THINKING BIG ABOUT THE FUTURE

AN ADDRESS BY

PRESTON MANNING, M.P.

LEADER OF THE OFFICIAL OPPOSITION

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INTRODUCTION

It is an honour and privilege to be invited to deliver the second annual lecture in honour of my long-time friend, advisor, and mentor, Mel Smith.

For twenty years before I entered federal politics, I was in the research and consulting business. I had some private sector clients who were concerned about the complete absence of any reference to economic and property rights in the Canadian Constitution and the initial drafts of what became the Canadian Charter of Rights and Freedoms. They were also concerned about the propensity of some Canadian governments like the Trudeau administration to curtail certain property rights – like the right to buy and sell natural resources – without just compensation.

They consequently financed a project managed by our firm to draft and promote a Property Rights Protection clause for entrenchment in the Canadian Constitution. In the course of promoting that clause I came to see Premier Bill Bennett of British Columbia and the cabinet minister then responsible for constitutional affairs in B.C., Mr. Rafe Mair.

I don't think Rafe was overly impressed with our proposal, and when a busy minister is in that situation he can do one of two things. He can say, "Please get out of my office" and usher you to the door. Or he can take the kinder, gentler approach and say, "I think you should talk to my deputy minister about this," and let him break the bad news.

In any event, Rafe took one look at my proposal and said, "I think you should talk to my deputy minister about this," and that's how I first got to know Melvin H. Smith who was then in that position and well on his way to becoming the longest-serving deputy minister in British Columbia.

That was the beginning of what has become a real friendship as well as a professional association built around shared values and political ideals.

Years later, when I became involved in the creation of the Reform Party and was eventually elected to Parliament, I came to rely more and more on Mel for advice on everything from Senate reform, to aboriginal issues, to judicial activism and a host of other issues.

It is therefore a great honour to be with you all today and to deliver the Second Annual Mel Smith Lecture under the heading of "Thinking Big About the Future."

The three subjects I want to touch upon under this heading are all connected in one way or another with Mel's life and career. Indeed, many of my thoughts on these subjects are inspired by Mel's life and advice – and those three subjects are:
(1) Big British Columbians
(2) Limiting Judicial Activism

(3) Securing Genuine Legal Standing for People of Faith

BIG BRITISH COLUMBIANS

So let me begin by reflecting on the past and future position of British Columbia – Mel Smith's home province – within the Canadian federation.

Over the past number of years, the federal government in Ottawa seems to be doing everything possible to alienate British Columbians. The only interest Ottawa appears to have in the B.C. economy is to extract the maximum amount of tax revenue from B.C. workers, businesses, and consumers. And most British Columbians are well aware of federal mismanagement of such important B.C. issues as the deterioration of health care, the decline of the west coast fishery, the B.C. land claim and treaty-making process (including the Nisga'a treaty), and the people-smuggling problem this summer – to name only a few.

But as we look at the long-term future of British Columbia and the West within the federation, there is good news. In the 21st century, the four western provinces will produce more than one-third of Canada's wealth. They will be home to more than one-third of Canada's population, and will control one-third of the seats in the House of Commons.

British Columbia itself will become Canada's second-largest province by population, and the most strongly represented western province in the House of Commons. British Columbia, Canada's gateway to the Pacific Rim, will rapidly gain the kind of economic and political clout that Quebec has exercised within the federation throughout much of the 20th century.

As British Columbia becomes an even more important player in the Canadian federal system – one whose concerns and aspirations can no longer be ignored – the question arises, How should B.C. use its growing power and influence to greatest effect?

I believe British Columbia should use its growing power and influence, first of all, to protect and advance its own regional interests – to achieve a better balance between what it contributes to federal coffers and what it receives, to reform federal fishery and aboriginal policies, and to vigorously expand B.C.'s role as Canada's gateway to the Asia-Pacific.

But I also believe that British Columbia can and should use its growing power and influence to address some of the challenges and problems which are affecting all Canadians and to bring its influence to bear on Canada as a whole.

And this requires us to give greater recognition to what I would call "the Big British Columbians" – representatives, spokespersons, leaders – like Mel Smith and others who, while understanding and advancing B.C.'s particular interests, are able to represent

them on the national stage and to demonstrate the relevance of B.C.'s ideas and perspective to the nation as a whole.

This Mel has been able to do. He has developed and promoted various constitutional ideas among B.C. legislators – on the division of powers, on a better amending formula, on institutional change. But he has also advanced those ideas on the national stage of inter-provincial and federal-provincial conferences.

For example, he has promoted proposals for Senate reform and a national House of the Provinces, not simply as a means of getting more effective representation of B.C.'s regional interests in national decision making, but as a means of advancing the regional interests of <u>all</u> the regions of Canada in national decision making.

