NOTE

Opinion submitted to the Foreign Affairs Committee of the House of Commons of the United Kingdom on the Role of the United Kingdom Parliament in Relation to the British North America Acts

Shortly after the Government of Canada tabled its proposed constitutional resolution in the House of Commons at Ottawa on 3 October 1980, the Foreign Affairs Committee at Westminster, under the chairmanship of Sir Anthony Kershaw, undertook an inquiry that would culminate in a report to the House of Commons of the United Kingdom on various aspects of constitutional reform in Canada. Sir Anthony's committee sought the advice and opinion of constitutional specialists.

The Editors of the *McGill Law Journal* are pleased to publish an opinion submitted by Stephen Allan Scott, an advocate in the Bar of Quebec and Professor of Law, McGill University. As an opinion it is printed without editorial emendation in quasi-facsimile. This opinion was not received by the Foreign Affairs Committee before its *First Report*, of 21 January 1981, *British North America Acts: The Role of Parliament*, H.C. 42, Volume I (Report, with Appendices) and Volume II (Evidence and Appendices).

January 14, 1981

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Dear Mr. Rose,

I write in reply to your letter of 13 November inviting me to submit a brief paper on the subject of the Committee's order of reference, to which your letter refers as "the role of the United Kingdom Parliament in relation to the British North America Acts".

In order that my discussion be kept reasonably brief and pertinent, it is necessary to make some reference to the general nature of the proposals which raise the question as to the nature of that role.

Summary

On October 2, 1980, the Government of Canada published a *Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada*, intended for passage by both houses of the Parlia-

ment of Canada and transmittal to Westminster for implementation by the Parliament of the United Kingdom.

In moments of pessimism — as I have already confessed to the Canadian joint parliamentary committee studying this proposal — the temptation has been to adapt the language of William Butler Yeats to ask "What rough beast, its hour come round at last, slouches towards Westminster to be born?" But I have come to the conclusion that it would be in accordance with both the law and the practice of the constitution for the United Kingdom Parliament to comply with a request in those, or in any comparable terms, should one be made in due course. By a "comparable" request I mean any request that the United Kingdom Parliament enact a statute creating domestic Canadian constitutional amendment processes to supersede the existing authority of the United Kingdom Parliament, and accompanying this transfer of constituent power with other reforms — notably a charter of guarantees of rights and freedoms — even though these reforms may have significant effects upon the legislative or other authority of the Canadian provinces.

My opinion, in summary, is this.

(I.) As a matter of *strict law*, the legislative authority of the Parliament of the United Kingdom to enact the proposed legislation, or any comparable legislation, is absolute and without qualification of any kind.

(II.) As a matter of *constitutional practice*, amounting probably to a convention of the constitution, the United Kingdom Parliament will, regardless of the subject or nature of the measure, exercise its remaining legislative authority for Canada on the basis that a request of the Senate and of the House of Commons of Canada is both (1) a necessary, and (2) a sufficient, condition for "Imperial" legislative action. In so doing the United Kingdom Parliament will have no regard to whether there exist in Canada any "domestic" Canadian constitutional practices or conventions, or whether, if there be any, they have been complied with.

(III.) There is no settled convention in Canada restricting the circumstances in which the Senate and House of Commons of Canada can properly approach the United Kingdom Parliament with a request to exercise its legislative authority with respect to the whole or any part of Canada.

I shall elaborate briefly on each of these matters. In so doing, it will be convenient from time to time to use the term "Imperial Parliament" — a phrase of more than merely colloquial standing (see s. 1 of the *Colonial Laws Validity Act*, 1865, 28 & 29 Vict., c. 63 (U.K.)). It may be read interchangeably with the more formal but lengthy style "Parliament of the United Kingdom", or those of its predecessor Parliaments.

