Amendment of the Constitution: Applying the Fulton-Favreau Formula

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On October 14, 1964, a federal-provincial Conference announced the unanimous acceptance by the representatives of the participating governments of a proposal (itself unanimously recommended by a conference of the Attorneys-General of Canada and of the Provinces) for a purely Canadian-operated amending procedure for the Canadian Constitution.[1] The proposal, in its main outlines, is the same one that failed to get unanimous approval of the Attorneys-General in 1961 when it was formulated in a conference under the chairmanship of the then federal Attorney-General, E. D. Fulton. Changes in a few provisions of that formula, considered by at least one Province to be significant, and a change of Government in another Province, produced unanimity under a succeeding federal Attorney-General, Guy M. Favreau. The formula is embodied in a draft bill which, if enacted in its present or altered form by the Parliament of Great Britain, will sever the last formal constitutional (and, certainly, legislative) link between Great Britain and Canada.[2]

The communique by which the federal-provincial Conference hailed the agreement on the Fulton-Favreau formula referred to efforts made since 1950 to fashion an acceptable amending procedure. A reference to the work of the committee of Attorneys-General which considered the question in 1950 shows that the Fulton-Favreau formula departs in at least two aspects from the views entertained in 1950.[3] First, and highly important, it represents a hardening in

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[1] In this article I shall treat the "Canadian Constitution" or the "Constitution", as it is later referred to, as consisting of the British North America Act, 1867, and later Acts of that name which changed or added to the terms of the original Act by amendments of which the latest was iu mid-1964. There were five schedules to the original Act, which are referred to in various of its sections. There is a wider definition in the draft bill embodying the Fulton-Favreau formula, and the other statutes comprised in the definition could profitably be subjected to the same analysis as is being attempted here.

[2] The draft bill embodying the formula and ancillary provisions, and including provisions for inter-delegation, is annexed to this article as an appendix.

[3] See Proceedings of the Constitutional Conference of Federal and Provincial Governments, January 10-12, 1950, p. 117.

favour of provincial control of the amending process, beyond what was envisaged in 1950, in the entrenchment of all provincial legislative power against adverse change save by unanimous consent. Second, it leaves the initiative for change in Parliament alone instead of permitting change to be formally initiated by provincial legislatures as well as by Parliament, as had been suggested in 1950. Moreover, although the 1950 Conference had recommended consideration of the delegation of legislative powers as an allied matter, it was only in the Fulton conferences in 1960 and 1961 that this item was developed, and it became part of the Fulton-Favreau formula in the same terms in which it was worked out in the Fulton formula in 1961.[4]

However desirable it may be to exclude further formal British participation in Canadian constitutional matters, it is clear (as it was clear in all the Conferences from 1950 to date) that an amending formula cannot sensibly be considered apart from the matters to which it will be applied. Of course, it is possible to be so concerned with terminating the role of the British Parliament as to seek agreement on a formula which will have the highest common denominator of acceptance by Canada and the Provinces, a formula that will ensure a veto by any one of them over change unacceptable to it. The Fulton-Favreau formula goes a considerable distance in this direction, and in this respect may be said to herald a new compact theory of Canadian confederation. Without at this time embarking on any close examination of the merits of the formula, it should be a useful aid to an assessment of its merits to deal concretely with its application to the various provisions of the British North America Act. I would add that I shall refrain, also, from any present consideration of the delegation features of the formula and will say only that it is a delusive hope to expect those features to provide any element of flexibility which is not otherwise available.[5]

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[4] For a short comment on the Fulton formula, see *Laskin*, Amendment of the Constitution, (1963) 15 Univ. of Tor. L. J. 190.

[5] It should be appreciated that the Fulton-Favreau proposals on inter-delegation of legislative power do not permit wholesale delegation of legislative power in relation to classes of subjects, but only the enactment of particular laws by way of delegation on the appropriate consent of the delegating legislature, whether Parliament or a provincial legislature, and with the adherence of at least four provincial legislatures. However, although delegation to Parliament of power to enact a particular statute may be approved by four Provinces, the statute is not operative beyond the Provinces which have approved it, and hence there is still the dilemma of requiring unanimity to effect a national policy. The delegation is revocable by any approving Province, and this means general consent and stability may have to be dearly bought. Delegation from Parliament to the Provinces is mere window-dressing because Parliament can limit its legislation to a Prov-

