Saskatchewan and the Amendment of the Canadian Constitution

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In recent years the Province of Saskatchewan has exerted an influence in constitutional reform far beyond its importance in size, wealth, or population. A latecomer to Confederation, the creation of the Dominion of Canada carved out of the latter's vast north-western colonial empire, her early years were occupied in striving for legal equality with the senior provinces. This accomplished, she turned her attention to the larger Canadian scene. With all the zeal of a convert, she became more national-minded than those statesmen who had called her forth. Conditions were such that she was forced to identify her interests with those of strong central government. For thirty years these considerations prevailed until mitigated by the growth of prosperity at home, of centrifugal political forces throughout the country, and finally the provincial election of 1964. But even today a majority of Saskatchewan people and politicians would favour a strong central government, and would accept with reluctance constitutional arrangements detracting from federal power.

The First Quarter Century : Consolidation

Two constitutional problems were created at the time of Saskatchewan's entry into Confederation in 1905. These arose over the issues of religion and resources. Insofar as there was any serious concern over constitutional affairs before 1930, it centred on these matters and manifested itself in a demand for local autonomy.

When the province was detached from the North-West Territories, the federal government was busily dumping immigrants into the area and settling them on Crown grants or "homesteads". This was part of a grand design conceived to be in the national interest. Federal authorities somewhat reluctantly yielded to the demands for provincial status from Territories Premier F. W. G. Haultain and his supporters, but they could not risk the possibility of new provincial administrations frustrating the settlement policies of the federal government. Hence section 21 of the Saskatchewan Act [1]

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[1] STAT. CAN. 1905, c. 42.

reserved for the Crown in right of Canada all Crown lands, minerals and water. By section 20 the province was to be paid a subsidy in lieu of resources revenues. Similar provisions were put in the Alberta Act of the same year.

In the negotiations leading up to passage of these Acts, Haultain opposed the qualified provincial status which the Laurier administration proposed to confer. His vocal opposition on this and other issues, including an intervention by him on behalf of the Conservative party in two federal by-elections in Ontario, led the Laurier-appointed Lieutenant Governor to overlook him when the first provincial government was formed.[2] This assured the victory of a Liberal administration in Saskatchewan but did not end the dispute over resources. Successive governments pressed the federal authorities for a "return" of Saskatchewan's natural resources. After federal settlement policies had been largely implemented Ottawa was responsive to this demand but had difficulty agreeing with the province on proper financial terms. Was the subsidy to be continued in spite of the return of the resources ? Should Ottawa account for resources profits from 1905 onward ? These were the contentious constitutional issues for Saskatchewan before 1930. For example, in preparing themselves for the Dominion-provincial conference of 1927, where constitutional amendment procedure was one of the subjects to be discussed, provincial representatives concentrated entirely on natural resources and related financial questions.[3] A summary of the conference proceedings reveals that this was one of the few subjects on which the province expressed strong views.[4] This issue was not settled until March 20, 1930, when an agreement between Ottawa and Regina was signed turning over to the province her natural resources. As confirmed by statute, the transfer eliminated the last major evidence of colonial status and with it the provincial demand for jurisdictional equality.

The other constitutional problem of this era also arose out of the terms of the Saskatchewan Act. When provincial status was proposed for Saskatchewan and Alberta, early drafts of the enabling legislation provided for a system of denominational schools — a

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[2] See *e.g.* Saywell, *Liberal Politics, Federal Policies, and the Lieutenant-Governor: Saskatchewan and Alberta 1905* (1955) 8 SASK. HIST. 81.

[3] I am indebted to Mr. A. R. Turner, Provincial Archivist, Regina, for his perusal of the material in question. I am also indebted to Mr. D. H. Bocking and other members of the Archives staff for their assistance with various sources of historical information.

[4] *Précis of Discussions, Dominion-Provincial Conference, 1927* (Ottawa, 1928) at 22-23.

bifurcated and wholly sectarian eductional structure. The resulting controversy, reminiscent of the Manitoba School question of the preceding decade, saw strong protests from Haultain's local autonomists and the resignation of Clifford Sifton, Laurier's Minister of the Interior. The final compromise, embodied in section 17 of the Saskatchewan Act, perpetuated the system of public schools with minority or separate school rights as previously found in the North-West Territories. Like most compromises, this left both sides dissatisfied. Haultain's group looked upon it as a flagrant interference with provincial rights and insisted that the province should be allowed to make its own decision as to the proper relationship between education and religion. The constitutional guarantee of pre-1905 separate school rights in the Saskatchewan Act detracted from provincial jurisdiction over education. It was viewed by many Saskatchewan citizens as a special privilege for Roman Catholics, imposed by Ottawa and subsequently defended by local Liberal administrations. Wartime and post-war fervour for things Anglo-Saxon and Protestant increased resentment against this system. These sentiments prevailed among large segments of the population during the 1920's and aided the formation of a strong Ku Klux Klan organization in the province in the latter part of that decade. The Klan and others who harboured anti-Catholic resentment aided in 1929 in defeating the provincial Liberal party as the body responsible for what they regarded as a constitutional travesty.[5] Shortly therearter the depression made religion and schools fade almost[6] into oblivion as political issues.

These then were the burning constitutional issues in Saskatchewan before 1930. They were mainly inward-looking, and they involved issues of provincial autonomy or equality with the older provinces.

In this context constitutional amendment procedures were not of first importance. Yet we can perceive some governmental and public awareness of the problem. It will be recalled that in early 1920 the minister of Justice, Hon. C. J. Doherty, had corresponded with the provincial attorneys-general concerning the possibility of devising a Canadian amending procedure.[7] Whatever Saskatchewan's official and private reaction was, Premier Martin's public utterances were

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[5] See *e.g.* Wright, *Saskatchewan, The History of a Province* (Toronto, 1955) at 212-13.

[6] Latent problems remained. For example, when the legislature in 1964 extended the tax-supported separate school system to secondary schools in urban centres, the measure proved to be very controversial.

[7] Gerin-Lajoie, *Constitutional Amendment in Canada* (Toronto, 1950) at 223.

unfavourable. He was disposed to "leave things are they are" and was certainly against giving the power to the Canadian Parliament to amend without approval by the provinces. (This was probably never suggested by Doherty.) He also disapproved of a weakening of ties with Britain. As for any thought of independence from the Crown, he said that [8]

> any man who had talked ten yeas ago as some are talking in Ottawa today would have been accused of treason... The war has not altered in the least the legal status of Canada.

These views were criticized by both daily papers in Regina. The *Regina Daily Post* argued that the Empire would instead be strengthened by formalizing the clearly recognized right of self-government. The success of the Empire had resulted from "slackening constitutional bonds and replacing them with bonds of friendship and mutual respect".[9] The *Regina Morning Leader* took the same general approach, and advocated an amendment procedure similar to Australia's. It described our constitutional dependence on Great Britain as "an anomaly that should be removed".[10] Only the *Alameda Dispatch,* a weekly, attacked the proposed Canadian amendment procedure, calling it an unwarranted attempt at "the separation of the Dominion from Great Britain and the creation of an independent state".[11]

Premier Martin's apparently casual remarks about the threat to the Imperial connection had thus stirred up some public controversy. A clarification of government policy was given by Attorney General W. F. A. Turgeon in a speech to a Regina service club on May 12, 1920. He pointed out that recent correspondence with the federal authorities had nothing to do with the status of Canada as a nation or as a member of the Empire. This was a matter beyond the scope of provincial concern. As for the possibility of a Canadian amending formula, Saskatchewan had no objection as long as unanimous consent of the provinces was required for amendments affecting provincial legislative jurisdiction, provincial property or education rights. He indicated that these views had been communicated to Ottawa.[12] This position was approved editorially by the *Regina Daily Post,* though it suggested that the consent of a "stated majority" of the provinces might be sufficient.

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[8] *Regina Daily Post,* March 26, 1920.
[9] *Id.,* March 27, 1920, and March 31, 1920.
[10] *Regina Leader,* March 29, 1920, and April 3, 1920.
[11] *Alameda Dispatch,* April 16, 1920.
[12] Reported in the *Regina Leader,* May 12, 1920.

