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CONSTITUTIONAL AMENDMENT IN CANADA*

Speaking in the House of Commons on October 2, 1974, the Leader of the Opposition, Mr. Robert Stanfield, and Prime Minister Pierre Elliott Trudeau agreed on the anomalous position of Canada, a sovereign nation not yet possessed of the complete legal power to amend certain parts of its own Constitution. The Prime Minister added that he hoped it would be possible, with the co-operation of the Opposition and the provinces, to adopt a Canadian amending formula within four years. The current situation, which is at times hard to explain to an outsider, is historical in origin and has been perpetuated by the difficulty of reaching agreement on the nature of a Canadian amending mechanism.

Canadians are well aware of this limitation, and many efforts have been made in the past to find a satisfactory method of amending the Constitution of Canada exclusively in Canada. To that end, several federal-provincial conferences were convened. So far, however, these efforts have not been successful.

This paper will discuss what the conferences tried to accomplish and, from a legal point of view, what is meant by the "amendment of the Constitution in Canada". The first question that arises, therefore, is: What do we mean by "Constitution of Canada"?

The Constitution of Canada is popularly thought to be the British North America Act of 1867 and its subsequent amendments, and a reference to constitutional amendment is usually intended to mean the amendment of the British North America Acts. What *is* the "constitution" of a country? It may be defined as the system of written laws and unwritten conventions by which a state is governed.

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These laws and conventions may be formally expressed, as in the case of the United States Constitution. In that country, the word "Constitution" means a particular document. In Britain, however, there is no document that is known as the Constitution. The Constitution there consists partly of written material, partly of conventions that have not been given official expression, and partly of statutes relating to some aspect of government.

No single constitutional document

In Canada there is no document that purports to set out the complete law pertaining to the country's government. The Constitution, as in the case of Britain, consists in part of written material and in part of conventions or customs. While the B.N.A. Act of 1867, with its subsequent amendments, is the major constitutional document of Canada, it is not, in fact, an exhaustive statement of the laws and rules by which Canada is governed. The written constitutional material further includes other British statutes (such as the Statute of Westminster, 1931), and British Orders-in-Council (notably those admitting various provinces and territories to federation). Included as well are statutes of the Parliament of Canada relating to such matters as the Succession to the Throne, the Royal Style and Titles, the Governor General, the Senate, the House of Commons, the creation of courts, the establishment of government departments, the franchise, elections, and statutes of provincial legislatures of a fundamental constitutional nature similar to those listed above. Other written instruments, such as the Royal Proclamation of 1763, the Letters Patent of October 1, 1947, constituting the office of Governor General of Canada, the Commission of the Governor General, and federal and provincial Orders-in-Council of a fundamental constitutional nature authorized by their respective statutes provide further constitutional material, as do those decisions of the courts that have interpreted the B.N.A. Acts and other statutes of a constitutional nature.

In addition, the Constitution of Canada includes substantial sections of the common law, unwritten constitutional usages and conventions and principles of representative and responsible government. The preamble to the B.N.A. Act states that it was the desire of the original provinces to be federally united "with a constitution similar in principle to that of the United Kingdom"; accordingly, many of the usages and conventions of government that had been developed in Britain have thrived and are evolving in the Canadian context. For example, it is a convention that the Government will resign or ask for a dissolution of Parliament (and a new election) upon the passing of a non-confidence motion by the House of Commons. This is not set out in any law, but is among the usages and principles governing out Cabinet system of responsible government.

Amending authorities

Constitutional amendments may consist of changing existing law or of making new law. Authority to make constitutional amendments is, therefore, simply authority to make constitutional laws.

The question arises: Who now has authority to amend the Constitution of Canada? Considering that expression in its widest sense as indicated above, we must look first at the British North America Act of 1867. We find that there are provisions in that act that are subject to alteration either by the legislatures of the provinces or by the Parliament of Canada. Thus Sections 40, 41, 47, 130 and 131 begin with the words "unless the Parliament of Canada otherwise provides". These provisions are therefore amendable by the Parliament of Canada. Similarly, Sections 78, 83, 84, 134 and 135 apply unless the appropriate legislature "otherwise provides", and they are therefore subject to alteration by provincial enactment. Under Head (1) of Section 92, the legislatures of the provinces have express authority to amend the constitution of the province, except as regards the office of lieutenant governor. Under this authority, the legislatures have authority to change and have changed sections such as 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 83, 84 and 85. It should be pointed out, however, that the actual texts of these provisions of the B.N.A. Act are not subject to change by Parliament or the legislatures; it is not the act as such that is amendable but rather the law as expressed in those provisions. The enactment by Parliament or the legislatures, as the case may be, substitutes a new law for the law contained in those sections of the B.N.A. Act; but that is, in every sense, a constitutional amendment.

