A CONSTITUTIONAL STRAIT JACKET FOR CANADA

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I. *Introduction.*

On October 14th, 1964 twenty-two men[1] meeting behind closed doors in Ottawa performed a disservice for this country whose repercussions will be felt by generations of yet unborn Canadians.[2] By unanimously agreeing on a domestic amending formula these men took the first step in bringing the Canadian Constitution home. Under this formula the unanimous consent of Parliament and the legislatures will be required for most significant amendments to our Constitution.[3]

This is the most important constitutional step taken in Canada since Confederation. Canada deserved statesmanship; Canada got provincial partisanship. There was political advantage in arriving at a Canadian amending formula; there was political advantage in giving every province a veto over important amendments; there was no political advantage in preserving the integrity of Canada as a nation.

Yes, we will have a Canadian amending formula, but in many

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[1] The Prime Minister, Premiers, and the Attorneys General of Canada and the provinces.

[2] This is on the assumption that the proposed formula for constitutional amendment is translated into a statute of the British Parliament.

[3] "The 'veto doctrine' whereby any one province may prevent an amendment to the constitution by withholding its consent is also known as the 'principle of unanimity' and is sometimes referred to as the 'entrenchment rule'.": in A Review of Saskatchewan's Position Regarding a Basis for the Amendment of our Constitution in Canada (Prepared by The Department of the Attorney General, Regina, Saskatchewan, January, 1962), p. 2, hereinafter cited as the Saskatchewan Review.

These three terms — veto, unanimity, and entrenchment — will be used interchangeably throughout this article.

For a short explanation of what might be considered to come within the term "Canadian Constitution" see The Amendment of the Constitution of Canada (Queen's Printer, 1965), pp. 1-2, hereinafter cited as the White Paper.

important matters we will never be able to use it. Canada will indeed be in a constitutional strait jacket.

II. *The Problem.*

The Fathers of Confederation did not provide a general amending formula in the British North America Act.[4] This omission may have been deliberate; it may have been accidental.[5] Whether deliberate or accidental, "the British North America Act is unique among federal Constitutions in not providing within itself a procedure of amendment . . ."[6]. Amendments to the B.N.A. Act are made by ordinary statutes of the British Parliament.

The omission of a general amending formula in the B.N.A. Act gave rise to the most important consequence of the compact or treaty theory of Confederation: that amendments to the B.N.A. Act require the consent of all the provinces.[7] The proponents of the compact theory argue:[8]

> . . . that the Quebec Conference of 1864 consisted of delegations from the several provinces which were to be united under a federal Constitution; that these several delegations agreed to seventy-two resolutions as the basis of union; that these resolutions received the formal approval of the provincial legislatures and were in fact the basis of the British North America Act; that therefore in the absence of any provisions to the contrary, the future amendment of the British North America Act must follow the same procedure as that by which the

[4] 1867, 30-31 Vict., c. 3, hereinafter cited as the B.N.A. Act. The term B.N.A. Act will also be used to encompass the British North America Acts, 1867 to 1964. The B.N.A. Act, as defined, is the most important part of the Canadian Constitution: White Paper, *op. cit.*, *ibid.*, p. 2.

The B.N.A. Act gives certain specific powers of amendment. For example: section 92(1) gives a limited power of amendment to the legislature of each province; section 91(1) gives a similar power of amendment to Parliament.

"It may be asked why any specific amending authority was necessary if the Canadian constitutional system inherited British principles, among which should be that of legislative supremacy. The answer is that this was the one major principle not fully carried overseas to the colonies.": in Clokie, Basic Problems of the Canadian Constitution (1942), 20 Can. Bar Rev. 395, 817, at p. 408.

[5] "No one has any certain knowledge why an amending clause was omitted; although it may be supposed that a British statute appeared to be the normal instrument through which another British statute might be changed. Everyone knows, however, why the omission continues: the people of Canada have simply been unable to decide what method of amendment they would like to have inserted in the Act, and no action can be taken until they somehow contrive to make up their minds.": in Dawson, The Government of Canada (1947), p. 138.

[6] O'Connor, Report to the Senate of Canada on the B.N.A. Act (1939), Annex 4, p. 140.

[7] For a statement of the compact theory of Confederation see, *op. cit.*, *ibid.*, pp. 134-139.

[8] *Op. cit.*, *ibid.*, p. 140.

> Quebec Resolutions were initiated and approved, namely, the unanimous consent of the constituent provinces of the Dominion.

The compact theory of Confederation has been effectively destroyed.[9] At this late date it is sufficient to quote one leading authority:[10]

> The [compact] theory, while plausible, is constructed on sheer invention which has been subsequently propped up by an occasional precedent. It has no legal foundation; it has no historical foundation. It would, if applied, have the merit of giving complete protection to any provincial minority; but the price would be high, for it would compel future amendments to secure the consent of all . . . [ten] provinces as well as the Dominion—a task which might well appal the stoutest heart.

The destruction of the compact theory disposes of any suggestion that the proposed Canadian amending formula in its veto provisions is giving effect to that theory.

III. *Procedure Followed in Obtaining Past Amendments to the B.N.A. Act.*[11]

As mentioned earlier, amendments to the B.N.A. Act are made by ordinary statutes of the British Parliament. What amendments have been made since Confederation? At whose request has the British Parliament acted? What part have the provinces played in securing these amendments? These questions will be answered in turn.

What amendments has the British Parliament made to the B.N.A. Act since Confederation? This is a difficult question to answer, because there is dispute as to what constitutes an amendment.[12] The following, however, are the most important, undoubted, amendments:[13] (1) 1871—removing doubts about the power of the Dominion Parliament to create new provinces; (2) 1875—removing doubts about the power of the Dominion Parliament to determine its privileges; (3) 1886—giving power to the Dominion Parliament to provide for the representation of the territories

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[9] *Op. cit., ibid.*, pp. 139-148. Six of seven constitutional experts appearing in 1935 before a special committee of the House of Commons categorically denied Confederation was a compact; the seventh was non-committal. See Ollivier, Problems of Canadian Sovereignty (1945), pp. 355-362.

[10] Dawson, *op. cit.*, footnote 5, p. 143, footnote omitted.

[11] See generally Gérin-Lajoie, Constitutional Amendment in Canada (1950), pp. 47-131, hereinafter cited as Gérin-Lajoie; Laskin, Canadian Constitutional Law (2nd ed., 1960), pp. 30-32, hereinafter cited as Laskin; Ollivier, *op. cit.*, footnote 9, pp. 363-380; Clokie, *op. cit.*, footnote 4, at pp. 407-429.

[12] Dawson, *op. cit.*, footnote 5, p. 138.

[13] See Laskin, pp. 31-32, for the first fourteen amendments.

in the federal houses of Parliament; (4) 1907—increase of subsidies payable by Dominion to provinces under section 118 of the B.N.A. Act; (5) 1915—alteration of representation in the Senate and provision for minimum representation in the House of Commons; (6) 1916—term of Dominion Parliament extended one year; (7) 1930—natural resources—reserved at the time of their admission to Confederation—returned to Western provinces; (8) 1940—power in relation to unemployment insurance transferred from provincial legislatures to Dominion Parliament; (9) 1943—postponement of readjustment of representation in the House of Commons in accordance with decennial census; (10) 1946—section 51 of the B.N.A. Act replaced by a new provision for representation in the House of Commons; (11) 1949—Newfoundland becoming tenth province; (12) 1949—giving power to the Dominion Parliament—subject to certain exceptions—to amend the "Constitution of Canada"; (13) 1951—power in relation to old age pensions transferred from provincial legislatures to Dominion Parliament, but provincial competence in relation thereto maintained; (14) 1960—provision made for compulsory retirement of provincial judges at age seventy-five; (15) 1964—power in relation to survivors' disability and death benefits, as part of a contributory pension scheme, transferred from provincial legislatures to Dominion Parliament, but provincial competence in relation thereto maintained.

At whose request has the British Parliament made amendments to the B.N.A. Act? "Conventionally, the British Parliament has not acted on its own initiative or on the initiative of British Governmental authorities but at the instance of the Dominion—in a few cases, at the instance of the federal executive and in most cases upon the presentation of a joint address by the Senate and House of Commons of Canada." [14]

[14] *Ibid.*, p. 31. But see Scott, Forgotten Amendments to the Canadian Constitution (1942), 20 Can. Bar Rev. 339.

That British participation in Canadian amendment is formal only is shown by these observations of the British Solicitor-General made in introducing the 1940 unemployment insurance amendment in the British Parliament: "As a matter of mere legal machinery, it is still necessary, until some better method is evolved for amendment of the British North America Act, for the extension of the Canadian powers to be passed by this Parliament. But our Parliament, in passing such legislation, is merely carrying out the wishes of the Dominion Parliament, and in that way the legal position is made to square with the constitutional position. . . . We must operate the old machinery which has been left over at their request in accordance with their wishes." Quoted in Dawson, *op. cit.*, footnote 5, p. 149. It has been said that, with respect to amendments, the British Parliament is a "legislative trustee" for Canada: Laskin, Amendment of the Constitution (1963), 15 U. of T. L.J. 190.

What part have the provinces played in securing amendments to the B.N.A. Act? This question can be conveniently divided into three sub-questions: (1) Has the British Parliament been influenced by provincial objections to Dominion requests for amendments? (2) Has the Dominion consulted the provinces before requesting certain amendments? (3) Has the Dominion recognized the necessity of securing unanimous provincial consent to certain proposed amendments?

(1) Has the British Parliament been influenced by provincial objections to Dominion requests for amendments to the B.N.A. Act? The answer is no. Provincial objections have been conveyed to the British government and Parliament on several occasions, without effect.[15]

(2) Has the Dominion consulted the provinces before requesting certain amendments to the B.N.A. Act? The answer is yes. The Dominion consulted all the provinces before requesting amendments (4), (8), (13), (14), and (15), *supra*.[16] The Dominion consulted the province or provinces directly concerned before requesting amendments (7) and (11), *supra*.[17] The Dominion did not consult any of the provinces before requesting amendments (1), (2), (3), (5), (6), (9), (10), and (12), *supra*.[18]

(3) Has the Dominion recognized the necessity of securing unanimous provincial consent to certain proposed amendments to the B.N.A. Act? This is a difficult question to answer. It depends on what one means by necessity. If by necessity one means a legal obligation to secure unanimous consent to certain proposed amendments, then the Dominion has not recognized the necessity.

Strictly speaking Parliament does not request amendments from the British Parliament, but rather from the British government. For the procedure followed see Gérin-Lajoie, pp. 148-152.

See generally on constitutional conventions, Dicey, Law of the Constitution (10th ed., 1959), pp. 417-473; Jennings, The Law and the Constitution (4th ed., 1952), pp. 79-135; see specifically with reference to Canada, Dawson, *ibid.*, pp. 77-82, 151-154, 160-162.

[15] See Clokie, *op. cit.*, footnote 4, at pp. 422-424. It has been argued that provincial objections to the 1907 subsidies amendment were given effect to by the British government and Parliament: Gérin-Lajoie, pp. 74-83, 194. The same author, however, notes, *ibid.*, p. 195 that today: "It is difficult to conceive that the British Government or Parliament might take upon themselves to modify a federal proposal of amendment on account of provincial objections."

[16] As to (4), (8), (13), and (14) see Laskin, p. 32; as to (15) see page 10 of the notes of a speech, entitled Constitutional Amendment in a Canadian Canada, given by the Hon. Guy Favreau, the Minister of Justice and Attorney General of Canada, on November 20th, 1964 to the Conference on Law and World Affairs, Faculty of Law, University of Toronto.

[17] Laskin, p. 32.

[18] *Ibid.*, pp. 31-32, despite provincial objections on several occasions: *ibid.*, p. 32.

On the other hand, if by necessity one means a political obligation, which may have ripened into a constitutional convention, then the Dominion has recognized the necessity.[19]

Has this political obligation to obtain unanimous provincial consent to certain proposed amendments ripened into a constitutional convention? In fact, the Dominion obtained the consent of all the provinces before requesting amendments (8), (13), (14), and (15), *supra*.[20] Did the Dominion feel obliged to do so, in a way that would give rise to a constitutional convention?[21] Three of these amendments[22] related to transfers of legislative powers from provincial legislatures to Dominion Parliament. While it seems clear that there is no constitutional convention requiring unanimous provincial consent to amendments affecting the provinces, apart from their legislative powers,[23] there probably is such a convention with respect to provincial legislative powers. Where a proposed amendment involves a transfer of legislative power from the provincial legislatures to the Dominion Parliament there probably is a constitutional convention obliging the Dominion to consult with and obtain the unanimous consent of the provinces before requesting the amendment from the British Parliament.[24]

In summary: At least fifteen important amendments have been made to the B.N.A. Act since Confederation. These amendments

The failure to consult the provinces with respect to amendments (1), (2), and (3) is a clear rejection of the compact theory of Confederation, because many members of the government and Parliament at these times were Fathers of Confederation: O'Connor, *op. cit.*, footnote 6, pp. 145-146.

[19] See Laskin, *op. cit.*, footnote 14, at p. 191.

[20] As to (8), (13), and (14) see Laskin, p. 32; as to (15) see Favreau, *op. cit.*, footnote 16.

[21] In connection with amendment (8), the 1940 unemployment insurance amendment, the Dominion government was careful "not to commit itself to the necessity of unanimous provincial consent. . . .": Gérin-Lajoie, p. 106.

On constitutional conventions generally, see, *supra*, footnote 14.

[22] (8), (13), and (15).

[23] See Laskin, p. 31. But see Gérin-Lajoie, p. 254.

[24] The clearest statement of this convention, if it is one, was made during the debate in the House of Commons on amendment (10), the 1946 Commons' representation amendment: "The Government's considered opinion was given to the House by Minister of Justice St. Laurent. He said that the Dominion enjoyed the right to request, on its own initiative, amendments to the B.N.A. Act regarding all matters with the exception of the allocation of legislative jurisdiction. He held that the Federal House has no right to deal with matters allocated to provincial legislatures and that, if any change is proposed which would affect the legislative competence of the provinces, the consent of the Provincial Governments would have to be obtained before an amendment to the B.N.A. Act could be secured.": Note (1946), 24 Can. Bar Rev. 609, at pp. 612-613.

The fact that on the three occasions involving transfers of provincial legislative powers the provinces were consulted and their consent obtained is not in itself sufficient to give rise to a constitutional convention: Jennings, *op. cit.*, footnote 14, pp. 133-135.

were made by the British Parliament at the request of the Dominion government or Parliament. Such requests are granted automatically by the British Parliament. The provinces play no part in formal requests for amendments, and the British Parliament ignores provincial objections to Dominion requests. The Dominion has frequently consulted the provinces before requesting amendments; there is probably a constitutional convention requiring consultation and requiring unanimous consent of the provinces where a proposed amendment involves a transfer of provincial legislative power to the Dominion Parliament. Our present method of amendment is legally flexible even though in certain situations politically, and probably conventionally, rigid.