Apparently nothing came of the federal-provincial correspondence in 1920, nor did Saskatchewan take any further initiative in the matter. The next occasion for official comment on an amending procedure came at the Dominion-Provincial Conference of 1927. Here the Minister of Justice proposed that Canada should be given the power of amendment. He suggested a requirement of unanimity for matters of provincial jurisdiction and minority rights, and majority provincial consent for other amendments.[13] While the official record of the conference does not reveal Saskatchewan's position, other evidence indicates that the western premiers supported the federal proposal. Prime Minister King hastily withdrew it, however, when Premier Ferguson of Ontario and Premier Taschereau of Quebec voiced strong objections.[14] Even those who expressed approval of a change were apparently content to let the matter rest at that. Subsequently, at the Dominion-Provincial Conference of April, 1931, to discuss the draft Statute of Westminster, Saskatchewan supported the preservation of the *status quo* as provided in section 7 of that Act. It apparently expected a later conference to settle the amendment procedure, as Prime Minister Bennett had promised. At home, the *Saskatoon Star-Phoenix* shared these expectations, hailing agreement on the Statute of Westminster as "a decisive step towards the acceptance of this dominion of national status within the Empire . . ."[15] No further conference on this subject was ever summoned by Bennett, but Saskatchewan apparently took no initiative at this time in advancing the adoption of an amending procedure. It took the combined calamities of depression and drought to arouse and sustain a serious provincial interest in constitutional reform.

1930 to 1960 : The Drive for Centralization

After 1930 the factors of climate, economics and politics all combined to rid Saskatchewan of complacency and force her to seek national remedies for her ills.

During the 1920's, Saskatchewan enjoyed boom conditions which ill-prepared her for what was to follow. Unsettled conditions in post-war Europe delayed a recovery of wheat production there, while in Canada and particularly in Saskatchewan production was growing rapidly. Almost all remaining arable land was settled and this combined with good weather and ready markets abroad made wheat pro-

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[13] *Précis supra* note 4 at 11.

[14] See Neatby, *William Lyon Mackenzie King: The Lonely Heights* (Toronto, 1963) at 235-36.

[15] April 9, 1931 at 11.

duction spiral.[16] Saskatchewan derived over sixty per cent of its income directly from agriculture (most of it through export) and much of the remainder was indirectly derived from the same source.[17]

When the world-wide depression commenced in 1929, it soon was accompanied in Saskatchewan by an unprecedented period of drought. Economic conditions and increasing production abroad drastically reduced the price of Canadian grain. Climatic conditions sharply reduced production. Federal tariff policies of the early Thirties kept up the cost of production in a period of rapidly declining revenues. In the words of the Rowell-Sirois Commission:[18]

> Canada's most serious economic troubles during the thirties had their origin in the impact of the world depression and drought upon the wheat-growing industry of Saskatchewan. This industry, upon which the interdependence and economic integration of the country were chiefly based, suffered the most unfavourable coincidence of circumstances in its history. If the repercussions upon other sections of the Dominion were widespread and severe, the conditions in Saskatchewan were nothing short of disastrous. Economically this area was the most vulnerable in Canada. No other province was so completely dependent upon the fluctuations in the export market. Nowhere was production so dependent upon the vagaries of the climate.

Between 1929 and 1933 average per capita income dropped from the fourth highest of any province to the lowest — $478 to $135, a 72 per cent decrease. This was in comparison to a national average decrease of 48 per cent, and to a decrease of only 36 per cent in Nova Scotia, the most fortunate province in this respect.[19] In 1931 one-half of the rural population was destitute; in 1937 two-thirds was destitute. Relief costs were equivalent to 60 per cent of all provincial and municipal revenues.[20]

As a result, Saskatchewan had to look to Ottawa for her salvation. Slowly, reluctantly, the federal government came to the aid of the province and her municipalities. After 1932 the Dominion was providing about 85 per cent of all relief costs, part in outright grants and part in the form of loans.[21] Federal subsides represented about 15 per cent of provincial - municipal revenue, compared to a national average of 4 per cent.[22]

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[16] See Mackintosh, *The Economic Background of Dominion-Provincial Relations* (originally Appendix III of the Rowell-Sirois Report, 1939). (Toronto, Carleton Library Series, 1964) at 87-90.

[17] *Report of the Royal Commission on Dominion-Provincial Relations* (Ottawa, 1939) (hereinafter referred to as the Rowell-Sirois Report) vol. I at 121-122.

[18] *Id.*, at 169.

[19] *Id.*, at 150.

[20] *Id.*, at 169-70.

[21] *Id.*, at 170.

[22] *Id.*, at 235.

Such experiences dramatically demonstrated for the people of Saskatchewan their interdependence with the rest of Canada and with world conditions. They concluded that economic ills had to be treated at the national level, that only the resources of the federal government were adequate to cope with major social ills. This new attachment to centralization necessarily raised the issue of constitutional reform and with it the matter of a suitable amending procedure. The strong desire for specific constitutional amendments in favour of federal jurisdiction created a demand for a flexible amending procedure — a procedure which could not be blocked by one or two more fortunate provinces with exaggerated notions of "provincial rights". Saskatchewan had learned that provincial rights were of little value where the province had no funds to exercise them.

The establishment and work of the special House of Commons committee on amendment of the B.N.A. Act in 1935 evoked considerable interest in Saskatchewan. The chairman of the committee was F. W. Turnbull, Conservative Member of Parliament for Regina. In addition, the terms of the resolution creating the committee were such as to strike a responsive chord on the prairies: the committee was to study the best method of amendment whereby (safeguarding legitimate minority and provincial rights) "the Dominion Government may be given adequate power to deal effectively with urgent economic problems which are essentially national in scope". The *Regina Daily Star*, a Conservative paper, in an editorial of February 18, 1935, noted the work of the committee and current controversy over the validity of Bennett's New Deal legislation and concluded that [23]

> whatever be the result of the present controversy, the B.N.A. Act will have to be amended, not to increase the powers of the provinces but those of the central authority to deal with all problems that are of nation-wide application.

When the committee announced that it was going to invite submissions from the provincial governments, the Daily Star took the occasion to castigate in advance those provinces who might take the "provincial rights line". The editorial writer quoted Arthur Meighen in warning against too rigid an amending formula.[24] The Regina Bar Association established a comittee to study the problem and adopted a report on May 8, 1935 with respect to amendment of the B.N.A. Act. The Association report, which was subsequently submitted to the House of Commons committee,[25] did not specify a means

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[23] *Regina Daily Star*, Feb. 18, 1935 at 4.

[24] *Id.*, March 11, 1935 at 4.

[25] See *Proceedings, Evidence and Report of the Special House of Commons Committee on the British North America Act* (Ottawa, 1935) at viii.

of amendment but obviously disapproved of "provincial rights" demands which would bring about inflexibility. It advocated changes which would allow the federal government to implement social security measures such as unemployment insurance, old age pensions, etc. and to control matters such as industrial disputes, hours of labour, and the use of child labour. It suggested that section 91 should be amended to provide that where parliament by a special majority declared a measure to be for the peace, order and good government of Canada such measure would be valid even if it "trenched" on provincial powers in sections 92[13] or 92 [16].[26] The *Daily Star* warmly supported these views and commended the report to its readers.[27]

When the House of Commons committee issued the invitation to the provinces to make submissions on the questions before it, Saskatchewan joined the other provinces in declining. Like most other provinces it felt that a Dominion-Provincial Conference would be the more appropriate vehicle for provincial participation. But the reply of Hon. T. C. Davis, provincial Attorney General, was by far the most conciliatory of any provincial response. He acknowledged that he had been "following with intense interest" the work of the Committee and suggested that the Report might form a basis for federal-provincial discussion after it had been submitted to Parliament for approval. This provincial refusal to make submissions to the Committee was supported by the Liberal *Saskatoon Star-Phoenix*,[28] but strongly criticized by the *Regina Daily Star*.[29]

Events in the next two years clearly demonstrated the strong interest of Mr. Davis and his government in an amending procedure. It will be recalled that the House of Commons committee of 1935 in its report recommended the holding of a Dominion-Provincial conference to discuss the method of amendment. Such a conference met in December of that year. In the constitutional amendment committee of the conference, three proposals were put forward: one by Ottawa, one jointly by Ontario and Manitoba, and one by Saskatchewan.[30] While none of these proposals was adopted, the Conference decided that there should be a Canadian amending procedure and that a continuing committee of Attorneys General should work out a formula for constitutional amendment. Out of this committee and its sub-committee came a proposal for an amending for-

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[26] *Regina Leader-Post*, May 9, 1935 at 1-2.

