" and says "we must guard against the tendency to put too much in the Constitution as if such a course would be the panacea for all the country's ills. There is no basis for believing that the constitution-makers of today will prove to be wiser than the legislators of tomorrow."

### Paper No. 2 - British Columbia: Canada's Pacific Region

This paper quickly outlines the distinctive, Pacific-oriented history of BC. The geography, economy and social setting of BC are also unique.

BC has the second largest population of the four western provinces; it is expected to increase its share of the Canadian population.

It "is important for differing regional views to be adequately represented at the federal level."

Main points in British Columbia's Constitutional Proposals

Paper No. 1 - Towards a Revised Constitution for Canada

"The traditional role of the monarchy is essential to the functioning of (Canada's) system of responsible government and the Government of British Columbia is opposed to any move that would, in any way, diminish that role."

"Although British Columbia is committed to the federal form of government it is dissatisfied with the importance given to British Columbia within our present federal system."

"Dissatisfaction" with Canadian federalism is neither only recent nor limited to Quebec. Not "minor tinkering" is needed, such as a few more Senate seats or some federal administrative decentralisation, but "major surgery".

BC puts forwards its proposals in keeping with the invitation of the White Paper (A Time for Action) to both levels of government to contribute to the ongoing debate.

BC feels "considerable regret" that there was "no prior consultation" with the provinces by Ottawa before putting forward its proposals. However, BC now looks forward to a "genuine process of negotiation and consultation" following assurances in the Prime Minister's letter of July 10 to Premier Bennett. However, "it is British Columbia's view that a number of the more significant subject matters contained within phase one are simply beyond the scope of those matters on which the federal government can proceed unilaterally." The process of renewal of the federation should be "carried on by a process that is conducive to engendering national unity. Any unilateral move would lead to further disunity and unnecessary divisiveness throughout the country and the process would, therefore, be self-defeating."

"Changes to the central institutions of federalism, which is a subject contained within phase one, interact with and only take on their full meaning if the distribution of powers between the two levels of government (a phase two matter) is clearly known." Both "institutional and jurisdictional changes" should proceed simultaneously.

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Paper No. 2 - British Columbia: Canada's Pacific Region

This paper quickly outlines the distinctive, Pacific-oriented history of BC. The geography, economy and social setting of BC are also unique.

BC now has nearly 40% of the population of the four western provinces; it is expected to increase its share of the Canadian population.

It "is important for differing regional views to be adequately represented at the federal level."

Past BC dissatisfactions in federal-provincial relations are very generally outlined. Some recent issues are also enumerated -

problems involving maritime boundaries, fishing disputes, harbour development and ocean shipping;

tariffs;

freight rates; and

natural resources -

and the differences between BC and Prairie regional interests highlighted.

"Unless more appropriate or restructured central government institutions for expression of Pacific regional interests are put in place, the traditional sense of alienation from the rest of Canada felt by British Columbians will not be overcome and Canada, and British Columbia, will be the worse because of it."

Paper No. 3 - Reform of the Canadian Senate

"Canada is the only federation in the world in which appointment to the second chamber is made by the central government."

"By reforming the role, the appointment process, and the basis of representation of the Senate, that body could become an effective instrument in representing provincial interests in the federal law-making process - the task originally conceived for the Senate by the Fathers of Confederation."

"In a federal system (an) important function of (a second chamber) is the representation in the national parliament of regional interests." A "reformed Senate could contribute to the solution of many of the problems afflicting Canadian federalism today, particularly those problems flowing from the feelings of alienation held by many Canadians in what Peter Newman has called 'Outer Canada'."

"Although others, in their discussions of constitutional reform, seem to focus on the decentralization of powers as a solution, the Government of British Columbia considers that reform of federal institutions is a more pressing matter."

"Federal appointment of Senators has robbed the Senate of any legitimacy it might otherwise have had as the representative of provincial interests", even though such representation was the main rationale for creation of the Senate.

The long years of Liberal government in Ottawa have particularly skewed the composition and tone of the Senate, the more as other parties hold office in most provinces.

Senators are "unlikely" to "be either particularly attuned to or sympathetic with many of the progressive developments taking place in their home provinces."

"To allow the central government to set important national policy uninformed by and unrestrained by the different regions in the country is to encourage the creation of laws which are inclined to take account of, and therefore satisfy, the needs of only the largest region in the country or of those regions in closest proximity to the central government."