Save in so far as it provides for delegation (and, of course, in so far as it establishes an amending procedure), the Fulton-Favreau formula does not alter any aspect of provincial legislative power, but it does reduce the legislative power of the Parliament of Canada as presently found in section 91(1) of the British North America Act, a provision enacted in 1949. This provision, which, subject to certain exceptions (including provincial legislative powers, denominational schools, the use of English and French, and some others) authorizes the Parliament of Canada to amend "the Constitution of Canada", may rightly be regarded as the federal counterpart to section 92(1) by which a Provincial Legislature is empowered to amend "the Constitution of the Province except as regards the office of Lieutenant-Governor".[6] The draft statute embodying the Fulton-Favreau formula repeals sections 91(1) and 92(1), and re-enacts section 92(1) in the very words in which it is now expressed but re-enacts section 91(1) with more exceptions than are presently in it. The additional exceptions have to do with preserving from unilateral change by Parliament (1) provisions of the British North America Act respecting the functions of the Queen and of the Governor-General in relation to the Parliament or Government of Canada; (2) provisions respecting provincial representation in the Senate and residence qualifications of Senators; and (3) provisions respecting proportionate representation of the provinces in the House of Commons. Apart from the exceptions in this re-enacted provision, the Parliament of Canada is free unilaterally to amend the British North America Acts (1867 to 1964) "in relation to the executive Government of Canada and the Senate and House of Commons". So too, each provincial Legislature is free unilaterally to amend its Constitution except as regards the office of Lieutenant-Governor. For all practical purposes, therefore, there are certain provisions of the British North America Acts which have no more force than an ordinary statute and hence are outside of any specific amending process. These provisions will be enumerated below.

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ince or to several Provinces, and hence nothing is added except the possibility of a stripping operation on pieces of federal power. Of course, Parliament may revoke the delegation, and so again there will be uncertainty of operation. Much more could be said but this is not the place. Notice may be taken of the fact that inter-delegation of administrative power is open without the need of constitutional amendment to authorize it, and this makes federal delegation to the Provinces hardly a startling achievement: see *P.E.I. Potato Marketing Board. v. H.B. Willis Inc.*, [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146. Delegation is no guarantor of flexibility in the exercise of legislative power and, *a fortiori*, it is even less a relief against a rigid amending formula.

[6] See *Scott*, The British North America (No. 2) Act, 1949, (1950) 8 Univ. of Tor. L. J. 201.

The Fulton-Favreau formula is, otherwise, in truth a three-fold formula. It requires unanimity of Canada and the Provinces in some cases; it requires in other cases consent of Canada and of two-thirds of the Provinces representing at least 50 per cent of the population of Canada; and it requires, in a third class of cases, consent of Canada and of the Provinces involved therein, such cases being those where the provisions of the Constitution refer to one or more but not all the Provinces. In each of the three situations, the consents in question must be those of the Parliament of Canada and of the Legislatures of the Provinces. Consents of the respective Governments alone will not satisfy the formula.

How, then, do the various provisions of the British North America Acts, 1867-1964, stand in the application thereto of the Fulton-Favreau formula ? The basic Act of 1867 consisted of a preamble and 147 sections;[7] and as amended to 1964 (in so far as such amendements added new sections rather than merely altering or replacing existing sections) it embraces 149 sections. From these, it is necessary to subtract nine sections that were repealed, over the years, by the Parliament of Great Britain.[8] Of the remaining 140 sections, there are a good many that were transitional provisions or were otherwise spent; others that may be classed as executed provisions (and spent in that sense); and others that were construction or interpretation sections and hence without independent viability. On my calculation there are fifty sections that fall within these three groups.[9] So long as they are in the Constitution they will be subject to such "amending" procedures for their repeal as may be finally agreed upon (unless they are specifically dealt with when the amending procedure enactment is passed by the British Parliament), but they do not represent anything of significance for the Fulton-Favreau formula to play upon. I propose therefore to subtract them from the 140 sections already mentioned so as to leave 90 for which the formula might be

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[7] The preamble, referring as it does to three Provinces, one of which (the Province of Canada) disappears as such by virtue of the Act, might be regarded as subject to change or repeal by Parliament and four Provinces only (i.e. Ontario, Quebec, New Brunswick and Nova Scotia) but I would read it as "affecting" all the Provinces and hence to be subject to the two-thirds rule of the Fulton-Favreau formula.

[8] These are sections 2, 25, 42, 43, 81, 89, 118, 127 and 145.

[9] I do not expect my classifications nor my assignment of particular sections to the various classifications to go unchallenged; nor do I regard my estimate as unchallengeable. The fifty sections that I speak of include sections 3, 4, 5, 6, 10, 13, 19, 40, 41, 56, 57, 62, 64, 66, 70, 83, 84, 88, 102, 103, 104, 105, 106, 107, 110, 111, 112, 113, 114, 115, 116, 119, 120, 122, 123, 126, 129, 130, 131, 134, 135. 137, 138, 139, 140, 141, 142, 143, 146 and 147.

regarded as significant. But from these it will be necessary to subtract those sections falling within unilateral federal or provincial competence as concerning, respectively, the executive Government of Canada and the Senate and House of Commons, and the Constitution of the Province.

