THE OBJECTIVES OF BRITISH COLUMBIA'S ELITES WITH REGARD TO CONSTITUTIONAL REFORM

by

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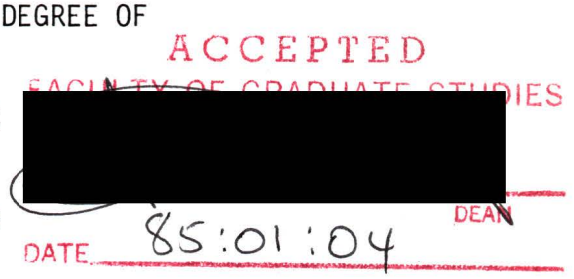

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ABSTRACT

In order to improve the scope of our understanding of British Columbia's orientation to the federal system, this study focuses on the objectives of British Columbia's political and economic elites toward revising our constitution. The study contends that because the levers of power of the national government are so critical to British Columbia's economic growth, elites in the province are increasingly dissatisfied with remaining 'province bound' in the context of constitutional change and that correspondingly they seek to 'plug into' the central decision-making process through institutional reform in the direction of intrastate federal arrangements.

The study presents first, the basic issues of constitutional reform in light of the limited nature of change found in the Constitution Act, 1982. It continues by examining the persistent and distinctive claims of British Columbia governments on Canadian federalism particularly during the last two decades of constitutional review which culminated in the 1981 federal-provincial Accord. The study then tests the hypothesis in conjunction with the responses by a number of senior decision-makers in the province to a questionnaire on various proposals for constitutional change.

In finding significant support among these decision-makers for the project of strengthening regional input at the centre, this study concludes that elites in British Columbia favour asserting their province's constitutional interests not by an isolationist orientation

as is depicted by many observers, but rather through an extraverted or integrationist approach. It then examines the efficacy, as well as the broad policy implications for our federal system, of institutional reform in the direction of intrastate federalism.

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CHAPTER ONE

INTRODUCTION

The literature surrounding the vast subject area of reforming our federal system has, by and large, focused on the demands of Quebec,[1] and to a lesser extent, the demands of the "New West."[2] This attention is not surprising given that the varying aspirations of Quebeckers for a more significant recognition of the duality of Canada have been at the heart of the constitutional debate since the 1960s, while the claims of the Alberta government and its prairie counterparts for greater jurisdiction in areas crucial to economic development, stronger ownership and control of resources, etc., have been part of the constitutional agenda since the 1970s. However, in concerning themselves with the demands of Quebec nationalism and the underlying drives of province-building in Alberta and Saskatchewan, constitutional observers have largely failed to take heed of the distinctive and increasingly prominent stance of British Columbia towards revising federal arrangements.

Since 1976, British Columbia has distanced itself strikingly from its previous attempts vis-à-vis its constitutional proposals to enlarge

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[1]See Edward McWhinney, Quebec and the Constitution 1960-1978 (Toronto: University of Toronto Press, 1979).

[2]See Allan Smith, "Quiet Revolution in the West," Canadian Forum, 58 (June-July 1978), 12-15.

the province's role in federalism through a major redefinition of federal-provincial powers. Under W.R. Bennett's premiership the province has redirected its goals towards restructuring the central institutions to better reflect regional concerns. Central to this objective has been the concept of a provincially appointed Senate that would provide for the direct participation of the provincial governments with a veto power over certain federal government proposals, which although within Ottawa's jurisdiction, significantly impinge on provincial interests. In addition to this function, a new upper house under British Columbia's proposals would serve as a vehicle for the provinces to approve or withhold their approval of federal appointments to the Supreme Court, federal agencies and commissions, and so forth. These recommendations, in effect, would not only give the provincial governments new and impressive responsibilities but would also serve to enhance the position of British Columbia relative to other provinces through its proposed fifth region status in the representation of a new second chamber.

Despite a number of important alterations to our constitution in 1982, British Columbia's objectives in the direction of reforming the Senate and other federal institutions remain unrealized. Like innumerable other proposals put forth in the recent constitutional debate, those of the Government of British Columbia were too comprehensive in scope for the limited nature of change which took place in the 1981 settlement. Nevertheless, it is the contention of this thesis that the gist of Premier W.R. Bennett's constitutional package to provide British Columbia a louder voice in the national decision

making process is of continuing interest to the province's political and economic elites.

In succinct terms, the outward looking thrust of the Premier's proposals would appear to have successfully addressed the dissatisfaction among the province's elites with their territorially bound status in existing federal arrangements. Factors contributing to the support among elites in British Columbia for a more sustained and organized provincial input into the decision making process in Ottawa would likely include the deficiencies in British Columbia's representation in the House of Commons and the federal Cabinet, as well as the enormous impact that the federal government can have on the province's export-oriented economy through its fiscal, monetary, trade and transportation policies, and its ability to influence the world market.

A major objective of this thesis is, therefore, to test the hypothesis that there is a desire among the province's political and economic elites for an enhanced role of regional interests at the centre. To secure evidence of such an outlook held by British Columbia's elites, I have surveyed a number of senior decision makers in the provincial government, business, and interest group organizations on the general direction of change they would like to see implemented in British Columbia's working role in the Canadian federal system. In ascertaining if the responses of British Columbian elites mirror the outward looking thrust of Premier W.R. Bennett's recent constitutional recommendations, this thesis aims to provide a more systematic

and comprehensive explanation than has been put forth in the literature on the matter of the constitutional objectives of elites in British Columbia. Garth Stevenson, for instance, maintains that the province's dominant elites have few ties with the rest of the nation, and that their chief concerns in federal-provincial relations are resisting Ottawa's intrusions and minimizing the redistribution of British Columbia's resource wealth.[3] Such descriptions of a self-imposed political isolation on the part of British Columbia's representatives in their dealings with the federal system are somewhat incomplete. Among other considerations, portrayals along these lines ignore the possibility that the province's often vocal discontent with its role in Canadian federalism has not precluded elites in British Columbia from maintaining a balanced perspective on the relevance of federal constitutional responsibilities to the successful exploitation of their province's resource wealth. Similar difficulties are faced by Allan Smith's inclusion of the province's elites in terms of a bloc of regional interests in the West seeking to gain more power for their provincial governments in the Canadian federation. As will be discussed, while the demands of British Columbia's elites are intricately linked with their prairie counterparts, the special needs of a resource oriented

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[3]Garth Stevenson, Unfulfilled Union, revised edition, (Toronto: Gage, 1982), p.80. For other descriptions of the disinterested or isolated relationship of British Columbia with the federal union, see R.M. Burns, "British Columbia and the Canadian Federation," in R.M. Burns, ed., One Country or Two (Montreal: McGill-Queen's, 1971) and "British Columbia: Perceptions of a Split Personality," in R. Simeon, ed., Must Canada Fail (Montreal: McGill-Queen's, 1977); Richard Simeon, Federal-Provincial Diplomacy (Toronto: University of Toronto Press, 1972); Gordon Galbraith,"British Columbia," in D.J. Bellamy et al., eds., The Provincial Political Systems, Comparative Essays (Toronto: Methuen, 1976).

export based economy and other factors have produced a distinctive British Columbia viewpoint vis-à-vis constitutional reform.

Besides examining the survey responses in light of these and other analyses of the objectives of British Columbia's political and economic elites towards revised constitutional arrangements, this thesis will also focus on some of the larger policy implications underlying any moves in the direction of intrastate federalism.[4] The intrastate perspective is, of course, not limited to the province's way of thinking and given that our constitution remains largely unreformed, the concept of providing for an enlarged forum for regions in the centre has the potential to place new proposals on the Canadian political agenda. It has long been argued by students of Canadian federalism that many of our institutional characteristics perpetuate regional differences and cleavages. Generally it is acknowledged that a combination of political practice and structural features of our parliamentary institutions conjoined with a federal division of legislative powers between two levels of government has worked in denying important regional interests a voice in Ottawa.[5] As a result of the perception

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[4]For a general overview of approaches to public policy see Richard Simeon, "Studying Public Policy," Canadian Journal of Political Science, 9, no. 4 (1976), 548-580. Simeon argues for an explanatory rather than prescriptive approach to the study of public policy. Towards this end, he underlines, a student should attempt to "penetrate the political process to ask some broader questions."

[5]See D.V. Smiley, "The Structural Problem of Canadian Federalism" Canadian Public Administration, 14, no. 1 (Spring 1971), 326-343, and Richard Simeon, "Regionalism and Canadian Political Institutions," Queen's Quarterly, 82 (1975), 499-509.

Parliament, for instance, have profoundly different implications for our federal system than does the Government of British Columbia's proposal for a provincially appointed Senate.[7] It is to a closer examination of these and other matters that this thesis now turns.

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[7]Smiley, "The Structural Problem," pp. 499-509.

of Ottawa's lack of responsiveness to the regional particularisms inherent in Canada, some observers argue that "these institutions and attitudes which are territorially delimited have come to find an outlet exclusively through the provincial governments."[6] This in turn has allegedly enabled the provinces to challenge the ability of the governing parties in Ottawa to sustain the national consensus which is necessary for long run political stability.

According to proponents of the intrastate approach towards constitutional change, a federation can in broad terms deal with regional diversities by conferring jurisdiction over several areas of the most crucial of these particularisms on states or provinces, by giving constituent territorial units a permanent voice in the central decision making process, or by strengthening Ottawa's capacity to represent regionally based interests in ways which bypass provincial governments. In rejecting a broadening of provincial power over local concerns, they view the "institutional deficiencies" in Ottawa as the crux of the problem to be solved. However, as will be discussed in greater detail, while those favoring intrastate federal arrangements are agreed upon the necessity of making the institutions of the central government more responsive to and more representative of provincial or regional particularisms, their views often differ radically on the solutions necessary to accomplish this. Suggestions for reform of the electoral system or steps to reduce the dominance of the Prime Minister over

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[6]Smiley, "The Structural Problem," p. 334.

CHAPTER TWO

THE BASIC ISSUES OF CONSTITUTIONAL REFORM

Since it is necessary to examine the larger constitutional debate before examining British Columbia's place in it, I first review the basic issues of constitutional reform in Canada. In this chapter, I attempt to briefly examine the constitutional structure of Canada, then look at the events leading to 1982, discuss the impact of the recent constitutional settlement and clarify some of the main alternatives toward future reform.

A central theme that will be underlined in this chapter is that although Canada now has a revised constitution, there are still basic and fundamental constitutional questions to be settled.

To begin to understand Canada's constitutional structure it is essential to realize that a constitution is more than the basic document now embodied in the Constitution Act, 1982. Our constitution is also a whole framework of statutes, conceptions, judicial decisions, and relationships to the political process, which is always evolving to meet new realities.[8] In the narrower sense of the concept of a constitution, the codified part of Canada's constitutional structure--according to section 52 of the Constitution Act, 1982--consists of

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[8]See R.I. Cheffins and R.N. Tucker, The Constitutional Process in Canada, second edition, (Toronto: McGraw-Hill Ryerson, 1976), pp. 1-15. See also Gerald L. Gall, The Canadian Legal System, second edition (Toronto: Carswell, 1983), pp. 51-100.

the Constitution Act, 1867--together with its subsequent amendments up to the Canada Act of 1982, and those British and Canadian Statutes and Orders in Council providing for the entry and creation of various provinces and territories after 1867.[9] As well, there are according to most constitutional observers, a number of enactments of the Parliament of Canada such as the War Measures Act, which are constitutional in subject matter even though they are not part of the formal documentary constitution, and, indeed, are the creation of and are amendable by a single legislature.[10]

In a broader sense, it must also be noted that the Canadian constitution largely consists of certain settled conventions of government structure and practice. For example, many crucial aspects of the executive nature of our parliamentary government such as the Office of

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[9]In any ordinary political discussion, the word constitution may be used in at least two senses. In the broadest sense according to British political scientist K.C. Wheare, a constitution is used to describe "the whole system of government of a country, the collection of rules which establish or regulate or govern the government." The constitution of the United Kingdom with its collection of legal and non-legal rules is characterized by this sense of the word. A second notion of a constitution is used in a much more narrower sense. It refers to in Wheare's view, not the whole collection of a country's legal and non-legal rules, but instead a selection of them which has usually been embodied in one document or a few closely-related documents. Since this notion of a constitution fits almost every country's in the world except Britain's, the narrower sense is most commonly used and probably best refers to the constitution of the United States in regards to that country's constitutional document of 1787 and its amendments. See K.C. Wheare, Modern Constitutions, (London: Oxford University Press, 1956), pp. 1-5.

[10]D.V. Smiley, Canada in Question, Federalism in the Seventies; second edition, (Toronto: McGraw-Hill Ryerson, 1976), p. 2.

the Prime Minister, the Cabinet, political parties, the Leader of the Opposition, etc. are not explicitly mentioned in our written constitution. As well, convention makes it unthinkable in present-day Canada for many powers vested in our constitution to be used except in extraordinary circumstances. To take just one example, the Governor General in Council has not for over 40 years exercised the power to disallow provincial legislation.[11]

While it is therefore necessary to examine a series of constitutional statutes, along with other statutes, legal documents, judicial decisions, and various conventions to understand Canada's constitutional structure, any analysis of it must begin with the Constitution Act, 1867 together with the amendments to that statute. (Until the recent constitutional revisions, this statute was formally known as the British North America Act of 1867.) The document is both historically and legally of immense significance in that it created the Dominion of Canada by uniting the original provinces and formed the common tie which expanded and now links the provinces presently making up our federation.[12] Moreover, the 1867 Constitution Act even with our recent constitutional changes, still provides the basic elements of our parliamentary democracy and

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[11]For a brief explanation of the role that convention plays in our constitutional structure see R.I. Cheffins and R.N. Tucker, The Constitutional Process in Canada, 10-13 and R. MacGregor Dawson, The Government of Canada, revised by N. Ward (Toronto: University of Toronto Press, 1977), pp. 58-60.

[12]R. MacGregor Dawson, The Government of Canada, p. 58.

the federalism that make up our constitutional system although it should be remembered that the key elements of responsible government were developed prior to Confederation.

As countries go it has often been said that Canada's origin can best be likened to a marriage of convenience. The event we call Confederation was the result of the convergence of a number of factors including the need for strengthened colonial defences due to the growing threat of the United States, the financial benefits likely to accrue from a larger economic union, and pressure from Great Britain itself, which desired colonies less dependent on the other country. The effect of these and other factors, culminated in the passage, by the British Parliament, of the Constitution Act, 1867.

A number of observations can be drawn from its passage. First, it can be said that based on the preamble of the Act, that the most important concern of the formulators of the original constitution was the desire to develop a constitution with principles similar to those of Great Britain. The preamble states that the various units desired to be "federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in Principle to that of the United Kingdom." Accordingly, many sections of the act are devoted to providing a Canadian context for the conventions and practices of British constitutionalism. For instance, in the act a method had to be devised whereby the rights of the monarch could be discharged in Canada.[13]

As well, a reading of the Act reveals the pragmatic manner in which its formulators approached the Union of British North American colonies.[14] Reflecting this pragmatism, the Constitution Act of 1867 is a succinct and prosaic work. Inspirational statements and statements of principle are notably absent.[15] Also, as has been touched on earlier, many of the key elements of our political process such as the Office of the Prime Minister etc. are not mentioned in the Act. Similarly, many long-term political problems such as the need for a future amendment process were not addressed.

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[13]See R.I. Cheffins and R.N. Tucker, The Constitutional Process, p. 8.

[14]It has frequently been said that the prosaic and pragmatic nature of the Constitution Act, 1982, illustrates the axiom that a constitution document reflects the political personality of the system. In this context, R.I. Cheffins and R.N. Tucker suggest that this statute parallels the Canadian personality wich has always been one to grapple with the real issues, and avoid unnecessary decisions, R.I. Cheffins and R.N. Tucker, The Constitutional Process in Canada, 10. To others, however, while the Constitutional Act, 1967 achieved the mainly economic and demographic purposes for which it was designed, it was less of a success in fulfilling the symbolic and ideological purposes of a constitution. See for instance, Garth Stevenson's Unfulfilled Union, pp. 53-54 for his comments on the inadequacies of the 1867 statute in this regard.

[15]A number of constitutional observers have underlined that the absence of such symbols contained in a Bill of Rights, etc. should not be construed to suggest a lack of commitment to the protection of rights on the part of the formulators of our constitution. Rather, it can be argued that their deep respect for common law principles and the faith in parliamentary democracy on the part of our constitution's founders left them no doubt that their rights as British citizens were sufficient.

The most significant aspect of the Constitution Act of 1867 is the division of legislative powers. That original distribution has allowed each level of government to operate relatively autonomously within their respective fields, and thus fit Canada's political system within the classification of a federal state.[16] Under the terms of sections 91, 92, 93, 94, 95, 101, 117 and 132 of the Constitution Act of 1867, legislative power is divided between the federal parliament and the provincial legislatures. (By convention, related executive power has followed the same division.) Because these sections have been commented on and analyzed by a great many observers, this paper will confine itself to underlining one of the central themes found in the literature on this subject. It has commonly been asserted that an examination of the enumerated sections outlining the distribution of powers reveals that the founders of the Dominion attempted to

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[16]The most often cited definition of federal states is that of K.C. Wheare in his book, Federal Government, 4th edition, (London: Oxford University Press, 1904). Wheare states the federal principle as "the method of dividing powers so that the general and regional governments are each within a sphere, coordinate and independent." The crucial characteristic of a federal state therefore is that neither level of government is in any way subordinate to the other within its constitutional jurisdiction. In a strict sense, due to the considerable power of the federal government to interpose on provincial jurisdictions through such means as the disallowance of provincial statutes by the Lieutenant Governor, there is some question as to whether Canada fits Wheare's description of the federal principle. However, as most constitutional observers underline, because federal intervention along these lines into the provincial sphere has for all practical purposes been eliminated, (except for perhaps the spending power), it can be said that the Canadian political system fits within the definition of federalism.

secure federal supremacy in the provisions of the Constitutional Act of 1867.

R. MacGregor Dawson thus maintains:

> . . . the deliberate plan which was adopted in creating the Dominion of Canada was to form a federation of a highly centralized kind, and to that end certain special powers and functions were placed in the hands of the central government.[17]

Evidence of this attempt to secure the dominance of the federal parliament includes the provisions whereby the residual power was to be vested in the federal parliament. As well, the considerable federal power to reserve and disallow provincial statutes was provided for.

An analysis of these enumerated sections dividing legislative powers also lends a great deal of weight to this view. Briefly outlined, section 91 vested in the federal parliament, the authority to "make laws for the peace, order and good government of Canada" in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislators of the province. As well, section 91 provided a detailed list of twenty-nine, and now thirty-one, specific areas in which the federal parliament has jurisdiction.

Two general comments should be made upon this enumeration in section 91. First, that an examination of these sections indicates that most of what were considered important matters in 1867--such as those relating to the currency and the regulation of trade and commerce--were given to the federal parliament. Second, as will be dis-

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[17] R. MacGregor Dawson, The Government of Canada, p. 76.

cussed later in this chapter, this enumeration was to prove of immense importance in judicial interpretation late in the nineteenth century as a number of decisions then found the peacetime legislative powers of parliament to be anchored or rooted not in the authority to enact laws for the "peace, order and good government of Canada," but rather in the enumerated heading in section 91.

Section 92 unlike section 91 contains no comprehensive grant of law making authority but instead lists fifteen clauses of subject areas over which provincial jurisdictions may exclusively legislate, with a sixteenth category, "Generally all matters of a merely local or private nature in the Province." The assigned powers of section 92 appear to be of a relatively limited nature when compared to a reading of those powers assigned in section 91. As well as the legislative authority granted to the provinces in section 92, section 93 provided that in each province "the legislature may exclusively make laws in relation to education." However, included with this exclusive provincial jurisdiction over education were a number of safeguards concerning the rights of denominational schools in which the federal parliament can intervene to protect. The terms of the Constitution Act of 1867 included two powers, immigration and agriculture, which were assigned concurrently to both the federal and provincial governments by section 95. Under those sections either federal or provincial legislatures may exercise jurisdiction in relation to these subjects. However, if a conflict of legislation should result, the federal parliament was granted paramountcy. A third case of concurrent

jurisdiction was added in 1951 by constitutional amendment. Under section 94(A) the Canadian parliament was given the authority to enact laws in relation to old age pensions (and subsequently survivor and disability benefits)--with this time provincial jurisdiction overriding in the event of conflict.

