R-11344

1661.2

PROPOSED RESOLUTION FOR JOINT ADDRESS RESPECTING THE CONSTITUTION OF CANADA - BRIEFING BOOK (2/)
OCTOBER 1980

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PROPOSED RESOLUTION FOR JOINT ADDRESS RESPECTING THE (2)
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PART II

EQUALIZATION AND REGIONAL DISPARITIES

Commitment to promote equal opportunities

31. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(*a*) promoting equal opportunities for the well-being of Canadians;

(*b*) furthering economic development to reduce disparity in opportunities; and

(*c*) providing essential public services of reasonable quality to all Canadians.

Commitment respecting essential public services

(2) Parliament and the government of Canada are committed to taking such measures as are appropriate to ensure that provinces are able to provide the essential public services referred to in paragraph (1)(*c*) without imposing an undue burden of provincial taxation.

PARTIE II

PÉRÉQUATION ET INÉGALITÉS RÉGIONALES

Engagements relatifs à l'égalité des chances

31. (1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent à:

a) promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être;

b) favoriser le développement économique pour réduire l'inégalité des chances;

c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.

Engagement relatif aux services publics essentiels

(2) Le Parlement et le gouvernement du Canada s'engagent à prendre les dispositions propres à mettre les provinces en mesure d'assurer les services publics essentiels visés à l'alinéa (1)*c*) sans qu'elles aient à imposer un fardeau fiscal excessif.

CONFIDENTIAL

PART II - EQUALIZATION AND REGIONAL DISPARITIES

The principle set out in this Part is a statement of intention or commitment only. It does not place legal obligations on governments. Thus, the opening words of subclause (1) of section 31 provide that the section operates:

> "without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them ...".

Section 31(1) expresses the commitment of federal and provincial legislatures and governments to:

(a) promote equal opportunities for Canadians;

(b) further economic development to reduce disparities in opportunities, and to

(c) provide essential public services of reasonable quality to all Canadians.

This was agreed to by all governments at the September 1980 Conference and is identical to the best efforts drafts discussed at that Conference.

Subclause (2) of section 31 provides an additional commitment for the Parliament and the government of Canada, a commitment to take such measures as are appropriate to ensure that provincial governments have sufficient revenues to provide essential public services.

The section is based on a proposal put forward by British Columbia at the September, 1980 Conference.

The three best efforts drafts discussed at the September Conference (the Saskatchwan draft, the Quebec draft and the British Columbia draft) differed as to how this clause should be framed. The Saskatchewan and Quebec drafts framed the commitment as one to "the principle of making equalization payments". The British Columbia draft which refers to "taking such measures as are appropriate" provides a more generic formulation and is therefore more appropriate for a constitutional text.

At present we do not know what "measures" there might be other than equalization payments to fulfill the commitment. We do not even see, at present, how one could be designed. Nevertheless there may be ways, as British Columbia has argued, that would become obvious in the future. However, since we do not see at present how such a measure might be designed or operate a question asking for a description of such measures and whether they would involve payments to governments or to people is very hypothetical.

The text does not change the present equalization formula. Entrenching the principle in the constitution has nothing to do with the precise terms of the formula.

The commitment is to enable provinces to provide essential public services without imposing an undue burden of provincial taxation. Thus not all public services enter into the equation. A decision on what is essential would consider factors such as whether most or only one province provided the service; whether the cost of the service was out of line with that provided by other provinces.

The test of "undue burden" carries with it the notion that there must be a comparison made of provincial revenues and provincial tax efforts. It carries with it the notion of a relative balance between provinces.

All three best efforts drafts presented to the September, 1980 Conference (Quebec's, Saskatchewan's and British Columbia's) contained a third subclause:

> "(3) The Prime Minister of Canada and the First Ministers of the Provinces shall review together the question and principles of such measures at least once every five years."

There is no counterpart in section 31 because it is thought advisable not to build procedural rigidity into the Constitution. More importantly, however, the clause was left out because many people seemed to misread it and feel that under such a draft the Ministers would consult with each other only once every five years while the subject was one that required continuous attention.

It will be remembered that there was a section respecting regional disparities discussed during the 1967-71 constitutional process which led to an article on that matter being included in the Victoria Charter as follows:

> PART VII—REGIONAL DISPARITIES
>
> Art. 46. The Parliament and Government of Canada and the Legislatures and Governments of the Provinces are committed to:
>
> (1) the promotion of equality of opportunity and well being for all individuals in Canada;
>
> (2) the assurance, as nearly as possible, that essential public services of reasonable quality are available to all individuals in Canada; and
>
> (3) the promotion of economic development to reduce disparities in the social and economic opportunities for all individuals in Canada wherever they may live.
>
> Art. 47. The provisions of this Part shall not have the effect of altering the distribution of powers and shall not compel the Parliament of Canada or Legislatures of the Provinces to exercise their legislative powers.

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PART III

CONSTITUTIONAL CONFERENCES

Constitutional conferences

32. Until Part V comes into force, a constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once in every year unless, in any year, a majority of those composing the conference decide that it shall not be held.

PARTIE III

CONFÉRENCES CONSTITUTIONNELLES

Conférences constitutionnelles

32. Avant l'entrée en vigueur de la partie V, le premier ministre du Canada convoque au moins une fois par an une conférence constitutionnelle réunissant les premiers ministres provinciaux et lui-même, sauf si la majorité d'entre eux décide de ne pas la tenir une année donnée.

PART III - CONSTITUTIONAL CONFERENCES

Section 32 - Provides that until the "final"* amending formula (Part V of the Act) is in force, the Prime Minister shall convene a constitutional conference of First Ministers at least once every year. The requirement can last for up to 4½ years from the date of the Act coming into force.

Part V comes into force in one of three ways (refer section 37):

(a) when both Houses of Parliament and the legislatures or governments of all provinces agree (which may be at any time from the day of the coming into force of the Constitution Act, 1980, up to two years from that date);

(b) automatically two years after the Constitution Act, 1980 comes into force if action under (a) above has not been taken; or

(c) if eight provinces propose an amendment to the provincial component of Part V and that version or some federal alternative thereto is approved by the people in a referendum then the amended Part V comes into force within six months of the date of the referendum (section 39). Under this last procedure, section 32 might be operative for four and a half years after the coming into force of the Constitution Act, 1980:

- provinces are given two years within which to file an amended version of Part V (section 38(2));
- the Government of Canada is then given a further two-year period within which it must hold a referendum on that proposal (section 38(3)); and
- there are six months after that date within which the Governor General's proclamation must be issued.

If, however, a majority of First Ministers, in any year, do not wish to have such a conference then one will not be held.

Part IV describes the amending formula which will be in force during the interim period before the "final" formula under Part V comes into force.

* - "final" here is not used in the sense of unamendable but in the sense of a formula which becomes operative after the interim period.

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PART IV

INTERIM AMENDING PROCEDURE AND RULES FOR ITS REPLACEMENT

Interim procedure for amending Constitution of Canada

33. Until Part V comes into force, an amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and by the legislative assembly or government of each province.

PARTIE IV

PROCÉDURE PROVISOIRE DE MODIFICATION ET RÈGLES DE REMPLACEMENT

Procédure provisoire de modification

33. Avant l'entrée en vigueur de la partie V, la Constitution du Canada peut être modifiée par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par des résolutions du Sénat et de la Chambre des communes et par l'assemblée législative ou le gouvernement de toutes les provinces.

Procédure provisoire de modification

PART IV

INTERIM AMENDING PROCEDURE AND RULES FOR ITS REPLACEMENT

Part IV provides for an interim amending formula to apply for a period of time which might be as short as two years or less or as long as 4-1/2 after the Governor General has issued proclamation (pursuant to section 57) bringing the Constitution Act, 1980 into force. The length of the interim period is discussed more fully in the note on section 37. The interim formula is set out in sections 33 and 34 and they do not apply to those parts of the Constitution which can now be amended in Canada (section 36).

Sections 37, 38, 39 and 40 provide for a mechanism whereby a "final" amending formula will be adopted.

Section 33 - Interim Procedure for Amending Constitution

Section 33 - Provides that amendments to the Constitution may, for an interim period, be made with the unanimous consent of both Houses of Parliament and all provinces.

This section must be read together with section 34 which provides during this interim period for the amendment provisions which affect one or more but not all provinces and with section 36 which provides that where there is an existing provision for amendment in the constitution (e.g. sections 91(1) and 92(1) of the B.N.A. Act) they continue to operate.

Although section 33 is broadly framed it does not encompass amendments covered by section 34. Section 34 is a more particular section and the rules of statutory interpretation require that more particular provision take precedence over the more general.

Provincial consent may be given by either the legislature (for example, by resolution) or by the government of the province (this could be by an informal instrument, such as a letter signifying the provincial government's consent) - the section talks about the consent ..."of the legislative assembly or the government of each province." Consent of the Senate and the House of Commons must, however, be by resolution.

These procedures reflect past practice. On occasion provincial consent to amendments has been signified by letter from the province. On other occasions the more formal process of signifying consent by resolution of the legislative assembly has been used.

"May be made by proclamation issued by the Governor General" does not leave discretion to the federal government to direct the Governor General not to issue a proclamation. The "may" does not relate grammatically to the issuing of the proclamation but to the use of a proclamation for such purposes. The section means the same as if it read that the Governor General shall issue a proclamation when he is so authorized.

Amendment of provisions relating to some but not all provinces

34. Until Part V comes into force, an amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and by the legislative assembly or government of each province to which the amendment applies.

Modification à l'égard de certaines provinces

34. Avant l'entrée en vigueur de la partie V, les dispositions de la Constitution du Canada applicables à certaines provinces seulement peuvent être modifiées par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par des résolutions du Sénat et de la Chambre des communes et par l'assemblée législative ou le gouvernement de chaque province à laquelle la modification s'applique.

Section 34 - Amendments of Provisions Relating to Some but not all Provinces

Section 34 - States that amendments to provisions of the Constitution which apply to one or more, but not all provinces, can be amended in the interim period with the consent of both Houses of Parliament and the legislature or government of the province or provinces concerned.

Provisions amendable in this way would include, for example, parts of the Terms of Union with British Columbia, Newfoundland and Prince Edward Island, since these relate only to one province. Another example would be section 133 of the B.N.A. Act which prescribes certain language guarantees in Quebec, and section 23 of the Manitoba Act which prescribes similar guarantees in Manitoba.

This section could be used, for example, to extend the language guarantees in section 133 to New Brunswick should that province so desire. (Premier Hatfield has indicated he would wish to see New Brunswick so bound) - note: in this regard, it is only amendments to existing provisions which apply to one or more but not all provinces which can be made under this section, but the consent required is of the province to which the amendment applies. Thus provinces not already covered by any such provision could be added thereto.

Rules applicable to amendment procedures

35. (1) The procedures for amendment described in sections 33 and 34 may be initiated either by the Senate or House of Commons or by the legislative assembly or government of a province.

Idem

(2) A resolution made or other authorization given for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Règles

35. (1) L'initiative des procédures de modification visées aux articles 33 et 34 appartient au Sénat, à la Chambre des communes, à l'assemblée législative d'une province ou au gouvernement de celle-ci.

Idem

(2) La résolution adoptée ou l'autorisation donnée, dans le cadre de la présente partie, peut être révoquée à tout moment avant la date de la proclamation qu'elle autorise.

Section 35 - Rules for Amendment Procedures

Section 35(1)- States that amendments may be initiated by either the Senate or the House of Commons, or by the legislative assembly, or by the government of a province.

While initiation by the federal government must be by resolution the section leaves the procedure to be followed by provincial legislatures and governments open, to be determined by them.

The provision mirrors the requirements for consent to a constitutional amendment set out in section 33. The Senate and House of Commons could initiate a constitutional amendment by joint resolution while a province might initiate an amendment by legislative resolution or by a letter from the Premier setting forth a proposal.

Section 35(2)- Provides that consent given to an amendment (either by resolution or otherwise) can be revoked by the sponsoring legislative body or government at any time before the amendment becomes law.

Equally action taken to initiate an amendment (either by resolution or otherwise) can be countermanded by the sponsoring legislative body or government at any time before the amendment becomes law.

A similar provision was contained in the Victoria Charter proposals.

Limitation on use of interim amending procedure

36. Sections 33 and 34 do not apply to an amendment to the Constitution of Canada where there is another provision in the Constitution for making the amendment, but the procedure prescribed by section 33 shall be used to amend the *Canadian Charter of Rights and Freedoms* and any provision for amending the Constitution, including this section, and may be used in making a general consolidation and revision of the Constitution.

Restriction du recours à la procédure provisoire

36. Les articles 33 et 34 ne s'appliquent pas aux cas de modification constitutionnelle pour lesquels une procédure différente est prévue par une autre disposition de la Constitution du Canada. La procédure visée à l'article 33 s'impose toutefois, pour modifier la *Charte canadienne des droits et libertés*, ainsi que les dispositions relatives à la modification de la Constitution, y compris le présent article; cette procédure peut également servir à toute codification ou révision générales de la Constitution.

Section 36 - Where an Existing Amending Procedure Exists for Amendment in Canada

Section 36 - Provides that the interim amending procedure of unanimous consent (in section 33) and that relating to provisions affecting one or more but not all provinces (section 34) do not apply where there is already in the Constitution another provision for making the amendment. Existing provisions for making amendments include section 91(1) of the B.N.A. Act which provides that the Parliament of Canada may legislate to amend the constitution of the central government (subject to certain exceptions); section 92(1) which provides that provincial legislatures may amend the Constitution of the province; and provisions such as that in the B.N.A. Act, 1871 which allows provincial boundary changes to be made when the federal Parliament and provincial legislatures agree.

The section expressly provides that the interim formula of unanimous consent (section 33) will apply to amendments to the Charter of Rights and Freedoms.

