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BILL C-60: OR, HOW NOT TO DRAFT A CONSTITUTION

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On June 20th, 1978, the Prime Minister of Canada then in office, the Rt. Hon. Pierre Elliott Trudeau, introduced into the House of Commons of Canada a Bill, No. C-60, entitled *An Act to amend the Constitution of Canada with respect to matters coming within the legislative authority of the Parliament of Canada, and to approve and authorize the taking of measures necessary for the amendment of the Constitution with respect to certain other matters*. General distribution to the public took the form of a grey-covered version prefaced by an introduction and expounded by explanatory annotation.¹ The "grey paper" is perhaps succinct enough, and not too highly coloured, an epithet. The Bill and the grey paper appeared in the company of a "white paper", *A Time for Action*, in at least two forms,² and of an additional *Explanatory Document*.³ Clause 1 of the

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¹ The Constitutional Amendment Bill[,] Text and Explanatory Notes[,] published to encourage public discussion of proposed changes in the Canadian Constitution, as set out in a Bill introduced in Parliament by the Government of Canada—June, 1978 (Government of Canada). This document carries no further details of publication (whether as to date of publication or other identification of any kind). It has the English and French texts back to back, rather than in the bicolumnar form in which federal bills and statutes appear. Comparison of texts is therefore made very inconvenient and difficult for anyone not possessing two copies. It would be preferable if, in future, the texts of such bills appeared in bicolumnar form, perhaps on the right hand page, with explanatory notes opposite, on the other page.

² *A Time for Action*[,] *Toward the Renewal of the Canadian Federation*[,] The Right Honourable Pierre Elliott Trudeau[,] Prime Minister[,] (Minister of Supply and Services[,] Canada[,] 1978); entitled, in the abbreviated or pamphlet version, *A Time for Action*[,] *Highlights of the Federal Government's Proposals for Renewal of the Canadian Federation*, with the same details of authorship and publication.

³ The Constitutional Amendment Bill, 1978[,] *Explanatory Document*[,] Government of Canada (Minister of Supply and Services[,] Canada[,] 1978).

Bill, in prescribing short titles, showed at once that a new comprehensive constitutional text was planned: "This Act may be cited as the *Constitutional Amendment Act, 1978*, and Part I of this Act may be cited as the *Constitution of Canada Act*." Though overtaken, it seems, by events,—not least the general election of May, 1979, and the consequent change of government,—it would be wrong to neglect Bill C-60. Its value now lies in the lessons it can afford both policy-maker and draftsman in how *not*—whether in point of form or in point of substance—to draft a constitution.

I. The Nature of the Scheme and the Mechanics of Constitutional Change.

The measure was intended to result, ultimately, in a new general⁴ constitution for Canada. This proposed constitution in fact formed Part I of the Bill.

The Parliament of Canada could not, however, unilaterally give force of law to the whole constitutional instrument. Provisions conferring legislative authority—whether upon the Parliament of Canada itself or upon the legislatures of the provinces—afford only one, obvious, example. In such cases even *textual reproduction* by the Parliament of Canada of the existing Imperial statutes could, in strictness of law, amount to no more than an idle gesture devoid of legal effect.⁵ An evident solution would have been to propose the whole text, by joint address of the houses of the Parliament of Canada, for enactment by the United Kingdom Parliament. And, indeed, much of the scheme acknowledged the necessity of intervention, sooner or later, by the Parliament at Westminster, unless a domestic, "patriated", amending process could be substituted in the meantime.⁶ But instead of being proposed for enactment integrally at Westminster, the text was to be adopted simply as a Canadian federal statute—so producing (at least in form) a single,

⁴ It was to be general or comprehensive, but in truth made little progress in the consolidation of disparate statutes of a constitutional nature. In fact Bill C-60 appeared to leave important provisions even of The British North America Act, 1867, 30 & 31 Vict., c. 3, unconsolidated and unrepealed; such, for example, as ss 109 and 117 (public property). The white paper had complained (p. 20) of various "deficiencies in our present constitutional legislation" including the fact that "[t]he provisions of our Constitution are scattered throughout a large number of different statutes, many of which, including a number of the most important ones, are practically unknown to the Canadian public". Here, as elsewhere, promise and performance were in sharp contrast.

⁵ The governing Imperial statutes would of course have remained in force; the federal Act would have amounted to no more than a reprint of their words.

⁶ Bill C-60 did not itself propose any general amendment process to supersede the authority of the United Kingdom Parliament, but contemplated (as in clauses 130 and 131) that one might be adopted before all stages of the proposed reforms had been completed.

comprehensive, constitutional instrument with a Canadian appearance. But, perforce, it was to have effect as law only partly by authority of the Parliament of Canada. For the rest, it was to be treated merely as a proposal to which the Parliament of Canada had consented by passing it in the form of a statute,⁷ and which was thereafter to undergo appropriate constitutional amendment processes (including, it might be, recourse to Westminster) upon which its fate would depend.

The hybrid character of the draft constitution found in Part I of Bill C-60—in part an enactment intended to have force of law; in part a mere proposal,—is reflected in the long title quoted above. Much of the constitution, in sum, was, for the reasons stated above, made suspended and conditional in its operation, by a series of elaborate provisions.⁸ A great deal of complexity and uncertainty resulted.

Since the creation of the Canadian federation, the legislatures of the several provinces have enjoyed a wide, though not an unrestricted, authority, under section 92.1 of The British North America Act, 1867, to amend the provincial constitutions.⁹ Its phrase “the Constitution of the Province”, is, of course, to be read to contrast with the constitution of the country generally. It covers, essentially,

⁷ See cls 125, 130, and 131, which employ a formula to the effect that “on and after the commencement of this Act and by virtue of its enactment by the Parliament of Canada, both Houses of the Parliament of Canada shall be deemed to have approved of a resolution for the amendment of the Constitution of Canada” in the appropriate terms.

⁸ Part II of the Bill, entitled “Implementation”, is largely concerned with providing that various provisions of the Bill should not come into force unless and until given effect by competent authority.