Although it may have been the case that the original distribution of powers was designed to provide strong central government, it must be recognized that a number of trends have significantly altered our constitution. Over time much of the relative power of the federal power has declined largely because so many of the new fields of jurisdiction were held by the courts to belong to the provinces. As R. Cheffins and R.N. Tucker comment, "The ineffectiveness of these centralizing clauses in the British North America Act serves as a classic example of the futility of written positive law in the face of a social environment which refuses to accept the original statutory intent."[18] It is therefore necessary to examine the constitution in light of the changes which have occurred since 1867.

As any review of our history suggests, our constitution has undergone considerable social, political and economic changes to meet new realities. During the past generations, it has faced periods of economic depressions, wars and rapid modernization. Significant changes in our relationship with Great Britain have taken place, as have major

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[18]R.I. Cheffins and R.N. Tucker, The Constitutional Process in Canada, p. 30.

changes between the federal and provincial governments including wide shifts in the relative powers of both levels of government, and the development of major social programs such as unemployment insurance, old age pensions, medicare, etc. However, what is perhaps most notable with the dramatic innovations in the constitutional system is that these changes have occurred without extensive constitutional amendment but, rather, through the gradual adjustment to new realities.

One source of flexibility in the constitution that has permitted informal changes in practice without formal constitutional amendment has been the growth in the importance of convention, particularly in the powers of the executive.[19] Two other important elements of informal change have been the impact of judicial review, and more lately, the emergence of federal-provincial conferences.[20]

The necessity of clarifying the distribution of powers in our federal system has given the courts a prominent role in the continuous development of the Canadian constitution. As P. Gerin Lajoie observes, although the courts may not formally modify the constitution they may bring about considerable change in its working through their wide latitude of interpretation:

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[19]See Paul Gerin Lajoie, Constitutional Amendment in Canada, (Toronto: University of Toronto Press, 1950), pp. 24-29 for the growth of convention and its relation to the flexibility of the constitution.

[20]Judicial review is the procedure by which judicial bodies determine the validity of the legislative enactments of executive acts in terms of a codified constitution, as cited in D.V. Smiley, Canada in Question, (Toronto: McGraw-Hill Ryerson, 1976), p. 18.

> They may put upon certain clauses a construction far different from that extended from the powers of this document. From time to time they may reverse the trend of their interpretation; the picture of the pendulum swinging between federal and provincial viewpoints has become commonplace in Canadian literature and discussion. In this way the courts have had an opportunity to play and have actually played a leading part--though one not uniformly precise--in the constitutional development of Canada.[21]

Notwithstanding the importance of judicial interpretation as an important element of change, since 1945, constitutional modifications have increasingly been the result of various federal-provincial negotiations, such as tax-sharing arrangements; shared-cost programs or inter-delegation of powers. Summarizing this development, Donald Smiley comments:

> The federal aspects of the Canadian constitution, using the latter term in the broadest sense, have come to be less what the courts say they are than what the federal and provincial cabinets and bureaucracies in a continuous series of formal and informal relations determine them to be.[22]

On this point, a number of observers have agreed with Smiley that politicians and administrators have played a more prominent role than judges in the post-war evolution of the constitutional system, but feel that Smiley has somewhat exaggerated the decline in the importance of

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[21] See Paul Gerin-Lajoie, Constitutional Amendment in Canada, pp. 31-32. Also see R. MacGregor Dawson, The Government of Canada for a succinct description of judicial decision and the development of the constitution.

[22] D.V. Smiley, "The Rowell Serois Report and Provincial Autonomy." Canadian Journal of Political Science and Economics, 54 (1962), 59, as cited in Peter Russell, Leading Constitutional Decisions, third edition (Ottawa: Carleton University Press, 1982), p. 20.

judicial review. Peter Russell points out that quantatively there was virtually no change in the frequency with which Canada's highest court was called on to make constitutional decisions. Moreover, he adds that "A veritable explosion of constitutional litigation since 1975 demonstrates how foolish it would be to write off the Supreme Court as an important element in the dynamics of Canadian federalism."[23]

In short, both judicial interpretation and federal-provincial negotiations have played a major role in the evolution of the federal system. Their impact along with that of convention, has provided the constitution considerable flexibility to meet evolving social and economic needs without any abrupt changes in its framework.[24] However, it should also be noted that there are certain factors or circumstances which may reduce the ability of such informal sources of change to provide the necessary adjustments in constitutional arrangements, and which may encourage formal amendment to be favoured over informal amendment. The limited number of constitutional provisions which allow flexibility, and the dilatory nature of the developments of informal changes in practice, may necessitate a more direct method of change. Similarly,

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[23]Peter H. Russell, Leading Constitutional Decisions, (Ottawa: Carleton University Press, 1982), p. 20.

[24]The use of judicial interpretation and federal-provincial negotiations are not without their costs. For instance, elected legislators and citizens are sometimes reduced to bystanders by these developments although it can be said that both procedures are usually responsible to public opinion. Also massive bureaucratic resources are committed to operating the process of federal-provincial negotiations itself. See R. Simeon, Intergovernmental Relations and Challenges to Canadian Federalism, (Kingston: Institute of Intergovernmental Relations, 1979), pp. 10-11.

since the constitution cannot be changed in what it directs or forbids by such developments, occasionally formal amendment is required because judicial interpretation of the existing constitution imposes obstacles to the adoption of certain government activities.[25] Lastly, and perhaps most importantly, informal changes cannot foster symbolic changes in practice, and unlike formal amendments, cannot foster symbolic benefits. Ironically, as one constitutional observer has pointed out, "Constitutional amendment is not so much a cause of changes in the distribution of political power as it is a means of legitimizing and giving recognition to changes that have already taken place.[26]

Although formal amendment may appear to be a more expedient source of change, in practice it is usually very difficult to bring about. In Canada, there has been a strong tendency to leave formal amendment alone if possible. The reasons are varied, but include: the possible raising of provincial consent; the difficulty of achieving a general consensus of opinion; and the ability to get around the act in other ways.[27]

Until its recent patriation, formal amendment of our constitution has also of course always been a perplexing predicament with Britain as the ultimate amending authority. It is commonly asserted in the

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[25]In Canada, the unemployment amendment of 1948 was the only real case of this kind.

[26]Garth Stevenson, Unfulfilled Union, p. 198.

[27]R. MacGregor Dawson, The Government of Canada, p. 140.

constitutional literature that the founders of the constitution saw no need for any amending process in the future for the simple reason that it could always be amended by the British parliament as the enacting body. Although convention after 1867 held that the United Kingdom would not amend the Constitution Act of 1867, the failure of Canadians to agree on a domestic amending formula was, until 1982, the most obvious failure of our constitutional experience.[28]

In Canada, the lack of a patriated amending procedure did not prevent Canadian governments from using amendment as a means to change the constitution. The Constitution Act of 1867 (not including the change adopted in 1982) has been amended on a number of occasions.[29] The most significant amendment was the passage of the Constitution Act of 1949 (No. 2). Other amendments include the 1940 amendment noted earlier, the 1951 amendment which gives the federal parliament shared authority over old-age pensions with provincial legislatures, the 1960

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[28]The adoption of a domestic amending procedure has been the subject of official consideration in Canada since the dominion-provincial conference in 1927. In that year the federal Minister of Justice placed it on the agenda. Since then no procedure was adopted until the constitutional settlement of 1982 because it was not possible to get the provincial and the federal governments to agree on a procedure. Before 1982, agreement was almost reached in 1964 on the Fulton-Favreau formula and with the "Victoria Charter" in 1971. In both cases agreement was scuttled because Quebec decided not to ratify it.

[29]For early history of constitutional amendment see Paul Gerin-Lajoie, Constitutional Amendment in Canada and Guy Favreau The Amendment of the Constitution of Canada, (Ottawa: Queen's Printer, 1965). For more recent discussion of amendments see Garth Stevenson, Unfulfilled Union, pp. 198-225.

amendment dealing with the tenure of office of judges, and the 1965 amendment dealing with the tenure of senators.

Before moving on to the events which led to 1982, it is important to keep in mind that the constitution has undergone a considerable evolutionary change to meet the new realities of Canadian society. While there has been both formal and informal change, until 1982, the development of our constitution can be said to have been altered more frequently by informal changes in practice than formal amendments to the constitution. All too often this has been glossed over in recent constitutional debates.

Despite the flexibility of our constitutional system and the inherent difficulties of formal amendment as a source of constitutional change, over the last few decades there has been an increasing disposition on the part of elites to demand explicit and extensive constitutional reform. This concentration on constitutional reform in Canadian constitutional debates is a relatively new development in our history. Prior to 1960 only two sets of prominent suggestions--the report emanating from the inter-provincial conference of 1887, and the highly centralized thrust of the League of Social Reconstruction--can be regarded as major demands for widespread constitutional change.[30] As Donald Smiley underlines, until recently, there was little

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[30]As cited by Donald Smiley in "A Dangerous Deed: The Constitution Act, 1982." In And No One Cheered--Federalism Democracy and the Constitution Act, Keith Banting and Richard Simeon, eds., (Toronto: Methuen, 1982), p. 94.

sense that the constitution prevented individuals or groups from achieving their goals:

> Prior to the 1960's there was an underlying consensus in Canada that the constitution itself did not stand in the way of any legitimate purposes that individuals and groups might want to pursue. Much of the constitutional debate centered around one version or another of the compact theory of Confederation, on the underlying conservative premise that the original constitutional settlement possessed a continuing legitimacy. Even those who rejected the compact theory, particularly in the vigorous debates of the 1930's, asserted the ongoing legitimacy of the Confederation Settlement as embodied in the British North America Act of 1867 and turned their criticism of the constitutional order not on the constitution itself but on its interpretation by the Judicial Committee of the Privy Council.[31]

Since 1960, the constitutional debate has been characterized by widespread criticism of our political institutions and sweeping proposals for constitutional change. The catalyst for new demands for comprehensive constitutional reform was the so-called 'Quiet Revolution' in Quebec that transformed the society of that province. An emerging perception on the part of many Québécois of a second-class status in Canada, in turn led to demands for major reforms in the structure of Canadian federalism.[32] Later, in the 1970s, the demands for change were reinforced by increasing regional alienation between the West and central Canada. The new economic power of the western provinces

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[31]Ibid., p. 75.

[32]See Edward McWhinney, Quebec and the Constitution 1960-1978, pp. 21-26 for the constitutional ideas of the Quiet Revolution.

increasingly led them to express their grievances and aspirations in constitutional terms.[33]

In essence, the widely perceived and seemingly widening demand for constitutional reform in recent years stems from the two primary cleavages that have dominated Canadian politics. In the last two decades this demand has increasingly polarized Canadian politics as it has derived fundamentally opposed constitutional views.[34] Briefly stated, one of these perspectives holds from this issue of Quebec nationalism that Canada should draft a new constitution recognizing what many Quebecers regard as a homeland with a unique status. This alternative is advocated most strongly by the Parti Québécois which has argued that Quebec must be sovereign to fulfill its goals, but it has also been advocated by most other Quebec provincial parties in a modified form involving, for example, some move towards greater decentralization. Against Quebec's vision of greater provincial power and recognition of a special place in Confederation for Quebec, has emerged a second constitutional alternative. This view put forth by the federal Liberals and others contends that while the federal

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[33]See Allan Smith, "Quiet Revolution in the West," pp. 12-15. See also J.F. Conway, The West: The History of a Region in Confederation. (Toronto: Lorimer, 1976), pp. 179-226.

[34]See Keith Banting and Richard Simeon, "Federalism, Democracy and the Constitution," in Banting and Simeon, eds. And No One Cheered, pp. 11-17.

government should reflect that Canada is composed of two founding peoples, transfers of additional powers to Quebec and for other provinces are not essential either to the preservation of a French-speaking culture, or to that of Canada.

Like Quebec nationalism, regionalism has spawned two very different alternatives, each leading to a different constitutional future. A simplified provincialist view, holds that provincial influence over national policy formation should be strengthened but that each order of government should remain sovereign in its own jurisdiction. The proponents of this vision largely focus on economic questions, hoping to gain more control by the provinces over their resources and their own economic development.

The provincialist constitutional alternative is opposed by a more centralist view. Basically, it holds that the proper response to regional concerns and identities is not to transfer greater power to provincial governments, but to strengthen the attachment of Canadians to their national community and government. This view emphasizes symbolic reinforcement of nationhood and stronger guarantees that regional interests can be accommodated within central institutions as the best goal of our constitutional future.

Previous to the most recent round of constitutional negotiations in the last two decades, there have been a number of different cycles of negotiations each with an increasingly crowded constitutional agenda.[35] In the early 1960s constitutional discussions which centered

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[35]Up until the mid-1960s, the constitutional agenda was limited

on the search for an amending formula failed when Quebec vetoed the proposed Fulton-Favreau formula. In the next stage, the search for an amending formula would be overshadowed by proposals for much broader and substantial constitutional change. The cycle began after Premier Robarts convened the "Confederation of Tomorrow" conference in 1967, in part to respond to the election of Daniel Johnson and the Union Nationale in the provincial election of 1966, in part in view of the increasing influence of new guard federal Liberals from Quebec. This initiative developed into the federal-provincial constitutional negotiations which culminated in the Victoria Charter of 1971. These negotiations collapsed when Quebec rejected the Victoria Charter, a package of proposals including an amending formula, the constitutional entrenchment of certain rights, reform of the Supreme Court and minor adjustments to the division of powers. The Victoria Charter also included a commitment to remove regional disparities and a requirement that there be a federal-provincial conference at least annually. In 1975, the federal government reopened negotiations with all of the provinces over a repatriation formula, which then quickly widened to cover some aspects over the division of powers but again the result was

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to a list including symbolic patriation, a domestic amending formula consideration on occasions of electoral or institutional reform of the House of Commons or the Senate, and from time to time redistribution of legislative powers. Since these the list has grown to include among other matters a Charter of Rights and Freedoms, promotion of bilingualism, regional economic development and an equalization principle. See Garth Stevenson, Unfulfilled Union, pp. 201-215 for constitution review, 1927-65 and 1965-80.

a failure to reach agreement. The separatist victory in 1976 set off another round of constitutional developments. After the introduction in 1978 of Bill C-60 (a draft of a new constitution) and a paper called "A Time for Action" which asserted the need to guarantee individual Canadian political, legal and language rights along with reforming institutions such as the Senate and Supreme Court, and following a successful court challenge by provincial governments of the power of Ottawa to make unilateral changes in the Senate, both levels of governments agreed to a new round of intensive talks in the fall of 1978 and early 1979. Once again they failed to reach a successful agreement.

The final and most intense struggle of constitutional negotiations which eventually culminated in the Canada Act, 1982 began after the Quebec referendum on sovereignty-association which was defeated on May 20, 1980. In that referendum Prime Minister Trudeau and his federal colleagues made ambiguous commitments to the Quebec electorate that if a "no" vote was returned an unspecified "renewed federalism" would take place. A series of federal-provincial conferences ensued lasting through the summer and early fall of 1980, but these conferences failed to yield agreement on the specifics of constitutional change. This deadlock led to a federal initiative to unilaterally patriate the constitution, and on October 6, 1980 to accomplish that objective, Prime Minister Trudeau introduced into the House of Commons a 'Proposed Resolution for a Joint-Address to Her Majesty the Queen respecting the Constitution of Canada' which included a draft bill but was not in itself one. The resolution was later approved in

1981 including a number of amendments proposed by the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada.[36] It was however not transmitted to the United Kingdom. Concomitant to these developments was: the emergence of the provincial coalition of the eight governments opposed the proposed amendments; the court challenge by a number of these provinces to the power of the federal Parliament to request--without provincial approval--the United Kingdom to amend the Canadian constitution; and the subsequent momentous ruling by the Supreme Court on September 28, 1981 that the consent of the provinces was not required by law but that "A substantial degree" of provincial consent was required by convention, and that the support of two out of ten provinces was insufficient in this regard.[37]

After that decision in the fall of 1981, a new round of discussions between the Prime Minister and the Premiers finally yielded agreement on an altered package of amendments. In essence, the agreement was struck after the federal government agreed to adopt a revised version

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[36]The Special Joint Committee which commenced sitting on November 6, 1980 and reported on February 13, 1981 received 1,208 submissions and heard 104 witnesses. For the proceedings of the Committee see Minutes of Publishing and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, First Session of the Twenty-Second Parliament, 1980-81, November 6, 1980 to February 13, 1981.

[37]For an analysis of the September 1981 Supreme Court decision see Peter Russell "The Supreme Court Decision, Bold Statescraft Based on Questionable Jurisprudence," from The Court and the Constitution, Peter Russell, et al., Institute of Intergovernmental Relations, 1983. Also, found in Keith Banting and Richard Simeon, eds., And No One Cheered, pp. 211-238.

of the amending formula of the 'gang of eight' premiers, and the provinces agreed to accept a revised version of the federal government's Charter of Rights. The agreement, of course, included only nine of ten provinces, as Quebec was a lone dissenter. Two more changes were agreed to in an unsuccessful attempt to bring Quebec into the agreement--compensation for opting out of amendments relating to education or culture, and limitation of minority language educational rights in Quebec. After some further minor changes and the necessary steps to gain royal assent, the Joint Resolution went to London, where a further enactment was passed--the Canada Act, 1982, which in turn, contains the Constitution Act, 1982, and the whole was proclaimed on March 25, 1982.

The 1982 accord brought about a number of longstanding constitutional objectives. The goals of patriation and an amending formula which have been around since 1927 were realized, as were the federal government's objectives of an entrenched bill of rights and stronger guarantees of linguistic rights which have been on the constitutional agenda since the 1960s.

The patriation of the amending of our constitution relinquished the last holdover from the colonial past. The Canada Act, 1982 ensured that no future Act of British Parliament will apply to Canada. Henceforth, "No Act of Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of the law."[38]

In addition, with the amending formula, the Constitution Act, 1982 ensured that all future constitutional amendments will be achieved through a domestic political process. The formula provides a mechanism whereby amendments require agreement of a majority of representatives in both Houses, plus a two-thirds majority of provincial legislatures representing at least fifty per cent of the total population.[39] This means, in effect, the approval of seven provincial legislatures and parliament at the federal level. However, the formula also includes the provision found in Section 38.2 whereby any province can opt out of constitutional changes which takes away existing provincial powers. Furthermore, if constitutional changes affect powers pertaining to education "or other cultural matters," a province that decides to opt out will receive financial compensation from the federal government. The amending formula requires unanimity for six enumerated subject matters. These include the Offices of the Queen and her representatives, the Governor General and Lieutenant Governor, provincial representation in the House of Commons related to that in the Senate,

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[38]It is important to remember that the Constitution Act (Canada Act) 1982 is a British enactment. There was no re-enactment in Canada as had been intended in 1971 with the Victoria Charter.

[39]Enacted on June 21, 1984 the first amendment to the revised constitution concerned an accord on aboriginal rights reached in March 1983, between Ottawa, all provinces except Quebec and native leaders. The amendment protects past and future native land claims in the constitution, guarantees that existing native rights apply equally to native women and men, and requires that native Indian groups be consulted before their constitutional rights are changed.

provisions with respect to French and English languages, the composition of the Supreme Court, and any amendment of the amending formula. Other provisions of the procedure include the amendments affecting just a few provinces require the assent of those provinces and parliament, while both the federal government and the provinces may unilaterally amend the constitution as it affects their internal operations. Lastly, the Senate is limited to a suspensive veto of six months concerning future amendments.

Another major alteration to our constitution by the 1982 settlement is that for the first time fundamental rights and freedoms have been entrenched. The Charter goes beyond the Canadian Bill of Rights which as an ordinary act of parliament could not put fundamental limits on the powers of parliament, nor offer protection against invasion of rights by the provinces. The provisions of the Charter embody guarantees of fundamental freedoms such as freedom of conscience and religion, the freedom of thought, belief, opinion and expression, and freedom of association. As well, the Charter guarantees the democratic rights such as the right to vote, mobility rights such as the right of citizens to live and work in any province, legal rights such as the right to counsel, and the right to be secure from unreasonable search or seizure, and equality rights such as the right of sexual equality.

