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No. 113 CONSTITUTIONAL AMENDMENT IN CANADA*

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CANADA is unique among the independent nations of the world in that it does not possess the complete legal power to amend its own Constitution. Canadians are well aware of this limitation on the sovereignty of their nation and many efforts have been made in the past to find a satisfactory method of amending the Constitution of Canada in Canada. So far, these efforts have not been successful. 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 upon 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 in Canada and, while considerable progress was made in clarifying the issues, the Conference did not succeed in finding an amending formula that would 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. Further sessions were held in November 1960 and in January and September of 1961. This paper will discuss what it is that the Conference tried to accomplish and, from a legal point of view, what is meant by the "amendment of the Constitution in Canada".

The objective is to find a way to amend the Constitution of Canada. The first question that arises 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 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 laws and conventions by which a state is governed. 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 the United Kingdom, 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 given official expression, and partly of statutes relating to some aspect of government.

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In Canada there is no document that purports to set out the complete laws pertaining to the country's government. The Constitution, as in the case of the United Kingdom, consists in part of written material and in part of conventions or customs. The written material consists partly of Canada's own statutes and partly of United Kingdom statutes. Among the former are included such enactments as the Succession to the Throne Act, the Senate and House of Commons Act, the Speaker of the Senate Act, the Speaker of the House of Commons Act, the House of Commons Act and the Salaries Act. There is also a series of United Kingdom statutes known as the British North America Act. But the written material includes more than statutes. It includes, for example, the letters patent constituting the office of Governor General of Canada and the instructions issued to the Governor General. In addition to the written material, there are certain constitutional usages and conventions. For example, it is a convention that the government will resign or ask for a dissolution of Parliament upon the passing of a non-confidence motion. This is not set out in any law, but the practice is well established.

We must also keep in mind that the provinces, too, have constitutions. There are provincial governments, and the rules and customs relating to the government of a province may properly be described as the constitution of the province. This suggests a further meaning for the phrase "Constitution of Canada". When we speak of the Constitution of Canada, we could be referring to the constitution of the whole country, which would include the constitution of the provinces; or we might, in contrast to "constitution of the province", mean only matters pertaining to the Federal Government.

In its widest sense, the Constitution of Canada includes

(a) Statutes of the United Kingdom

e.g. British North America Acts,
Statute of Westminster, 1931,
Parliament of Canada Act, 1875.

(b) Statutes of Canada

e.g. Senate and House of Commons Act
Canada Elections Act
Representation Act
Northwest Territories Act
Yukon Act
Saskatchewan Act
Alberta Act
Manitoba Act

(c) Statutes of the Provinces

e.g. Acts relating to:
Executive Council
Legislature
Representation
Election

(d) Other Documents

Instructions to Governors
Letters Patent

(c) Conventions

Constitutional amendments may take the form of changing existing law or may take the form of making a 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 70, 72, 73, 77, 80, 83, 84 and 85. It should be pointed out, however, that the actual text of these provisions of the British North America 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 British North America 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 ge made respecting offices involved in the Constitution.

Section 129 of the British North America Act continues existing laws in force, but subject to be repealed, abolished or altered by the Parliament of Canada or by the legislature of the respective provinces, according to the authority of Parliament or of the legislature under the British North America Act; originally excepted from this provision were Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland. It follows that any pre-Confederation laws of a constitutional character are amendable by Parliament or by the legislature of the provinces according to their jurisdiction under the British North America Act. The exception, however, was an important limitation on the powers of Parliament or the provincial legislatures.

The laws of England applicable in the colonies are of two kinds, namely those that are applicable by adoption by the local legislature and those that are applicable in proprio vigore. The former, being enactments of the local legislatures, may be repealed by them. The latter, however, are applicable by force of their own terms and could not be altered by the local legislatures.

Shortly before the passage of the British North America Act the Parliament of the United Kingdom 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 Parliament of the United Kingdom. It has been held by the courts that this limitation applies only to Imperial Acts in force in a colony in proprio vigore, and not such as are applicable by adoption. The Colonial Laws Validity Act was therefore a further fetter on the legislative power of Parliament and the provinces. Thus, neither

Parliament nor the legislatures in Canada could repeal or amend an Act of the Parliament of the United Kingdom 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 Act of the United Kingdom.

The limitations imposed by the Colonial Laws Validity Act were removed by the Statute of Westminster of 1931. The limitation imposed by Section 129 of the British North America Act was also removed, except 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 United Kingdom Parliament, except the British North America Acts 1867 to 1930. It follows that if any Acts of the United Kingdom Parliament other than the British North America Act 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 that Act, is the inability to amend the British North America Acts, 1867 to 1930. This collective title includes the original Act of 1867 and all amendments to 1930. But there have been amendments since 1930. The collective title is now British North America Acts, 1867 to 1960. Does the title 1867 to 1930 include later amendments? Apparently not. In the Interpretation Act of Canada there is a provision to the effect that a reference to an Act by its title includes amendments, but there seems to be no similar provision in the United Kingdom Interpretation Act. Another interesting question is whether the power conferred to amend United Kingdom statutes extends to the Statute of Westminster itself, since it is not included in the collective title British North America Acts 1867 to 1930.

The next statute that altered the authority to make constitutional amendments was the British North America Act Amendment Act No. 2 of 1949. That amendment added a new Head (1) to Section 91 of the British North America Act and conferred on the Parliament of Canada power to amend the "Constitution of Canada", subject to exceptions therein stated. One might ask what is meant by the expression "Constitution of Canada", as used in this amendment. Does it mean the whole of the British North America Act? Does it mean more than that? Or less than that? Does it mean the Constitution of Canada as distinguished from the constitution of the provinces, i.e., is it confined to matters relating to the Federal Government only rather than to the whole governmental system of Canada? These are questions that, of course, can be decided only by the courts. Whatever interpretation is given to this expression, it is clear that there are certain things that Parliament cannot do under this amendment.

The distribution of legislative authority between Parliament and the legislatures cannot be touched; no change can be made with respect to the use of the English and French languages; except in cases of emergency, the life of Parliament cannot be extended; the rights or privileges of the legislature or the government of a province cannot be affected.

The Parliament of the United Kingdom also has power to make constitutional laws for Canada. This power is, theoretically at least, still without limit. Theoretically (but subject to compliance with the formalities prescribed in the Statute of Westminster, namely, request and consent by Canada) the Parliament of the United Kingdom could make any laws of any character having application in Canada. In practice, however, this power is not exercised except with regard to those constitutional amendments that cannot now be made by any legislative authority in Canada.

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".

The Conference did discuss the transfer formula but the general feeling was that there was no reason why the Conference could not find an acceptable amending formula and discussions therefore proceeded along those lines.

In addition, the possibility of including a delegation clause was also discussed. The proposal was that provision should be made in the Constitution whereby Parliament could, in specific instances, delegate legislative power to the provinces and the provinces could, likewise, delegate legislative power to Parliament in specific instances. There might conceivably be cases where it would be desirable for a legislative body, other than the one that has jurisdiction under the British North America Act, to pass a statute dealing with a particular matter, but it would not be desirable to have a permanent constitutional amendment. A provision of this kind would serve to relax to some extent the rigidity of a formal amending procedure.

On December 1, 1961, a draft amending formula that was worked out at the Conference was transmitted to all Attorneys General for submission to their respective governments. Each government was to consider and decide whether or not it found the formula acceptable for enactment as an amendment to the British North America Act. The work of the Conference of Attorneys General has thus been completed, and the next step to be taken is one for the governments concerned to determine.

RP/A