Equalization (Part II of the Act) and the provision for constitutional conferences (Part III of the Act) would be amendable by section 33; no express reference is made to them in this section because there is no argument that they might apply only to one or more but not all the provinces.

Coming into force of Part V

37. Part V shall come into force

(*a*) with or without amendment, on such day as may be fixed by proclamation issued pursuant to the procedure prescribed by section 33, or

(*b*) on the day that is two years after the day this Act, except Part V, comes into force,

whichever is the earlier day but, if a referendum is required to be held under subsection 38(3), Part V shall come into force as provided in section 39.

Entrée en vigueur de la partie V

37. La partie V entre en vigueur à la première des dates suivantes:

a) avec ou sans modification, à la date fixée par proclamation prise conformément à la procédure visée à l'article 33;

b) deux ans après l'entrée en vigueur, exception faite de la partie V, de la présente loi.

Il demeure entendu que, si la tenue d'un référendum s'impose conformément au paragraphe 38(3), la partie V entre en vigueur conformément à l'article 39.

Entrée en vigueur de la partie V

Section 37 - Coming into Force of Part V

Section 37 - Provides that Part V (i.e.: the "final"* amending formula) comes into force in one of three ways:

(a) when both Houses of Parliament and the legislatures or governments of all provinces agree; this would be accomplished by use of the amending procedure set out in section 33 above; or

(b) automatically two years after the Constitution Act, 1980 comes into force, if provinces have not agreed upon an amended version of Part V which is to be put to the people by referendum pursuant to section 38(3); or

- if eight provinces representing 80 per cent of the population agreed upon a proposal for a replacement for Part V as provided for in section 38 and that proposal, or some federal alternative thereto, is approved by the people in a referendum, then Part V amended in accordance with that proposal comes into force within six months of the date of the referendum (section 39).

* - "final" here is not used in the sense of unamendable but in the sense of a formula which becomes operative after the interim period.

Provincial alternative procedure

38. (1) The governments or legislative assemblies of eight or more provinces that have, according to the then latest general census, combined populations of at least eighty per cent of the population of all the provinces may make a single proposal to substitute for paragraph 41(1)(*b*) such alternative as they consider appropriate.

Proposition de remplacement

38. (1) Les gouvernements ou assemblées législatives d'au moins huit provinces dont la population confondue représente, selon le recensement général le plus récent à l'époque, au moins quatre-vingts pour cent de la population de toutes les provinces peuvent présenter une proposition commune en vue de remplacer la procédure prévue à l'alinéa 41(1)*b*).

Proposition de remplacement

Section 38 - Alternative Formula Proposed by Provinces

Section 38 - Provides for the adoption by referendum of an alternative version of the "final" formula set out in Part V. If eight or more provinces initiate the referendum process provided for in this section, within the two-year interim period, Part V (i.e.: the "final" formula), will be determined by that process.

Section 38(1) - Provides that if the governments or legislatures of eight or more provinces that have at least 80 per cent of the population can agree on a single proposal as an alternative "final" amending formula to the "provincial component" of Part V, that will be put forward for approval by referendum.

The provincial component is subsection 41(1)(b) which provides that for general amendments the provincial consent required is that of:

(i) every province that has or has had 25 per cent of the population of the country;

(ii) two Western provinces with a combined population of at least 50 per cent of the population of the region;

(iii) two Atlantic provinces with a combined population of at least 50 per cent of the population of the region.

The provinces cannot change the component of the Part V formula which requires Parliament's consent to constitutional amendments (amendments made, for example, under section 92(1) of the B.N.A. Act with respect to the Constitution of a province do not, of course, require such consent). No proposal for an amending formula which has been put forward so far has done so and any such proposal could be based on the philosophy that Canada was of a confederal nature or merely an association of states rather than the federation which we are.

Nor can provinces change that part of the "final" formula which provides for the adoption of general amendments to the Constitution by the agreement of the people through referenda rather than by the agreement of governments (section 42).

A provincial proposal, by replacing subsection 41(1)(b), however, could convert section 41 into a quite different amending formula. Among the options open are:

(1) The Fulton-Favreau formula of 1964 which would require the consent of Parliament and of all provincial legislatures for amendments regarding matters of fundamental concern, such as the distribution of powers, and the consent of Parliament and two-thirds of the provincial legislatures representing 50% of the population for other matters of mutual concern (such as the office of the Queen or Lieutenant Governor);

(2) The "Toronto consensus" formula 1978-79 which would require unanimity for amendments to provincial ownership or jurisdiction over natural resources, and the consent of Parliament and 7 provincial legislatures representing 85% of Canada's population for all other matters, and

(3) The "Alberta" formula of 1979-80 (which Alberta renamed the "Vancouver" formula) which would require the consent of Parliament and two-thirds of the provincial legislatures representing at least 50% of the population of Canada, except that if the amendment affected the legislative powers of the provinces, rights and privileges granted or secured to a provincial legislature or government, the assets or property of a province, or the natural resources of a province, the amendment would not apply to a province whose legislature had expressed its dissent.

The percentage of population found in each province according to the 1976 census is as follows:

Nfld.	2½%	Que.	27%	Man.	4%
P.E.I.	½%	Ont.	36%	Sask.	4%
N.S.	4%			Alta.	8%
N.B.	3%			B.C.	11%

(The next census will occur June, 1981, but it is unlikely that the relative positions of the provinces will change except that Quebec will likely drop to 26% and Alberta rise to 9%.)

Thus any alternative must have the consent of Ontario and Quebec each of which has more than 25% of the population. Also, by requiring the consent of at least 8 provinces, a region can not be ignored; there must be at least two provinces in both the Atlantic and Western regions that agree to the proposal. This stringent requirement can be justified on the ground that an alternative to Part V should have strong support before it qualifies as a serious proposal to be put before the people in a referendum and that it should have support from all regions of the country.

The requirement will be criticized on the ground that it heavily favours central Canada since both Ontario and Quebec obtain a veto under Part V as it is presently drafted and their consent is needed before any alternative thereto can be put to the people in a referendum. On the other hand in a referendum those two provinces do represent over 60% of Canadians.

Procedure for perfecting alternative

(2) One copy of an alternative proposed under subsection (1) may be deposited with the Chief Electoral Officer of Canada by each proposing province within two years after this Act, except Part V, comes into force but, prior to the expiration of that period, any province that has deposited a copy may withdraw that copy.

Possibilité de mise au point

(2) Chaque province concernée peut déposer le texte de la proposition visée au paragraphe (1) auprès du directeur général des élections du Canada dans les deux ans suivant l'entrée en vigueur, exception faite de la partie V, de la présente loi, étant entendu qu'elle peut retirer le texte au cours de cette période.

Section 38(2) - Provincial Alternative or that Preferred by the Federal Government Adopted by Referendum

Section 38(2) - Provides that when the provinces agree on an alternative to the provincial component of Part V they shall deposit a draft of that proposal with the Chief Electoral Officer.

Any province so filing would be entitled to withdraw its proposal at any time within the two year period. The proposals filed by at least 8 provinces having 80% of the population would have to be identical.

This is preliminary to the holding of a referendum to allow the people to choose whether they prefer the proposed provincial alternative or one put forward by the federal government. This could be Part V, as contained in the Act, or another federal alternative put forward under para. 38(3)(a).

The Chief Electoral Officer is chosen because he has an independent status as an officer of Parliament and he will likely be the person in charge of conducting the required referendum - the Parliament of Canada may under Section 40(1) set the rules for holding the referendum but it is likely it would choose to use the offices of the Chief Electoral Officer for this purpose.

In the Referendum Bill, which died on the order paper in May, 1979, the Chief Electoral Officer was under the terms of that legislation placed in charge of the referendum.

If the federal government should support the provincial alternative agreed to by 8 or more provinces, but not 10, then a referendum would have to be put to the people asking whether they preferred that alternative or the one presently set out in paragraph 41(1)(b) ie.: modified Victoria. If all 10 provinces and the federal government agreed, however, this could be substituted for section 41(1)(b) by using the interim amending formula of unanimous consent set out in section 33.

Referendum

(3) Where copies of an alternative have been filed as provided by subsection (2) and, on the day that is two years after this Act, except Part V, comes into force, at least eight copies remain filed by provinces that have, according to the then latest general census, combined populations of at least eighty per cent of the population of all the provinces, the government of Canada shall cause a referendum to be held within two years after that day to determine whether

(*a*) paragraph 41(1)(*b*) or any alternative thereto proposed by the government of Canada by depositing a copy thereof with the Chief Electoral Officer at least ninety days prior to the day on which the referendum is held, or

(*b*) the alternative proposed by the provinces,

shall be adopted.

Référendum

(3) Dans les cas où, deux ans après l'entrée en vigueur, exception faite de la partie V, de la présente loi, au moins huit provinces remplissant les conditions démographiques visées au paragraphe (1) n'ont pas retiré leur texte, le gouvernement du Canada fait tenir, dans les deux années suivant l'échéance des deux ans, un référendum pour déterminer laquelle des procédures suivantes sera adoptée:

a) celle qui est prévue à l'alinéa 41(1)*b*) ou l'éventuelle procédure de remplacement proposée par le gouvernement du Canada après dépôt de son texte auprès du directeur général des élections au moins quatre-vingt-dix jours avant la date du référendum;

b) celle qui fait l'objet de la proposition des provinces.

Section 38(3) - Provides that where the required number of provincial consents to an alternative proposal for the provincial component for the amending formula are filed, at the end of two years after the Constitution Act comes into force, the Government of Canada shall ensure that a referendum is held giving the people of Canada the choice between that alternative and such one as might be preferred by the federal government.

It is probable that the federal government's preferred alternative would be the modified Victoria proposal now set out in section 41(1)(b) since:

- it is similar to the one which has been agreed to at one time at least by all provincial governments;
- it provides for a guaranteed regional balance;
- yet it is not overly rigid as would be a provision for unanimous consent of all provincial legislatures.

Nevertheless, an alternative proposal might come forward from the provinces pursuant to subsection 38(1) and (2) which would lead the federal government to think that something other than the present section 41(1)(b) was most appropriate and there is therefore flexibility built in by section 38(3) to allow the federal government to propose an alternative to the modified Victoria proposal set out in section 41.

Should the federal government agree with a provincial alternative, proposed by 8 or 9 but not agreed to by all 10 provinces, then a referendum would have to be held asking the people whether they preferred that alternative or the modified Victoria Charter proposals as set out in section 41(1)(b).

Coming into force of Part V where referendum held

39. Where a referendum is held under subsection 38(3), a proclamation under the Great Seal of Canada shall be issued within six months after the date of the referendum bringing Part V into force with such modifications, if any, as are necessary to incorporate the proposal approved by a majority of the persons voting at the referendum and with such other changes as are reasonably consequential on the incorporation of that proposal.

39. Dans les six mois suivant la date du référendum, une proclamation sous le grand sceau du Canada est prise en vue de faire entrer en vigueur la partie V, éventuellement modifiée dans la mesure nécessaire pour incorporer la proposition approuvée par la majorité des votants et pour intégrer les autres aménagements justifiés qui en découlent.

Entrée en vigueur de la partie V après référendum

Rules for referendum

40. (1) Subject to subsection (2), Parliament may make laws respecting the rules applicable to the holding of a referendum under subsection 38(3).

40. (1) Sous réserve du paragraphe (2), le Parlement peut légiférer pour réglementer la tenue du référendum visé au paragraphe 38(3).

Règles en matière de référendum

Section 39 - Coming into Force of Part V where a Referendum is Held

Section 39 - Provides that where a referendum is held a proclamation must be issued within six months by the Governor General bringing the proposal chosen by the people into force.

In addition consequential changes to the other components of the "final" amending formula set out in Part V would be made by virtue of this section, for example,

- the present section 41(1)(b) provides for consent of a province - Sections 42 and 45 accordingly assume that consent will be given by resolution of the legislature and refer to such resolution, yet it is open to the provinces by means of the procedure prescribed in Section 38 to provide for a "provincial component" of the final formula which would not use resolutions of the provincial legislatures - it might require only the consent of the government of a province, or it might require a provincial statute. In such case consequential amendments would be required in Sections 42 and 45.

It may be questioned why the voting in this case is on a national basis with no requirement for majorities from the particular regions of the country. This is because the formula put forward by the provinces will already have been approved by at least eight of the provinces. Thus it is not felt necessary to provide for a regional majority in the referendum.

Section 40 - Rules for Referendum

Section 40(1) - Provides that Parliament may make rules for holding the referendum described in Section 38.

Parliament's authority in this regard will be subject to Section 40(2) which provides that all citizens may vote subject to reasonable distinction or limitation.

Parliament's authority in this regard would be limited by the new constitutionally-entrenched

Charter of Rights set out in Part I of the Constitutional Act 1980 and its requirements for freedom of expression, opinion and the media.

It is reasonable to assume that provisions similar to those set out in the Referendum Bill, which died on the order paper in May 1979 would be enacted.

Right to vote

(2) Every citizen of Canada has, without unreasonable distinction or limitation, the right to vote in a referendum held under subsection 38(3).

(2) Tout citoyen canadien a le droit de vote à l'occasion du référendum visé au paragraphe 38(3). Ce droit ne peut, sans motif valable, faire l'objet d'aucune distinction ou restriction.

Droit de vote

5

Section 40(2) - Guarantees that all citizens of Canada without unreasonable distinction have the right to vote in a referendum.

Clearly a provision which prevented citizens under 18 years of age from voting would be a reasonable restriction.