⁹ A review of the authorities bearing on the scope of this power may be found in Stephen A. Scott, *Constituent Authority and the Canadian Provinces* (1966-67), 12 McGill L. J. 528. The subject has most recently been considered in the courts of Quebec and Manitoba in connection with litigation concerning language matters. In Quebec, as regards provincial legislative authority to amend s. 133 of the B.N.A. Act, 1867, see *Procureur Général du Québec v. Blaikie*, [1978] C.A. 351 (C.A.), aff'ing *Blaikie v. Procureur Général de la Province de Québec*, [1979] C.S. 37 (Que. S.C.). This case is also reported, with French reasons in English translations to be approached with great caution, as *Attorney-General of Quebec v. Blaikie* (1978), 95 D.L.R. (3d) 42 (C.A.), aff'ing *Blaikie v. Attorney-General of Quebec* (1978), 85 D.L.R. (3d) 252. In Manitoba, as regards provincial legislative authority to amend s. 23 of the Act commonly known as the Manitoba Act, see *Forest v. A.-G. Manitoba*, [1979] 4 W.W.R. 229 (C.A.), rev'ing [1978] 5 W.W.R. 721, 90 D.L.R. (3d) 230 (Man. Q.B.). See also *Regina v. Forest* (1976), 74 D.L.R. (3d) 704, 34 C.C.C. (2d) 108, [1977] 1 W.W.R. 363 (Man. Co. Ct). Related proceedings in the Manitoba courts are *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445, 35 C.C.C. (2d) 497, [1975] 5 W.W.R. 347 (Man. C. A.). Appeals to the Supreme Court of Canada from the decisions of the Quebec and Manitoba Courts of Appeal are pending.

the province's institutions of government,¹⁰ and in particular its lawmaking process,¹¹ though probably not (for most purposes) its

¹⁰ Some guidance to the scope of the category "the Constitution of the Province" in s. 92.1 is given by Part V of the Act of 1867, entitled "PROVINCIAL CONSTITUTIONS", and comprehending ss 58 to 90 of the Act. But it seems quite wrong to treat the term "the Constitution of the Province" in s. 92.1 as co-extensive in its subject-matter with the provisions of Part V. It is often wider, and perhaps in some cases narrower, in its subject-matter than that dealt with in Part V.

On the one hand, s. 92.1 uses generic language; and a fair reading of s. 92.1 could not reasonably confine its scope to matters with which Part V deals. Ss 58 to 90 could not, either in 1867 or later, have been regarded as exhausting subjects properly to be considered the concern of the provincial constitutions. Thus, in upholding provincial legislation on parliamentary privilege (a subject *not* covered in Part V of the Act of 1867) as properly enacted under s. 92.1, the Privy Council, through Lord Halsbury L.C., observed in *Fielding v. Thomas*, [1896] A.C. 600, at p. 610-611: "It surely cannot be contended that the independence of the provincial legislatures from outside interference, its protection, and the protection of its members from insult while in the discharge of their duties, are not matters which may be classed as part of the constitution of the province, or that legislation on such matters would not aptly and properly be described as part of the constitutional law of the province." This, then, is an actual case where Part V of the 1867 Act was held not to exhaust the subject-matter of "the Constitution of the Province", as that phrase is used in s. 92.1.

On the other hand, s. 90 is found in Part V, but it is nevertheless obvious that the provincial legislature cannot, under s. 92.1, abolish (for example) its provisions as to reservation of provincial bills and disallowance of provincial acts. In part that can be explained by the exception made in s. 92.1 for "the Office of Lieutenant Governor". But it is not obvious that that exception, in itself, literally embraces subsequent action on reserved bills, or disallowance of provincial acts: these are powers of the Governor General. Still it is plain enough that such matters, whether or not they "regard" the "Office of Lieutenant Governor" enough to be caught by the express exception, are on any view well outside provincial legislative authority under s. 92.1. It is enough, in support of such a result, to say that they are not part of the internal "Constitution of the Province" within the meaning of s. 92.1.

It follows that observations, such as those found in the *Blaikie* case, *supra*, footnote 9, which would treat the phrase "Constitution of the Province" in s. 92.1 as co-extensive with the subject-matter of Part V of the 1867 Act, must be treated with caution. They are, with respect, too wide; and are, moreover, in no way necessary to the result of that case, which, of course, accords with the views of the present writer previously expressed in the published opinion referred to by the court.

¹¹ In *Constituent Authority and the Canadian Provinces*, *op. cit.*, footnote 9, it is argued that the provincial legislatures enjoy virtually unrestricted authority to recast their lawmaking processes, so long as the position of the Crown is left intact. This would extend to the addition or removal of elements of the lawmaking authority (such as representative or deliberative houses, and popular participation through referenda) and the prescription of special majorities. In other words, it would embrace the entire manner and form of lawmaking, with the exception of the functions of the Crown.

The doubts expressed at the conclusion of the opinion *In re the Initiative and Referendum Act* [of Manitoba], [1919] A.C. 935 (P.C.), are, of course, *obiter dicta* and indeed announced as such; and were very possibly intended to discourage re-enactment in revised form of a scheme rather evidently *uncongenial* to their Lordships. Whatever else may be said about it, the construction of the Manitoba scheme adopted by the Privy Council, and which rendered it *ultra vires*, was that

courts (these being dealt with elsewhere).¹² The important exception, of course, is that explicitly made for "the Office of the Lieutenant Governor", which probably either expresses, or supports an implication, that the essential position of the Crown vis-à-vis the province is *a fortiori* excluded from the purview of the provincial constitutional amendment power.¹³ Within the scope of the

least favourable to the validity of the legislation: an interpretation in effect *magis ut pereat quam valeat*. Indeed the Act, in its main provision on the popular "Initiative" (s. 7), expressly saved what it called the "veto": the term "veto", though here a solecism, can its context have no obvious meaning other than the Crown's power to grant or withhold assent to or from the voters' initiatives. Section 11 (concerning the so-called "referendum", through which a certain number of electors could compel submission, for approval of the electorate at large, of acts of the representative legislature) did not, it is true, envisage any action by the Crown or its representative consequent on the results of a referendum; but it may be regarded as a mechanism designed, not to authorize passage of repealing legislation, but to impose on the representative legislative process a further or additional requirement—namely a condition subsequent of voter approval. Indeed, on equal division of the electors, an act of the representative legislature would *expire* for want of voter approval; whereas, if in the "referendum" the voters were properly regarded as dealing with proposals to pass repealing measures, such measures should *fail* on equal division of the electorate, and the Acts of the representative legislature *stand good*. In sum, the Manitoba scheme certainly need not have been read, as the Privy Council chose to do, as intended to interfere with the position of the Crown and so *ultra vires*.

