Chapter 5—Amendments to the Constitution

RECOMMENDATION

4. The formula for amending the Constitution should be that contained in the Victoria Charter of June 1971, which requires the agreement of the Federal Parliament and a majority of the Provincial Legislatures, including those of:

(a) every province which at any time has contained twenty-five percent of the population of Canada;

(b) at least two Atlantic Provinces;

(c) at least two Western Provinces that have a combined population of at least fifty percent of the population of all the Western Provinces.

The new amending formula is contained in articles 49 to 57 of the Victoria Charter. The formula is as follows: in general, constitutional amendments would require a resolution of consent at the Federal level, plus the consent of the Legislatures of a majority of the Provinces including (a) the Legislature of any Province now containing at least 25 per cent of the population of Canada, and of any other province that hereafter reaches the same percentage of the population; and (b) the Legislatures of at least two Provinces west of Ontario providing that the consenting Provinces comprise 50 per cent of the population of the Provinces west of Ontario; and (c) the Legislatures of at least two Provinces east of Quebec. The only exceptions to the preceding formula are as to matters peculiar to the constitutions of Parliament or of the Provinces or of concern to less than all the Provinces. In effect, a constitutional amendment would require the agreement of the Federal Parliament, of the Legislatures of Ontario and Quebec and of two Atlantic and two Western provinces, with a special rider as to the composition of the two Western provinces that we shall have to look at closely.

To our mind the new formula is a substantial improvement over the Fulton-Favreau Formula. While that Formula may have appeared to require for constitutional amendment only the agreement of the Federal Parliament and of the Legislatures of two-thirds of the Provinces representing 50 per cent of the population of Canada according to the latest census, actually the amendment of any important section of the British North America Act would have required the agreement of all the Provincial Legislatures, since included in the category requiring unanimous agreement were all the powers in sections 91, 92 and 93 of that Act (except that the consent of Newfoundland would not have been required for amendments to section 93). In effect, therefore, the earlier formula would have required unanimous agreement on all matters of moment, whereas the new one is content with the approval of six provinces on a weighted basis. The theory on which the Fulton-Favreau Formula was based was that each province has an equal right to a veto, since each is equally a province.

In our view what was objectionable about the Fulton-Favreau Formula was this rigidity. We are of the opinion that an amending formula must be a blend of rigidity and flexibility, and that the lower the number of provinces with veto power over amendments the more satisfactory the formula is likely to be. In fact, our only criticism of the new formula is the element of rigidity which is incorporated in the requirement concerning the consent of the Western Provinces.

We have no fault to find with lodging a veto power in the legislatures of provinces which contain at least 25 per cent of the population of the country. Provinces which represent that sizeable a proportion of the population can reasonably expect that their consent will be necessary for constitutional amendment. Since Ontario and Quebec would now acquire a veto on this basis, they will on the formula never lose that veto even if their population should dip below the 25 per cent proportion in the future. Moreover, it is only fitting that any province that hereafter contains 25 per cent of the population should also gain a veto.

The only problem is with the position gained by British Columbia. The requirement for the weighted consent of the Western Provinces is to the effect that consent is required from two Provinces comprising 50 per cent of the population west of Ontario. Some present population projections suggest that British Columbia will possess more than 50 per cent of the population of the Provinces west of Ontario at some point in the 1990s. At such a time even the agreement of the other three Western Provinces would not be sufficient to carry an amendment without the consent of British Columbia. The affirmative adherence, however, of British Columbia would still not be enough to carry an amendment without the support of another Western Province.

On the question of the role of the Senate in the amendment procedure at the Federal level there is a case for the position that the Senate should not be consulted at all with respect to constitutional amendments, on the ground