The file - I will need this during the Ottawa meetings

DISADVANTAGES OF THE VANCOUVER FORMULA

The Alberta proposal, subsequently known as the Vancouver formula, provides for general amendments to the Constitution of Canada to be made with the assent of the Parliament and two-thirds of the provinces with at least 50% of the population. However, if the amendment, so approved, affects

(i) the powers of the legislature of a province to make laws,

(ii) the rights and privileges granted or secured by the Constitution to the legislature or government of a province,

(iii) the assets or property of a province, or

(iv) the natural resources of a province,

it would not apply to any province that expressly dissents from it. (This procedure has been termed "opting-out".)(1)

While the Victoria formula contained in the draft Resolution puts forward a complete scheme for amending the Constitution, the Vancouver proposal does not. Apart from the merit or lack of merit of the proposal itself, it raises three important questions that would have to be answered before it could be said that the proposal provides a complete scheme for constitutional amendment.

1. Should any matters be excluded from "opting-out" and, if so, what matters?

   At the various constitutional conferences it was recognized that "opting-out" should not be made available on some amendments of general application even if they do affect provincial powers. The Vancouver formula does not provide a list of matters in respect of which there could be no opting-out.

   Presumably any list of excluded subjects would include

NOTE: (1) The full text of the Alberta proposal is annexed hereto.

such matters as the Supreme Court (if and when it is entrenched in the Constitution), the Senate (or other Upper House), the Charter of Rights and Freedoms and the use of English and French. At the constitutional meetings it was generally agreed that these subjects, at least, should be excluded from opting out. But should any other subjects be added to the list? The Vancouver proposal contains no list at all of excluded subjects and the Conservative motion does not envisage the preparation of any list. Would this then mean that, if it is decided in a few years to entrench the Supreme Court, a province could decide to opt out of the amendment and not have appeals to the Supreme Court? Could it opt out of language rights? How about section 121 of the B.N.A. Act which relates to economic union or section 125 of that Act which excludes crown lands and property from taxation? Should a province be able to opt out of these provisions? It is suggested that some matters must be excluded from opting-out and any formula that does not so provide is not appropriate for the Constitution of Canada.

2. How should general amendments not subject to opting-out be handled?

Since the Vancouver proposal does not provide a list of exclusions, it does not answer this question. Nor does the motion of the Right Honourable Leader of the Opposition address this important matter.

With no opting-out on particular items, presumably the general amending formula (2/3 of the provinces with 50% of the population) would apply. This raises the argument that

(a) some amendments would be too easy to obtain, e.g. when considered in relation to entrenched language rights; and

(b) amendments of particular concern to a province could be made without that province's approval.

For example, the right of a province to a number of members in the House of Commons not less than the number of Senators representing the province is of particular concern to Prince Edward Island. Similarly Quebec would consider it important that any amendment entrenching the Supreme Court include a special provision respecting civil law judges. Quebec would not want it to be possible for an amendment on this subject to be passed without its assent.

It would thus appear that the Vancouver formula is not adequate as an amending formula in respect of these important matters of general concern. How then should they be handled.

The options for resolving the problem of how to deal with items that by their nature do not lend themselves to the opting-out process include:

(a) unanimity - this would provide inherent protection for Quebec and all other provinces;

(b) higher population requirement - for example, 2/3 of the provinces with at least 80% of the population of Canada - this would provide inherent protection for Quebec and Ontario;

(c) Quebec assent requirement - this would identify particular linguisitic or cultural and dualism items and require that Quebec be included among the 2/3 of the provinces approving such amendments;

(d) assent of province concerned - this would identify items of particular concern to a province and require that that province be among the 2/3 of the provinces approving such an amendment.

The non-confidence motion does not provide an adequate formula to deal with these important matters of general interest. The proposal of the government contained in the proposed Resolution does so provide.