However, the provisions of a general qualifying clause and an over-ride clause in the Charter offer significant restrictions to these rights and freedoms. Section 1 states that the rights and freedoms are "subject only to such reasonable limits prescribed by

law as can be demonstrably justified in a free and democratic society." The intent of this preamble is to ensure that rights and guarantees be exercised in such a way that they do not offend the democratic nature of Canadian society--in other words, "that the rights of others are not impeded in the process." Section 33, the override clause, was inserted to reach an accommodation with those provinces opposed to the entrenchment of rights. By virtue of section 33, the federal parliament and the provincial legislatures, by passing legislation which expressly declares it will operate "notwithstanding" may override the provisions for fundamental political freedoms in section 2, the legal rights in sections 7 to 14, and the equality rights in section 15 of the Charter.

Further to these restrictions the Charter includes limitations on mobility rights and equality rights, which allow provinces leeway in programs or laws designed to ameliorate the 'conditions of the individuals' in a province with lower than average employment rates.

Besides these innovations the Constitution Act, 1982 provides stronger guarantees for linguistic rights. The act entrenches English and French as the official languages of Canada, it protects certain educational language rights for English and French minorities in all provinces, and it imposes an obligation on the federal government to provide bilingual services to the public in the offices of an institution of the parliament or the government of Canada.[40]

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[40]Besides the patriation of the constitution, the amending formula,

Although it can be said that the constitutional settlement of 1982 has achieved many long-standing objectives, and has surpassed in significance any previous amendment in Canadian history, it must be noted that the act has only brought about a limited alteration in our constitutional framework. As Alan Cairns comments "Our constitutional system was only modified, not overthrown by our constitutional renewal."[41]

The limited extent of constitutional change is apparent in several respects. First, the recent constitutional changes are relatively modest compared to those which have evolved over the years through convention and other constitutional practices. Second, the Constitution Act, 1982 has not altered the basic framework of Canadian federalism or the functioning of parliamentary and cabinet government. A review of schedule 1 of the act substantiates that thirty major pieces of earlier constitutional legislation and Orders-in-Council are retained virtually intact. Beyond a minor change in the name of various statutes, the 1982 constitutional settlement did not in any substantial way change the content of Canada's constitutional structure. In reality, the division of powers remain unaltered except for the amendment to section 92 in regard to natural resources. Similarly, the whole functioning of parliament and cabinet government remains

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the Charter of Rights, and the constitutionalization of language rights, the constitutional package included several other important amendments such as the section extending and clarifying provincial powers over natural resources, and a more explicit reference (largely symbolic) reference to equalization payments.

[41]Alan Cairns, "The Politics of Constitutional Conservatism," in Banting and Simeon, eds., And No One Cheered, p. 29.

intact, and almost all of judicial decisions remain relevant. Lastly, to take another source of the limited nature of constitutional alternatives, one need only look at the twelve item agenda established by the first ministers after the Quebec referendum.[42] Of that agenda, only resource ownership and interprovincial trade, equalization and regional disparities, the Charter of Rights and the patriation of an amending formula achieved some kind of constitutional resolution. Eight other items--the Senate, the Supreme Court, communications, family law, fisheries, off-shore resources, powers over the economy and a statement of principles were left in limbo. Moreover, this twelve item agenda was not viewed as exhaustive; it was originally said to represent only the first stage of constitutional reform.

While to most constitutional observers there is some satisfaction that the constitution was patriated and a Charter of Rights entrenched, there is also a widespread sense of disillusionment that the basic dynamics of federalism have not been more radically altered. Commenting on the limited outcome of the constitutional settlement, Richard Simeon and Keith Banting note that the act failed to renew Canadian federalism since "None of the underlying conflicts that give rise to the constitutional debate in the first place have been resolved, and no new framework has been put in place to manage them more

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[42]As cited by Richard Simeon in A Citizen's Guide to the Constitutional Question (Toronto: Gage, 1980), pp. 12-13.

effectively."[43]

Similarly, the authors of Canada and the New Constitution--The Unfinished Agenda, maintain that "the unfinished agenda of constitutional change that alone can unify 'this most fractious of federal states' is not much different now from what it seemed to be before patriation'."[44] Sharing this sense of non-success, Roger Gibbins comments that "the damage caused by the constitutional process was entrenched rather than mitigated by the new constitution "and that the act" both sustains and exacerbates fundamental institutional weaknesses within the Canadian political system.[45]

Much of the dismay with the constitutional settlement of 1982 lies in the view that the changes do not represent a reconciliation between French Canada and English Canada. To many observers, the act of changing the constitution despite the vigorous objection of the Quebec government was a betrayal of commitments made to the Quebec electorate by the federalist forces in the 1980 referendum, and in many ways intensified the struggle between French and English Canadians.

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[43]Keith Banting and Richard Simeon, "Federalism, Democracy, and the Future," in Banting and Simeon, eds., And No One Cheered, p. 61.

[44]Stanley M. Beck and Ivan Bernier, eds., Canada and the New Constitution--The Unfinished Agenda. Vols. I and II (Montreal: The Institute for Research on Public Policy, 1983).

[45]Roger Gibbins, "The Politics of the Canada Act," Canadian Forum, 62 (February, 1983), p. 17.

Other observers contend that the settlement represents a partial victory for English-French relations with the constitution's emphasis on securing rights for minority languages across Canada. Nonetheless, the isolation of Quebec raises a deep sense of illegitimacy with the constitutional changes. Commenting on this, Gerard Bergeon notes, "there is a sort of fate in our history which once again has shown that "Canadians have a very special propensity for failing to create great national symbols, which are necessary popular reference in any political society.[46]

The outcome of the constitutional settlement is also disappointing to those who saw the potential for constitutional reform to accommodate, or set up a framework to accommodate regionalism. While the provincialist view gained many of its objectives, particularly with the new amending formula, in the end the settlement of 1982 failed to address the chronic problems of regional representation that have fostered western alienation and some believe eroded the bond between Canadians and their national government. Again, to quote Roger Gibbins:

> While the Act cannot be said to work against the interests of the west, it does nothing to advance those interests through much overdue institutional reform. At the end of a long and bitter constitutional process, Western Canadians are left with a strengthened provincial vision and a weakened national vision of the Canadian federation, neither of which will serve them well. They are left with

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[46]Gerard Bergeron, "Quebec in Isolation," in Banting and Simeon, eds., And No One Cheered, p. 61.

> a political system that fails to capture the national aspirations that flourished in the West.[47]

In Gibbins' view, because neither the reform and revitalization of national parliamentary institutions nor the constitutional enshrinement of popular sovereignty was achieved in the Constitution Act, we have missed a momentous opportunity in our constitutional development to moderate or contain regional conflict.

The argument that the Constitution Act of 1982 has failed to fundamentally alter our constitutional structure to solve some of our conflicts, is not meant to imply that the alternatives contained in it will have no important impact. Both the amending formula, which will alter the dynamics of prospective constitutional change, and the Charter, which is going to vastly increase the role of judicial policy-making, will give rise to major changes in our constitutional development. One area in which the new amending formula is likely to have a major impact is over political institutions. In effect, the amending formula has brought much more rigidity to our constitutional structure than had previously existed before its adoption.[48] With the adoption of a formula largely designed by the provinces, many matters which previously could have been altered by the federal govern-

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[47]Roger Gibbins, "Constitutional Politics and the West," in Banting and Simeon, eds., And No One Cheered, pp. 131-132.

[48]See R.I. Cheffins, "The Constitution Act, 1982 and the amending formula: Political and Legal Complications," Supreme Court Law Review, 43 (1982) 42-52.

ment alone, now require either unanimous or seven province approval. As a result, potential reform of the composition of the Supreme Court, the alteration of our present cabinet government, the introduction of the principle of proportionate representation in the House of Commons, and creation of new provisions will, as a result of the amending formula, now be much more difficult to bring about. The implications of the rigidity are compounded by the failure of the recent constitutional changes to deal with the increasing inability of Canada's political institutions to reflect large elements of the population, or their incapacity to check the immense growth of executive government. The result, according to R.I. Cheffins, is "that not only does the constitutional package fail to deal with the inadequacies of Canada's political institutions, but that it in fact forces them along lines which are now appearing to be increasingly unresponsive and excessively oligarchic.[49]

As one of the principal items in the recent constitutional package, the Charter of Rights and Freedoms will also play a major role in future constitutional development. As was discussed earlier in this work, judicial review is a growing trend in the evolution of our constitution. In the past, the courts have gained a prominent role in Canada's constitutional history through their immense responsibility of interpreting the distribution of powers. However, constitutional adjudi-

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[49]See R.I. Cheffins,"The Constitution Act, 1982 and the amending formula: Political and Legal Complications," p. 44.

cation is at a decisive turning point now with the injection of a supremacy clause, and an entrenched Charter of Rights and Freedoms. The effect of this added responsibility will widen the focus of judicial review from a concern with the constitutional process of government to a concern with the constitutional rights of individuals.[50]

In other words, whereas in the past, the courts in their protection of rights of Canadians largely determined whether a challenged law had been passed by the appropriate level of government, judges now are able to acknowledge that the constitution bestows rights on Canadian citizens beyond the reach of either level of government. In essence, the recent constitutional changes involve a significant shift in the policy-making authority from the other branches of government to the courts. As we are already witnessing, judges will be called upon with increasing frequency to decide on a host of questions, previously decided in the political arena, involving the scope of rights and freedoms.[51] As has been frequently remarked, the principal impact of the Charter on the process of government will be the tendency to "judicialize politics and politicize the judiciary."[52]

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[50]See Peter H. Russell, Leading Constitutional Decisions, p. 4.

[51]See Peter H. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts," Canadian Public Administration, 25, No. 1 (1982), 1-33 for his comments on the expanded role that judges will have in deciding how fundamental social and political values should be affected by public policy.

[52]This was one of the prime arguments against entrenchment, see D. Schmeiser, "The Case Against Entrenchment of a Canadian Bill of Rights," Dalhousie Law Journal, 50 (September 1973), 15-50.

While Canadians have underestimated the policy-making role of their judges in the past, the Charter will likely increase the awareness of this growing role.

One final comment on the significance of the Charter in our constitution should be made concerning its potential impact on national unity. Indeed, this was one of the prime political purposes behind political support for the Charter since it was argued by many, especially at the federal level, that with its capacity to serve as a unifying symbol, the Charter has the potential to reverse the centrifugal forces which some consider to threaten the survival of Canada. However, Peter Russell contends that the Charter's unifying effect is not likely to be in this largely symbolic manner but, rather, is more apt to be indirectly established through the application of uniform national standards by the Supreme Court to particular policy areas, such as film censorship, which otherwise would be subject to diverse provincial standards.[53] Further, this centralizing dimension of the Charter, in his view, will among other things, mean that the federal government's monopoly of the power to appoint judges, not only to the Supreme Court of Canada but to all the higher provincial courts, will be increasingly questioned.

To sum up to this point, the package of changes now emobodied in the revised constitution has achieved some long-standing objectives in

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[53]See Peter Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms," Canadian Bar Review, 61, No. 1 (March, 1983), 30-54.

Canada, including patriation--an amending formula, an entrenched bill of rights, and stronger minority language provisions. However, while it can be said that these changes clearly surpass in significance any previous amendment in Canadian history, and that these alterations are likely to have important impacts on our polity, it must be emphasized that our recent constitutional settlement has only modified our constitutional framework, rather than replaced it with a wholly new constitutional document or a comprehensive constitutional revision.

More importantly, because our constitutional system is still essentially much as it was before the recent changes, the Constitution Act, 1982, failed to address any of the underlying conflicts that originally triggered much of the demand for constitutional reform in the first place. For the reason that our constitution remains largely unreformed, it can therefore be suggested that there are still major constitutional questions to be settled--or as two commentators have put it, "we are still not out of the constitutional woods."[54] While national economic problems and the public's distaste for constitutional bickering are likely to delay the momentum for constitutional change for some time, it seems inevitable that the underlying tensions in our political system will ensure that constitutional issues will not remain in a state of inertia for long. Indeed, already new proposals are surfacing such as the federal government's discussion paper on Senate reform.

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[54]Stanley M. Beck and Ivan Bernier, eds. Canada and the New Constitution--The Unfinished Agenda, p. 4.

Based on these considerations then what is the future likely to hold for constitutional reform? One lesson which can be drawn from our recent constitutional experience, is the impressive capacity of our constitutional system to survive in spite of widespread dissatisfaction with its functioning. Canadians have in recent years, been exposed to a considerable amount of revolutionary rhetoric which raised the aspirations of both participants and the public towards fundamental and widespread change. Those who sought a sweeping transformation of our constitution have, of course, been disappointed in their goal. According to Alan Cairns, there are a number of sources of constitutional conservatism which helps explain why there was so little formal change where so many were convinced that the Canadian constitutional system was about to be extensively reformed. It is his contention that the resistance of the existing constitutional system to change was, among other reasons, derived from the limitations and uncertainties of the amending procedures, the profound disagreement by contending governments about the desirable direction of change, and the veto power of particular interests within the federal government which resist change detrimental to themselves. The result is in his words, "A system in which the capacity to resist change has far more leverage than can usually be mustered by the forces of innovation."[55]

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[55] Alan Cairns, "The Politics of Constitutional Conservatism," p. 29.

Accordingly, broadscale reform is unlikely in our constitutional future. However there are several respects in which the amending formula may encourage an incremental and cumulative approach to constitutional change. First, where prior to 1982, initiatives for amending the constitution had to come from the federal level, incentives may now be taken from either Ottawa or the provinces.[56] Secondly, with the new amending procedures it is now possible for an amendment of quite a limited issue to begin with passage in only one or two legislatures and gradually over three years be adopted by other legislatures until the required majority is reached within a specific time frame outlined in section 39. An attempt to follow this route has already been witnessed with the unanimous approval by the British Columbia legislature of the resolution to add the "enjoyment of property" to the Charter. Lastly, the new amending process may open more avenues for public influence towards constitutional change. Groups may now be able to bring pressure on individual governments to initiate an amendment, and then expand their efforts across the country, much on the model of the American Equal Rights Amendment movement.[57] For instance, trade unions or other groups might one day begin to mobilize along these lines to extend fundamental and social rights--the right

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[56] R.I. Cheffins, "The Constitution Act, 1982 and the Amending Formula: Political and Legal Implications," p. 51.

[57] Keith Banting and Richard Simeon, "Federalism, Democracy and the Future," p. 357.

to a job, to housing, a clean environment and health care--to the Charter, or Franco-Ontarians might pressure Ottawa to initiate an amendment extending official bilingualism to their province as a means of intensifying the pressure on provincial politicians.

Viewed from this perspective, despite the possibility of a growing dissatisfaction by some Canadians with our largely unreformed constitution, the direction of future change is not likely to depart radically from the existing structure. Even with the achievement of an amending formula, those who may seek a sweeping "phase two" of constitutional change are likely to be disappointed since the barriers to a political consensus required for widespread constitutional renewal have not been removed. Instead, the general direction of prospective constitutional change is more likely to be part of the continual evolutionary process in our existing constitutional structure, through some combination of more modest attempts at formal amendment and the gradual adaptation and adjustment of the constitution to new realities.

In more specific terms, prospective reform of our constitutions will take place in two areas which the Constitution Act, 1982 failed to address: reform of our central institutions, and a review of our division of powers. One of the first areas of reform when constitutional discussions resume, is likely to be in the constitutional restructuring of the central government since the inability of federal institutions to successfully represent and provide a forum for accommodation among competing interests remains a central issue. Institutions such as the House of Commons, the Senate, the Supreme Court of Canada, federal

administrative and executive agencies, and federal-provincial consultative mechanisms are just a few of the most obvious areas of possible change.[58] This thesis will focus on three of the most prominent proposals to address the problem of regional representation in our central institutions: reform of the Senate, changes in the electoral system, and reform of the Supreme Court.

The range of recent proposals reveals a large amount of interest in the Senate. The Upper House originally was created to provide representation of the regions but this function has in large part not been fulfilled for the main reason that Senators are appointed by the Prime Minister without provincial consultation.[59] Moreover, argue some observers, the existing Senate is further flawed because of the manner in which it provides for the representation for the provinces. For instance, the present Senate provides ten seats for Nova Scotia and New Brunswick and only six seats for Alberta and British Columbia.

Two major alternatives to the existing Senate have been discussed in recent years: a Council of the Provinces and an elected Senate. The first alternative has been suggested in a number of proposals such as

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[58]See Donald Smiley, "Central Institutions," in Beck and Bernier, eds., Canada and the New Constitution, pp. 19-90 for his discussion of this matter.

[59]It should be kept in mind here that in strict terms Senators are appointed by the Governor-General on the advice of the Prime Minister. Historically, it is interesting to note that in 1896 Lord Aberdeen refused to make senatorial and judicial appointments recommended by a Prime Minister who, although still in office, had been rejected by the electorate.

those of British Columbia and Alberta governments, the Task Force on Canadian Unity, the "Beige Paper" of the Quebec Liberal Party, and the Canadian Bar Association. Basically it would have an upper house consisting of delegates from provincial governments including provincial cabinet ministers and, with some proposals, headed by a premier. Its main purpose would be to bring the provinces to the centre and give them a much louder voice in the national decision-making process. Most of the proposals recommend an absolute veto for this upper house on certain matters of major federal-provincial concern and for nominations to the Supreme Court and major federal agencies and commissions. They tend to recommend a suspensive veto on all other matters including legislation passed by the House of Commons.

Supporters of this alternative claim that that projected reform would go a long way toward eliminating one of the major defects of the existing linkages between the provinces and the federal government. To quote the report of the Task Force on Canadian Unity, a Council of the Provinces "could play a major part in ensuring that the views of provincial governments are taken into account before any central action which might have an impact upon areas of legitimate provincial concerns."[60] Critics of the concept argue that a Council of the Provinces would restrict the capability of Ottawa to discharge its vital powers to act in the name of an overriding national interest,

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[60]The Task Force on Canadian Unity. A Future Together: Observations and Recommendations (Ottawa: Supply and Services, 1979), p. 99.

and that it is uncertain whether a provincially appointed Senate would lead to less intense federal-provincial conflicts than now exist. Lastly, some opponents of this alternative maintain that, while it would offer a form of 'regional responsibility', there is the danger in the assumption that regional interests would or should be defined exclusively by provincial governments.[61]

An alternative to a provincially-appointed Senate is an upper house composed of elected Senators.[62] This proposed reform would involve election of Senators directly by citizens, in elections separate or parallel to the normal life of parliament for terms longer than the normal life of parliament, and with terms staggered so that all Senators do not come up for election at any one time.[63] Supporters for an elected Senate argue that in a democratic age, the most credible legislators are those directly elected by the people. Moreover, they point out that existing models of an elected Senate exist in Australia and the United States. There are, of course, a variety of uncertainties

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[61]For the disadvantages to a Council of the Provinces, see Peter McCormick, et al., Regional Representation--The Canadian Partnership: A Task Force Report Prepared by Peter McCormick, Earnest C. Manning, Gordon Gibson, (Calgary: Canada West Foundation, 1981), pp. 79-83.

[62]While there seems to be wide support amongst the Canadian public for the concept of an elected Senate, there have only been three proposals for an elected Senate: the report of the Federation des francophones of Quebec, the 1981 Canada West Study, Regional Representation, and the recent Report of the Special Joint Committee of the Senate and House of Commons on Senate Reforms, January 1984. (Ottawa: Supply and Services Canada, 1984).

[63]In the case of Bill C-60, legislators would do the electing.

raised by the concept of an elected Senate--the most important being, how easily an elected Senate can be grafted onto a parliamentary system, and the impact an elected Senate would have on the principle of responsible government.[64]

Electoral reform, like Senate reform, is likely to enjoy wide interest as a future constitutional option. It has long been suggested that one means of correcting the inability of the central government to adequately represent and take account of the interests in all regions is to modify the current mode of elections to the House of Commons by introducing an element of proportionality to the single member constituency. The current electoral system has been criticized for accentuating regional imbalances in party support by regionalizing party representation, and underrepresenting important segments of opinion in the House of Commons.[65] To correct the difficiencies in the way that our members of parliament are chosen most of the proposals for electoral system change envision an additional set of M.P.'s from each

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[64]Canada, Minister of Justice, Reform of the Senate--A Discussion Paper (Ottawa: Publications Canada, 1983) for a comprehensive discussion of the issues raised by Senate reform.