Let me deal briefly with the fifty sections that I regard as having no remaining constitutional force although they have formal validity. The first group of these, those that are transitional or are otherwise spent, include sections 40 and 41, specifying federal electoral districts and applicable federal election laws unless Parliament otherwise provides; and Parliament has otherwise provided. This group also includes in my estimation sections 56 and 57, respecting disallowance and reservation of federal statutes and bills, involving action by British governmental authorities, which is utterly impossible to contemplate today.[10] Among other provisions in this group is section 64 respecting the executive authority in New Brunswick and Nova Scotia which was to continue until altered under the authority of the British North America Act. This last phrase I consider to be a reference to the plenary power given by section 92(1). I would refer also to sections 122, 129 and 134, continuing existing laws until altered by Parliament or a provincial Legislature, as the case may be. These sections are, no doubt, important links or bridges with the past, but they do not represent anything presently significant either for constitutional structure or constitutional function.

In the second group of sections are executed provisions such as section 3, under which the new Canada was proclaimed on July 1, 1867; section 5, respecting the division of Canada into Provinces; and section 6, respecting the division of the Province of Canada into Ontario and Quebec. This group includes (in my view) a host of provisions respecting proclamations (sections 139 and 140); division of debts, assets and records between Ontario and Quebec (sections 142 and 143); creation of revenue funds, transfer of property and assumption of debts (see, generally, sections 102 to 116 but excluding sections 105 108, 109 and 110), which may sensibly be regarded as having been carried out without leaving any residue of authority to be concerned about in any constitutional sense. In the third group, as being construction or interpretation provisions, are six sections consisting of section 4 (Canada means Canada as constituted under the Act); sections 10 and 13 (explaining the effect of references

[10] This does not mean that they are legally ineffective: see *Reference re Disallowance and Reservation of Provincial Legislation* [1938] S.C.R. 71, [1938] 2 D.L.R. 8.

to the Governor-General); sections 62 and 63 (comparable provisions respecting the Lieutenant-Governors); and section 138 (respecting the use of the words "Upper Canada" and "Lower Canada" for Ontario and Quebec).

From the 90 sections now remaining, there must be subtracted, before bringing into play the three-fold Fulton-Favreau formula, those that are within the unilateral competence of Parliament or of a provincial Legislature. The estimate of numbers here is somewhat more difficult than in the other situations covered, because there is doubt how far some of the provisions of the British North America Acts are subject to such unilateral amendment or even repeal. Broadly speaking, there are twenty sections that are arguably within Parliament's sole competence to change, and nineteen such sections within sole provincial competence.[11] Among these are sections concerning the functioning of the Senate (e.g., sections 29 to 33 and others); provisions concerning the functioning of the House of Commons (e.g., sections 44 to 49); and sections concerning the Quebec Legislative Council (e.g., sections 72 to 80).

This leaves, on my count, some 51 sections of the British North America Acts to which the formulae for amendment will have concrete application. Of the three stems of the Fulton-Favreau formula, the one with the least force in terms of application is that which operates upon those provisions of the Constitution that refer to one or more but not all the Provinces. Change in these provisions depends upon the concurrence of Parliament and of the Legislature of every Province to which they refer. Some of the provisions which would formally fall within this category have already been dismissed as having been transitional or spent or executed. There are three other sections that may justifiably be brought within it; section 7, respecting the limits of Nova Scotia and New Brunswick (amendment here would, of course, have to be envisaged as not affecting the limits of any other Province); section 65, respecting the continuation in the Lieutenant-Governors of Ontario and Quebec of powers formerly exercisable by the Governors or Lieutenant-Governors of Upper Canada, Lower Canada or the Province of Canada;

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[11] The twenty sections that I regard as fairly being within unilateral federal competence are sections 18, 23 (in part), 29, 30, 31, 32, 33, 35, 36, 39, 44, 45, 46, 47, 48, 49, 51 (in part), 53, 54 and 128 (in part). The nineteen sections similarly within unilateral provincial competence are sections 63, 68, 69 (in part), 71 (in part), 72, 73, 74, 75, 76, 77, 78, 79, 80, 85, 86, 87, 90 (in part), 136 and 144. *Quaere* whether section 128 should not be added in part to each of these groupings!

and section 82, respecting the summoning of the Legislative Assemblies of Ontario and Quebec by their respective Lieutenant-Governors.