[27] *Regina Daily Star*, May 13, 1935 at 4.

[28] *Saskatoon Star-Phoenix*, April 20, 1935 at 15.

[29] *Regina Daily Star*, June 10, 1935 at 4.

[30] Referred to by Hon. T. C. Davis in *Journals and Speeches, Legislature of Saskatchewan, 1936* (Regina, 1936), Appendix at 12.

mula. This proposal largely followed a familiar pattern, dividing the constitution for amendment purposes into (a) matters affecting Parliament only, (b) matters affecting Parliament and one or more but not all provinces, (c) minority rights, and (d) matters affecting Parliament and all provinces. T. C. Davis, in his report[31] to the legislature of March 24, 1936, on the work of the Conference and the committee, indicated that initially it was proposed to amend matters in group (d) by enactment of Parliament with approval of the legislatures of two-thirds of the provinces representing at least 55 per cent of the population. While he did not specifically say so, it is apparent that Davis was prepared to accept such a procedure. He noted, however, that the Maritime provinces were concerned about having changes forced on them by the other six provinces who could form the requisite two-thirds. The proposal had therefore been modified to provide that where a province voted against an amendment affecting certain specified matters (including section 92[13] and 92[16],) and the amendment was nevertheless adopted, it could continue to legislate on the matter in question even if the amendment denied this power to the approving provinces. Davis expressed the hope that this compromise proposal would prove acceptable to the Maritimes. In fact the committee was not reconvened and no further Dominion-Provincial conference was held on this subject for over a decade thereafter.

Why did Saskatchewan take such an active interest in the development of an amending formula ? Attorney General Davis did not fully explain this to the legislature in reporting on the lengthy efforts made to establish a procedure. He explained the general interest of the provinces in this matter on the basis that they had been losing power by judicial interpretation (the "Bennett New Deal" cases were yet to come) and wanted a clear-out definition of their status, and further that they should have some definite control over future amendments instead of leaving these in the hands of the Canadian and Imperial Parliaments.[32] This would suggest that the dominant motive for constitutional reform was the strengthening of provincial rights. But Davis nowhere stated that this was the view of his government. He may have explained the matter in this way to reassure members of the government and legislature who might fear centralization. Certainly the acceptance by Saskatchewan of the two-thirds, 55 per cent formula belied any strong attachment to entrenchment of provincial powers. Moreover, events in 1937

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[31] *Id.*, at 13-16.
[32] *Id.*, at 6-8.

indicate clearly the direction in which Saskatchewan's views were developing.

When the Government of Saskatchewan presented its brief to the Rowell-Sirois Commission in December, 1937, it took a strong line in favour of centralization and constitutional reform to facilitate social security measures. This official position was no doubt the product of the disasters of the Thirties and provincial dependence on the federal treasury. The constitutional issue had recently been thrown into sharp focus by the series of Privy Council decisions handed down on January 28, 1937, striking down the various "New Deal" measures and denying to the Parliament of Canada power to implement treaties or deal with labour conditions, unemployment insurance, and the marketing of natural products.[33] An early passage in the provincial submission set the tone by declaring that[34]

> there is a danger that the motion of provincial autonomy may be pushed too far. We must also keep in mind that the British North America Act established a Federal State, likewise with a claim to autonomy, and that the machinery of government established under our constitution exists only as a means to the end of human advancement.

The compact theory was described as "unsupportable", and it was urged that "in such circumstances the principle of unanimity of consent to constitutional amendment cannot be tolerated". This view was reiterated near the end of the brief with the qualification that "minority rights presently guaranteed under the British North America Act should not be interferred with in the absence of complete agreement among the provinces".[35] Apart from this no specific suggestion was made for an amendment procedure.

In addition to opposing the entrenchment of provincial powers, Saskatchewan suggested a series of amendments to extend the powers of the Parliament of Canada. It was urged that power be given to Parliament to implement treaties, and to legislate with respect to unemployment insurance, health insurance, crop insurance, invalid and old age pensions, the regulation of labour conditions, and industrial disputes (presumably without limitation to recognized federal industries). The Dominion was asked to assume responsibility for all direct relief, and for the construction of a trans-Canada high-

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[33] *A.G. for Can.* v. *A.G. for Ont.* (Labour Conventions Case) [1937] A.C. 326; *A.G. for Can.* v. *A.G. for Ont.* (Unemployment Insurance Case) [1937] A.C. 355; *A.G. for B.C.* v. *A.G. for Can.* (National Products Marketing Act Case) [1937] A.C. 377.

[34] *Submission by the Government of Saskatchewan to the Royal Commission on Dominion-Provincial Relations* (Regina, 1937) at 7.

[35] *Id.*, at 7-8 and 330.

way. A full power of delegation of legislative authority from province to Dominion, and a limited power of delegation from Dominion to province, were advocated.

The *Regina Daily Star*, ever sympathetic to constitutional reform, welcomed the clarification of Saskatchewan's position, which it described as "recognizing the inevitable".[36] A few days later it criticized New Brunswick as one of the chief opponents of constitutional amendment. The editorial argued that New Brunswick "must march along with the rest of us, not attempt to stage a parade of its own".[37]

Before leaving the 1937 submission, we should note the two lawyers who were most influential in the development of Saskatchewan's official position. The submission was prepared under the direction of Attorney General T. C. Davis. Davis had had considerable experience with the amendment issue. As Provincial Secretary he had been one of the provincial delegates to the Dominion-Provincial Conference in 1927 where the matter was discussed. He was made Attorney General within a month after that Conference, held the post until the defeat of the Gardiner government in 1929, and was reappointed to it with the return to power of the Liberals in 1934. Undoubtedly one of the ablest members of the Gardiner and Patterson cabinets of the Thirties, he had a breadth of vision and an appreciation of social problems combined with a penetrating wit. He introduced progressive legislation for the relief of hard-pressed Saskatchewan debtors.[38] Some of this legislation still remains, and in later years was sometimes mistakenly attributed to the "socialist" government elected in 1944. He strongly protested the actions of the Bennett government against the army of unemployed (on their way to Ottawa) which brought about the Regina Riot of July 1, 1935. In the aftermath of the Riot he showed tact and sympathetic understanding in negotiating with the nearly 2,000 men encamped at Regina, arranging for their care and later for free transportation back to where they had begun their ill-starred trip to the national capital. Although appointed to the Saskatchewan Court of Appeal in 1939, he was pressed into governmental service soon after the Second World War began. He served in Ottawa for two years as Deputy Minister of one of the new wartime departments, and then was called on for diplomatic duties. He was successively High Commissioner to Australia, Ambassador to China, Head of the Ca-

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[36] December 10, 1937, at 4.

[37] December 14, 1937, at 4.

[38] *E.g. The Limitation of Civil Rights Act*, R.S.S. 1965 c. 103, s. 2, originally enacted by STAT. SASK. 1934-35, c. 89.

nadian Mission to the Allied High Command, West Germany, and later Canada's first ambassador to the West German Republic.

Davis' two principal assistants in the preparation of the 1937 brief were drawn from the University of Saskatchewan. They were Professor G. E. Britnell of the Economics Department, and Dean F. C. Cronkite, K.C. of the College of Law. As the lawyer of this team, Dean Cronkite no doubt was the most influential in shaping the constitutional recommendations. Earlier that same year he had criticized the Privy Council's *Labour Convention* decision in a note in the Canadian Bar Review. There his concern for a central government strong enough to deal with pressing social problems had been clearly manifested.[39] Apart from his work in the Rowell-Sirois submissions, he played a very significant role in later constitutional amendment discussions as will be seen.