I. *The Law*

"[T]he King's Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons of Great Britain, in Parliament assembled, had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the Crown of Great Britain, in all cases whatsoever." These blunt and succinct terms are those which the british Parliament itself chose, in 1766, to state the law which, in its view, governed

its political relations with the colonies within the King's dominions — more particularly, the North American colonies. The statute in which it did so, *An Act for the better securing the Dependency of His Majesty's Dominions in America upon the Crown and Parliament of Great Britain*, 6 Geo. 3, c. 12 (G.B.), known in the American colonies as the "Declaratory Act" (and much later, by the *Short Titles Act*, 1896, styled *The American Colonies Act*, 1766) represented in effect a joinder of issue with what became prevailing opinion in the "thirteen colonies". Indeed it was one of the steps towards the outbreak of the American Revolution. It survived the particular historical circumstances which induced its passage, standing on the British statute book until its repeal by the *Statute Law Revision Act*, 1964 (1964 c. 79) as one of a number of enactments which were collectively declared (s. 1) to be "obsolete, spent or unnecessary or ... superseded by other enactments".

The more modern authoritative statement of Imperial legislative supremacy is of course that contained in the *Colonial Laws Validity Act*, 1865 ("in Imperial history clarum et venerabile nomen": *per* Lord Birkenhead, L.C., speaking for the Privy Council in *McCawley* v. *The King*, [1920] A.C. 691 at p. 709). Here the governing principle is stated more elaborately, and also more generally as to its geographical application, than it had been in 1766. The rule of *Imperial legislative supremacy* is on this occasion implicit in the statutory statement of the converse rule — *colonial legislative subordination* — found in sections two and three of the Act, which must be read with the defining provisions of section one. But its effect is not on that account any the less absolute.

This, then, was the legal position of Canada vis-à-vis the Imperial Parliament, on 11 December 1931, the date of enactment of the *Statute of Westminster*, 1931, 22 Geo. 5 c. 4 (U.K.). It made two crucial reforms. Section two (read with s. 7(2)) allowed the Canadian Parliament and provincial legislatures to make laws repugnant to Imperial statutes. Section 4 provided that "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented, to the enactment thereof."

It may be observed that section 4 of the *Statute*, read literally, makes extension of Imperial Acts conditional, not upon the *fact* of "Dominion" request and consent but rather upon mere statutory *recital* of that fact. Section 4 thus technically depends for its effectiveness on Imperial *bona fides*. The "sovereignty" which it confers on the "Dominion" accordingly suffers what, in a formal sense at least, is a significant qualification. In practical terms this qualification makes legally irrelevant (and so judicially unreviewable) the sufficiency of "Dominion" request and consent (whether as between central and local institutions, or as between legislative and executive authorities, or otherwise).

Much more far-reaching than any qualification found in the text of section 4 of the *Statute of Westminster*, 1931, is the effect on the *Statute* of subsection 7(1). Opinions may differ as to the scope of the latter, but on any view it is a provision of profound constitutional significance. Subsection 7(1) speaks categorically: "Nothing in this Act shall apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder."

Subsection 7(1) plainly overrides section 2, — so placing beyond controversy the constitutional supremacy in Canada of the *British North America Acts*, 1867 to 1930.

Does subsection 7(1) also override section 4 — so preserving intact to the Imperial Parliament its absolute legislative freedom (as a matter of strict law) to repeal, amend or alter the *British North America Acts*, 1867 [to 1930]?

In my opinion it does. And these considerations lead me to my conclusion.

A statute is not a theme upon which courts of law are invited to spin variations, nor a suggestion thrown to them for whatever they may think it worth. It is a peremptory exercise of arbitrary power. It must be taken to mean what it says unless the clearest and most cogent grounds point to some other conclusion.

Now subsection 7(1) uses the words "Nothing in this Act". Section 4, undeniably, *is* "in" the "Act". It is in the Act quite as much as is section 2. The words of subsection 7(1), if literally construed, therefore control section 4 quite as surely as they control section 2. Doubtless some reasons can be advanced for regretting this literal reading of subsection 7(1), and for preferring a narrower interpretation. But these reasons are, in my view, very far indeed from supporting a conclusion that Parliament *could not* have contemplated section 4 when it said, in categorical terms, that *"Nothing in this Act"* (my emphasis) should apply to the repeal, amendment, or alteration of the British North America Acts, 1867 to 1930.

It may be said, quite rightly, that no anomaly would have resulted had subsection 7(1) been confined in its terms to controlling section 2, and that no anomaly results from reading it in this way. But it is equally certain that subection 7(1) is in no way bizarre in its operation if it is applied as controlling section 4 also — so leaving the constitutional position of the *British North America Acts*, 1867 to 1930 in law completely unchanged by the *Statute of Westminster*, 1931.

