Constitutional Amendment in a Canadian Canada

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In the presence of so many distinguished experts — and future experts — on Canada's constitution, I would not dare try to give here a classroom lecture on constitutional law. As a former law professor myself, I will admit, of course, an instinctive preference for the free-wheeling postulations that make the academic career so satisfying; but as Minister of Justice, I must, alas, content myself with the far less exciting task of soberly explaining government policy. From the noble work of awakening young minds, you might say, I have graduated to the post-prandial function of keeping old men (those of my own age) from falling asleep.

Since I fear the teachers' scrutiny and respect the students' taste for forthrightness, I shall not attempt in the twenty or thirty minutes at my disposal to offer you a fully documented essay on the new amending formula, complete with footnotes and precedents. That you shall have next month, when the Government publishes its comprehensive White Paper on this subject. All that I wish to do to-night is present a brief sketch of the formula in layman's terms suitable for digestion with a fine banquet.

I shall treat the new formula in three stages. We shall begin with a summary of the formula's main provisions in the light of efforts to define an amending procedure over the years; then will follow a defence of the formula against what I am compelled to consider ill-founded criticisms; and finally, I shall try to convey the historic significance of the formula for a Canada seeking a fresh, and distinctively Canadian identity.

1. The Formula Explained:

The search for a procedure allowing amendment of the whole Canadian Constitution in Canada began immediately following the First World War. By her extraordinary contribution to that conflict and her active participation in the ensuing peace conferences and

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the League of Nations, Canada demonstrated that her inability to amend her entire Constitution was anomalous. Dr. Maurice Ollivier, Parliamentary Counsel to the House of Commons, has shown that Canadian statesmen during the half-dozen years after Versailles decried this irregularity almost every few months. Most notably, Mackenzie King did so in 1920, J. S. Woodsworth in 1924, and W. F. MacLean in 1925.

This unofficial questioning, heartened by the Imperial Conference of 1926, led the Minister of Justice, the Hon. Ernest Lapointe, to raise the problem at the Dominion-Provincial Conference of 1927. After justifying the need of a procedure for amendment in Canada, the Minister went on to propose a qualified formula in which one can easily recognize the major lines of the formula achieved in 1964. In particular, the Minister urged that:

> "in the event of ordinary amendments being contemplated the provincial legislature should be consulted and a majority consent of the provinces obtained, while in the event of vital and fundamental amendments being sought involving such questions as provincial rights, the rights of minorities, or rights generally affecting race, language and creed, the unanimous consent of the provinces should be obtained."

At this Conference in 1927, Lapointe's proposal was scarcely well received. Indeed certain provinces considered that the Canadian Constitution, being a charter granted by the British Parliament, could not be amended anywhere but in London. The final report of the Conference did no more than record the Canadian Government's intention to study the problem carefully.

After this rather modest beginning, four other high-level Federal-Provincial Conferences took up the question, respectively in 1935-36, 1950, 1960-61 and 1964. I shall not bother to remind you of all the details of these discussions or to recite the impressive list of persons who moved their work forward. It is enough to observe that these Conferences traced the constant and coherent evolution of men of all parties toward the definition unanimously agreed on last month. For make no mistake: the amendment formula of 1964 in no way represents a sudden departure; it is but the logical — in fact, inevitable — consequence of an uninterrupted series of small advances forged by men of two generations. It cannot be portrayed as the fruit of a single mind or a single day's work; it is a monument sculpted patiently, with chisels made of patriotic concessions, by statesmen who, from ministry to ministry, saw themselves as Canadians first.

Out of this long and continuous search for a procedure of amendment came, as you know, the formula of October 14, 1964. This

arrangement will permit Canadians to amend any part of their Constitution through Canadian institutions; and for this reason one can say that it will domicile our Constitution in Canada.

The formula may be broken down, for simplicity, into two major phases, one treating amendment of strictly federal powers, and the other, amendment of powers concerning to both Ottawa and the provinces.

You will remember that section 91(1) of the British North America Act was enacted in 1949 specifically to grant Parliament the right to amend the Constitution in matters of exclusively federal interest. In conferring this right, it sought obviously to give Ottawa a power already enjoyed by the provinces, in respect to their part of the Constitution, under section 92(1). At the time, however, and ever since, certain provinces have expressed fears that the 1949 amendment was drafted with an imprecision that might conceivably be interpreted by the courts to impinge upon provincial right and prerogatives. For example, some provinces worried that the new section might some day deprive them of their traditional proportion of representatives in the Senate and House of Commons. It is no secret that some provinces during the 1960-61 conference declined to approve any general formula for bringing home the Constitution until section 91(1) had been amply clarified.