Mel has taken and applied the tragic lessons to be learned from the federal government's gross mismanagement of aboriginal interests in eastern Canada, the Prairies, and northern Canada, and has said loudly and eloquently, "Let us not allow the federal government to repeat those mistakes in British Columbia."

But he has also taken the more immediate lessons to be learned from federal mismanagement of aboriginal land claims and aboriginal self-government in B.C. – as represented, for example, by the Delgamuukw decision and the Nisga'a Treaty – and has endeavoured to warn Canadians in all parts of the country of the costs and negative consequences which these precedents will have for them.

This is what I mean by thinking and acting like a Big British Columbian. And you need – Canada needs – more British Columbians to emulate Mel in this regard.

But then there is a second question which British Columbians need to address in order to maximize the political and economic influence of this province within the federation of the 21st century.

That is, How to rise above the regional divisions and political polarization in British Columbia which often dissipates and reduces this province's effectiveness on the national stage?

You know what I'm talking about.

British Columbia is a magnificently diverse province. Vancouver Island, the Lower Mainland, the Fraser Valley, the Sunshine Coast, the Skeena, the Interior, the Okanagan, the Kootenays, the Chilcotin Plateau, the Cariboo, and the Peace River country – all have their distinctive characteristics and often distinctive positions on provincial and national issues.

This often makes it difficult for British Columbia to speak with one voice on national issues, a situation which is further compounded by the "polarization tendency" of B.C. politics.

Because of the political history and culture of British Columbia, there is a tendency to polarize politically on many issues – management versus labour, right versus left, aboriginals versus non-aboriginals, new immigrants versus old immigrants, environmentalists versus resource developers, rural versus urban, etc., etc.

But once again, as we look to the future, I see encouraging developments on this front. I see greater and greater recognition by British Columbians of the importance of "coalition building" – principled coalition building.

And once again, coalition building requires encouraging and accepting the leadership of the Big British Columbians among you – representatives, spokespersons, and leaders who, while recognizing and appreciating regional diversities and polarized opinions, can transcend them and unite the parties into bigger, broader, and more powerful coalitions.

The original creation of the Reform Party – in which so many British Columbians have played a key role – was an exercise in "coalition building." The exercise in which we are now engaged in creating the Canadian Alliance as a bigger, principled alternative to the federal Liberals is likewise an exercise in coalition building which British Columbians are supporting strongly.

The next government of B.C. will most likely be formed by the party best able to build and sustain new coalitions. The next government of Canada is most likely to be formed by those with a capacity to build new, principled coalitions:

- A new national coalition of taxpayers to reduce federal taxes.
- A new national coalition to heal the health care system.
- A new national coalition to restore integrity and accountability to Parliament.
- A new national coalition to reform federalism for the 21st century.

Therefore, in electing people to your provincial legislature and to fill your parliamentary seats, it is more relevant than ever before to ask, "Who are the Big British Columbians among us?" -- representatives and leaders of the whole, as distinct from representatives and leaders of the parts, people who know what they are for as well as what they are against, people who can inspire others to unite behind great principles and causes rather than to divide over smaller differences of opinion.

And once again, if I were looking for a model of someone who – while recognizing the polarization aspect of B.C. politics – has gradually transcended it in his writings and associations, I couldn't think of a better example than Mel Smith.

LIMITING JUDICIAL ACTIVISM

Turning now from the general to the particular, let me direct your attention to one of the "big issues" that is relevant both to British Columbia and to Canada, and on which Big British Columbians like Mel have made major contributions on the national stage.

I refer to the issue of Judicial Activism – or more correctly, Political Activism by the courts.

One of the principles on which our Constitution is founded is the ancient principle that Parliament and the legislatures make the laws, the executive implements the laws, and the courts interpret the laws.

The door was opened for a great departure from that principle when Canada adopted into its Constitution the Charter of Rights and Freedoms and replaced the supremacy of Parliament and the legislatures with the supremacy of the Constitution as interpreted by judges.

The principle of Parliament and the legislatures as the supreme law-making bodies is violated, to the detriment of peace, order, and good government, when the courts take on the political role of making as well as interpreting law as was done by the B.C. courts in the Sharpe decision on child pornography and by the Supreme Court in its Delgamuukw decision on aboriginal title.

In Delgamuukw, the Supreme Court of Canada, after a two-day trial, ignored the findings of the B.C. judge who had devoted 374 trial days over three years to hearing the evidence, to find there had not been an extinguishment of aboriginal title in B.C. The effect was to invent a definition of aboriginal title and put an aboriginal caveat on most of the lands of British Columbia.

The court then proceeded to attempt to determine when and how aboriginal interests could justifiably be limited, setting down rules that are almost impossible for government officials or private sector resources developers to understand and which are always open to attack in the courts. The Supreme Court's ill-conceived attempt to arrive at its own definition of aboriginal title has created great uncertainty in the resource industries and contributed to British Columbia's current economic woes.