While the Rowell-Sirois Report declined to deal with the question of an amendment procedure, it did make recommendations for several specific amendments advocated by the Saskatchewan brief. These included the transfer of power to the Parliament of Canada with respect to unemployment insurance, old age pensions,[40] labour standards,[41] and the implementation of labour conventions of the International Labour Organization. It also favoured a comprehensive power of delegation of legislative authority, operating either way between Dominion and province.[42]

After the Rowell-Sirois Commission disappeared as a focal point for discussion of constitutional amendment, little was heard of the subject in Saskatchewan during the Thirties and Forties. But before passing on to the reign of the Co-operative Commonwealth Federation as the provincial government, it is interesting to see the general political context of Saskatchewan opinion on constitutional reform at this time. As we have seen, the Liberal government had by 1937 come out clearly in favour of a flexible amending procedure and a series of amendments to strengthen federal powers. While the provincial Conservatives do not appear to have stated an official policy it may be noted that their main newspaper supporter, the *Regina Daily Star,* consistently favoured constitutional reform and deplored any exaggeration of provincial rights, F. L. Bastedo, K.C., a Conservative and prominent Regina lawyer, apparently took a similar position. He attacked the compact theory in a 1934 Canadian Bar

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[39] "The Social Legislation References" (1937) 15 Can. B. Rev. 478.
[40] *Supra* note 17, vol. II at 43.
[41] *Id.*, at 49.
[42] *Id.*, at 72-73.

Review article [43] and was a member of the Regina Bar Association committee which prepared the report on the B.N.A. Act in 1935. As previously discussed, that report also urged centralization and was critical of excessive entrenchment. The Regina Bar Association approved the report, which would suggest that the views stated therein were not far removed from accepted public opinion. Later on during World War II George H. Barr, Q.C., another respected Regina lawyer, renewed discussion of constitutional amendment in correspondence with various magazine editors. He wanted constitutional reform and the repeal of section 7 of the Statute of Westminster, 1931 which had denied Canada the power to amend its own constitution. For the existence of section 7 he placed most of the blame on former Premier Ferguson of Ontario and Premier Taschereau of Quebec whom he described as "the Imperialistic Tory and the reactionary French-Canadian".[44] While it would be wrong to pretend that large segments of the population held these or any other views on constitutional reform, such were the predominant views of those to whom the public would look for leadership.

Into this situation came the C.C.F. government of T. C. Douglas, elected in June, 1944. This was the first government formed by the Co-operative Commonwealth Federation, a national political movement whose basic programme had been laid down in the Regina Manifesto of 1933. Point 9 of the Manifesto called for [45]

> the amendment of the Canadian Constitution, without infringing upon social or religious minority rights or upon legitimate provincial claims to autonomy, so as to give the Dominion Government adequate powers to deal effectively with urgent economic problems which are essentially national in scope; the abolition of the Canadian Senate.

Point 9 insisted on a flexible constitution, and declared that it

> must be brought into line with the increasing industrialization of the country and the consequent centralization of the economic and financial power — which has taken place in the last two generations.

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[43] "Amending the British North America Act" (1934) CAN. B. REV. 209.

[44] Archives of Saskatchewan, G. H. Barr Papers, Barr to R. D. Colquette (Editor, Country Guide) August 20, 1942. Apart from editors, Barr's other correspondents in this period included Dr. Ollivier, Law Clerk of the House of Commons, and Dr. Arthur Beauchesne, Clerk of the House of Commons.

[45] It is amusing to note that in 1935 the House of Commons, perhaps unwittingly, adopted without objection a resolution embodying almost identical language except for the reference to the Senate. This resolution, moved by the C.C.F. leader J. S. Woodsworth, called for the establishment of a committee to study how the B.N.A. Act could best be amended to achieve these ends. He obviously borrowed his wording from the Regina Manifesto. Thus was established the Turnbull committee of 1935 as discussed earlier.

Thus the Douglas government had a ready-made position to assert should an appropriate opportunity arise.

That opportunity came in 1950, when the Dominion-Provincial Constitutional Conference was summoned in fulfillment of an undertaking given by Prime Minister St. Laurent at the time of the passage of the B.N.A. (No. 2) Act, 1949. Premier Douglas welcomed the occasion for discussion on this matter.[46] Extensive preparations for the Conference were undertaken in Regina, and a strong delegation selected. Among its members were Dean F. C. Cronkite, whose part in the preparation of the Rowell-Sirois submission has previously been noted. Also included was Professor F. R. Scott of McGill, distinguished constitutional lawyer and one of the authors of the Regina Manifesto. His preference for a very flexible amending procedure had been stated quite clearly to the House of Commons Committee on the B.N.A. Act in 1935.[47] He had there favoured a system whereby matters of joint concern (other than minority rights) could be amended by a majority vote in the two houses of Parliament in joint session. The influence of these two lawyers in the formulation of a provincial policy must have been considerable.

There is nothing to indicate that opinion in Saskatchewan differed much from the official C.C.F. position at this time. Memories of the depression were still strong, and these created sympathy for reform in favour of strong central government. The recent war had accustomed the public to centralization. Mr. George Barr of Regina, writing in the *Financial Post* on October 24, 1949, hailed the forthcoming constitutional conference. He attacked the compact theory, spoke favourably of the U.S. amending procedure, and thus by implication urged the adoption of a flexible formula. The *Saskatoon Star-Phoenix* on January 10, 1950, the day the Conference opened in Ottawa, argued for flexibility in the constitution. It suggested this could be achieved either by judicial interpretation or a suitable amendment procedure.[48] These views were probably typical of informed Saskatchewan opinion on the eve of the 1950 Conference.

In this opening statement[49] on the first day of the Conference Premier Douglas assumed a predictable position. He stressed what he considered to be the purpose of a constitutional amendment procedure: the facilitation of efficient governmental action to serve

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[46] Douglas to St. Laurent, Sept. 20, 1949. Canadian House of Commons Debates, 1949, (Appendix), at 875-76.

[47] *Supra* note 25 at 80-92

[48] Jan. 10, 1950 at 9.

[49] *Proceedings of the Constitutional Conference of Federal and Provincial Governments, January 10 12, 1950.* (Ottawa 1950) at 32-40.

social ends. He quoted the statement made by his government to the Dominion-Provincial Conference on Reconstruction of 1945, that

> if the satisfying of human needs and the advancement of economic welfare means constitutional changes, then we are prepared to support constitutional changes.

The establishment of an amending formula was of secondary importance. He wanted the federal government to make good its promises, made at the 1945 Conference, of federal action in fields of unemployment assistance, old age pensions, health insurance, and public investment in underdeveloped areas to stimulate employment. Accepting, however, the task assigned to the Conference, he advocated entrenchment of constitutional provisions respecting language, education, solemnization of marriage, representation by population (in the House of Commons) and a maximum length for the term of Parliament. He urged the adoption and entrenchment of a Bill of Rights. Apart from these matters, he was opposed to any requirement of unanimity of the provinces for changes affecting the distribution of legislative power.

> [T]he tyranny of the minority, exercised through any power of veto is to be not only guarded against, but is to be feared.
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> If political institutions are vehicles for social action, then the constitution is the roadway along which they must travel. In pursuing our deliberations, we must exercise the greatest care to ensure that we are making of it a broad highway, and not a dead-end street.

He therefore suggested that for matters of joint concern amendment should be possible with the consent of a majority of the House of Commons and a majority of the provinces. The Senate was deliberately eliminated from the process. In Douglas' view, a veto power in the Senate "would be a guarantee only of freedom from progress".

Having stated his position on an amending procedure, the Premier returned to his first concern — the need for particular amendments at that time. He urged changes which would give Parliament exclusive jurisdiction over marketing of natural products and implementation of treaties, and concurrent jurisdiction over labour disputes and standards. For the provinces he sought the power of indirect taxation. He suggested a power of delegation as recommended by the Rowell-Sirois Commission. He reiterated his concern for the solution of pressing social problems without waiting for a new amendment procedure. His concluding exhortation was "Let it not be said of any of us that we fiddled while Rome burned".