IV. *The Search For A Canadian Amending Formula.*[25]

The search for a Canadian amending formula has been a long and frustrating one. The reason for this is simple: it was conceded from the beginning that any domestic amending formula must have the concurrence of the Dominion and all the provinces.[26] The main obstacle to unanimity has been disagreement over the degree of provincial participation in various kinds of amendments.[27]

There have been five serious attempts to find a Canadian amending formula:[28] (1) 1927, (2) 1935-1936, (3) 1950, (4) 1960-1961, and (5) 1964.

(1) 1927.

At the Dominion-Provincial Conference in 1927 the Hon. Ernest Lapointe, then Minister of Justice, proposed that Canada ask the British government for legislation to provide a Canadian amending formula.[29] His proposal contemplated two kinds of amendments: ordinary amendments, which would require the consent of the Dominion and a majority of the provinces; and fundamental amendments, which would require the consent of the Dominion and all the provinces. Under fundamental amend-

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[25] See generally Gérin-Lajoie, pp. 221-255; Ollivier, *op. cit.*, footnote 9, pp. 381-403; Saskatchewan Review, pp. 4-8.

[26] "No student of Canadian political institutions ever suggested, it seems, that a new amending process might properly be secured without the unanimous agreement of the federal and provincial governments.": Gérin-Lajoie, p. 163, n. 2.

[27] *Ibid.*, pp. 238, 256.

[28] There were earlier references to the problem, but no serious attempts to find a solution: *ibid.*, pp. 221-228.

[29] Report of Dominion-Provincial Conference, 1927, on Amendment of B.N.A. Act (Canadian Sessional Papers, 1928, No. 69, pp. 11-12. Reproduced in O'Connor, *op. cit.*, footnote 6, pp. 130-132.)

ments he included sections 92(12), (13), and (14), 93, and 133 of the B.N.A. Act.[30]

The 1927 Conference was divided on the proposal. Many of the provinces felt that Canada should not seek to change the present procedure of obtaining amendments from the British Parliament as they are needed.[31] Assuming the desirability of a change in procedure, there was, significantly, substantial agreement with Mr. Lapointe's proposal on fundamental amendments: both with the matters included within the fundamental class, and with the necessity for unanimous consent to any amendment.[32]

(2) 1935-1936.

"The passing of the Statute of Westminster in 1931 did not alter the situation."[33] By 1931, however, in contrast to the position four years earlier, there was general support for a Canadian amending formula.[34]

"The whole question next received serious attention, when, in 1935, a committee of the House of Commons was established for the purpose."[35] This committee heard seven witnesses, all con-

[30] These sections deal with the following matters: 92(12) "The Solemnization of Marriage in the Province."; 92(13) "Property and Civil Rights in the Province."; 92(14) "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including procedure in Civil Matters in those Courts."; 93 "In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions: . . . [then follows protection for denominational schools]"; 133 "Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; . . . [then follow additional language guarantees]".

A more flexible amending formula was proposed by the Canadian League in 1927: Gérin-Lajoie, p. 232.

In 1932 Mr. Lapointe made a proposal similar to his 1927 proposal, with this addition: that Dominion consent to amendments be manifested by a two-thirds majority vote in each House: *ibid.*, p. 233. This was criticized "as 'an almost insuperable obstacle' to any amendment.": *ibid.*, quoting Professor F. H. Underhill.

[31] The most populous provinces, apparently, favoured the *status quo*: see Rogers, the Constitutional Impasse (1934), 41 Queen's Quarterly 475, at p. 485.

[32] See O'Connor, *op. cit.*, footnote 6, p. 131.

[33] Saskatchewan Review, p. 5. "The Imperial Conference of 1930 and the Statute of Westminster . . . safeguarded the *status quo*.":Gérin-Lajoie, p. 196.

Section 7(1) of the Statute of Westminster, 1931, 22 Geo. V, c. 4, excepted the B.N.A. Acts 1867-1930 from other provisions of the Statute. See generally on the Statute of Westminster O'Connor, *op. cit.*, footnote 6, Annex 5, pp. 15-28.

[34] Gérin-Lajoie, p. 231.

[35] Saskatchewan Review, p. 6. The resolution proposing this committee reads as follows: "That in the opinion of this House a special committee should be set up to study and report on the best method by which the British North America Act may be amended so that while safeguarding the existing rights of the racial and religious minorities, and legitimate

stitutional experts.[36] Only one of the witnesses said the present method of constitutional amendment was satisfactory.[37] Six of the witnesses submitted proposals (of more or less detail) for domestic amending formulas.[38] All of the proposals provided for considerable flexibility.[39]

The committee in its report[40] to the House of Commons in June 1935 did not recommend a particular amending formula: it did stress flexibility and protection of minority rights as essentials in any amending formula. The committee did recommend that a Dominion-Provincial conference be convened to study the prob-

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provincial claims to autonomy, the Dominion government may be given adequate power to deal effectively with the urgent economic problems which are essentially national in scope.": Can. H. of C. Debates, January 28th, 1935, p. 217.

[36] For the composition of the committee and the names and dates of appearance of witnesses see Ollivier, *op.cit.*, footnote 9, pp. 354-355.

The committee invited representations from the provincial governments, but the invitation was declined on the basis that a House of Commons committee was not the proper body to deal with constitutional amendment: Gérin-Lajoie, p. 236.

[37] *Ibid.*, p. 237.

[38] See generally on these proposals, Gérin-Lajoie, pp. 237-243; Ollivier, *op. cit.*, footnote 9, pp. 390-403.

[39] All of the proposals recognized that certain matters must be entrenched. The most rigid formula proposed was proposed by Dr. Maurice Ollivier; the most flexible by Professor Frank Scott.

Dr. Ollivier would require a two-thirds majority in Parliament (a requirement making any amendment difficult, *supra*, footnote 30), and, for general amendments, approval of a majority of the provinces. He would require unanimous provincial approval for amendments affecting the amending procedure itself, the boundaries of the provinces, and sections 92(12), (13), and (14), 93, and 133 of the B.N.A. Act. (For the matters dealt with by these sections see, *supra*, footnote 30.) In certain circumstances, Dr. Ollivier would except from the principle of unanimity that part of section 92(13) dealing with social services. For Dr. Ollivier's proposal see Gérin-Lajoie, pp. 239-241; Ollivier, *op. cit., ibid.*, pp. 393-398.

Professor Scott suggested that for amendments not affecting minority rights a majority vote in a joint session of Parliament would be sufficient. The provinces would not participate in such amendments. For amendments affecting minority rights Professor Scott would require a majority vote in Parliament and unanimous provincial approval. He considered the following sections of the B.N.A. Act to be dealing with minority rights: 51 (dealing with readjustment of representation in the House of Commons); 51A ("Notwithstanding anything in this Act a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province."); 92(1) ("The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant-Governor."); 92(12), 93, and 133. (For the matters dealt with by these last three sections see, *supra*, footnote 30.) Professor Scott was willing to consider the Civil Code of Quebec, but no other part of section 92(13), as a minority right. (For the matters dealt with by section 92(13) see, *supra*, footnote 30.) Like Dr. Ollivier, Professor Scott would also entrench the amending formula itself. For Professor Scott's proposal see Gérin-Lajoie, pp. 242-243; Ollivier, *ibid.*, pp. 400-401.

[40] Proceedings, Evidence and Report of Special Committee on the B.N.A. Act, 1935.

lem.[41] Pursuant to this recommendation, a Dominion-Provincial Conference met at Ottawa in December, 1935.[42] The Conference referred the problem of amendment to a Sub-conference.[43] Unfortunately, no detailed report of the work of the Sub-conference was published.[44]

The Sub-conference, however, recommended to the 1935 Conference the establishment of a committee of constitutional experts, representing the Dominion and provincial governments, to work out the details of a Canadian amending formula.[45] This committee of experts met at Ottawa early in 1936.[46] "A sub-committee was appointed to work out the details of the plan and to draft the proposed amending clause. . . ."[47] The draft Canadian amending formula prepared by this sub-committee of constitutional experts is the most comprehensive plan ever proposed.[48] It did not, however, have the unanimous approval of the Dominion and provincial governments.[49]

The main provisions of the 1936 draft plan were these: the new amending formula was to become section 148 of the B.N.A. Act; amendments were to be initiated in the House of Commons; the Constitution[50] was divided into four parts, each with its own amending procedure: part one dealt with amendments that could be made by Parliament alone; part two dealt with amendments that could be made by Parliament and one or more of the provinces (such amendments not relating to all of the provinces, and requiring consent of only the provinces involved); part three dealt with amendments that could be made by Parliament and two-thirds of the provinces, representing at least fifty-five per cent of the Canadian people (such amendments relating to all of the provinces). This part included all the Dominion legislative powers in section 91 of the B.N.A. Act, and all the provincial legislative powers in

[41] Gérin-Lajoie, pp. 236-237.

[42] The Conference had a number of other matters on its agenda besides amendment: *ibid.*, p. 244.

[43] *Ibid.*

[44] *Ibid.*, p. 245. The Province of Ontario published a proposal for an amending formula that that province, supported by the Province of Manitoba, had submitted to the Sub-conference: *ibid.* The Ontario proposal was similar to Dr. Ollivier's 1935 proposal, *supra*, footnote 39. The main provisions of the Ontario proposal are set out in Gérin-Lajoie, pp. 245-246.

[45] *Ibid.*, p. 244.

[46] *Ibid.*, p. 246. "No official report of the proceedings was published.": *ibid.*, n. 2.

[47] *Ibid.*, p. 247.

[48] This plan was not published at the time, but it is set out in full in Gérin-Lajoie, pp. 301-312.

[49] *Ibid.*, p. 247.

[50] As to what the word "constitution" comprised see, *ibid.*, p. 301.

section 92, except clauses (12) and (14).[51] Thus clauses (13) and (16)[52] of section 92 were subject to the flexible amending procedure of this part. The unique provision of part three, and of the 1936 plan, was that any province dissenting from an amendment relating to either clause (13) or clause (16) of section 92 would not be subject to such amendment; part four dealt with amendments that could be made by Parliament and all of the provinces (such amendments relating to all of the provinces). The following sections of the B.N.A. Act were entrenched under this part: 51, 51A, 92(12) and (14), 93, and 133.[53]

(3) 1950.

Almost fifteen years elapsed before another serious attempt was made to find a Canadian amending formula.

By an amendment to the B.N.A. Act in 1949 Parliament obtained the power—subject to certain exceptions—to amend the "Constitution of Canada".[54] During the 1949 election campaign Prime Minister St. Laurent promised, if re-elected, he would convene a Dominion-Provincial conference to deal with the problem of a Canadian amending formula. In fulfillment of this promise, a Conference of the Prime Minister and Premiers met at Ottawa in January 1950, and at Quebec City in September of that year.[55] In his introductory remarks to the Conference Prime Minister St. Laurent said:[56]

> . . . the federal government believes that any satisfactory method of

[51] For the matters dealt with by these clauses see, *supra*, footnote 30.

[52] For the matters dealt with by clause (13) see, *ibid.* Section 92(16) provides for "Generally all Matters of a merely local or private Nature in the Provinces".

[53] For the matters dealt with by sections 51 and 51A see, *supra*, footnote 39. For the matters dealt with by sections 92(12) and (14), 93, and 133 see, *supra*, footnote 30.

[54] Section 91(1) of the B.N.A. Act. This amendment was designed to give Parliament the same power of amendment as the provincial legislatures have by virtue of section 92(1), but section 91(1) is much wider: Laskin, p. 32. For the matters dealt with by section 92(1) see, *supra*, footnote 39.

See generally on the 1949 amendment, Gérin-Lajoie, pp. xiv-xxxv; Report of the Quebec Royal Commission of Inquiry on Constitutional Problems (1956), Volume I, pp. 160-163.

[55] See Proceedings of Constitutional Conference of Federal and Provincial Governments (1950); Proceedings of Constitutional Conference of Federal and Provincial Governments (second session) (1950). This was "the first inter-governmental conference ever to be held in Canada solely on the subject of constitutional reform.": Gérin-Lajoie, p. xxxvi.

See generally on the 1950 Conference, *ibid.*, pp. xxxv-xliii; Laskin pp. 33-34; Report of the Quebec Royal Commission of Inquiry on Constitutional Problems, *op. cit.*, *ibid.*, pp. 163-167; Saskatchewan Review, pp. 6-7.

[56] Proceedings of Constitutional Conference of Federal and Provincial Governments, *op. cit.*, *ibid.*, p. 10.

> amendment must meet three tests. It must protect minority rights absolutely. It must preserve the federal character of the Canadian nation by preserving the autonomy, within their respective spheres, of the provincial legislatures and of parliament itself. It must have sufficient flexibility to enable our country with all its great human and natural resources to continue to go forward as a dynamic nation.

The Prime Minister had earlier made the rather strange admission that "the federal government does not intend to put forward any concrete proposal".[57]

At the January sessions of the Conference there was unanimous agreement that Canada should have a domestic amending formula.[58] "Few premiers proposed any definite amending scheme, but the Ontario proposal of 1935 was frequently referred to as a suitable basis of discussion."[59] Nine premiers objected to the 1949 amendment giving Parliament the power to amend the "Constitution of Canada".[60] The Prime Minister said the Dominion government would repeal the 1949 amendment, if the Conference could agree on a general amending formula.[61]

A committee of the Attorneys General of Canada and the provinces was formed to draft a plan for amendment, as a basis for further discussion by the Conference.[62] This committee submitted a plan to the Conference providing for six classes of amendments; the committee did not attempt to give content to these classes. The committee recommended that the Conference consider delegation of legislative powers as part of the amending formula.[63]

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[57] *Ibid.* The Prime Minister went on to say: "Since it is obvious that the federal parliament will participate in any amending procedure, we feel that the representatives of each of the provinces should put forward their views as to the most appropriate form of provincial participation. It is our hope that the conference may find the means of reconciling the various proposals put forward and reaching a conclusion satisfactory to all.": *ibid.* If the Prime Minister was conceding that the federal government had no interest in a general amending formula, beyond seeing that the federal government had a veto over all proposed amendments, then, in my view, this was an outrageous concession: it amounted to an abdication of the federal government's responsibilities and rights. "Ottawa is not a mere spectator at a game of constitution blocks played by the provinces; and it has an obligation to take the lead in proposing, and then revealing, for public and expert discussion, a scheme of amendment that will reflect the balances of federalism while protecting particularly cherished interests of the provinces or any one of them.": Laskin, The Financial Post, October 3rd, 1964, p. 37.

[58] Gérin-Lajoie, p. xxxvi.

[59] *Ibid.*, pp. xxxvi-xxxvii, footnote omitted. See the 1935 Ontario proposal, *supra*, footnote 44.

[60] Gérin-Lajoie, p. xxxvii.

[61] Proceedings of Constitutional Conference of Federal and Provincial Governments, *op. cit.*, footnote 55, pp. 46-47, 54-55, 68-69.

[62] Gérin-Lajoie, p. xxxix.