In the Sharpe case, the B.C. court took the position that an adult's desire to possess and enjoy child pornography is a protected Charter right and struck down legislation that was unanimously passed by Parliament only 6 years before to make possession of child pornography a crime under the Criminal Code.

Parliament when it passed the law was well aware of the Charter's provisions for freedom of expression but, unlike the B.C. judges, did not believe that this freedom should extend to activities which place the well-being of children at risk. Now, we are waiting for the Supreme Court to decide whether the framers of the Charter really did intend that the desires of adults to possess child pornography should take precedence over the rights of children to protection from such desires. (Let us pray that sanity may yet prevail.)

These examples of political activism by the courts have had a particularly pernicious impact on British Columbia. But on the positive side, they have provided Big British Columbians like Mel Smith and Reform MPs John Reynolds, Mike Scott, and John

Duncan with incentives and opportunities to promote measures to restrain judicial activism and restore the supremacy of Parliament and the legislatures.

Let me refer to those three remedial measures which the Official Opposition intends to pursue vigorously, and on which the thinking of the Official Opposition has been significantly influenced by Big British Columbians like Mel Smith.

1. We propose a Judicial Review Committee of the House to formalize the House's consideration of Charter issues.

At present, draft legislation is previewed by the Department of Justice to determine whether it is compatible with the Charter. But this analysis is considered "client confidential" to the government, so Members of Parliament charged with deciding whether to adopt or change legislation have no access to the review.

The proposed Judicial Review Committee would have independent advice regarding the Charter implications of any draft bill, and that advice would be made public. The committee would also review bills to ensure that Parliament's intent is made clear in each statute. It would also review any court decision where political activism has led the courts into law making, and would recommend remedial legislation to the House when required, including use of the Notwithstanding clause.

2. We propose that Parliament and the legislatures, who are directly accountable to the people, should play a more significant role in the appointment of Supreme Court judges.

Instead of the present behind-the-scenes nomination process, with the Prime Minister making the appointments, we propose a role for the legislatures in putting forward the names of nominees and a role for the proposed Judicial Review Committee of the House in conducting review and ratification hearings.

Nominees for the Supreme Court would be publicly interviewed by the Judicial Review Committee of the House of Commons so their views on the Charter and the relationship between legislators and judges would be known. The House committee would then make its recommendation to the Prime Minister for the final decision.

Our original ideas on the role for the House in reviewing judicial appointments have been modified by Mel Smith's insistence that the provinces – whose constitutional rights may be particularly affected by judicial activism – should also have an effective role in the nomination and ratification of Supreme Court appointments.

3. We are prepared to examine the feasibility of establishing a Special Constitutional Court along the lines of the German model – an idea which Mel Smith and others have proposed.

A Special Constitutional Court, with proper representation from the provinces to ensure true neutrality and which dealt only with constitutional matters, could provide the

best of both worlds – true expertise and balance in constitutional adjudication, and opportunity for the provincial courts to act as the final court in most matters of provincial law, with the Supreme Court dealing only with issues that affect all Canadians, primarily with respect to federal law.

Drawing and maintaining the appropriate line between the courts and the legislatures for the 21st century is a big issue. It is an issue on which Big British Columbians like Mel Smith have already contributed a great deal, and on which much more needs to be done in the years ahead.

SECURING LEGAL STANDING FOR PEOPLE OF FAITH

Finally, I want to turn to a third subject – related to the second – and of particular relevance to the faculty and students of this university with your commitment to examining the issues and challenges of the day from the perspective of a Christian world view.

Mel Smith is not only a Big British Columbian and a distinguished lawyer and legal scholar. He is also a committed Christian whose faith directs both his thinking and his actions.

People of faith – like Mel and myself and many of you – indeed like people of faith the world over – hold to the view that there is a transcendent moral order established by our Creator, and that men and legislators do not invent the laws that govern morality – we discover them.

A great deal has been written on the subject of natural law – on human law as "derivative" from something more fundamental. I have been helped considerably on this subject by the writings and lectures of Dr. Ian Hunter, Professor Emeritus at the University of Western Ontario, who notes that this natural law concept predates Christian antiquity. (For example, Heraclitus, the Greek philosopher of the 4th century B.C., wrote, "All human law is nourished by one law, which is divine.")

To my mind, this is what the preamble of the Canadian Charter of Rights and Freedoms affirms when it says that "Canada is founded upon principles that recognize the supremacy of God and the rule of law."

Our Constitution links acknowledgement of that transcendent moral order represented by the supremacy of God with man's attempts to express and enforce it by the rule of law.

In defence of this linkage one is compelled to add, "What the Parliament and the legislatures have joined together, let not the courts rend asunder." And yet that is precisely what the courts have done and unless checked will continue to do.