That stem of the Fulton-Favreau formula which requires unanimity of Parliament and the Legislatures of the Provinces applies to the central parts of the Constitution, those relating to legislative power. The other stem, that which involves the concurrence of Parliament and two-thirds of the Legislatures representing at least 50 per cent of the population of Canada, applies more to constitutional structure than to function, although, as will be seen, it applies to executive function to a large extent. The unanimity requirement applies to more than legislative power. As set out in the draft bill, it is applicable to changes effecting (1) the amending formula itself and, indeed, any part of the draft bill; (2) section 51A of the Constitution guaranteeing no fewer members of the House of Commons to a Province than the number of Senators therefrom; and it then goes on, in section 2, to require unanimity for any law "affecting any provision of the Constitution of Canada relating to (a) the powers of the legislature of a province to make laws; (b) the rights or privileges granted or secured by the Constitution of Canada to the legislature or the government of a province; (c) the assets or property of a province; (d) the use of the English or French language". Clause (d) refers, of course, to section 133 of the British North America Act, and clause (c) refers to such provisions as are found in sections 109, 113 and 117. So far as concerns provincial assets or property, it may rightly be said that they are not shielded from federal expropriation under the unanimity requirement since it applies only to change by constitutional amendment and does not curtail any existing power of Parliament to expropriate provincial Crown property.[12] Section 9 of the draft bill is specific that "nothing in this Part diminishes any power of the Parliament of Canada or of the legislature of a province, existing at the coming into force of this Act, to make laws in relation to any matter".

Clause (a), above, in entrenching all provincial legislative power says nothing expressly about federal legislative power. Does this mean, then, that federal power is subject to the two-thirds rule while provincial power is absolutely entrenched ? The answer may depend, in part at least, on what is meant by the terms of the proposed section 2 which require unanimity for an amendment "affecting any [constitutional] provision... relating to" provincial legislative power. It is long-established constitutional doctrine that, by and large, all law-making power has been distributed either to

[12] See, for example, *Attorney-General of Quebec v. Nipissing Central Railway*, [1926] A.C. 715, [1926] 3 D.L.R. 545.

Parliament or to the Legislatures of the Provinces.[13] Hence, it will ordinarily follow that any enlargement of federal power involves a corresponding attenuation of provincial power, and *vice versa.* Unanimity will, therefore, be necessary to increase federal power, but does it follow that unanimity will be required to diminish it ? It will certainly be required to diminish provincial power directly, but what if it is proposed to enhance provincial power ? Will an amendment of the latter kind be one "affecting" provincial legislative power ? The answer cannot depend on whether the proposed change is made in the terms of section 92 rather than in the terms of section 91; indeed, it may be accomplished by an entirely new section. The word "affecting" is open to the construction of "adversely affecting", in which case an enhancement of provincial power by a diminution of federal authority could be wrought by the two-thirds formula. Of course, there is the overriding factor that no such change or, indeed, any change can take place without the initiation thereof, formally at any rate, by the Parliament of Canada.

There are ten sections of the Constitution that are integral in the distribution of law-making power.[14] (There are other provisions strewn through the British North America Acts that confer legislative power but they are of a lesser order).[15] Of these ten, sections 91 and 92 (each of which is subdivided into classes of subjects) dominate the scheme of distribution. Under the present state of constitutional interpretation, one of those ten sections, namely, section 132 dealing with the power to implement international treaties, is a dead letter.[16] The others have a continuing importance, whether they operate (as most of them do), to confer affirmative legislative power, or, as is the case with sections 121 and 125, to limit or deny legislative power. The scope of the limitation or denial is no less relevant to the scheme of distribution than is the express authorization to legislate. Overall, then, it is a pivotal point whether the reference in the Fulton-Favreau draft bill to provincial legislative

[13] Most recently enunciated by Rand J. in *Murphy v. C.P.R.*, [1958] S.C.R. 626, 15 D.L.R. 2d 145.

[14] These are sections 91, 92, 93, 94, 94A, 95, 101, 121, 125 and 132.

[15] For example, sections 40 and 41.