A concern for the substance, not the procedure, of constitutional amendment characterized Saskatchewan's position at the 1950 con-

ference. Procedure was important only in a negative sense — that it should not impede socially and economically desirable amendments. The contrast between Saskatchewan and some other provinces at this time was the contrast between an activist view of government and a preference for the *status quo*. In the range of views expressed there were various shades of opinion between these two polar positions, but Saskatchewan was clearly at one pole. The province's position is explicable on historical, economic, and political grounds. Historically, Saskatchewan had little in its experience to make it jealous of provincial rights. It had no unique racial or religious institutions, no long history of shared experience, and no geographic cohesion (being bounded by four imaginary straight lines). Its most vivid recollection was the depression, with provincial dependence on federal subventions. Many of the economic factors prevalent in the Thirties — such as fluctuations in international export markets and rising farm production costs — still remained. Thus it was not surprising that the position assumed by Premier Douglas was almost identical (except for the exclusion of the Senate) to the position of the province's Liberal government in its brief to the Rowell-Sirois Commission in 1937. History and economics had not changed, even if the government had. These factors were reinforced by the socialist orientation of the C.C.F. government. Article 9 of the Regina Manifesto undoubtedly provided ideological justification for views so consistent with the practical needs of the province.

After the initial remarks had been made by all heads of government, the remainder of the January, 1950, Conference was taken up with rather vague and disjointed discussions of a number of issues. Some concerned the merits of repatriation versus non-repatriation of the constitution. Other discussions involved the effect of the B.N.A. (No. 2) Act, 1949. As for the amending formula itself, agreement was readily reached on classification (for amendment purposes) of the constitution into the various categories suggested by the 1936 committee of experts. The contentious category was, of course, that pertaining to provisions of concern to Parliament and all of the provinces (excluding "fundamental rights"). While there was general agreement that such provisions could be amended by Parliament plus some special majority of the provinces,[50] there was no agreement as to what provisions properly fell within this category and not within "fundamental rights". Those favouring rigidity wished to characterize as many matters as possible as "fundamental rights" because these were to be amendable

[50] *Id.*, at 93.

only by unanimous provincial consent. While no final views were put forward by any delegation, Premier Douglas strongly objected to any suggestion that all matters in section 92, and particularly head 13 (property and civil rights) should be entrenched as fundamental rights requiring unanimous consent for amendment.[51] The Conference ended with a committee of Attorneys-General being assigned the task of making the necessary categorization. Recalling the failure of the 1935 Dominion-Provincial Conference to reconvene after the appointment of a similar committee, Mr. Douglas stressed the importance of an early report and a reconvening of the Conference.[52]

Subsequently the Dominion and the provinces submitted their views in writing on categorization to the committee of Attorneys-General. The moment of truth for constitutional amendment came at the meeting of this committee in August, 1950. A comparison of the submissions revealed substantial agreement on many of the less important provisions, but substantial disagreement on the important provisions.[53] The hard core of the problem was section 92. At the extremes were Quebec, which wanted to entrench the whole section, and Saskatchewan which was prepared to entrench only heads 12 (solemnization of marriage) and 14 (administration of justice). The remaining heads, in its view, should be amendable by Parliament and a majority of the provinces. The Dominion was prepared to concede entrenchment only of 92[12] and part of 92[13]. Ontario joined Quebec in wanting to entrench all matters within 92[13] but no other province insisted on this. The views of the other provinces varied considerably, with each wishing parts of section 92 entrenched and other parts left for the more flexible amending procedure.

Once the Attorneys-General had clarified the area of disagreement the full conference was reconvened at Quebec in September. One detects a certain lack of enthusiasm or reality in its deliberations. Since its earlier meeting the Korean War had broken out and new problems preoccupied government representatives. Prospects for any agreement on a procedure were remote. Premier Duplessis made a strong defense of entrenchment.[54] Premier Douglas stressed

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[51] *Id.*, at 78-79, 86.

[52] *Id.*, at 95-96.

[53] Tables showing the position of the various governments on particular sections are reproduced in *Proceedings of the Constitutional Conference of Federal and Provincial Governments (Second Session) Sept. 25-28, 1950* at 79-84.

[54] *Id.*, at 44-46.

the need for flexibility. He argued that, rather than accepting entrenchment of all provincial powers, it would be better to leave amendment procedures as they were.[55] The Conference met *in camera* for two and one half days and apparently resolved very little. At the end the matter was referred back to the Committee of Attorneys-General with a view to preparation for further discussion at a forthcoming Federal-Provincial fiscal conference in December. No further progress was made thereafter. At the December conference there was no discussion of an amending procedure. It was agreed to suspend further deliberations pending consideration of fiscal matters and new tax agreements. There the matter was dropped.

There was little if any dissent in Saskatchewan from the position taken by Premier Douglas at these conferences. Indeed, he apparently had the support of the two largest daily newspapers, and of the opposition Saskatchewan Liberal Party. Both the *Saskatoon Star-Phoenix* and the *Regina Leader-Post* expressed opposition to excessive entrenchment. They both agreed with Mr. Douglas that if a flexible procedure could not be devised, it would be better to leave matters as they were.[56] At the following session of the provincial legislature the subject was discussed only briefly and without a conflict of opinion. It arose when the Premier introduced a resolution expressing approval of the proposed constitutional amendment (enacted later that year) conferring power on Parliament with respect to old age pensions. He noted that the federal government wanted the unanimous consent of the provinces before proceeding with the amendment. In his view unanimous provincial consent was not necessary and he hoped that this would not be considered a precedent.[57] Mr. W. A. Tucker, Leader of the Opposition, doubted that it would be treated as a precedent. He agreed, however, that unanimous consent should not be required for ordinary constitutional amendments such as those with respect to social security. Unanimous consent should be required only for amendments affecting minority rights.[58] Thus he and his party appeared to be at one with the C.C.F. government as to the elements of a proper amending formula. When the Douglas government had spoken on this issue, it had fairly represented informed Saskatchewan opinion of 1950 and the following decade.

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[55] *Id.*, at 32-36.

[56] *Star-Phoenix*, Sept. 27, 1950, at 17, and Sept. 30, 1950, at 17; *Leader-Post* Sept. 30, 1950, at 15.

[57] *Debates of the Legislative Assembly of Saskatchewan* (1951), vol. 4, no. 32, at 2.

[58] *Id.*, at 19-20.

1960 and After : Conflict and Compromise

There was no serious public discussion of constitutional amendment in Saskatchewan during the Fifties, just as there was none elsewhere in Canada. Nor was there anything to indicate that government or public opinion on this matter had changed in any way.

The passage of time had not diminished the provincial government's interest in constitutional reform, however. At the Dominion-Provincial Conference on fiscal relations in July, 1960, Mr. Lesage, newly-elected Premier of Quebec, called for a renewal of discussions on repatriation of the constitution. He also suggested incorporation of a bill of rights into the constitution.[59] Premier Douglas, one of the few heads of government present who had been in office during the 1950 conferences, warmly endorsed these suggestions.[60] He may have assumed (unjustifiably) that the recent changes of government in Quebec and Ottawa would make possible an amending formula acceptable to Saskatchewan. As a result, Prime Minister Diefenbaker agreed to convene a conference at the ministerial or official level on the subject of an amendment procedure. He preferred to postpone possible discussions of a constitutional bill of rights until after a Canadian amending procedure had been adopted.[61]

Soon after this Conference the Saskatchewan government commenced preparations for the forthcoming discussions on amendment. An interdepartmental committee was established under the chairmanship of Hon. R. A. Walker, Q.C., Attorney General, a toughminded and resourceful minister. Dean F. C. Cronkite and Professor F. R. Scott were named as members of the Saskatchewan delegation as they had been in 1950. There was cautious optimism in Regina that the conflicts which emerged in 1950 could be reconciled.

These expectations were short-lived. In his letter of September 19, 1960 inviting the Attorneys-General to the initial meeting in Ottawa on October 6 and 7, Justice Minister Fulton took the surprising step of proposing an interim amendment procedure.[62] His proposal was even more startling in its content. It suggested a two-step approach to the problem. First, the B.N.A. Act could be amended

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[59] *Proceedings of Dominion-Provincial Conference, July 25-27, 1960* (Ottawa, 1960) at 28-29.