In the extensive body of authority pertinent to this subject, the *Trethowan* case stands out: *A.-G. N.S.W. v. Trethowan*, [1932] A.C. 526 (P.C.), (1931), 44 C.L.R. 394 (H.C. of A.); *sub nom. Trethowan v. Peden* (1930), 31 S.R. (N.S.W.) 183 (S.C.). The Privy Council's opinion (upholding an entrenching scheme involving a referendum) appears to rest on the effect of s. 5 of the Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63 (U.K.), whose applicability to Canadian provincial legislatures is made somewhat uncertain by ss 2 and 7(2) of the Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.); but the highly instructive opinions rendered in the High Court of Australia and the Supreme Court of New South Wales lend cogent support, on more general grounds, to the same result. See especially, in the High Court, Starke and Dixon JJ.; and, in the Supreme Court, Ferguson J.

¹² S. 92.14 of the 1867 Act.

¹³ "The references their Lordships have already made to the character of the office of Lieutenant-Governor, and to his position as directly representing the Sovereign in the province, renders natural the exclusion of his office from the power conferred on the Provincial Legislature to amend the constitution of the Province. The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of construing s. 92 as permitting the abrogation of any power which the Crown possesses through a person who directly represents it": per Viscount Haldane for the Privy Council in *re the Initiative and Referendum Act*, *supra*, footnote 11, at p. 943.

Two rationales seem available to support the exclusion, from the provincial constitutional amendment power, of the status, and at least the essential powers and functions, of the Sovereign and the Governor-General, even as they relate directly to the government of the province. The first is that these are matters not properly part of the "Constitution of the Province" within the meaning of that term in s. 92.1, but rather part of the constitution of Canada generally. The second, and alternative, theory, is that, although they be part of the "Constitution of the Province", they are

subject-matter so defined, the provincial legislature can alter the very provisions of the 1867 Act itself.¹⁴

Only in 1949, in circumstances and for reasons which are familiar, was a parallel power conferred upon the Parliament of Canada, by the Imperial statute of that year¹⁵ which added a new item or "head", numbered 1, to the list of federal legislative powers enumerated in section 91 of the Act of 1867. This power was conceived essentially to permit the Parliament of Canada to deal with the central political institutions in much the same way as the provincial legislatures could deal with local institutions. In effect it was, more or less, an analogue of section 92.1.

Much of the scheme of Bill C-60 depended upon the exercise of this power. The best-known example, perhaps, was the proposed reconstruction of the upper house of the federal Parliament, to become the "House of the Federation", with provincial legislative participation in the selection of its members.¹⁶ Dispute as to Parliament's power to effect such a change by its own authority has, of course, given rise to a reference to the Supreme Court of Canada, in which judgment is pending. Less discussed, but raising (it seems) rather more difficult issues of *vires*, was the carrot tendered to the provincial legislatures to induce their co-operation in acceding to clauses 5 to 29 of Bill C-60, collectively entitled (clause 5) "*the Canadian Charter of Rights and Freedoms*". Clause 131(3) provided that "From and after such time as it is provided by the legislature of any province, acting within the authority conferred on it by the Constitution of Canada, that the provisions of the Canadian Charter of Rights and Freedom as enacted by this Act extend to matters coming within its legislative authority, (a) the provisions of the Act of 1867 . . . [respecting reservation of provincial bills and disallowance of provincial Acts] shall cease to extend and be applicable to the legislature of that province as if they were herein repealed or made inapplicable in terms to that province and its legislature . . .". It was assumed, in effect, that the Parliament of Canada could by its own Act abolish the reservation and disallo-

nevertheless excepted from provincial legislative authority for one reason or another. This may be because they are integrally linked to the "Office of Lieutenant Governor"; the exception for the agent carrying with it an exception for the principals (the Sovereign and Governor General). Or it may be because they are excluded simply by necessary implication. Certainly, to use Viscount Haldane's language, the express exception for the Lieutenant Governor "points" to the exclusion, *a fortiori*, of at least the essential status and functions of the superiors by whom he is appointed and for whom, and under whose instructions, he acts.

¹⁴ This results from—and is obviously the purpose of—the words "notwithstanding anything in this Act" found in s. 92.1 of the 1867 Act.

¹⁵ The British North America (No. 2) Act, 1949, 13 Geo. 6, c. 81 (U.K.).

¹⁶ Cls. 62 to 70.

wance powers insofar as they concerned the provinces (sections 55 to 57 and section 90 of the 1867 Act), even though this would affect, and affect seriously, the limits *inter se* of federal and provincial authority. The Charter—perhaps even more than the contemplated reform of the upper house of the federal Parliament—was one of the linchpins of the whole scheme of constitutional reform. It invites a closer look at section 91.1 of the Act of 1867, as enacted in 1949.