[16] See *Attorney-General of Canada v. Attorney-General of Ontario*, [1937] A.C. 326, [1937] 1 D.L.R. 673. But see the questioning of the *Labour Conventions* case in *Francis v. The Queen*, [1956] S.C.R. 618, 3 D.L.R. 2d 641. Would it be open to reinvigorate section 132 through the two-thirds formula by repealing the reference to "British Empire" and "Empire" and substituting a reference to Canada ? In my view, the unanimity rule would apply because section 132 must be viewed under its construction by the Courts, and as presently construed, the change suggested would adversely affect the legislative power of the Provinces.

power (to the exclusion of any express reference to federal law-making authority) must be taken as putting provincial powers on a higher plane of security against adverse change than federal powers. In a broad sense, the law-making authority of each "affects" the other, and despite the emphasis in the draft bill on provincial power, it can be urged that federal power is equally involved in any enhancement as well as diminution of provincial competence. The trite remark to make at this point is to say that we are in the hands of the Courts on the meaning to be extracted from the clause (a) of section 2 of the draft bill, and if the unanimity rule does not apply to a diminution of federal legislative power, the two-thirds rule will govern.

In assessing what the Courts are likely to say, it should be remembered that the word "affecting", which is a key term of the amending formula, has been an old friend in Canadian constitutional interpretation. The mechanics of constitutional construction resulted in opposing it to the phrase "in relation to", which is a governing expression in sections 91 and 92 whereas the word "affecting" is nowhere to be found in the sections of the Constitution on legislative power. The results of construction have been to endow the term "affecting" with a wider compass than is accorded to the phrase "in relation to". As our Constitution has been interpreted, legislation may "affect" matters coming within the specified classes of subjects in sections 91 and 92 without being "in relation to" such matters.[17] Occasionally, the Courts, even the Privy Council, have used the former when, in the result, they intended the latter;[18] but the distinction between them is clear in principle albeit there is considerable difficulty in applying the distinction in concrete cases. Indeed, it is this difficulty that makes a purely mechanical conception of constitutional interpretation an exercise in aridity and futility so far as any understanding of constitutional power is concerned.[19] The obvious alternative to leaving the matter under discussion at large is to remove, or at least ease, the uncertainty by a clarifying revision of the draft bill. The Courts may have to pass on the situation in any event, but it is better that they have clearer guidance than the present terms provide.

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[17] See *Gold Seal Ltd. v. Dominion Express Co.* (1921), 62 S.C.R. 424, 62 D.L.R. 62.

[18] See, for example, *Attorney-General of B.C. v. Attorney-General of Canada*, [1937] A.C. 377, [1937] 1 D.L.R. 691.

[19] See *Laskin*, Tests for the Validity of Legislation: What's the "Matter"?, (1955) 11 Univ. of Tor. L. J. 114.

The remaining fully entrenched provisions are those relating to "the rights or privileges granted or secured by the Constitution of Canada to the legislature or the government of a province". This specification is borrowed immediately from section 91(1) of the British North America Act where it is found as one of the exceptions to the power therein given to Parliament to amend "the Constitution of Canada". What the quoted phrase means is far from clear. Conceivably, it could apply to such rights as those given by the natural resources agreements of 1930 which, as confirmed by the British North America Act, of the same year, turned over to the western provinces their natural resources.[20] But since "assets or property of a Province" are already entrenched under the Fulton-Favreau formula, it would be idle for the draftsman to cover this again, unless in doing so he covered more than provincial assets or property. A similar observation may be made with respect to legislative power. Moreover, the phrase "rights or privileges granted or secured... to the Legislature or the government of a province" could cover matters involved in the structure of the provincial organs of government; but, in that respect, they would be within unilateral provincial competence to change, except as regards the office of Lieutenant-Governor. I pass over those provisions of the Constitution which I have characterized as transitional or executed or otherwise spent (even though, possibly, some of them could fall under the phrase under discussion),[21] and this leaves for consideration certain provisions operating by exception to federal unilateral power to amend the Constitution in relation to the federal executive government and the Senate and House of Commons, and also certain provisions, not previously alluded to, touching the office of Lieutenant-Governor and the appointment of Judges of provincial, superior, district and county Courts.

In my submission, such provisions, as are found in sections 96 to 100 of the British North America Act respecting the appointment, tenure and salary of those Judges are subject to the two-thirds rule of the Fulton-Favreau formula and not to the unanimity rule since such rights or privileges as they accord to the Provinces are not rights or privileges granted or secured to the Legislature or Government of a Province. There is perhaps one ground on which this

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[20] The British North America Act, 1930 (Imp.), c. 26. However, I should point out that these agreements include provisions for their amendment by the Dominion and the Province concerned; and it would seem, therefore, that they fall within that stem of the Fulton-Favreau formula that pertains to amendments by parliament and one or more (but not all) provincial Legislatures.