Constitutional laws may also be made by Parliament or the legislatures under the enumerated heads of Section 91 or 92. Thus, under Head (8) of Section 91 or Head (4) of Section 92, laws could be made respecting offices involved in the Constitution.

Section 129 of the B.N.A. Act of 1867 continues in force then-existing laws, but subjects them to repeal, abolishment or alteration by the Parliament of Canada or the legislatures of the respective provinces, according to the authority of Parliament or the legislatures under the B.N.A. Acts. It follows that any pre-Confederation laws of a constitutional character are amendable by Parliament or by the legislatures of the provinces according to their jurisdiction under the B.N.A. Acts. Originally, an important limitation on such powers was imposed by the exception from the provisions of Section 129 of Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland that extended to Canada.

Furthermore, shortly before the passage of the B.N.A. Act, 1867, the British Parliament enacted the Colonial Laws Validity Act of 1864. This act had the effect of nullifying a colonial enactment if it was repugnant to any act of the British Parliament. The laws of Britain applicable in its colonies were of two kinds -- namely, those that were applicable by adoption by the local legislature and those that were applicable *in proprio vigore* (that is to say, by force of their own terms). The former, being enactments of the local legislatures, could be repealed by them. The latter, however, could not be altered by the local legislatures. It has been held by the courts that the limitations of the Colonial Laws Validity Act applied only to Imperial Acts in force in a colony *in proprio vigore*, and not such as were applicable by adoption. The Colonial Laws Validity Act was, therefore, a further fetter on the legislative power of Parliament and the provinces.

Thus, by virtue of Section 129 of the B.N.A. Act, 1867, as originally in force, and by virtue of the Colonial Laws Validity Act, neither Parliament nor the provincial legislatures of Canada could repeal or amend an act of the British Parliament that extended to Canada by virtue of its own terms, and any act passed by a legislative body in Canada would be void or inoperative if it was repugnant to any British act.

Statute of Westminster

The limitations imposed by the Colonial Laws Validity Act were removed by the Statute of Westminster of 1931, Section 2 (22 George V, c.4 (U.K.)). The limitation imposed by Section 129 of the B.N.A. Act was also removed, except (at Canada's request) as to the British North America Acts 1867 to 1930. Today, the Parliament of Canada or the legislatures of the provinces have the power to repeal or amend any act of the British Parliament, except the B.N.A. Acts 1867 to 1930. It follows that, if any acts of the British Parliament other than the B.N.A. Acts of 1867 to 1930 applicable to Canada are of a constitutional character, they may be repealed or altered by the appropriate legislative body in Canada.

The terms of the Statute of Westminster raise an interesting question. The sole limitation on legislative power in Canada, according to Section 7 of that act, is the inability to amend the B.N.A. Acts, 1867 to 1930. This collective title includes the original act of 1867 and all amendments to 1930. Yet there have been amendments since 1930. The collective title is now British North America Acts 1867 to 1975. Does the phrase "1867 to 1930" include later amendments? Apparently not. Mr. E.A. Driedger, Q.C., concluded simply, in an article in the *Canadian Bar Journal* in August 1968, that

Parliament or the legislatures might amend or repeal any British statute forming part of the Constitution of Canada if it had been passed after July 10, 1930 (the date of assent to the last of the series 1867 to 1930) and if that statute was in relation to a matter within the legislative competence of Parliament or the legislatures, as the case might be.

Another interesting question is whether the power conferred to amend British statutes extends to the Statute of Westminster itself, since it is not included in the collective title B.N.A. Acts 1867 to 1930.