The structure of section 91.1 appears to be the first clue to its true construction. It begins by empowering the Parliament of Canada to make laws from time to time amending "the Constitution of Canada". Then it lists exceptions. In construing section 91.1 one principle seems critical. Words defining a class of matter, from which exceptions are then to be carved out, must be read so as to define the class *widely enough to enable the required exceptions to be made*. (A by-law prohibiting the keeping of animals in any dwelling might be thought ambiguous as to water mammals or fish; this ambiguity disappears if the prohibition becomes "keeping animals other than goldfish". "Animals" must be a class wide enough to allow goldfish to be excepted.) The phrase "the Constitution of Canada" must, then, define a category wide enough to allow the (large and important) enumerated exceptions to be drawn or deducted from it. These exceptions,—amongst them "matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces", and "rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a Province",—point, indeed by their very breadth, to the conclusion that the introductory phrase "the Constitution of Canada", is of the widest possible ambit. The term, "the Constitution of Canada", as employed in section 91.1 of the (amended) 1867 Act, appears to comprehend every rule of law which defines or attributes public authority of any kind in what may be called the "aggregate" Canadian state—aggregate in the sense of embracing all levels of government. The term, at any rate *prima facie*, comprehends at least all rules directly constituting, organizing, or empowering legislative, executive, or judicial institutions, both federal and provincial,¹⁷ and as well those rules resulting from

¹⁷ It is even possible to argue that the term "Constitution of Canada" ultimately comprehends all the rules of the legal system as an entirety. (This would follow from the evidently constitutional nature of rules themselves attributing the authority of law to rules proceeding from certain bodies, or to certain sources. Such are *e.g.* s. 129 of the 1867 Act, and the common law and statutory rules governing "reception".) A position of this sort would, in effect, follow the well-known jurisprudential analysis which sees the state and the law as a single phenomenon, and not as two (the one the maker of the other). Such a solution has the distinct advantage of eliminating the necessity of arbitrary decisions as to which rules do, and which do not concern directly enough the position of the public authorities to be considered "constitutional".

the common law as those found in statutory enactments.¹⁸

The limits of the federal constitutional amendment power are thus effectively imposed by the exceptions enumerated in section 91.1, and not by any restrictions inherent in the basic concept of the "Constitution of Canada", as the term is there employed. Whatever they may be, the boundaries of this concept or category do not by themselves appear to set limits even on the subject-matter which can properly, under section 91.1, be incorporated into the (abstract)

¹⁸ Does so wide a scope for the "Constitution" become unacceptable by making "ordinary" federal legislation fall afoul of the exceptions in s. 91.1? It may be conceded that a reading of the phrase "Constitution of Canada" in s. 91.1, making that phrase wide enough to embrace *inter alia* even "ordinary" federal statutory provisions, must (if it is to be acceptable) somehow be reconciled with the power of the federal Parliament to enact and repeal "ordinary" statutes dealing with language and school rights in matters under federal jurisdiction, without hindrance from the express exceptions in s. 91.1 We are speaking of "ordinary" federal enactments not objectionable in other respects. They are assumed not to infringe the terms of Imperial Acts extending of their own force to Canada (*e.g.* s. 133 of the 1867 Act) or provisions of comparable status (*e.g.* those made under ss. 2 and 3 of the British North America Act, 1871, 34 & 35 Vict., c. 28 (U.K.)).

The necessary reconciliation is possible on the following basis. On the one hand, s. 91.1 of the amended 1867 Act, and, on the other hand, the various other grants of federal legislative authority, are not mutually exclusive *inter se*. So a provision which, though properly considered part of the "Constitution of Canada", cannot, by reason of the exceptions in s. 91.1, be enacted by the Parliament of Canada *under that head or item*, may nevertheless be enacted under any other appropriate grant of power; *as, indeed, it could have been so enacted had s. 91.1 never been added*. Section 91.1 does not supersede or exclude authority derived by Parliament *ab extra*.

To give a concrete example, s. 11 of the Official Languages Act, R.S.C., 1970, c. O-2 (concerning the language of proceedings in various courts and other tribunals) is validly enacted, as the Supreme Court of Canada has indeed held: *Jones v. Attorney-General of New Brunswick*, [1975] 2 S.C.R. 182, *sub nom. Jones v. Attorney-General of Canada* (1975), 45 D.L.R. (3d) 583. The authority to enact it was, and is, derived from sources outside s. 91.1. But section 11 might still arguably be regarded as part of "the Constitution of Canada"; and *even if so regarded would be none the less validly enacted by Parliament, and might none the less validly be repealed by Parliament*.

Parliament can clearly (as the *Jones* case held) exercise legislative jurisdiction derived from sources outside s. 91.1, to deal with (for example) language use, so as (for instance) to create rights of use of the English or the French language going beyond those of s. 133 of the Act of 1867. Equally it must be able to alter or remove them from time to time. The phrase in s. 91.1 concerning language (and, similarly, that concerning schools) each creates an "exception from a grant of new power" and *not* "a general substantive limitation unrelated to that power": [1975] 2 S.C.R. 182, at p. 196.

In sum, characterization of a provision like s. 11 of the Official Languages Act as part of the "Constitution of Canada" is possible without bringing into question either its validity or the power of the Parliament of Canada to repeal it. Moreover both enactment and repeal of the terms of s. 11 should have been equally competent to Parliament even had Parliament chosen to frame it as a new section 133A to be added to or inserted in the Act of 1867.

"Constitution of Canada", or into texts carrying that express designation. For one thing, the term "constitution" is neither in its ordinary, grammatical, meaning, nor as found in sections 91.1 and 92.1 of the 1867 Act,¹⁹ confined to such rules of law as are not amendable by ordinary legislation. Nor are constitutions confined by their nature to rules defining public institutions and conferring authority upon them. Very much the contrary: constitutions may, and do, contain substantive or adjectival law of any kind and on any subject thought desirable by reason of importance or otherwise.²⁰ Thus section 133 of the 1867 Act (wherever jurisdiction to amend it may be found to lie²¹) is, at least in its context (the 1867 Act) plainly of "constitutional" nature, no less when it defines individual rights or liberties of language use than when it prescribes the language of legislative records and statutes. Indeed, certainly when taken as a whole, it could very aptly have been described as part of the "Constitution of Canada" even apart from the circumstance of appearing in a statute largely concerned with the organization of institutions and the conferral of power. But be that as it may, it is enough to say that the Parliament of Canada, being entitled to "amend"²² the "Constitution of Canada", can incorporate into it any subject-matter, whether or not previously considered to be of "constitutional" nature, so long as in so doing it does not intrude into expressly-expected matters enumerated in section 91.1.