[63] The committee's report is set out in Proceedings of Constitutional

". . . the constitutional conference summoned in 1950 adjourned at the end of the year *sine die*." [64] The conference could not reach unanimous agreement on a Canadian amending formula. The reason was this: [65]

> The obstacle to constitutional reform has been . . . the conflict between those who stress flexibility for the constitution and those who stress entrenchment of existing provincial powers. At the 1950 sessions, the central provinces were the chief advocates of entrenchment of provincial powers. On the other hand, Saskatchewan, Manitoba, Nova Scotia and Prince Edward Island advocated flexibility in any amending procedure. While discussions achieved some degree of compromise there were major stumbling blocks. One of the chief sources of contention was section 92, head 13, giving provinces control over "Property and Civil Rights in the Province". Those wanting the maximum protection for existing provincial powers insisted that this head should not be amendable without the consent of every province. Those urging flexibility felt that some less rigorous amending formula should apply—such as a requirement of consent by one-half or two-thirds of the provinces.

(4) 1960-1961.

Ten years went by. At the Dominion-Provincial Fiscal Conference in the summer of 1960 it was suggested that the search be resumed for a Canadian amending formula.[66] As a result of this suggestion the Attorneys General of Canada and the provinces met in Ottawa in October, 1960.[67] Subsequent meetings were held in November, 1960, and in January and September, 1961.[68] Little is known about what went on at these meetings: they were held

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Conference of Federal and Provincial Governments, *op. cit.*, footnote 55, p. 117, and in Laskin, pp. 33-34.

[64] Scott, Centralization and Decentralization in Canadian Federalism (1951), 29 Can. Bar Rev. 1095, at p. 1121, footnote omitted.

[65] Saskatchewan Review, p. 7; accord, Report of the Quebec Royal Commission of Inquiry on Constitutional Problems, *op. cit.*, footnote 54, p. 167.

In connection with most provincial legislative powers it is difficult to imagine circumstances giving rise to demands for amendments transferring those powers to Parliament: for example, section 92(1) (For the matters dealt with by clause (1) see, *supra*, footnote 39.); 92(2) ("Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes."); 92(3) ("The borrowing of Money on the sole Credit of the Province."); 92(4) ("The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers."); 92(5) ("The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon."); 92(9) ("Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes."); 92(11) ("The Incorporation of Companies with Provincial Objects."); and 92 (12) (For the matters dealt with by clause (12) see, *supra*, footnote 30.)

[66] Saskatchewan Review, p. 7. [67] *Ibid.*, pp. 7-8.

[68] *Ibid.*, p. 1.

in camera, and the proceedings were not published.[69] They resulted, however, in the Fulton formula for constitutional amendment.[70] The Fulton Bill was not agreed to unanimously. Saskatchewan and Quebec, for different reasons, did not approve of it.[71]

Again, as has been the case throughout most of the history of the search for a Canadian amending formula, the main obstacle to unanimity at the 1960-1961 meetings was the apposition of irreconcilables: flexibility and entrenchment.

Saskatchewan's position at these 1960-1961 meetings of the Attorneys General was as follows:[72]

> The Saskatchewan Government reiterated . . . its desire to protect adequately all fundamental rights. Saskatchewan maintains that such rights should be subject to alteration only by the unanimous consent of the provinces. Among those fundamental rights Saskatchewan includes education and language. . . .
>
> Moreover, Saskatchewan advocated at the recent conference the entrenchment of the amending procedure because the Saskatchewan Government believes that the safeguards built into such a procedure with respect to these fundamental matters would be useless if the procedure itself could be readily altered.
>
> In a spirit of compromise, however, at the constitutional session in November, 1960, the Saskatchewan delegation accepted the proposed entrenchment of several matters other than the fundamental rights mentioned above, including certain matters in section 92 of the B.N.A. Act, . . . and certain other matters in recognition of the desires of certain other jurisdictions.
>
> The Saskatchewan Government, however, refused to accept the entrenchment or unanimity principle for all matters coming within head 13 of section 92 of the B.N.A. Act which deals generally with provincial powers over property and civil rights embracing the multitude of powers which the courts have ascribed to it. One compromise

[69] What little is known about these meetings is mainly due to the publication of the Saskatchewan Review.

See generally on these meetings, *ibid.*, pp. 8-11; Press Release, Office of the Prime Minister, November 3rd, 1964, Appendices 2, 3, 4, and 5.

[70] Hereinafter referred to as the Fulton Bill. "On December 1, 1961, the Honourable E. D. Fulton, Q.C., M.P., then Minister of Justice and Attorney General of Canada released to the public a draft statute for enactment by the Parliament of the United Kingdom, embodying a formula for amendment of the British North America Act in Canada.": Laskin, *op. cit.*, footnote 14.

The text of the Fulton Bill is set out in Appendix "A", *infra*. The Bill is examined in detail in Part V, *infra*.

[71] "Objections on different grounds to the draft proposal have already been voiced by the governments of Saskatchewan and Quebec. The former is opposed to the unrelieved entrenchment of all provincial legislative powers, and the latter is concerned with the retention in the B.N.A. Act of section 91(1), added in 1949, giving the Parliament of Canada certain wide amending powers in respect of the 'Constitution of Canada'. The positions of other provincial governments still remain to be clarified.": Laskin, *op. cit.*, *ibid.*, at p. 191.

[72] Saskatchewan Review, pp. 8-10.

which Saskatchewan suggested at the November, 1960, meeting was that any provision affecting the provinces but not within the class of fundamental matters should be subject to amendment by Parliament and two-thirds of the provinces, provided that any amendment affecting Property and Civil Rights would not apply to Quebec if the Quebec Legislature did not approve of it. This proposal would have enabled the Province of Quebec to nullify within its borders the effect of any amendment extending Federal jurisdiction over property and civil rights including the Quebec Civil Code. The proposal, however, did not meet with the full approval of the conference. . . .

Saskatchewan then started compromising along other lines gradually accepting the entrenchment of more and more heads of provincial jurisdiction. Faced with the demands of the entrenching provinces, Saskatchewan retreated until it felt it could retreat no more. It has consistently maintained that Property and Civil Rights, other than those of a fundamental nature indicated above, must not be entrenched. . . .

The Government of Saskatchewan has refused to concede that the unanimity rule in all amendments is either desirable or acceptable. At the recent conferences, Saskatchewan expressed its acceptance of a general amending procedure which it believed would adequately protect most heads of provincial jurisdiction, including section 92, head 13. Such a procedure would require a majority vote in Parliament plus the consent of two-thirds of the provinces representing the majority of the Canadian population. Under this system the majority would speak both at the Federal and Provincial level. On the other hand, with the consent of at least seven provinces required, no temporary majority could bring about an unwise or unjust amendment.

(5) 1964.

The search for a Canadian amending formula was in abeyance for almost three years.

Saskatchewan and Quebec had been the hold-outs at the 1960-1961 meetings: Saskatchewan opposed the rigidity of the Fulton Bill's amending procedures; Quebec opposed the exclusion from the Fulton Bill of section 91(1) of the B.N.A. Act.[73] Quebec could be placated by including section 91(1) in the amending formula;[74] Saskatchewan's objection could not be met so easily.

In the spring of 1964 a Liberal government, headed by Premier Ross Thatcher, was elected in Saskatchewan. With this new government came the possibility that Saskatchewan might review its position on amendment. This possibility became a reality at the Dominion-Provincial Conference of the Prime Minister and Premiers held at Charlottetown on September 1st and 2nd, 1964:

[73] *Supra*, footnote 71.

[74] This was done by sections 6 and 12 of the Favreau Bill: so named after the Hon. Guy Favreau, Q.C., M.P., Minister of Justice and Attorney General of Canada. The text of the Favreau Bill is set out in Appendix "B", *infra*. The Bill is examined in detail in Part V, *infra*.

> *Charlottetown* — With hopes for agreement riding high, Prime Minister Pearson and the 10 provincial premiers push history into the background today and try to work out a formula that will give Canada full control over its own constitution before its 100th birthday. . . .
>
> The tricky task of bringing home the constitution has eluded Canada's political leaders for 37 years, but there were indications that today's meeting may achieve a breakthrough. . . .
>
> Saskatchewan Premier Ross Thatcher indicated Tuesday that while he believes only such fundamentals as language, education and the amending procedure itself should require unanimity, he would let other issues be included if this would help reach agreement.
>
> As the prime minister and premiers met for a public and commemorative meeting Tuesday, many indicated they are hoping to see constitutional changes made. Because Saskatchewan was the hold-out at previous discussions, Mr. Thatcher's comments were considered the most significant.
>
> "Our government is prepared immediately to co-operate with the federal government [sic] which will permit our nation to amend its own constitution", he said. It was an "anachronism" that Canada's constitution still had to go to Westminster for changes.[75]

The Charlottetown Conference issued the following *communiqué* on September 2nd, 1964:[76]

> The Prime Minister and Premiers affirmed their unanimous decision to conclude the repatriation of the B.N.A. Act without delay. To this end they decided to complete a procedure for amending the Constitution in Canada based on the draft legislation proposed at the Constitutional Conference of 1961,[77] which they accept in principle. An early meeting of the Attorneys General of Canada and the provinces will be held to complete the amending formula devised by the 1961 Conference, and to report to the Prime Minister and Premiers.

Pursuant to this *communiqué* the Attorneys General met in Ottawa on October 5th and 6th, 1964.[78] Progress was made at these meetings,[79] but it took two further meetings, on October 13th and 14th, to achieve unanimous agreement.[80] The Favreau Bill for Canadian constitutional amendment was the result. The Favreau Bill was reported by the Attorneys General to, and unanimously accepted by, a Dominion-Provincial Conference of the Prime Minister and Premiers meeting in Ottawa on October 14th, 1964.[81]

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[75] The Ottawa Citizen, September 2nd, 1964.

[76] Press Release, *op. cit.*, footnote 69, Appendix 7; Can. H. of C. Debates (unrevised), September 30th, 1964, p. 8589.

[77] The Fulton Bill.

[78] Press Release, *op. cit.*, footnote 69, Appendix 8.

[79] *Ibid.*; Can. H. of C. Debates (unrevised), October 7th, 1964, p. 8833.

[80] *Ibid.*, October 15th, 1964, p. 9067. As was true of the 1960-1961 meetings, *supra*, the 1964 meetings of the Attorneys General were held *in camera*; little is known about what went on.

[81] Press Release, *op. cit.*, footnote 69, Appendix 9.

These steps remain to be taken before we will have a Canadian amending formula: The Favreau Bill must be approved by the governments or legislatures of all the provinces; only after this is done will Parliament's approval be sought;[82] after the govern-

[82] See Can. H. of C. Debates (unrevised), November 18th, 1964, p. 10220. Apparently, all the provinces, except Newfoundland, will seek the approval of their legislatures: see Can. H. of C. Debates (unrevised), February 22nd, 1965, p. 11574.

"A formula to give Canada jurisdiction over the British North America Act will likely be approved by all 10 provincial governments this winter, says Ontario's Attorney General Arthur A. Wishart.": The Ottawa Citizen, February 1st, 1965. All the provincial legislatures will be in session by February 18th, 1965: The Ottawa Citizen, January 20th, 1965. Newfoundland was the first province to notify the federal government of its approval of the Favreau Bill: Can. H. of C. Debates (unrevised), February 22nd, 1965, p. 11574. As of April 15th, 1965 the following provincial legislatures had approved the Favreau Bill: Nova Scotia: The Globe and Mail February 16th, 1965; Ontario: Ont. Leg. Ass. Debates (unrevised), March 12th 1965, pp. 1257-1258; New Brunswick and Alberta: The Ottawa Citizen, March 17th, 1965; Prince Edward Island and British Columbia: The Globe and Mail, March 27th, 1965. Saskatchewan and Quebec are likely to give the Bill its most difficult time. The strong C.C.F. opposition in Saskatchewan (assuming it holds the same views now as it did in 1962 when, while in power, it published the Saskatchewan Review) can be counted on to make a concerted effort to derail the Favreau Bill. In Quebec, the *Union Nationale* has come out against the Bill. "Some 200 delegates from (National Union) associations in 42 eastern Quebec regions voted unanimously Saturday to oppose a federal-provincial formula for bringing the constitution to Canada from Britain. . . . . 'Our party will never be a traitor to the nation', opposition leader Daniel Johnson told the meeting. 'It is your duty and mine to fight this attempt at enslavement and integration of our people.' . . . 'In accepting the yoke offered by Ottawa Premier Lesage and education minister Paul Gérin-Lajoie are guilty of treason to the Quebec nation', Mr. Johnson said.": The Ottawa Citizen, February 1st, 1965. Although the *Union Nationale* is in the minority in the Legislative Assembly, it holds a majority of the seats in the Legislative Council. On the assumption that the Legislative Council will refuse to approve the Favreau Bill, Premier Lesage has introduced a bill in the Legislative Assembly to limit the upper house's veto: The Ottawa Citizen February 5th, 1965. "Included in the proposed legislation is a clause that any legislation [and this presumably applies to approval of the Favreau Bill] adopted by the assembly in two sessions within a one-year period would automatically become law despite action by the council.": *ibid.* The bill was adopted by the Assembly on third and final reading on February 16th, 1965: The Ottawa Citizen, February 17th, 1965. If the Legislative Council had agreed to the bill as adopted by the Assembly, the Quebec government was prepared to delay bringing the bill into force until a mandate for its passage had been obtained from the electors: The Ottawa Citizen, March 5th, 1965. The Council, however, amended the bill on third reading to provide for retention of its veto in constitutional matters: The Ottawa Journal, March 25th, 1965. This amendment is unacceptable to Premier Lesage and he is now prepared to appeal to the Queen to limit the powers of the Council: The Globe and Mail, April 10th, 1965. It is possible, of course, that Premier Lesage is using the threat of this veto bill as a means of coercing the Council into agreeing, among other things, to the Favreau Bill.

The federal government is being pressed by the New Democratic Party to send the Favreau Bill to a Parliamentary committee. The government has not yet decided whether it will do so: Can. H. of C. Debates (unrevised), October 15th, 1964, p. 9073; October 19th, 1964, p. 9178; Novem-

ments or legislatures and Parliament have approved the Bill, the British Parliament will be asked to enact it as their final amendment to the "Constitution of Canada".

In summary: Early in the search for a Canadian amending formula it was agreed that the formula finally chosen must have the concurrence of the Dominion and all the provinces. The obstacle to unanimity has been the conflict between those advocating maximum entrenchment in the amending formula and those advocating maximum flexibility. The advocates of entrenchment conceded that some matters should not be entrenched; the advocates of flexibility conceded that some matters should be entrenched.

There has been a consensus throughout the search for a Canadian amending formula that the following matters should be entrenched and should be amended only if the Dominion and all the provinces agreed to the change: sections 51, 51A, 93, and 133 of the B.N.A. Act,[83] and the amending formula itself.