[21] For example, sections 65 and 68.

submission is challengeable, and it is that since the provincial Courts are, as such, established by the Provincial Legislature under powers which it undoubtedly has, it enjoys a correlative right or, perhaps, privilege, to have Judges appointed thereto and paid from the federal purse, as provided by sections 96 to 100. This is a construction which, to me at any rate, seems far fetched. The fact that the 1960 amendment to the Constitution, prescribing compulsory retirement of provincial superior Court Judges at age 75, was made with the unanimous consent of the Provinces does not establish that any right or privilege of the Legislature or Government of a Province was involved.[22] The consent was sought as a matter of political expediency, and, however great the provincial interest in the staffing of provincial superior Courts there was no legal right or privilege of participation by a provincial Legislature or Government in the appointment of such Judges; the power is one vested by law in the federal executive government.

Conceivably, the "rights or privileges" entrenchment clause might be regarded as embracing certain provincial rights (mentioned below) to Senate representation and proportionate House of Commons representation but, again, it is difficult to consider these as being rights or privileges granted or secured by the Constitution to a provincial Legislature or Government. It is tempting to say that the lack of any obvious substance or content in the entrenched "rights or privileges" clause may persuade the Courts to take a broad, and even charitable, view of it, simply on the principle that the proponents of the amending formula must have had something in mind other than the matters specified in other clauses. To take another example, would section 8 of the Constitution, requiring a decennial census which distinguishes the populations of the Provinces, fall within the unanimity rule as a "right or privilege" section or is it within the lesser requirements for change ?[23] If "rights or privileges granted or secured by the Constitution of Canada to the legislature or government of a province" means the same thing as if the word "province" was unqualified, there will be much more entrenchment to contend with than the strict words of the clause would suggest.

Somewhat similar considerations may be suggested in respect of the office of Lieutenant-Governor. The office, it will be remembered,

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[22] The British North America Act, 9 Eliz. 2, 1960 (Imp.), c. 2, effective March 1, 1961.

[23] It may be noted that among existing exclusive federal powers which are conferred by section 91 notwithstanding anything in the Act is legislative power in relation to "the census and statistics" (para. 6 of section 91). In terms, therefore, it enables Parliament to ignore the prescriptions of section 8.

is excluded from the unilateral power given to a Province to amend its constitution, which in this connection is a reference to the structure and operation of the organs of government (but not a reference to legislative power). So far as concerns the office of Lieutenant-Governor (and I would regard the constitutional functions attached to the office as being part of it) the question is whether it falls within the unanimity rule for purposes of change or within the two-thirds rule. It can only be within the unanimity rule if it is a "right or privilege" as aforesaid, and I would find it odd indeed if the office of Lieutenant-Governor were regarded in that fashion when it is in law a necessary part of the Legislature and of the Government.[24] There are some eight sections of the Constitution which concern the Lieutenant-Governor's office and constitutional functions, and, in my view they would be governed as to amendment by the two-thirds rule, save as some of them (e.g., sections 69, 71 and 82) may be regarded as requiring only the consent of Ontario and Quebec, in addition to that of Parliament, because those two Provinces alone are mentioned in the above-named sections. Sections 58 to 61 and section 90 (in part) concern the office strictly and the constitutional powers annexed to it, and have an application to all Provinces.

The provisions of the Constitution that concern one or more but not all the Provinces, those that concern legislative power or are otherwise entrenched, those touching provincial judicial appointments and those referable to the office of Lieutenant-Governor total about thirty sections, and this leaves to the force of the two-thirds rule about twenty sections in addition to those referred to above as coming within the rule. These twenty sections, more or less, are those excluded from the unilateral competence of Parliament "in relation to the executive Government of Canada and the Senate and House of Commons". In the main, they concern "the functions of the Queen and the Governor-General in relation to the Parliament or Government of Canada"; for example, sections 9, 11, 12 and 14 to 17 concern the Queen's functions with respect to the Canadian Parliament and Government; sections 24, 26, 27, 38 and 55, involve the Queen and the Governor-General (but primarily the latter); and sections 34 and 67 involve other functions of the Governor-General. (The latter section concerns not the Government of Canada but the appointment of an administrator for the Province where the Lieutenant-Governor cannot act). Other matters within the two-thirds rule as being excluded from unilateral federal competence are (1) the provision for an annual session of Parliament (section 20); the provisions for a maximum five year term save in emergency circumstances (section 50);

[24] See sections 58, 69 and 71 of the British North America Act.

the provincial representation in the Senate and the residence qualifications of Senators (sections 21, 22 and, in part section 23); and the principle of proportionate provincial representation in the House of Commons (sections 37, 51 and 52). (The two last mentioned provisions may possibly be caught by the entrenched "rights or privileges" clause, as previously discussed). Two other matters excluded from unilateral federal competence are the protection of provincial House representation which cannot be less than the number of Senators from a Province, and the use of English or French. Both of these (sections 51A and 133) are expressly included in the entrenched provisions even though, in terms, Quebec is the only Province concerned as such with section 133.

