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FORMAL AMENDMENT OF THE CONSTITUTION OF CANADA

PETER W. HOGG*

I

IMPERIAL AMENDMENT

The British North America Act, 1867 (now the Constitution Act, 1867) differed from the constitutions of other federal countries including the United States and Australia in that it contained no general provision for its own amendment.¹ The reason for this omission was that the framers were content for amendments to be made in the same way as the BNA Act itself—by the imperial Parliament. Until 1982, that was Canada's amending procedure: amendments to the BNA Act had to be enacted by the United Kingdom (imperial) Parliament. Even in 1931, when the Statute of Westminster conferred upon Canada and the other dominions the power to repeal or amend imperial statutes applying to them, the BNA Act and its amendments were excluded from the new power at Canada's insistence. This was done so that the BNA Act should not be subject to easy amendment by ordinary legislation of either the federal Parliament or a provincial legislature. The idea was, and still is, that a constitution should be more difficult to amend than, for example, an income tax act.

After the Statute of Westminster, while other imperial statutes had lost their protected status, the BNA Act could still be amended only by the U.K. Parliament. This did not mean, however, that Canadians had no control over the amending process. At the imperial conference of 1930 (the same conference that recommended the enactment of the Statute of Westminster), the prime ministers of the United Kingdom and all the dominions agreed that the British Parliament would not enact any statute applying to a dominion except at the request and with the consent of that dominion. This agreement, which reflected already long-standing practice, created a binding, although not formally enacted, constitutional convention.

The convention did not specify which governmental bodies in Canada were to request, and which were to consent to, proposed amendments to the

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1. There were some limited domestic powers of amendment, of which the most important were contained in sections 91(1) (power in the federal Parliament to amend a narrowly defined "Constitution of Canada") and 92(1) (power in each provincial Legislature to amend the "constitution of the province"). These provisions were both repealed by the Constitution Act, 1982, but Part V of the Constitution Act contains counterpart provisions (sections 44 and 45, discussed below at part III).

BNA Act. However, long before 1930, the practice had developed of requesting amendments by a "joint address" of the Canadian House of Commons and the Canadian Senate. The joint address consisted of a resolution requesting the government of the United Kingdom to lay before its Parliament a bill proposing the amendment; the text of the bill was always included in the resolution. After the resolution was passed by Canada's two houses of Parliament, it was sent to the British government for its introduction in the U.K. Parliament and eventual enactment. This procedure was established in 1895, and has been employed since then for every amendment to the BNA Act.

What was the role of the provinces in the amending process that has just been described? Before the decision of the Supreme Court of Canada in the *Patriation Reference*,² the position was unclear. The federal government had not made a consistent practice of obtaining the consent of the provinces before requesting an amendment, although unanimous provincial consent had been obtained for all amendments directly affecting provincial powers.³ When Prime Minister Trudeau proposed the amendments which ultimately (and after substantial change) became the Canada Act 1982 and the Constitution Act, 1982, he asserted that if provincial consent could not be obtained, the federal government would proceed unilaterally to request the enactment of the amendments by the U.K. Parliament. The proposed amendments, including a Charter of Rights and an amending formula, substantially and directly affected the powers of the provinces. Three provinces directed references to their Courts of Appeal asking (1) whether there was a requirement of law that provincial consents be obtained and (2) whether there was a requirement of convention that provincial consents be obtained. On appeal from a variety of answers in the Courts of Appeal, the Supreme Court of Canada in the *Patriation Reference*⁴ held that the consent of the provinces to the proposed amendments was not required "as a matter of law," but that a "substantial degree" of provincial consent was required "as a matter of convention." After this decision, the Prime Minister and nine of the ten provincial premiers⁵ agreed on a revised version of the amendments. This

2. *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753.