PROPOSED RESOLUTION FOR JOINT ADDRESS RESPECTING THE (2/)
CONSTITUTION OF CANADA - BRIEFING BOOK USE IN PARLIAMENT,

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PART V

PROCEDURE FOR AMENDING THE CONSTITUTION OF CANADA

Part V provides for what is called in these briefing notes a "final" amending procedure. It is final only in the sense that it is to be distinguished from the interim amending formula set out in sections 33 and 34 of Part IV. It could, of course, be amended before or after coming into force. Refer section 47 which provides that:

> 47. The procedures prescribed by section 41, 42 or 43 do not apply to an amendment to the Constitution of Canada where there is another provision in the Constitution for making the amendment, but the procedures prescribed by section 41 or 42 shall nevertheless be used to amend any provision for amending the Constitution, including this section, and section 41 may be used in making a general consolidation or revision of the Constitution.

Part V provides for two alternate ways of approving constitutional amendments, by approval of the federal and provincial legislatures (sections 41 and 43) or by approval of the people in a referendum (section 42).

As noted above (section 37), this "final" formula set out in Part V, can come into force in one of three ways:

(1) when both Houses of Parliament and the legislatures or governments of all provinces agree, if within two years of the coming into force of the Act;

(2) automatically two years after the Constitution Act, 1980 comes into force; or

(3) if the provinces agree upon an alternative to the provincial component of section 41, and that version or some alternative thereto is approved by the people in a referendum, then Part V amended accordingly comes into force within six months of the date of referendum (section 39).

PART V

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

PARTIE V

PROCÉDURE DE MODIFICATION DE LA CONSTITUTION DU CANADA

General procedure for amending Constitution of Canada

41. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(*a*) resolutions of the Senate and House of Commons; and

(*b*) resolutions of the legislative assemblies of at least a majority of the provinces that includes

(i) every province that at any time before the issue of the proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada,

(ii) at least two of the Atlantic provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Atlantic provinces, and

(iii) at least two of the Western provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Western provinces.

Procédure normale de modification

41. (1) La Constitution du Canada peut être modifiée par proclamation du gouverneur général sous le grand sceau du Canada, autorisée:

a) par des résolutions du Sénat et de la Chambre des communes;

b) par des résolutions des assemblées législatives d'une majorité des provinces; cette majorité doit comprendre:

(i) chaque province dont la population, avant la date de cette proclamation, représentait, selon un recensement général antérieur quelconque, au moins vingt-cinq pour cent de la population du Canada,

(ii) au moins deux des provinces de l'Atlantique dont la population confondue représente, selon le recensement général le plus récent à l'époque, au moins cinquante pour cent de la population de l'ensemble de ces provinces,

(iii) au moins deux des provinces de l'Ouest dont la population confondue représente, selon le recensement général le plus récent à l'époque, au moins cinquante pour cent de la population de l'ensemble de ces provinces.

Definitions

(2) In this section,

"Atlantic provinces"

"Atlantic provinces" means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland;

"Western provinces"

"Western provinces" means the provinces of Manitoba, British Columbia, Saskatchewan and Alberta.

Définitions

(2) Les définitions qui suivent s'appliquent au présent article.

«provinces de l'Atlantique»

«provinces de l'Atlantique» Les provinces de la Nouvelle-Écosse, du Nouveau-Brunswick, de l'Île-du-Prince-Édouard et de Terre-Neuve.

«provinces de l'Ouest»

«provinces de l'Ouest» Les provinces du Manitoba, de la Colombie-Britannique, de la Saskatchewan et de l'Alberta.

CONFIDENTIAL

Section 41 - General Amending Formula

- In order to see the complete amending process, one should read section 41 together with section 43 which provides for amendments to provisions affecting one or more but not all of the provinces, section 48 which provides for amendment by Parliament for the executive government of Canada, the Senate and the House of Commons, and section 49 which provides that provincial legislatures may make amendments with respect to provincial constitutions.

Section 41 is a modified version of the Victoria formula in that the consent required from the Atlantic provinces must be by at least two provinces comprising at least 50 per cent of the population of all Atlantic provinces. In the Victoria formula such a population requirement only pertained to the two Western provinces.

The Victoria amending formula was acceptable to all governments in Victoria in 1971, although Quebec rejected the whole constitutional proposal because the provision relating to social services did not go far enough; in addition, Saskatchewan never officially accepted the whole Charter because its government changed at that time.

Subclause (1) will require, at the present time, the consent of Ontario and Quebec.

The percentage population of the provinces is as follows:

Nfld. -	2½%	Que. -	27%	Man. -	4%
P.E.I. -	½%	Ont. -	36%	Sask. -	4%
N.S. -	4%			Alta. -	8%
N.B. -	4%			B.C. -	11%

It should be noted, however, that the formula requires the consent of "every province that at any time before the issue of the proclamation (i.e.: bringing any particular constitutional amendment into force) had a population of at least 25 per cent ... ". Thus, the consent of every province which at any time in its history had 25 per cent of the population is required, even though at the time of the particular amendment it may have less than that number. Therefore, over the course of time the consent of several provinces could be required under this section. That would only occur if, as a result of population shifts, that province at some time or other had 25 per cent of the population of the country.

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The population of provinces by percentage of total population of the Atlantic and Western regions respectively are set out below. The figures are taken from the 1976 census. Those for the next census in June, 1981 are not expected to change the relative positions of the provinces.

Atlantic Region

Nova Scotia	38%
New Brunswick	31%
Newfoundland	25.6%
P.E.I.	5.4%

Western Regions

British Columbia	39%
Alberta	29%
Saskatchewan	16%
Manitoba	16%

The result of the 50 per cent regional population requirement means that in no case will the vote of P.E.I. count since any two other Atlantic provinces can carry an amendment and yet P.E.I., combined with any other Atlantic province, would not constitute a majority.

In the Western region the regional population requirement means that an amendment can only be made when British Columbia and at least one of the other Western provinces agree. Otherwise, if B.C. does not agree, the three other Western provinces must agree.

As noted above, the provincial component of the amending formula (section 41(1)(b) can be altered if eight provinces having at least 80 per cent of the population agree on an alternative proposal which is approved by referendum as provided for under section 38.

Victoria Proposal

Art. 49. Amendments to the Constitution of Canada may from time to time be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assemblies of at least a majority of the Provinces that includes

(1) every Province that at any time before the issue of such proclamation had, according to any previous general census, a population of at least twenty-five percent of the population of Canada;

(2) at least two of the Atlantic Provinces;

(3) at least two of the Western Provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Western Provinces.

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Why did the federal government propose the Victoria amending formula as the "final" formula?

1. All provinces and the federal government explicitly agreed to its provisions in 1971.

2. It provides for a regionally-weighted "national consensus" requiring the agreement of Parliament and the legislatures of at least six provinces representing over 80% of the Canadian population distributed among four regions.

3. The Victoria formula (or variations of it) continues to have broad public support (the Pepin-Robarts Report, the Canadian Bar Association Report, the Ontario Advisory Committee on Confederation Report, the Quebec Liberal Party "Livre Beige").

4. The Victoria formula strikes an appropriate balance between the need for flexibility and the need for stability.

5. The provisions of the Alberta amending formula, discussed at the First Ministers' Conference in September, 1980, were not explicitly accepted by all provinces or by the federal government. The emerging consensus around the Alberta approach was contingent upon acceptance of a larger package of constitutional changes. There was some continued concern about the opting-out provisions which might lead to a checker-board effect over time. Furthermore, some questions remained unresolved, such as how to handle amendments where opting-out would not be appropriate (i.e., amendments respecting the Supreme Court and the Senate). If, however, eight provinces representing at least 80 per cent of the population were to agree to a fully elaborated version of the Alberta formula, it could be put to the people in a referendum. If adopted, it would replace the Victoria formula.

Amendment authorized by referendum

42. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by a referendum held throughout Canada under subsection (2) at which

(*a*) a majority of persons voting thereat, and

(*b*) a majority of persons voting thereat in each of the provinces, resolutions of the legislative assemblies of which would be sufficient, together with resolutions of the Senate and House of Commons, to authorize the issue of a proclamation under subsection 41(1),

have approved the making of the amendment.

Modification autorisée par référendum

42. (1) La Constitution du Canada peut être modifiée par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par un référendum tenu dans tout le pays conformément au paragraphe (2) et lors duquel la modification a été approuvée:

a) d'une part, à la majorité des votants;

b) d'autre part, à la majorité des votants de chacune des provinces dont les résolutions de leurs assemblées législatives suffiraient, avec les résolutions du Sénat et de la Chambre des communes, à autoriser la proclamation mentionnée au paragraphe 41(1).

CONFIDENTIAL

Section 42 - Amendment by Referendum

Section 42(1) - Provides for approval of amendment by referendum instead of by legislatures as required by section 41.

It is being argued that this section allows the federal government to amend the constitution "over the heads of the provinces". It does; it allows going "over the heads of the province" to the people of the respective provinces. A better characterization of the section is to say that it allows constitutional issues to be removed from the hands of governments and placed in the hands of the people for decision. Governments too often have a vested interest in constitutional amendment which means that they make decisions based on what would lead to most power for that particular government. This does not necessarily lead to the best solution for the country as a whole. It is this attitude on the part of governments which has led to the continued deadlock in federal-provincial constitutional negotiations for more than 50 years. It must be emphasized that a referendum under this section cannot be won on the basis of a national majority only.

Two majorities are required in order to ensure acceptance of the proposed amendment in all regions: a majority of voters voting and a majority in each region. The purpose of the section is to place authority to consent to an amendment directly in the hands of the people as an alternative to amendment by agreement by Parliament and the provincial legislatures. Thus, the required regional majorities parallel the consent required from provincial legislatures under section 41. On the basis of the present section 41, approval by referendum therefore would require:

(a) a majority of voters voting thereat;

(b) a majority of voters

(i) in every province having or having had 25 per cent of the population (Ontario and Quebec);

(ii) in at least two Atlantic provinces having combined populations of at least 50 per cent of the region;

(iii) in at least two Western provinces having the combined population of at least 50 per cent of the region.

If section 41 is amended as a result of an alternative proposal by the provincial or federal government under section 38, then the requirement for regional approval in a referendum under this section would change accordingly.

It may be asked why only a referendum authorized by Parliament and not by the provinces is provided under this section. The rationale is that only Parliament represents all of the people of Canada and, consequently, the ability to go to them by way of referendum should be vested in the national Parliament.

Authorization of referendum

(2) A referendum referred to in subsection (1) shall be held where directed by proclamation issued by the Governor General under the Great Seal of Canada authorized by resolutions of the Senate and House of Commons.

(2) L'ordre de tenue d'un référendum mentionné au paragraphe (1) est donné par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par les résolutions du Sénat et de la Chambre des communes.

Autorisation de référendum

Section 42(2) - Provides that a national referendum shall be held under section 42(1) when directed by proclamation issued by the Governor General when authorized by resolution of both Houses of Parliament. Parliament is empowered by section 46(1) to make rules respecting the holding of this referendum.

Amendment of provisions relating to some but not all provinces

43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

Modification à l'égard de certaines provinces

43. Les dispositions de la Constitution du Canada applicables à certaines provinces seulement peuvent être modifiées par proclamation du gouverneur général sous le grand sceau du Canada, autorisée par des résolutions du Sénat, de la Chambre des communes et de l'assemblée législative de chaque province à laquelle la modification s'applique.

Section 43 - Amendments of Provisions Relating to Some but not all Provinces

Section 43 - Provides that amendments to provisions of the Constitution that apply to one or more, but not all of the provinces, may be amended with the consent of the two Houses of Parliament and the legislative assembly of each province to which the amendment applies.

This is identical to the interim amending formula for the same cases set out in section 34 of this Act and to Article 50 of the Victoria proposal.

> Art. 50. Amendments to the Constitution of Canada in relation to any provision that applies to one or more, but not all, of the Provinces may from time to time be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assembly of each Province to which an amendment applies.

There is no referendum alternative for amendments under this section. It would not be appropriate to hold a national referendum on an issue pertaining to one or more but not all provinces.

Amendments without Senate resolution

44. An amendment to the Constitution of Canada may be made by proclamation under subsection 41(1) or section 43 without a resolution of the Senate authorizing the issue of the proclamation if, within ninety days after the passage by the House of Commons of a resolution authorizing its issue, the Senate has not passed such a resolution and if, at any time after the expiration of those ninety days, the House of Commons again passes the resolution, but any period when Parliament is prorogued or dissolved shall not be counted in computing those ninety days.

Modification sans résolution du Sénat

44. La Constitution du Canada peut être modifiée par proclamation, dans le cadre du paragraphe 41(1) ou de l'article 43, sans une résolution du Sénat autorisant la proclamation, lorsque, dans un délai de quatre-vingt-dix jours suivant l'adoption par la Chambre des communes d'une résolution à cet effet, le Sénat n'a pas adopté une telle résolution et si, après l'expiration de ce délai, la Chambre des communes adopte de nouveau la résolution. Dans la computation du délai ne sont pas comptés les jours pendant lesquels le Parlement est prorogé ou dissous.

Section 44 - Amendments Without Senate Approval

Section 44 - Provides that where the Senate refuses to authorize an amendment by passing a resolution, the House of Commons may override that lack of consent by re-passing the resolution. All such amendments will require the approval of either a majority of provinces regionally distributed as set out in section 41(1), or the provinces immediately concerned (section 43). It is not thought appropriate that the Senate should be able to block a proposed amendment to which both the House of Commons and the relevant provincial legislative assemblies have agreed.

The section has no application to amendments by national referendum under section 42.

The section has no application to amendments which require Parliament's consent alone - those relating to the executive government of Canada, or the Senate, or House of Commons, under section 48.

An amendment to abolish the Senate, however, could be accomplished without Senate approval by virtue of this section since "the powers of the Senate" are by virtue of section 50 amendable by the general amending formula (section 41) and are not among the items which require Parliament's consent alone.