The main battle between the advocates of entrenchment and the advocates of flexibility has been fought over section 92 of the B.N.A. Act: should amendments transferring provincial legislative powers in that section require the consent of the Dominion and all the provinces? The pivotal head of power has been section

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ber 18th, 1964, p. 10220; February 16th, 1965, pp. 11380-11381; February 22nd, 1965, p. 11575; February 23rd, 1965, p. 11621; March 2nd, 1965, pp. 11872-11873; March 29th, 1965, p. 12895; March 31st, 1965, pp. 12996-12997; April 6th, 1965, p. 17; April 12th, 1965, p. 211. The motion for approval (yet to be heard) of the Favreau Bill in the Saskatchewan Legislature calls for the amendment formula to be submitted to a Commons or Senate committee for public hearings: The Ottawa Citizen, April 2nd, 1965. The federal government has stated that, at the least, there will be an opportunity for a detailed examination of the Favreau Bill in a committee of the whole house: Can. H. of C. Debates (unrevised), February 23rd, 1965, p. 11621. The government intends to submit the Favreau Bill to Parliament at the next session: Can. H. of C. Debates (unrevised), February 22nd, 1965, p. 11575; April 5th, 1965, p. 2 (speech from the throne).

The federal government has prepared a White Paper on constitutional amendment — originally scheduled for publication in December, 1964: Press Release, *op. cit.*, footnote 69, p. 1 — but not, in fact, tabled in the House of Commons until March, 1965: Can. H. of C. Debates (unrevised), March 2nd, 1965, pp. 11872-11873. The White Paper will be examined in Part VIII, *infra*. The reason for the delay in tabling the White Paper was its circulation among the provinces, apparently for comment and approval: see Can. H. of C. Debates (unrevised), February 17th, 1965, pp. 11435-11436; February 22nd, 1965, p. 11574. But see Can. H. of C. Debates (unrevised), March 4th, 1965, p. 11972.

There has been a report of a caucus revolt by some Liberal backbenchers against the Favreau Bill: The Ottawa Citizen, October 21st, 1964.

[83] For the matters dealt with by sections 51 and 51A see, *supra*, footnote 39; for those dealt with by sections 93 and 133 see, *supra*, footnote 30.

92(13).[84] The advocates of entrenchment have insisted that this provincial power, above all others, must be subject to the unanimity rule; the advocates of flexibility have insisted that this provincial power, above all others, must not be subject to the unanimity rule.

The advocates of flexibility gradually gave ground: they conceded that part of section 92(13) should be entrenched; they suggested that the rest of section 92(13) be subject to a flexible amending formula, but that Quebec, or perhaps any province dissenting from an amendment to the flexible part of section 92(13), should not be subject to that amendment; finally, in the Favreau Bill, the advocates of flexibility agreed to the entrenchment of the whole of section 92(13), as well as to the entrenchment of all other provincial legislative powers.

V. *The Fulton and Favreau Bills.*

The Fulton and Favreau Bills for Canadian constitutional amendment are set out in Appendices "A" and "B", *infra*. In this part I will compare and examine the two Bills: firstly, as to form, and secondly, as to substance.

(1) *Form.*

The preambles to the two Bills are slightly different: the enacting clauses are identical.

The Fulton Bill is divided into three parts, comprising eleven sections: Part I (sections 1 to 8) gives the procedures for amendment; Part II (section 9) provides for an amendment to the B.N.A. Act giving the procedures for delegation of legislative powers; Part III (sections 10 and 11) provides for the citation and commencement of the Bill.

The Favreau Bill is divided into four parts, comprising sixteen sections: Part I (sections 1 to 11) gives the procedures for amendment; Part II (sections 12 and 13) provides for three amendments to the B.N.A. Act, one of which gives the procedures for delegation of legislative powers; Part III (section 14) provides for the French version of the Bill; Part IV (sections 15 and 16) provides for the citation and commencement of the Bill.

Every section in the Fulton Bill finds its identical or virtually identical counterpart in the Favreau Bill.[85] The following sections are identical: sections 1, 3, 4, and 5 of both Bills; section 10 (Ful-

[84] "Property and Civil Rights in the Province."

[85] Five sections in the Favreau Bill are not found in the Fulton Bill: sections 6, 7, 8, 12, and 14. The substance of these sections will be examined, *infra*.

ton) and section 15 (Favreau). The following sections are virtually identical, and there is no significance in their slight verbal differences: section 2 of both Bills;[86] section 6 (Fulton) and section 9 (Favreau);[87] section 7 (Fulton) and section 10 (Favreau);[88] section 8 (Fulton) and section 11 (Favreau);[89] section 9 (Fulton) and section 13 (Favreau);[90] section 11 (Fulton) and section 16 (Favreau).[91]

(2) *Substance.*

The important substantive sections of the Fulton and Favreau Bills are those giving the procedures for amendment and delegation of legislative powers.

Sections 1 to 5 of Part I of both Bills give the procedures for amendment.[92] Section 1 gives Parliament, "Subject to this Part", the power to "make laws repealing, amending or re-enacting any provision of the Constitution of Canada". Section 2 is the entrenching section. "The amending formula itself, section 51A of the B.N.A. Act, and the whole of the provincial powers under section 92 as well as the use of the two official languages under section 133 are all subject to the rule of unanimity. Parliament and all ten provincial legislatures would have to agree to any change."[93] Sec-

[86] Section 2 of the Favreau Bill adds the conjunction "or", missing from section 2 of the Fulton Bill, after subsection (c) of section 2.

[87] Section 9 of the Favreau Bill substitutes the clause "existing at the coming into force of this Act" for the clause "existing immediately before this Act came into force" in section 6 of the Fulton Bill.

[88] Section 10 of the Favreau Bill makes explicit that which is implicit in section 7 of the Fulton Bill.

[89] In defining the expression "Constitution of Canada", section 11(a) of the Favreau Bill brings section 8(a) of the Fulton Bill up to date by including the 1964 pensions amendment; section 11(d) of the Favreau Bill adds the words "Session 2" to section 8(d) of the Fulton Bill, thereby clarifying that subsection.

[90] These sections deal with delegation of legislative powers. The main change is in connection with delegation of provincial legislative powers to Parliament where fewer than four provinces are concerned. Section 9 of the Fulton Bill provides that Parliament, on its own initiative, shall declare whether fewer than four provinces are concerned; section 13 of the Favreau Bill provides that Parliament shall make this declaration only after "the Government of Canada has consulted with the governments of all the provinces". This is, doubtless, more than a verbal distinction, but its practical operation can hardly be significant.

Section 13 of the Favreau Bill substitutes the word "classes" for the word "heads"; the words "fewer than four" for the words "less than four"; and the word "coming" for the words "that is otherwise" in section 9 of the Fulton Bill.

[91] Section 16 of the Favreau Bill makes a slight verbal change in the provision for the commencement of the Act.

[92] Sections 6 and 7 of the Favreau Bill also provide procedures for amendment. These sections are discussed, *infra.*

[93] Saskatchewan Review, p. 12. (For the matters dealt with by sections 51A and 133 see, respectively, *supra,* footnotes 39 and 30.)

Section 2 of the Fulton and Favreau Bills entrenches the following matters as well: subsection (a) entrenches all provincial legislative powers, not only those in section 92. Thus the provincial legislative powers in sec-

tion 3 provides that an amendment "that refers to one or more, but not all, of the provinces", must be concurred in by the province or provinces to which it refers. Section 4 provides for amendments relating to education. Section 5 provides the "flexible amending power intended for all parts of the constitution not otherwise specifically dealt with . . .".[94] Amendments under section 5 must be "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". Section 5 comprises, *inter alia*, the Dominion legislative powers.[95]

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tions 93 and 95 of the B.N.A. Act are entrenched. (For the matters dealt with by section 93 see, *supra*, footnote 30. Section 95 gives Parliament and the provincial legislatures concurrent powers over agriculture and immigration, Parliament's powers being paramount.); subsection (b) entrenches "the rights or privileges granted or secured by the Constitution of Canada to the legislature or the government of a province"; subsection (c) entrenches "the assets or property of a province". As to what might be encompassed by subsections (c) and (b) of section 2, see Laskin, Amendment of the Constitution: Applying the Fulton-Favreau Formula (1965), 11 McGill L.J. 2, at pp. 8, 11. In his article, *ibid.*, Professor Laskin examines in detail the application of the amending procedures of the Fulton and Favreau Bills to the various provisions of the B.N.A. Act.

[94] Saskatchewan Review, p. 12.

[95] Such as the legislative powers contained in the following sections of the B.N.A. Act: 91 (general legislative powers), 94 (unification of laws in common law provinces), 94A (old age pensions—this is a concurrent power with provision for provincial paramountcy), 95 (agriculture and immigration—these also are concurrent powers with provision for Dominion paramountcy), 100 (appointment of judges of higher provincial courts, and fixing of their salaries), 101 (maintenance of a general court of appeal for Canada), and 132 (implementing of certain international treaties). As to what other sections of the B.N.A. Act might be considered to come within section 5 of the Fulton and Favreau Bills see Laskin, *op. cit.*, footnote 93, at pp. 13-14.

It has been said that the Dominion legislative powers are entrenched under section 2 of the Fulton and Favreau Bills: Press Release, *op. cit.*, footnote 69, Appendix 9. But see Laskin, *ibid.*, at pp. 8-10.

Section 2 speaks of a law "affecting any provision of the Constitution of Canada relating to (a) the powers of the legislature of a province to make laws". The argument for saying Dominion legislative powers are entrenched under section 2 is this: "affect", in this context, means to produce a change in, and refers to both decreases and increases in provincial legislative powers; a transfer of a Dominion legislative power to the legislatures increases provincial legislative powers, and thus "affects" those powers; therefore Dominion legislative powers are included in section 2.

I believe this argument is untenable for the following reasons:

1. "Affect", in a particular context, may mean produce an adverse change in: "affect . . . The word is derived from the Latin, *afficio*, and sometimes means to act upon; to influence, but it is more frequently used in the sense of weakening, debilitating; acting injuriously upon persons and things.": Ballentine, Law Dictionary (2nd ed., 1948), p. 51. It seems obvious that "affect" as it relates to subsections (b), (c), and (d) of section 2 means to produce an adverse change in. Why should "affect" be given a different meaning in relation to subsection (a)? I believe that in the context of section 2 of the Fulton and Favreau Bills "affect" refers only to decreases in provincial legislative powers.

2. If the Dominion legislative powers were to be entrenched under

Section 9 of the Fulton Bill and section 13 of the Favreau Bill provide for an amendment to the B.N.A. Act giving the procedures for delegation of legislative powers.[96]

> . . . the provinces may only delegate powers conferred under heads (6), (10), (13) and (16) of section 92 of the B.N.A. Act. . . . On the other hand all federal powers could be delegated to the provinces. The proposed section 94A(2) . . . sets forth certain requirements before the Federal Parliament can make laws on any of the four provincial matters referred to above while section 94A(4) sets forth the requirements before a province could legislate on a matter delegated to it by the Federal Parliament. Section 94A(6) provides for revocation of consents to delegations.[97]

Five sections found in the Favreau Bill are not found in the Fulton Bill: sections 6, 7, 8, 12, and 14. Section 14 of the Favreau Bill provides for a French version of the Bill as a schedule to it. Section 12 provides for the repeal of sections 91(1)[98] and 92(1)[99] of the B.N.A. Act. The provisions of section 12 of the Favreau Bill made necessary sections 6, 7, and 8. Section 6 gives Parliament the exclusive power to make certain amendments to the "Constitution of Canada". Section 6 replaces the repealed section 91(1) of the B.N.A. Act, but is a more limited power.[100] Section 7 gives each provincial legislature the exclusive power to amend "the Constitution of the province, except as regards the office of Lieutenant-Governor". This is a re-enactment of the repealed section 92(1) of the B.N.A. Act. Section 8 of the Favreau Bill provides

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section 2 of the Fulton and Favreau Bills, it seems extraordinary that the draftsman did not say so expressly: *expressio unius est exclusio alterius.*

3. It is nowhere suggested in the Saskatchewan Review that Dominion legislative powers are entrenched under section 2 of the Fulton Bill.

4. Even if "affect" is given the wide meaning of produce a change in, section 2 of the Fulton and Favreau Bills does not include Dominion legislative powers. Section 2 speaks of "affecting . . . the powers of the legislature of a province", not the "power". A transfer of a Dominion legislative power to the legislatures would "affect", in the sense of increase, the legislative "power" of the legislatures, but it would not increase the existing "powers"—it would merely add another power to the list of existing provincial "powers".

[96] Section 94A of the B.N.A. Act will be re-numbered 94B, and the new section on delegation will be numbered 94A.

[97] Saskatchewan Review, p. 13. For the matters dealt with by subsections (13) and (16) of section 92 see, respectively, *supra*, footnotes 30 and 52. Section 92(6) provides for "The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province."; section 92(10) provides for "Local Works and Undertakings other than such as are of the following classes: . . . [then follow certain exceptions, which exceptions are within the exclusive legislative powers of Parliament]".

[98] *Supra*, footnotes 4, 54, and 71.

[99] For the matters dealt with by section 92(1) see, *supra*, footnote 39.

[100] Despite the provisions of section 9 of the Favreau Bill. Laskin, *op. cit.*, footnote 93, at p. 4. But see Press Release, *op. cit.*, footnote 69, p. 3.

that any amendment to the "Constitution of Canada" not authorized by sections 6 or 7 "is subject to the provisions of sections 1 to 5".[101]

In summary: The Fulton and Favreau Bills are virtually identical. The following are the important sections of the two Bills: section 2 dealing with amendments requiring unanimity; section 5 dealing with amendments requiring a two-thirds majority; section 9 of the Fulton Bill and section 13 of the Favreau Bill dealing with delegation.

VI. *Criticism of the Fulton and Favreau Bills.*

Any critique of the Fulton and Favreau Bills for Canadian constitutional amendment must first overcome this objection: How can one criticize a formula having the concurrence of the Dominion and provincial governments? Are not the Attorneys General of Canada and the provinces who hammered out this formula constitutional experts? The answer to this objection is this: unanimous agreement to a particular formula is no assurance in itself of the formula's perfection; the Attorneys General of Canada and the provinces are not constitutional experts.

Answering the second of these questions is more important than answering the first. If the Attorneys General were constitutional experts, then their unanimous agreement to a particular formula would be some assurance that it was a good formula. If the Attorneys General were not constitutional experts, then their unanimous agreement to a particular formula would be no assurance that it was a good formula; in fact, the opposite conclusion might be drawn.

It is probably fair to say that the only constitutional expert among the Attorneys General attending the 1960-1961 and 1964 meetings was the Quebec representative, the Hon. Paul Gérin-Lajoie.[102] Mr. Gérin-Lajoie's expertness is undoubted. I have

[101] Because section 6 of the Favreau Bill gives Parliament a more limited power than is given by section 91(1) of the B.N.A. Act, *supra*, more matters are subject to sections 1 to 5 of the Favreau Bill than are subject to the same sections of the Fulton Bill.