3. Twenty-two constitutional amendments were adopted between 1867 and 1965. See *Re Authority of Parliament in Relation to the Upper House*, [1980] 1 SCR 54, 60-62, and *Re Resolution to Amend the Constitution*, [1981] 1 SCR 826-30, 859-62, 888-91 (reproducing a list of 22 constitutional amendments appearing in a White Paper titled *The Amendment of the Constitution of Canada* prepared by Guy Favreau for the federal government). Of the 22 amendments, only five—in 1931, 1940, 1951, 1960, and 1964—were preceded by the unanimous consent of the provinces. However, three of these five amendments—in 1940, 1951 and 1964—altered the distribution of legislative powers between the two levels of government. Moreover, the Statute of Westminster, 1931, which increased powers at both levels of government, was included among the five amendments obtaining unanimous provincial consent even though it was not literally an amendment to the BNA Act. Of the other 17 amendments, none was preceded by unanimous provincial consent, and most were not preceded by provincial consultation.

4. *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753. This decision is discussed more fully in the Canadian Bar Review. See Peter W. Hogg, *Comment*, 60 Can Bar Rev 307 (1982).

5. The Premier of Quebec was the sole dissenter. This raised the question whether the conventional rule laid down in *Patriation Reference* of a "substantial degree" of provincial consent had

version was passed as a joint address by both houses of the federal Parliament, was sent to London, and enacted by the U.K. Parliament as the Canada Act 1982,⁶ which included, as Schedule B, the Constitution Act, 1982.⁷

Part V of the Constitution Act, 1982 introduces into the Canadian Constitution a set of amending procedures which enable the BNA Act (now renamed the Constitution Act, 1867) and its amendments to be amended within Canada without recourse to the U.K. Parliament. The role of the U.K. Parliament in Canada's amendment process is thus eliminated, and the Canada Act 1982 formally terminates the authority of the U.K. Parliament over Canada. The roles of the federal and provincial governments in the amendment process are now defined in precise statutory language. The vague and unsatisfactory rules laid down by the Supreme Court of Canada in the *Patriation Reference* have accordingly been supplanted and have no current relevance. The new procedures in Part V of the Constitution Act, 1982 constitute a complete code of legal (as opposed to conventional) rules which enable all parts of the "Constitution of Canada" to be amended. Those rules are described below in Part III.

II

THE SEARCH FOR A DOMESTIC AMENDING PROCEDURE

The Constitution Act, 1982 was the culmination of a search for a domestic amending procedure that began in 1927 when the federal Minister of Justice placed the issue on the agenda of the dominion-provincial conference of that year. The Minister was influenced by the Balfour Declaration of 1926, which recognized Canada as the equal of the United Kingdom. Equality plainly called for the elimination of the role of the U.K. Parliament in Canada's amendment process. But that could not be accomplished until a new domestic amending procedure had been enacted into Canada's Constitution. Until November 5, 1981, agreement on a domestic procedure had eluded Canada's political leaders. And even the 1981 agreement, as related above, did not include Quebec.

Agreement had nearly been reached on two earlier occasions. In 1964, the Fulton-Favreau formula was agreed to by all provinces except Quebec. In effect, it was an agreement not to agree, because it required the unanimous

to include Quebec. See note 4 and accompanying text. On a reference of this question by Quebec, the Quebec Court of Appeal and, on appeal, the Supreme Court of Canada answered no. *Re Objection to a Resolution to Amend the Constitution*, [1982] 2 SCR 793.

6. Canada Act, 1982, ch 11 (UK).

7. The reason for two acts seems to have been to separate the provisions relating to the British Parliament in the Canada Act from the provisions relating to Canadian institutions in the Constitution Act. The Canada Act became effective upon receiving royal assent on March 29, 1982. As a schedule to the Canada Act, the Constitution Act became law, but under section 58 of the Constitution Act its date of effectiveness was postponed until "a day to be fixed by proclamation." Subsequently, a proclamation fixed April 17, 1982, as the effectiveness date. *The Canada Gazette*, Part III 33 (Sept 21, 1982).

consent of the federal Parliament and all provincial legislatures for most significant amendments. Even so, Quebec did not agree to it, and it was not proceeded with. Then in 1970, the Prime Minister and all premiers agreed to the Victoria Charter formula, but the agreement was subject to ratification by each provincial government, and Quebec decided not to ratify it. For most amendments, the Victoria Charter formula required the consent of the federal Parliament and a complex distribution of provinces: (1) any province having had at any time 25 percent of the population of Canada; (2) at least two of the Atlantic provinces; and (3) at least two of the western provinces having a combined population of at least 50 percent of the population of all the western provinces. Category (1) insured a permanent veto for Quebec (as well as Ontario). Even so, Quebec did not agree to it, and it was not proceeded with.