If subsection 7(1) is to be applied otherwise than literally, clear and cogent grounds must be advanced to show that the United Kingdom Parliament cannot have meant what it said.

He who would advocate an interpretation of subsection 7(1) sufficiently restrictive to prevent its application to section 4 — and its suppression of that section, where the amendment of the B.N.A. Acts is in question, must bear the burden of justifying such a departure from the principle of literal interpretation. But the arguments available to him in attempting to discharge his burden seem to do no more than allow him to show that it would have been at least *equally* reasonable for the Imperial Parliament to adopt a course of legislation other than that grammatically indicated by the text of its enactment. Concede even that such a course would have been *more* reasonable. The available arguments, however, stop far short of showing that the Imperial legislature *could not* have meant, with reference to section 4, what it said, in unqualified terms, in subsection 7(1). The conclusion, then, must be that subsection 7(1) *does* apply to, and *does* override, section 4. But as a contrast we can usefully consider the point that subsection 7(1) is *itself* "in this Act". To apply that subsection to itself would annihilate its effect altogether. That such is not the proper construction does in this

instance follow as a matter of necessary implication. So subsection 7(1) does not apply to — does not override — subsection 7(1) itself.

The Imperial Parliament, in sum, has, through the enactment of subsection 7(1) of the *Statute of Westminster*, 1931, retained what may be thought of as an unrestricted power of appointment over public authority in Canada — legislative, executive, and judicial. As a matter of strict law, it retains, in my view, absolute and unrestricted constituent authority for Canada. Indeed, various Imperial Acts amending the *British North America Acts* have employed language different in form (though indistinguishable in substance) from that proposed in the requests contained in the addresses to the Sovereign passed by the houses of the Canadian federal Parliament.

II. *The Constitutional Practice at Westminster*

What, then, is the constitutional practice?

Sir William Jowitt, then Solicitor-General and later Lord Chancellor, seems to me to have provided the definitive statement of the constitutional practice in the Westminster Parliament on amendments to the British North America Acts. The passage of the *British North America Act*, 1940, provided the occasion for his remarks. The Act of 1940 was of course a constitutional amendment which altered the distribution of legislative authority as between the Parliament of Canada and the legislatures of the Canadian provinces. On 10 July 1940, during passage of the bill in the House of Commons of the United Kingdom (362 U.K. *Parl. Deb.*, 5th Ser., H.C. 1177-1181) the honourable member for Wolverhampton East (Mr. Mander) put this question: "In this bill we are concerned only with the Parliament of Canada, but, as a matter of interest, I would be obliged if the Solicitor-General would say whether the Provincial Canadian Parliaments are in agreement with the proposals submitted by the Dominion Parliaments ...".

In responding, Sir William Jowitt spoke in these terms:

> "... One might think that the Canadian Parliament was in some way subservient to ours, which is not the fact. The true position is that at the request of Canada this old machinery still survives until something better is thought of, but we square the legal with the constitutional position by passing these Acts only in the form that the Canadian Parliament require and at the request of the Canadian Parliament.
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> My justification to the House for this Bill — and it is important to observe this — is not on the merits of the proposal, which is a matter for the Canadian Parliament; if we were to embark upon that, we might trespass on what I conceive to be their constitutional position. The sole justification for this enactment is that we are doing in this way what the Parliament of Canada desires to do ....
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> In reply to the hon. Member for East Wolverhampton (Mr. Mander), I do not know what the view of the Provincial Parliaments is. I know, however, that when the matter was before the Privy Council some of the Provincial Parliaments supported the Dominion Parliament. It is a sufficient justification for the Bill that we are morally bound to act on the ground that we have here the request of the Dominion Parliament and that we must operate the old machinery which has been left over at their request in accordance with their wishes."

This appears to me to be a statement of the greatest importance. First, it is one made by a law officer of the Crown, and indeed by a person of special legal eminence. Second, it is more or less contemporaneous with the reforms of law and practice effected by the Imperial Conferences of 1926 and 1930 and by the *Statute of Westminster*, 1931. Third, it was made in the course of debate on a bill transferring exclusive provincial legislative jurisdiction to the Parliament of Canada. Fourth, it was made in direct response to a question raised as to be the extent of provincial concurrence.