[102] Mr. Gérin-Lajoie is the Minister of Education for the Province of Quebec; the Attorney General of Quebec did not attend these meetings: see, Press Release, *op. cit.*, footnote 69, Appendix 6.

Since the meetings were held *in camera* it is difficult to discover whether constitutional experts assisted the Attorneys General. Professor Scott of the McGill Law School and Mr. Cronkite the former Dean of the Saskatchewan College of Law represented the Province of Saskatchewan at at least one of the 1960-1961 meetings: Saskatchewan Review, p. 14. Both these men are constitutional experts. Professor Scott was one of the constitutional experts who appeared before the 1935 House of Commons Committee: *supra*, footnote 39.

referred to his excellent monograph, *Constitutional Amendment in Canada*, in innumerable footnotes throughout this article. It must be remembered, however, that Mr. Gérin-Lajoie was expressing the Quebec point of view at these meetings.[103] One might speculate upon the influence Mr. Gérin-Lajoie, the expert, had on the non-experts at these private meetings of the Attorneys General.

Having, I hope, disposed of the objection to criticism, my criticism of the Fulton and Favreau Bills will take three directions: firstly, the way they were realized; secondly, the amending formula they propose; thirdly, the people involved in their realization.

(1) *The way the Fulton and Favreau Bills were realized.*

The Fulton and Favreau Bills for Canadian constitutional amendment were realized behind closed doors; opportunity to participate in their formulation was given to neither private citizens nor constitutional experts;[104] the proceedings resulting in their realization were not made public.[105]

It has been argued that:[106]

> Virtually all important political decisions originate in private meetings,

[103] "One must also note the excellent work done in Quebec's name by Education Minister Paul Gérin-Lajoie, recognized in Canada as a specialist in constitutional questions. He obtained the formal guarantees Quebec wanted. . . .": excerpt from Quebec *L'Evénement*, reported in The Ottawa Citizen, October 23rd, 1964.

The late Professor Dawson said this about Mr. Gérin-Lajoie in the foreword to Mr. Gérin-Lajoie's book: ". . . he reflects to a degree the attitude of French-speaking Canada in the province of Quebec.": Gérin-Lajoie, p. ix.

[104] As mentioned earlier, *supra*, constitutional experts were called before the committee of the House of Commons in 1935; a committee of constitutional experts in 1936 prepared the comprehensive draft plan for a Canadian amending formula: *supra*.

[105] As, for the most part, were the proceedings at the earlier attempts to find a Canadian amending formula: in 1927, in 1935-1936, and in 1950, *supra*.

[106] The Ottawa Citizen, October 23rd, 1964. The assumption that the Fulton and Favreau Bills will be openly debated in Parliament and the legislatures may be wishful thinking: it is possible that the Bills will be presented to Parliament and the legislatures as *faits accomplis*: see Can. H. of C. Debates (unrevised), September 30th, 1964, p. 8607. Debate in committee is not possible on a joint address —the conventional method of asking the British Parliament for amendments: Scott, The British North America (No. 2) Act, 1949 (1950), 8 U. of T.L.J. 201, at p. 202. But see The Ottawa Citizen, February 6th, 1965: "Donald S. Macdonald, Liberal member of Parliament for Toronto-Rosedale and parliamentary secretary to Justice Minister Guy Favreau, told the panel [a discussion in Niagara Falls, Ontario, before the Ontario branch of the Canadian Bar Association] the formula will receive full debate in Parliament and in the provincial legislatures."; "During 1964, two significant events occurred which will affect the future of Ontario. The first of these was the agreement reached on a formula to amend the British North America Act. During the course of this session, you will have an opportunity of discussing this agreement.": Ont. Leg. Ass. Debates (unrevised), January 20th, 1965, p. 3 (speech from the throne).

> whether inside a department, in caucus, in cabinet, or at a federal-provincial conference. But they cannot be given the force of law until they are openly debated and approved by Parliament. That protection exists in the . . . case [of the Fulton and Favreau Bills], as it does with other legislation. In addition, the constitutional formula will undoubtedly be debated in all the provincial legislatures.

The refutation of this argument is that the establishment of a Canadian amending formula is not an ordinary political decision. Although it has political implications, the establishment of a Canadian amending formula will be the most important constitutional step taken in our country since Confederation. Thus the Fulton and Favreau Bills are not ordinary statutes.[107] Before they are enacted, private citizens are entitled to be heard. Before they are enacted, Parliament and the legislatures are entitled to the benefit of expert advice.

In 1962 Saskatchewan stated its views on public and expert participation as follows:[108]

> Saskatchewan has consistently and continually advocated that this question of constitutional amendment should be put completely before the Canadian people for discussion. At the opening of the recent conferences in October, 1960, the Attorney General for Saskatchewan stated:
>
> "We also believe that when this constitution is being developed, the people of Canada should be given an apportunity to present opinions and submissions on the matter. In our view the Canadian

[107] "Constitutional reform, in a country as old as Canada, is more than a matter of expedient policy of the moment. Governments at present in office in Canada and in the provinces cannot treat the establishment of an amending procedure in the same way that they would treat an ordinary piece of legislation, something that is routine. Succeeding governments will not be able to dismantle it as easily as they can ordinary legislation if they should disagree with it.": Laskin, *op. cit.*, footnote 57.

[108] Saskatchewan Review, pp. 14-15.

A resolution calling for public hearings was passed unanimously by the Legislative Assembly of the Province of Saskatchewan on March 28th, 1961. This resolution is set out, *ibid.*, Appendix "B".

"Concern over the 'private' nature of the recent constitutional conference called 'to fashion a domestic amending procedure for the B.N.A. Act' has been expressed by the Association of Canadian Law Teachers. . . . A resolution to this effect and calling for public hearings was passed by the Association of Canadian Law Teachers at its annual meeting in Montreal in June, 1961, a copy of which is attached hereto as Appendix 'C'.": *ibid.*, p. 17. A similar resolution was adopted by the Association of Canadian Law Teachers at its annual meeting in Toronto in June, 1962.

"The views of several academic lawyers that the Fulton-Favreau formula introduces amending rigidities on the one hand and opens the door for provincial raids on federal power on the other, should be given every opportunity for airing before some appropriate parliamentary committee. Indeed, it would be a great disservice to prevent or limit the broadest professional and public discussion of such important constitutional reforms.": Dean Maxwell Cohen, The Gazette, February 23rd, 1965. As mentioned before, *supra*, footnote 82 the federal government is being pressed to send the Favreau Bill to a Parliamentary committee.

constitution does not belong to the Federal and Provincial Governments of this country. It belongs to the Canadian people. They all have an interest in the form and structure of this fundamental law, because in many respects it is a law regulating their relationship with their governments. I suggest in a matter of this importance we should hear what interested citizens and organizations have to say."

Later at the January, 1961, conference, the Attorney General declared:

"The secrecy surrounding this conference is most inappropriate considering the public importance of the issues involved. The constitution should not be a secret convention secretly arrived at. It is the life and blood of this country, a matter of vital concern to every citizen. . . .

The Attorney General then went on to say:

"Let us therefore take this matter to the Canadian people for discussion through parliamentary and legislative debate, parliamentary committees, royal commissions, the press or other means. Perhaps the time has come to assemble a constitutional convention broadly representative not only of governments but also of opposition parties, constitutional experts and organizations reflecting other facets of public opinion."

(2) *The amending formula proposed by the Fulton and Favreau Bills.*

The amending formula proposed by the Fulton and Favreau Bills has two main provisions: the procedures for amendment to the "Constitution of Canada", and the procedures for delegation of legislative powers between Parliament and the provincial legislatures.

PROCEDURES FOR AMENDMENT

There are two avenues for orderly constitutional change in a federal state: Through the slow process of constitutional interpretation by the courts; By direct amendment of the Constitution by use of the procedure prescribed for that purpose.

Although the procedure should not be susceptible to such easy manipulation as to make constitutional change a humdrum every day occurrence, neither should it be so rigid, even in its central operation on the distribution of federal-provincial power, as to make change dependent on offering hostages to one unyielding province.[109]

[109] Laskin, *op. cit.*, footnote 57. There is a third method of constitutional change: usage or custom: Rogers, *op. cit.*, footnote 31, at pp. 477-478.

"In the United States . . . it is declared that the constitution may be amended by a proposal which receives a two-thirds majority in both houses of Congress and the approval of three-quarters of the state legislatures of the union. In Australia the procedure calls for a popular referendum on every amending proposal and the amendment does not become law unless and until it has been accepted by a majority of the total votes cast in the Commonwealth and by majorities in the majority of the component states of the Commonwealth.": *ibid.*, at p. 481.

The most important potential amendments in any federation are those involving the distribution of legislative powers. For this reason I will confine this part of my criticism of the Fulton and Favreau Bills to the procedures for amendment *re*: distribution of legislative powers.

Section 2(a) of both Bills entrenches all provincial legislative powers.[110] No distinction is drawn between fundamental and non-fundamental powers.[111] A transfer of a provincial legislative power to the Dominion by means of amendment, will require the concurrence of Parliament and "the legislatures of all the provinces". Conversely, the Dominion legislative powers are subject to the flexible amending procedure of section 5 of both Bills.[112] A transfer of a Dominion legislative power to the provinces, by means of amendment, will require the concurrence of Parliament and "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". Paradoxically, a legislative power transferred to the provinces under the flexible provisions of section 5 could be reclaimed by the Dominion only if the provinces unanimously agreed to the re-transfer, under section 2(a).

For practical purposes, transfers of provincial legislative powers to the Dominion, by means of amendment, will be impossible; transfers of Dominion legislative powers to the provinces, by means of amendment, will be difficult, but not impossible.[113] The Fulton and Favreau Bills have virtually closed one of the avenues for orderly constitutional change in Canada.[114] Many national problems, requiring national solutions, will go unsolved.[115]

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[110] For the provincial legislative powers see, *supra*, footnote 93.

[111] Such a distinction was drawn in 1927, in 1935-1936, and in 1950, *supra*.

[112] For the Dominion legislative powers see, *supra*, footnote 95.

[113] The amending formula proposed by the Fulton and Favreau Bills has been variously described as: "a formula for constitutional futility and absolute rigidity.": Can. H. of C. Debates (unrevised), October 15th, 1964. p. 9069 (Andrew Brewin, N.D.P. — Greenwood.); "an unmitigated constitutional disaster. . . .": Laskin, *op. cit.*, footnote 57; "an unusual federal deference to extreme provincialism".: Laskin, *op. cit.*, footnote 14, at p. 191; "render[ing] the Canadian constitution the most rigid in the world.": Smith, The Financial Post, November 7th, 1964, p. 7.

[114] Thereby, of course, putting pressure on the other main avenue of constitutional change: the courts. Will the Supreme Court of Canada be able to meet this challenge? See generally Gérin-Lajoie, pp. 31-32; Laskin, pp. 34-35; Ollivier, *op. cit.*, footnote 9, p. 392; Laskin, Occupying the Field: Paramountcy in Penal Legislation (1963), 41 Can. Bar Rev. 234, at p. 236, n. 10; Lederman, Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada. (A paper given by Dean Lederman at the June, 1964 meeting at Charlottetown of the Association of Canadian Law Teachers); Smith, *op. cit.*, *ibid.*

[115] The Saskatchewan Review, pp. 3-4, gives the following examples of

Sections 2(a) and 5 of the Fulton and Favreau Bills have given a permanent legal basis to decentralization, as a philosophy of Canadian federalism.[116] My objections to this are not derived from a preference for centralization. Canadian history shows that we have vacillated between these two philosophies of federalism.[117] It is true "that Canada is currently going through a cycle of diminishing central power and increasing provincial power".[118] Therefore, it is argued, the Fulton and Favreau Bills "merely formalize . . . existing informal arrangements".[119] What is wrong with this formalization is that what history suggests is merely a temporary political phenomenon—a move towards decentralization—has been given a permanent constitutional basis.[120] No longer will the opposing philosophies of Canadian federalism—centralization and decentralization—be susceptible, at least to the same extent, to the political pressures that have affected them in the past, and,

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national problems requiring solution by means of transfers of provincial legislative powers to Parliament: 1. Fraudulent transactions in securities; 2. Marketing of natural products; 3. Conciliation of industrial disputes; 4. Implementing treaties; 5. Control of foreign corporations.

[116] "Centralization is a currently popular term used to describe the prevailing trend toward an increase in the powers of central governments as opposed to regional and local governments. Its antonym is decentralization, the reverse process. . . .": Scott, *op. cit.*, footnote 64, at p. 1097.

[117] Neither of the major political parties can claim to have had a consistent philosophy of Canadian federalism. John A. Macdonald, the Conservative Prime Minister of Canada for most of the first twenty-five years of Confederation, was a strong centralist. His decentralist opponents during most of this period were Oliver Mowat, the Liberal Premier of Ontario, and Alexander Mackenzie, the Liberal Prime Minister of Canada from 1873-1878.

During and following the second world war, Mackenzie King and Louis St. Laurent, as Liberal Prime Ministers of Canada, were strong centralists. Their Conservative opposition, latterly led by John Diefenbaker, were decentralists.

The present Liberal Prime Minister, Lester Pearson, as his support of the Fulton and Favreau Bills shows, is a decentralist. The Conservatives, led by Mr. Diefenbaker, have taken over the centralist role.

[118] The Ottawa Citizen, October 23rd, 1964. Increase and decrease of power is not used here in the sense of a change in the existing distribution of legislative powers, but in the sense of the use or lack of use of powers within the existing framework.

[119] *Ibid.*

[120] *Cf.* Scott, *op. cit.*, footnote 64, at p. 1100: "But of one thing we can be sure if Canada is to remain a federal state, neither breaking up into separate pieces nor marching to unification under a single government: a rigid attitude either for or against centralization is indefensible. The problems faced by governments have to be assessed, and the distribution of authority determined, not only in relation to cultural guarantees, but also and in some instances primarily in relation to social need. To refuse centralization where the evil to be met is beyond provincial control is to court anarchy or to suffer the unchecked domination of private interests; to rush into centralization when the matter is not of serious national concern is to risk creating an overmighty state and depriving the people of their local democratic control."

from time to time, allowed one or the other to predominate. Section 5 of the Fulton and Favreau Bills allows Parliament and two-thirds of the provinces to accelerate the movement towards decentralization. Section 2(a) of the Fulton and Favreau Bills allows one province to thwart the majority desire for a return to centralization, at least by means of amendment.[121]

PROCEDURES FOR DELEGATION OF LEGISLATIVE POWERS

> It is possibly permissible and fair to say that at the recent conferences [1960-1961] all provinces supported the inclusion of a power of delegating legislative authority between the Federal and Provincial Governments to some degree. However, those provinces which advocate maximum rigidity in our constitution lent their support to delegation as a means of furthering their aim of maximum entrenchment. Unfortunately, in the opinion of Saskatchewan at least, even a wide power of delegation would be an inadequate substitute for a sensible amending formula. The Government of Saskatchewan does not believe that the problems which can be foreseen in an inflexible constitution will be erased by the introduction of a power of delegation and so stated its position at the January 1961 conference.[122]

Section 9 of the Fulton Bill and section 13 of the Favreau Bill provide for the delegation of all Dominion legislative powers to the provincial legislatures, while limiting provincial delegation to Parliament to those legislative powers contained in section 92(6), (10), (13), and (16) of the B.N.A. Act.[123] The Fulton and Favreau

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[121] The political pressures for centralization or decentralization will still be important: see Favreau, *op. cit.*, footnote 16, pp. 8-10.