How, then, did some of the arrangements proposed to be enacted in Bill C-60 "square" with the terms of section 91.1 of the 1867 Act? First, what of "Senate reform"?

Section 91.1 is as clearly drawn as any such provision is likely to be. Cogent grounds would be required for any departure from its terms, where their meaning is plain. There is no cause to put aside the rule of literal construction in interpreting section 91.1. When literally construed, the enumerated exceptions to which the federal constitutional amendment power is subject afford no very obvious reason why the Parliament of Canada should not be competent to create a new upper house of Parliament, constituted in any way

¹⁹ Ss. 91.1 and 92.1 are proof of this *par excellence* because they apply the term "constitution" to provisions amendable, on the same basis as "ordinary" laws, by the Parliament of Canada and the provincial legislatures respectively.

²⁰ For example, art. 32 *ter* of the Federal Constitution of the Swiss Confederation prohibits the manufacture, importation, transportation, sale, or possession of absinthe and like beverages throughout the Confederation; certain pharmaceutical uses excepted.

²¹ This is one of the issues in the *Blakie* litigation, *supra*, footnote 9, in which the judgment of the Supreme Court of Canada is pending.

²² The verb is important.

Parliament might think fit to prescribe.²³ No matters coming within provincial classes of subjects seem in any way affected. There is no obvious interference with any "rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a Province". It may be true that the provinces, as abstract collectivities, can in a general sense be said to have "rights", under present law, to certain numbers of Senators. But even these (which would not have been diminished absolutely under Bill C-60, though the proportions would have changed²⁴) are not rights belonging specifically (to use the very words of the exception) *to the Legislature or the Government* of any province. At least at first glance, then, the proposals for "Senate reform" raised issues as to merit rather than as to *vires*.

On the question of *vires*, however, the intended abrogation of the reservation and disallowance powers offers a much more borderline case. If such powers did not exist, and the Parliament of Canada attempted to create them by its unilateral Act passed in reliance on section 91.1 of the amended 1867 Act, the enactment purporting to do so would very probably fall afoul of the exception concerning "matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces". The contemplated interference with the exercise of provincial legislative jurisdiction would be a direct one; and, on a fair reading of section 91.1, the amendment would doubtless be held to be an amendment "as regards" such matters. Bill C-60 did not, of course, propose to *create* such a power. Quite the opposite: it proposed to abrogate it. In effect Bill C-60 would liberate the provinces from this existing degree of federal executive interference in the exercise of their legislative powers. Does this change the character of the amendment for the purposes of section 91.1? Does *repeal* of reservation and disallowance, as these concern the provinces, "*regard*" the provincial classes of subjects any less than would the *creation* of such powers, if they did not exist? The meaning of the verb *regard* seems decisive.

It is not easy to offer any answer as being clear or certain. But that of course is just the point. The Canadian Charter of Rights and Freedoms occupied a central place in Bill C-60. Adoption by a province of its provisions was made to have the consequence that,

²³ Arguments based on the rule against "interdelegation" (*A.-G. Nova Scotia v. A.-G. Canada*, [1951] S.C.R. 31) are, it is submitted, misconceived when invoked against schemes involving participation of provincial legislative bodies or their members.

²⁴ Under cl. 62, Newfoundland, Manitoba, and Saskatchewan each would secure two additional members of the upper house, and Alberta and British Columbia each four.

for such a province, the federal reservation and disallowance powers would, as a *quid pro quo*, disappear. A finding that this concession was *ultra vires* would have serious implications for the scheme as a whole, even if it did not (as possibly it might²⁵) entail the ineffectiveness of provincial statutes adopting the Charter. Such risks were, of course, inherent in attempting wholesale constitutional reform through a hybrid measure. Breakdown in any part would have consequences for the arrangement as a whole. The best-skilled draftsman could not be sure of seeing all the implications of every provision, and of making judgments which proved, in the ultimate view of the courts, to be correct in every case. Security could lie only in extreme caution: recourse to the United Kingdom Parliament for every matter involving the slightest doubt: meaning, in the end, Imperial ratification of the whole. Recognition of this truth from the start would greatly have simplified and improved the draft.

Correct or incorrect, then, the position on reservation and disallowance taken by the framers of Bill C-60 can fairly be judged rather exposed. And it may, as a matter of interest, be contrasted with a cautious posture as to *vires* evident elsewhere in the Bill. Clauses concerning the Lieutenant Governor (clauses 79 *et seq.*) were "designated" (see clauses 125 and 126) and left to subsequent enactment by the United Kingdom Parliament: this despite the express exclusion from provincial jurisdiction (section 92.1) of "the Office of Lieutenant Governor".²⁶ This careful policy was (rightly, it seems) adopted whether the proposed provisions repeated existing law (clause 79) or modified it in favour of the provinces (clause 80). Again, clause 122 (freedom of movement of articles of the growth, manufacture or produce of any of the provinces) repeats with immaterial modification section 121 of the 1867 Act. It, too, is "designated", and, again, doubtless rightly so; for, although a provision to repeal section 121 would present issues of the same sort as does the proposed repeal of the reservation and disallowance powers vis-à-vis the provinces, re-enactment would reaffirm a limitation on provincial legislative (and presumably executive)

²⁵ The provincial legislation might be read as adopting the whole Charter scheme exactly as set out in Bill C-60 and with all its concomitants, and to depend fundamentally on the validity of the whole.

²⁶ Even if "the Office of Lieutenant Governor", being excepted from provincial legislative jurisdiction, were held to fall within federal "residuary" power, the Parliament of Canada, until the Statute of Westminster, 1931, *supra*, footnote 11, would probably have been barred from dealing with it in a manner repugnant to an Imperial statute, *vis.*, the Act of 1867 itself. In 1931, therefore, the issue as to federal legislative authority over that office assumed much more substance; and, with the addition of s. 91.1 in 1949, a new possible basis of federal jurisdiction appeared.

authority,²⁷ and so "regard" them within the meaning of section 91.1 of the 1867 Act.