[60] *Id.*, at 87-88.

[61] *Id.*, at 107-108.

[62] Copies of correspondence on this subject between the Minister of Justice and provincial ministers between July 1, 1960 and December, 1962, have been tabled in the House of Commons. See *House of Commons Journals*, vol. 108 at 307, vol. 109 at 392-93.

to allow the Parliament of Canada, with the concurrence of the legislatures of all provinces, to amend any part of the Canadian Constitution. This would achieve early "repatriation" of the constitution. Secondly, after this step was completed, the various governments could agree on some other amending formula which would then be written into the B.N.A. Act by Parliament with unanimous provincial consent.

Such a proposition could hardly encourage the advocates of a flexible amending procedure. The first concrete proposal thus advanced contemplated complete entrenchment. Moreover, it had emanated from the federal government — the government one might have expected to defend the interests of Ottawa against provincial demands for a veto power. Thus, accidentally or deliberately, Saskatchewan was put on the defensive before the conference began.

When the conference opened in Ottawa on October 6, 1960, it was agreed by the majority that the press and public would not be admitted to any of the sessions. Partly at the request of Saskatchewan and others, it was understood that any government could release statements to the press with respect to its own position, so long as it did not reveal the position taken by other governments.[63]

Saskatchewan's opening statement was comprehensive and emphatic. While welcoming the opportunity to discuss an amendment procedure, Attorney General Walker attacked the Fulton proposal for a two-stage repatriation process. In particular he feared that once the amendment power had been given to Parliament subject to the requirement of provincial unanimity there would never be any better amendment procedure worked out within Canada. The provinces, once having been given a veto power on all matters, could scarcely be expected to agree to some less advantageous arrangement. Mr. Walker thought the Fulton proposal too pessimistic. He pointed out that no province at the 1950 conference had insisted on entrenchment of every single item in the constitution, and he doubted the necessity of such a condition being attached to the transfer of amendment power to the Parliament of Canada.

Having criticized the Fulton proposal, the Attorney General of Saskatchewan made several concrete proposals of his own. He called on the conference to set itself a "more ambitious and imaginative goal". All constitutional instruments should be consolidated into a single document, with official versions in both English and French. The constitution should have a flexible amendment procedure for

[63] While the author attended the 1960-61 conferences, the account herein of discussions is confined to general comments and to facts otherwise made public.

all matters except fundamentals and it should contain a Bill of Rights. In the process of developing the new constitutional arrangements, the public should be kept informed and should be allowed to make representations.

In conclusion, Mr. Walker contended that the 1950 conferences had failed because they lacked organization and direction. He therefore urged that a preparatory committee of the conference be established, that it methodically work out an agenda and procedure for the next plenary conference, and that it narrow and define the policy questions which would require decision by the plenary conference. These suggestions from Saskatchewan were all virtually ignored in this and subsequent conferences.

The remainder of this two day meeting was taken up with rather aimless discussions. A few provinces favoured Mr. Fulton's approach and a few were strongly against it. Others did not like it but suggested they might accept it if no agreement could be reached for a better amendment formula. Some attention was given to such a formula, the preferences ranging from widespread entrenchment of provincial matters to minimum entrenchment, with one government suggesting the possibility of a flexible formula subject to the right of Quebec to override any amendment affecting her Civil Code. Several delegations indicated they might tolerate widespread entrenchment if a procedure for delegation of legislative powers between province and Dominion (and *vice versa*) was introduced.

At the end of this conference it was agreed to hold another meeting within a month. In the meantime work was to proceed on both a formula for transferring the amendment power to Canada from the United Kingdom, (to be drafted by the Department of Justice), and an amendment procedure. In furtherance of the latter, each province was to advise the Minister of Justice as to which sections of the B.N.A. Act it would insist on having entrenched and those it would prefer to have entrenched but on which it might be willing to compromise.

While most delegations had not stated their views as emphatically as had Saskatchewan, it was obvious even at this point that there were substantial differences of opinion which would not easily be eliminated. Agreement was hardly as close as the sanguine official press release indicated at the end of the conference. But Mr. Fulton could at least be congratulated for having avoided any open breach at this time.

Not even Mr. Fulton could dispel or conceal the real differences of opinion which existed, however. These came to a head at the

conference of November 2 and 3. This conference was also significant for Saskatchewan because at this session it acquired the unjustified public reputation as the obstructionist province.

As requested, nine of the ten provinces submitted lists indicating which matters they wished entrenched, and which matters they would prefer, but not insist on, having entrenched. The results showed a great disparity of views. Saskatchewan wanted very little entrenchment. It insisted on entrenching sections 93, 133, a Bill of Rights, the amending procedure as finally established, section 51(1) and section 51A. It was prepared to accept entrenchment of section 92[12], 92[14], section 121, and new provisions for a limitation on the life of provincial legislatures and for a requirement of annual legislative sessions. A number of other provinces indicated a preference for a minimum of entrenchment. Only two provinces expressed unqualified support for entrenchment of section 92[13].

In spite of a rambling debate about a number of matters, the key issue at the November sessions was the extent to which entrenchment was to be necessary and acceptable. More precisely, the controversy centered around section 92[13]. At one extreme were a few provinces, led by Quebec, who insisted on entrenchment of head 13. At the other extreme was Saskatchewan, which consistently opposed complete entrenchment. In the middle were a number of provinces who indicated they could accept entrenchment of 92[13] (though unwillingly) if a proper power of delegation were agreed to. While it was true that Saskatchewan had indicated no intention of accepting entrenchment at this time, it is equally true that some of the entrenchment supporters had not agreed to a delegation power. Thus, since several provinces would not accept entrenchment without delegation, further progress was hampered as much by opposition to delegation as it was by Saskatchewan's opposition to entrenchment.

In the meantime Saskatchewan had tried to avoid the foreseeable deadlock by introducing a compromise solution. She proposed that for amendments related to matters other than fundamentals, enactment by Parliament with the consent of at least two-thirds of the provinces would be sufficient. This would, however, be subject to the important proviso that no such amendment could affect property and civil rights in Quebec unless ratified by the Quebec legislature (or in the alternative, it would take effect but be subject to nullification by the Quebec legislature). This compromise, though evoking considerable interest, was rejected by Quebec.

In spite of obstacles to agreement raised by other provinces, and in spite of Saskatchewan's offer of a compromise, she was largely blamed for the deadlock which developed at this conference. Saskatchewan had been most emphatic in stating her views inside and outside the constitutional conferences. Accordingly, Atttorney General Walker issued a press release during the second day of the November meeting in which he reiterated his opposition to a complete veto power for each province. He also revealed the compromise formula which his delegation had submitted. This press release was quite consistent with the conference decision that each government was free to make public its own position. Nevertheless, it annoyed the federal and some other delegations, probably because it would detract from the usual end-of-conference press release to the effect that everything was for the best in the best of all constitutional worlds. As a result, the press was led to believe that Saskatchewan had single-handedly scuttled the November meeting. The Toronto *Globe and Mail* carried this headline on November 4, 1960: "Saskatchewan is Hold-Out. Constitution Parley Finishes in Deadlock." On the same day the main headline of *Le Devoir* read "*La position de la Saskatchewan fait suspendre la conférence. Québec exige: consentement unanime des provinces pour amender la constitution.*" According to the *Montreal Gazette* of that day "the Saskatchewan delegation apparently sounded the only sour note in an otherwise harmonious conference". Mr. Fulton told a press conference that "the Saskatchewan statement of the position (in the conference) is a very extreme one and therefore unrealistic."[64] It seemed that if they could not have an agreement on a new formula, some of the delegations were determined to have a convenient scapegoat.

From this point onward very little advance was made in the 1960-61 negotiations. While a committee of experts met in November, 1960, to work out details with respect to the education clauses, and while various drafts of an amending formula were polished and repolished, the substantive barriers to progress remained. There was no serious opposition to the entrenchment of education, language rights, the amending formula itself, and a large portion of the provincial powers. The disputes area was always section 92[13], and, associated with this, the need for an adequate delegation power to offset the evils of entrenchment.