[65]There is a great deal of literature on this subject including Alan C. Cairns, "The Electoral System and Party System in Canada," Canadian Journal of Political Science, 1, (March,1968): 55-80; J.A. Lovink, "On Analyzing the Impact of the Electoral System in Canada," Canadian Journal of Political Science, 3,(December, 1970): 497-516; William P. Irvine, Does Canada Need a New Electoral System? (Kingston, Instititute of Intergovernmental Relations, Queen's University, 1979); and John C. Courtnay, "Reflections on Reforming the Canadian Electoral System," Canadian Public Administration, 23, (Fall, 1980), 427-457; as well as the report of the Task Force of Canadian Unity, A Future Together, Observations and Recommendations.

province or region selected in a manner which will reflect the distribution of voting preferences in a province regardless of whether or not they have resulted in victories in individual ridings. While the redistributive or topping-up mechanisms and the number of seats may differ from one proposal to the next, it is sufficient to note that all seek to ensure that both government and opposition have some members of parliament from all major regional and linguistic groups in the country.[66]

Supporters claim that reforming the electoral system in such a manner would among other improvements eliminate the startling discrepancy between the popular vote the parties and the number of seats they win in parliament, reduce the likelihood that a party is hopelessly without support in a region, and ensure that interests, which are presently expressed in provincial governments, would find increasing weight in Ottawa.[67] Moreover, those who favour some method of proportional representation, add that such an option to constitutional change would improve a body that already exists, and therefore add neither new institutions or new elections to the process.[68] Yet, other

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[66]Details of two widely discussed proposals--the Irvine formula and the Pepin-Robarts formula--can be found in Irvine, Does Canada Need a New Electoral System?, pp. 52-58, and 90-94; and Task Force on Canadian Unity, A Future Together, Observations and Recommendations, pp. 104-6, and 131.

[67]See William Irvine, Does Canada Need a New Electoral System?, pp. 68-69.

[68]Canada West Foundation's report--Regional Representation, p. 54.

constitutional observers are more wary of claims made on the behalf of electoral reform, particularly those promises that a different electoral system would lead to increased party "credibility" in the regions and increased "sensitivity" to the regions.[69]

There are other arguments against such electoral reforms including the claim that it might foster a large number of regional parties or make it difficult for a party to get a majority in the House of Commons, that it would create two classes of M.P.'s, and that electoral changes would do little to reduce the disadvantages of minority groups in a majority chamber.[70]

Like the House of Commons or the Senate, the Supreme Court is likely to figure prominently in institutional reform of a constitutional nature. Pressure to reform our final court of appeal is rooted in the fact that the court originally was, and today is, a creation of the federal level of government. The Supreme Court is, accordingly, not established by the constitution, but by federal law, and its judges are appointed by Ottawa alone.[71] Although the recent constitutional

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[69]See John C. Courtney, "Reflections on Reforming the Canadian Electoral System," for his analysis of some of the claims made on behalf of a reformed electoral system.

[70]See Canada West Foundation Report--Regional Representation, pp. 56-58, or Paul Fox, "The Pros and Cons of P.R. for Canada," Politics Canada, Paul Fox, ed.,(Toronto, McGraw-Hill Ryerson, 1977), pp. 307-314.

[71]In keeping with the nature of Canada's constitutional history, our constitution gives little awareness to the significance of the Supreme Court. Simply put, the constitution merely provides for the

changes mean that the federal government can no longer legislate unilaterally concerning much of the Supreme Court, most constitutional observers deplore the current state of the institution. To most, it seems indisputable that the constitution should provide for the status (that is, its existence and independence), the composition (the size, distribution of judges, and appointment procedures) and the jurisdiction of the Supreme Court.[72]

The main thrust of proposals to reform the Supreme Court is to provide more equitable participation in the appointment process amongst the federal and provincial governments through some means of federal nomination and provincial confirmation. On this matter, two basic models have emerged. The first model favours giving the provincial government, through involvement of its Attorney-General, a voice in the appointment process. The second model calls for a national institution, usually a reformed Senate, whose membership consists of Senators either appointed by or elected in the provinces to ratify the selection. Some observers contend that the second model is more likely to be concerned with merits than one-to-one in-camera dealings of the two Attorneys-General.[73]

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possibility of a final court. Acting on the basis of section 101 of the Constitution Act of 1867, parliament, by ordinary statute created the Supreme Court in 1875. For these and other details see Peter Russell, Leading Constitutional Decisions, pp. 3-8.

[72]This point was made by the Trembley Commission in 1956, and has since been underlined by every major government.

[73]For this and other issues of reforming the Supreme Court see James MacPherson, "The Potential Implications of Constitutional Reform

Concerning the jurisdiction of the Supreme Court, one of the major proposals towards Supreme Court reform is the suggested creation of a separate constitutional court.[74] Its jurisdiction would be over all constitutional matters, and would be composed of judges with experience and expertise in constitutional affairs. Proponents point out that constitutional courts in the United States and Europe have performed well, and contend that better judicial decisions would result from specialization. However, there is little support for a specialized constitutional court for the main reason that it would likely encourage a great many more public issues of the day being decided by the court, and on legal grounds, rather than by politicians on political grounds.[75]

Lastly, a third major concern of reforming the Supreme Court is rooted in the role of "dualism" in the court. Many proponents of reform argue that the Supreme Court must have enough Quebec-based judges because of the special situation of the French language minority and Quebec's unique system of civil law. There are several proposals on this matter. One method to recognize the dualist nature of Canada's

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for the Supreme Court of Canada," in Beck and Bernier, eds., Canada and the New Constitution, pp. 161-223.

[74]This is a longstanding proposal of Quebec see J.Y. Morin, "A Constitutional Court for Canada," Canadian Bar Review, Vol. 43 (1965), 454-552.

[75]For the major problems faced by a specialized constitution court see James MacPherson "The Potential Implications of Constitutional Reform of the Supreme Court," Canada and the New Constitution, pp. 200-203.

legal system would be to expand the court from nine to eleven judges, five of whom would be from Quebec.[76] Other methods include awarding an equal or near equal number of common law and civilian law judges on the Supreme Court--i.e. award four of the present nine to Quebec judges; and the alteration of French and English-speaking chief justices.[77]

Like the proposed constitutional restructuring of our national institutions--a review of our distribution of powers makes up a large part of the unfinished agenda on constitutional reform. Except for the addition of section 92A to section 92 on natural resources, the recent constitutional change has left the original division of powers unaltered. This means that the Constitution Act, 1982 failed to address a wide range of controversies concerning the distribution of powers, many of which have been the subject of bitter constitutional cases--i.e. jurisdiction over pay television, off-shore mineral rights, and the trade and commerce power. The issues surrounding the distribution of powers cannot be put off forever since they are at the core of the dispute between governments. Indeed, it seems likely to many observers that constitutional discussions will eventually focus on changes that will be even more fundamental to federal-provincial

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[76]See Task Force on Canadian Unity--A Future Together--Observations and Recommendations, p. 101.

[77]See James MacPherson, "The Potential Implications of Constitutional Reform of the Supreme Court of Canada," pp. 198-200.

relations than have taken place so far.[78]

In relation to the matter of a constitutional review of the distribution of powers, any future blueprint is subject to many complex considerations. It is extremely difficult to define the relative responsibility of the two orders of government since few activities are local in nature, and similarly, because national activities often affect local areas in different ways with different effects. Moreover, in any federation the functions assigned to the two levels of government can never in practice be completely isolated from each other into watertight compartments, nor can they be so cut and dried as to prevent conflict. Lastly, any allocation of jurisdiction cannot avoid the need for adjustment to changing circumstances.[79]

Of the specific powers that I have selected for examination in this thesis, the question over the control of communications is a good example of the complexity of any rationalization of powers. The issue of reforming this power centers on how much provincial control of communications there should be. The present constitutional position is that the federal government has jurisdiction over almost all aspects of communications. Radio, television, interprovincial telegraphs and telephones, and cable systems--provided any part of their programming is received by the airwaves--are controlled by Ottawa.

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[78]See for example, Stanley M. Beck and Ivan Beanier, eds., Canada and the New Constitution.

[79]Task Force on Canadian Unity, A Future Together--Observation and Recommendations, p. 84.

It has been proposed by the provinces, usually most vociferously by Quebec, that the major portion of communications be reassigned to provincial jurisdiction. This would not affect the power of the national government to employ the other heads of the jurisdiction relating to communications, provided such exercise is not coloured by the appearance of an intent to control or regulate.[80] The proposed transfer is justified by Quebec as being essential to building its regional culture. Other provinces, led by Saskatchewan, desire to be free to establish provincial networks and to license and control cable T.V. Defenders of federal domination over communications argue that any reassignment of this responsibility to regional entities could reduce the ability to maintain open nationwide facilities; that such a development might reduce the quality of Canadian programming, and destroy a vehicle for maintaining a national forum in which to reflect a national point of view.

Besides these two opposing constitutional alternatives, there are also several possibilities centering on concurrent power over communications. For instance, this might involve leaving the federal government with control of national networks, standards, and allowing the provinces some control over content or over cable. Another possibility would involve giving the provinces some of a voice in appointments to the C.R.T.C. and thus an opportunity to influence its decisions.

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[80] David Elton and Peter McCormick, Alternatives, 1980, The Basic Issues of Constitutional Reform (Calgary: Canada West Foundation, 1980), p. 19.

In recent years, the fields of off-shore resources and fisheries, like that of communications, have proved to be highly contentious areas of dispute. Again each of these fields represents an area where the federal and provincial governments believe they have a legitimate interest and jurisdiction.[81] There are a number of reasons why both the central and provincial governments have such a keen interest in off-shore resources and fisheries. One of the most significant is the fact that each of these fields has been greatly influenced by changes in technology, international developments, environmental circumstances and social impact as witnessed by the effect of the extension of Canada's off-shore boundaries to a 200-mile limit and the technological advances in fishing methods, and in extracting resources from the oceans and their seabeds.[82]

Given areas as complex and rapidly-changing as these and the fact that neither level of government is anxious to give up for the fore-

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[81] In the case of off-shore resources, these resources are under Ottawa's jurisdiction. Led by Newfoundland, the provinces argue that off-shore resources should be treated no differently than national resources which are owned by the provinces. The federal government under the Liberals, refuses to concede provincial ownership but was willing to share revenues. Similarly, with fisheries, on the one side there are the provinces again led by Newfoundland, which seek some control of fishing, and on the other side there is the federal government which while willing to share some of the administration and responsibility with the provinces for inland fishing, refuses to concede jurisdiction over coastal fisheries in large part because of the difficulty of dealing with international aspects of fisheries policy and of sharing the catch among the provinces. As cited by Richard Simeon, Citizens Guide to the Constitutional Question, p. 40.

[82] See The Task Force on Canadian Unity, A Future Together--Observations and Recommendations, p. 91.

seeable future its ability to respond to changing circumstances, many constitutional observers see numerous problems in any attempt to rationalize the division of powers by delineating the aspects which might be placed under their exclusive jurisdiction of one government or the other, or under concurrent jurisdiction. In their view, better results could be achieved by administrative agreement and policy coordination. One proposal suggested in this regard, is the development of "effective councils" or "intergovernmental bodies" designed to facilitate the formulation of policy at both levels of government that would effectively mesh with each other."[83] Also, it has been proposed that the review of central legislation in a Council of Provinces could assist the process by reassuring provinces that their views will have a direct impact when Parliament legislates in such areas as fisheries or off-shore resources.[84]

To summarize, despite the major innovations brought about by the 1982 constitutional settlement--patriation, an amending formula, the Charter of Rights and Freedoms, and stronger linguistic guarantees for minorities--our constitution remains largely unreformed. In effect, the same functioning of parliamentary and cabinet government remain intact, as does our distribution of legislative powers (except for the classification on resource ownership). Accordingly, no new frame-

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[83]See The Task Force on Canadian Unity, A Future Together--Observations and Recommendations, p. 92.

[84]Ibid., p. 92.

work has been put in place to more effectively manage the underlying conflicts that originally led to demands for constitutional change. Canadians therefore, are still faced with difficult decisions over structural changes which must eventually be made to the institutions of our central government and the distribution of legislative powers. Prospective agendas for revised constitutional arrangements are likely to include such proposals for a reconstituted Senate, electoral change, Supreme Court reform, and a review of highly contentious areas of governmental dispute in such areas as communications, off-shore resources and fisheries. As well, although not as likely to figure as prominently in constitutional debates to come, proposed changes to our Charter of Rights, such as the entrenchment of the right to property, may present further constitutional options for public officials and citizens to consider in future agendas of reform.

CHAPTER THREE

BRITISH COLUMBIA AND THE CONSTITUTION

As the second chapter has underlined, the basic framework of Canadian federalism has not been fundamentally altered by the package of recent constitutional changes. In this chapter, the implications of the limited degree of reform effected will be examined from a British Columbian perspective. Based on a review of the province's evolving relationship with Canadian federalism, and particularly the striking shift in the last decade in the approach of Premier W.R. Bennett's government to constitutional reform, it will be argued that the Constitution Act, 1982 has largely failed to address British Columbia's recent constitutional agenda, as well as the province's traditional claims on Canadian federation.

Before discussing the various recommendations of British Columbia governments to reform Canada's constitution, it is useful to briefly examine the province's orientation to federalism prior to the emergence of recent constitutional review since many of this province's traditional themes or stances over the past century have re-emerged in its constitutional agenda over the last two decades. British Columbia's unique and often acrimonious interaction with the Canadian federation was initiated by the special terms which were granted to the province upon its admission to the Dominion in 1871. As historians have underlined, there was little in the province's history as a British colony

to link it in any way with Canada, but due to pressing financial difficulties Confederation became an increasingly attractive alternative which the province could no longer refuse.

In any event, as a leading provincial spokesman, Dr. John S. Helmcken forewarned in a speech delivered during the Confederation debate, it was not likely to continue successfully unless it be the "pecuniary benefit of the inhabitants."[85] The terms of the union granted to the province at its admission to the Dominion were to soon serve as a focal point for British Columbians to judge the material gains which were to have been accrued from Confederation, and in later years were to provide a springboard for launching a favorite and longstanding provincial complaint for "better terms" than the original agreement had established. Basically, the special terms of 1871 consisted of various financial commitments to the province on the part of the federal government, of which the two most important were that the Dominion would guarantee interest at 5 per cent on a provincial loan not in excess of £100,000 to be used for the construction of a "graving dock" at Esquimalt, and that it would undertake the construction of a Pacific railway to be started within two years of the union and completed within ten.[86]

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[85]See Debate on the Subject of Confederation With Canada, reprinted from the government gazette extraordinary of March 1870. (Victoria: Printed by R. Wolfenden, 1870).

[86]The financial commitment on the part of the Dominion included its agreement to provide annual grants amounting to $216,000, and to assume liability for all of British Columbia's debts and liabilities.

Beginning in 1870, the delay in implementing the terms for British Columbia, especially with the construction of the railway, gave rise to the first of many bitter controversies between the province and the federal government. With the federal government on one hand pointing to the extravagence of the special terms, and the province on the other arguing that the terms were endowed with the character of a contractual agreement, the controversy over carrying out the conditions of the agreement erupted in what can be called as near open political warfare, particularly during Prime Minister Alexander MacKenzie's term from 1873 to 1878.[87] At one point the dispute became so hostile under Premier Walkem's leadership that the support of the provincial Legislature was secured for three petitions to the Queen, as well as for a seccession resolution which stated that the province would separate from Confederation should its claims go unheard.[88]

For the specifics of the terms, see British Columbia, Memorandum Respecting Claims of British Columbia for Better Terms, (Victoria: King's Printer, 1914), Appendix A, pp. 21-23; or James A. Maxwell, Federal Subsidies to the Provincial Governments in Canada, (Cambridge: Harvard University Press, 1937), pp. 38-40.

[87]For the bitter feelings of this period see Margaret Ormsby, "Prime Minister McKenzie, The Liberal Party and the Bargain with British Columbia," Canadian Historical Review, 26 (June, 1945), 148-174.

[88]Although the controversy over the terms continued this resolution came to no effect after Sir John A. Macdonald was elected as Prime Minister, since he was seen as being more sympathetic to British Columbia's view. Later in 1894, the long-standing conflict over the special terms granted to the province was settled when the major point of contention had been eliminated with the completion of the Canadian Pacific Railway, and after British Columbia and the Dominion subscribed

After the dispute over the fulfillment of the terms of the union had largely been laid to rest, the quest for "better terms" was to next serve as the main characteristic of British Columbia's approach to its position in Confederation. While the province was putting its case for improving the financial arrangements that were available to British Columbia under the terms of Confederation as early as the 1890s, this claim did not really make a significant appearance until the turn of the century when at the 1906 Dominion-Provincial Conference Premier McBride successfully obtained a special grant for the province amounting to £100,000 for ten years.[89]

Continued by successive provincial governments at various Dominion-Provincial Conferences in the 1920s and 1930s, the claims for better terms have, in the words of one observer, "been based more or less on the same factors although the emphasis has varied from time to time."[90] As a review of a number of Dominion-Provincial Conferences throughout the 1900s to 1930s demonstrates, the province's claims for improved terms dealt primarily with subsidies, grants, alienated lands,

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to a finality clause which declared that the agreement was "in full of claims up to this date" which each had against the other. For a brief review of the Settlement Act see James A. Maxwell, Federal Subsidies to Federal Governments, p. 92.

[89]See Minutes of the Proceedings in Conference of the Representatives of Canada and the Provinces, October 1906, in the Dominion-Provincial and Interprovincial Conferences from 1887-1926 (Ottawa: King's Printer, 1951), p. 60.

[90]R.M. Burns, "British Columbia and the Canadian Federation," One Country or Two, ed., R.M. Burns, (Montreal and London: McGill Queen's University Press, 1971), p. 258.

freight rates, and tariffs.[91]

Two major arguments or themes were advanced by British Columbia governments as they prepared their case for "better terms." First, beginning in 1901, it was repeatedly asserted by British Columbia that the province had contributed to the federal treasury a disproportionately large amount of revenue and that it received in return a disproportionately small return in the form of federal expenditures. A second argument for "better terms" by Victoria was also based on economic disabilities that the province was incurring. However, rather than centering on the unfairness of a revenue/expenditure imbalance, it pointed to the peculiar physical conditions as incurring major transportation and administrative costs on the provincial government. Thus, despite being rich in resources and revenue raising capability, British Columbian governments have been able to repeatedly plead poverty in their discussions with Ottawa over the inadequacy of the original arrangements for the entry of British Columbia into Confederation.

During the period of the province's campaign for "better terms," the emergence of the federal government's invasion of the field of income

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[91] See British Columbia, British Columbia in Canadian Confederation, Part (Victoria: King's Printer, 1914), pp. 3-23 and Canada, Dominion-Provincial Conferences, 1887-1926 (Ottawa: King's Printer, 1951) and Dominion-Provincial Conferences, 1927-1941 (Ottawa: King's Printer, 1941). See also R.W. Leeson, "British Columbia, Better Terms and Provincial Rights 1900-1941," Kumtuks Review (Spring 1975), 47-63; and James Maxwell, Federal Subsidies to the Provincial Governments in Canada for a brief review of claims by the province for "better terms."

tax in 1917 was to prove to be an important constitutional development.[92] The right to income tax was at the time thought by the provinces to belong to them, but as a war measure, income taxation was not vigorously opposed with the understanding that Ottawa would vacate the field. With the federal government's reluctance to surrender its new powers, income taxation became an issue which British Columbia increasingly took notice of in the post-World War I period. Expressing his dismay at the permanence of federal income taxation, Premier Maclean in 1927 noted that "after ten years, it appears to be losing its temporary aspect and commencing to assume the guise of permanency."[93] The issue was to prove significant in Victoria-Ottawa relations as it was the beginning of one of the major factors in British Columbia's campaign for "provincial rights" which by the 1930's had begun to overtake "better terms" as the province's primary stance towards Canadian federalism.[94]

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[92]Historically, it should be added that the racial treatment of Orientals by various British Columbian governments mainly around the turn of the century also caused some controversy between Victoria and Ottawa. With the growing resistance in the province to Oriental immigration, largely with Chinese labourers who were imported to work on the CPR, British Columbia attempted to close off the influx through legislation designed to restrict the numbers of immigrants or create heavy head taxes. The federal government disallowed numerous Acts or Orders of the Province for the main reason that provincial actions were seen as detrimental to relations with Japan. See R.M. Burns, "British Columbia and the Canadian Federation," p. 257, and G.V. LaForest, Disallowance and Reservation, (Ottawa: Queen's Printer, 1955), p. 66. For the specific Acts or Orders of the province disallowed or reserved see Appendix A and B of Disallowance and Reservation.