Assuming, however, the federal Parliament's power to relieve the provinces of liability to reservation of their bills and disallowance of their Acts,²⁸ further basic, and probably graver, questions remain. They expose major flaws in Bill C-60.

What for example, was to stop a provincial legislature from repealing its statute adopting the Charter, even one day after having freed itself of disallowance and reservation? Indeed, would not provincial legislation adopting the Charter be subject even to implied repeal *pro tanto* by subsequent provincial legislation inconsistent with the terms of the Charter? Could the Parliament of Canada similarly repeal the guarantees of the Charter, either expressly or by the enactment of inconsistent legislation?

"Entrenchment" of the Charter,—entrenchment at any rate of some sort,—was, it is true, ostensibly contemplated by Bill C-60. The clauses primarily relevant were clauses 131(2) and (4).

Their professed purpose was (clause 131(2)) to secure "that effect may be given as soon as may be to the extension of the Charter . . . to matters coming within the legislative authority of the legislatures of all the provinces equally as to [*sic*²⁹] matters coming within the legislative authority of the Parliament of Canada, *as part of the Constitution of Canada*".³⁰ These clauses appear to envisage entrenchment of the Charter as a whole. But how was it to be accomplished? And would it have been effective?

Entrenchment was to be effected either by the United Kingdom Parliament, or by a substituted, domestic, amending process (were plenary amending power to have been "patriated" to Canada in the meanwhile?). But while entrenchment was an ultimate goal, it was not (it seems) to occur until an adequate degree of provincial consensus had been attained. What consensus was to be necessary? On this critical issue, the Bill was as vague as possible.

²⁷ *Quaere* whether Parliament's power to repeal s. 121 of the 1867 Act would turn on whether s. 121 is read as applying only to the provincial authorities; or to both federal and provincial authorities. As to this latter question (the applicability of s. 121) see *Atlantic Smoke Shops v. Conlon*, [1943] A.C. 550 (P.C.) and *Murphy v. C.P.R.*, [1958] S.C.R. 626 (S.C.C.).

²⁸ Whether as a *quid pro quo* for their accession to the Charter, or otherwise.

²⁹ Read, "as well as to". This is one of very many examples of unsatisfactory English in the Bill.

³⁰ Emphasis added. The emphasized phrase bears on the provincial authority subsequently to repeal the Charter insofar as it bears on matters within provincial jurisdiction. See the discussion below.

The Canadian constitution now reserves, *in law*,³¹ absolute constituent power to the Parliament of the United Kingdom Parliament. As a matter of *convention*—constitutional custom of binding force—it appears to require that Parliament to act upon, and not without, the request of the Canadian federal authorities:³² more precisely, a joint address of the Senate and House of Commons of Canada.³³ In practice, the Parliament of Canada does not, at *any rate* where it perceives the constitutional changes to affect directly the legal position of one or more provinces, proceed without a politically

³¹ This is the effect of s. 7(1) of the Statute of Westminster, 1931, *supra*, footnote 11; which provision, if read literally (and there is no adequate reason, it is submitted, not to read it literally) even obviates the necessity of any compliance with s. 4 of the Statute in enacting Imperial statutes amending the British North America Acts.

³² See the remarks of Sir William Jowitt, then Solicitor-General, in the United Kingdom House of Commons, in the debate on the bill for the British North America Act, 1940, on 10th July 1940, 362 U.K. Parl. Deb. (5th Series), H. C. 1177-1181. At cols 1179-1180: "The true position is that at the request of Canada this old machinery still survives until something better is thought of, but we square the legal with the constitutional position by passing these Acts only in the form that the Canadian Parliament require and at the request of the Canadian Parliament." At cols. 1180-1181: "... I do not know what the view of the Provincial Parliaments is. . . . It is a sufficient justification for the Bill that we are morally bound to act on the ground that we have here the request of the Dominion Parliament and that we must operate the old machinery which has been left over at their request in accordance with their wishes."

More recently, the following answer was given by the Rt. Hon. Roy Hattersley, M.P., Minister of State for Foreign and Commonwealth Affairs, on 10th June, 1976, in reply to a question addressed to the Secretary of State for Foreign and Commonwealth Affairs, concerning the "patriation" to Canada of the powers of the United Kingdom Parliament to amend the British North America Acts, 912 U.K. Parl. Deb. (5th Series), H.C., Written Answers, col. 719: "The British North America Acts, which contain the constitution of Canada, can be amended in certain important respects only by Act of the United Kingdom Parliament. The Canadian Prime Minister has publicly expressed the desire of the Canadian Government that this power of amendment should be a matter of Canadian competence and should no longer be exercisable by the United Kingdom Parliament. If a request to effect such a change were to be received from the Parliament of Canada it would be in accordance with precedent for the United Kingdom Parliament to introduce in Parliament, and for Parliament to enact, appropriate legislation in compliance with the request."