Mention ought to be made of the very first section of the original British North America Act, which is still intact, specifying the name or short title of the Act. Presumably, it would fall within the two-thirds rule and could be altered thereby to express a more domestic conception of the Constitution. Should the title of the enactment be changed to the "Constitution of Canada", an interesting question would arise whether this would permit broader rules of construction than the statutory rules which are now applied.

This general survey of the application of the Fulton-Favreau formula to the Constitution, viewing the former as an operating instrument, indicates that the Constitution could be pruned with advantage and that closer study of the distribution of the parts of the Constitution under the amending formula would be desirable, if this has not already been done as an official undertaking [25]. The rigidity of the formula in its particular application to the whole range of provincial and federal legislative power, as discussed above, will be more pronounced if the "rights or privileges" clause is found to possess wider scope than its strict construction would permit. One intriguing thought comes to mind in connection with the operation of the formula. It is possible that an amendment that can be made by Parliament with approval of a two-thirds or even lesser proportion of Provincial Legislatures might when made come within the

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[25] This was done in the second session of the 1950 constitutional conference, the proceedings of which show the assignment by each of the participating governments of various sections of the Constitution to the classifications suggested by the Committee of Attorneys-General: see Proceedings of the Constitutional Conference of Federal and Provincial Governments, Second Session, September 25-28, 1950, pp. 76 ff. Although tables prepared for the Conference showed some measure of agreement on the assignments, the participating governments were apart on well over half the provisions of the British North America Act.

entrenched provisions so as to require unanimous consent for future change [26].

APPENDIX

An Act to provide for the amendment in Canada of the Constitution of Canada

WHEREAS the Senate and House of Commons of Canada in Parliament assembled have submitted Addresses to Her Majesty praying that Her Majesty may graciously be pleased to cause a measure to be laid before the Parliament of the United Kingdom for the enactment of the provisions hereinafter set forth:

Be it therefore enacted by the Queen'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:

Part I

Power to amend the Constitution of Canada

1. Subject to this Part, the Parliament of Canada may make laws repealing, amending or re-enacting any provision of the Constitution of Canada.

2. No law made under the authority of this Part affecting any provision of this Act or section 51A of the British North America Act, 1867, or affecting any provision of the Constitution of Canada relating to

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

b) the right or privileges granted or secured by the Constitution of Canada to the legislature or the government of a province,

c) the assets or property of a province,

d) the use of the English or French language,

shall come into force unless it is concurred in by the legislatures of all the provinces.

3. (1) No law made under the authority of this Part affecting any provision of the Constitution of Canada that refers to one or more, but not all, of the provinces, shall come into force unless it is concurred in by the legislature of every province to which the provision refers.

(2) Section 2 of this Act does not extend to any provision of the Constitution of Canada referred to in subsection (1) of this section.

4. (1) No law made under the authority of this Part affecting any provision of the Constitution of Canada relating to education in any province other than Newfoundland shall come into force unless it is concurred in by the legislatures of all the provinces other than Newfoundland.

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[26] For example, the power to appoint provincial superior Court Judges might be given to the Governments of the Provinces.Would it not thereafter be an entrenched provision, amendable only by unanimous consent ?

(2) No law made under the authority of this Part affecting any provision of the Constitution of Canada relating to education in the province of Newfoundland shall come into force unless it is concurred in by the legislature of the province of Newfoundland.

(3) Sections 2 and 3 of this Act do not extend to any provision of the Constitution of Canada referred to in subsection (1) or (2) of this section.

5. No law made under the authority of this Part affecting any provision of the Constitution of Canada not coming within section 2, 3 or 4 of this Act shall come into force unless it is concurred in by the legislatures of at least two-thirds of the provinces representing at least fifty per cent of the population of Canada according to the latest general census.

6. Notwithstanding anything in the Constitution of Canada, the Parliament of Canada may exclusively make laws from time to time amending the Constitution of Canada in relation to the executive Government of Canada, and the Senate and House of Commons, except as regards

a) the functions of the Queen and the Governor General in relation to the Parliament or Government of Canada;

b) the requirements of the Constitution of Canada respecting a yearly session of Parliament;

c) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons, except that the Parliament of Canada may, in time of real or apprehended war, invasion or insurrection, continue a House of Commons beyond such maximum period, if such continuation is not opposed by the votes of more than one-third of the members of such House;

d) the number of members by which a province is entitled to be represented in the Senate;

e) the residence qualifications of Senators and the requirements of the Constitution of Canada for the summoning of persons to the Senate by the Governor General in the Queen's name;

f) the right of a province to a number of members in the House of Commons not less than the number of Senators representing such province;

g) the principles of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada; and

h) the use of the English or French language.