3. Should constitutional provision be made for the financial implications of opting out amendments?

The right to opt out of general amendments raises the immediate question as to whether there should be a constitutional provision requiring financial compensation in the event of "opting out", whether a province that does not join a general scheme should be left to pay for its own scheme, or whether this matter should be addressed on an ad hoc basis as each amendment is put forward. The Vancouver proposal and the motion do not address this question. Yet it is something that would be of considerable interest to the provinces.

While the question of financial compensation is raised here to indicate the need for extensive further development of the scheme proposed in the motion prior to its being put forward as a possible constitutional provision, it should be noted that the government would not favour a sweeping constitutional provision requiring financial compensation in the event of opting out. Naturally, if there were compelling reasons for addressing this question in respect of any particular amendment, a solution could be provided on an ad hoc basis.

Apart from the fact that the Vancouver proposal raises a number of important questions that it does not answer and that must be answered in any effective constitutional scheme, it has other serious disadvantages. For example, the disadvantages of the proposal would include the following:

(a) if Parliament were to be opposed at all times to "opting out" by any one province, the formula could in practice require unanimous consent for amendments;

(b) as mentioned above, there would be no special protection for Quebec on matters of special concern to it (proportion of civil law judges on an entrenched Supreme Court, the use of English and French at the federal level);

(c) the possibility of "opting out" would remove the pressure on provinces to reach agreement on matters of constitutional change after patriation - each could argue that it was not holding up agreement on changes which could occur if only seven other provinces agreed; and

(d) the problem of financial compensation discussed above (If an amendment were adopted involving new federal expenditures, an "opting out" province could press for financial compensation.)

Apart from the substance of the Vancouver formula, the language of the proposal is not clear and could leave a legal vacuum. It assumes that any amendment to the Constitution would take away powers from a province and that an opting-out province should thus be able to "continue exclusively to make laws in relation to the subject matters coming within such enactment". These words may have no application at all. The amendment might give additional powers to legislate to a province but a province might for some other reason wish to opt-out of the amendment. What then would be the legal situation in that province? The province could not "continue" to legislate on a subject in respect of which it had no previous powers and it could not make laws under the amendment.

While the Vancouver proposal was favoured by a number of provinces this summer, over the years by far the majority of non-governmental bodies that have given serious consideration to the question of an amending formula have endorsed the regionally based "national consensus" approach of the Victoria formula. For example,

(a) The Pepin-Robarts Task Force proposed that amendments could be initiated in either the House of Commons or in the Council of the Federation (composed of provincial government delegations voting on instruction). The bill would have to be passed by a majority in both Chambers. Ratification would be through a Canada-wide referendum, requiring approval by a majority of

electors voting in each of four regions (Atlantic, Quebec, Ontario and the West, including the territories). Any province that might have, at any point in time, at least 25% of the Canadian population would become a separate region.

(b) The Beige Paper of the Quebec Liberal Party proposed that amendments could be initiated by both orders of government and by the Federal Council (composed of provincial delegations acting on instruction). Ratification would require adoption by the House of Commons and approval by all provinces which contain at least 25% of the Canadian population, by two Atlantic provinces and by two Western provinces, including one of the two most populous provinces in each region.

(c) The Ontario Advisory Committee on Confederation proposed in effect the Victoria formula, although the Senate would have been replaced by a "House of Provinces" and the single-province regions would be restricted to every province that "has" 25% of the population of Canada.

(d) The Canadian Bar Association proposed, in effect, the Victoria formula, although the Senate would have been replaced by an Upper House whose members would serve at the pleasure of the provincial governments and Western region support would require at least two of the Western provinces comprising at least one of the two most populous provinces in that region.

This widespread support for the national consensus approach would indicate that it should not lightly be swept away in favour of a formula that has not been adequately developed and that might permit too easy amendment in some cases.

The challenge facing the House of Commons at this time is to approve an amending formula that strikes an appropriate balance between the need for stability and the need for flexibility; a balance that would ensure that whenever change in the Constitution is generally regarded as necessary, it can be brought about by agreement without undue delay or complication. The formula contained in the proposed Resolution would meet this challenge. The one proposed in the motion would fail to meet it.