A similar provision was contained in the Victoria formula:

> Art. 51. An amendment may be made by proclamation under Article 49 or 50 without a resolution of the Senate authorizing the issue of the proclamation if within ninety days of the passage of a resolution by the House of Commons authorizing its issue the Senate has not passed such a resolution and at any time after the expiration of the ninety days the House of Commons again passes the resolution, but any period when Parliament is prorogued or dissolved shall not be counted in computing the ninety days.

Rules applicable to amendment procedures

45. (1) The procedures for amendment described in subsection 41(1) and section 43 may be initiated either by the Senate or House of Commons or by the legislative assembly of a province.

45. (1) L'initiative des procédures de modification visées au paragraphe 41(1) et à l'article 43 appartient au Sénat, à la Chambre des communes ou à l'assemblée législative d'une province.

Règles applicables aux procédures de modification

Idem

(2) A resolution made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

(2) La résolution adoptée dans le cadre de la présente partie peut être révoquée à tout moment avant la date de la proclamation qu'elle autorise.

Idem

CONFIDENTIAL

Section 45 - Rules for Amendments by Parliament and the Provincial Legislatures

Section 45(1) - Provides that amendments under sections 41 and 43 may be initiated by either the Senate or the House of Commons, or by the legislative assembly of any province. Presumably this will be done by resolution of the respective legislative assemblies.

Section 45(2) - Provides that any resolution may be revoked any time before the amendment to which it relates becomes law. Similar provisions were part of the Victoria proposal.

Art. 52. The following rules apply to the procedures for amendment described in Articles 49 and 50:
(1) either of these procedures may be initiated by the Senate or the House of Commons or the Legislative Assembly of a Province;
(2) a resolution made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Rules for referendum

46. (1) Subject to subsection (2), Parliament may make laws respecting the rules applicable to the holding of a referendum under section 42.

46. (1) Le Parlement peut, sous réserve du paragraphe (2), légiférer pour réglementer la tenue du référendum visé à l'article 42.

Réglementation des référendums

Right to vote

(2) Every citizen of Canada has, without unreasonable distinction or limitation, the right to vote in a referendum held under section 42.

(2) Tout citoyen canadien a le droit de vote lors du référendum visé à l'article 42; ce droit ne peut, sans motif valable, faire l'objet d'aucune distinction ou restriction.

Droit de vote

CONFIDENTIAL

Section 46 - Rules for Referendum

Section 46(1) - Provides that Parliament may make rules for holding the referendum described in section 42.

Parliament's authority in this regard will be subject to section 46(2) which provides that all citizens may vote subject to reasonable distinction or limitation.

Parliament's authority in this regard would be limited by the new constitutionally-entrenched Charter of Rights, set out in Part I of the Constitutional Act, 1980, and its requirements for freedom of expression, opinion and the media.

It is reasonable to assume that provisions similar to those set out in the Referendum Bill, which died on the order paper in May, 1979, would be enacted.

Section 46(2) - Guarantees that all citizens of Canada without unreasonable distinction have the right to vote in a referendum. However, reasonable distinctions or limitations would be permitted (e.g., minors would not be able to vote). This parallels the provisions in section 3 of the Charter of Rights respecting voting in provincial and federal elections.

Limitation on use of general amending formula

47. The procedures prescribed by section 41, 42 or 43 do not apply to an amendment to the Constitution of Canada where there is another provision in the Constitution for making the amendment, but the procedures prescribed by section 41 or 42 shall nevertheless be used to amend any provision for amending the Constitution, including this section, and section 41 may be used in making a general consolidation or revision of the Constitution.

Restriction du recours à la procédure normale

47. Les articles 41, 42 ou 43 ne s'appliquent pas aux cas de modification constitutionnelle pour lesquels une procédure différente est prévue par une autre disposition de la Constitution du Canada. La procédure visée aux articles 41 ou 42 s'impose toutefois pour modifier les dispositions relatives à la modification de la Constitution, y compris le présent article; la procédure visée à l'article 41 peut également servir à toute codification ou révision générales de la Constitution.

CONFIDENTIAL

Section 47 - Clarification re: Use of Amending Formula

Section 47 - Provides that the general amending formula (section 41 or 42) and the procedure for amendments respecting one or more but not all provinces (section 43) may not be used where there is another provision in the Constitution for making amendments. For example, section 48 provides that Parliament may amend provisions relating to the executive government of Canada, or the Senate or House of Commons. Section 49 provides that provincial legislatures may amend provincial Constitutions.

However, the section makes it clear that the general amending formula (section 41 or 42) must be used to alter any provision respecting the procedures for constitutional amendments, including this section, and that section 41 may be used to make a general consolidation or revision of the Constitution.

Amendments by Parliament

48. Subject to section 50, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate or House of Commons.

48. Sous réserve de l'article 50, le Parlement a compétence exclusive pour modifier les dispositions de la Constitution du Canada relatives au pouvoir exécutif fédéral, au Sénat et à la Chambre des communes.

Modification par le Parlement

CONFIDENTIAL

Section 48 - Amendments by Parliament

The section provides that Parliament itself may make amendments to provisions concerning the executive government of Canada, or the Senate or the House of Commons.

This section must be read together with section 50 which exempts certain matters from that amending power:

- the office of the Queen;
- the office of the Governor General;
- the powers of the Senate;
- the number of members by which a province is entitled to be represented in the Senate, and the residence qualifications of Senators;
- 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;
- the principles of proportional representation of the provinces in the House of Commons prescribed by the Constitution of Canada.

This section replaces section 91(1) of the British North America Act which was added to that Act by an amendment of the United Kingdom Parliament in 1949. It provides:

> "... the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—
>
> 1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House."

The requirement that there be one session of Parliament each year, and that no House of Commons continue for more than five years are governed by provisions of the Charter of Rights (sections 4 and 5), and would not fall under Parliament's authority pursuant to this section. The replacement of section 91(1) is similar to the provisions of the Fulton-Favreau formula and the Victoria formula. As a practical matter, it probably does not narrow Parliament's power much more than the Supreme Court did in the Senate reference.

Section 91(1) is repealed by section 51.

Amendments by provincial legislatures

49. Subject to section 50, the legislature of each province may exclusively make laws amending the constitution of the province.

49. Sous réserve de l'article 50, la législature de chaque province a compétence exclusive pour modifier la constitution de celle-ci.

Modification par les législatures provinciales

Section 49 - Amendments by Provincial Legislatures

The section empowers provincial legislatures to amend their own Constitutions. This authority is subject to section 50 which provides that the office of Lieutenant Governor can only be amended by the general amending formula of section 41 or 42.

This replaces section 92(1) of the B.N.A. Act which also excepted the office of the Lieutenant Governor from the amending power of the province.

> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say,—
>
> 1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

Section 92(1) is repealed by section 51.

This section 49 is like the Fulton-Favreau and the Victoria formulas.

Matters requiring amendment under general formula

50. An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with a procedure prescribed by section 41 or 42:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the *Canadian Charter of Rights and Freedoms*;

(*c*) the commitments relating to equalization and regional disparities set out in section 31;

(*d*) the powers of the Senate;

(*e*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(*f*) 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; and

(*g*) the principles of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada.

Procédure normale de modification

50. Toute modification de la Constitution du Canada portant sur les questions suivantes se fait selon la procédure visée aux articles 41 ou 42:

a) les fonctions de la Reine, celles du gouverneur général et celles des lieutenants-gouverneurs;

b) la *Charte canadienne des droits et libertés*;

c) les engagements énoncés, en matière de péréquation et d'inégalités régionales, à l'article 31;

d) les pouvoirs du Sénat;

e) le nombre de sénateurs représentant chaque province au Sénat et les conditions de résidence qu'ils doivent remplir;

f) le droit d'une province d'avoir à la Chambre des communes un nombre de députés au moins égal à celui de ses sénateurs;

g) les principes de la représentation proportionnelle des provinces à la Chambre des communes prévus par la Constitution du Canada.

Consequential amendments

51. Class 1 of section 91 and class 1 of section 92 of the *Constitution Act, 1867* (formerly named the *British North America Act, 1867*), the *British North America (No. 2) Act, 1949*, referred to in item 21 of Schedule I to this Act and Parts III and IV of this Act are repealed.

Modifications corrélatives

51. La rubrique 1 de l'article 91 et la rubrique 1 de l'article 92 de la *Loi constitutionnelle de 1867* (antérieurement désignée sous le titre: *Acte de l'Amérique du Nord Britannique, 1867*), l'*Acte de l'Amérique du Nord Britannique (nº 2), 1949*, mentionné au nº 21 de l'annexe I de la présente loi, et les parties III et IV de la présente loi sont abrogés.

Section 50 - Matters Requiring Amendment by General Formula

This section removes a number of matters from the power of Parliament and of the provincial legislatures to amend their respective Constitutions, including the office of the Queen, the Governor General and the Lieutenant Governor of a province. In addition, it makes it clear that the new constitutional provisions added by this Act (The Canadian Charter of Rights and Freedoms, and the commitments relating to equalization and regional disparities) are amendable only by the general amending formula prescribed by section 41 or 42. Amendment of the amending procedures added by this Act is also governed by the general formula. Section 47 so provides.

Section 51 - Consequential Amendments

Provides for the repeal of sections 91(1) and 92(1) of the B.N.A. Act, and Parts III (Constitutional Conferences of First Ministers) and IV (Interim Amending Procedure and Rules for its Replacement) upon the coming into force of Part V.

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PROPOSED RESOLUTION FOR JOINT ADDRESS RESPECTING THE (2/)
CONSTITUTION OF CANADA - BRIEFING BOOK USE IN PARLIAMENT,
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PART VI

GENERAL

Constitution of Canada

52. (1) The Constitution of Canada includes

(*a*) the *Canada Act*;

(*b*) the Acts and orders referred to in Schedule I; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Amendments to Constitution of Canada

(2) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

PARTIE VI

DISPOSITIONS GÉNÉRALES

Constitution du Canada

52. (1) La Constitution du Canada comprend:

a) la *Loi sur le Canada*;

b) les textes législatifs et les décrets figurant à l'annexe I;

c) les modifications aux textes législatifs et aux décrets mentionnés aux alinéas *a*) ou *b*).

Modification

(2) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

CONFIDENTIAL

PART VI - GENERAL

Section 52 - Definition of Term "Constitution of Canada"

This section defines the major parts of the Constitution of Canada.

The definition is not exhaustive; it "includes" the documents specifically listed. The Constitution of Canada is found in other documents as well as those listed, such as the letters patent appointing the Governor General, the instructions to Lieutenant Governors, provincial statutes relating to the constitution of the province, federal statutes such as the Succession to the Throne Act. To try to enumerate all such documents would be too time-consuming. There would be a danger of leaving some out.

Section 52(2) - This subsection expresses the general rule that amendments to the Constitution may only be made as provided in the Constitution. This is a critical element of patriation establishing an exclusive Canadian procedure for amendment.

Repeals and new names

53. (1) The enactments referred to in Column I of Schedule I are hereby repealed, or amended to the extent indicated in Column II thereof, and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

Abrogation et nouveaux titres

53. (1) Les textes législatifs énumérés à la colonne I de l'annexe I sont abrogés ou modifiés dans la mesure indiquée à la colonne II. Sauf abrogation, ils restent en vigueur en tant que lois du Canada sous les titres mentionnés à la colonne III.

CONFIDENTIAL

Section 53 - Repeals and New Names

Section 53(1) - Amends portions of the constitutional documents set out in the Schedule as indicated therein. Most of the repeals are for the purpose of changing the titles of the British North America Act, 1867-1975 to the Constitution Act, 1867-1975. In addition, some of the long and cumbersome titles of statutes other than the B.N.A. Acts have been changed to a more modern version. For example, the long title of the Manitoba Act:

> "An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.)."

is changed to "Manitoba Act, 1870" (item 2 of the Schedule).

In addition to the changes of title, some consequential changes are made:

> Section 20 of the British North America Act, 1867 which provides for one session of Parliament every year is repealed (item 1 of the Schedule). It is now replaced by section 5 of the Constitution Act, 1980.
>
> Section 20 of the Manitoba Act (item 2 of the Schedule) is repealed because it also is replaced by section 5 of the Constitution Act, 1980.
>
> The British North America Act (No. 2), 1949 (item 21 of the Schedule) is repealed on the coming into force of Part V of the Constitution Act. The 1949 Act added section 91(1) to the B.N.A. Act, 1867 giving the Parliament of Canada authority to amend certain provisions of the Constitution. When Part V comes into force, section 91(1) will be replaced by sections 48 and 50 of that Part.

In addition, some statutes which are obviously spent are repealed:

> Canadian Speaker (Appointment of Deputy) Act, 1895 (item 10 of the Schedule) validating federal legislation providing for the appointment of a deputy speaker in the Senate; it is now spent.
>
> British North America Act, 1943 (item 18 of the Schedule) provided for the postponement of redistribution of the seats in the House of Commons until after the war.

Consequential amendments

(2) Every enactment, except the *Canada Act*, that refers to an enactment referred to in Schedule I by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in Schedule I may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

Modifications corrélatives

(2) Toute loi, sauf la *Loi sur le Canada*, qui fait mention d'une loi figurant à l'annexe I par le titre indiqué à la colonne I est modifiée par substitution à ce titre du titre correspondant mentionné à la colonne III; tout Acte de l'Amérique du Nord Britannique non mentionné à l'annexe I peut être cité sous le titre de *Loi constitutionnelle* suivi de l'indication de l'année de son adoption et éventuellement de son numéro.

British North America Act, 1946 (item 19 of the Schedule) altered the provisions for readjustment of representation in the House of Commons. It has been superseded by federal legislation enacted pursuant to the authority given to Parliament by the 1949 amendment.