An amendment to the B.N.A. Act passed by the British Parliament in 1949 considerably enlarged the authority of the Parliament of Canada to legislate with respect to constitutional matters by adding a new Head (1) to Section 91 of the B.N.A. Act. The Parliament of Canada may now amend the Constitution of Canada except as regards the distribution of legislative authority between Parliament and the legislatures, the rights and privileges of any class of persons with respect to schools, the use of the English and French languages, the requirement of at least an annual session of Parliament and, except in cases of emergency, the maximum five-year life of each Parliament.

The British Parliament still retains a theoretical power to make constitutional laws for Canada, without limit. Theoretically (but subject to compliance with the requirements prescribed in the Statute of Westminster -- namely, request and consent by Canada), the British Parliament could make any laws of any character having application in Canada. In practice, however, this power is not exercised except with regard to that residue of the constitutional amending power that does not now fall within the competence of any legislative authority in Canada. Therefore, no act of the British Parliament affecting Canada is passed unless it is requested and consented to by Canada. Conversely, every amendment requested by Canada in the past has been enacted, and there is no evidence to suggest that in future a British Parliament would reject or obstruct requested amendments to the B.N.A. Act.

At present, therefore, constitutional laws for Canada may be made by the Parliament of Canada, by the legislatures of the provinces or by the British Parliament. 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 Sub-section (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 Sub-section (2) of Section 7 of the Statute of Westminster.

Circle of authority

The 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 legislatures of the provinces. The remaining segment represents the area of jurisdiction that is beyond the authority of Parliament or of the legislatures; the sole power to make constitutional laws in this residual area rests with the British Parliament. In addition, the British Parliament has, theoretically, a concurrent jurisdiction over the federal and provincial segments.

The problem of finding a suitable method of amending the Constitution of Canada exclusively in Canada involves two things. First it must be decided what are the appropriate legislative bodies in Canada to which should be transferred jurisdiction over that segment of our circle that is now within the exclusive authority of the British Parliament. Secondly, we must remove from the British Parliament 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.

Constitutional amendment was discussed briefly by the Dominion-Provincial Conference of 1927. A special committee of the House of Commons at the 1935 session of Parliament studied and reported on the best method by which the British North America Act might be amended. Constitutional amendment was again discussed at a dominion-provincial conference in 1935; a sub-committee was appointed to prepare a report on a method of procedure to amend the Constitution of Canada; a report was duly submitted, but no further action was taken. In 1950, a conference was convened to find a method of amending the Constitution entirely in Canada but, while considerable progress was made in clarifying issues, the conference did not succeed in finding an amending formula likely to be acceptable to all governments concerned.

A conference of attorneys-general was convened in October 1960 with a view to arriving at a basis for the amendment of the Constitution of Canada, and met four times in the succeeding 14 months. These conferences drew up a draft statute under the leadership of E. Davie Fulton, then Minister of Justice, but some differences of view remained and the plan was not carried through to completion. It was

later completed, and became known in 1964 as the "Fulton-Favreau Formula", the latter name being that of the Minister of Justice at that time, Guy Favreau. This text was approved by the federal-provincial conference of the Prime Minister and premiers on October 14, 1964.

The Fulton-Favreau Formula provoked varied opposition, particularly to its perceived inflexibility and to the possibility that differences of opinion would arise as to the rule applicable in any particular case. Opposition in the Province of Quebec was particularly strong; some opponents even claimed that the Formula was a "straitjacket" that would hinder the development of a cherished "special status". Following more than a year of debate and delay, Mr. Lesage, then Premier of Quebec, concluded that his government would postpone indefinitely its consideration of the Formula. With this refusal to sanction the proposal, the unanimous approval of the provinces that Ottawa had sought as a matter of sound political practice (though not legal necessity) was left unachieved.

Constitutional discussions were renewed in February 1968, with the convening of a conference of first ministers, and agreement was reached to embark on a comprehensive review of the Constitution. From that date to June 1971, fundamental questions were examined in six sessions of first ministers, many sessions of ministers on special subjects, and some two dozen meetings of officials. A session in February 1971 indicated wide agreement on a number of matters, including a formula for amending the Constitution, and resolved to discuss draft texts as well as the issue of social policy and income security measures at the seventh meeting of first ministers in June 1971 in Victoria, B.C.