At the January 1961 conference, debate centred again on this issue. Near the end of the conference Attorney General Walker de-

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[64] Canadian Press story, as printed in the *Regina Leader-Post*, November 4, 1960 at 1.

livered an extensive speech in which he reviewed the history and significance of Saskatchewan's position. He reiterated his opposition to entrenchment of section 92[13] and he explained why his province did not consider even the widest delegation power to be an adequate substitute for a flexible amending formula. He concluded by calling for a thorough public discussion of the issues invelved. He promised that

> if, after this is done, the informed opinion of the Canadian people is that our constitution should be amendable with respect to all matters provincial only on the condition of provincial unanimity, Saskatchewan will be prepared to accept that opinion. But in the meantime we are not prepared to see this conference stampeded into actions which may do great and permanent harm to the nation.

While Saskatchewan's position was the most unambiguous, it was not the sole cause of the failure to reach agreement at the January meeting. Though a number of provinces would accept entrenchment only if there were an adequate delegation power, no generally acceptable delegation power was devised. Moreover, Quebec and certain others for the first time raised objections to any new amendment formula if Parliament were to retain its powers of amendment under section 91 head [1]. It will be recalled that section 91[1] had been introduced, without provincial agreement, by an amendment to the B.N.A. Act in 1949.[65] This had caused controversy in the 1950 constitutional conferences, but it had not as yet been a factor in the 1960-61 proceedings. Its introduction at this point created a whole new obstacle which had nothing to do with Saskatchewan's position. This was overlooked in conference headlines such as "Saskatchewan's Objections hold up Amending Powers",[66] however.

With all of these issues unresolved, few could have taken much comfort in the agreement that each government would consider a draft Act which was to be based on conference discussions and circulated at an early date. The official press release, of course, expressed optimism for early agreement.

During the following months, several provinces stated their views on the draft Act in letters to the Minister of Justice. The draft provided for entrenchment of all provincial powers and a limited power of delegation. In a memorandum of July 6, 1961, the Government of Saskatchewan expressed its opinion. It re-affirmed its opposition to entrenchment of section 92[13], disapproved of the delegation power because it was not sufficiently flexible, and again

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[65] B.N.A. (No. 2) Act, 1949, 13 Geo. VI, c. 81 (U.K.).

[66] *Regina Leader-Post*, January 14, 1961.

called for public discussion of the proposals. It also agreed to participate in further conferences only on condition that no amending formula would be adopted without the consent of all provinces.[67]

The next conference, in September, 1961, saw no real progress. The refinement of the draft Act had not altered any of the basic differences of opinion. Saskatchewan still opposed the entrenchment provision. No agreement was reached on a delegation formula satisfactory to those who saw this as a pre-condition for agreement on entrenchment. Quebec was adamant about the need for a drastic change in section 91[1] before she could agree to a new amending formula. No such change was forthcoming. The only significant accomplishment of this conference was the agreement to release publicly the text of the draft Act once it had received some technical revision. This agreement, reached partly at Saskatchewan's initiative, would have the effect of airing the whole issue before the public, and of permitting informed comment and criticism. The text was accordingly released on December 1, 1961.

No progress for adoption of the Fulton formula was made after this date. In a letter of January 28, 1962, to Mr. Fulton, Attorney General Walker rejected the Act because of its requirement for consent of all provinces for any amendment of provincial powers. He made this qualification, however: [68]

> [W]hile the draft proposal does not commend itself to us any more than certain of its elements did in our discussions at the recent conferences, rather than object outright, final decision of the Government of Saskatchewan will be deferred until adequate means are afforded for public discussion.

While some provinces gave the draft active consideration, others apparently did not. No agreement was reached, even among those provinces whose demands had seemingly been met by the draft Act. The Diefenbaker-Fulton initiative had come to naught, and it remained for changes of government at both the federal and provincial level to bring about agreement.

Before leaving this controversial period, it is important to assess the roles of the governments of Saskatchewan and of Canada in these proceedings. Saskatchewan's position in 1960 and 1961 was characterized by a stubborn opposition to entrenchment, but a willingness to seek some accomodation with Quebec on another basis.

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[67] While this was thought by some to be an anomalous stand for a province which generally opposed entrenchment, it was entirely consistent with Saskatchewan's position that the amendment formula itself should be entrenched, along with language and education rights and certain other fundamental matters.

[68] Walker to Fulton, Feb. 28, 1962. See *supra* note 62.

Was the opposition to entrenchment merely an outdated bit of socialist dogma as some suggested ? On the contrary, it was a position which was not only consistent with the history of the province as a whole but was also one which enjoyed broad contemporary support. Within Saskatchewan, editorial opinion generally favoured the government's stand at the conferences.[69] One of the most influential western papers, the *Winnipeg Free Press,* voiced its objection to the entrenchment of "property and civil rights".[70] A debate on amendment procedures in the Saskatchewan legislature in March, 1961, did evoke some opposition criticism of the Saskatchewan government as a "hold-out", and some members suggested it might be better to agree to complete entrenchment in order to get a Canadian amending procedure. But at the end of the debate, and after a compromise in wording, the legislature passed unanimously a resolution essentially supporting the government's stand. The resolution expressed the hope that agreement would be reached on as flexible a procedure as possible while protecting certain fundamentals, and asked that before the Conference of Attorneys General made any final recommendation the whole matter should be thrown open for public discussion.[71] The Saskatchewan position was also supported indirectly by the Association of Canadian Law Teachers. At its June, 1961, meeting it passed a resolution calling on the federal and provincial governments to make public the proposals for an amending formula and to arrange public hearings on them. In June, 1962, after the "Fulton formula" was released, the A.C.L.T. passed a resolution disapproving of it and again calling for public discussion. Thus Saskatchewan's attitude towards the formula could not be considered merely the stubborn opposition of a radical minority party.

Indeed, it is arguable that Saskatchewan's policy might have been otherwise if dictated solely by partisan considerations. It must be remembered that the C.C.F. had evolved some distance from the strong pro-centralist position of the Regina Manifesto, 1933.[72] The national party's Winnipeg Declaration of Principles in 1956 lacked the strident tones of the earlier Manifesto. With respect to the constitution it said this:

> The C.C.F. believes in Canada's federal system. Properly applied in a spirit of national unity, it can safeguard our national well-being and at the same

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[69] *E.G. Saskatoon Star-Phoenix,* October 12, 1960; *id.,* Nov. 7, 1960; *Regina Leader-Post,* Feb. 25, 1961.

[70] December 15, 1961 at 29.

[71] *Journals of the Legislative Assembly of Saskatchewan, 1961* at 186-187.

[72] See *supra* note 45 and accompanying text.

> time protect the traditions and constitutional rights of the provinces. Within the framework of the federal system the C.C.F. will equalize opportunities for the citizens of every province in Canada.

Centralization of legislative power was no longer regarded as a panacea. By late 1960 the New Party was in formation and in the summer of 1961 the New Democratic Party succeeded the C.C.F. nationally. The aspiration of the N.D.P. to become a genuinely national party dictated efforts at accommodation with Quebec. Had the Saskatchewan government looked only to party interests, it probably would have acceded to the demands of Quebec. It had maintained its stand at the cost of considerable editorial criticism within Quebec.

It is therefore an oversimplification to dismiss Saskatchewan's position in the 1960-62 period as merely partisan and eccentric. There were no doubt elements of political dogma in her stand, but there were many other factors. There was a genuine concern for the future of effective government in Canada, predicated on the belief that government intervention in the economy is not *per se* bad and that Ottawa will have a legitimate role to play in future economic and social reforms. This view was also reinforced by Saskatchewan's own experience as one of the smaller and less secure provinces.

It may be argued with some force that Saskatchewan could have avoided the opprobrium for the failure of the Fulton formula. The government's insistence on stating its position publicly, frequently, and emphatically, made it stand out in contrast to those provinces who never disclosed their position. It made the Saskatchewan position subject to public comment when other provincial positions were confidential. It probably made formal acquiescence to an entrenchment formula easier for some provinces: though they did not want to see such a formula adopted, they could avoid the unpopularity of disagreement while assuming that Saskatchewan would prevent adoption of any such scheme. Saskatchewan might also have considered other compromises, such as entrenchment of part of section 92[13] without entrenchment of the whole. But it did make an honest effort at compromise with its proposal which would have allowed Quebec to opt out of any amendment affecting property and civil rights. Quebec objected to this because it would constitute special treatment for her and set her apart from the other provinces. Considering that Quebec leaders had for some time insisted that Quebec was *not* a province "like the others", Saskatchewan may at least by forgiven for her bewilderment at this objection.