7. Notwithstanding anything in the Constitution of Canada, in each province the legislature may exclusively make laws in relation to the amendment from time to time of the Constitution of the province, except as regards the office of Lieutenant-Governor.

8. Any law to repeal, amend or re-enact any provision of the Constitution of Canada that is not authorized to be made either by the Parliament of Canada under the authority of section 6 of this Act or by the legislature of a province under the authority of section 7 of this Act is subject to the provisions of sections 1 to 5 of this Act.

9. Nothing in this Part diminishes any power of the Parliament of Canada or of the legislature of a province, existing at the coming into force of this Act, to make laws in relation to any matter.

10. No Act of the Parliament of the United Kingdom passed after the coming into force of this Act shall extend or be deemed to extend to Canada or to any province or territory of Canada as part of the law thereof.

11. Without limiting the meaning of the expression "Constitution of Canada", in this Part that expression includes the following enactments and any order, rule or regulation thereunder, namely,

a) the British North America Acts, 1867 to 1964;

b) the Manitoba Act, 1870;

c) the Parliament of Canada Act, 1875;

d) the Canadian Speaker (Appointment of Deputy) Act, 1895;

e) the Alberta Act;

f) the Saskatchewan Act;

g) the Statute of Westminster, 1931, in so far as it is part of the law of Canada; and

h) this Act.

Part II

British North America Act, 1867, amended

12. Class 1 of section 91 of the British North America Act, 1867, as enacted by the British North America (No. 2) Act, 1949, and class 1 of section 92 of the British North America Act, 1867, are repealed.

13. The British North America Act, 1867, is amended by re-numbering section 94A thereof as 94B and by adding thereto, immediately after section 94 thereof, the following heading and section :

Delegation of Legislative Authority

"94A. (1) Notwithstanding anything in this or in any other Act, the Parliament of Canada may make laws in relation to any matters coming within the classes of subjects enumerated in classes (6), (10), (13) and (16) of section 92 of this Act, but no statute enacted under the authority of this subsection shall have effect in any province unless the legislature of that province has consented to the operation of such a statute in that province.

(2) The Parliament of Canada shall not have authority to enact a statute under subsection (1) of this section unless

a) prior to the enactment thereof the legislatures of at least four of the provinces have consented to the operation of such a statute as provided in that subsection, or

b) it is declared by the Parliament of Canada that the Government of Canada has consulted with the governments of all provinces, and that the enactment of the statute is of concern to fewer than four of the provinces and the provinces so declared by the Parliament of Canada to be concerned have under the authority of their legislatures consented to the enactment of such a statute.

(3) Notwithstanding anything in this or in any other Act, the legislature of a province may make laws in the province in relation to any matter coming within the legislative jurisdiction of the Parliament of Canada.
of this section shall have effect unless

(4) No statute enacted by a province under the authority of subsection (3)

a) prior to the enactment thereof the Parliament of Canada has consented to the enactment of such a statute by the legislature of that province, and

b) a similar statute has under the authority of subsection (3) of this section been enacted by the legislatures of at least three other provinces.

(5) The Parliament of Canada or the legislature of a province may make laws for the imposition of punishment by fine, penalty or imprisonment for enforcing any law made by it under the authority of this section.

(6) A consent given under this section may at any time be revoked, and

a) if a consent given under subsection (1) or (2) of this section is revoked, any law made by the Parliament of Canada to which such consent relates that is operative in the province in which the consent is revoked shall thereupon cease to have effect in that province, but the revocation of the consent does not affect the operation of that law in any other province, and

b) if a consent given under subsection (4) of this section is revoked, any law made by the legislature of a province to which the consent relates shall thereupon cease to have effect.

(7) The Parliament of Canada may repeal any law made by it under the authority of this section, in so far as it is part of the law of one or more provinces, but if any repeal under the authority of this subsection does not relate to all of the provinces in which that law is operative, the repeal does not affect the operation of that law in any province to which the repeal does not relate.

(8) The legislature of a province may repal any law made by it under the authority of this section, but the repeal under the authority of this subsection of any law does not affect the operation in any other province of any law enacted by that province under the authority of this section."

Part III

French Version

14. The French version of this Act set forth in the Schedule to this Act shall form part of this Act.

Part IV

Citation and Commencement

15. This Act may be cited as the Constitution of Canada Amendment Act.

16. This Act shall come into force on the..... day of.....

Schedule