Victoria Conference

Much preparation preceded the Victoria meeting, including bilateral discussions and the deliberations of committees of ministers and officials. From these efforts and the extensive negotiations at the Victoria Conference itself, came the "Canadian Constitutional Charter, 1971", perhaps (in one commentator's words) "the most important product of the nation's attempt at constitutional review and revision". A number of constitutional reforms were proposed in the Charter, certain fundamental political freedoms were entrenched, and a new mechanism for amending the constitution was set down, which would have cleared the way for the "patriation" of the Constitution.

In general, in the nine predominantly English-speaking provinces, public opinion and politicians showed themselves to be in favour of the proposed Charter. However, strong opposition to it quickly deve-

loped in Quebec. Mr. Bourassa, the Quebec Premier, had, with his delegation, attempted to gain constitutional control over an integrated scheme of social and income security services through the entrenchment of an absolute control by provincial legislatures over federal laws in these areas. Though some concession was made in this direction by the Conference, the proposals of Quebec in these matters were, by and large, turned down. On June 23, 1971, the office of Premier Bourassa issued a statement saying that his government could not accept the Victoria Charter, citing in particular the "uncertainty" in the texts dealing with income security. Once again the unanimous approval of the provinces was not forthcoming, a unanimity agreed upon at Victoria as the appropriate (if not customarily required) vehicle for adoption of such a fundamental document as the Charter.

Amending formula

Basically, in devising an amending formula, care must be taken to ensure that there is no interference with the powers of Parliament and the legislatures. An amending formula should not, for example, make it impossible for the provinces alone to amend their constitutions, as they may now do under Head (1) of Section 92; nor should there be taken from Parliament the powers it now has under the various sections of the British North America Act that confer upon it 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 an acceptable amending formula should include some change in the authority conferred by this provision.

The Fulton-Favreau Formula of 1961-1964 had attempted to meet these considerations. It proposed the abrogation of the powers still held by the British Parliament to amend that part of the B.N.A. Act that had been left under its jurisdiction in 1949. It provided for a Canadian mechanism for amending the B.N.A. Act that would have allowed Canada to make amendments with the co-operation of the legislative bodies of all the provinces. The Formula provided that a number of entrenched sections -- those concerning the amending formula itself, provincial legislative powers and the rights and privileges of the provincial governments and legislatures, the assets and property of a province, the use of the English and French languages, guarantees concerning schools, and the protection afforded the parliamentary representation of a province in Section 51A of the B.N.A. Act -- would be amendable only with the unanimous agreement of Parliament and all ten provincial legislatures. The amending

formula further provided that an amendment that referred to one or more, of the provinces, but not all of them, must be concurred in by the province or provinces to which it referred. For all parts of the B.N.A. Act not otherwise specifically dealt with, amendments would have required the concurrence of the legislatures of at least two-thirds of the provinces, representing at least 50 per cent of the population of Canada. This latter provision comprises, *inter alia*, the federal legislative powers.

Another feature of the draft act embodying the Fulton-Favreau Formula was the provision for the mutual delegation of legislative power between the Federal Parliament and the provincial legislatures in compensation for the rigidity that the entrenchment of provincial powers might imply. Delegation was restricted for the provinces to four matters in the classes of subjects enumerated in Section 92 of the B.N.A. Act, although among these was the important subject of property and civil rights. It was further restricted in that the Federal Parliament could not legislate on the matter unless the legislatures of at least four provinces consented. The enactment would not have effect in any province unless the legislature of that province had consented to its operation in that province. If Parliament declared, however, that the passage of the act concerned fewer than four provinces, only those concerned would have to agree to its adoption. A provincial legislature, on the other hand, could enact laws to be applicable in that province in relation to any matter coming under the legislative jurisdiction of the Federal Parliament, provided that the latter agreed and provided that a similar law had been passed by the legislatures of at least three other provinces. Under the Formula, individual provinces could withdraw their consent in either of the two instances of delegation, but the delegation would continue to hold good for those provinces that continued to consent to it.

Finally, it was proposed that the French text of the act incorporating the amending formula be made legally official by incorporating it into the text of the act to be passed by the British Parliament.

The failure of the Fulton-Favreau Formula did not end the still-unfinished tale of attempts to "patriate" the B.N.A. Act. Fresh steps, from 1968 to 1971, led to the "Canadian Constitutional Charter, 1971" (or "Victoria Charter"). Despite the rejection by Quebec of the Charter, it represents the results of many years of discussions and negotiation and most of its articles were acceptable to all the heads of government present at Victoria, including the Premier of Quebec.