"Unfortunately, in British Columbia's view are the current federal government proposals to reconstitute the Senate as

the House of the Federation. The appointment process envisaged in that proposal will not result in the regional interests being represented. What will result will be a myriad of allegiances along party lines."

Party discipline prevents MPs from adequately representing their regions. And "for many years now Western Canada has been underrepresented in the Cabinet, a fact which has no doubt contributed significantly to the feelings of alienation which have taken such deep root in the West."

The specific proposals of BC are as follows:

- (1) The Senate should not be abolished. It should be substantially altered.
- (2) The primary purpose of the Senate should be to institutionalize provincial or regional participation in the national law-making process.
- (3) The secondary purpose of the Senate should be to review legislation enacted by the House of Commons.
- (4) There should be equal regional representation in the Senate from each of the five regions of Canada: Atlantic, Quebec, Ontario, Prairie, and Pacific.
- (5) Senate members should be appointed by and removed by the provincial governments. The leading Senator from each province would be a provincial Cabinet Minister. There should not be any restrictions on the provincial governments in relation to the appointment of all other Senators.
- (6) The powers of the Senate should be divided into two categories. In relation to a carefully limited list of subject matters which are also of crucial importance to the provinces (Category A) the Senate would exercise an absolute veto. These would include:
  - (a) Appointments to the Supreme Court of Canada.
  - (b) Appointments to major Crown agencies and federal commissions and administrative tribunals such as the Bank of Canada, CBC, CTC and CRTC.
  - (c) Amendments to the Constitution in respect of some of those subject matters currently covered by section 91(1) of the BNA Act.
  - (d) Amendments to the Constitution in relation to all those subject matters not covered by the present section 92(1) and an adjusted section 91(1) of the BNA Act.
  - (e) The creation of federal laws to be administered by the provinces.
  - (f) The ratification of a declaration by the House of Commons pursuant to section 92(10)(c) of the BNA Act.
  - (g) Approval of the use of the federal government's spending power in areas of provincial jurisdiction.
- (7) The Senate would exercise a suspensive veto in respect of all other subject matters within the jurisdiction of the federal government (Category B). This veto could be overridden by the Commons passing the same law again at its next session or after three months have elapsed, whichever comes first.
- (8) The defeat in the Senate of a government bill would not undermine the authority of the governing party in the House of Commons.
- (9) In relation to Category A matters, the Senator who is a provincial Cabinet Minister

- would cast a bloc-vote for that province's Senators.
- (10) In relation to Category B matters, all Senators would cast their vote on their own behalf as free agents and not under instruction from provincial governments.

Paper No. 4 - Reform of the Supreme Court of Canada

The Supreme Court has become perceived as a much more powerful agent in public policy than previously.

"Throughout the 1960's the operation of Pearsonian co-operative federalism kept almost every potential constitutional issue out of the courts. But, after 1968, the combination of Prime Minister Trudeau's more rigid approach to federalism and the growth of expertise, confidence - and power - in the provinces has meant that it has not been possible to work out, on a co-operative intergovernmental basis, an increasing number of federal-provincial issues. Accordingly, in recent years (particularly the last three) a large number of important federal-provincial issues have found their way to the Supreme Court of Canada."

Also, since 1974 the Supreme Court has been much more accessible. So, "the convergence of these developments has been a great increase in the volume of constitutional cases." Now, "fundamental federal-provincial issues...are being resolved by an institution not in the mainstream of the political process."

The "essence of provincial criticism of the Supreme Court is that it is an institution whose very existence, as well as its composition and jurisdiction, are entirely dependent on the federal government. The provinces ask: how can a Court subject to these constraints fairly fulfill its role as impartial umpire of the Federal system?"

The "federal government has not been entirely insensitive to these criticisms", and has shown "a willingness to provide for the Court in the Constitution, a willingness to allow a limited and secondary provincial role in appointments and, generally, an unwillingness to narrow the jurisdiction of the Court."

"There are those who contend that the fact that the Court is dependent on ordinary federal legislation is irrelevant because the principle of judicial independence results in the Court not being dependent on either level of government, including the level that creates it. But in a federal society public perceptions are just as important as legal niceties. Although the principle of judicial independence does guarantee the impartiality of the Court in fact, in the public mind its impartiality is called in question if its very existence is dependent on ordinary federal or, for that matter, ordinary provincial legislation. It is instructive to note that other countries have recognized this fact - indeed the practice in all other federations is to provide for the Court in the Constitution."

BC rejects the "European" notion, espoused by "most French Canadian academics", of a separate constitutional court.