If I am wrong in my conclusion, *supra*, and footnote 95, that the Dominion legislative powers are subject to the flexible amending procedure of section 5, and the Dominion powers are held to be subject to the rigid amending procedure of section 2, my criticism of the amending procedures of the Fulton and Favreau Bills would not differ substantially.

If both Dominion and Provincial legislative powers are subject to the rigid provisions of section 2, then, for practical purposes, one of the avenues for orderly constitutional change, amendment, would be completely closed. The pressure on the Supreme Court of Canada, as the main remaining avenue of constitutional change, would be increased, correspondingly.

My argument based on decentralization would change in degree only. There is no doubt that, contrary to the intentions of the Fathers of Confederation, we presently have a decentralized form of federalism: See generally Laskin, pp. 58-75; Scott, *op. cit.*, *ibid.*, at pp. 1100-1117. Scott gives a list of authorities, at pp. 1108-1109, n. 44, setting out the "degree to which the courts have departed from the original intention of the constitution". Therefore, if both Dominion and provincial legislative powers are subject to the rigid provisions of section 2, although we could have no further decentralization, by means of amendment, neither could we have any less decentralization, by means of amendment, than we now have.

[122] Saskatchewan Review, p. 11.

[123] For the matters dealt with by subsections (6) and (10) see, *supra*, footnote 97; for the matters dealt with by subsections (13) and (16) see, respectively, *supra*, footnotes 30 and 52.

Bills offer delegation of legislative powers as a substitute for a flexible amending procedure.[124] Any criticism of the use of delegation for this purpose must begin with an examination of the present status of delegation.[125]

Inter-delegation of legislative powers between Parliament and the provincial legislatures was held unconstitutional in the *Nova Scotia Inter-delegation* case.[126] The limits of this decision must be appreciated. Firstly, it does not forbid referential legislation,[127] or

One would suppose that there might well be certain Dominion legislative powers that should not be capable of being delegated to the provinces: McAllister, The Financial Post, November 7th, 1964. For example, the political civil liberties, "freedom of association, freedom of assembly, freedom of utterance, freedom of the press (or of the use of other media for the dissemination of news and opinion) and freedom of conscience and of religion.": Laskin, An Inquiry into the Diefenbaker Bill of Rights (1959), 37 Can. Bar Rev. 77, at p. 80, footnote omitted, are within Parliament's exclusive competence: *ibid.*, at pp. 112-113. But see, *ibid.*, at p. 116. The Dominion should not be able to delegate legislative jurisdiction over political civil liberties to the provinces. This is probably not a matter for concern because the "proposals on interdelegation 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".: Laskin, *op. cit.*, footnote 93, at p. 3, n. 5.

Nor should the Dominion be able to transfer jurisdiction over civil liberties to the provinces, by way of amendment. In other words, assuming that Dominion legislative powers are subject to the flexible amending provisions of section 5 of the Fulton and Favreau Bills, certain Dominion legislative powers should be entrenched under section 2 of those Bills.

This problem of transferring Dominion legislative jurisdiction over civil liberties to the provinces, either by way of delegation or amendment, could be obviated if at the time of adoption of an amending formula a bill of rights were entrenched in our Constitution. This would have the effect of withdrawing legislative competence over civil liberties, and other matters, from both Dominion and provinces. At the 1960-1961 meetings of the Attorneys General "the Government of Saskatchewan advocated the entrenchment of a Bill of Rights which could more adequately safeguard individual rights and urged that such a Bill should become a part of the constitution at the time the amending procedure is adopted".: Saskatchewan Review, p. 8. At the time of the enactment by Parliament of the Canadian Bill of Rights, S.C., 1960, c. 44, (operative on the federal level only, and not binding on Parliament) many people "thought that the Bill should take the form of a constitutional amendment, applicable to both Parliament and the provincial legislatures, and accordingly immune from easy repeal.": Schmeiser, Civil Liberties in Canada (1964), p. 2. An entrenched bill of rights, binding on both Parliament and the legislatures, by "placing fundamental freedoms as well as minority rights beyond the risk of diminution without the unanimous consent of all the provinces, [and the Dominion] might provide a basis on which a reasonably flexible amending process for other parts of the constitution might be established, and the legislative independence of the country finally secured.": Scott, Areas of Conflict in the Field of Public Law and Policy, a chapter in Canadian Dualism (Wade ed., 1960), p. 105.

[124] See Press Release, *op. cit.*, footnote 69, Appendix 9.

[125] See generally Laskin, pp. 35-57.

[126] *A.-G. N.S.* v. *A.-G. Can.*, [1951] S.C.R. 31, [1950] 4 D.L.R. 369; (1951), 29 Can. Bar Rev. 79.

[127] "It is important . . . to appreciate the limits of the doctrine affirmed

conditional legislation,[128] involving Parliament and the provincial legislatures. ". . . a thin line may be said to divide unconstitutional delegation from permissible referential legislation or conditional legislation."[129] Secondly, it does not forbid the delegation of legislative power by Parliament or by a provincial legislature to a subordinate agency of the other.[130] Thus the interdiction of the *Nova Scotia Inter-delegation* case can be overcome, to a great extent, by careful language or by careful choice of the delegate.

Any assessment of the value of delegation as a substitute for a flexible amending procedure must take account of the foregoing. Admitting its value in allowing Parliament and the legislatures to do directly what they now can do only indirectly and imperfectly, delegation has little or no value as a substitute for a flexible amending procedure. "The two things [delegation and amendment] are barely related."[131] Delegation of legislative powers as a substitute for amendment suffers from two inherent defects: Firstly, to be effective in many situations all the provinces would have to delegate to Parliament;[132] Secondly, "delegation is revocable and either the provinces or the federal government could grant and withdraw delegated powers at will, depending on their satisfaction with day-to-day exercise of such powers".[133]

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by the *Nova Scotia Inter-delegation* case. Properly understood the case does not prohibit either Parliament or a provincial legislature from incorporating referentially into the valid legislation of one the future valid enactments of the other. . . . There is no unconstitutional delegation involved where there is no enlargement of the legislative authority of the referred legislature, but rather a borrowing of provisions which are within its competence and which were enacted for its own purposes, and which the referring legislature could have validly spelled out for its own purposes.": Laskin, pp. 36-37.

For a recent case upholding the validity of anticipatory incorporation by reference, and referring to it as a valid form of delegation see *Regina* v. *Glibbery*, [1963] 1 O.R. 232, 36 D.L.R. (2d) 548 (C.A.).

[128] For a recent case upholding the validity of conditional legislation see *Lord's Day Alliance of Canada* v. *A.-G.B.C.*, [1959] S.C.R. 497, 19 D.L.R. (2d) 97. Of this case it has been said: "the result appears to conflict with the constitutional rule against delegation of legislative authority." Schmeiser, *op. cit.*, footnote 123, p. 104.

[129] Laskin, p. 142.

[130] *P.E.I. Potato Marketing Board* v. *H. B. Willis Inc. and A.-G. Can.*, [1952] 2 S.C.R. 392, [1952] 4 D.L.R. 146; (1952), 30 Can. Bar Rev. 1050.

[131] Laskin, *op. cit.*, footnote 14, at p. 191.

[132] A requirement that might not be much easier to satisfy than unanimity with respect to amendments. But see Gérin-Lajoie, p. 281. "For example, if nine provinces delegated power over trading in securities to the Dominion and the tenth province did not, the benefits of a single central control system could not be realized and if an unregulated market existed in the tenth province it would result in making a mockery of the Dominion scheme.": Saskatchewan Review, pp. 11-12.

[133] *Ibid.*, p. 12. "For example, if the federal government was obliged to implement treaties by virtue of delegated powers, it would surely be intolerable if one province by withdrawing its delegation could put this

If a general power of delegation is no substitute for a flexible amending procedure, *a fortiori*, the limited power of delegation proposed by the Fulton and Favreau Bills is not.

(3) *The people involved in realizing the Fulton and Favreau Bills.*

The Fulton and Favreau Bills were realized by the Attorneys General of Canada and the provinces. I have suggested that these men were not all constitutional experts. Those who were not experts could not fully appreciate the significance of the step they were proposing. My criticism at this point, however, is not that the Attorneys General were not all constitutional experts, but rather that they were the Attorneys General. They were members of the governments of the Dominion and the provinces. One of the serious defects of Dominion-Provincial conferences—and this applies to the meetings of the Attorneys General that resulted in the Fulton and Favreau Bills—is "the unrepresentative character of the conferences, which speak for the political party in power at the moment in the Dominion and in each province and not for the opposition parties as well".[134]

Apart from the unrepresentative character of the participants in the meetings of the Attorneys General, one might speculate, in connection with the Favreau Bill, on whether the weak minority government in Ottawa was able to stand up for national rights against ten strong provincial governments. Provincial politicians cannot be expected to give priority to the national interest.[135]

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country in default of its treaty obligations and make Canada a violator of international law."

Thus, while amendment is relatively permanent, delegation is relatively impermanent.

[134] Scott, *op. cit.*, footnote 64, at p. 1121.

I am not suggesting that only one political party was represented at the meetings of the Attorneys General. In fact, at the 1964 meetings, there were five Liberal, four Conservative and two Social Credit Attorneys General: see The Ottawa Journal, November 10th, 1964. Included in the five Liberals was Mr. Gérin-Lajoie, the Quebec Minister of Education: *supra*, footnote 102.

[135] ". . . many Canadians must have a feeling of unease when a minority federal government, newly in office and still shaky on its feet, engages ten provincial governments all strongly entrenched and ably led, and comes out with an agreement on the constitution that could make the provincial governments much stronger than they are. . . . Naturally, the provincial premiers are happy about such an outcome. And the federal government badly in need of some kudos would be happy about it. But the question remains —in the infighting behind closed doors, did the concept of a strong federal government get a fair shake? Did the federal negotiators yield too much? Is repatriation of the constitution, with the new amending formula, a step toward Balkanization with ten strong governments and a weak one at the centre? . . . Provincial premiers, strong and able though they may be, are provincial in outlook, and cannot be expected to give priority to the national interest.": Charles Lynch, The Ottawa Citizen, October 16th, 1964.

The positions some of the provinces have taken on the problem of constitutional amendment is worthy of comment.

Over the years, the Provinces of Quebec and Ontario have quite consistently demanded a veto over all constitutional amendments.[136] As might be expected, in the meetings of the Attorneys General that resulted in the Fulton and Favreau Bills, Quebec and Ontario were strong proponents of entrenchment of provincial powers, rights, and privileges. One can have more sympathy with Quebec's position than with Ontario's.[137] Quebec wishes to protect her special cultural values, and believes that if she is to do this there must be a rigid procedure for constitutional amendments, with an extensive veto for Quebec. Ontario's reasons for wanting a veto over constitutional amendments would appear to be entirely selfish: as the wealthiest province she has the most to gain from decentralization.[138]

The less wealthy provinces have the most to lose from decentralization. At the 1960-1961 meetings of the Attorneys General, Manitoba, Nova Scotia, and Saskatchewan favoured an amending procedure with a maximum of flexibility and a miminum of entrenchment.[139] Why in 1964 did these provinces agree to the Favreau Bill, with its emphasis on entrenchment? This question will not be answered until the provinces involved choose to answer it.

The position taken by most of the provinces at the recent meetings of the Attorneys General is difficult to fathom. After all, as Professor Laskin has said:[140] "The provinces have a stake, no less than the Dominion, to see to it that no one, or even two or three of them, unless there is a population preponderance, holds up otherwise desirable constitutional reforms. In short, we must not forget that in a federal system the whole is more than merely the sum of its parts."

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[136] Gérin-Lajoie, pp. 250, 258. In 1935 the Liberal government of Ontario deviated from the veto principle to a considerable extent with its proposal for a Canadian amending formula: see, *supra*, footnote 44.

[137] "The position of Quebec is understandable. It wishes to secure the present constitutional guarantees of racial and religious minorities against any possibility of assault and has not yet realized that these minority guarantees can be given the maximum of safety without applying the doctrine of unanimous consent to the entire field of constitutional amendment. The position of Ontario is less intelligible and more susceptible of modification.": Rogers, *op. cit.*, footnote 31, at pp. 484-485.

On Quebec's position generally see Gérin-Lajoie, pp. 262-263, 270-271; Scott, *op. cit.*, footnote 64, at pp. 1104, 1122.

[138] "Only from Ontario does the federal government collect more money than it spends [in Ontario].": The Ottawa Citizen, November 7th, 1964.

[139] Laskin, *op. cit.*, footnote 14, at p. 191.

[140] Laskin, *op. cit.*, footnote 57.

In summary: I have criticized the Fulton and Favreau Bills on three bases:

(1) The way they were realized. The Bills were realized in private. Despite the lasting importance of the step taken, there was no public participation.

(2) The amending formula they propose. The amending procedure proposed by the Bills is too rigid. It gives a permanent legal basis to decentralization. Delegation of legislative powers is no substitute for a flexible amending procedure.

(3) The people involved in their realization. The Bills were realized by the Attorneys General of Canada and the provinces. Besides not all being constitutional experts, these men were representing the partisan interests of their respective governments.

VII. *Alternatives to the Fulton and Favreau Bills.*

In proposing alternatives to the Fulton and Favreau Bills for Canadian constitutional amendment one must be a realist. Ideally one might wish to have an amending formula that stresses flexibility and entrenches only matters such as sections 93 (education) and 133 (language) of the B.N.A. Act, and the amending formula itself. Even if this degree of flexibility were desirable, it is not possible in the Canada of today; nor is it ever likely to be possible.

I believe there are two possible alternatives to the Fulton and Favreau Bills—one offering a change in emphasis, the other offering a new approach. Both alternatives would retain the two main divisions for amendment in the Fulton and Favreau Bills: entrenched matters (section 2) and flexible matters (section 5). The first alternative is to transfer some of the matters presently entrenched by the Bills to the flexible category. The second alternative is to transfer most of the matters presently entrenched by the Bills to the flexible category, and at the same time give Quebec a veto, operative within that province only, with respect to all matters presently entrenched by the Bills.[141] Both alternatives could re-

[141] "One way out of the impasse in which Canadians have found themselves since at least the early 1930s is to grant to Quebec the right to declare that certain amendments that are mandatory for all other provinces, once a majority of them and the federal government give their approval, will not apply to Quebec. There is little doubt that the number of clauses requiring unanimous assent in, for example, the so-called Fulton Formula could be considerably reduced by this device and that therefore a more flexible amending formula than any now in sight would result.": Quebec States Her Case (Scott & Oliver eds, 1964), p. 10. (This small paperback contains a number of recent speeches and writings by leading Quebec politicians and intellectuals.)