[93]British Columbia, British Columbia's Claim for Readjustment of Terms of Union (Victoria, 1927), p. 29, as cited by R.W. Leeson, "British Columbia, Better Terms and Provincial Rights," p. 48.

[94]Ibid., p. 48.

The ascendency of "provincial rights" largely paralleled the terms of office of Premier T.D. Pattullo from 1933-1941, although its developments had roots in the 1920s when governments across Canada were forced to re-assess their financial, political and social responsibilities.[95] While British Columbia continued to press for "better terms" during the Pattullo years, attention was increasingly focused onto "provincial rights" as the province tried to preserve and in some cases expand the autonomy in a time when its government was experiencing grave financial difficulties due to the Depression, and then in later years when the war brought centralizing forces to the Canadian federal system.

In the early Pattullo years, the Premier and his government entered into a divisive constitutional dispute with Prime Minister R.B. Bennett. The source of friction between the two men lay in Pattullo's firm conviction that strong government intervention was needed to assist the province out of its financial difficulties. While Pattullo's economic ideas were in many ways substantially ahead of their time, the Prime Minister was decidedly opposed to them.

The contention between Victoria and Ottawa emerged shortly after Pattullo led the provincial Liberals to office on a campaign of "work and wages."[96] During its first session the new government under the

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[95] Ibid., p. 47.

[96] Pattullo, among other things, favored an extensive public works program financed by large interest free loans from the Dominion, a return to the provinces of the income tax field, a national credit scheme, a central bank, national unemployment insurance, state health insurance, and a provincial economic credit. While he realized that his

direction of Premier Pattullo quickly acted to implement his plan for economic recovery and in its first budget showed a deficit of over $2,000,000.[97] In May of 1934, Pattullo's economic plans were largely curtailed when Prime Minister Bennett not only refused a request by the province for special consideration--an 8 million dollar loan--but went on to insist on federal supervision of the province's finances and that the provincial deficit be reduced from $2,000,000 to $1,000,000 or the province might not receive anything at all.[98]

Bennett's demands brought a short reply from the Premier:

> . . . under no circumstances will British Columbia consent to Dominion control over Provincial expenditures. It seems obvious that surrender by the Provinces of their jurisdiction under the terms of union, would lead either to disunion or centralized control.[99]

Further defending provincial rights, Pattullo went on to make the threat that, "If I did not think that British Columbia is essential to the hegemony of the Dominion I would tomorrow move the question to test."[100]

Despite his inability to secure federal cooperation, Pattullo was able to implement some of his campaign promises and the issue of

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proposals were limited by the constitution, he believed that a modified social experiment was possible in the short term. Canadian Annual Review (1934) 330 as cited by R.W. Leeson, Ibid., p. 51.

[97]Ibid., p. 51.

[98]Pattullo to Sir George Perley, May 7, 1934 as cited by Margaret Ormsby, British Columbia: A History, (Toronto: Macmillan, 1958), p. 460.

[99]Ibid., p. 460.

[100]Ibid., p. 460.

"provincial rights" lost much of its visability in the coming years.[101] It was not until the release of the report of the Royal Commission on Dominion-Provincial Relations, otherwise known as the Rowell-Sirois Commission, in 1940 that the issue of provincial rights surfaced again in major controversy.

The Rowell-Sirois Commission since 1937 had been looking into potential ways of redistributing sources of revenue and responsibility of social and economic assistance. British Columbia in March of 1938 submitted to the Commission a brief entitled British Columbia in the Canadian Federation which contained many of the traditional points on which the province's disputes with Canada had been based but which did adopt something of a new stance with its emphasis on the delimitation of jurisdiction between the two levels of government.[102] On this matter, British Columbia argued that the provinces should continue to be consulted in any major procedure and that they be given much broader taxing powers. As well, the province argued for the federal government to take responsibility for old-age pensions, unemployment insurance, and other social services.

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[101]Premier Pattullo did continue to expand on a theme of greater provincial autonomy at the 1935 and 1936 Dominion-Provincial Conferences. At the 1935 Conference, Pattullo demanded a redefinition of taxation powers and in 1936 he argued for complete provincial autonomy in matters of finance as cited by Margaret Ormsby, British Columbia: A History, p. 464. Also see Canada, Dominion-Provincial Conferences, 1927-1941, p. 16.

[102]See British Columbia, British Columbia in the Canadian Federation, Part VII, pp. 351-354.

In its findings three years later, the Rowell-Sirois Commission recommended that the federal government relieve the provinces of their debt and that Ottawa would provide special assistance under certain circumstances in the form of national adjustment grants in exchange for the province's surrendering federal subsidies, control of personal and corporation income taxes, and the right to levy succession duties. On the basis of his government's 1938 submission to the Commission, in addition to his previously expressed views on "provincial rights" it is not surprising that Premier Pattullo found disfavor with the Commission's recommendations. At the 1941 Dominion Conference called by Prime Minister MacKenzie King to discuss the Rowell-Sirois Report, Premier Pattullo took a strong stand against the implementation of the Report arguing that to do so would both tie down the province in perpetuity and lead to "ever-increasing centralization of authority in the Dominion."[103] Later on in the proceedings Pattullo along with Premiers Aberhart and Hepburn refused to go into Committee to discuss the Report and the Conference subsequently ended the next day.

Due in large part to the emergencies of World War II, Pattullo's stand was immediately and almost universally deplored in British Columbia. The Vancouver Sun proclaimed that, "At Victoria there are still some men who do not conceive of this as a nation, but only as a

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[103]Canada, Dominion-Provincial Conference, Tuesday, January 14, 1941 and Wednesday, January 15, 1941 (Ottawa: King's Printer, 1941), pp. 38 and 81.

collection of Balkan states,"[104] while the Province declared that "Mr. Pattullo puts his own political interests first and Canada second."[105] In the words of Margaret Ormsby, Premier Pattullo's error of aligning himself in such a manner against the Report, was not forgiven by a people "grown tired of paternalism and or argument and constitutional principle" and a province which wanted "no blight on its proud record for patriotic effort."[106] The unpopularity of his stand reflected in the results of the 1941 provincial election in which his party's representation was reduced from thirty-one to twenty-one seats. Accordingly, British Columbia's case for "provincial rights" was put in abeyance in the immediate post-war period by the province's governments as new issues began to occupy Victoria-Ottawa relations.

Before going on to discuss the evolving relationship of British Columbian governments in the process of constitutional review, a number of observations should be made regarding the nature of the province's approaches to Canadian federalism so far discussed. As many observers have pointed out, the major issues or themes put forth by British Columbia in its dealings with the federal system have displayed a remarkable consistency throughout the province's history in Confederation. Its

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[104] Vancouver Sun, November 21, 1940, as cited in Margaret Ormsby, British Columbia: A History, p. 472.

[105] Province, November 8, 1940, as cited by Margaret Ormsby, Ibid., p. 472.

[106] Margaret Ormsby, "T.D. Pattullo and the Little New Deal," Canadian Historical Review, 43 (December, 1962) 297.

leaders have habitually reminded Ottawa that it owed the province a better deal for the powers and resources which the province forfeited at the time of union. These same leaders in their pursuit of an enlarged role for the province in Confederation have also repeatedly attempted to protect or even increase provincial autonomy from encroachment from Ottawa. Although both "better terms" and "provincial rights" as constitutional claims are not unique to British Columbians, the combination of shared policy areas and arguments which make up the province's recurrent themes concerning its position in Confederation comprise what has been called a "distinctive British Columbian stance vis-a-vis Ottawa."[107]

The major stances or themes put forth by British Columbia in its dealings with Ottawa also reflect an often intense dissatisfaction with the province's economic position in Canada. Successive British Columbian leaders have focused on an extensive and varied list of economic grievances, including the conditions upon which the province had entered union, tariffs, freight rates, revenue/expenditure imbalance, etc. According to R.M. Burns, much of the British Columbia's preoccupation with materialist considerations originates in the basic characteristics of the province's economy. In his view, an economy based on the production and sale of natural resources, and which is subject to the vagaries of the world market, have all served

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[107]Norman J. Ruff, "British Columbia and Canadian Federalism," The Reins of Power, Governing British Columbia, J. Terence Morley et al. (Vancouver: Douglas and McIntyre, 1983), p. 290.

to make British Columbians "overly sensitive and often vocally belligerent about aspects of Canadian policy."[108] Moreover, as will be discussed later on in this work, for the reason that the structural conditions imposed by British Columbian economy continue today, many of the themes running through this period may be witnessed in the constitutional pronouncements of recent British Columbia governments.

However, it should also be underlined from this brief look at the province's orientation of Canadian federalism that although successive British Columbia governments have proven remarkably consistent in their constitutional dealings and have been single-minded in directing attention to the province's economic grievances, British Columbians at times do show a great deal of concern with the national government of Canada. As illustrated by the electoral demise of Premier Pattullo for his jurisdictional stance against the prevailing centralist mood of the country, the people of British Columbia do not always side against Ottawa on issues that have been exposed to major public controversy. To again quote R.M. Burns, a reasonable generalization is that

> while British Columbia is always willing to press its case against Canada, in times of stress there is a basic Canadian strain which predominates and submerges all the narrow and provincial interests of less previous times.[109]

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[108] R.M. Burns, "British Columbia in Canada: Perceptions of a Split Personality," Must Canada Fail, ed. Richard Simeon (Montreal and London: McGill-Queen's University Press, 1971), p. 65.

[109] R.M. Burns, "British Columbia and the Canadian Federation," p. 261.

Under the premiership of W.A.C. Bennett from 1961 to 1972 the province continued its distinctive British Columbian orientation to Canadian federalism, but in a somewhat revised constitutional context. That is, while Premier Bennett in his interaction with the federal government followed in the tradition of previous provincial leaders in pressing for both improved economic terms and greater provincial autonomy,[110] he was, unlike his predecessors, able to plunge deeply into issues revolving around constitutional reform. Thus, with the emergence of constitutional review, British Columbia was able, for the first time, to go beyond a critique of existing constitutional arrangements to propose basic changes to the structure and the practices of Canadian federalism.

As an examination of Bennett's recommendations to reform the constitution suggests, his primary objective was to strengthen the role of British Columbia in the Canadian federation through a major transfer of authority from the federal to the provincial governments. Of the major issues which dominated the process of constitutional review during his premiership--entrenchment of fundamental rights and

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[110]During federal-provincial conferences W.A.C. Bennett continued to articulate British Columbia's economic grievances over tariffs, freight rates, and transportation policies which have made us the province's traditional claims for "better terms," and he continued to argue for greater provincial autonomy for the province particularly on the issue of taxing powers. Summarizing British Columbia's relationship with the nation during the Bennett regime, R.M. Burns concludes that although "there have been major changes in emphasis," all in all, "one finds a thread of argument which is straight from the past." See R.M. Burns, "British Columbia and the Canadian Federation," pp. 263-264.

linguistic guarantees, reform of the Senate, a method of constitutional amendment, and the redistribution of powers--Bennett's two main priorities were to first resolve the subject of an amending formula, and then upon resolution, to give early consideration to the question of the delegation of powers.[111] A procedure to amend the constitution was a top priority of Premier Bennett since in his view "there is little point in proceeding to discuss other subject matters until the amending formula is resolved."[112] While an amending formula was a foremost concern of W.A.C. Bennett, he never offered his own proposal for such a procedure, although he did support the formulas of both the 1964 Fulton-Favreau Formula and that of the 1971 Victoria Charter.

Reflecting his view that the stresses within Canada are primarily economic or financial in nature, Bennett desired to move onto the subject of the delegation of powers as quickly as possible.[113] The Premier consistently advocated widespread changes to the distribution of powers which were currently in existence. By far the most extreme in its implication was his recommendation that the direct tax fields of personal and corporate income taxes be assigned exclusively to the provinces.[114] Bennett argued that such a redefinition of federal pro-

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[111]W.A.C. Bennett, British Columbia's Proposals to the Working Session of the Constitutional Conference, Ottawa, September, 1970 (Victoria: Queen's Printer, 1970), p. 6.

[112]Ibid., p. 5.

[113]Ibid., p. 5.

[114]W.A.C. Bennett, Opening Statement of the Province of British Columbia to the Constitutional Conference, Ottawa, February 10, 11 and 12, 1969 (Victoria: Queen's Printer, 1969).

vincial powers was needed in light of burgeoning provincial responsibilities particularly in the fields of education, health and welfare. In addition to a complete transfer of a major source of revenue from the federal to the provincial governments, Bennett advocated further changes in a decentralized direction including: increasing the province's legislative authority through a realignment of enumerated subject areas;[115] granting to the provinces the power of the federal government to legislate on all residual matters;[116] and restricting the spending power of the federal government to matters under federal jurisdiction.[117]

W.A.C. Bennett's overriding constitutional concern for reducing federal power and increasing autonomy as underlined in his proposals for a redistribution of powers is also reflected in his recommendations to reform the central institutions of federalism. Central to his

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[115]Bennett favored limiting the federal government's legislative powers to such areas of national concern as the regulation of banking, currency, and the defence of the nation while granting greater legislative abilities to the provinces in the fields of property and civil rights, education, social welfare and natural resources. Additionally, he recommended that matters of material concern should be put under concurrent jurisdiction and shared responsibility. Canada, Constitutional Conference, Proceedings of the First Meeting (Ottawa: Queen's Printer, 1968), p. 78.

[116]W.A.C. Bennett, Opening Statement of the Province of British Columbia to the Constitutional Conference, Ottawa, February 10, 11 and 12, 1969, p. 12.

[117]Ibid., p. 13. Although there is no specific legal meaning to the term spending power, it involves the right of Parliament to expend on matters in which it has no constitutional jurisdiction. The power is effectively free of legal challenge, as long as such expenditures are not used in an attempt to legislate.

recommendations for institutional reform was his notion that Canada was comprised of five economic regions--the Atlantic, Quebec, Ontario, the Prairies, and British Columbia. Based on this five-region concept Bennett proposed that each region receive equal representation in a reconstituted Senate with the appointment of Senators made up by the provincial governments for a fixed period.[118] On the issue of Supreme Court reform Bennett favored the continued practice of the final court of appeal having jurisdiction on all constitutional matters, but advocated altering the process of judicial appointments to the court whereby judges would be selected from each of the five regions of Canada and approved in a reconstituted Senate.[119] By reforming these institutions in this manner held Bennett, they would better reflect the legitimate aspirations and concerns of the regions.

Further to Bennett's recommendations towards institutional reform was his advancement of a rather idiosyncratic scheme (based on a redrawing of political boundaries to correlate with Canada's five economic regions) in which British Columbia would become one of five provinces. Additionally, Bennett's proposals suggested that the boundaries of British Columbia be enlarged (along with each of the applicable provinces) northward to the northern limits of continental Canada in order

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[118] British Columbia, Proposals of the Province on the Constitution of Canada, December 1968 (Victoria: Queen's Printer, 1968), p. 10.

[119] W.A.C. Bennett, Opening Statement of the Province of British Columbia to the Constitutional Conference, Proceedings of the Second Meeting, Febuary 10, 11 and 12, 1969, p. 11.

to amalgamate the province with the Yukon territory.[120] Given the historical resistance to amalgamation of the Maritime provinces and the territorial conservatism of the provinces in general, it is interesting to speculate on how seriously W.A.C. Bennett took his proposals to radically restructure the boundaries of the Canadian federation. As one would expect, his proposals on this matter met with resistance, and some amusement, from his fellow premiers and the federal cabinet.[121] Nevertheless, his concept of a fifth region status was an important one and continues to interest British Columbia today.

Lastly, in his constitutional discussions to reform the constitution, W.A.C. Bennett consistently opposed the entrenchment of linguistic guarantees, as well as the entrenchment of fundamental rights. Bennett's opposition to linguistic guarantees stemmed from his fear that giving such rights would render those whose ethnic origin is not French or English "second class citizens by constitutional means"[122] and, in addition, hinder unilingual individuals from entering the public service. He further argued that linguistic guarantees were inappropriate in British Columbia and in other parts of the country given the sparsity

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[120]British Columbia, Proposals of the Province on the Constitution of Canada, December, 1968, p. 13.

[121]See, for instance, Canada, Constitutional Conference, Proceedings of Second Meeting, February 10-12, 1969 (Ottawa: Queen's Printer, 1969), pp. 91-93.

[122]W.A.C. Bennett, Opening Statement of the Province of British Columbia to the Constitutional Conference, February 10, 11 and 12, 1969, p. 4.

of French-speaking Canadians. Therefore, in Bennett's mind, any recognition of language rights should take the form of linguistic action by the provinces alone.

In opposing the entrenchment of fundamental rights Bennett advanced the now familiar arguments of recent constitutional debate concerning the principle of legislative supremacy, judicial policy-making, and constitutional rigidity. Similar to his views on protecting the language rights, Bennett felt that provincial legislative actions were a more appropriate form ensuring fundamental rights.[123]

Thus, the main thrust of W.A.C. Bennett's positions to reform the constitution was to bring about a significantly more decentralized federation through a redistribution of taxing and legislative authority from the federal government to the provinces. Additionally, as witnessed by his proposals to redraw the political boundaries of the provinces and to restructure the central institutions around his concept of Canada's five economic regions, Bennett's constitutional recommendations reflect a desire to see British Columbia recognized as a separate and distinct region from the rest of the country. By promoting greater provincial/regional autonomy, Bennett envisioned a greater future role--largely economic--for British Columbia in the Canadian federation since the province in his view would be largely

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[123]See W.A.C. Bennett, Ibid., pp. 7-9. While Bennett did oppose the entrenchment of linguistic guarantees and fundamental rights, this did not preclude his acceptance of the 1971 Victoria Charter which included an entrenchment of such rights.

free from federal interference to promote its own development.

The constitutional impasse in the wake of the abortive Victoria Charter and, more importantly, the 1972 defeat of the Social Credit party by the NDP under the leadership of Dave Barrett brought an end to the W.A.C. Bennett era in the province's proposals to reform the constitution. Due to the lack of specific conference debate during his premiership, as well as to his inclination to avoid discussions on constitutional issues in favor of promoting more pragmatic or redistributed priorities, the new Premier did not advance formal proposals on behalf of his government on matters such as institutional changes, jurisdictional questions, or the role of the government in the protection of political and linguistic rights.[124] Consequently, in respect to constitutional review, the Barrett government may be characterized as an interlude between the constitutional proposals of W.A.C. Bennett and those of W.R. Bennett.

Nevertheless, a number of related policies of federal-provincial

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[124]Barrett's slighting of constitutional issues may be seen in his response to the issue of linguistic rights which he considered 'phoney.' Basically he considered that the energy devoted to Quebec nationalism was like most constitutional issues, a diversion to more important ones; as cited by Norman J. Ruff, "Leadership Autonomy and Federal-Provincial Relations: British Columbia's Approaches to Federalism in the 1970's." Paper presented at the annual meeting of the Canadian Political Science Association, Dalhousie University, 27-30 May 1981, p. 17. His attitude that constitutional issues were secondary to economic issues and devoid of any real relevance to the Canadian public persisted after his premiership through to the most recent constitutional debate. See, for instance, his remarks during the debate on patriation during the special December 11, 1980 sitting in the B.C. Legislature. Province of British Columbia, Debates of the Legislative Assembly, Vol. 8, No. 7, Thursday, December 11, 1980, pp. 4337-4342.

matters illustrate a marked alteration in the constitutional orientation of British Columbia during the Barrett tenure. Unlike W.A.C. Bennett's call for greater provincial autonomy and a weakening of the federal position through a redistribution of legislative power, Premier Barrett gave little priority to jurisdictional issues. Rather he gave primary concern in British Columbia's working role in the federal system to the achievement of immediate policy outcomes. According to one observer, the premier in his exchanges with Ottawa:

> showed his own distinctive pragmatic approach to the operation of the federal system and a willingness to bargain on long term provincial interests in order to achieve more immediate goals.[125]

Thus, while Premier Barrett was committed to strong provincialist stances in such fields as human resources and communications policy, on a variety of other matters he was willing to accept a much more significant role for Ottawa if it advanced immediate policy preferences. This so-called "pragmatic integrationalist" approach may be seen in his argument for a strong role by the federal government in safeguarding national levels of public services through equalization payments, but it is probably best viewed in light of his positions on energy and related jurisdictional questions.[126] On a number of occasions, he offered to accept federal jurisdiction over all non-renewable energy resources pro-

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[125]Norman J. Ruff, Ibid., p. 16.