"The Government of British Columbia recommends:

- (1) The existence, composition and jurisdiction of the Supreme Court of Canada should be provided for in the Constitution so that these attributes of the Court will not be subject to unilateral change by either level of government.
- (2) There should be a three-stage procedure for

appointments to the Supreme Court of Canada:

- (a) Consultation between the federal government and the government of the province to decide upon the proposed nominee;
  - (b) Nomination by the Federal Government;
  - (c) Confirmation by a reconstituted Senate.
- (3) The Supreme Court of Canada should be composed of eleven members. Membership should be based primarily on merit but should be drawn from all the five regions of Canada.
  - (4) The Supreme Court of Canada should continue to exercise final appellate jurisdiction in constitutional and nonconstitutional cases.
  - (5) The Supreme Court of Canada should continue to exercise final appellate jurisdiction in relation to both federal statutes and provincial statutes.

Paper No. 5 - Improved Instruments for Federal-Provincial Relations

"In Canada, the need for intergovernmental co-operation has never been greater. With the attention of the country focused on the major problems of the economy and regional alienation, it has become more obvious that accommodation of regional realities will require improvements in the area of federal-provincial relations."

"There have been many attempts over the years to adapt the practice of federalism to the challenges of growing interdependence among governments in Canada. Too often changes have been piece-meal and short-term, with little regard for long-term objectives and priorities. The result has been that effective consultative processes have been lacking. A rather nebulous clutter of committees has grown up, often without consistent objectives or formal organization. There has been little attention paid to co-ordinating the activities of the vast network of federal-provincial meetings and conferences that take place each year. It is for these reasons, that the Province of British Columbia has focused on this important subject as part of the constitutional review process."

"While...problems are fundamental to any system of inter-governmental activity, there are a number of basic weaknesses more particular to Canada. One set of difficulties arises from the administrative details. In most cases, the federal government has assumed the responsibility of calling meetings, deciding on dates, developing agendas, chairing the proceedings, and initiating follow-up procedures. The provinces have no means of ensuring that meetings are held as desired. Consultation, in some cases, has taken place after, rather than before the introduction of federal legislation to the House of Commons. The federal government has not always felt an obligation to consult with the provinces on policies, which although technically not in an area of concurrent jurisdiction, affect the provinces and their interests. Even when consultation occurs, no means exist whereby governments are obliged to accept or be influenced by the results of intergovernmental consultation."

The "Government of British Columbia has concluded that the basic problems of existing consultative forums are ones of structure and support. The mechanisms for consultation are available. In many cases, the opportunity for consultation is available. But, in many cases, the opportunity for consultation and input are not efficiently utilized due to the lack of systematic organization and procedures. Consultative forums have been established in Canada in response to short-term demands with little concern for co-ordination, systematic procedures or long-range needs." Thus, "the present system has developed as a series of ad

hoc responses with no formal structure or continuity." "The complexities of modern government in a country like Canada, make more formal processes a basic necessity of good government."

"Intergovernmental relations may be made more effective through a greater structuring of the mechanisms to allow for co-ordination of effort and to avoid the duplication of activities. Set procedures should be outlined for the scheduling and frequency of discussion including the formulation of agendas and the selection of conference chairman. Moreover increased efforts must be made to monitor the outcome of such discussions and agreements."

"It is recommended that this Conference (of First Ministers) be scheduled during a specified period each year. Its purpose would be two-fold. First it would have the responsibility of dealing in a broad perspective with current issues of national importance. Secondly, it would turn attention to long-range planning and priority-setting in policy areas of mutual concern. The agenda for these First Ministers' Conferences should be ratified by First Ministers based upon the recommendation of a permanent committee of officials".

"In order to facilitate planning for and the follow-up to Conferences of First Ministers, federal and provincial governments should establish a permanent Federal-Provincial Liaison Committee on National Policy. Such a committee should be composed of one senior official designated by the First Minister of each of the eleven senior governments in Canada. Considerable familiarity with the broad range of policy issues on the part of each committee member would serve to increase the effectiveness of this committee. The Committee would be responsible for setting the agenda for the First Ministers' Conference; co-ordination of discussions, reports and preparatory work; the co-ordination of follow-up work and; the monitoring of the progress between conferences on new developments and implementation."

A BC-style reformed Senate would also contribute to better federal-provincial consultation, by encouraging the federal government to seek early agreement on its proposals, etc.