It will be noticed that both the Fulton-Favreau formula and the Victoria Charter formula gave a veto to Quebec. Moreover, in 1964 and 1971, it was clear that all participants understood that Quebec had to be a party to whatever agreement was reached, because the sole dissent of Quebec was sufficient to abort both of these previous projects. When Prime Minister Trudeau tabled the constitutional proposals that evolved into the Constitution Act, 1982, the amending formula that he proposed was essentially the Victoria Charter formula. Eight provinces now opposed that formula and proposed an alternative "Vancouver formula." The Vancouver formula required for most amendments the agreement of the federal Parliament and two-thirds of the provincial legislatures, representing 50 percent of the population of all the provinces. This formula did not give any province a veto, and it was formally proposed in a much-publicized, eight-province accord which repeatedly affirmed the "equality" of the provinces. Premier Levesque of Quebec was one of the eight signatories to that document; for the first time, Quebec had formally abandoned its claim to a special status involving (at the minimum) a veto over constitutional amendments.

The agreement of November 5, 1981, was achieved when the Prime Minister and his two provincial allies, the Premiers of Ontario and New Brunswick, gave up their support for the Victoria Charter formula and accepted instead a modified Vancouver formula. Seven of the eight provincial premiers dissenting from the Victoria Charter formula agreed to accept a modified Charter of Rights. Quebec Premier Levesque did not agree with the compromise and even found the new amending formula unacceptable, despite his earlier agreement to the very similar Vancouver formula.

Once again, as in 1964 and 1971, there was an agreement on an amending formula that included all premiers, except the Premier of Quebec. But this time the absence of Quebec from the agreement did not stop the process. The Prime Minister was determined to press on with the proposal despite the incomplete agreement, and the Supreme Court of Canada had ruled in the *Patriation Reference* that the consent of Quebec (or any other province) was not

required by law, and was probably not required by convention either. The federal-provincial agreement of November 5, 1981, supplemented by four changes agreed to later, was accordingly embodied in a resolution for a joint address that passed both houses of the November 1981 federal Parliament in December 1981,⁸ and was then transmitted to London. The Canada Act 1982 was enacted by the U.K. Parliament on March 29, 1982. When the Constitution Act, 1982 came into force on April 17, 1982, Canada had at last acquired domestic amending procedures for its Constitution. These procedures are described later in this article.

III

THE CONSTITUTION ACT, 1982'S AMENDING PROCEDURES

Part V of the Constitution Act, 1982, which is headed "Procedure for Amending Constitution of Canada," provides the following five different amending procedures:

(1) A general amending procedure in section 38 for categories of amendments not otherwise expressly provided for and for specific types of amendments set forth in section 42, requiring the assents of the federal Parliament and two-thirds of the provinces representing 50 percent of the population. This procedure has been successfully operated once.⁹

(2) A unanimity procedure in section 41 for five defined kinds of amendments, requiring the assents of the federal Parliament and all of the provinces. No amendment has been adopted using this procedure.¹⁰

(3) A some-but-not-all provinces procedure in section 43 for amendment of provisions not applying to all provinces, requiring the assents of the federal Parliament and only those provinces affected. One amendment has been adopted using this procedure.¹¹

(4) The federal Parliament alone in section 44 has power to amend provisions relating to the federal executive and Houses of Parliament.

(5) Each provincial Legislature alone in section 45 has power to amend "the constitution of the province."

