

At the present time, therefore, constitutional laws for Canada may be made by the Parliament of Canada, by the provinces or by the Parliament of the United Kingdom. As we have seen, the Parliament of Canada may make constitutional laws under Head (1) of Section 91, under other provisions of the British North America Act, and also under Subsection (2) of Section 2 of the Statute of Westminster. The legislatures of the provinces may make constitutional laws under Head (1) of Section 92, under other provisions of the British North America Act and also under Subsection (2) of Section 7 of the Statute of Westminster.

The present situation may be represented by a circle divided into three segments. One segment represents the authority of the Parliament of Canada to make constitutional laws. Another segment represents similar authority possessed by the legislature of the provinces. The remaining segment represents the area of jurisdiction that is beyond the authority of Parliament or the legislature; the sole power to make constitutional laws in this area rests with the Parliament of the United Kingdom. In addition, the Parliament of the United Kingdom has concurrent jurisdiction over the federal and provincial segments.

The problem of finding a suitable method of amending the Constitution of Canada in Canada involves two things. First there must be transferred to appropriate legislative bodies in Canada jurisdiction over that segment of our circle that is now within the exclusive authority of the Parliament of the United Kingdom. Secondly, we must remove from the Parliament of the United Kingdom the jurisdiction it now has over this segment, and also the concurrent jurisdiction it now possesses over the areas included in the segments of our circle now falling within the jurisdiction of Parliament or of the legislatures. At the same time, we must be careful to see that we do not now interfere with the powers that Parliament and the legislatures have. We would not want, for example, an amending formula that would make it impossible for the provinces alone to amend their constitutions, a power they now possess under Head (1) of Section 92; nor would we want to take away from Parliament the powers it now has under the various sections of the British North America Act that confer upon Parliament power to amend the Constitution of Canada in matters of purely federal concern. However, it should be pointed out (and this was made clear during the 1950 Conferences) that there is some objection to the wide powers conferred on Parliament by the new Head (1) of Section 91 and it is no doubt felt by some that if we do arrive at an acceptable amending formula there should be some change in the authority conferred by this provision.

When the current Conferences began, it was suggested that the Conference might consider first the transfer of authority to Canada to amend the Constitution in those respects in which it is not amendable by any legislative authority in Canada, but without writing a final amending formula. This proposal grew out of the recent amendments to Section 99 of the British North America Act, which deals with the tenure of office of superior court judges. The proposed amendment was approved by the Government of Canada and the governments of all the ten provinces. It was felt that in those cases where unanimous consent could be obtained in Canada, there should be no need to go to the United Kingdom for an amendment. It was therefore suggested that a statute of the United Kingdom Parliament be requested that would authorize any amendments to the Constitution by the Parliament of Canada with the consent of the legislatures of all the provinces. Under such authority an appropriate amending power could ultimately be enacted in Canada, but in the meantime any proposed amendments that had unanimous approval in Canada could be made here. This step was described as the "Transfer Formula" and the ultimate final amending formula was designated as the "Amending Formula".