Paper No. 6 - A Bill of Rights and the Constitution of Canada

"According to the preamble to the British North America Act of 1867, Canada was to have a constitution 'similar in principle to that of the United Kingdom'. The central feature of the constitution of the United Kingdom has been the supremacy of Parliament in the sense of absence of legal restrictions on the scope of Parliament's law-making power."

"The principle of parliamentary supremacy has applied as fully in the area of fundamental rights and freedoms as it has in other areas of the law. That has meant that protection for such rights and freedoms is to be found in the ordinary law of the land, which includes the statutory law enacted by Parliament and the common law principles which have been gradually developed by the courts on a case-by-case basis over the years."

BC poses questions as to the role of appointed judges as decision-makers (as opposed to elected legislators); the inflexibility of the Canadian Supreme Court's considerable consistency; implications of American experience where often a conservative court frustrated social reforms, despite the liberalism of the recent "Warren Court"; the risks for judicial credibility of drawing judges into the "political fray"; the capacity of courts to assess social and economic facts; and the possibility that the courts would be more cautious because of their greater

responsibility for far-reaching, and not easily amended, interpretations.

9.

"Many...concerns and difficulties would be reduced, if not entirely avoided, through the device of parallel federal and provincial statutory enactments, that is to say, a federal Bill of Rights applying to all federal laws (as is presently the case) supplemented by a provincial Bill of Rights applying to provincial laws. Under such an arrangement the 'last word' remains with the elected members of legislative bodies."

Paper No. 7 - Language Rights and the Constitution of Canada

Much of the background argumentation in this paper is to be found in the preceding paper on a Bill of Rights.

Despite the prominence of French-speaking people in the earliest days of the white man's presence in BC, the Francophone element lost ground rapidly with the decline of the fur trade. In 1881 over half the population was native Indian, nearly 30% from the British Isles, and with the Chinese as the next largest group.

In 1976, the Francophone population amounted to 38,430 (1.6% of BC population) and showed "fairly even distribution throughout the entire province". BC has the highest "assimilation rate" in Canada, being 70%; that is, 70% of Francophones use a language other than French "most often at home". "Whether this assimilation rate can be significantly affected by government policies or whether it is a result of individual choice and social and economic circumstances, is an open question."

A problem with the federal proposals in Bill C-60 "related to the 'constitutionalization' of language guarantees is the attendant shift in authority from the legislatures to the judiciary in this complex and delicate area of social policy." "British Columbia is not convinced that the policy-makers of tomorrow are likely to be less benevolent or less wise than the constitution-makers of today." How would "reasonable" determinations be made by courts? "Will the decisions of the courts made with respect to the schools in Sherbrooke, Quebec, for example, be applicable to the schools in Chilliwack, B.C.?"

"In the context of the Province of British Columbia serious practical considerations arise. The modest numbers of our Francophone population and the extent to which this population is dispersed throughout the province put obvious limits on the extent to which British Columbia could or should be expected to meet constitution language guarantees. As all government services are supported by public funds the issue of practicality must be taken into consideration."

"If the Francophone community was more or less evenly distributed throughout the country so as to give British Columbia, for example, a 27% Francophone population instead of 1.6% then a good case for broad language guarantees in the Constitution could be made. But it is inappropriate to provide guarantees of any kind in a constitution which because of practical considerations have little hope of being fully obtainable in many parts of the country. A country's constitution, almost by definition, should address those matters on which there may be some reasonable expectation of uniform application throughout the country. Universal bilingualism in its fully sense is not obtainable in Canada at the present time, nor may it ever be, and the Constitution should not suggest that it is."

"Moreover, it is not good constitution-making to make significant provisions, such as section 15 and 19 of Bill C-60, only applicable to large parts of the country if provincial legislatures in those areas choose to opt-in.

The Constitution should not be used as an ongoing vehicle of policy-coercion."

10.

"British Columbia does see, as a logical extension of section 133, constitutional provision for further federal government services and Quebec government services in both languages."

"Because British Columbia is opposed to the inclusion of broad language guarantees in any revision to the Constitution is not to say that it is indifferent to the needs and aspirations of six million Canadians of Francophone origin. But it is to suggest that their needs and aspirations can best be made through appropriate governments responding to these needs by ordinary legislative action when and where they arise."

"Because of the linguistic and cultural differences in the country, the division of powers in the Constitution must be flexible enough to allow provinces to legislate on matters of language and culture within their province. Provinces could pass such legislation where it is perceived that there is a genuine need. Linguistic and cultural rights could then be developed in each province according to local social conditions. The flexibility which legislative action provides would enable the provinces to meet changing circumstances and varying situations, province by province."