British North America Act, 1951 (item 22) which originally gave Parliament concurrent jurisdiction with the provinces to make laws in relation to old age pensions was made obsolete by the changes to that jurisdiction made by the British North America Act, 1964.

British North America Act, 1952 (item 23) which provided a scheme for the readjustment of representation in the House of Commons is now superseded by federal legislation of 1974.

The most significant repeal is that of sections 4 and 7(1) of the Statute of Westminster (item 16) to clarify and symbolise the termination of the authority of the U.K. Parliament over the Canadian constitution. An editorial amendment is also made to the Statute of Westminster to delete the phrase "and Newfoundland" from sections 1 and 10(3) of the Statute (item 16) which was enacted when Newfoundland was still a separate Dominion.

5 Modifications corrélatives

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Section 53(2) - This section serves a technical purpose. It provides that where any of the renamed statutes listed in the Schedule are referred to in other statutes (federal or provincial) by their old names, that reference will be repealed and the new name substituted therefor.

The section also provides that any British North America Act not referred to in the Schedule, for example, those which have been repealed, may be referred to by the new name, the Constitution Act. This is simply to avoid confusion by making the new title generally applicable.

French version of Constitution of Canada

54. A French version of the portions of the Constitution of Canada referred to in Schedule I shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

Version française de la Constitution du Canada

54. Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe I; toute partie suffisamment importante est, dès qu'elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient.

CONFIDENTIAL

Sections 54, 55 and 56 - French Version of the Constitution of Canada

Section 54 - Requires the Minister of Justice to prepare as expeditiously as possible a French version of the constitutional documents listed in the Schedule. Section 55 provides that when these are enacted the French and English versions will be equally authoritative.

Consultation with the provinces is not expressly required by the section, but it will be necessary since the French version can only be brought into force by "the procedure then applicable to an amendment of the same provisions of the Constitution of Canada". That is, if the provision is one that requires use of the general amending formula then it will require the consent of Parliament and all provincial governments or legislatures in the interim period (section 33), or the consent of Parliament and those provinces indicated by section 41 ("final" formula). If the provision is one which relates to one or more but not all the provinces, then it will require the consent of Parliament and the provincial legislatures or governments concerned (interim formula - section 34; "final" formula - section 43).

While there are translations of the various U.K. amendments available, including the British North America Act, 1867, and these appear in the appendices to the consolidated federal statutes, they are not official French versions because the statutes were enacted only in English. The only parts of the Constitution for which there are at present official French versions are those which have been enacted by the Canadian Parliament, such as the Manitoba Act, the Saskatchewan Act, and the Alberta Act, as well as certain amendments to the Constitution of the Province of Quebec (and perhaps to some extent, some of those of Manitoba - which will be extended as that province translates its statutes to comply with the recent Supreme Court decision).

English and French versions

55. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 54, the English and French versions of that portion of the Constitution are equally authoritative.

55. Les versions française et anglaise des parties de la Constitution du Canada adoptées dans ces deux langues ont également force de loi. En outre, ont également force de loi, dès l'adoption, dans le cadre de l'article 54, d'une partie de la version française de la Constitution, cette partie et la version anglaise correspondante.

Versions française et anglaise

English and French versions

56. The English and French versions of this Act are equally authoritative.

56. Les versions française et anglaise de la présente loi ont également force de loi.

Versions française et anglaise

Section 55 - Provides that: (1) where there already exist statutes enacted in both French and English, the two versions are equally authoritative; (2) when new amendments are enacted, both language versions will be equally authoritative; and (3) that when a French version is enacted pursuant to section 54, it will be equally authoritative with the English.

Section 56 - Provides that the French and English version of this Act, the Constitution Act, 1980, are equally authoritative.

Commencement

57. Subject to section 58, this Act shall come into force on a day to be fixed by proclamation issued by the Governor General under the Great Seal of Canada.

57. Sous réserve de l'article 58, la présente loi entre en vigueur au jour fixé par proclamation du gouverneur général sous le grand sceau du Canada.

Entrée en vigueur

Exception respecting amending formula

58. Part V shall come into force as provided in Part IV.

58. La partie V entre en vigueur dans les conditions prévues à la partie IV.

Exception à l'égard des procédures de modification

Citations

59. This Schedule may be cited as the *Constitution Act, 1980* and the Constitution Acts, 1867 to 1975 (No. 2) and this Act may be cited together as the *Constitution Acts, 1867 to 1980*.

59. Titre de la présente annexe: *Loi constitutionnelle de 1980*; titre commun des lois constitutionnelles de 1867 à 1975 (nº 2) et de la présente loi: *Lois constitutionnelles de 1867 à 1980*.

Titres

Entrée en vigueur

Exception à l'égard des procédures de modification

Titres

Section 57 - Coming into Force of Constitution Act

Provides that the Constitution Act, 1980 will come into force when proclaimed in force by the Governor General.

Section 58 - Coming into Force of Part V

Refers to the special procedures for bringing the "final" amending formula in Part V into force set out in section 37.

Section 59 - Citation

The section refers to "this Schedule" instead of "this Act" because the Constitution Act, 1980 is Schedule B to the Canada Act.

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PROPOSED RESOLUTION FOR JOINT ADDRESS RESPECTING THE CONSTITUTION OF CANADA - BRIEFING BOOK USE IN PARLIAMENT, OCTOBER 1980 (2/)

A

TAB A

LIST OF UNITED KINGDOM AMENDMENTS TO THE CANADIAN CONSTITUTION

(1) *The Rupert's Land Act, 1868* authorized the acceptance by Canada of the rights of the Hudson's Bay Company over Rupert's Land and the North-Western Territory. It also provided that, on Address from the Houses of Parliament of Canada, the Crown could declare this territory part of Canada and the Parliament of Canada could make laws for its peace, order and good government.

(2) *The British North America Act of 1871* ratified the Manitoba Act passed by the Parliament of Canada in 1870, creating the province of Manitoba and giving it a provincial constitution similar to those of the other provinces. The British North America Act of 1871 also empowered the Parliament of Canada to establish new provinces out of any Canadian territory not then included in a province; to alter the boundaries of any province (with the consent of its legislature), and to provide for the administration, peace, order and good government of any territory not included in a province.

(3) *The Parliament of Canada Act of 1875* amended section 18 of the British North America Act, 1867, which set forth the privileges, immunities and powers of each of the Houses of Parliament.

(4) *The British North America Act of 1886* authorized the Parliament of Canada to provide for the representation in the Senate and the House of Commons of any territories not included in any province.

(5) *The Statute Law Revision Act, 1893* repealed some obsolete provisions of the British North America Act of 1867.

(6) *The Canadian Speaker (Appointment of Deputy) Act, 1895* confirmed an Act of the Parliament of Canada which provided for the appointment of a Deputy-Speaker for the Senate.

(7) *The British North America Act, 1907* established a new scale of financial subsidies to the provinces in lieu of those set forth in section 118 of the British North America Act of 1867. While not expressly repealing the original section, it made its provisions obsolete.

(8) *The British North America Act, 1915* re-defined the Senatorial Divisions of Canada to take into account the provinces of Manitoba, British Columbia, Saskatchewan and Alberta. Although this statute did not expressly amend the text of the original section 22, it did alter its effect.

(9) *The British North America Act, 1916* provided for the extension of the life of the current Parliament of Canada beyond the normal period of five years.

(10) *The Statute Law Revision Act, 1927* repealed additional spent or obsolete provisions in the United Kingdom statutes, including two provisions of the British North America Acts.

(11) *The British North America Act, 1930* confirmed the natural resources agreements between the Government of Canada and the Governments of Manitoba, British Columbia, Alberta and Saskatchewan, giving the agreements the force of law notwithstanding anything in the British North America Acts.

(12) *The Statute of Westminster, 1931* while not directly amending the British North America Acts, did alter some of their provisions. Thus, the Parliament of Canada was given the power to make laws having extraterritorial effect. Also, Parliament and the provincial legislatures were given the authority, within their powers under the British North America Acts, to repeal any United Kingdom statute that formed part of the law of Canada. This authority, however, expressly excluded the British North America Act itself.

(13) *The British North America Act, 1940* gave the Parliament of Canada the exclusive jurisdiction to make laws in relation to Unemployment Insurance.

(14) *The British North America Act, 1943* provided for the postponement of redistribution of the seats in the House of Commons until the first session of Parliament after the cessation of hostilities.

(15) *The British North America Act, 1946* replaced section 51 of the British North America Act, 1867, and altered the provisions for the readjustment of representation in the House of Commons.

(16) *The British North America Act, 1949* confirmed the Terms of Union between Canada and Newfoundland.

(17) *The British North America Act (No. 2), 1949* gave the Parliament of Canada authority to amend the Constitution of Canada with certain exceptions.

(18) *The Statute Law Revision Act, 1950* repealed an obsolete section of the British North America Act, 1867.

(19) *The British North America Act, 1951* gave the Parliament of Canada concurrent jurisdiction with the provinces to make laws in relation to Old Age Pensions.

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(20) *The British North America Act, 1960* amended section 99 and altered the tenure of office of superior court judges.

(21) *The British North America Act, 1964* amended the authority conferred upon the Parliament of Canada by the British North America Act, 1951, in relation to benefits supplementary to Old Age Pensions.

(22) *Amendment by Order in Council*

Section 146 of the British North America Act, 1867 provided for the admission of other British North American territories by Order in Council and stipulated that the provisions of any such Order in Council would have the same effect as if enacted by the Parliament of the United Kingdom. Under this section, Rupert's Land and the North-Western Territory were admitted by Order in Council on June 23rd, 1870; British Columbia by Order in Council on May 16th, 1871; Prince Edward Island by Order in Council on June 26th, 1873. Because all of these Orders in Council contained provisions of a constitutional character—adapting the provisions of the British North America Act to the new provinces, but with some modifications in each case—they may therefore be regarded as constitutional amendments.

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PROPOSED RESOLUTION FOR JOINT ADDRESS RESPECTING THE (2/)
CONSTITUTION OF CANADA - BRIEFING BOOK USE IN PARLIAMENT,
OCTOBER 1980

B

TAB B

STATUTE OF WESTMINSTER

No. 26

THE STATUTE OF WESTMINSTER, 1931

22 George V, c. 4 (U.K.)

An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930

[11th December, 1931]

Whereas the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences:

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom:

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained:

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

No 26

STATUT DE WESTMINSTER, 1931

22 George V, c. 4 (R.-U.)

Loi donnant effets à certains vœux formulés par les Conférences impériales de 1926 et de 1930

[11 décembre 1931]

Considérant que les délégués des Gouvernements de Sa Majesté du Royaume-Uni, du Dominion du Canada, du Commonwealth d'Australie, du Dominion de la Nouvelle-Zélande, de l'Union Sud-Africaine, de l'État libre d'Irlande, et de Terre-Neuve, aux Conférences impériales tenues à Westminster en les années de Notre-Seigneur mil neuf cent vingt-six et mil neuf cent trente, ont concouru aux énoncés et aux vœux formulés dans les rapports desdites Conférences;

Considérant qu'il est expédient et à propos, puisque la Couronne est le symbole de la libre association des membres de la Communauté des nations britanniques et que ces dernières se trouvent unies par une allégeance commune à la Couronne, d'exposer sous forme de préambule à la présente loi qu'il serait conforme au statut constitutionnel consacré de tous les membres de la Communauté dans leurs rapports réciproques, de statuer que toute modification de la Loi relative à la succession au Trône ou au Titre royal et aux Titres doit recevoir désormais l'assentiment aussi bien des Parlements de tous les Dominions que du Parlement du Royaume-Uni;

Considérant qu'il est conforme au statut constitutionnel consacré de statuer que nulle loi émanant désormais du Parlement du Royaume-Uni ne doit s'étendre à l'un quelconque desdits Dominions comme partie de la législation de ce Dominion, sauf à la demande et avec l'agrément de celui-ci;

Considérant que la ratification, la confirmation et la mise à effet de certains desdits énoncés et vœux desdites Conférences nécessitent la confection et l'adoption, par autorité du Parlement du Royaume-Uni, d'une loi en bonne et due forme;

Considérant que le Dominion du Canada, le Commonwealth d'Australie, le Dominion de la Nouvelle-Zélande, l'Union Sud-Africaine, l'État libre d'Irlande, et Terre-Neuve ont solidairement demandé et agréé de saisir le Parlement du Royaume-Uni d'une mesure tendant à statuer, quant aux questions susdites, dans le sens prescrit ci-après dans la présente loi:

A ces causes, qu'il soit édicté ce qui suit par Sa Très Excellente Majesté le Roi, de l'avis et du consentement et par autorité des lords spirituels et temporels et des communes en le présent Parlement assemblés:

Meaning of "Dominion" in this Act

1. In this Act the expression "Dominion" means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

Signification du mot «Dominion» dans la présente loi

1. Dans la présente loi l'expression «Dominion» signifie l'un quelconque des Dominions suivants: le Dominion du Canada, le Commonwealth d'Australie, le Dominion de la Nouvelle-Zélande, l'Union Sud-Africaine, l'État libre d'Irlande, et Terre-Neuve.

Validity of laws made by Parliament of a Dominion. 28 & 29 Vict. c. 63

2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

Validité des lois émanées du Parlement d'un Dominion. 28 et 29 Vict. ch. 63

2. (1) La Loi de 1865 relative à la validité des lois des colonies ne doit s'appliquer à aucune loi adoptée par le Parlement d'un Dominion postérieurement à la proclamation de la présente loi.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

(2) Nulle loi et nulle disposition de toute loi édictée postérieurement à la proclamation de la présente loi par le Parlement d'un Dominion ne sera invalide ou inopérante à cause de son incompatibilité avec la législation d'Angleterre, ou avec les dispositions de toute loi existante ou à venir émanée du Parlement du Royaume-Uni, ou avec tout arrêté, statut ou règlement rendu en exécution de toute loi comme susdit, et les attributions du Parlement d'un Dominion comprendront la faculté d'abroger ou de modifier toute loi ou tout arrêté, statut ou règlement comme susdit faisant partie de la législation de ce Dominion.