8. It is an interesting commentary on "executive federalism" that of the nine premiers who signed the agreement of November 5, 1981, only one bothered to submit it to a provincial legislature for approval. It was approved by the Alberta Legislature on November 10, 1981. The Quebec National Assembly rejected it on December 1, 1981.

9. Constitution Amendment Proclamation, 1983, adding provisions relating to aboriginal rights to the Constitution Act, 1982. This amendment was adopted by the Parliament and nine provincial legislatures (all but Quebec).

10. See notes 15-16 and accompanying text for an account of the Meech Lake Accord, an unsuccessful attempt to amend the Constitution using the unanimity procedure.

11. Constitution Amendment, 1987 (Newfoundland Act), amending the Newfoundland Act with respect to denominational school rights. This amendment was adopted by the Parliament of Canada and the Legislature of Newfoundland.

The more simple amending procedures of the Australian and United States constitutions provide an interesting contrast to Canada's. For example, amendments to the Australian Constitution require approval by a simple majority in both houses of the federal Parliament, followed by a popular referendum in which the requisite approval must be by a "double majority" of votes, which involves (1) a national majority and (2) a state majority in a majority of states (that is, four of the six states). The U.S. Constitution requires approval by a two-thirds majority in both houses of Congress, followed by ratification by the legislatures of three-quarters of the states or, alternatively, at the discretion of the Congress, by constitutional conventions in three-quarters of the states—a method that has been used only once.¹²

IV

THE FAILURE TO ACCOMMODATE QUEBEC

The Constitution Act, 1982 was a major achievement, curing several longstanding defects in Canada's Constitution. In addition to adopting domestic amending procedures (sections 38-49), a Charter of Rights was adopted (sections 1-34), aboriginal rights were recognized (section 35), equalization of disparities in the welfare of Canadians was guaranteed (section 36), provincial powers over natural resources were extended (sections 50-51), and the Constitution of Canada was defined and given supremacy over other laws (section 52). But the Constitution Act, 1982 signally failed to accomplish one of the goals of constitutional reform, and that was the better accommodation of Quebec within the Canadian federation.

The Premier of Quebec had been the sole dissenter to the federal-provincial meeting of November 5, 1981; the Quebec National Assembly had passed a resolution condemning the constitutional settlement that had been agreed upon; and Quebec had even sought relief in the courts, though without success.¹³ Nor were Quebec's concerns without substance. The new amending procedures denied a veto to Quebec, something that in the past had always been recognized in practice. The new Charter of Rights restricted the powers of the provincial legislatures, and, in particular, limited the capacity of the Quebec National Assembly to implement French-language policy.¹⁴ Thus, the outcome of the constitutional changes of 1982 was a diminution of Quebec's powers and a profound sense of grievance in the province.

In assessing the gravity of Quebec's alienation resulting from the constitutional changes of 1982, it is important to recall Quebec's referendum

12. The sole occasion on which approval by state conventions was used to approve an amendment to the U.S. Constitution was in 1933 for the twenty-first amendment repealing prohibition. US Const, Amend xxi.

13. See note 5.

14. This concern was shown to be justified by the later decisions of the Supreme Court of Canada in *Quebec (Attorney General) v Quebec Protestant School Boards*, [1984] 2 SCR 66 (striking down Quebec's restrictions on admission to English-language schools) and *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 (striking down Quebec's prohibition of English-language commercial signs).

on sovereignty-association, which was held by the Parti Québécois government in the spring of 1980. The referendum was defeated by a popular vote of 60 percent to 40 percent. In the referendum campaign, the federalist forces promised that a vote of "no" to sovereignty-association was not a vote for the status quo and that the defeat of the referendum would be followed by constitutional reforms that would better accommodate Quebec's aspirations within the federal structure. The defeat of the referendum was immediately followed by a series of federal-provincial conferences in the summer and early fall of 1980, but the conferences failed to yield agreement on the specifics of constitutional change. On October 6, 1980, despite the absence of a federal-provincial agreement, Prime Minister Trudeau introduced in the House of Commons a resolution calling for the set of constitutional amendments that, after substantial alteration, became the Canada Act 1982 and the Constitution Act, 1982. These 1982 changes obviously did not fulfill the promises made during the 1980 referendum campaign in Quebec.