"British Columbia's recent initiatives in giving parents a choice of either official language as the language of instruction in the education system is a good example of this approach. This approach to the language question, while less dramatic than grand constitutional guarantees, can be a creative, positive and practical response to the needs of the citizens of Canada and could lead to the development of a new spirit of tolerance and mutual understanding between the two major language communities within our country."

#### Paper No. 8 - The Distribution of Legislative Powers

"The Government of British Columbia is presently engaged in a comprehensive review of the present distribution of powers. This review will be completed by next year. It is likely that further recommendations for changes to the distribution of powers will be forthcoming following completion of this review."

"A distribution of powers in a constitution cannot be made in the abstract. Rather there must be an underlying philosophy or unifying theme in a country from which a logical distribution of powers can flow. In a democracy there are, of course, the traditional themes of majority rule and protection of the individual from arbitrary government action. In the Canadian federal system there are three other themes or general principles which British Columbia believes are essential and therefore must serve as starting points for our distribution of powers. These three organizing principles are:

- (1) The need to create a distribution of powers which strikes an appropriate balance between factors of unity and factors of diversity in Canadian national life. Specifically, this involves recognizing, and attaching appropriate weight to, the factors of nationalism and regionalism, in our national consciousness;
- (2) Benefit sharing;
- (3) Efficiency."

"British Columbia believes that the factors of unity existing in Canada flow from our feelings of nationalism - our strong sense of a clearly definable, unhyphenated Canadian identity."

"The Government of British Columbia believes that the factors which bound Canadians together in 1867 still exist and, indeed, have strengthened. In addition to the military security and economic advantages provided by nationhood we now have a collective history of over one hundred years. Our social and political institutions, literature, art, culture, economy, athletics - indeed every facet of our life - have grown to maturity under the umbrella of Canadian nationhood. We have all the unifying factors that were present in 1867. But we have one more now - namely, a shared history as participants in a great national enterprise. Accordingly, it is appropriate, as we reassess the distribution of powers, to conclude that the similarities of 1978 in our national fabric argue for the continuation of a strong national government."

It "is sufficient to conclude that a new distribution of powers must acknowledge, and be based on, the importance of regional diversities in our country. In relation to those subject matters in which these differences appear it is essential that the distribution of powers be structured so as to permit different regional responses."

"The Government of British Columbia believes that the hope of mutual economic advantage was a prime motivating force behind the union of the original provinces and the subsequent entry into Confederation of the other six provinces. This goal was a worthy one and, although in part it has been fulfilled, there remains much to do to ensure that the benefits of the Canadian economy are shared by all Canadians. In this regard British Columbia affirms its continuing attachment to the concept of the promotion of equality of opportunity and well-being for all individuals in Canada, and the assurance, as far as possible, that essential public services of reasonable quality are available to all individuals in Canada."

"British Columbia is prepared to accept that equal access to public services is a legitimate Canadian goal, that the distribution of powers must recognize this fact and that, in practice, the federal government will have to take primary responsibility for achieving that goal."

"The Government of British Columbia believes strongly that one of the major problems of our national life is the inefficient provision of services by government to the public. There are two reasons for the vast amounts of duplication and overlap that characterizes Canadian government today. First, in a number of important areas, there is a lack of clarity in the present distribution of powers as to which level of government has jurisdiction. Secondly, even if the distribution of powers in the Constitution is clear, the aggressive attitude of the present federal government and its attempts to expand the limits of its own jurisdiction have resulted in much duplication and overlap."

"In the next few months" BC hopes to complete a comprehensive study of the distribution of powers, measure specific subjects against the four principles of nationalism (sic), regionalism, benefit sharing and efficiency and then "be able to recommend a complete distribution of powers that is both rational and refined."

BC "does not altogether agree" with the proposal of some people "that the residuary power should be assigned to the provinces". However, "it has never seemed logical (to BC) that mere ignorance of a subject matter in 1867 should be a compelling argument for its assignment, after later discovery, to the federal government. Rather the matter should be assigned to either level of government according to whether its nature is primarily 'national' or 'local'."

