

October 7, 1980

THE AMENDING FORMULA

EXPLANATORY NOTES

Section 42 (Amendment of the Constitution
authorized by referendum)

and

Section 44 (Amendments without Senate
resolution)

1. Section 42

Q: Why should the federal Parliament be allowed to circumvent the normal procedure for constitutional amendments under section 41 which requires the consent of legislatures representing at least two Atlantic provinces having combined populations of at least 50% of that region, Quebec, Ontario and at least two Western provinces having combined populations of at least 50% of that region, as well as the consent of Parliament?

A: The amending formula contained in section 41 is essentially that agreed to in principle by the federal government and all of the provinces at the time of the Victoria Conference in 1971. But while the Victoria amending formula established the principle of a regionally-weighted national consensus for approving amendment proposals, it did not provide for a deadlock-breaking mechanism in the event that Parliament, representing all Canadians, was strongly of the view an amendment was desirable and that an insufficient number of legislatures approved it.

Since the House of Commons and the legislatures are elected by the same citizens, it seems only right that the people should be called upon to decide the issue when a deadlock arises. In a constitutional referendum, each province would have the opportunity to put its case to the people.

It is worth noting that in our sister Commonwealth country, Australia - which also combines a federal form of government with a parliamentary system - the sole method for approving a constitutional amendment proposal is through a referendum on a proposal adopted by the federal Parliament. For ratification, the proposal has to gain the support of a majority of the electors in a majority of the six states, and there must also be an overall national majority. There is no provision for consultation with the state governments or for the consent of the state legislatures.

Lest anyone think that the Australian formula favours unduly the federal Parliament, it is useful to recall that only four amendments were adopted out of 24 referenda during the first 64 years of existence of the Australian federation. Obviously, the states

were highly effective in defending their interests! If the Australian track record has improved in recent years, it is largely because the federal government and the states have engaged in broad consultations on constitutional amendments before the question is put to the people by the federal Parliament.

In the case of Canada, normally the route provided in section 41 (consent of Parliament and of the legislatures) would be followed. But when it is necessary to break a deadlock or when it is imperative to have the matter resolved - one way or the other - within a reasonable time frame, an appeal to the people would be possible. The provinces would have ample opportunity to participate in the debate. But in the last analysis, the people of the four regions of Canada would decide.

Q: Does section 42, by removing the provinces from the process of consent to amendment proposals, reduce Canada to a unitary state?

A: No. In a unitary state, a constitutional referendum would require only a national majority. Section 42 requires not only an overall majority, but also a majority in each of the four regions of Canada. This requirement reflects the regionally-weighted national consensus provided for in section 41 (the Victoria amending formula).

Furthermore, the provinces would have ample opportunity to participate in the referendum campaign. They would not, therefore, be removed from the process of consent, but ratification or rejection of the proposal would be determined by the people of Canada on a regional basis.

2. Section 44

Q: Why does this section allow the House of Commons to circumvent the Senate in approving constitutional amendments under section 41 or section 43 (amendments affecting one or more, but not all, provinces)?

A: This section comes from the Victoria formula. It can be argued that one of the functions of the Senate is to represent the interests of the provinces and regions of Canada. However, since the consent of at least six legislatures distributed among four regions is required for an amendment under section 41 and the consent of each legislature affected is required under section 43, the interests of the provinces and regions will be adequately represented by the provincial legislatures themselves.

It should be noted, however, that the consent of the Senate would be required for holding a constitutional referendum under section 42.