Quebec was of course legally bound by the Constitution Act, 1982 because the Act had been adopted into law by the correct constitutional procedures. However, the government of Quebec thereafter refused to participate in constitutional changes that involved the new amending procedures. Furthermore, Quebec "opted out" of the new Charter of Rights to the maximum extent possible under section 33 by introducing a "notwithstanding clause" into each of its existing statutes, and into every newly-enacted statute.¹⁵ In these ways, the point was made that the Constitution Act, 1982 lacked political legitimacy in the province of Quebec.

In 1984, Prime Minister Trudeau resigned and, after a general election, the Progressive Conservative government of Prime Minister Mulroney took office. One of the new government's policies was reconciliation with Quebec. In 1985, an election was held in Quebec, and the Parti Québécois government was defeated. Quebec then moved toward reconciliation with the rest of Canada through the new Liberal government of Premier Bourassa, which took office after the Parti Québécois was defeated. The new government announced five conditions that were required for Quebec's acceptance of the Constitution Act, 1982: (1) the recognition of Quebec as a distinct society; (2) a greater role in immigration; (3) a provincial role in appointments to the Supreme Court of Canada; (4) limitations on the federal spending power; and (5) a veto for Quebec on constitutional amendments.

The Prime Minister and the other provincial premiers agreed to negotiate on Quebec's five conditions. The outcome of those negotiations was the Meech Lake Constitutional Accord of 1987, an agreement entered into by all eleven first ministers on a set of amendments essentially giving effect to Quebec's five conditions. This seemed at the time to be an immensely

15. Section 33 enables the Parliament or a provincial legislature to override most of the provisions of the Charter of Rights by including a provision in a statute declaring that the statute is to operate notwithstanding a particular provision of the Charter of Rights.

important development, reconciling the government of Quebec to the Constitution Act, 1982. However, in order to become law, the Accord had to be ratified by resolutions of the Senate and House of Commons and of the legislative assembly of every province.¹⁶ It was ratified by the Senate and House of Commons,¹⁷ but only eight of the ten provinces ratified it.¹⁸ The Accord therefore lapsed. A unique opportunity to resolve a serious political problem was squandered.

The lapse of the Meech Lake Accord caused great disappointment in the province of Quebec, because it seemed to indicate that the rest of Canada was unwilling to make any accommodation with Quebec. This has caused an increase in nationalist sentiment in the province that will make a new accommodation much harder to achieve. We must find a way of reaching that accommodation, because another failure would certainly lead to the secession of Quebec.

16. The unanimity procedure of section 41 of the Constitution Act, 1982 was applicable, because the Accord included provisions relating to the composition of the Supreme Court of Canada (section 41(d)) and a change in the amending procedures (section 41(e)).

17. The Senate actually refused to ratify it, but was overridden by the House of Commons under section 47 of the Constitution Act.

18. The government of New Brunswick changed in 1987 before ratification, and the Liberal government of Premier McKenna refused to ratify. The same thing happened in Manitoba in 1988, and the new Progressive Conservative government of Premier Filmon refused to ratify. The government of Newfoundland changed in 1989 after ratification, and the new Liberal government of Premier Wells acted under section 46(2) of the Constitution Act, 1982 to revoke the previous ratification. In an attempt to bring the dissenters on board, a companion accord was agreed to by the First Ministers in Ottawa on June 6, 1990, which proposed some changes to the original Accord. This was followed by New Brunswick's ratification, but the legislative assemblies of Manitoba and Newfoundland adjourned without bringing the issue to a vote by June 23, 1990. Section 39(2) of the Constitution Act, 1982 caused the process to lapse on that date, which was three years from the date of the first legislative ratification, which had been by Quebec on June 23, 1987.