The Fulton-Favreau Formula in Alberta

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The reaction in Alberta to the blood and toil, tears and sweat as concomitants of the hammering out of an indigenous procedure for amending the Canadian Constitution was one characterized by silence. When in 1960-61 the Dominion-Provincial Conferences laboured and brought forth the Fulton Formula, and when in 1964 the Conferences of that year produced the Favreau version, and when in March 1965 the latter version came before the Alberta Legislative Assembly for approval, the public at large, the press, and even the legal profession itself, failed overtly to respond. It should at once be added, however, that this apparent lack of interest or concern cannot, I think, rightfully be attributed to apathy, complacency, or indifference. Rather, it was due to a prevailing and wide-spread unawareness of the significance and importance of the momentous constitutional and historical goal that the federal and provincial authorities jointly were endeavoring to achieve. In any event, so far as I am informed, the only expression of opinion was that of the present writer in a submission to the Provincial Government on the eve of the Formula coming before the Legislative Assembly for approval. With the reader's indulgence, and, I trust, without impropriety, I shall here recapitulate the tenor of that submission.

The position taken was that the unanimity requirement of the proposed amending procedure, as it related to amendments affecting the legislative authority of the provinces, was to impose upon the Canadian Constitution the rigidity of the strait jacket. Were the procedure to be adopted, and subsequently a general and pressing need felt throughout Canada for the federal control, let it be assumed, of the whole field of labour relations, inclusive of the area within provincial domain, an amendment in that behalf would be doomed to rejection depending, as it would depend, upon the unanimous consent of ten provinces. The dissent of one province would defeat the amendment. On the other hand, by way of contrast, it was emphasized that an amendment providing for the surrender by Parliament to the Provincial Legislatures of authority over, for example, "Interest", could be achieved by a two-thirds majority of the provinces representing 50% of the Canadian population. It was

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pointed out that this basic fault of inflexibility was not cured by the expedient of inter-delegation, which had been introduced into the Formula, in that such a device afforded, essentially, a temporary and not a permanent solution.

The submission went on to acknowledge (as the federal "White Paper" [1] had pointed out) that the proposed procedure represented the maximum of agreement possible at the time, but proceeded to declare that such maximum was not enough and that, therefore, it followed that the time was not yet propitious or ripe and that final action should be delayed; that this was a case where prudence required that haste be made slowly; that the dangers of delay were far less than the dangers of precipitate action; and that it was much better to endure present ills than flee to those of greater magnitude.

Continuing, it was submitted that a constitution must be at once sufficiently rigid to ensure stability yet sufficiently flexible to accommodate change. Flexibility, the permitting of play in the joints, was to be achieved either by a liberal judicial interpretation of the fundamental law, or by amendment thereof. The history of the judicial performance as related to the expounding of the British North America Act, however, had rendered it unmistakably clear that the necessary elasticity was not to be forthcoming from that source. Accordingly, flexibility, therefore, remained to be achieved by amendment. However, that avenue too had been closed by virtue of the unanimity requirement in the proposed Formula. An important amendment was to be at the mercy of the veto of a single province. And furthermore, the submission warned, it must be remembered that once the Formula was adopted, no escape was permitted, for the rigidity which was injected into the Constitution proper was likewise injected into the amending procedure itself. That was to say, the amendment of the amending procedure in turn required unanimity. The result was to place ourselves in shackles and to throw away the key.

In the following month, March 1965, the Honourable Ernest C. Manning, Premier and Attorney-General, moved in the Legislative Assembly the adoption of the amending Formula. By way of recital to his motion Mr. Manning noted that it was a matter of concern both to the Assembly and to Canadians generally that full authority to amend the Canadian Constitution did not presently reside in this country; that the Governments of Canada and of the Provinces had for many years attempted to establish an acceptable scheme permitt-

[1] *The Amendment of the Constitution of Canada*, (Queen's Printer, 1965), at p. 44.

ing the exercise of such authority domestically; and that as such a scheme had now been agreed upon it was proper that the Legislative Assembly give its approval thereto and to the implementation thereof. Then followed the formal resolution:

> "THEREFORE, BE IT RESOLVED, That this Assembly approve the request proposed to be made to the Parliament of the United Kingdom for the enactment of an Act to Provide for the amendment in Canada of the Constitution of Canada, such Act to be substantially in the form approved by the Conference of the Prime Minister of Canada and the Premiers of all the Provinces on the fourteenth day of October, A.D. 1964."

The motion was seconded by the Leader of the Opposition, Mr. Michael Maccagno, Liberal, and, without debate, was unanimously carried.[2]

In the course of his address moving the adoption of the motion, Mr. Manning traced the history of the attempts to agree upon and frame a procedure for amending the Constitution in Canada which had culminated in the Fulton Formula in 1961 and the revised version thereof, namely, the Fulton-Favreau Formula, in 1964, the subject-matter of the motion. He acknowledged that of the criticisms which had been advanced against the Formula the most prominent was that, by constitutional authorities, of over-rigidity. Referring to the "White Paper" he went on to submit that the rigidity complained of was overcome by the flexibility injected into the Formula by way of the provision permitting inter-delegation of powers between Parliament and the Provincial Legislatures. He frankly conceded, however, that universal acceptance of the Formula throughout Canada was too much to expect.

He said:

> "I know there's going to be disagreement among the public as to the wisdom of this statute — whether it's in proper form or not, but, Mr. Speaker, I would only have this further to say on that point — after having attended these conferences since 1950, and being familiar with the efforts that have been made over such a long period of time to reach finality in this matter, it is my very firm belief that there is no hope of getting agreement to the measure of unanimity that exists today between and in all the Governments of Canada on any other approach to this matter than that which has finally evolved out of these discussions. No one would say that it is perfect, but it is a good formula and it gives the Constitution of Canada into the hands of the Canadian people exclusively."[3]

Such, then, is a description of the reception and disposition of the Fulton-Favreau Formula in Alberta.

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[2] (1965) 70 *Journals of the Legislative Assembly of the Province of Alberta*, at pp. 59-68 and 74-83.

Of the 63 seats in the Assembly, the composition thereof was as follows: Social Credit 59, Liberal 2, Coalition (Liberal-Progressive Conservative) 1, vacant 1.

[3] Taken from a recorded transcription of the proceedings.