A similar position has been taken on other occasions. The *British North America Act*, 1943, involved not the rights or powers of any *province* as a legal entity, but, in a general way, the collective interests of its inhabitants in the distribution of seats, as amongst provinces, in the federal House of Commons. The Legislative Assembly and executive government of Quebec protested against the measure, but an address to the Sovereign was nevertheless carried through both houses of the federal Parliament. In the course of passage of the bill through the United Kingdom House of Commons (391 U.K. *Parl. Deb.*, 5th Ser., H.C., Vols. 1100-1104) these remarks were made:

> The Secretary of State for Dominion Affairs (Mr. Attlee): I beg to move "That the Bill be now read a Second time."
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> I would like to explain briefly to the House the circumstances in which this Bill has been brought before the House.
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> ...
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> The reason why the matter comes before this House is this: there is no power conferred by the Act of 1867 on the Canadian Parliament to deal with this matter. From time to time, the question has been discussed in Canada of whether some method should not be devised in order that Canada should amend its own Constitution, but there has never been any agreement on that. At the time of the passing of the Statute of Westminster, an express provision was made at the request of the Government of Canada, taking out from the general powers then conferred any power to amend or repeal the British North America Act, and the procedure therefore for amending the British North America Act remains as it was before the Statute of Westminster. This procedure has for many years been followed on the basis of an Address presented to the King by both Houses of the Canadian Parliament, and that is what has been done on this occasion. I understand that the Address was carried in both Houses by very large majorities. The Clauses of the Bill follow substantially the terms of the Address passed in the Canadian Parliament, and the Recital corresponds closely with that adopted on the last occasion on which similar legislation was passed here.
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> ...
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> Mr. Mander (Wolverhampton, East): I desire to facilitate the passage of the Measure in every way, but there is one point that I should like to raise and ask the right hon. Gentleman to comment on. I have received a communication from the Dominion of Canada pointing out that the Measure now before us was objected to by one Province and met with a certain amount of opposition in the two Houses of Parliament. In view of the fact that these representations have been made, would the right hon. Gentleman say to what extent there appears to be any difference of opinion among the Provinces?

Mr. Maxton (Glasgow, Bridgeton): I should like to reiterate the point made by the hon. Member for East Wolverhampton (Mr. Mander). I accept the assurance of the right hon. baronet that during his very short visit to Canada he got a complete low-down on the whole situation, but I should like the right hon. Gentleman to give us precise particulars of how this was brought before the two Houses in Canada, what debate took place, and what opposition was expressed.

Mr. Attlee: I have no detailed information with regard to the Debate. My information is that it was carried in both Houses by very large majorities. Perhaps the hon. Member for East Wolverhampton (Mr. Mander) will consult with his Leader as to the specific point that he put. I have no information as to any Province objecting, but, in any case, the matter is brought before us by an Address voted by both Houses of Parliament, and it is difficult for us to look behind that fact. After all, in this House we carry things, and sometimes we have minorities, but they become the act of the Legislature.

...

Mr. Stephen (Glasgow, Camlachie): I thought I heard the right hon. Gentleman say that all parties were in agreement in Canada with regard to this legislation, but it appears from what he has said subsequently that that is not the case. There are parties which are not in agreement. He also says that the fact that both Houses have passed it should be sufficient for this House. The fact that the Act laid it down that this House had to give its assent to any such changes also shows that this House has a certain interest in the matter to see that minorities are not simply steam-rollered by majorities. I think the right hon. Gentleman might have taken the trouble to inform himself a little more fully as to the position in Canada. He seems to know very little about it. That is not the proper way for the responsible Minister to bring it before the House.

Sir Edward Grigg (Altrincham): I suggest that it is really improper in present circumstances for the House to question the discretion of a sovereign Parliament in the Commonwealth of Nations. It is only owing to a technical legislative peculiarity that it comes to the House at all, and it is very improper that the House should question the discretion of a national and absolutely sovereign Parliament. I hope that that will be accepted by the House and that this legislation will be passed without further comment.