In the Sharpe decision, when legal counsel for Focus on the Family and other faith-oriented groups attempted to argue against the possession of child pornography on moral grounds, and attempted to advance those arguments from principles rooted in the supremacy of God and a morality derived therefrom, the judge dismissed that argument with these words:

> I accept that the law of this country is rooted in its religious heritage. But I know of no case on the *Charter* in which any court of this country has relied on the words Mr. Staley invokes [i.e., principles that recognize the supremacy of God]. They have become a dead letter and while I might have wished the contrary, this Court has no authority to breathe life into them for the purpose of interpreting the various provisions of the *Charter*…. The words of the preamble relied upon by Mr. Staley can only be resurrected by the Supreme Court of Canada.

Note that the judge not only dismisses arguments based on a Christian conception of morality, but does so in language as offensive as possible to Christians for whom the doctrine of the resurrection is the most sacred article of their faith.

This B.C. judge pronounced the supremacy of God "dead" and capable of "resurrection" only by the Supreme Court.

I venture to say that if this judge had so cavalierly dismissed a faith-based argument advanced by an aboriginal believer or a committed practitioner of Judaism or Islam – if any judge had taken such a back-handed crack at the most sacred doctrines of those faiths – every editorialist and civil libertarian in the country would have risen up in indignation and cited that judge for contempt. But not so, when the object of contempt is the most sacred doctrine of the Christian faith.

One wonders, why the double standard?

In any event, the sad truth is that arguments against pornography based on Christian morality and rooted in the supremacy of God had no standing and carried no weight whatsoever with the B.C. Court of Appeal.

In taking this position, however, the B.C. Court was simply following in the footsteps of the Supreme Court of Canada.

In the 1994 Supreme Court decision on the Rodriguez case – in which the court came within one vote of creating an unregulated right to physician-assisted suicide, our then Chief Justice, Antonio Lamer, declared Canada to be a "secular society" in which the court was not obliged to be guided in any way by "theological considerations."

This is what the Chief Justice wrote:

> Can the right … to choose suicide, be described as an advantage of which the appellant is being deprived? In my opinion, the Court should answer this question without reference to the philosophical and theological considerations fuelling the debate on the morality of suicide or euthanasia. It should consider the

> question before it from a legal perspective … while keeping in mind that the Charter has established the essentially secular nature of Canadian society.

Canada declared by the Chief Justice of the Supreme Court to be a secular society – despite the existence of a deep and broad Christian heritage, despite constitutional guarantees of freedom of conscience and religion to all Canadians, and despite polling data which demonstrate that the thorough secularity of our legal and political and media elites is not shared by the majority of Canadians.

For example, a poll conducted by Angus Reid for *Maclean's* magazine just one year before the Rodriguez decision found that eight out of ten Canadians affirm their belief in God, two out of three of all adults subscribe to the basic tenets of Christianity, more than half claim to read the Bible or other religious literature at least occasionally (at least more frequently than they read Supreme Court decisions).

And almost one-third of the adult population claims to pray daily to the Supreme Being, the relevance of whom, according to the B.C. Court of Appeal, can only be resurrected by the Supreme Court.

Where does all this leave us? And where does it lead us?

As we enter the 21st century, and legislatures and courts face unavoidable moral decisions on everything from the regulation of reproductive technologies to euthanasia – life and death issues affecting Canadians from the womb to the grave – people of faith need to do everything in our power to ensure that the faith perspective has standing – genuine standing – before the courts and the regulatory bodies of the day.

We do not seek standing to coerce – to impose our values or our morality on others. That is not the way of the God of the Old Testament or the Christ of the New.

Nor do we seek such standing for our faith perspective alone, but for all who wish to address moral issues from the perspective of their most deeply-held values.

But we do seek the right to stand before courts and regulatory bodies of Canada to bear witness to the truths and experience of our faith – for example, the truth and experience not only of Mel Smith the Big British Columbian, or Mel Smith the lawyer and legal scholar, but also – and most importantly – the truth and experience of Mel Smith the Christian.

In the final analysis it is not our politics or the law that ultimately guides or sustains or comforts us in all the vicissitudes of life. It is our relationships – with family, with friends and community, and with our Creator.

I pay tribute therefore today to our friend Mel Smith, the Big British Columbian, and ask you to join with me in pledging to do everything in our power to secure Big British Columbians like Mel more recognition and influence on the national stage.

I pay tribute also today to our friend Mel Smith the lawyer and legal scholar, and ask you to pledge with me that we will do everything in our power to draw and maintain the appropriate line between courts and legislatures in the years ahead.

But above all, I pay tribute to our friend Mel Smith the man of faith, and ask you to join with me in pledging that we will do everything in our power to ensure that the insights of faith are respected by the makers and interpreters of our laws.