The second alternative is similar to the proposal advanced in 1936, *supra*. It differs from that proposal in that (a) it gives a special status to

tain, for what they are worth, the delegation provisions of the Bills.

Neither of these alternatives would be easy to realize. Quebec has shown no willingness to accept anything less than the Fulton and Favreau Bills; while the other provinces might be willing to accept something less than the Fulton and Favreau Bills, they have shown no willingness to accept a special status for Quebec. The Dominion government, an apparent spectator[142] to this dilemma, recently said that the amending formula proposed by the Fulton and Favreau Bills "is undoubtedly the best that could be reached through the process of negotiation and mutually acceptable compromise. . . ."[143] What the Dominion government neglected to add is that the word "best" must be understood in the context of this serious qualification: the proposed amending formula is the *only* formula that could have achieved unanimity in 1964.

Despite the difficulties involved in realizing either of the proposed alternatives they are worth consideration.

(1) *The first alternative.*

The first alternative offers a change in emphasis from the amending procedures proposed by the Fulton and Favreau Bills. The first alternative is to transfer some of the matters presently entrenched by the rigid section 2 to the flexible section 5. As with my criticism of the amending procedure, I will confine my remarks to the legislative powers entrenched by section 2.

Section 2(a) of both Bills entrenches all provincial legislative powers.[144] Could the provinces be persuaded to allow some provincial legislative powers to be transferred from section 2 to section 5? The key powers are found in section 92(13) of the B.N.A. Act. Could the provinces be persuaded to allow some of the myriad of matters coming within "Property and Civil Rights in the Province" to be transferred from section 2 to section 5? After all, amendments under section 5 will be difficult: Ontario and Quebec together will be able to prevent any amendment desired by the Dominion and the other eight provinces.

I believe that today most of the provinces could be persuaded to allow some provincial legislative powers to be subject to the

Quebec alone, not, as the 1936 proposal did, to all provinces dissenting from a particular amendment; (b) it gives a wide veto to Quebec, not, as the 1936 proposal was, confined to section 92(13) and (16) of the B.N.A. Act.

In 1960 Saskatchewan proposed that Quebec be given a special status with respect to amendments affecting section 92(13) of the B.N.A. Act: Saskatchewan Review, p. 9.

[142] *Supra*, footnote 57.

[143] Press Release, *op. cit.*, footnote 69, p. 5.

[144] For the provincial legislative powers see, *supra*, footnote 93.

flexible amending provisions of the Fulton and Favreau Bills, including some of the matters in section 92(13). I believe that today the Province of Quebec could not be persuaded to allow any provincial legislative powers to be subject to the flexible amending provisions of the Fulton and Favreau Bills, particularly any of the matters in section 92(13).

The focus of Quebec's present position is section 92(13). Thirty years ago it could be said, with some hope for unanimous provincial support:[145]

> Section 92, subsection 13 . . . has some claim to be included in this category [entrenchment] if it is defined as covering private contractual rights and provisions for the holding or transfer of property, say, the points on which the Civil Code of Quebec differs from the law prevailing in other provinces, and is not construed so broadly as to prevent federal action, if desired, in the fields of general social and economic legislation, matters of public policy rather than private right.

This definition of property and civil rights, as a basis for entrenchment, might have satisfied Quebec thirty years ago; it will not satisfy her today. "In 1867, when our economy was still predominantly rural and agricultural, it was thought that ownership of the land, maintenance of our civil laws, free use of our language, and control of our schools were enough to preserve our particular culture. In 1963 these are no longer sufficient. We must also have control over our economy."[146]

There is, of course, the possibility that Quebec may modify its position on provincial legislative powers generally, and section 92(13) particularly. Today this seems like a remote possibility. It is easy for an English-speaking Canadian to be critical of what appears to be an uncompromising position. If we are to have a Canada at all, however, English-speaking Canadians must try to understand Quebec's fears and aspirations.[147]

Since unanimity is an accepted prerequisite for any Canadian amending formula, I believe that the first suggested alternative to the Fulton and Favreau Bills is unattainable and should be discarded.

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[145] Gérin-Lajoie, p. 239, quoting Dr. Skelton's testimony before the special committee of the House of Commons in 1935.

[146] Quebec States Her Case, *op. cit.*, footnote 141, p. 36. (The Hon. Daniel Johnson, the leader of the *Union Nationale* party in Quebec, replying, in the Quebec Legislature on April 23rd, 1963, to Premier Lesage's budget speech of April 8th, 1963.) There is reason to believe that Mr. Johnson's views on section 92(13) of the B.N.A. Act are shared by the Quebec government: see, for example, *ibid.*, pp. 132-145. (An interview of the Hon. René Lévesque, Minister of Natural Resources in the Lesage government, which appeared in *Le Devoir*, July 5th, 1963.)

[147] *Ibid.*, *passim.*

(2) *The second alternative.*

The second alternative offers a new approach to the problem of a Canadian amending formula. The second alternative is to transfer most of the matters presently entrenched by section 2 of the Fulton and Favreau Bills to section 5,[148] and at the same time to give Quebec a veto, operative within that province only, with respect to all matters presently entrenched by the Bills.[149] The Dominion and nine provinces would be subject to the flexible amending procedure of section 5, with respect to most amendments; Quebec would only be subject to that flexible amending procedure, with respect to most amendments, if she chose not to exercise her veto. "Eventually Quebec's relationship to the rest of Canada might differ in many respects from that of any other province. But . . . there is already ample precedent for this."[150]

I do not underestimate the political difficulty of realizing this second alternative. Besides the difficulty of convincing the other provinces to agree to transfer most of the matters presently entrenched by section 2 of the Fulton and Favreau Bills to section 5,[151] it means giving Quebec a special status so far as constitutional amendment is concerned. The Dominion government has been at great pains to point out that the Fulton and Favreau Bills do not give Quebec a special status.[152] More and more, in recent times,

[148] Probably at least the following matters should remain entrenched: sections 51, 51A, 93, and 133 of the B.N.A. Act, and the amending formula. (For the matters dealt with by sections 51 and 51A see, *supra*, footnote 39; for the matters dealt with by sections 93 and 133 see, *supra*, footnote 30.) But see Underhill, The Image of Confederation (1964), p. 65, on the desirability of entrenching section 93.

[149] If Quebec were given a special status with respect to constitutional amendment she might agree to a more limited range of operation for that status than the matters presently entrenched by the Fulton and Favreau Bills.

[150] Quebec States Her Case, *op. cit.*, footnote 141, p. 10. It is suggested, *ibid.*, p. 9, that a special status for Quebec is recognized by certain sections of the B.N.A. Act: see, *infra*, footnote 153.

[151] One would imagine that this would be particularly difficult in the case of Ontario, *supra*. But see the speech from the throne at the opening of the third session of the twenty-seventh Ontario legislature. Ont. Leg. Ass. Debates (unrevised), January 20th, 1965, p. 3. "The Ontario government indicated today that it would concern itself more than [*sic*] any other in the province's history with the task of cementing Canada as a nation. In the speech from the throne, the government announced that it would establish a non-partisan committee to advise the government 'with respect to all matters in relation to and arising out of the position of Ontario in confederation.' ": The Ottawa Citizen, January 20th, 1965. The eighteen members of this committee were named on February 23rd, 1965: *ibid.*, February 24th, 1965.

[152] "There is absolutely nothing in the proposed amendment Act that, directly or indirectly, explicitly or implicitly, provides for the granting of a special status, within the Canadian federation, to one or the other of the provinces.": Press Release, *op. cit.*, footnote 69, p. 4; Favreau, *op. cit.*, footnote 16, pp. 12-13.

Quebec has been claiming a special status within Confederation.[153]

> Quebec's nationalism is no longer a plea for passive autonomy. Quebec asks of Confederation not sufferance to survive, but freedom to fulfill the goals of cultural nationhood. It asks the rest of the country to accept the semantically difficult proposition that Quebec is not a province like the others, because it is more than a province: that [sic] is, the embodiment of the French Canadian nation. And Quebec speaks with the impatience of people who feel surely, it is time that English Canada heeded Sir John A's classic admonition: "Treat them as a nation and they will act as a free people generally do. Call them a faction and they will become factious."[154]

Many English-speaking Canadians, outside the Province of Quebec, have come to realize the justice of Quebec's claim to special status.[155] The real problem will be to convince the governments of the other provinces of the justice of this claim.

Despite the difficulties, I believe that the second suggested alternative to the Fulton and Favreau Bills is attainable, and should be striven for.

[153] "Would it not be wise to recognize explicitly that Quebec is not a province like the others? There is nothing revolutionary about this idea. It is already given formal recognition in the B.N.A. Act, in sections 22, 23(6), 80, 93, 94, 98, and 133, for example.": Quebec States Her Case, *op. cit.*, footnote 141, p. 9. In a similar vein see *ibid.*, pp. 31 (The Hon. Daniel Johnson), pp. 143-144 (The Hon. René Lévesque). Premier Lesage has recently said "it was reasonable . . . for Quebec to aspire to a special status within confederation, which would not endanger the essentials of the federal system.": a speech given November 16th, 1964 in Toronto to a joint meeting of the Empire Club and the Canadian Club, as reported in The Ottawa Citizen of the same date.

[154] Time Canada, October 16th, 1964, p. 16.

[155] "There is . . . room for explicit recognition of the special position Quebec—in so far as it is the primary outlet for the French element in Canada—should occupy in the Canadian political organization.": Can. H. of C. Debates (unrevised), September 30th, 1964, p. 8593. (Gordon Fairweather, P.C.—Royal); "Mr. Baldwin (G. W. Baldwin, P.C.—Peace River) accepted too the claim of the French-speaking people of Canada to special status in certain matters.": The Ottawa Citizen, December 8th, 1964; Bourne, The Financial Post, November 7th, 1964, p. 7. In a formal statement on party policy the New Democratic Party has recently suggested consideration by Parliament and the legislatures of a special status for Quebec within Confederation.: The Ottawa Citizen, February 12th, 1965. (In the same policy statement the N.D.P. condemned the Favreau Bill, and called for a general revision of the B.N.A. Act and a workable amendment formula: *ibid.*) See Prime Minister Pearson's response when questioned about Premier Lesage's claim for a special status for Quebec, *supra*, footnote 153: "I have had the pleasure of reading the statement made by the premier of Quebec in Toronto, and I thought it was a very good, Canadian, constructive statement.": Can. H. of C. Debates (unrevised), November 19th, 1964, p. 10253. The opposition has been pressing the government to say whether it presently recognizes a special constitutional status for Quebec: Can. H. of C. Debates (unrevised), March 4th, 1965, p. 11972; March 8th, 1965, pp. 12063-12064. Prime Minister Pearson's equivocal response was: "Mr. Speaker, the Province of Quebec has its present constitutional status inside our federal system, and the government recognizes that.": Can. H. of C. Debates (unrevised), March 4th, 1965, p. 11972.

In summary: I have suggested two alternatives to the Fulton and Favreau Bills. The first I discarded as unattainable. The second involves giving a special status to Quebec. While this would doubtless be acceptable to Quebec,[156] the other provinces would require some convincing. The second alternative is worth striving for, however, because it would provide the Dominion and the provinces, other than Quebec, with a degree of flexibility in amendments missing from the Fulton and Favreau Bills.

VIII. *The White Paper on Constitutional Amendment.*

The *White Paper* on constitutional amendment was tabled in the House of Commons on March 2nd, 1965.[157]

My dictionary defines a "white paper" as "2. an official report of a government".[158] The *White Paper* on constitutional amendment could be defined as "an official report of eleven governments".[159] A servant required to satisfy many masters must, of necessity, seek the highest common denominator. The *White Paper* reflects this necessity.[160]

The *White Paper* is organized as follows: Introduction (pp. vii-viii, by Prime Minister Pearson); Chapter 1—The Constitution of Canada (pp. 1-7); Chapter II—History of Constitutional Amendment in Canada (pp. 8-16); Chapter III—History of Efforts to Find Amending Formula (pp. 17-31); Chapter IV—The Amending Formula Explained (pp. 32-43); Chapter V—The Amending Formula: An Appraisal (pp. 44-53); Appendices (pp. 54-129—Appendix 1: The B.N.A. Acts 1867-1964, pp. 54-105; Appendix 2: The Fulton Bill, pp. 106-109; Appendix 3: The Favreau Bill, including the French version, pp. 110-121: Appendix 4: Notes on Amendment Procedure Used in Some Other Federal States, pp. 122-129.).

For the purpose of critical examination I will discuss the *White Paper* under three headings: firstly, its historical analysis (Chapters I-III); secondly, its comparison and explanation of the

[156] *Supra*, footnote 153. But see Gérin-Lajoie, pp. 264-265.

[157] *Supra*, footnote 82.

[158] American College Dictionary (1960), p. 1392. More fully defined in Jowitt, Dictionary of English Law (1959), vol. 2, p. 1868: "an official memorandum issued by the government in which a problem and various considerations bearing on it are set out, and the policy which the government advocates, or is disposed to advocate, is stated."

[159] See, *supra*, footnote 82.

[160] One can sympathize with the author of this document, assuming it was written by one man only, which is unlikely. Within the limits imposed upon him, he performed his task admirably: the White Paper is clear, concise and well written. The criticism that follows is in no way a reflection on him.

Fulton and Favreau Bills (Chapter IV); thirdly, its defence and justification of the Fulton and Favreau Bills (Chapter V).

(1) *Historical analysis.*

The *White Paper's* historical analysis of past amendments to the B.N.A. Act, and the search for a Canadian amending formula, is, in my opinion, impeccable, as far as it goes.[161] It contains, however, no facts that were not previously available. One would have hoped, perhaps naively, that the 1960-1961 and 1964 *in camera* meetings of the Attorneys General, which resulted in the Fulton and Favreau Bills, and about which little is known,[162] might have been discussed in detail. The *White Paper* discusses these meetings summarily.[163] No mention is made of what constitutional experts, if any, assisted the Attorneys General in arriving at the Fulton and Favreau Bills. Nothing is revealed of the infighting and horse trading that must have taken place, particularly at the 1960-1961 meetings where unanimity was not realized.[164] All that is said about the lack of agreement on the Fulton Bill is that "some differences of view remained and the plan was not carried through to completion".[165]

(2) *Comparison and explanation of the Fulton and Favreau Bills.*

The *White Paper's* comparison of the form of the Fulton and Favreau Bills is consistent with my own.[166]

In explaining the matters entrenched under section 2 of the Fulton and Favreau Bills, the *White Paper* appears to enunciate a new version of the compact theory of confederation when it says:[167]

> Paragraphs (a) to (d), and especially (a) and (d), could be said to represent essential conditions on which the original provinces united to form the Canadian Confederation, and on which other provinces subsequently joined the union. Changes in these basic conditions—such as the powers allocated to provincial legislatures—could alter their status in relation to Parliament, thus changing the conditions on which the provinces entered Confederation.