I quote lastly a question and written answer given in the United Kingdom House of Commons on 10 June 1976 (912 U.K. *Parl. Deb.*, 5th Ser., H.C., p. 719) because, although recent, the exchange occurred before the current proposals were produced or (at least in their present form) even conceived:

"Mr. Cartwright asked the Secretary of State for Foreign and Commonwealth Affairs what proposals he has received from the Canadian Government about their plans to request the patriation to Canada of the British North America Acts of 1867 to 1946.

"Mr. Hattersley: I have received no proposals from the Canadian Government on this matter. The British North America Acts, which contain the constitution of Canada, can be amended in certain important respects only by Act of the United Kingdom Parliament. The Canadian

Prime Minister has expressed publicly the desire of the Canadian Government that this power of amendment should be a matter of Canadian competence and should no longer be exercisable by the United Kingdom Parliament. If a request to effect such a change were to be received from the Parliament of Canada it would be in accordance with precedent for the United Kingdom Government to introduce in Parliament, and for Parliament to enact, appropriate legislation in compliance with the request."

These various remarks in the United Kingdom House of Commons are doubtless already familiar to you. I have quoted them at length here essentially to show that, at all events since 1931, governments of all political persuasions in the United Kingdom have taken a consistent position on the proper constitutional practice — perhaps "convention" — governing legislative action by the United Kingdom Parliament for Canada.

That position appears to me to be essentially this: an address carried through both Houses of the Parliament of Canada is, so far as the United Kingdom Parliament is concerned, both a *sufficient* and a *necessary* condition for an Imperial statute substantially in accordance with the request; and this is so whether or not there exist practices or "conventions" in Canada pertaining to the circumstances when a federal parliamentary address is proper, and whether or not in my given instance these practices have been followed or these conventions complied with.

My opinion on this point is, I should emphasize, quite consistent *either* with the *presence* or *absence* of pertinent conventions in Canada. I argue simply that Westminster does not look behind the federal parliamentary joint address.

If I am right, the existence and nature of conventions within Canada will not be of direct or immediate interest to you. Before I proceed to speak of them briefly, I wish to place my remarks — those which I have already made and those which follow in the concluding part of this submission — in a rather wider context than they may themselves suggest.

Constitutional theorists have vied with one another for imagery sufficiently vivid to convey, with enough force, the absolute nature, in the law of the United Kingdom, of the legislative sovereignty of its Parliament. The power to do all 'save make a woman a man, or a man a woman' is by Sir Robert Megarry (*A Second Miscellany-at-Law*, p. 107) traced to the mid-seventeenth century. Dicey, quoting Leslie Stephen, spoke of an Act providing for the killing of blue-eyed babies (Dicey, *Law of the Constitution*, 10th ed., p. 81).

I do not argue that any such extreme formulation is, at least for the present, appropriate in any statement of the practice or the convention now governing the United Kingdom Parliament's surviving legislative authority for Canada. Extreme and highly-coloured hypotheses of possible federal requests can of course be invented.

The outright abolition of the Canadian federal system affords one example; the elimination of one or more provinces another. How would it be proper for the United Kingdom Parliament to respond to such requests? My answer is that requests for cataclysmic changes would have to be judged in the light of the circumstances. What might be unacceptable today might be quite appropriate in the wake of rebellion or nuclear war.

For the moment, in dealing with the current proposals for an amending formula and a charter of guarantees of rights and freedoms, it is enough to assess them broadly, and having done so, — without entering upon the merits or deficiencies of particular provisions — conclude that, taken as an aggregate, they (or any broadly similar scheme) are far from the extreme cases where the United Kingdom Parliament might think itself obliged to make itself the arbiter on the merits. We need not argue that every request, however outrageous or extravagant, must be complied with on the spot.

What is the case made by those who advocate refusal by the United Kingdom Parliament to act on such a proposal without the consent of all — or at all events, of most — of the Canadian provinces? They must, and do, argue essentially that the current proposals, or others that might resemble them, differ from those enacted in the past by the United Kingdom Parliament without provincial concurrence. The current (or similar) proposals would (it is alleged) be subversive of the federal system.