Power of Parliament of Dominion to legislate extra-territorially

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

Pouvoir du Parlement d'un Dominion de légiférer extra-territorialement

3. Il est déclaré et statué par les présentes que le Parlement d'un Dominion a le plein pouvoir d'adopter des lois d'une portée extra-territoriale.

Parliament of United Kingdom not to legislate for Dominion except by consent

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to the enactment thereof.

Le Parlement du Royaume-Uni ne doit légiférer pour un Dominion que du consentement de celui-ci

4. Nulle loi du Parlement du Royaume-Uni adoptée postérieurement à l'entrée en vigueur de la présente Loi ne doit s'étendre ou être censée s'étendre à un Dominion, comme partie de la législation en vigueur dans ce Dominion, à moins qu'il n'y soit expressément déclaré que ce Dominion a demandé cette loi et a consenti à ce qu'elle soit édictée.

Powers of Dominion Parliaments in relation to merchant shipping. 57 & 58 Vict. c. 60

5. Without prejudice to the generality of the foregoing provisions of this Act, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

Pouvoirs des Parlements des Dominions relativement à la Marine marchande. 57 et 58 Vict. c. 60

5. Sans préjudice de l'ensemble des dispositions précédentes de la présente Loi, les articles sept cent trente-cinq et sept cent trente-six de la Loi de la Marine marchande, de 1894, doivent être interprétés comme si la mention de la Législature d'une possession britannique ne s'appliquait pas au Parlement d'un Dominion.

A.D. 1931.

Powers of Dominion Parliaments in relation to Courts of Admiralty. 53 & 54 Vict. c. 27

6. Without prejudice to the generality of the foregoing provisions of this Act, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

Pouvoirs des Parlements des Dominions relativement aux Cours d'amirauté. 53 et 54 Vict., c. 27

6. Sans préjudice de l'ensemble des dispositions précédentes de la présente Loi, et dès la mise en vigueur de celle-ci, doivent cesser d'avoir effet dans les Dominions: l'article quatre de la Loi relative aux cours coloniales d'amirauté, de 1890, (qui exige que certaines lois soient réservées en attendant la signification du bon plaisir de Sa Majesté, ou contiennent une clause suspensive), et la partie de l'article sept de ladite loi qui exige l'approbation par Sa Majesté en son conseil de toute règle de cour concernant la pratique et la procédure d'une cour coloniale d'amirauté.

Saving for British North America Acts and application of the Act to Canada

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

Exception dans le cas des Actes de l'Amérique du Nord britannique et application de la Loi au Canada

7. (1) Rien dans la présente Loi ne doit être considéré comme se rapportant à l'abrogation ou à la modification des Actes de l'Amérique du Nord britannique, 1867 à 1930, ou d'un arrêté, statut ou règlement quelconque édicté en vertu desdites Actes.

(2) Les dispositions de l'article deux de la présente Loi doivent s'étendre aux lois édictées par les provinces du Canada et aux pouvoirs des législatures de ces provinces.

(3) Les pouvoirs que la présente Loi confère au Parlement du Canada ou aux législatures des provinces ne les autorisent qu'à légiférer sur des questions qui sont de leur compétence respective.

Saving for Constitution Acts of Australia and New Zealand

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

Exception dans le cas des Lois constitutionnelles de l'Australie et de la Nouvelle-Zélande

8. Rien dans la présente Loi n'est censé conférer le pouvoir d'abroger ou de modifier la Constitution ou la Loi constitutionnelle du Commonwealth d'Australie ou la Loi constitutionnelle du Dominion de la Nouvelle-Zélande autrement qu'en conformité de la loi existant avant la mise à effet de la présente Loi.

Saving with respect to States of Australia

9. (1) Nothing in this Act shall be deemed to authorize the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth.

A.D. 1931

Exception dans le cas des Etats de l'Australie

9. (1) Rien dans la présente Loi ne doit être considéré comme autorisant le Parlement du Commonwealth d'Australie à légiférer sur toute question qui tombe sous l'autorité des Etats de l'Australie et qui échappe à l'autorité du Parlement ou du Gouvernement du Commonwealth d'Australie.

(2) Rien dans la présente Loi ne doit être considéré comme exigeant le consentement du Parlement ou du Gouvernement du Commonwealth d'Australie à une loi quelconque du Parlement du Royaume-Uni touchant toute question qui tombe sous l'autorité des Etats de l'Australie et qui échappe à l'autorité du Parlement ou du Gouvernement du Commonwealth d'Australie, dans tous cas où l'adoption de cette loi par le Parlement du Royaume-Uni sans ledit consentement aurait été conforme à la coutume constitutionnelle existant antérieurement à la mise en vigueur de la présente Loi.

(3) Dans l'application de la présente Loi au Commonwealth d'Australie, la demande et le consentement visés à l'article quatre sont la demande et le consentement du Parlement et du Gouvernement du Commonwealth d'Australie.

Certain sections of Act not to apply to Australia, New Zealand or Newfoundland unless adopted

10. (1) None of the following sections of this Act, that is to say, sections two, three, four, five and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

Certains articles de la Loi ne s'appliquent pas à l'Australie, à la Nouvelle-Zélande ou à Terre-Neuve, à moins qu'il n'aient été adoptés

10. (1) Aucun des articles suivants de la présente Loi, savoir les articles deux, trois, quatre, cinq et six, ne doit s'étendre à un Dominion auquel s'applique le présent article comme partie de la législation de ce Dominion, à moins que l'article en question ne soit adopté par le Parlement du Dominion, et toute loi de ce Dominion adoptant un article quelconque de la présente Loi peut pourvoir à ce qu'elle prenne effet, soit le jour de la mise en vigueur de la présente Loi, soit à telle date ultérieure que la loi d'adoption spécifiera.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in subsection (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand and Newfoundland.

(2) Le Parlement de tout Dominion susdit peut en tout temps abroger tout article visé au paragraphe (1) du présent article.

(3) Les Dominions auxquels s'applique le présent article sont le Commonwealth d'Australie, le Dominion de la Nouvelle-Zélande et Terre-Neuve.

Meaning of "Colony" in future Acts. 52 & 53 Vict. c. 63

11. Notwithstanding anything in the Interpretation Act, 1889, the expression "Colony" shall not, in an Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

Signification du mot «Colonie» dans les lois à venir. 52 et 53 Vict., c. 63

11. Nonobstant toute disposition contraire de l'*Interpretation Act* de 1889, l'expression «Colonie» ne doit, dans aucune loi du Parlement du Royaume-Uni adoptée après l'entrée en vigueur de la présente Loi, s'appliquer à un Dominion ou une province ou un Etat quelconque faisant partie d'un Dominion.

Short title

12. This Act may be cited as the Statute of Westminster, 1931.

Titre abrégé

12. La présente Loi peut être citée sous le titre de Statut de Westminster, 1931.

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PROPOSED RESOLUTION FOR ... CONSTITUTION OF CANADA - BRIEFING BOOK USE IN PARLIAMENT, OCTOBER 1980

C

TAB C

LEGALITY OF UNILATERAL PATRIATION

There are two main grounds on which those opposed to the Proposed Resolution are likely to seek to challenge its constitutional validity. The first possible line of attack would be based on arguments concerning the alleged internal constitutional conventions for requesting amendments to the BNA Acts. The second would be based on arguments concerning the requirement for amendments to the Statute of Westminster. The Canada Act amends both the British North America Acts and the Statute of Westminster.

Amendments to B.N.A. Acts

With regard to the first line of attack it might be noted at the outset that there is no precedent for patriation or the adoption of an amending formula since this has never happened before. One can at best draw analogies from practices followed to achieve other amendments. In this regard, most amendments have been made at the request of the Parliament and Government of Canada without any involvement of the provinces. However, amendments altering the distribution of powers (1940, 1951, 1964) and the retirement age of judges of provincial superior courts (1960) were made with the consent of all provinces.

Various commentators have interpreted this evidence and expressed different views on the strength or scope of any requirement for agreement of the provinces for fundamental constitutional changes. Perhaps the most potentially embarrassing interpretation is that set forth in the February 1965 publication of the Minister of Justice, Honourable Guy Favreau, The Amendment of the Constitution of Canada. After summarizing the history of past amendments it suggested four general principles that emerged, of which the fourth was as follows:

> "The fourth general principle is that the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definition."

This suggested "principle", it will be argued, is an authoritative statement of a constitutional convention and an admission by the federal government of the necessity for agreement with the provinces for amendments "directly affecting federal-provincial relationships" (which a new amendment procedure and changes such as a Charter binding the provinces would arguably involve).

Moreover, the Supreme Court of Canada in its December, 1979, judgment in the Senate Reference quoted this "fourth general principle" and implied an expectation, at least, that fundamental changes affecting the provinces would be sought from the U.K. only after agreement with the provinces. While this was not relevant to the questions the Court was asked to answer in that reference, it does indicate that, should the occasion arise, the Court might give a good deal of weight to the Favreau statement of the constitutional conventions as to the amendment of the BNA Acts.

Emphasis must be given, however, to the fact that the Supreme Court of Canada, in the Senate Reference, was strictly dealing with the ability of Parliament itself to make an amendment to the BNA Act pursuant to section 91(1) of that Act. It did not deal with the authority of the United Kingdom Parliament to enact legislation. In addition, the issue of the rules governing the manner of making a request to London for constitutional amendment was not before the Court.

Even assuming a case could be made that by convention no major changes affecting federal-provincial relationships should be sought without the agreement of the provinces, there is very strong authority for the proposition that constitutional conventions are not enforceable by the Courts. Conventions, at least in domestic law, are "non-legal" rules of conduct which do not give rise to any "legal" obligation of compliance. As the Favreau document itself says, at page 11, by way of preface to the description of past practices and the four "principles" which it derives from them "Though not constitutionally binding in any strict sense, they [the practices] have come to be recognized and accepted in practice as part of the amendment process in Canada."

This is not to say that there may not be some legitimate recognition by the courts of conventions. They may be used by them in the process of interpreting a statute. Conventions may also be determinative in international law, since state practice and its acceptance by others may in due course establish rights in international law recognizeable by courts. For example, in the Labour Conventions case, Duff, C.J. used a convention as an interpretive guide to determine the status of Canada on the international plane as this status had evolved over the years. This, however, is very different from applying a convention to establish an internal constitutional rule or law. In matters of domestic law, even if conventions are broken, no court will take notice of their violation. As non-legal rules, conventions do not affect the legal authority of a Parliament, and thus could not prevent the U.K. Parliament from enacting legislation requested solely by the Parliament and Government of Canada. In this regard, there is a very relevant precedent decided by the Privy Council on an appeal from Rhodesia in 1969, Madzimbamuto v. Lardner-Burke [1969] 1 A.C. 645. The British Government, in a publication of 1961, had stated that it had "become an established convention" for the British Parliament not to legislate for Southern Rhodesia on matters within the competence of its legislature except with the agreement of the Southern Rhodesia government. Notwithstanding this convention, the U.K. Parliament, immediately following Mr. Smith's Unilateral Declaration of Independence, enacted a measure overriding the previous constitution of Southern Rhodesia and empowering the Queen in Council to provide for its governance. When the validity of a subsequent Order in Council was challenged, in part on the basis that by the 1961 statement of Convention the U.K. Parliament was precluded from the action it took in 1965, the Judicial Committee rejected this argument. Of the convention, the Committee said:

> "That was a very important convention but it had no legal effect in limiting the legal power of Parliament."

It is hard to imagine the Supreme Court of Canada coming to a different conclusion and giving legal effect to conventions so as to hold invalid or inapplicable in Canada an Act of the U.K. Parliament concerning a subject on which that Parliament clearly has jurisdiction to legislate.

TAB C

Legal Positions on Patriation
- Questions and Answers -

CONFIDENTIAL

2A

November 6, 1980

ADDENDUM RE B.N.A. ACT, 1949
(NEWFOUNDLAND TERMS OF UNION)
REGARDING CASE OF JOHN STUART CURRIE VS.
SIR GORDON MACDONALD (UNREPORTED)

The following points provide details relating to the fact that in 1949 a joint address was presented to the British Parliament and the British Parliament enacted the B.N.A. Act, 1949 despite pending litigation challenging the constitutionality of such enactment.

1. On November 13, 1948 six Newfoundland residents started this action against the Governor of the Colony and his six advisors who formed the Commission challenging the constitutionality of the Canada-Newfoundland union process.

2. The case was dismissed at the trial level (December 13, 1948) and unanimously in the Newfoundland Court of Appeal (February 21, 1949) as being frivolous and vexatious.

3. The case was not referred to in the Canadian Parliamentary debates (February 7 to February 17, 1949).

4. On the same day the U.K. Parliament began debate on the B.N.A. (Amendment) Bill (now the B.N.A. Act, 1949), (March 2, 1949), the Newfoundland Court of Appeal granted leave to appeal to the Privy Council.

5. In the British Parliamentary Debates the question was raised of the propriety of proceeding to enact the Bill before the case had been considered by the Privy Council.

6. In the Lower House the Attorney General, Sir Hartley (later Lord) Shawcross, pointed out there were precedents for Parliament proceeding with legislation while relevant appeals were pending to the Court of Appeal or to the House of Lords in Britain and the government "did not think it right that the action of a sovereign Parliament should be delayed or impeded by an action defined by the Supreme Court as a frivolous and vexatious action".