I have said[168] that the compact theory of Confederation has been

[161] My own historical analysis, *supra*, is in the main consistent with that of the White Paper.

[162] *Supra*, and footnotes 69 and 80. [163] Pp. 27, 30-31.

[164] Some of the conflict is revealed in the Saskatchewan Review, pp. 8-10.

[165] White Paper, p. 29. [166] *Supra.* [167] Pp. 35-36.

[168] *Supra; cf.* Laskin, *op. cit.*, footnote 93, at p. 3: "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 assure 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."

effectively destroyed, and that the veto provisions of the Fulton and Favreau Bills cannot be justified as merely giving effect to that theory.

The enigma, for me, of the *White Paper's* explanation of the Fulton and Favreau Bills is its failure to say where Parliament's legislative powers are to be found: whether under the entrenched amending procedure of section 2, or under the flexible amending procedure of section 5.[169] This is of fundamental importance.[170] Why is the *White Paper* silent? The point must have been a contentious one at the meetings leading to the Fulton and Favreau Bills. In explaining section 5 the *White Paper* says:[171] "This clause provides for the amendment of constitutional provisions not covered by any of the preceding clauses. . . . " There is no attempt to give content to the section.[172]

(3) *Defence and justification of the Fulton and Favreau Bills.*

The *White Paper* begins what it calls its "appraisal" — a word connoting disinterest — of the Fulton and Favreau Bills by saying:[173]

> The federal government is satisfied that the procedure for constitutional amendment elaborated in 1960-61 and completed in 1964 is suited to the framework of Canada's federal constitution and political structure. It represents the best balance that could be achieved by agreement between the federal and provincial governments.

Then it turns to the criticism of the Bills and says:[174]

> This procedure has, however, been criticized by some Canadians. Some have called it excessively rigid; others object that it is too flexible. Some argue that the delegation clause was designed to facilitate decentralization; others are apprehensive that it will encourage centralization. These contradictory views reflect the basic differences that made a federal system necessary in Canada. They are probably unavoidable in any proposal for constitutional amendment in a federal state.

The *White Paper* deals with these criticisms under two headings:

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[169] I have suggested, *supra*, and footnote 95, that Parliament's legislative powers come under section 5. At p. 46 the White Paper says: "It may be argued that a requirement of unanimity is too inflexible to be applied to the distribution of legislative powers. . . ." In the context it is clear that this is a reference to provincial legislative powers only.

[170] ". . . it is a pivotal point whether the reference in the Fulton-Favreau draft bill to provincial legislative 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.": Laskin, *op. cit.*, footnote 93, at pp. 9-10.

[171] P. 37.

[172] Except obliquely when explaining section 6 of the Favreau Bill, *ibid.*, p. 38. For the possible content of section 5 see Laskin, *op. cit.*, footnote 93, at pp. 13-14.

[173] P. 44. I suggested, *supra*, that in this context the word "best" is subject to a serious qualification.

[174] P. 44.

Stability versus Flexibility,[175] and Centralization versus Decentralization.[176]

Under Stability versus Flexibility, in defending and justifying the rigidity of the Fulton and Favreau Bills' procedures for amendment, the *White Paper* first examines the amending experiences of the United States and Australia. Although the amending procedures in those two countries are on their faces[177] considerably more flexible than the procedures proposed by the Fulton and Favreau Bills, the *White Paper* points out how difficult it has been to obtain amendments in practice.[178]

Then turning specifically to the defence of the rigidity of the Fulton and Favreau Bills, the *White Paper* says:[179]

> In Canada, we find all the usual considerations that favour constitutional stability in any federal system. Special considerations, working in the same direction, arise from our need to maintain the provisions developed in recognition of our dual culture.
>
> Accordingly, all attempts to work out an amending formula over the past 30 years have led to the same conclusion: that a clear distinction must be made between the manner of changing provisions which are fundamental in our constitution and the manner of changing those that are not. . . .
>
> It may be argued that a requirement of unanimity is too inflexible to be applied to the distribution of [provincial] legislative powers, but this distribution is basic to the Canadian federation.

One might have expected that these special considerations would have been revealed. They are not. No one disputes that

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[175] Pp. 44-47.

[176] Pp. 47-50.

[177] For the main provisions of the American and Australian amending procedures see, *supra*, footnote 109. These provisions are set out in detail in the White Paper, Appendix 4.

[178] Pp. 45-46. With respect to the United States it is said, *ibid.*, p. 123: "Amendments to the Constitution have not been frequent. While there have been five thousand proposals to amend the Constitution introduced in the Houses of Congress since 1789, only twenty-eight of these have received the required congressional support and been referred to the states for ratification. Of these, twenty-four have been ratified."; and with respect to Australia, *ibid.*, p. 127: "Since 1900, there have been 24 proposed amending laws, some dealing with several subjects, submitted to the electors. Only in four instances have the requisite majorities been obtained."

After mentioning the American amending difficulties, the White Paper adds, p. 45: "This does not mean, of course, that the U.S. Constitution has not been changed in other ways through which development can take place. A principal method has been by judicial interpretation, in which the constitution is applied by the courts to situations that could not have been foreseen at the time it was devised." If from this, one is to infer that rigidities in the Favreau Bill's amending procedures can be similarly overcome, it ignores the fundamentally different, and more liberal, attitude taken by the Supreme Court of the United States to *stare decisis* in constitutional matters than has been taken by our courts: Laskin, pp. 189-192.

[179] P. 46.

different amending procedures should be applied to fundamental and non-fundamental provisions of our constitution, and that fundamental provisions should be entrenched. The dispute is over what matters are to be considered fundamental. Why are all provincial legislative powers considered fundamentals under Canadian federalism, while such powers are not considered fundamentals, and are not entrenched, under American and Australian federalism? No answer is given.[180] One might suggest a simpler explanation for the entrenchment of provincial legislative powers under the Fulton and Favreau Bills than that they are basic to Canadian federalism: since any amending formula required unanimity,[181] the more matters that were subject to provincial veto, the easier it was to obtain provincial consent.

Under the heading Centralization versus Decentralization, the *White Paper* defends and justifies the delegation provisions of the Fulton and Favreau Bills. The purpose of the delegation provisions "was to overcome rigidity [in the amending procedures] by a practical arrangement through which provinces wanting to effect a change could do so without amending the constitution as such".[182] I have pointed out that, because of inherent defects, delegation is no substitute for a flexible amending procedure.[183]

The attacks made on the delegation provisions on the basis that they favour either centralization or decentralization are, in my view, misconceived. I think the federal government is justified in believing that there is, in the delegation provisions, no "bias or tendency towards either centralization or decentralization of legislative powers or functions".[184] I agree "that the delegation section does not permit Parliament or the provinces to delegate or confer any constitutional responsibility for, or jurisdiction over, a given area; only the power to enact a specific statute pursuant to such jurisdiction can be delegated".[185] However, the objection to the

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[180] Except to point out, *ibid.*, pp. 46-47, that in the past no amendment transferring provincial legislative powers has been made without unanimous provincial consent, and that this practice has ripened into a constitutional convention. I have suggested, *supra*, that there may be such a convention, This, in itself however, is no warrant for putting all provincial legislative powers in the entrenched category when new amending pr cedures are being devised. Conventions can change: Dawson, *op. cit.*, footnote 5, pp. 151-153, while the Favreau Bill's amending procedures will be permanent —because they too are in the entrenched category.

I suppose the White Paper's resurrection of the compact theory of confederation, *supra*, is also one of its arguments in favour of the entrenchment of provincial legislative powers.

[181] *Supra*, and footnote 26.

[182] White Paper, p. 47.

[183] *Supra*.

[184] White Paper, p. 48.

[185] *Ibid.* See, *supra*, footnote 123.

delegation provisions of the Fulton and Favreau Bills remains: they cannot perform their *raison d'être*.

In summary: I have criticized the *White Paper* on a number of bases: (1) In effect, it was prepared under the supervision of eleven governments. This fact inhibited the author and coloured the whole document. (2) It reveals no new information. This is particularly disappointing with respect to the 1960-1961 and 1964 meetings of the Attorneys General, about which little is known. (3) In explaining the amending procedures of the Fulton and Favreau Bills it fails to say where Parliament's legislative powers fall. (4) It does not offer a satisfactory justification for the entrenchment of all provincial legislative powers under section 2 of the Fulton and Favreau Bills. (5) It fails to justify delegation as a substitute for a flexible amending procedure.

IX. *Conclusion.*

Everyone agrees that the Canadian Constitution should be brought home; to this extent, everyone agrees with the Favreau Bill, for it will bring our Constitution home; not everyone agrees, however, with the Favreau Bill's amending formula; many feel that the price for repatriation is too high.

The most that one who opposes this amending formula can hope for is that one of the parties to the agreement will renege, and we will be left with the *status quo*. One cannot realistically hope to have the Dominion and provinces agree today, or in the near future, to a new Canadian amending formula.

Quebec feels that a Canadian amending formula is essential now.[186] Perhaps she can be persuaded to change her mind. After all, under the present amending procedure, Quebec, as well as the other provinces, appears as a matter of constitutional convention to have a veto over the most important potential amendments: those transferring provincial legislative powers.[187] One hundred years after Confederation there is no value in the Favreau Bill as a symbol of our emancipation.[188]

It is argued that we should accept the Canadian amending formula provided by the Favreau Bill because if its "rules prove

[186] "Asked about changes French-Canadians consider essential, Mr. Lesage listed three: Revision of federal-provincial taxation agreement; the right to withdraw from certain federal-provincial joint programmes, and the 'repatriation' of the constitution, which has remained an act of the British Parliament since 1867.": The Ottawa Citizen, November 13th, 1964.

[187] *Supra.*

[188] "Canada is not a new nation in which symbolism may with some justification be emphasized almost for its own sake.": Laskin, *op. cit.*, footnote 14, at p. 191. *Contra*, Favreau, *op. cit.*, footnote 16, pp. 14-15.

too inflexible, they can surely be altered in the light of experience".[189] To suggest that the provinces, having once got the wide veto that the Favreau Bill will give them, are going to agree at some future time to give up part of this veto—remembering that the amending formula itself is entrenched under the Bill—is, in my opinion, the height of fatuity.

A new concept of federalism—called co-operative federalism—is taking shape in Canada under the auspices of Prime Minister Pearson's Liberal government. Under the Liberal banner of co-operative federalism Canada has seen, among other things: many Dominion-Provincial conferences; the appointment of a Commission on Bilingualism and Biculturalism; the recognition that the provinces need larger sources of revenue: This is to be gone into by an unprecedented Dominion-Provincial study of Canada's fiscal structure, with the purpose of arriving at a new tax-sharing plan, favourable to the provinces, before the present plan expires in 1967; a Canada Pension Plan that will make a great deal of money available to the provinces for economic development; Dominion legislation allowing provinces to "opt out" of Dominion-Provincial joint programmes; a proposed extension of provincial education and welfare services to Canada's Indian population.

So far co-operative federalism has not required amendments to our Constitution.[190] It seems that the Favreau Bill for Canadian constitutional amendment is but a link in the co-operative federalism chain: probably the most important link, because it could provide the legal basis for a great many more links. The Dominion government has denied that any amendments to the Constitution of Canada are presently contemplated.[191] Quebec thinks otherwise.[192]

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[189] The Ottawa Citizen, October 15th, 1964; Press Release, *op. cit.*, footnote 69, p. 5. Even so keen a constitutional student as Dean Lederman apparently subscribes to this view: see Lederman, The Financial Post, November 7th, 1964, p. 7.

[190] Unless the 1964 pensions amendment is to be considered part of co-operative federalism.

[191] Favreau, *op. cit.*, footnote 16, p. 13; see Can. H. of C. Debates (unrevised), February 22nd, 1965, p. 11575 (Prime Minister Pearson). But see The Ottawa Citizen, March 1st, 1965: "Justice Minister Favreau says the proposed formula to amend the Canadian constitution is 'only a preliminary step to a formal revision of the constitution.'" (a speech given to the Greater Montreal Junior Chamber of Commerce on February 27th, 1964).

[192] "Premier Jean Lesage says Quebec must use rights guaranteed under the Canadian constitution—a constitution brought home and brought up to date—'in such a manner as to give Quebec control of its own economy.' It is true the constitution must be brought up to date, the Quebec leader said Sunday night in a speech at a $50-a-plate fund-raising dinner sponsored by the Quebec Liberal Federation. . . . The result of the repatriation 'will be to allow us to negotiate with Ottawa and our sister provinces

There is nothing wrong with co-operative federalism *per se*. The conceptual difficulty with it is that "it can pragmatically cover just about anything . . .".[193] Perhaps the degree of decentralization that co-operative federalism is providing piecemeal is necessary for the survival of Canada. Perhaps the constitutional strait jacket of the Favreau Bill is necessary for the same reason. If this is true, however, the Canadian people have the right to be told these harsh facts of Canadian life. They have the right to know what kind of Canada their politicians are preparing for them. They have the right to participate in the preparation.

What was said by the Attorney General of Saskatchewan four years ago has even greater relevance today:[194] "Perhaps the time has come to assemble a constitutional convention broadly representative not only of governments but also of opposition parties, constitutional experts and organizations reflecting other facets of public opinion".

APPENDIX "A"

THE FULTON BILL

November 6, 1961.

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,

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amendments which could give our constitution greater flexibility and give French-Canadians, as well as Quebec, stature appropriate to 1967.' ": The Ottawa Citizen, November 23rd, 1964.

[193] Time Canada, October 16th, 1964, p. 16, quoting Jean-Luc Pépin, Lib. — Drummond-Arthabaska.

[194] Saskatchewan Review, p. 15, and quoted, *supra*.

(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,

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.

(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. Nothing in this Part diminishes any power of the Parliament of Canada or of the legislature of a province, existing immediately before this Act came into force, to make laws in relation to any matter.

7. 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 thereof.

8. 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 1960;
(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

9. 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 heads (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 enactment of the statute is of concern to less 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 that is otherwise within the legislative jurisdiction of the Parliament of Canada.

(4) No statute enacted by a province under the authority of subsection (3) of this section shall have effect unless

(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 repeal 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

Citation and Commencement

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

11. This Act shall come into force on the . . . day of . . . 1962.

APPENDIX "B"

THE FAVREAU BILL

October 30, 1964.

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

WHEREAS Canada has requested, and consented to, the enactment of an Act of the Parliament of the United Kingdom in the terms hereinafter set forth, and 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 Bill to be laid before the Parliament of the United Kingdom for that purpose:

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 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, or
(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.

(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 Parlia-

ment 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, Session 2;
(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 matter 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 the provinces, and that the enactment of the statute is of concern to fewer than four of the provinces and the provinces so declared to be concerned have under the authority of their legislatures consented to the enactment of such a statute.

(3) Notwithstanding anything in this or 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.

(4) No statute enacted by a province under the authority of subsection (3) of this section shall have effect unless

(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 repeal 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 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 . . . day of . . . .