The immediate and characteristic achievement of the 1964 conference was to make this clarification. Henceforth, the clause in the formula replacing the present section 91(1) authorize Parliament to amend "the Constitution of Canada in relation to the executive Government of Canada, and the Senate and House of Commons" — new exceptions being made of minimum provincial representation in the Senate (as well as residence qualifications of Senators) and proportional representation of provinces in the House of Commons. It was in great part the redefinition of the present section 91(1) in more precise language that made possible at this time the unanimous acceptance of the general amendment formula arrived at in 1961.

This understanding of 1961 forms, in fact, the entire second part of the present agreement, that affecting powers of joint federal and provincial concern. Since I shall be defending this part in detail in a few moments, I shall for now merely recall its stipulations in general terms.

This part of the formula can in turn be reduced to two main aspects, namely the basic amending procedure and the so-called "delegation clause". For cases not spelt out specifically in the formula, the basic procedure allows amendments with the approval of Parlia-

ment, as well as two thirds of the provinces having at least fifty per cent of the Canadian population. For amendments to those provisions of the constitution which presently concern only a limited number of provinces, Parliament can act with the simple consent of the interested provinces. And finally, for certain fundamental matters, such as the division of legislative powers between Ottawa and the provinces or the use of official languages, Parliament can amend the Constitution only if all the provinces agree.

The "delegation clause", for its part, represents an attempt to soften any possible rigidity in the amending procedure that might have resulted from this requirement of unanimity. The clause allows Parliament, with the consent of any four provinces, to delegate conditionally to these provinces limited portions of its law-making powers. Similar delegation can be made by any four provinces to Ottawa.

2. The Formula Defended:

Since the proposed new amending formula was officially published last October 14, it has been the object of certain criticisms. While we should welcome criticism as evidence of a serious public interest in constitutional matters, we have a right to expect it to be informed, objective and responsible.

True to their vocation, university specialists commenting on the formula have, I think, met these standards. Perhaps a few academics have confused the amending procedure with the distinct question of substantial amendments; and perhaps some others have tended to rationalize the formula more to suit symmetrical theories than inconveniently complex realities. Yet in the main, professional jurists and political scientists have examined the formula carefully and impartially.

As for the formula's critics in Parliament, I would never suggest that they lacked this same integrity or a sense of public duty; but I insist most candidly that many of them have not troubled to give the proposed formula the diligent study it deserves. Perhaps, indeed, only one of these opponents, Mr. Andrew Brewin, can claim to have based his presentation on truly competent research. Some Members, I think, notably those directly in front of me in the House of Commons, have preferred not to clutter their cases with any reference to the facts at all. Certain of the more prominent critics, as I hope to show, seem in sum to have constructed their arguments from a curious amalgam of lethargy, prejudice and political opportunism.

Before reviewing the main accusations against the formula, I think it appropriate to put these in perspective. To begin, the current

criticisms are not directed primarily against the present government's own fresh contribution to the formula — namely the clarification of exclusively federal amending powers in section 91(1) of the B.N.A. Act; virtually all of the most strident attacks fall upon that part of the arrangements adopted almost *verbatim* from the formula arrived at in 1961 during the tenure of my friend and predecessor, the Hon. E. Davie Fulton. On the two key points of contention, indeed, perhaps you will allow me to quote from a memorandum (somehow leaked to the press) which the former Conservative Minister of Justice sent last October 26 to the Leader of the Opposition. Calling the new amending formula "precisely identical", with minor exceptions, to the Conservative formula of 1961, Mr. Fulton went on to confirm that "these new provisions do not... alter in principle or affect the amending formula as embodied in the 1961 proposal". And on the second subject of criticism, the so-called "delegation provisions are thus exactly as they were embodied in the 1961 proposal". And on the second subject of criticism, the so-called "delegation clause", he observed that the (1964) "delegation provisions are thus exactly as they were embodied in the 1961 proposal". Some might consider my willingness to quote from the internal correspondence of the Conservative Party rather indecent; I would reply simply that in the light of Mr. Fulton's clearly stated judgments, the readiness of certain of his ex-colleagues to vituperate the present formula strikes me, to put it charitably, as incongruous.

Let us weigh now each of the leading criticisms of the formula in turn. These focus, as I said, on two crucial stipulations: the basic amending procedure and the "delegation clause".

The basic amending procedure is attacked essentially for its alleged rigidity. More precisely, its critics assert that the requirements of a unanimous vote of the provinces and Ottawa on all changes affecting the fundamental rights of the provinces, including control over resources, education and official languages, will put Confederation in a so-called "straitjacket". For at least four good reasons, this fear appears unfounded.