³³ See, generally, Paul Gérin-Lajoie, *Constitutional Amendment in Canada* (1950). On the joint address procedure, see pp. 50 *et seq.*, and Ch. IV, esp. pp. 145 *et seq.* On the absence of provincial standing at Westminster, see pp. 138 *et seq.* On 27th March 1871 the House of Commons of Canada passed (by 99 votes to 38) a resolution, approving *ex post facto* the request of the Government of Canada to the Imperial Government for the measure which ultimately became the British North America Act, 1871, *supra*, footnote 18, but concluding (on an amendment carried 137-0) "but this House is of the opinion that no changes of the *British North America Act* should be sought by the Executive Government without the previous assent of the Parliament of the Dominion": 4 Journ. H. C. Can. 145-150, at pp. 149-150. (Later proceedings on the British North America Act 1871 are found at pp. 155, 275, 291-294, 300-301.)

sufficient degree of provincial consensus, which may amount to unanimous consent. It is highly doubtful, however, that any particular or specified degree of provincial consent can be said to be required, as a matter of constitutional convention, before the Parliament of Canada may, with constitutional propriety, approach the Parliament at Westminster; and, if there were any, it would not follow that the conventions either permit or require the United Kingdom Parliament to look into the existence or sufficiency of provincial consent; which in any case is not required as a matter of *pure law*.³⁴

Bill C-60 would have aggravated the problems inherent in the current constitutional position by its proposal to give statutory force to existing practice, with all its vagueness and controversial character. The tortured terms of clause 131(2) required that, if (for want of a "patriated" amending process) entrenchment of the Charter required a journey to Westminster, that journey was to be undertaken "by action as on a joint address or by proclamation,³⁵ as the case may be, as and when it may lawfully be so taken up and dealt with in accordance with the procedure for such amendment then recognized by accepted usage . . .". On assent to Bill C-60, "accepted usage", theretofore wholly extralegal, would arguably, by referential incorporation into a statute, have become the subject-matter of a set of jural rules; and, therefore, the question, "What in truth is the 'accepted usage'?", a justiciable issue. Clause 131(2) would have invited such a construction all the more through its expression of concern with the procedure enabling a joint address to be taken up and dealt with "lawfully".³⁶ Obscurities in practice would have become obscurities in law; controversies about practice become controversies about law. Approaches thereafter to Westminster by the federal authorities, whether with respect to the Charter or other matters, could easily have become encumbered by litigation which, before the enactment of Bill C-60, could have had no plausible basis in law. Indeed, in the end, a unanimity rule might well have found itself transformed from a precautionary guideline

³⁴ The Statute of Westminster, 1931, *supra*, footnote 11, s. 7(1), preserves the legal position as it was under the Colonial Laws Validity Act, 1865, *supra*, footnote 11. Moreover, nothing in the Statute assists the legal position of the provinces in this respect. As a matter of the history of constitutional practice, the Canadian provinces appear to have no standing at Westminster to promote or oppose Imperial legislation for Canada or any part of Canada. See Gérin-Lajoie, *loc. cit.*, *supra*, footnote 33.

³⁵ The reference to a procedure by "proclamation" seems unintelligible either in the context of established procedures, or in that of the provisions of Bill C-60 itself. See also cl. 130(2).

³⁶ See also cl. 125 dealing with "designated" provisions. It is not easy to escape the inference that the notional "resolutions" could not be "lawfully" acted upon by the mere fact of their passage by both Houses of the Canadian Parliament, immediately and *ipso facto*.

for political prudence in federal-provincial relations into either a judicially-settled rule or an inflexible policy designed to avoid litigation of uncertain outcome. Here, then, was a perfect case to leave well enough alone. This the framers did not do.

The Canadian Charter of Rights and Freedoms poses one last challenge, perhaps the most basic of all, to the soundness of the reform scheme embodied in Bill C-60. Suppose that all the steps proposed to implement the Charter had been taken, including the intervention of the United Kingdom Parliament contemplated by clauses 131(2) and 131(4). Would its guarantees have been effectively "entrenched",—placed beyond repeal by the Parliament of Canada or the legislature of any province? Very possibly not.

It is beyond question that the government's publicity promoted and encouraged the belief that the rights and liberties enshrined in the Charter—whose adequacy is another question—would indeed become secure against unilateral abrogation by the Parliament of Canada, and secure likewise against the legislatures of the several provinces.

There was the "grey paper". The explanatory notes in the grey-paper version of Bill C-60 repeatedly employed the term "entrenchment", explaining it as a process rendering a provision "not subject to unilateral amendment either by Parliament or a provincial legislature".³⁷ Indeed, the term could have little other meaning; and why else should clause 131 have proposed recourse to the United Kingdom Parliament?

Then there was the "white paper". *A Time for Action*, broaching "The Principles of Renewal",³⁸ first dealt with "Pre-eminence of citizens and of their freedoms". Steps were desirable "to develop understanding and friendship among Canada's communities" and to "reinforce their solidarity". "Canadians", it continued, "will progress more rapidly in this direction if their governments recognize the pre-eminence of their rights and freedoms by entrenching them in the Constitution".

Perhaps it is not essential to do this in a unitary state where one supreme Parliament, representing all the interests of the citizenry, can provide an ultimate guarantee for the rights of citizens. It is different in a federal system where different orders of government, representing different interests of the same citizenry, can have opposing views. Hence, in a federal system, the Constitution through its protection of rights and freedoms must serve [*sic*³⁹] the ultimate basis of national unity.

Canada is no exception. The supremacy of the Constitution necessarily

³⁷ See, in the "Introduction", the heading "Category 2"; and, generally, the explanatory notes for cls. 130 *et seq.*

³⁸ Chapter III, p. 8.

³⁹ Perhaps "serve as the ultimate basis"; or "serve the ultimate objective".

follows from this first principle to the extent that the Constitution records the rules of democratic life, protects *fundamental rights and liberties*, provides for the distribution of powers and guarantees the independence of the judiciary.⁴⁰

A prefatory capsule, carried over from the white paper into its concise pamphlet version (*Highlights*), had succinctly announced that: "The renewal of the Federation must confirm the pre-eminence of citizens over institutions, guarantee their rights and freedoms, and ensure that these rights are inalienable."⁴¹ Elsewhere the white paper, having complained of "a serious deficiency in the present Constitution, namely the lack of any declaration of the basic rights and freedoms of Canadians",⁴² emphasized that "*The government sets only two conditions for the renewal of the Constitution*", of which "*The second is that a Charter of basic rights and freedoms be included in the new Constitution and that it apply equally to both orders of government.*"⁴³ Accordingly,

The government will be putting forward its proposals for a *Charter of Rights and Freedoms*. The Charter would embrace not only the major political rights and freedoms, many of which have already been recognized in various federal and provincial statutes, but would establish new rights for Canadian citizens to live and work wherever they wish in Canada, and would provide new protection for minority language rights. . . . The Charter would be intended to provide a permanent constitutional guarantee that fair and reasonable treatment will always prevail.⁴⁴

The *Explanatory Document* seems most explicit of all:

Today in Canada there are a number of basic rights and freedoms expressed in a variety of federal laws and provincial statutes. These rights and freedoms vary with legislation from province to province. With few and limited exceptions, none of those rights and freedoms are constitutionally guaranteed. What Parliament or provincial legislatures enacted yesterday, they can remove or restrict tomorrow.