[126]Ibid., p. 24.

viding that Ottawa adopt a national energy policy for the complete public ownership of gas and oil. Similarly, in exchange for the federal government agreeing to raise natural gas prices to a level proposed by British Columbia, the Premier offered to share increased revenue from those price hikes with Ottawa and the provinces municipalities.

Thus, in giving preference to immediate policy preferences over those of intergovernmental jurisdiction or status in his dealings with Ottawa, the Barrett government maintains Norman Ruff, "displayed far less respect for the traditional agenda and fewer impulses to province building" in its relationship with Ottawa than did his predecessor.[127] The approach of British Columbia to federal provincial issues undertaken by Premier Barrett, coupled with his government's opening up of closer relations with other provinces and a more participatory approach in the network of intergovernmental conferences, may be said to have provided the roots of the province asserting itself not through isolationism but through a more participatory and outward looking approach to the federal system. In this way, the Barrett years have brought a lasting impact to British Columbia's relationship in Canadian federalism.

Since W.R. Bennett's coming to power, the British Columbia government has in its constitutional proposals continued to propel the province to a more extraverted outlook than witnessed during the

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[127]Norman J. Ruff, "British Columbia and Canadian Federalism," p. 300.

W.A.C. Bennett era.[128] In contrast to W.A.C. Bennett's proposal to seek a greater role for British Columbia through a massive redistribution of powers, the proposals of W.R. Bennett advocate achieving this end primarily through a comprehensive restructuring of the central institutions of Canadian federalism. On the question of a redistribution of powers, the proposals of W.R. Bennett's government break with the decentralized stance of his father in a number of important respects.[129] First, whereas W.A.C. Bennett advocated transferring a major source of revenue from the federal to the provincial sphere W.R. Bennett has proposed that the principle of universal access be applied which would provide the two major levels of government with equal access to the same fields of taxation.[130] W.R. Bennett has also abandoned somewhat, W.A.C. Bennett's position of requesting for the provinces much greater

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[128]The W.R. Bennett government has expanded on a number of the initiatives of the Barrett years in dealing with the federal system. The most noteworthy of these initiatives has probably been the formation of the British Columbia Ministry of Intergovernmental Affairs which grew out of the office of the planning advisor to the New Democratic cabinet. However, despite the continued priority to such matters these are numerous distinctions in the stances of Premier Bennett to the federal system. These include primarily his insistence on the province's defence of existing constitutional powers in regard to immediate policy concerns and the special priority given to constitutional reform. See Norman J. Ruff, "Leadership Autonomy and Federal Provincial Relations: British Columbia's Approaches to Federalism in the 1970's."

[129]See British Columbia, British Columbia's Constitutional Proposals (Victoria: Queen's Printer, 1978), p. 96.

[130]Two exceptions in this regard include the imposition of customs and excise taxes which would be reserved for the federal government and the property and retail sales tax which would be reserved for the provinces. Ibid., p. 96.

legislative responsibilities at the expense of the federal government. W.R. Bennett's stance favors instead the retention of basically the existing distribution of legislative authority rendered to the respective levels of government under sections 91 and 92, but suggests that these sections be reorganized on a rational basis which, it is argued, would solve the current technical problem of a so-called illogical arrangement of subject matters in light of historical changes. A further difference in the reform proposals of the two men is to be seen in W.R. Bennett's position that there should be a shared residuary power between the federal government and the provinces, in contrast to the former premier's view that the provinces be granted the exclusive authority to legislate on any residual matters. Finally, W.R. Bennett's position that the spending power be retained by the federal government, but with restrictions, breaks with the senior Bennett's recommendation that the spending power be limited to matters under federal jurisdiction.

Rather than focusing on a decentralization of powers as the primary means of enlarging British Columbia's role in Canadian federalism, Premier Bennett's constitutional proposals consider that reform of federal institutions is a more pressing matter.[131] The reformulation of British Columbia's constitutional priorities under the premiership of W.R. Bennett is manifest most strikingly in his government's

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[131] Ibid., p. 29.

recommendations on Senate reform. In Bennett's view, the Senate, if structured properly could become a mechanism for the articulation and protection of provincial or regional interests in the national decision making process. In this regard, Premier Bennett's proposals envision a second chamber with equal representation from each of the five regions of Canada identified by his father.[132] The new Senate members would be appointed by and removed by provincial governments, and in providing for direct provincial representation, the proposals envision the leading Senators, comprised of provincial Cabinet ministers, casting a bloc vote on behalf of their provincial cabinets over matters within federal jurisdiction but of "crucial importance to the provinces," such as appointments to the Supreme Court, appointments to major federal crown corporations or federal commissions, etc.[133] On other matters, Senators would be free agents with the powers of a suspensive veto in respect to all other subject matters within the jurisdiction of the federal government.

Premier Bennett's 1978 constitutional reform package also includes a proposal on Supreme Court reform.[134] The basic elements of the proposal

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[132]While his five regions concept displays some continuity with that of W.A.C. Bennett's proposals on Senate reform, the proposals of W.R. Bennett's provide for provincial representation rather than regional representation in a new upper house. That is, unlike W.A.C. Bennett's proposals, those of W.R. Bennett do not conceive that provincial boundaries would conform to regional boundaries.

[133]Ibid., p. 42.

[134]Ibid., pp. 45-54.

surround the appointments to the ultimate federal court and include an enlarged membership from 9 to 11 drawn from each of the five regions of Canada.[135] Furthermore, allowing for nomination by the federal government after consultation between the federal government and the government of the province to decide upon the proposed nominee, it is suggested by Premier Bennett that an appointment be confirmed in a reconstituted Senate.[136]

As reflected by his proposals for Senate and Supreme Court reform, Premier Bennett also took a regional approach to the question of constitutional amendment.[137] The basic component of his amendment proposals was that subject matters of concern to Parliament and all the provincial legislatures should be amendable by the affirmative votes of the House of Commons and the five regions in a reconstituted Senate.[138] This would, in effect, give British Columbia a veto over most vital constitutional issues. On subject matters which were solely of

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[135]Providing echoes of W.A.C. Bennett's proposal to reform the Supreme Court along the lines of his five regions concept, this proposal would ensure that at least one British Columbia judge sits on the court. It is also argued that enlarging the court is necessary for regional representation since Quebec by direct constitutional provision and Ontario in practice always have three members on the court. Ibid., p. 48.

[136]Ibid., p. 51.

[137]Ibid., pp. 99-105.

[138]It was also put forth that if the Senate was not reformed along the lines suggested by British Columbia that the forum for aggregating the five regional votes required for constitutional amendments be the respective provincial legislatures. Ibid., p. 104.

consequence to the government concerned that provincial legislatures and Parliament both be permitted to act unilaterally.

Finally, W.R. Bennett's constitutional proposals did adhere to W.A.C. Bennett's position of opposing entrenchment of linguistic guarantees in the constitution, as well as entrenchment of fundamental rights embodied in a Charter of Rights and Freedoms, but with some minor differences. Premier W.R. Bennett has proved somewhat more flexible on the matter of linguistic issues based on his government's self-proclaimed initiatives for the encouragement of French language instruction in the school system.[139] As well, his position was somewhat less adamant in its opposition to the entrenchment of fundamental rights, since his proposal expressed a willingness to encourage the enactment of parallel federal and provincial statutory enactments which it is argued would attain a number of advantages gained through a bill of rights but would still ensure that the "last word" would remain with the elected members of legislative bodies.[140]

Thus, as evidenced by Premier Bennett's 1978 constitutional proposals, there has been a marked shift in the approach taken by British Columbia towards a restructuring of the federal system. Rather than continuing W.A.C. Bennett's basic aim of decentralized federalism brought about through a massive redistribution of powers, and to a

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[139]Ibid., p. 78.

[140]Ibid., p. 68.

lesser extent by an extension of the province's political boundaries, the W.R. Bennett government has in its proposals for reform redirected the British Columbia's constitutional objective towards gaining for the regions a louder voice in the central institutions. Reflecting on this new constitutional goal away from greater provincial autonomy toward an enhanced role of regional interests at the center, some observers have labelled this a shift from interstate federalism to intrastate federalism,[141] and a departure from an isolationist concept of federalism to a provincially extraverted institutional integration.[142]

In the constitutional review process that was gathering momentum in 1980, and which eventually culminated in the 1982 Constitution Act,

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[141] K.Y. Yam, "British Columbia--False Perceptions," M.A. thesis, Queen's University, 1981, pp. 37-39. As will be discussed in greater detail later on in this work, the interstate orientation to constitutional reform centers on a redistribution of powers between the two levels of government, while the intrastate orientation focuses on a restructuring of the central institutions to better reflect regional interests.

[142] Norman J. Ruff, "Leadership Autonomy and Federal Provincial Relations: British Columbia's Approaches to Federalism in the 1970's," p. 24. It should be pointed out that although British Columbia's 1978 set of proposals show a radical departure from any previous government's view of federalism, they do not break with the traditional themes British Columbia has put forth regarding its role in Confederation. Given the province's long term claim that it hasn't been allowed to attain the role it rightfully deserves, Premier Bennett's emphasis on asserting provincial interests in national institutions is not a new theme. Similarly, his concept of fifth region status for British Columbia in reconstituted institutional arrangements, as was W.A.C. Bennett's idea of making British Columbia one of five economic regions in Canada, is merely a refinement of the province's longstanding desire for special consideration by the federal government on the basis of its geographic uniqueness. On this matter, see Michael Sheppard, "The Constitutional Proposals of Two British Columbia Governments," honours essay, Department of Political Science, University of Victoria, 1979, p. 117.

the British Columbia government continued to reflect the basic thrust of its recently formulated proposals for reform. Stating in his opening remarks to the 1980 First Ministers Conference that British Columbia did not want to "opt out" of Canada but rather "opt in" in a new and more meaningful way,[143] Premier Bennett demanded that:

> British Columbia and the aspirations of British Columbians be recognized and have a proper place in the central decision making role.[144]

Despite this insistence on institutional reform to give the province a stronger voice at the national level, Premier Bennett and the rest of his government's delegation subsequently were forced to substantially modify the positions British Columbia had advanced in its 1978 proposals.

This was particularly the case concerning British Columbia's previously articulated desire for fifth region status. On the question of Senate reform, Premier Bennett abandoned British Columbia's concept for equal regional representation in a new upper House by agreeing to the establishment of a Council of the Provinces to be comprised of equal provincial representation.[145] However, in compromising

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[143]See Canada, Federal-Provincial Conference to the First Ministers on the Constitution, Ottawa, September 8-13, 1980, Verbatim Transcript, Vols. I and II (Ottawa: Canadian Intergovernmental Secretariat), p. 54. Also see British Columbia, Constitution 1980: A British Columbia Perspective, a publication of the Ministry of Intergovernmental Resources, for a sampling of remarks of Premier Bennett and his delegation at the Conference.

[144]Ibid., p. 50.

[145]In referring to a Council of the Provinces, Premier Bennett was

on a cornerstone of his government's constitutional proposals, Premier Bennett was adamant that British Columbia could not agree with the proposal for a Council of the Provinces unless "it was taken in concert with a commitment to complete the job."[146]

At the 1980 First Ministers' Conference, British Columbia also abandoned its regional approach to the question of an amending formula. Waiving its previous position that British Columbia should have a status of a region in its own right, and that it should have a veto along with Ontario and Quebec, the W.R. Bennett government endorsed the Vancouver Accord which would basically allow a province to prevent an amendment that it dislikes from taking effect within its own boundaries.[147]

The province's position on reforming the Supreme Court at the 1980 Conference was more in keeping with its previous proposal on this matter. Taking the position that the Supreme Court is the national court and should therefore continue to be the final court of appeal in

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speaking of new Senate similar to that described in a "Best Efforts Draft" of the Continuing Committee of the First Ministers. A major function of the Council would be its ratification of federal action on a defined list of subject matters of vital interest to the province such as the approval of appointments to major federal boards and committees, the use of the declaratory power, etc. Ibid.

[146]Later on in the Conference, Premier Bennett demanded attention be given to the reform of the Senate when the issue was being put in abeyance.

[147]Canada, Federal-Provincial Conference of the First Ministers on the Constitution, Ottawa, September 8-13, 1980, pp. 249-252.

all matters arising from litigation in Canada including constitutional issues, the province put forth three main recommendations:[148] first, on the question of composition it was suggested that the present nine man court continue as long as it adequately discharges its responsibilities but that the court be enlarged to 11 if the volume of business increases the need to do so; second, on the question of the distribution of judges, the concept of Bill C-60 was favored and which called for regional representation for each of the four areas besides Quebec: the Atlantic Provinces, Ontario, the Prairie Provinces, and British Columbia; lastly on the issue of the selection of judicial candidates, British Columbia called for consultation between the Minister of Justice and the Attorney General of the Province from which a judge is chosen.

The British Columbia delegation also continued its government's traditional opposition against linguistic guarantees being constitutionally bound on provincial legislation or provincial legislatures, as well as maintaining the province's practice of rejecting entrenchment of a national Charter of Rights and Freedoms.

Lastly, due to the extension of the constitutional review agenda under the First Ministers Conference, British Columbia was able to

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[148]The forerunner of the 1982 amendment procedure, the Vancouver Accord of the "Best Efforts Draft" also allowed for amendment of the constitution after being authorized by resolutions of the Senate and House of Commons and by resolution of the Legislative Assembly in two-thirds of the provinces representatives at least fifty per cent of the population of Canada according to the latest general census, see Excerpt from the Report of the Continuing Committee on the Constitution to First Ministers. Document: 800-14 September 1980.

formulate its position on a number of issues centering on the distribution of powers. Although the province's 1978 proposals did not specifically cover these issues, the basic thrust of the 1978 constitutional package in arguing against a massive decentralization of power was followed by Premier Bennett and his delegation at the 1980 Conference. During the proceedings British Columbia called for shared legislative powers over the matters of family law, communications, and fisheries, and it advocated exclusive provincial autonomy over off-shore resources.[149]

While the 1980 First Ministers Conference ultimately ended in the failure of the provinces and Ottawa to reach agreement on any of the twelve items on the constitutional agenda, it did underline from a British Columbian perspective, the considerable difficulty that the

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[149]See Excerpt from the Report of the Continuing Committee on the Constitution to First Ministers Document: 800. More specifically, on the issue of family law the province desired to have the power to provincially appoint judges to hear and decide on the complete range of matrimonial and other family dispute proceedings but in order to maintain uniformity it favored federal primacy over resident rules and recognition of divorce (pp. 302-306). In reference to fisheries, the province supported the "Best Efforts Draft" which was endorsed by nine provinces and which would broaden their management responsibility over inland fisheries, marine plants, etc., and favored shared responsibilities over sea coast fisheries (p. 339). Regarding the issue of communications, the province recommended concurrent jurisdiction with specific areas respecting paramountcy as found in the "Best Efforts Draft." This, it was argued would give the federal government a free hand in areas of admitted federal concern such as national broadcasting networks, but also would give a significant role to the provinces to coordinate communciations within their boundaries if they so choose to do so (pp. 169-173). Finally, in arguing for provincial control over offshore resources, the province argued these resources should be treated as resources elsewhere (p. 386).

province had in gaining sufficient support for its proposals to address the inadequacy of the central institutions of the country despite the considerable compromise on the part of Premier Bennett and his delegation. One difficulty British Columbia may have had in establishing institutional reform as a priority of constitutional review was that other provinces were interested in different things. As Edward McWhinney has commented, while Premier Bennett may have insisted that Senate reform is of crucial importance everyone else dismissed the issue "as of low priority and an irritating distraction to more important issues."[150] It may also be suggested that given the complexity of the reforming of the Upper House that the time limit imposed by the conference further hindered any serious discussion on the issue. Nevertheless, soon after the stalled 1980 conference British Columbia's Deputy Minister on Constitutional Affairs issued a statement declaring his government's continued interest in the direction of reforming the central institutions:

> Is it any wonder that feelings of alienation exist in British Columbia when the largest and second largest provinces of Canada each have twenty-four members in the Senate of Canada whereas British Columbia, the third largest province, has only six? The Senate, you will recall, was to be the regional voice in the federal law-making process.
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> Is it any wonder that feelings of alienation exist in British Columbia when the Supreme Court of Canada has at all times three members from Quebec and, until re-

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[150]Edward McWhinney, Canada and the Constitution, 1979-1982 (Toronto: University of Toronto Press, 1982), p. 44.

> cently, three members from Ontario with one appointment from British Columbia on an average about every thirty-five years?
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> Is it any wonder that there are feelings of alienation when, of the nineteen major federal boards and commissions of this country, no British Columbian is represented on twelve of them?
>
> Even the House of Commons, whose representation is based on population, lags about ten years behind current population figures which means, in a fast-growing province like British Columbia, this represents serious under-representation. These institutional deficiencies exist whoever is in power in Ottawa.[151]

The difficulty of the British Columbia government in gaining support for its constitutional proposals at the aborted 1980 conference was to foreshadow from the province's point of view, the limited nature of revision to the constitution reached at the 1981 First Ministers Conference.[152] Despite Premier Bennett's hope that the November 5 federal-provincial accord be seen as a "beacon of hope to generations of Canadians," and notwithstanding his claim that British Columbia had achieved its objectives of preserving and strengthening the federal system and obtaining an amending formula equitable to all provinces,

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[151] Mel Smith, mimeo, as cited by Donald Smiley, "Central Constitutions," p. 67.

[152] Prior to the 1981 Constitutional Conference, Premier Bennett and four (eventually six) other provincial premiers decided in October, 1980 to challenge the federal government's initiative to unilaterally patriate the constitution in three provincial courts: Manitoba, Quebec and Newfoundland. British Columbia actively assisted the Manitoba challenge but passively supported the other two cases. Furthermore, in December of 1980, Premier Bennett's government decided to challenge further Ottawa's approach to patriation and constitutional amendment by forewarding a forty-seven page document to the British government entitled, Submission to the Foreign Affairs Committee, House of Commons, London, England (Victoria: Government of British Columbia, 1980).

it must be concluded that the 1981 Accord and its successor, the 1982 Constitution Act, ignored the gist of his government's previously stated proposals for reform in two major respects.[153] First, with the new amendment procedure which provided for amendment on most constitutional matters after the approval of seven provincial legislatures and Parliament, British Columbia failed to attain the status of a region with veto power over constitutional change. Secondly, fifth region status for British Columbia for the purposes of representation in federal institutions, as well as more effective provincial representation in the central decision making process, were also abandoned by the constitutional revisions since they did not even provide the beginnings of reformed central institutions.[154]

Nevertheless, it is likely that the provincial government under Premier Bennett's leadership will continue its previous course of seeking a restructuring of Canada. Recent constitutional discussions that the provincial government has taken part in,[155] as well as policy

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[153]Canada, Federal-Provincial Conference of the First Ministers on the Constitution, Ottawa, November 2-5, 1981 (Ottawa: Canadian Intergovernmental Conference Secretariat, 1981), pp. 120-121. Although Premier Bennett mentioned that British Columbia had come to the constitutional conference to achieve three objectives he failed to mention a third objective.

[154]It might also be added that the constitutional package also contained stronger linguistic guarantees and an entrenched Charter of Rights which the province had consistently opposed. However, the provision of a notwithstanding clause in the Charter negates many of the province's traditional reservations against entrenchment by ensuring that elected members of legislative bodies have the "last word" on many fundamental rights.

statements issued by provincial officials responsible for British Columbia's working role in Canadian federalism, have continued to reflect the province's outward looking approach to constitutional reform of late.[156]

The basic thrust of British Columbia's proposals to enhance the role of regional interests at the centre would also appear to be of continuing interest to the province's political and economic elites. Due to the enormous impact that Ottawa may have on their province's resource based economy, and given the fact that their clout in the formation of national policy is minimized by British Columbia's eleven per cent share of Canada's population and its proportionate share in the House of Commons and Cabinet, elites in British Columbia may also, like their provincial government, be increasingly dissatisfied with remaining province bound along present lines in the federal system.[157]

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[155]For the post-1982 initiatives of the provincial government in regard to constitutional items see British Columbia, Ministry of Intergovernmental Relations, Annual Report, April 1, 1982 to March 31, 1983, (Victoria: Ministry of Intergovernmental Relations, 1983), pp. 7-8. Also see, British Columbia, Submission to the Parliamentary Committee on Senate Reform, Victoria, October 6, 1983.