First, the procedure does not impose any legal constraint that thwarts the traditional forces of constitutional change; on the contrary, it mirrors these forces with utter realism. In the past, Ottawa has never amended the Constitution on matters touching essential provincial rights (as defined in clause 2 of the formula) without the consent of all the provinces. Given the current — and I think, fruitful — resurgence of provincial initiative, a change in this convention becomes inconceivable. However much some people

may regret this convention, it remains an undeniable political reality. The formula does not invent that reality; it merely acknowledges it.

Second, any rigidity the unanimity clause might theoretically produce is softened by the possibility of judicial interpretation. We have witnessed often during our history interventions by the courts that, in the view of many, have in fact transferred powers originally assigned to Ottawa and the provinces with apparent finality. Sections 91 and 92 of the B.N.A. Act thus distinguish subjects intrinsically federal and matters properly provincial; yet since *Russell* v. *The Queen* in 1882 and well beyond the abortive "New Deal" legislation of R. B. Bennett in the 1930's, the courts have readjusted the effective federal-provincial distribution of powers frequently and substantially. As long ago as 1938, Professor Frank Scott tried to show that, since Confederation, judicial interpretation had added no less than 11 powers to federal jurisdiction and 21 to that of the provinces. We can expect such judicial review to interpret our constitution with continued sensitivity to Canada's changing needs.

Another important precaution against the formula's feared rigidity is enshrined intentionally in the formula's delegation clause. This clause is designed precisely to prevent any constitutional impasse that might result from the requirement of unanimous federal-provincial agreement. Should this requirement make it impossible for Ottawa and all the provinces to secure a permanent amendment, those parties desiring a change (assuming they included at least four provinces and Ottawa) could achieve their immediate purpose by delegating to the appropriate authorities the power to enact a particular law. Moreover, if all the provinces did agree with Ottawa that such a law were desirable, but not all wished a permanent transfer of legislative power through amendment, the eleven governments could agree to a delegation of limited power — thereby using the clause simply as a convenient device for avoiding a cumbersome, and indeed far more rigid, formal amendment.

In a word, it seems obvious that the delegation clause will be used exactly in those cases where the present constitution acts as a straitjacket. I have in mind the various sectors of application of those federal and provincial jurisdictions which, though not juridically concurrent, are nevertheless complementary — those cases referred to by Lord Atkin in the *Natural Products Marketing* case of 1937 when he said: "... as the provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired".

Finally, it can be shown that the proposed procedure is distinctly less confining than present constitutional conventions. Since Confederation (and leaving aside the 1949 enactment of section 91(1) on purely federal powers), only three constitutional amendments have dealt with legislative powers as between Ottawa and the provinces. Had the proposed unanimity clause existed since 1867, only one of these amendments, that on unemployment insurance in 1940, would legally have demanded unanimous agreement. Yet, in the absence of such a formal clause, and because of resulting uncertainty as to amending procedure, Ottawa felt obliged to secure the consent of all provinces on each of the two other amendments. These amendments, enacted in 1951 and 1964 to permit federal legislation on old age pensions, in no way affected provincial power to make laws on such pensions under section 92; therefore, had the amendments been made under the presently proposed formula, they could have been achieved with the consent of only two thirds of the provinces. Far from putting Confederation in a constitutional straitjacket, it is clear, the new procedure frees it from a timid and restrictive constitutional convention.

A second set of criticisms attack the delegation clause itself. These can be reduced to three main allegations.

First, we are warned that the delegation clause, presumably by transferring federal powers wholesale to the provinces, will "Balkanize" Canada. One can forgive some of our professional Cassandras who pretend this their characteristic lack of serenity; one forgives less readily their remarkable inability to read. For the delegation clause says nothing of transferring jurisdiction; it foresees simply the conditional delegation of authority to enact specific laws.

For instance, Ottawa could not, under this clause, relinquish to any province its power under section 91(12) of the B.N.A. Act over sea coast and inland fisheries; it could, however, delegate to the four Atlantic provinces the right to round out their own local fisheries legislation by letting them enact provisions dealing with catch limits, closed seasons, and interprovincial and international trade. Furthermore, it must be remembered, such limited authority under the delegation clause would be subject to abrogation or recall at any time by the federal government. In sum, Ottawa would consent to such limited delegation only if it wished; and once granted, the delegation could be cancelled whenever Ottawa thought it expedient. At every stage, the delegation would be strictly subject to Parliament's free and formal consent.

Moreover, the prophets of Balkanization forget that the delegation clause does not allow the *ad hoc* loan of powers merely from Ottawa

to the provinces; it is intended to let provinces concede authority in a similar way to Ottawa. It is not difficult to imagine, for instance (although I am not now suggesting it), that a majority of provinces might at some time wish to authorize Ottawa to enact a comprehensive law on contracts or some other civil matter. If critics persist in confusing conditional delegation of limited authority with outright transfers of general jurisdictions, they must therefore agree that the clause could serve not only (as they put it) to "weaken" Ottawa, but equally well to "strengthen" it. In fact certain extreme provincial autonomists have already decried the clause as a perfidious device to promote a unitary state. In their suspicions, they display just as much logic as the Balkanizers.