7. In the House of Lords, Viscount Simon, previously Lord Chancellor, said, "there was never a more astounding effort to get a political question decided by a court of law than exists in this particular litigation".

8. The Act was passed on March 22, 1949 and received the Royal Assent on March 23, 1949.

9. The appeal to the Privy Council was withdrawn on May 27, 1949.

Section 38(3) - Provides that where the required number of provincial consents to an alternative proposal for the provincial component for the amending formula are filed, at the end of two years after the Constitution Act comes into force, the Government of Canada shall ensure that a referendum is held giving the people of Canada the choice between that alternative and such one as might be preferred by the federal government.

It is probable that the federal government's preferred alternative would be the modified Victoria proposal now set out in section 41(1)(b) since:

- it is similar to the one which has been agreed to at one time at least by all provincial governments;
- it provides for a guaranteed regional balance;
- yet it is not overly rigid as would be a provision for unanimous consent of all provincial legislatures.

Nevertheless, an alternative proposal might come forward from the provinces pursuant to subsection 38(1) and (2) which would lead the federal government to think that something other than the present section 41(1)(b) was most appropriate and there is therefore flexibility built in by section 38(3) to allow the federal government to propose an alternative to the modified Victoria proposal set out in section 41.

Should the federal government agree with a provincial alternative, proposed by 8 or 9 but not agreed to by all 10 provinces, then a referendum would have to be held asking the people whether they preferred that alternative or the modified Victoria Charter proposals as set out in section 41(1)(b).

Addendum | The question may arise as to why it is necessary to hold a referendum on the amending formula where 8 or 9 of the provinces with more than 80% of the population have all agreed upon a new amending formula which is found acceptable to the federal government. Since this degree of agreement would exceed that contemplated under the permanent (Victoria) amending formula, wouldn't it be sufficient to enable the proposed new formula to be adopted over the dissent of one or two provinces without a referendum?

There are perhaps two answers to this. First, during the interim amending period the general rule for amending the constitution, including the amending formula itself, is that of unanimity. Consequently, it would be a breach of this rule to enable the adoption of a new amending formula over the objection of one or two provinces.

Following this approach, one could equally argue that a new amending formula should be adopted if the requirements of the Victoria formula are met, ie. agreement of the federal government and six provinces meeting the population qualifications of section 41.

Second, the prospect of a referendum where not all the provinces agree places strong pressure on the provinces to come up with a unanimous proposal for an alternative referendum during the initial two year period that would also be acceptable to the federal government.

Further, even if there were an "internal" convention requesting provincial consent to major constitutional amendments, this is not legally relevant to the question of the validity and/or applicability in Canada of the U.K. statute amending the B.N.A. Act since the U.K. authorities are not bound by internal Canadian practices. The only relevant convention, insofar as the U.K. authorities are concerned, is that the U.K. Government is obliged not to ask the U.K. Parliament to pass a law altering the B.N.A. Acts otherwise than at the request and with the consent of the "Dominion" of Canada. "Dominion" in the past has always been considered to be the Government, or the Government and Parliament of Canada. Hence, the U.K. Parliament would respect the only convention directly relevant to the enactment of the statute amending the B.N.A. Act in acting upon the mere request and consent of the Government and Parliament of Canada.

Further, it is abundantly clear that the federal government and only the federal government can request amendments to the Constitution from Westminster.

(a) In 1868 a Nova Scotian delegation sought the withdrawal of Nova Scotia from Confederation. They were referred back to Ottawa by the British Secretary for the Colonies.

(b) In 1874 British Columbia carried to Westminster a petition relating to non-performance of the terms on which that colony had entered Confederation. The province was rebuffed.

(c) In 1877 Prince Edward Island appealed unsuccessfully for British intervention.

(d) In 1886 Prince Edward Island protested against non-compliance with the terms of entry into Union. The Colonial Secretary declined to advise the Queen.

(e) In 1887 New Brunswick, Nova Scotia, Ontario, Quebec and Manitoba unanimously agreed upon 18 resolutions proposing amendments to the B.N.A. Act. No action was taken by the British government.

(f) In 1907 the federal government obtained an amendment to the B.N.A. Act increasing federal subsidies to the provinces despite a formal protest by British Columbia to London.

(g) In 1943 an amendment to postpone the redistribution of seats in the House of Commons was obtained despite Quebec's formal protest.

Amendments to Statute of Westminster

The second line of attack would be based on arguments concerning the manner of requesting amendments to the Statute of Westminster. The Canada Act will repeal sections 4 and 7(1) of the Statute of Westminster:

> "4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to the enactment thereof.
>
> 7(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder."

In the Canadian context, what is a "Dominion" request or consent under section 4? The request of the Government of Canada? Of the Parliament of Canada? Or of these plus the provinces? Statements of that era in both the British and Canadian Parliaments indicate that the ambiguous word "Dominion" was used to leave flexibility, being capable of meaning either the federal Government or Parliament or both but permitting a request and consent by the Government alone should circumstances so require. Indeed, circumstances did so require when in December, 1936, the government of Mr. King gave consent to the enactment of the necessary British legislation to approve the abdication of King Edward VIII and to alter the succession to the Throne (thus changing the King of Canada as well as of the U.K.).

Thus, one might conclude, the "Dominion" (represented by the Government and Parliament of Canada) could proceed to request and consent to the necessary amendments to the Statute of Westminster. However, Saskatchewan suggested during the argument of the Senate Reference that a request and consent under section 4 of that Act would have to involve the provinces. While the basis of this proposition was not elaborated there, it could be argued that section 7 of the Statute of Westminster was originally enacted on the basis of the agreement of all provinces and its alteration should equally have that agreement. That there was such prior provincial agreement cannot be denied. The Imperial Conference of 1930, (presumably on the initiative of Prime Minister R. B. Bennett) had placed on record the view that the critical sections of the proposed Statute of Westminster should not apply to Canada "except in response to such requests as are appropriate to an amendment of the British North America Act." A federal-provincial conference of April, 1931, then approved the terms of section 7 of the Statute and the subsequent Joint Address of the Senate and House of Commons requesting its enactment recorded the fact of this agreement. Therefore provinces would at least have a debating point that no request for the repeal of section 7 of the Statute should now be made without their agreement. However, the force of this argument depends on the binding form of conventions and, as stated above, they have none.

Conclusion

In conclusion, it is within the legal authority of the U.K. Parliament to amend the B.N.A. Act and the Statute of Westminster, 1931 with respect to Canada. The former can be done legally without any Canadian consent (even though, by constitutional convention, the U.K. Government is obliged not to ask Parliament to pass a law altering the B.N.A. Acts otherwise than at the request and with the consent of the "Dominion" of Canada), and the latter can be done legally pursuant to s.4 of the Statute of Westminster with the express request and consent of the "Dominion" (probably the Government, or the Government and Parliament, of Canada) duly recorded in the amending statute. That consent is recorded in the proposed preamble to the Canada Act which commences "Whereas Canada has requested and consented to the enactment....".

CONFIDENTIAL
October 20, 1980

Legal Position on Patriation -
Questions and Answers

Q. Is the Government of Canada satisfied that it can legally proceed, as proposed, with a patriation measure, an amendment formula, and a Charter, without approval of all the provinces?

A. Yes. As we see it, the position is as follows:

(1) The two Houses of Parliament are perfectly entitled to pass a resolution on this or any other subject. There are no legal limitations on adopting resolutions.

(2) The British Parliament retains full legal sovereignty over the entrenched parts of our Constitution. That sovereignty was preserved by the Statute of Westminster, 1931.

(3) The well-established British convention is that if the two Houses of the Parliament of Canada request an amendment to our constitution, the British Parliament will enact it. They do not act on the request or advice of the provinces.

(4) There is no convention in Canada that says that the federal Parliament should not request patriation, etc. without full provincial agreement. There is no precedent for this situation. Past practice has varied a great deal concerning amendments affecting the provinces. The provinces may argue that there is such a convention and that it is "illegal" to act without unanimous provincial agreement. Even if they attempt to show that there is such a convention, conventions are rules of political conduct, not rules of law.

Moreover, we have tried to get agreement with the provinces for 53 years - ever since the Balfour Declaration of 1926 said that we are sovereign in fact - and agreement has been impossible. Federal-provincial discussions on patriation and an amendment formula have been held unsuccessfully

- in 10 different attempts to resolve the problem including
  - 13 first ministers meetings
  - 17 ministerial meetings
  - numerous meetings of officials
- under 6 Prime Ministers (2 Conservative, 4 Liberal).

Even constitutional conventions have to change with circumstances when they are shown to be unworkable!

Q. Does the federal government intend to refer to the Supreme Court the question of the validity of its unilateral patriation action? If not, why not?

[see p. 2 for possible question about a reference at the request of the provinces]

A. No.

(1) You only refer questions where there is serious doubt about the validity of action proposed.

(2) This would be a very difficult issue for the Court to deal with. The main argument the provinces appear to be making is that such action is contrary to Canadian constitutional conventions, but those are rules of political practice, not rules of law. The Court would have to try to say what the political practice is or what it should be.

(3) Such a reference would be unnecessary and could delay the whole process. The people of Canada want action now. If anybody thinks they have some case to make in Court against it, they can certainly try to do so. But you don't hold up legislation or government action every time somebody, somewhere, thinks he can make some legal argument against it.

(4) We have said that we are prepared to consider changes in the resolution as a result of its study in the Joint Committee and the debates in Parliament. It would not make sense for the Court to be considering the legality of something which is subject to change.

Q. <u>If the provinces request the federal government to refer the validity of its patriation action to the Supreme Court, what will the government do?</u>

A. We did not think it necessary to take a reference, ourselves. As I understand the decision of the 5 premiers in Toronto on October 14, they do not intend to ask us to take such a reference, but plan to initiate some action on their own.

Q. <u>What will the government do if the provinces take one or more references to provincial courts? Will you hold up further proceedings with the Joint Address until these references are over? Will the federal government take part in proceedings before the provincial courts?</u>

A. I don't foresee us holding up action in Parliament just because some province thinks it needs to consult its court. At that rate we could wait for years until every province had had one or more references on this question. If we held up action in Parliament every time some province wanted to take a reference to its courts about something we are considering here, Parliament could be effectively obstructed by one or more provinces from doing anything. It is also premature for the provinces to refer the resolution to their courts because it is subject to change here in Parliament. They may be asking completely hypothetical questions.

As for federal participation, we would have to consider all the circumstances, including the nature of the questions and whether they really raise any legal issue.

...3

Q. Do you think the British government and Parliament will refuse to proceed with patriation if the provinces are challenging the legal validity in Canada?

A. I am confident the British government will act in Canadian matters on the advice of the Government of Canada, on legal issues as well as on other matters. It is the way in which relations have been carried on in the past concerning our constitutional affairs.

Q. Has the Supreme Court not already decided in the Senate Reference (December, 1979) that the Parliament of Canada cannot amend the entrenched parts of the Constitution without the consent of the provinces?

A. (1) The Supreme Court dealt in that case with the legislative authority of the Parliament of Canada. The Court said that this Parliament did not have the power under s.91(1) of the B.N.A. Act to make such amendments - only the British Parliament has such jurisdiction. What is involved now is a proposal for an amendment by the British Parliament which, as the Supreme Court confirmed in the Senate Reference, has the sole jurisdiction to enact it.

(2) The Supreme Court did not decide the question of what amendments the two Houses of the Parliament of Canada can request from Westminster. It only dealt with what the Parliament of Canada can enact under the authority of s.91(1) of the B.N.A. Act.

(3) What the Supreme Court was asked to do in that case was to interpret a specific provision of the Constitution, s.91(1), concerning the scope of Parliament's legislative authority. That was clearly a question of law. What the provinces want to refer to the courts is a question concerning the constitutional conventions with respect to provincial consent for amendments to the constitution. This really involves matters of political practice. This is not a question of law but a political question.

Q. What position will the government take in the Manuel case in B.C. where some B.C. Indian chiefs are suing the government in the Federal Court for a declaration that patriation should not proceed unless native peoples agree?

A. As that is a matter already before the court I should not say much. However, as I understand it, the concern of the plaintiffs in that case is about a possible change in the role of the Queen. The action was started before our proposed resolution was made public. The proposed resolution does not in any way affect the role of the Queen. It only affects the role of the British Parliament.

...4

Q. What about Newfoundland's argument that it joined Confederation by agreement and the agreement can't be changed unilaterally?

A. By the Terms of Union Newfoundland became a province like all the others, subject to certain special terms that are not affected by our proposals.

Newfoundland can hardly insist that constitutional change is impossible without unanimous agreement. It was brought into Confederation without the agreement of any other province. Yet Quebec's border with Labrador was confirmed by the Terms of Union, and the interests of all provinces were affected by changes such as the addition of Senators and M.P.'s.

It is true that s. 146 of the B.N.A. Act contemplated admission of Newfoundland by Imperial Order in Council at the request only of its legislature and of the Parliament of Canada. But that was no longer relevant in 1949 as Newfoundland was under British trusteeship because of its financial difficulties and it had no legislature to make such a request. Also, by 1949 the "conventions" that the provinces now argue for should have required the consent of other provinces to the B.N.A. Act, 1949 that admitted Newfoundland.

CONFIDENTIAL
October 20, 1980

RESPONSE TO ARGUMENTS CONCERNING CONSTITUTIONAL CONVENTIONS

I - Constitutional Conventions Are Not "Legally" Binding

1. On various occasions, Professor Lederman made the argument that the breach of a constitutional convention would be unconstitutional and illegal and that the courts would be bound to invalidate a law enacted in disregard of such convention.