[156]For his comments on British Columbia's reaction to the unfinished agenda of constitutional reform see Miel Smith, "Still Way to Go--That's B.C.'s View," The Province, April 18, 1982, p. B2.

[157]Norman J. Ruff, "British Columbian in Canadian Federalism," p. 291.

CHAPTER FOUR

THE OBJECTIVES OF BRITISH COLUMBIA'S ELITES TO CONSTITUTIONAL REFORM

To gain insight into British Columbia's possible future orientation towards constitutional reform, this chapter analyzes data from a survey of provincial politicians as well as senior decision makers in the provincial government, business, and interest group organizations on the general direction of constitutional change they would like to see implemented. A reason for exploring elite attitudes towards constitutional reform lies in the fact that constitution making has historically been an elitist process in this country. One need only examine our most recent constitutional experience to witness a political process which was, for the most part left to the federal and provincial ministers and their officials, and to a lesser extent the leaders of major interest groups. Indeed except for Newfoundland's referendum on entry in Confederation and Quebec's referendum on sovereignty association, citizens and legislatures most of the time, have been afforded a peripheral role in constitutional deliberations.[158]

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[158]As cited by Keith Banting and Richard Simeon, "Federalism, Democracy and the Constitution," p. 18. These authors attribute the elitist nature of constitutional politics to the institutional barriers which diminish public awareness and participation over constitutional issues. A primary factor in this regard is our parliamentary system which limits direct participation to ministers, public servants and well organized interest groups. Another factor is our framework of executive federalism with its complexities over jurisdictional matters and its secrecy surrounding federal provincial diplomacy.

Important to my interest in attitudes of provincial elites toward reforming our constitution, however, is the central role elites play in the far broader scenario of political and economic conflict which shapes our federal system. Of the literature dealing with elites in this regard, Allan Smith's analysis of local elites and their underlying pursuit of regional political and economic interests remains an important work. In his article, "Quiet Revolution in the West," Smith underlines the relationship between the West's growing institutional and economic maturity and the increasing demands among influential Westerners for constitutional change.[159] He contends that previously the West's elites have not been in a position to "challenge centre-based businessmen, politicians, and bureaucrats [who] were able to shape an economic and constitutional system clearly reflecting their understanding on how the nation should operate."[160]

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[159]Allan Smith, "Quiet Revolution in the West," pp. 12-15.

[160]Ibid., p. 12. Garth Stevenson's political economy approach to federalism is in a similar vein in that it attributes the centripetal and centrifugal forces of federalism to conflict between different classes and class fractions who identify their interests with different levels of government. See Garth Stevenson, Unfulfilled Union, pp. 64-83. Alan Cairns on the other hand, argues that major changes in federalism are not the product of powerful socio-economic forces but rather of the constitution, and more importantly, of the governments fostered by political and bureaucratic elites, that work the constitution. See Alan Cairns, "The Governments and Societies of Canadian Federalism," Canadian Journal of Political Science, 10 (December 1977): 695-725. Cairns further concludes that the recent constitutional controversy "was not rooted in enduring constellations of economic interests which dictated the constitutional options pursued by political elites." Rather, he argues, political elites dominated the constitutional process and defined the economic concerns that would be placed on the agenda. See Alan Cairns, "The Politics of Constitutional Conservatism," pp. 46-47.

However, major political and economic changes in the West, he argues, including the diversification of the region's economy, an increasing population, and the rise of the new technological, bureaucratic and business elites have created influential groups who do not perceive their interests to be served by existing arrangements. To quote Smith:

> The emergence of new interest groups, tied closely to regional economies and regional institutions which are themselves changing has made this old view obsolete. Demands for change now come, very clearly, from able and aggressive groups of businessmen, politicians, and civil servants whose perspective has been shaped by their participation in the increasingly complicated economic, political and bureaucratic lives of the provinces. The consequence is a new and more substantial kind of opposition to Ottawa's rule--a turn of events which signals difficulty ahead for those who want to defend the continued existence of a strong central government.[161]

The effect of these changes from a constitutional perspective is twofold. In the first instance, the growing conviction among Western politicians, bureaucrats, and businessmen that "the region is now in a position to shape its own future," has brought a clearer view among the West's elites towards getting more power for their provincial governments.[162] Secondly, the new political and economic initiatives by the West means that the West's elites are now in a position to press for their demands for a new federal union. As Smith contends:

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[161]Ibid., p. 12.

[162]Ibid., p. 13.

> All of this reflects a conviction that, because the west controls resources and a hinterland of its own, because it is now building a more diversified economy, and because its parts are now able to unite in support of regional interests transcending purely provincial concerns, it has acquired leverage in the national political system of a kind it never possessed before. Western politicians no longer consider themselves to be posturing bit players on the national scene.[163]

More specifically, notes Smith, politicians in the West are beginning to insist that policy formation in the fields of resource exploitation, taxation, external trade, transportation, communications, etc., be carried out to allow the provinces a larger role. Moreover, western premiers are increasingly concerned with obtaining a more significant symbolic status which the present constitution, in principle, does not allow the provinces.

Political and economic circumstances have, of course, altered much of the background of Smith's 1978 article. The 1982 constitutional settlement has forced constitutional issues off the public agenda for the near future while the state of the economy has reduced much of growth which took place in the West. However, in the long run because basic structural changes have not taken place in the revised constitution, discontent with power sharing arrangements among the West's elites still has the potential to generate new demands on Canadian federalism.[164]

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[163] Ibid., p. 14.

[164] In regard to structural changes compatible to the desirability of Westerners getting more power for their governments, Smith offers three solutions: maximizing provincial power at the center through reform of central institutions; a redistribution of powers devolving more authority to the provinces; or an addition of a schedule of responsibilities to be shared by both levels of government.

To gain insight into the role of British Columbia's elites to the political and economic conflict underlying our federal system, it is necessary to modify Smith's analysis somewhat. Despite the growing economic diversity of the West as a whole described by Smith, British Columbia has not experienced the same level of economic growth as its prairie neighbours. Garth Stevenson has argued that although British Columbia was the most rapidly growing province in the 1970s until it was overtaken by Alberta, "its growth did not bring any fundamental change in character."[165] British Columbia, argues Stevenson, remained a resource frontier although Vancouver rose in prominence as a commercial and transportation centre. Similarly, Norman Ruff concludes that while British Columbia also shared some of the new domestic political and economic motive forces which affected its western neighbours, it "has not enjoyed anything close to the full force of the underlying drives to province-building as experienced by the [prairie] provinces."[166]

British Columbia's economy has remained tied directly or indirectly to primary resource industries producing goods for export.[167] This reliance of province's economy on its natural resource base has had, in turn, a major effect on the relationship between Ottawa and

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[165]Garth Stevenson, Unfulfilled Union, pp. 80-81.

[166]Norman J. Ruff, "Leadership Autonomy and Federal-Provincial Relations: British Columbia's Approaches to Federalism in the 1970s," p. 25.

[167]See Martin Robin, "British Columbia: The Company Province," Canadian Provincial Politics, ed., Martin Robin, (Scarborough: Prentice Hall, 1978).

Victoria according to Norman Ruff. He contends:

> British Columbia's position in federal-provincial relations necessarily goes beyond simple bilateral intergovernmental interaction. The reality is rather a complex triangular interaction among the two jurisdictions and the dominant resource industries.[168]

Essentially, argues Ruff, this relationship boils down to the provincial government acting as a spokesman for most resource industries, but the federal government maintaining the ability through its public policy to have a direct impact on the exploitation of the province's resource base and the marketing of its products. For instance, in the case of the forest industry, provincial control over access to forest resources and a high profile in the management of the resource give the British Columbia government a great deal of control over the forest industry. However, federal decisions affecting transportation facilities and costs, tariffs, and trade restrictions, monetary policy, and fiscal policy all have long term importance on the province's forest industry.[169]

A major effect of this relationship is its restraint in British Columbia on the growth of an exclusionary alliance against Ottawa between economic elites and the provincial government in terms of province building. The province's economic elites, Ruff contends, are cosmopolitan in their loyalties maintaining a horizon "extending" far into

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[168]Norman J. Ruff, "British Columbia and Canadian Federalism," p. 275.

[169]Ibid., pp. 276-279.

the national government as well as provincial concerns, and therefore, "would not support any balkanizing self-aggrandizement by provincial politicians."[170]

In Ruff's view, institutional change in the direction of intra-state federalism is more conducive to conjoining the constitutional ambitions of British Columbia's elites to obtain a larger role for their province in Canadian federalism. Reform of this nature, he points out, perfectly encapsulates "the unwillingness of the British Columbia economic and political elites to remain province bound."[171] Institutional change to enhance the role of regional interests at the centre would, unlike a redistribution of powers devolving a significant amount of power to the provinces, enable provincial elites to gain a louder voice in the federal decision-making process without emasculating the central powers equally important to the exploitation of British Columbia's resource economy.

Therefore, it can be argued that Premier Bennett's proposal for an upper house which would provide for direct representation of the provincial governments in the federal decision-making process, has encompassed the growing consensus among the province's elites in regard to directing the province's constitutional reform objectives towards enhancing British Columbia's role in the policy formation of the central

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[170]Ibid., p. 275. For a general discussion of province building see Garth Stevenson, Unfulfilled Union, pp. 104-126.

[171]Ibid., p. 301.

government. Given the considerable impact that federal policy may have on the exploitation of British Columbia's resource base economy and the inadequacy of British Columbia representation in the House of Commons or the Cabinet, both political and economic elites alike would appear to be increasingly unwilling to remain province bound by existing constitutional arrangements. Therefore, the hypothesis to be tested is that in British Columbia there is a desire by elites for a more sustained and organized regional input into federal institutions.

To secure evidence of the orientation of British Columbia's political and economic elites to revisions to the constitution,[172] a questionnaire was mailed out in March 1984 to all members of the provincial legislature, including cabinet ministers (N = 57), as well as all deputy

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[172] Robert Presthus defines the concept of elites as "that minority in society who possess and manipulate disproportionate shares of scarce and highly valued resources as prestige, security, education, income, authority, power and influence." See Robert Presthus, Elite Accommodation in Canada (Toronto: MacMillan, 1973). Presthus' analysis of interest group interactions in Canada with federal and provincial legislators, cabinets, and senior bureaucrats led him to contend that both the substance and implementation of public policy in Canada is largely shaped by accommodation among three political elites comprised of legislators, higher bureaucrats and the leaders of major interest groups." (p. 17) More specifically, of the two elite subgroups covered in this survey, the political elite has been defined as "those who occupy roles, offices or positions in the political system that rest formal decision-making power in their incumbents." By Richard T. Van Loon and Michael S. Whittington, The Canadian Political Process (Toronto: McGraw-Hill Ryerson, 1981), p. 447. The second subgroup, the economic elite has been defined as "those who occupy the major decision-making process in the corporate institutions of Canadian society." See John Porter, The Vertical Mosaic (Toronto: University of Toronto Press, 1968). For a discussion of the role of elites in the political system see Dennis Forcese, "Elites and Power in Canada," Approaches to Canadian Politics, ed. John H. Redekop (Scarborough: Prentice Hall, 1978).

ministers or assistant deputy ministers (N = 20). At the same time the questionnaire was mailed out to a representative sampling of various leaders of interest groups, chairmen of government boards, commissions, and crown corporations, and directors of major economic interests (N = 25).[173] Lastly, the mayors of Vancouver and Victoria were included in the survey (N = 2).

From a total of 104 individuals surveyed, the number of questionnaires returned was 31; the return rate was 29.8 per cent.[174] Of the MLA's surveyed, the return rate was 22.8 per cent with one of the respondents a spokesman for the government caucus. MLA's were therefore somewhat under-represented. Of the MLA's returning questionnaires, 61.5 per cent were Social Credit and 38.4 per cent, NDP. The return rate among deputy ministers and assistant deputy ministers was 45 per cent--they were thus over represented. Lastly, the return rate among senior decision makers in business, interest group, organizations and government agencies, crown corporations, and commissions was 35.7 per cent, while the return rate of the two mayors was 100 per cent.

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[173]Given my assumption of elites to the network of federal-provincial interactions, as well as the awareness of elites to the impact of federal policy on the province's resource industries, individuals were chosen on the basis of whether their interest group, corporation, agency, etc., had dealings with Ottawa or whether they were resource based.

[174]If one takes into consideration that one of the respondents was a spokesman for the government caucus, this return rate is in keeping with rates found in other surveys. Garth Stevenson's study of provincial elites, for instance, produced a response rate of 38.4 per cent. See Garth Stevenson, "Foreign Direct Investment and the Provinces: A Study of Elite Attitudes," Canadian Journal of Political Science, 7 (1974), 630-647.

The questionnaire focused on five aspects of constitutional reform discussed in chapter one: Senate reform, changes to the division of powers, changes to the Charter, reform of the Supreme Court, and electoral reform of the House of Commons. Those surveyed were asked a series of questions concerning whether the Senate should be reformed, and if so, what structure, powers, and representation a reconstituted Senate should have; whether it is necessary to undertake a redistribution of powers, and if this is the case, what level of government should have control over three contentious subject areas--off-shore mineral rights, fisheries, and communications; whether property rights should be added to the Charter and if the provisions of the Charter should be extended to the private sector in areas of employment, accommodation, and public services; whether the provinces should have a role in appointments to the Supreme Court and, if so, what method should be implemented to achieve that role; and lastly, if electoral reform of the House of Commons is a viable option for prospective constitutional reform. As well, the questionnaire contained an open-ended question which asked if there were any other specific proposals that those surveyed would like to see implemented in the years to come. Lastly, the respondents were asked to rank the five items covered in the questionnaire in terms of what they considered were in most urgent need of reform.

Given my argument that there is a growing consensus among provincial elites towards gaining a larger role for British Columbia in the national decision making process, I would anticipate respondents to place the highest priority on reforming the Senate and Supreme Court

to enlarge provincial input into those two central institutions. Correspondingly, I would therefore expect respondents to place less importance on the need to undertake constitutional changes in the division of powers between the national and provincial governments in the future. Moreover, in my view, for the reason that it has been argued that British Columbia's elites maintain a broad perspective of federal constitutional responsibilities, respondents favoring a redistribution of powers would not desire devolving a significant amount of authority to the provinces over the question of off-shore resources, fisheries, communications, or other subject areas. Rather they are likely to favour both governments sharing responsibilities over these powers which would formally recognize provincial input into federal policy. Lastly, I forsee the majority of respondents placing a low priority on changes to the Charter or electoral reform of the House of Commons for the reason that neither of these reasons would revise power sharing arrangements towards giving provincial elites a louder voice in the formation of national public policy. The following is a brief summary of the results of the questionnaire on each aspect of reform.

Senate Reform

On the question of reforming the Senate, the vast majority of those surveyed were in favour of such a move (96.7%). However, a significant portion of those who favoured Senate reform desired to abolish the upper house (30%).[175] Of those who were in favour of a

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[175]It is perhaps not surprising to note that of the 9 respondents favouring abolition of the Senate, 4 were NDP MLA's. The vast majority

reconstituted Senate, the majority of respondents desired an elected Senate (75%) as opposed to a Council of the Provinces, with equal representation for each region (61.9%), but were divided relatively equally on what powers a new Senate should have.

No. 1. Number of respondents in favour of reforming.

30-(96.8%) of which 9 were in favour of abolition.

Number of respondents not in favour of reforming the Senate.

1-(3.2%)

No. 2 Number of respondents recommending a Council of the Provinces: 5-(25%)

Number of respondents recommending an elected Senate: 15-(75%)

N.A. 11

No. 3 Number of respondents in favour of a reformed Senate with representation by population: 1-(4.8%)

Number of respondents in favour of a reformed Senate with representation for each province: 7-(33.3%)

Number of respondents in favour of a reformed Senate with equal representation for each region: 13-(61.9%)

N.A. 10

No. 4 Number of respondents in favour of a reconstituted Senate with powers equal to those of the House of Commons: 8-(38.0%)

Number of respondents in favour of a reconstituted Senate with powers restricted to specified areas of joint concern: 7-(33.3%)

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of Social Credit MLA's, Deputy Ministers, spokesmen for interest groups such as the Mining Association of B.C., and the directors of major economic interests such as MacMillan Bloedel favoured a reconstituted Senate.

Number of respondents in favour of a reconstituted Senate with powers limited to a suspensive veto only: 6-(28.6%).

N/A 10

Division of Powers

The majority of respondents believed that it is necessary to undertake a redistribution of powers in the future (62.1%). Reasons given by the respondents for the necessity of reviewing the distribution of powers included that the complexities of modern government required such a move, as well as more specific recommendations that the power over resource management be clarified or that the covert but significant role of the federal government in the field of education be recognized. Of those who responded that a redistribution of powers was unnecessary, most felt that the current balance was adequate and that few problems would be solved by the move.

On the matter of whether the federal government should have control over off-shore resources, fisheries, and communications, the respondents were relatively divided over which level should have jurisdiction over off-shore resources, but favoured both governments having jurisdiction over fisheries (55.6%) and communications (63%).[176]

No. 5 Number of respondents believing that it is necessary to undertake constitutional changes in the division of powers: 19-(63.3%)

Number of respondents that it is unnecessary to undertake constitutional changes in the division of powers: 11-(36.7%)

N/A 1

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[176]Other suggestions towards a redistribution of powers included that the provinces have control over agriculture and forestry, and that Ottawa have jurisdiction over shelter allowances and securities.

No. 6a Number of respondents in favour of the federal government having control over off-shore mineral rights: 9-(33.3%)

Number of respondents in favour of the provincial government having control over off-shore mineral rights: 7-(25.9%)

Number of respondents in favour of both levels of government having control over off-shore mineral rights: 11-(40.7%)

N/A 4

No. 6b Number of respondents in favour of the federal government having control over fisheries: 5-(18.5%)

Number of respondents in favour of the provincial government having control over fisheries: 7-(25.9%)

Number of respondents in favour of both levels of government having control over fisheries: 15-(55.6%)

N/A 4

No. 6c Number of respondents in favour of the federal government having control over communications: 4-(14.8%)

Number of respondents in favour of the provincial government having control over communications: 6-(22.2%)

Number of respondents in favour of both levels of government having control over communications: 17-(63.0%)

N/A 4

Charter

On the question of whether property rights should be added to the Charter most respondents opposed such a move citing reservations that government attempts to secure highway property rights, etc., might be adversely affected (56.6%). As well, the majoirty of elites also disapproved of extending the Charter's provisions to the private sector (66.7%).[177]

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[177]It is interesting to note that party affiliation was a significant factor here. NDP MLA's were by in large opposed to extending property rights to the Charter but were very supportive of extending the Charter's provisions to the private sector. Social Credit MLA's were by in large in reverse of the NDP MLA's positions.

No. 7 Number of respondents in favour of adding property rights to the Charter: (13-(43.3%)

Number of respondents against adding property rights to the Charter: 17-(56.6%)

N/A 1

No. 8 Number of respondents in favour of extending the provisions of the Charter to the private sector in the areas of unemployment, accommodation, and public services: 10-(33.3%)

Number of respondents against such a move: 20-(66.7%)

N/A 1

Supreme Court

The vast majority of respondents desired giving the provinces some constitutional role in appointments to the Supreme Court (80.6%) but were divided on how to accomplish this. On the matter of an appointment process, 44% of the respondents in favour of a provincial role regarded approval by an Attorney General of a federal nomination as the most appropriate means, while 36% of respondents favoured approval of a federal nomination in a reconstituted Senate. As well, 20% of respondents in approval of a provincial role in the appointment process favoured other means of appointing Supreme Court judges such as the involvement of the provincial section of the Canadian Bar Association or through federal approval of provincial nominations.