To me it is evident — and I press this upon you — that the United Kingdom Parliament cannot accede to any such argument about subversion of the federal system without a very close review of the operation of the Canadian federal system, and of the necessity or opportunity of the measures proposed in the light of the nature of that system. This means, in effect, a review of the proposals on their merits.

The Committee have made it clear that it has no wish to embark upon any such inquiry. It is evident that the United Kingdom House of Commons would shrink from such an undertaking. This instinct is, in my view, sound.

For on the face of the proposals their essential character may be sufficiently ascertained to enable the United Kingdom Parliament to conclude that they are not subversive of the federal system. The proposed amendment mechanism (which is broadly comparable to that of the Australian federation) protects the provinces to a degree quite acceptable in any normal federal system. The charter of rights and freedoms is of a character comparable to what may be found in the constitution of a modern liberal-democratic federal state, or indeed in that of a community of states.

So much being evident on a cursory inspection — necessarily undertaken to ascertain what it is that the United Kingdom Parliament is being asked to do, and what principles govern its proper response — the scheme cannot then be found subversive of the federal system unless the test is to be simply whether or not it has an effect on the status or powers of the provinces.

But consider the nature of the inquiry to which such a test, if adopted, would lead.

Any constitutional amendment formula *necessarily* has the most profound impact on the constitutional system as a whole, including the status of the provinces. In effect, the amendment formula indeed *defines* their status, as it defines the status of all else.

Is the United Kingdom Parliament then to conclude that *no* "patriation" — *no* constitutional amendment formula — is to be introduced without the unanimous consent of all the provinces? If not all provinces, then what number? Will the consent of executive governments suffice? Does it matter whether consent of a province has unreasonably been withheld? What are reasonable grounds? Is it unreasonable to withhold consent to an amending

formula until concessions are made on collateral matters? What is the history of the federal-provincial negotiations on an amending formula? Would it be relevant to show that unsuccessful negotiations had been conducted at various intervals over the past fifty-five years?

Surely the United Kingdom Parliament could not reasonably *refuse* to act on a federal parliamentary joint address without reviewing such matters. Surely it would not willingly undertake such a review. Surely it would require most extravagant proposals to justify such a review. Surely neither the amending formula under discussion, nor one resembling it, would remotely justify such a review.

If the Imperial Parliament rightly shrinks from embarking on such an inquiry with reference to a proposed amending formula, still less is it likely to wish to review on the merits a request for inclusion of a charter of guarantees of rights and freedoms. Yet without such a review I cannot see how a federal parliamentary request could reasonably be *refused.* It may be argued that a charter of this nature impinges on the powers of the legislatures of the provinces. So of course it does, just as it impinges on the powers of the Parliament of Canada. But even so, how could the United Kingdom Parliament reasonably deny the Senate and House of Commons of Canada the right to justify the opportunity, or even the necessity, of such a charter to the proper functioning of a Canadian liberal-democratic federal state?

Suppose, for example, that the federal Parliament is able to establish the recurrence of serious abuses of basic liberties, — including even interferences with freedom of movement within the federation — and able too to show the practical impossibility of securing provincial concurrence in a suitable charter of guarantees. Would that not be relevant to an inquiry by the Westminster Parliament as to whether the federal request was subversive of the federal constitution? Suppose that the federal Parliament is able to show that various provinces refuse to concur in a charter for reasons quite extraneous to the merits of the guarantees, demanding, for example, redistribution of legislative powers and public property in their favour. Would that not be relevant to such an inquiry?

And in such an inquiry, would it not be pertinent to adduce as evidence a catalogue of instances of violations of fundamental principles, which the charter had as its purpose to guarantee as legal rights? Suppose that the Senate and House of Commons of Canada pointed to provincial legislation of the nature of acts of attainder. Legislation denying access to common occupations on the basis of race or racial origin (e.g. a statute prohibiting employment of white female labour in places of business or amusement kept by "Chinamen"). Pseudoscientific legislation providing for compulsory sterilization of mental "defectives" (at least one of whom later proves capable of passing secondary school examinations). Legislation compelling the press to publish government statements on its policies and to disclose the sources of other information or criticism of those policies. Legislation barring, save on terms fixed by statute, expenditure to promote views on matters of public concern. Legislation allowing arbitrary interference with the publication of books, films, and even toys and games (as, a statute barring sale of games involving use of one language unless comparable versions are made available in another language; a bill proposing a similar statute for films; with nothing to prevent similar legislation for books).