"The Government of British Columbia recommends that:

- (1) The four principles of nationalism, regionalism, benefit sharing and efficiency should form the foundations for a new distribution of powers.
- (2) The starting point for a revised distribution should be the identification of a few central realms of subject matters such as international relations, economics, culture, education, health, communications, transportation, justice, property. Following identification of these broad realms of subject matters, more specific subject matters should be identified and arranged as a group under the umbrella of the theme heading. This two-step approach would solve the current technical problem of the illogical arrangement of subject matters in sections 91 and 92 of the BNA Act.
- (3) The Canadian Constitution should continue to have three lists of power - exclusive federal, exclusive provincial, and concurrent power.
- (4) There should be a shared residuary power. The enumeration of federal subject matters should conclude with a section such as "all other matters of national interest." The enumeration of provincial subject matters should conclude with the section "all matters of provincial or local interest."
- (5) In order to solve the serious problems of a distribution of powers which is too rigid, one or more of the following flexibility mechanisms should be given a primary place in a new distribution of powers:
  - (a) concurrency with paramountcy
  - (b) delegation
  - (c) allowing the federal government to create a law and the provincial governments to administer it.
- (6) Flexibility should not be achieved by granting some subject matters to some provinces and denying those matters to other provinces.
- (7) The federal government's powers of disallowance and reservation should be abolished.
- (8) The federal government's declaratory power should be retained, but with serious restrictions. A declaration that a provincial work has become one for the general advantage of Canada should require confirmation by a Senate reconstituted along the lines of British Columbia's Senate proposals before it becomes operative.
- (9) The Constitution should make clear the existence of the federal government's emergency power and should provide that the courts can apply the emergency power to validate federal legislation only if Parliament specifically declares that an emergency exists. Judicial inference of an emergency situation should not be permitted. Thirdly, the Constitution should provide for consultation with the provincial governments prior to the making of an emergency declaration if that declaration will result in a serious infringement on normal provincial powers.
- (10) The federal government's spending power should be retained, but with serious restrictions. Federal programs based on the spending power which relate to areas of provincial jurisdiction should require confirmation by a reconstituted Senate before becoming operative.

- (11) The principle of universal access should be the touchstone for the distribution of taxing powers. Two exceptions to this general rule could be: the imposition of customs and excise taxes could be reserved to the federal government while taxes on real property and retail sales tax could be reserved to the provinces. Finally, it is essential not to exaggerate the importance of access to tax fields as a panacea for provincial finances. Access alone will not be enough for less wealthy provinces - a fact which must be borne in mind in discussions of the distribution of taxing powers.
- (12) Both levels of government must respect the current distribution of powers and a new allocation once agreed upon. Major intrusions by one level of government into the jurisdiction of the other level seriously distorts the delicate balance of powers required for successful operation of federalism in Canada.

Paper No. 9 - The Amendment of the Constitution of Canada

"The provinces are unhappy with the current practice because it places them in a subservient position which is contrary to the classical notion of federalism as a system of government in which there are two separate and equal levels of government. Although...one of the conventions that has developed concerning constitutional amendment is that the Canadian Parliament will not seek an amendment in a field affecting provincial rights without obtaining the prior agreement of the provinces, in practice it has been Parliament alone which has determined what constitutes a matter of provincial concern. The United Kingdom Parliament has never heeded provincial objections to federal requests for amendments - it has refused to umpire between the conflicting claims of the two levels of government. Accordingly, although there is a constitutional convention requiring joint federal-provincial action to amend the Constitution on provincial matters, that convention is substantially diluted by the prior fact that the definition of what constitutes such matters is in effect a unilateral decision of the federal government."

"The Government of British Columbia makes the following proposals concerning the process of constitutional amendment in Canada:

- (1) The constitutional amendment process should be one that is exclusively Canadian.
- (2) Subject matters of concern to only the provincial legislature should be amendable by the provincial legislatures acting unilaterally.
- (3) Subject matters of concern to only Parliament should be amendable by Parliament acting unilaterally. Careful attention should be focussed on the identification of these matters to exclude some which may be said to be included in this category - for example, the Senate and the Supreme Court - do not in fact affect only Parliament but rather have a significant impact on the provinces as well.
- (4) Subject matters of concern only to Parliament and some, but not all, of the provincial legislatures should be amendable by those governments concerned.
- (5) Subject matters of concern to Parliament and all the provincial legislatures should be amendable by the affirmative votes of the House of Commons, the Atlantic Region, Quebec, Ontario, the Prairie Region and British Columbia.

- (6) The forum for aggregating the five regional votes required for constitutional amendments should be the Senate, provided that it is reformed so that its primary purpose is the representation of regional interests at the national level and provided that all Senators are appointed by, and are directly responsible to, provincial governments.
- (7) If the Senate is not reformed along these lines then the forum for aggregating the five regional votes required for constitutional amendments should be the respective provincial legislatures.