And what of Mr. Fulton and his government? No one could doubt the sincerity, good will and dedication with which Mr. Fulton approached his task in September 1960. It must also be conceded that the work of the next fifteen months constituted the longest sustained attempt at devising an amending formula ever known in Canada. (The Fulton-Favreau formula hastily agreed to in 1964 was almost entirely based on the Fulton formula of 1961). This prolonged effort was largely due to Mr. Fulton's persistent prodding of the provinces and the drafting labours of his own department. Yet the failure of these conferences could also be laid partly at his feet.

First one must look at the objective of the federal government in pressing for an amendment formula. As far as one could ascertain, the only purpose in mind was to achieve an agreement, no matter what it might be, in order that the constitution might be "brought home". This was, after all, a government which had an atavistic yearning to participate in nation building — what one might describe as the "Sir John A. Macdonald syndrome". Had the federal government any clear concept of what it wanted the Canadian constitution to be, or any serious concern for the future effectiveness of federal parliaments and governments, it would have exercised its influence on the settlement of substantive issues in some consistent manner. Instead, Mr. Fulton was reported as saying that [73]

> the Federal government had not taken sides in any of the disagreements over an amending formula, but had acted only as a mediator.

A curious position indeed for the only participating government which had responsibility for national, as opposed to local, interests!

Objectives aside, the mechanics of these conferences were also ill-conceived. Four meetings, each of two days duration, with a minimum of communication in between, spread over a year, could hardly be expected to cope with such fundamental problems. Longer meetings among officials below the ministerial level would have been more effective in narrowing the policy issues. This might have facilitated concentration by the Attorneys General on a limited number of issues, with orderly progress from one point to another. There was also a suspicion among some that the draft Act as developed had within it many difficulties which might have been brought to light through examination by constitutional experts across the country. Some of these problems of conference procedure should have been apparent to the federal officials from an examination of earlier efforts at constitutional reform.

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[73] *Toronto Globe and Mail*, Nov. 4, 1960 at 2.

After 1962, there is little of note in Saskatchewan's position on constitutional amendment except for her sudden agreement to the Fulton-Favreau formula in 1964. The provincial election of April 1964 had defeated the C.C.F. government by a small margin. A Liberal government headed by Premier W. Ross Thatcher took office in May and within a few months was faced with renewed negotiations on an amending formula. At the Federal-provincial conference in Charlottetown on September 1 and 2, Premier Thatcher quickly joined in the agreement to accept the Fulton formula with certain modifications. The most significant change agreed to was the elimination of Parliament's exclusive power under section 91[1] to amend the internal constitution of the Government and Parliament of Canada. Thus agreement was reached among the eleven governments because Saskatchewan had reversed its position and because of the general surrender to Quebec's demand (not accepted in 1961) for repeal of section 91[1].

In spite of Saskatchewan's apparent *volte-face*, it is clear that the basic attitude of the provincial government was similar to its predecessor's. Before the opening of the Charlottetown conference Mr. Thatcher said that, like the C.C.F. government, he still believed that entrenchment should be confined to fundamentals such as language, education, and the amending procedure. Referring to the 1961 resolution of the Saskatchewan legislature, he said he hoped that there would be an opportunity for public discussion of any proposed change.[74] At the ensuing conference of Attorneys General in October, Saskatchewan's new Attorney General, Hon. D. V. Heald, stated a preference for less entrenchment than that provided by the Fulton formula. He also argued that the delegation procedure should be more flexible, so that the consent of fewer than four provinces would be required for exercise of the power.[75] In a 1965 resolution approving the Fulton-Favreau formula, submitted to the Saskatchewan legislature, the government also called on the Government of Canada to refer the matter to a committee of the Commons or Senate for hearings and a report to Parliament.[76]

The new government placed a higher value on patriation than it placed on constitutional flexibility, however. Mr. Thatcher was reported as saying that[77]

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[74] *Regina Leader-Post*, Sept. 1, 1964 at 1, 4.

[75] As reported by him to the legislature, *Debates and Proceedings of the Legislative Assembly of Saskatchewan, 1965* at 1323.

[76] *Journals of the Legislative Assembly of Saskatchewan, 1965* at 203-204.

[77] *Supra* note 74.

> we value a Canadian constitution highly enough to accept wider entrenchment if that is the only means of achieving it.

Government spokesmen in the provincial legislature justified approval of the Fulton-Favreau formula on the grounds that a Canadian amending procedure was important, that in practice the consent of provincial governments had been obtained in the past for amendments affecting provincial jurisdiction so that the formula changed nothing, and that in the future good sense would undoubtedly prevail permitting the new procedure to be quite workable. They admitted a preference for a more flexible procedure but thought that this formula was the best that could be achieved.[78] Members of the C.C.F. Opposition did not share this faith in the inherent rationality of Canadian politicians. They reiterated their criticisms of an inflexible amending procedure and felt there was little to gain and everything to lose by adoption of the formula at this time. The government resolution passed, the House dividing on party lines.

Thus Saskatchewan's agreement to the Fulton-Favreau formula was not an abandonment of the province's long attachment to flexibility in constitutional arrangements.[79] The change was in the new government's order of priorities. It wanted an agreement and was not prepared to stand against the majority view. In a period when Mr. Thatcher was trying to stamp out what he considered to be the evils of "twenty years of socialism", he was probably also reluctant to be identified too strongly with any views held by the former administration. While he was prepared to press his government's point of view on many other matters, this was an issue on which he was not prepared to fight.

Conclusion

I have attempted to show that since it achieved maturity, Saskatchewan has been a consistent supporter of flexibility in constitutional arrangements. I have also tried to show the various reasons for her maintenance of this position.

Of what significance was this for the nation ? Did Saskatchewan's persistent objections in 1960 and 1961 — the only time when she stood out alone against entrenchment of all provincial powers —

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[78] *Debates supra* note 75 at 1316-25, 1682-89.

[79] Only the *Saskatoon Star Phoenix* in an editorial, September 8, 1964, interpreted Thatcher's position as a conversion to entrenchment. It praised the Premier for statesmanship and concluded that the principle of unanimity was "inescapable". It thus conveniently ignored its own support in earlier years for a flexible amending formula.

prevent the patriation of the Canadian constitution ? Later events suggest not. When, after 1964, Saskatchewan had acquiesced in the entrenchment formula sought by Quebec, and when all the provinces had capitulated to Quebec and other demands for repeal of section 91[1], there was still no patriation of the constitution. In the end it was Quebec alone of all the provinces who declined to give legislative approval to the Fulton-Favreau formula. While the reasons for this have never been clearly revealed, there appeared to be serious criticism of the formula developing in Quebec generated to a large extent by the then opposition Union Nationale. At its congress in March, 1965, that party passed a resolution opposing the formula because it would result in a constitution too rigid for the best interests of Quebec.[80] It may be assumed that the Union Nationale after its election to government in June 1966 will take the same attitude. This is surely a vindication of Saskatchewan's earlier opposition to the formula, also based on a fear of "rigidity". Quebec, having emerged from the ara of devotion to the *status quo*, has also realized that her aspirations for constitutional reform would not easily be achieved in a system of complete entrenchment. And those governments, federal and provincial, who were prepared to sacrifice constitutional flexibility for the sake of agreement have ultimately gained nothing but frustation and bewilderment.[81]

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[80] *Saskatoon Star-Phoenix*, March 22, 1965.

[81] On March 17, 1966 the Saskatchewan legislature adopted a resolution, as amended by a government proposal, calling on the Government of Canada to hold a Federal-provincial conference or refer the matter to a Parliamentary Committee in order to discover Quehec's objections to the Fulton-Favreau formula. See *Votes and Proceedings of the Legislative Assembly of Saskatchewan*, March 17, 1966 at 2-3.