A long catalogue of such instances could easily be furnished. Of this the Committee need have little doubt. But an inquiry into the working of Canadian federalism which would compel the houses of the Canadian Parliament to justify their address to Westminster with such evidence would be an inquiry which — at all events in the present state of constitutional evolution of the British Commonwealth — the United Kingdom Parliament could not readily or willingly undertake.

For these reasons, I argue that these, or comparable, proposals — being very far from measures on their very face palpably outrageous and shocking to the conscience of a liberal-democratic federal state — cannot, consistently with established constitutional practice, be subjected to scrutiny on the merits by the United Kingdom Parliament, and still less refused enactment outright without such a scrutiny.

I may add that I write as I do despite many and grave reservations both as to the form and substance of the proposals, and after what seem likely to prove largely fruitless and thankless efforts at their improvement.

III. *The Constitutional Practice in Canada*

I have argued that the relevant practices or conventions *at Westminster* (that is, those governing the response of the United Kingdom Parliament to an address of the Houses of the Canadian Parliament requesting an amendment to the *British North America Acts*) depend neither upon the existence of any practices or conventions *in Canada* as to the circumstances when such an address is proper, nor upon compliance with such practices or conventions if any exist.

It follows, in my submission, that if the question be pressed, "What are those practices or conventions within Canada?", the answer, whatever it may be, does not affect the opinions which I have given above.

With this reservation, I shall state, very shortly, my reasons for thinking that no settled convention or practice exists on the subject within Canada.

The nature of Canadian federalism is such that extreme efforts are usually made to secure federal-provincial consensus on sensitive matters. Few matters are more sensitive than constitutional matters. Where it has been proposed to transfer legislative authority from provincial to federal authorities, the latter have necessarily exercised extreme caution before proceeding with a request to Westminster. But this is explicable on normal grounds of political prudence, and in itself does not involve any acknowledgment of constitutional obligation. It would be most unfortunate if the federal authorities were held obliged to act, from time to time, in the teeth of provincial opposition, in order to maintain the principle that they were, constitutionally, free to act without provincial consent.

I have already quoted Sir William Jowitt's remarks, — made in connection with the passage of the *British North America Act*, 1940, — on the irrelevance at Westminster of provincial consent. This Act, of course, transferred certain provincial legislative jurisdiction (unemployment insurance) to the federal Parliament. Unanimous provincial consent was in fact obtained on that occasion. On June 25, 1940, in the course of debate in the federal House of Commons on the address to Westminster (223 *Deb. H. Com. Can.* 1108-1126), pressed on the necessity of provincial consent, the Rt. Hon. Ernest

Lapointe, the Minister of Justice, summarized his position in this way: "May I tell my hon. friend that neither the Prime Minister nor I have said that it is necessary, but it may be desirable".

I accept that some will adopt a view of the precedents contrary to my own, and, pointing to the instances where provincial consent has been secured to transfers of legislative authority to the federal Parliament, infer the necessity of provincial consensus, or even of unanimous provincial consent.

Even so (and assuming that it is possible to define what is meant by a consensus), a proposal for a constitutional amending formula, or a proposal for a charter of guarantees of rights and freedoms, is of a character quite different from a transfer of authority from one level of government to another. On the facts, the precedents deal with quite different situations. The Parliament of Canada, in a scheme like that now under consideration, asks not for redistribution of power in its favour, but for an amending formula and for a charter of guarantees applying alike to both levels of government.

Especially in the light of the circumstances to which I have referred above, bearing on the working of the federal system, — is it unreasonable for the Canadian federal Parliament to conclude that the securing of sovereign legislative independence with a constitutional amendment procedure, and the securing simultaneously of a guarantee of basic rights, each presents an urgency which constitutionally justifies action although consensus cannot be obtained, and all the more as consensus very possibly never may be obtained?

I would not willingly be persuaded that such a parliamentary view of the constitutional practice and convention in Canada is unreasonable.

And I am

Yours faithfully,

Stephen A. Scott,
Advocate.