Another school of critics worries that the delegation clause will lead to a confusing "hodge-podge" of dissimilar jurisdictions among provinces supposedly equal in law. Powers will vary haphazardly, warn these orderly minds, from one province to another; we shall no longer have two clearly defined levels of government, but eleven peculiar and chameleon-like suzerainties. Again, a simple reading of the clause would lay these fears to rest: for the clause leaves the entrenched constitutional powers of all provinces intact and uniform. All that will vary from province to province will be the particular laws in force at any time. And this, since each province is free as well as equal, describes precisely the situation of provincial laws today.

Finally, we must deal with the distressing calculation of certain alarmists (who noisily pretend they stand for national unity) that the delegation clause will enable Quebec to become what is popularly called an "associate state". At the outset, I would remind you that this term, though often echoed, has never been defined. I am sure that those French-Canadian nationalists who use the phrase are groping sincerely towards a formula aptly describing Quebec's legitimate need for broad law-making initiative. Just as a footnote, however, I think this first attempt, borrowed as it is from a discredited French colonial enterprise in Indo-China, ill suits a young people seeking to affirm itself. Yet however obscure or inept its origin, the term seems to convey a connotation that, in the Canadian context, sounds nostalgically separatist. At the very least, it appears to suggest that the federal government will have to relinquish certain of its legislative powers to a single province.

The delegation clause certainly allows Ottawa to lend freely and equally to all provinces limited portions of its powers. But Ottawa can never, under the clause, relinquish its constitutional rights in favour of one province or any number of provinces. Any transfer of general legislative power as implied by the term "associate state"

could result only from a substantial and unanimously adopted amendment to the constitution itself — and once more, I would emphasize that substantial amendments have absolutely nothing to do with the procedure for amendment. At present, we are proposing no more — and I assure you this is quite enough to keep a Minister of Justice busy — than to bring to Canada the total power to amend her Constitution.

A further assurance that the clause cannot confer special powers on a single province is contained in the provision that any delegation must command the agreement of at least four provinces.

The only possible conjuncture, under the clause, that would even vaguely resemble a special position for one province would result indirectly from the positive action of the other nine provinces. Were these nine to delegate limited authority to Ottawa in order to unify legislation on matters of complementary interest, obviously the province outside these arrangements would enjoy (if that is the word) a limited special status. Quebec, for instance, might then, in this ironic hypothesis, attain "splendid isolation" willy-nilly through the constructive efforts of the other provinces to forge a more centralized state.

3. The Formula's Historic Significance In A Canadian Canada :

In what way, one may logically ask, does this new formula meet the tangled circumstances of today ? At a time when everything in our Confederation — principles, structures and means — is called into question, how can the formula stamp Canadian federalism with a new certainty and a new confidence ?

To these questions I reply first: the formula, because forged by the accumulated wisdom of yesterday's history, offers our Confederation an indispensable flexibility to calm the tension of tomorrow's history. Above all, the formula is an instrument of negotiation — an instrument of conciliation and peaceful readjustment suited to the already formidable arsenal of means to understanding furnished by co-operative federalism. Born of goodwill, fashioned with clarity, seeking exclusively the ideal of pragmatic progress, the formula gives reasonable men a way of building a reasonable Canada. This aim obviously answers our country's most practical needs.

But the formula gives us more than a workable means of adjusting interests. In the distant perspective of Canadian history, it marks the birth in Canada of a new climate of political discussion. That climate, for the first time, is unmistakably Canadian. As long as our

country's fundamental law remained domiciled abroad, a cloud of doubt, humiliating doubt, obscured our homeland's sovereignty. However deep the affection we all feel for that great island beyond the seas that sent us one of our founding peoples, we could no longer, as a proud and independent nation, allow our Constitution to stand subject, even formally, to an absentee Parliament. The pilgrimage to London was an intolerable anachronism; and I would ask the carping and cavilling patriots who denounce the new formula to remember that.

We enter then upon an exhilarating era of Canadian history with a fresh, unchallenged identity and a sure confidence in our future. The new formula symbolizes these qualities, as will soon, I trust, our new flag and anthem. There remain to be enacted, in years to come, whole archives of inspired laws — economic, social, even cultural — to bring our greatness to maturity. Yet, as of now, we are certain this greatness will mirror our native genius; the genius of a Canada authentically and wholeheartedly Canadian.