Victoria Charter

The amendment procedure of the Charter is more flexible than the ill-fated Fulton-Favreau Formula. It does not contain provisions requiring unanimity for any amendment proposal. Under it, the Constitution as it affects all of Canada could be altered through the agreement of the Federal Parliament and the legislatures of six of the ten provinces, provided that among the six were Ontario and Quebec (each of which has more than 25 per cent of the Canadian population), two of the four provinces in the Atlantic region, and two of the four west of Ontario, provided they contained at least 50 per cent of the population in that region. If any other province attained a population 25 per cent of the whole, it also would acquire the same entrenched position as Ontario and Quebec. What this amounted to was a kind of regional assent, with the large provinces having a veto and the small ones unable alone to paralyze the mechanism. Amendments that did not concern all the provinces would require the consent only of the Federal Government and the provinces concerned. Amendments to the Constitution would be proclaimed by the Governor General when authorized by resolutions of the Senate and the House of Commons and the legislatures of a majority of the provinces according to the special formula.

Article 51 of the Charter introduced a new element by restricting the powers of the Senate where amendment was concerned. If the Senate had not given its authorization within 90 days after approval of the amendment by the House of Commons, the amendment would be made without Senate authorization, provided it had been passed a second time by the Lower House. The amendment could be proposed by the Senate, the House of Commons or a provincial legislative assembly.

Article 55 stipulated that, notwithstanding certain exceptions to the procedure described above, the following matters could be amended only in accordance with that procedure: the office of the Queen, of the Governor General and of lieutenant-governor; requirements respecting yearly sessions of the Parliament of Canada and the legislatures of the provinces; the powers of the Senate, representation in the Senate and the residence qualifications of Senators; the right of a province to have at least as many representatives in the House of Commons as in the Senate; proportionate representation of the provinces in the House of Commons; and the requirements of the Charter respecting the use of the English and French languages.

At Victoria, all the governments agreed to accept in the Constitution certain fundamental political freedoms: freedom of thought,

conscience and religion; freedom of opinion and expression; and freedom of peaceful assembly and association. With these were cited certain fundamental principles of the Constitution, such as universal suffrage and free democratic elections to the House of Commons and the legislatures. The Charter also forbade any denial of the right to vote or hold office in the House of Commons or a provincial legislature on grounds of race, ethnic or national origin, colour, religion or sex. All these rights appear to be already present in the laws and practices of Canadian democracy. Other subjects covered in the Charter concerned the Supreme Court, regional disparities, federal-provincial consultation, language rights and certain social security measures.

The fate of the Canadian Constitutional Charter, 1971, has also been reviewed above. With its rejection by Quebec, the most recent major chapter in federal-provincial negotiation with a view to the amendment of the constitution of Canada was closed.

Interest in the subject of constitutional amendment in Canada has, however, been sustained. The formula of the Charter was approved in 1972 by a report of a special joint committee of the Senate and the House of Commons on the Constitution of Canada. "In sum, we endorse the proposed amending formula as a feasible approach to constitutional amendment," wrote the authors of the report, "and would not expect to see its general terms substantially improved on, no matter how long inter-governmental negotiations were carried on." This report of the special joint committee on proposals for change in the Canadian Constitution was prepared after the committee had held 145 public meetings, received more than 8,000 pages of evidence and heard 1,486 witnesses.

It is, therefore, possible that the "Canadian Constitutional Charter, 1971" will be used as a basis for renewed bargaining, which the comments of Mr. Trudeau and Mr. Stanfield, mentioned at the beginning of this article, may herald. The comments that accompanied the refusal by Quebec in 1971 left the door open for such a renewal, and indeed there are recent indications that Mr. Bourassa may be willing to reopen the issue. For the time being, however, the situation remains as it was following the partial "patriation" of 1949.

The shaping of a new Constitution for Canada cannot, in the words of the late Guy Favreau, "be portrayed as the fruit of a single mind or a single day's work; it is a monument sculpted patiently, with chisels made of patriotic concessions, by statesmen who, from ministry to ministry, saw themselves as Canadians first".

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