2. It is clear that constitutional conventions are not legally binding. They are "non-legal" rules of conduct which do not give rise to any "legal" obligation of compliance. If they are broken, no court will take notice of their violation. In Madzimbamuto v. Lardner-Burke, (1969) 1 A.C. 645, the Privy Council considered the effect of an admittedly established convention that the U.K. Parliament would not legislate for Southern Rhodesia in matters within the competence of its legislature except with the agreement of the Southern Rhodesia Government. As to this convention, the Judicial Committee said:

> "That was a very important Convention but it had no legal effect in limiting the legal power of Parliament. It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the Courts could not hold the Act of Parliament invalid."

This view of convention is also accepted by Professor Peter Hogg in his constitutional Law of Canada at p. 7 where he points out that:

> "Conventions are rule of the constitution which are not enforced by the law courts ... they are best regarded as non-legal rules."

Similarly Hood Phillips on Constitutional and Administrative Law (4th Edition) at page 77 describes constitutional conventions as:

> "rules of political practice which are regarded as binding by those to whom they apply but which are not laws as they are not enforced by the Courts or by the Houses of Parliament."

Therefore, it is clear that any so-called constitutional convention would have no legal effect on the power of the Senate and House of Commons to pass and present an address to the U.K. Parliament requesting amendments to the B.N.A. Act, and could not limit the legal power of the U.K. Parliament to enact the requested legislation. The breach of a constitutional convention might be viewed as politically improper. However, it would not be illegal.

3. This is not to say that there may not be some legitimate recognition by the courts of conventions. They may be used by them in the process of interpreting a statute. Similarly, a convention may be considered in determining whether or not there has been a crystallization of a rule of international law, for example, the process by which Canada became an independent country and was recognized as such in the international community: see (the Labour Convention case) Re Weekly Rest in Industrial Undertakings Act (1936) (S.C.C.). However, contrary to Professor Lederman's beliefs, such judicial references to constitutional conventions for such limited purposes constitute no support for the proposition that the legal rights and powers of the U.K. Parliament or of the Canadian Senate and House of Commons are impaired or affected by the existence of constitutional conventions.

II - The So-Called Constitutional Convention Requiring Provincial Consent to Constitutional Amendments

4. It is said that there is a constitutional convention binding the federal government to obtain the consent of the provinces before a request is sent to the U.K. government for amendments to the B.N.A. Act which directly affect "federal-provincial relationships".

5. It is quite uncertain whether historically such a general convention can be said to exist. It is true that amendments altering the distribution of powers (1940, 1951, 1964) were obtained with the consent of all provinces. It is not unusual, however, for the federal government to seek and obtain a constitutional amendment from Westminster despite the opposition of some of the provinces. For example, in 1907, the federal government obtained an amendment to the B.N.A. Act increasing federal subsidies to the provinces despite British Columbia's objections. Similarly, in 1949, the amendment admitting Newfoundland into Confederation was sought and obtained without consultation with the provinces despite provincial claims that the provinces should have been consulted and their consent sought.

6. Further, the so-called convention referred to above is so elusive that its scope cannot be precisely defined. This can raise serious doubts concerning its existence. Does this convention require acquiescence of all the provinces, or a majority of them, or of all but one? Professor Lederman,himself, during his appearance in 1978 before the Joint Parliamentary Committee on the constitution and in his writings, argued that the so-called convention does not require the consent of all the provinces but only "substantial compliance" with the requirements for provincial consent. He defined "substantial compliance" as the consent of Quebec, Ontario, Alberta and British Columbia; further, the dissent of three of the Atlantic Provinces, or of both Manitoba and Saskatchewan, would block substantial compliance. In sum, the so-called convention would encompass a conventional amending formula along the lines Professor Lederman suggested.

... 3

The main condition establishing a constitutional convention is the belief by those to whom it applies that the practice is obligatory. Does Newfoundland believe that the consent of British Columbia or Alberta is necessary, while its consent is not? Do the Atlantic provinces believe that the consent of three, rather than all of them, is necessary? Because of this imprecision, it is difficult to see how the parties supposedly bound by the so-called convention could feel obliged to do so. To what form of procedure, precisely, are the parties bound?

7. Even if the so-called convention exists, the argument may be made that the impossibility of proceeding in accordance with it has made it necessary to seek the contemplated amendments by alternative means. A convention may lose its (non-legal) binding force because of major changes in circumstances. It can be argued that such change has occurred as a result of continuous provincial dissents that lead to permanent dead-lock.

III - The White Paper of 1965

7. Professor Lederman has argued that the terms of the so-called constitutional convention have been embodied in the following "fourth general principle" set out in the February 1965 publication of the Minister of Justice, Honourable Guy Favreau, the Amendment of the Constitution of Canada.

> "The fourth general principle is that the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definition."

Professor Lederman has added that the Favreau White Paper had been viewed in draft form and agreed to as to its historic accuracy by the provincial governments, so that it is particularly strong evidence of the constitutional position.

8. Firstly, it can hardly be said that the provinces and the federal government had expressly agreed in 1965 that the fourth general principle embodied a constitutional convention. In tabling a copy of his correspondence with the provincial Premiers on the White Paper, Prime Minister Pearson stated in the House of Commons:

> "All the provinces have now agreed that the draft White Paper on the "Amendment of the constitution of Canada", which is to be published by the federal government, satisfactorily sets forth the history of the efforts to achieve agreement on an amending formula as well as the nature and effects of the plan that has now been agreed on."
> (H. of C. Debates, 1964-65, vol. XI, 11574)

... 4

Nevertheless, in his letter of January 5, 1965 to the provincial Premiers, Prime Minister Pearson had stated:

> "At the Conference I suggested that it might be possible to have a paper such as this issued as a "Conference" document. On reflection it seems to me that it would be extremely difficult to try to get a text that would have the kind of complete agreement of all governments that would be needed for joint responsibility and sponsorship. The result of such an effort might be to delay publication undesirably. I am, accordingly, not suggesting this course. The federal government will issue the White Paper in the normal way and will assume full responsibility for it. But I am, of course, anxious that it should not contain anything that any Premier would consider undesirable or in error."

This can hardly be interpreted as an invitation to agree on the existence of a constitutional convention. In addition, the general character of the replies received from the provinces makes it possible to debate the nature and extent of their so-called "endorsement" of the publication. For example, the reply of New Brunswick merely stated: "Government of New Brunswick appreciates opportunity for study, and does not suggest any change in content".

8. Secondly, the "fourth principle" itself expressly stated that "the nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definitions".

9. Thirdly, it must be stressed that the Favreau White Paper says, at p. 11, by way of preface to the description of past practices and the four "principles" which it derives from them:

> "Thought not constitutionally binding in any strict sense, they (the practices) have come to be recognized and accepted in practice as part of the amendment process in Canada."

Hence, it is apparent that whatever the scope of the fourth principle, it was not set forth as a legally binding rule.

10. Fourth, there is no suggestion in the judgment of the Supreme Court of Canada in the Senate Reference that this "fourth principle" would restrict either the legal power of the U.K. Parliament to enact amendments to the B.N.A. Act or the right of the Senate and House of Commons of Canada to request by resolution the U.K. Parliament to amend the B.N.A. Act.

11. Fifth, the Government of Canada issued in 1978 a new white paper, namely, Lalonde and Basford, The Canadian Constitution and Constitutional Amendment (1978), in which the four principles of the Favreau paper are re-stated as "four observations". The fourth of these is as follows (p. 13):

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> "The fourth observation is that, although not constitutionally obliged to do so, the Government of Canada, before asking Parliament to adopt a Joint Address, sought and obtained the consent of all provinces on the three amendments (1940, 1951 and 1964) that involved the distribution of powers."

This observation is explicit in its disclaimer of any binding obligation to secure provincial consents for any amendment involving the distribution of powers.

IV - The "Request and Consent" Clause in Section 4 of the Statute of Westminster

12. Since the Canada Act repeals s. 4 and s. 7(1) of the Statute of Westminster, its preamble contains an express declaration that "Canada has requested and consented to the enactment" thereof, in accordance with s. 4 of the Statute of Westminster which provides:

> "4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to the enactment thereof."

13. It cannot be seriously maintained that the word "Dominion" in section 4 includes the governments or legislatures of the provinces:

First, the provinces were not represented at the Imperial Conference of 1926 and 1930 that created the legislative history of the Statute of Westminster.

Secondly, the wording of section 4 is similar to the wording of the Convention enunciated in the third recital of the Preamble which governs a request for amendments to the B.N.A. Act. The word "Dominion" in that Convention has always been considered to be the Government, or the Government and Parliament of Canada. Thus, amendments to the B.N.A. Act have been enacted by the U.K. Parliament on an address by the federal Houses of Parliament alone.

Thirdly, statements of that era in both the British and Canadian Parliaments indicate that the ambiguous word "Dominion" was used to leave flexibility, being capable of meaning either the federal government or Parliament or both but permitting a request and consent by the Government alone should circumstances so require. During the debate at Westminster on the Statute of Westminster, it was moved in amendment that instead of the word "dominion" in s. 4, there should be substituted the word "Parliament of that Dominion" because "the Parliament of each Dominion is always referred to as the authority for testing the opinion of that particular Dominion". The Minister in charge of the Bill, Mr. J.H. Thomas, replied:

> "If I had only to consult my own personal wishes I should be quite willing to accept this amendment, but the clause was drafted in its present form at the request of the dominions themselves. The government were indifferent on this point, but the real answer is that as far as the government was concerned we did not care which method was adopted, but what is now proposed was put in at the request of the dominions."

Indeed, circumstance did require action by the Federal Government alone when in 1936 the government of Mr. King gave by order-in-council consent to the enactment of the necessary British legislation to approve the abdication of King Edward VIII and to alter the Succession to the Throne. Prime Minister King later explained in Parliament that the action was perfectly "legal" under section 4 which requires the "request and consent" of the federal Government alone to make British acts applicable to Canada. The Leader of the Opposition, Mr. Bennett, agreed with Mr. King that the word "Dominion" rather than the word "Parliament of the Dominion" was used "in order that in the event of some emergency necessiting action by the Government rather than Parliament it would be possible for the government to act". See Can. H. of C. Debates, 1937, pp. 44-45.

Fourth, Australia requested the enactment of section 9(3) of the Statute, making "the Parliament and Government of the Commonwealth" the vehicle of Australia's request, at the instance of Sir James Latham who had declared in the Australian Parliament:

> "What is meant by "that Dominion" (in s. 4)? Generally it means, in practice, the executive Government of the Dominion. ... If this statute is passed as drafted, a request by the Government of a Dominion will be final."
> (Extract printed in Keith, Speeches and Documents on the British Dominions, p. 267.)

Thus, s. 9(3) was not inserted to exclude the Australian states but to include "the Parliament" as well as the government of the Commonwealth of Australia.

15. However, an argument could still be made that there is a conventional requirement that any request for an amendment to section 7(1) of the Statute of Westminster should be preceded by the consent of the provinces since s. 7(1) was originally enacted on the basis of the agreement of all provinces. The argument would be that the Imperial Conference of 1930 (presumably on the initiative of Prime Minister Bennett) had placed on record the view that the critical sections of the proposed Statute of Westminster should not apply to Canada "except in response to such request as are appropriate to an amendment of the British North America Act"; that the terms of s. 7 of the Statute were subsequently agreed upon unanimously at a federal-provincial conference in April 1931; that that agreement was recited in the subsequent Joint Address of the Senate and House of Commons which requested the addition of s. 7 to the draft Statute of Westminster; and that s. 7 was enacted in the terms agreed upon. Therefore, provinces would at least have a debating point that no request for the repeal of s. 7(1) should now be made without their agreement. However, whether the fact that s. 7(1) was adopted upon the unanimous consent of the provinces is sufficient to amount to a binding convention is a debating point. Moreover, even if it is sufficient to amount to a binding convention, its breach would not impair the validity of any law passed without the required consents since, as previously stated, constitutional conventions are not legally binding and are not enforceable in the courts.

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V - Reducing Provincial Powers

16. The Favreau white paper referred to amendments "directly affecting federal-provincial relationships". The argument will certainly be made that an unilateral federal request for the enactment of the Constitution Act, 1980, is in breach of the so-called constitutional convention because it contemplates amendments directly affecting federal-provincial relationships and it implies a reduction in provincial powers.

17. It can be answered that the 1978 white paper referred to amendments "involving the distribution of powers". Even if there were a convention, it would apply only to amendments involving the distribution of powers such as those made in 1940 (unemployment insurance), 1951 (old age pensions) and 1964 (supplementary benefits). The proposed Joint Address would not be in breach of any constitutional convention since the requested amendments do not effect any change in the distribution of powers.

18. Such an answer, however, would probably not be persuasive. If there is a constitutional convention, its purpose is probably to prevent the federal government from securing changes in the powers of the provinces without their consent. If a change in the distribution of power requires provincial consent, it is probable that the introduction of a constitutional bill of rights binding on the provincial legislatures as well as the federal Parliament would also require provincial consents. The effect of a bill of rights is to limit legislative powers. Hence, it would be difficult to maintain that its effect would not be to cut down provincial legislative powers. In addition, section 42 of the Constitution Act, 1980 provides for approval of amendment by referendum instead of by legislatures or governments. It will certainly be argued that this section allows the federal government to amend the constitution "over the heads of the provinces". The provincial governments are completely excluded from this amending process. This can be viewed as a detraction from provincial powers.

19. In any event, even if one admits that the proposed amendments affect federal-provincial relationships in a substantive way and effect a reduction in provincial powers, this does not have any effect on the validity of the proposed resolution since, at best, a federal request for the contemplated amendments without prior agreement with the provinces would merely constitute a breach of the so-called convention. As stated earlier, such a breach would not be illegal. The convention could not legally limit either the right of the Senate and House of Commons to present the Address to the Queen, or the legislative powers of the U.K. Parliament to enact the requested amendments.