No. 9 Number of respondents in favour of a provincial role in the appointments to the Supreme Court: 25-(80.6%)

Number of respondents not in favour of such a role: 6-(19.35%)

No. 10 Number of respondents in favour of a provincial role in the appointment process to the Supreme Court through approval of a federal nomination by a provincial Attorney General: 11-(44%)

Number of respondents in favour of a provincial role through approval of a nomination in a reconstituted Senate: 9-(36%)

Number of respondents in favour of a provincial role through other means: 5-(20%)

N/A 6

Electoral Reform

The vast majority of elites did not see elctoral reform in the form of proportional representation to the House of Commons as a viable option for prospective constitutional reform 83.3%.

No. 11 Number of respondents viewing electoral reform of the House of Commons as a viable option for prospective constitutional reform: 5-(16.7%)

Number of respondents not viewing electoral reform of the House of Commons as a viable option for constitutional reform: 25-(83.3%)

N/A 1

Other Proposals

Other specific proposals that respondents would like to see placed on future agendas to reform our constitution largely centered on changes to the Charter of Rights. Suggestions included entrenching economic and social rights in the Charter, as well as providing a clear statement of the rights of women and children in the Charter. Other responsibilities favoured giving more priority to economic concerns, while one person provided the rather unlikely scheme of repealing the Charter, and redefining Canada into five provinces along the lines of W.A.C. Bennett's proposals.

Ordering of Priorities for Constitutional Reform

When asked to rank the five aspects of constitutional reform covered in the survey in terms of which they think is in more urgent need of reform, the following order was put forth by most respondents.

(1) Senate reform;

(2) Supreme Court reform;

(3) changes to the division of powers;

(4) changes to the Charter of Rights; and

(5) electoral reform.

No. 13 Number of respondents ranking the following as their first priority for constitutional reform:

Senate reform	- 11-(36.6%)
changes to the division of powers	- 9-(30%)
changes to the Charter	- 6-(20.0%)
Supreme Court reform	- 2-(6.7%)
electoral reform	- 2-(6.7%)

N/A-1

Number of respondents ranking the following as their second priority for constitutional reform:

Senate reform	- 8-(27.6%)
changes to the division of powers	- 4-(13.8%)
changes to the Charter	- 6-(20.7%)
Supreme Court reform	- 10-(34.5%)
electoral reform	- 1-(3.5%)

N/A-2

Number of respondents ranking the following as their third priority for constitutional reform:

Senate reform	- 3-(11.1%)
changes to the division of powers	- 9-(33.3%)
changes to the Charter	- 3-(11.1%)
Supreme Court reform	- 7-(25.9%)
electoral reform	- 5-(18.5%)

N/A-4

Number of respondents ranking the following as their fourth priority for constitutional reform:

Senate reform	- 1-(3.7%)
changes to the division of powers	- 5-(18.5%)
changes to the Charter	- 9-(33.3%)
Supreme Court reform	- 7-(25.9%)
electoral reform	- 5-(18.5%)
N/A-4	

Number of respondents ranking the following as their fifth priority for constitutional reform:

Senate reform	- 4-(14.8%)
changes to the division of powers	- 2-(7.4%)
changes to the Charter	- 5-(18.5%)
Supreme Court reform	- 1-(3.7%)
electoral reform	- 15-(55.6%)
N/A-4	

To summarize, the survey results indicate that in regard to options towards reforming our federal system, the province's political and economic elites desire to give British Columbians a louder voice in the federal policy-making process. Ranking the Senate as in most urgent need of reform, respondents to the questionnaire in large part desired elections of Senators to a new upper house based on equal representation by region, but were quite evenly divided over what powers a Senate should have. On the matter of the basis of representation by region, it might be suggested that in the minds of most respondents favouring a reconstituted Senate that British Columbia would have a regional status of its own. It is significant that most respondents did not favour a provincially appointed Senate in the form of a Council of Provinces given that such a proposal was the centre-piece of Premier Bennett's constitutional reform package. The majority of respondents also gave high priority to reforming the Supreme Court to

give the provinces a constitutional role in the appointments of judges the court but a majority failed to agree on how to best achieve this. Furthermore, it may be concluded that although most respondents believed it is necessary to undertake constitutional changes to the division of powers between the national and provincial governments in the future, as anticipated they were not in favour of a major decentralization of powers to the provinces. Rather, the majority of respondents favoured both levels of government sharing jurisdiction over such diverse fields as fisheries and communications. Even on the matter of off-shore resources, the respondents did not overwhelmingly support provincial jurisdiction which has long been a claim by British Columbia governments. It may be suggested that the over-all support for joint federal-provincial responsibilities over such subject areas indicates a desire among the province's elite for further input into federal policy through executive federalism. Lastly, the respondents were not in favour of the proposed changes to the Charter covered in the questionnaire, nor did they see electoral reform of the House of Commons as a viable option for constitutional change--accordingly changes to the Charter and electoral reform were ranked by respondents as in least urgent need of reform.

CHAPTER FIVE

CONCLUSION

Through my questionnaire I have attempted to ascertain the general direction of constitutional change that elites in British Columbia would like to see implemented. The questionnaire findings appear to support the hypothesis that because the levers of powers held by the national government are so critical to British Columbia's export-oriented resource based economy, that the province's political and economic elites are dissatisfied with remaining province-bound along present lines and that, correspondingly, they desire to gain access to the policymaking process in Ottawa through a more sustained and organized regional input at the centre.

Accordingly, it may be concluded that elites in British Columbia cannot be automatically placed in the context of a self-imposed political isolation depicted by so many observers. On the contrary, the survey results indicate that elites in British Columbia favour asserting the province's interests through an extraverted approach to the federal system rather than by isolationism. Correspondingly, because they appear to be more concerned with the way in which Ottawa carries out its constitutional responsibilities than with limiting the scope of those responsibilities, British Columbia's political and economic elites cannot be easily characterized in terms of 'province-building.' While many elites are caught up in the momentum of province-building,

much of the momentum is in a centripetal direction to enhance the powers of provincial governments in the central institutions. Barring any new political and economic imperatives, therefore, the elites of British Columbia would appear to be in no danger of 'contracting out' of the federal system by endorsing a significant erosion of Ottawa's powers.[178] In other words, the elites surveyed appeared to be willing to respect power at the centre if Ottawa's power is more directly subject to regional or provincial veto powers on matters of crucial interest.

It has also been underlined that while the ambitions of the province's elites towards revised federal arrangements are intricately linked with their Western counterparts due to the growing economic and governmental strengths of their provinces, British Columbia's elites do not necessarily share the same constitutional vision as some other influential groups of Westerners. The province is differentiated from the three prairie provinces by its economic distinctiveness, as well as its political culture, geography and rapid population growth. Therefore, in terms of how it views itself in Confederation--as reflected by its ongoing claim for fifth region status in revised constitutional arrangements--British Columbia remains in many ways what nineteenth century Canadians described as "the West beyond the West."[179]

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[178]See Larry Pratt and Garth Stevenson, eds., Western Separation (Edmonton: Hurtig, 1981), p. 11 for their comments that in at least one western province--Alberta--some of the dominant political and economic elites are in such a process of contracting out of federalism.

[179]Norman J. Ruff, "British Columbia and Canadian Federalism," p. 272.

While it is difficult to speculate on a provincial government's prospective orientation, it would appear that the findings of the questionnaire demonstrate to some degree an endorsement of the general outward looking thrust of Premier W.R. Bennett's constitutional package. Thus, the results may also serve to give some indication that British Columbia will continue to follow for the forseeable future, Premier Bennett's attempts at long term institutional reform to provide for direct provincial input at the centre. In speculating on this policy direction, however, the widespread autonomy of any provincial premier in federal-provincial issues must be kept in mind. That is, as at least one observer has underlined, a premier's own conception of the federal system is the primary determinant of a province's constitutional stance.[180] Nonetheless, a number of factors give rise to significant influence on the part of provincial elites in a premier's formation of his constitutional positions. These include: the role of elites in the broader scenario of governmental and regional conflict underlying our federal system, the ability of elites to mobilize public opinion through various resources; and the extent that attitudes, beliefs, and personal needs of provincial elites may be transmitted to the Premier.

From the broader perspective of public policy, given the continuing interest of British Columbia'a elites, as well as the growing

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[180]Norman J. Ruff, "Leadership Autonomy and Federal Provincial Relations: British Columbia's Approaches to Federalism in the 1970's," p. 26.

attention of other political actors in Canadian federalism towards institutional change in the direction of intrastate federalism, there is likely to be a wide range of proposals related to this concept, regardless of whether or not they are in the form of proposals for formal amendments.[181]

Any such proposals will be faced with numerous considerations of which the most basic is the differentiation between "provincialist" and "centralist" intrastate federal arrangements. Although both of these distinctions are concerned with the reflections of provincial/regional interests in the structure and operation of the central government, they differ radically in this vision of what the federal system is, and what it should be.[182] Provincialist intrastate federalism is geared toward broadening the powers of the provincial governments by increasing their direct participation in the central decision-making

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[181]The interest of British Columbia toward reforming the central decision making process and national institutions is increasingly shared by other political actors. As outlined by Donald Smiley, while in the period of the 1960s to 1976 most constitutional debate was centered exclusively on the division of powers between the federal and provincial governments, since that time attention has been focused on reform of the institutions of the government of Canada. Besides the proposals of the British Columbia government, Smiley cites the following proposals in this direction: the Trudeau government's Bill C-60, the report of the Committee on the Constitution of the Canadian Bar Association, proposals of the Ontario Advisory Committee on Confederation, the proposals of the Government of Alberta, the report of the Task Force on Canadian Unity, and the document A New Canadian Federalism published by the Quebec Liberal Party. See Donald Smiley, "Central Institutions," p. 26. The recent report of the Special Joint Committee on Senate Reform may also be included.

[182]Ibid., p. 67. For a detailed distinction of these two forms of the intrastate perspective see Alan Cairns, From Interstate to Intrastate Federalism in Canada, Discussion Paper (Kingston: Queen's University of Intergovernmental Relations, 1979).

process. This direct provincial input would take the form of a provincialization of national institutions which would ensure that the decisions of the House of Commons and Cabinet be ratified by a Second Chamber dominated by provincial governments, and provide for strong provincial spokesmen in other central institutions. Implicit in this variation of intrastate federalism is the assumption that the provinces are better articulators of cultural and regional disparity than the existing federal system.

Based on the proposition that national institutions should significantly represent Canada's regional and cultural concerns, centralist intrastate federalism is directed towards strengthening the powers of the central government by improving the capacity of Ottawa to represent these concerns. In sensitizing the national decision making process to territorially bounded interests through such means as an elected Senate or through electoral reform to the House of Commons it is assumed that the power of the provinces to act as cultural and regional spokesmen in national affairs would be rivalled by competing spokesmen in Ottawa.[183]

In moving beyond theory to practice, however, major moves in the direction of either version of intrastate federalism will face profound

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[183]Alan Cairns and Donald Smiley are particularly skeptical of the assumption of many proponents of centralist orientated institutional arrangements that as Ottawa becomes a more effective outlet for regional interests, the strength and assertiveness of the provinces will be reduced. Contemporary provincial power, argue these observers, is more than a byproduct of Ottawa's insensitivity. It is also a result of the provinces' jurisdictional possession of the growth areas of government, the increasingly competent bureaucracies at their disposal, etc. See Alan Cairns, From Interstate to Intrastate Federalism in Canada, pp. 19-22 and Donald Smiley, "Central Institutions," pp. 66-70.

difficulties. Firstly, serious attention has not been addressed to the far-reaching implications of any attempts to reform our central institutions. As was suggested previously, the effect of a revised upper house on the practice of responsible government is a major unsolved issue and (to be accurate) not entirely predictable. Similarly, changes to the Supreme Court to allow the provinces a share in delineating its composition raise the possibility that the court might become even more of a political institution than it is now. Other proposals along these lines present further unanswered questions. On a more general level, some observers contend that intrastate constitutional arrangements may inhibit our non-regional definitions of problems.[184]

Secondly, either form of or approach to intrastate federalism would encounter powerful institutionally based rivals in the form of the eleven governments of the federal system. For instance, provincial premiers are likely to view an elected Senate as potential rivals, while the House of Commons or the Federal Cabinet would in all likelihood resent the intrusion of a provincially appointed upper house. Therefore, a significant change in attitude would have to take place before institutional reforms could even begin to be implemented.

Given these factors, some observers hold that the objective of broadening the input of the provinces into federal policy may be more easily achieved through executive federalism. Basically, such a con-

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[184]See Alan Cairns, From Interstate to Intrastate Federalism in Canada, p. 21.

stitutional option would take the form of entrenching joint responsibility between the federal and provincial governments over such powers as transportation, economic development, social policy, etc. which would in turn necessitate formal federal provincial consultation before action could be taken. Such an arrangement, contend its supporters, would simply give formal recognition to the power sharing that already enjoys extraconstitutional status through executive federalism. However, the major problem with concurrency in fields already the subject of dispute is the absence of clarity in government policy including responsibility for action. Furthermore, critics of this approach contend that relations conducted primarily through the negotiations of the political executive could increase the already existing level of conflict, as well as further limit citizen participation.

An obvious point to these alternative allocations of power in our federal system is how much more information is needed in relation to their broad policy implications. Towards this objective, Donald Smiley presents three normative criteria for choice which we can use in debates on the success or failure of the present federal system, as well as alternative proposals for change: these being conceptions of community, conceptions of functional efficacy, and conceptions of democracy.[185] From the perspective of community--which has provided the overwhelming focus for both practioners and students of federalism

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[185]See Richard Simeon, "Criteria for Choice in Federal Systems," Queen's Law Journal, 8 (Fall, 1982; Spring 1983), 131-157.

in the last two decades--the focus is centered on the implication that various forms of federalism raise for the different images of the preferred level of community to which people identify and feel their loyalty--nation-building, province-building, and Quebec nation-building. The functional perspective on the other hand directs itself as to which level of government can carry out most effectively any given responsibility of the contemporary polity. That is, the functional perspective asks whether a federal arrangement promotes or renders less effective economic planning, environmental control, etc. Lastly, from the perspective of democracy, constitutional alternatives are to be decided on whether a proposal is likely to enhance or threaten their view on democracy usually in terms of minority rights. While Smiley admits that his criteria raise as many issues as they answer, they are in his evaluation useful as rough guides or as tests to apply in constitutional discussions.

Hence, if there is one message manifestly evident in light of Smiley's criteria in concluding this analysis of the place of British Columbia and its political and economic elites in the continuing constitutional debate, it is how much more insight, data, and analysis will be required, and time expended before any proposals to correct the regional failures of parliamentary institutions and their accompanying party structures will be placed on the public agenda and then acted upon by the federal and provincial governments. Whether or not a concerted drive for regional input into the central decision-making process does continue--or should continue--remains an open question. If

such a drive to reform the constitution does take place by the province's elites or other elites in the federal system, they will have to more cogently defend their constitutional aspirations than has been done in the recent past given the public distaste for constitutional controversies of late.

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APPENDIX A

Respondents to the Questionnaire on Constitutional Reform

L. Bell--D.M., Ministry of Finance

J. Bodkin--D.M., Ministry of Consumer and Corporate Affairs

R.M. Buzza--Spokesman, British Columbia Teachers Federation

D. Campbell--MLA--Social Credit

J. Carter--D.M., Ministry of Education

D. Cocke--MLA--NDP

A.J. Eddy--President, Provincial Section of Canadian Bar Association

C. Gabelmann--MLA--NDP

M. Harcourt--Mayor of Vancouver

J.C. Johnston--D.M., Lands, Parks, Housing

C. Knudson--President, MacMillan Bloedel

Dr. G. MacEachern--D.M., Ministry of Agriculture and Food

G. MacFarlane--Director, B.C. Telephone

B.E. Marr--D.M., Ministry of Environment

P.R. Mathew--Spokesman, Mining Association of British Columbia

F. Mitchell--MLA--NDP

R. Nelson--Director, B.C. Packers

M.C. Norris--Director, B.C. Rail

J. Parks--MLA--Social Credit

P. Pollen--Mayor of Victoria

W. Reid--MLA--Social Credit

J. Reynolds--MLA--Social Credit

A. Rhodes--D.M., Ministry of Transportation and Highways

R. Rhodes--Assistant D.M., Ministry of the Attorney General

M. Rose--MLA--NDP

D. Stupich--MLA-NDP

H. Schroeder--MLA--Social Credit

M. Smith--Assistant D.M., Ministry of Constitutional Affairs

B. Strachan--MLA--Social Credit

Spokesman--MLA, Social Credit

Spokesman--Government Caucus

APPENDIX B

Questionnaire

1. In your opinion, should the Senate be reformed?

   ( ) yes
   ( ) no

2. Proposals for a new upper house to ensure effective representation of the regions in central policymaking consist of two major alternatives. The first alternative--a Council of Provinces--would be composed of provincial delegations made up of provincial cabinet ministers headed by a premier. The second alternative--an elected Senate--would involve election of Senators directly by the citizens, in elections separate from general elections to the Commons, for terms longer than the normal life of a Parliament, and with terms staggered so that not all Senators come up for election at any one time. If you are in favour of a reconstituted Senate, which of these two alternatives would you recommend.

   ( ) a Council of the Provinces
   ( ) an elected Senate

3. If you are in favour of a reformed Senate, should representation in a new upper house be:

   ( ) representation by population
   ( ) equal representation for each province
   ( ) equal representation for each region

4. If you are in favour of a reformed Senate, should the powers of a new upper house be:

   ( ) equal to those of the House of Commons
   ( ) restricted to specified areas of joint concern
   ( ) limited to a suspensive veto only

5. Is it necessary to undertake constitutional changes in the division of powers between the national and provincial governments in the future?

   ( ) necessary
   ( ) unnecessary

   Why?

_____

_____

_____

6. If changes to constitutional powers are necessary, which government should have control over the following:

   a. off-shore mineral rights

      ( ) the federal government
      ( ) the provincial government
      ( ) both

   b. fisheries

      ( ) the federal government
      ( ) the provincial government
      ( ) both

   c. communications; including regulation of a radio and television broadcasting, regulation of program content

      ( ) the federal government
      ( ) the provincial government
      ( ) both

   d. other (please specify)

      _____

      _____

      _____

7. With the new constitutional package, Canada entrenched a Charter of Rights and Freedoms. Recently, though debate has focused on the exclusion of the right to property in the Charter. Are you in favour of adding property rights to the Charter?

   ( ) yes
   ( ) no

8. In your opinion, should the Charter of Rights and Freedoms be extended to the private sector in the areas of employment, accommodation, and public services?

   ( ) yes
   ( ) no

9. Although the Supreme Court has risen in importance with the recent constitutional changes since it must now clarify what the wording of the Charter will mean in practice, the structure, composition, and jurisdiction of our final court of appeal remains unaltered.

Accordingly, the Supreme Court remains a creature of the federal government, its judges appointed by Ottawa alone. Debate on reforming the Supreme Court has long focused on whether there should be a provincial role in appointment process. On this issue, are you in favour of some provincial role in the appointments to the Supreme Court?

( ) yes
( ) no

10. If you are in favour of some provincial role in the appointments to the Supreme Court, how should this be implemented?

( ) through approval of a federal nomination by a provincial Attorney General

( ) through approval of a nomination in a reconstituted Senate

( ) other (please specify)

_____

_____

_____

11. It has long been suggested that the current mode of elections to the House of Commons should be modified by introducing an element of proportionality to the present single-member constituency. Supporters of various proportional representation proposals contend that, with electoral reform, a better balance could be struck between the number of votes and the number of seats in different regions of provinces. Furthermore, they point out that electoral reform of the House of Commons would improve a body that already exists, and would, therefore, add neither new institutions or new elections to the process. However, other observers underline that while proposals for electoral reform create two types of M.P.'s while doing little to reduce the disadvantages of regional or other minority groups in a majority chamber. Given these advantages and disadvantages, do you see electoral reform of the House of Commons as a viable option for prospective constitutional reform?

( ) yes
( ) no

12. Are there any other specific proposals that you would like to see placed on agendas for constitutional reform in the years to come?

_____

_____

_____

13. Please rank the five specific areas of future constitutional reform that were addressed in this survey from 1 to 5 in the order of which you feel is in the most urgent need of reform. (1--most urgent; 5--least urgent).

( ) Senate reform

( ) changes in the division of powers

( ) changes to the Charter of Rights

( ) Supreme Court reform

( ) electoral reform

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November 26, 1984.

Date