The best means of ensuring that Canadians anywhere in Canada will always enjoy basic rights and freedoms is to place them in the Constitution, where they will be beyond change by Parliament or any provincial legislature acting unilaterally. Most of the rights and freedoms in the new Charter are drawn from existing provisions found in the BNA Act and in federal and provincial laws. These are, however, extended in a number of cases and there are a number of new rights which have been added.⁴⁵

Would Bill C-60 indeed, in the government's own words, have provided "a permanent constitutional guarantee", applicable

⁴⁰ The linking of entrenched guarantees to federalism is unnecessary and undesirable. An opposite case could just as easily be made: that in unitary states power is so concentrated as to create greater risk of abuse and greater need for entrenched guarantees.

⁴¹ White paper, p. 8; *Highlights*, p. 2.

⁴² Ch. V, *A New Constitution for Canada*, p. 20.

⁴³ *Ibid.*, pp. 21-22.

⁴⁴ *Ibid.*, p. 22.

⁴⁵ Pp. 8-9.

“equally to both orders of government”, of “inalienable” basic rights and freedoms? Would Bill C-60 have remedied the “serious deficiency in the present Constitution” by “entrenching” these basic rights and freedoms “beyond change by Parliament or any provincial legislature acting unilaterally”?

This central question should, of course, be merely rhetorical. Given the “white paper”, the “grey paper”, and the *Explanatory Document*, one would expect, not to say hope, that the language of Bill C-60 would offer an emphatically affirmative answer. It does not. It speaks at best with an uncertain sound. The terms of Bill C-60, though offering some support to those who would find the Charter entrenched, affords as much, or more, to those who would read it as susceptible (very largely) to unilateral repeal by the Parliament of Canada or the legislature of a province, insofar as the Charter applies to the one or to the other.

To see why this is so it is necessary to look at the powers of constitutional amendment as they would become under Bill C-60, and as they would govern future constitutional changes.

Under Bill C-60, both the Parliament of Canada, and the legislatures of the provinces, would retain, with some modification, their existing powers of unilateral constitutional amendment. Clauses 91(1) and 92(1) of Bill C-60—“designated”⁴⁶ for enactment by the United Kingdom Parliament—correspond in their numbering, and, largely, in their substance, to the present sections 91.1 and 92.1 of the (amended) 1867 Act. Bill C-60 would leave these constitutional amending powers largely as they now are. Each would, however, be subject to new exceptions expressly preventing repeal of *three clauses* of the Charter,—clauses 10, 11 and 12 of the Bill (securing, respectively, free and democratic elections; limitations on the duration of elected legislative bodies; and annual legislative sessions). The remainder of the Canadian Charter of Rights and Freedoms,—by far the bulk of that Charter,—would, arguably, remain,—at least to a large if somewhat uncertain extent,—vulnerable to abrogation by federal or provincial legislation.

Federal legislation could, *prima facie*, alter any part of “the Constitution of Canada”, including therefore the Charter, save “as regards” expressly excepted matters (such as matters within provincial classes of subjects).

On the other hand, provincial legislation could *prima facie* abrogate the terms of the Charter insofar as the Charter was part of the “constitution of the province”. Those seeking refuge in the Charter against provincial legislation would therefore be driven to

⁴⁶ See cls. 125 to 128.

argue in each case that the relevant guarantee was not part of the mere "constitution of the Province" but rather part of the general constitution of Canada; citing, perhaps, clause 131(2), which envisaged the intervention of the Westminster Parliament to make the Charter "part of the Constitution of Canada".⁴⁷ (The debate in each case would exactly parallel that now before the courts as to the authority of the Quebec Legislature, under section 92.1 of the 1867 Act, to repeal section 133 as it concerns Quebec. In fact the new language guarantees proposed in Bill C-60 seem in some respects more, not less, vulnerable than those which they would supersede.⁴⁸)

Some additional fortification for the Charter might, perhaps, be drawn from clause 23 of the Bill:

To the end that full effect may be given to the individual rights and freedoms declared by this Charter, it is hereby further proclaimed that, in Canada, no law shall apply or have effect so as to abrogate, abridge or derogate from any such right or freedom.

though—for some unintelligible reason—that is framed to buttress only such parts of the Charter as create "individual rights" (as that term is defined in clause 27⁴⁹) and thus indirectly disparages the other guarantees. Some protection might even flow from the clumsy and florid terms⁵⁰ of clause 35:

The Constitution of Canada shall be the supreme law of the Canadian federation, and all of the institutions of the Canadian federation shall be governed by it and by the conventions, customs and usages hallowed by it, as shall all of the people of Canada.

A cogent response, however, would readily be forthcoming. Those supporting a construction of Bill C-60 which would empower Parliament and the provincial legislatures to abrogate, unilaterally, the provisions of the Charter would urge that clauses 23 and 25, like the rest of the Charter, must be subject to repeal by competent

⁴⁷ Hence not part of the "constitution of the province", and, accordingly, not subject to the provincial constitutional amending power.

⁴⁸ The integral character of s. 133 of the 1867 Act (dealing simultaneously with federal institutions and those of Quebec) invites treating it as a single enactment not forming part of the "Constitution of the Province" of Quebec within the meaning of s. 92.1. In Bill C-60, cls. 13 *et seq.* deal separately with the federal and provincial institutions, and so make those concerning the provinces the more vulnerable to the provincial amending power. S. 133 of the 1867 Act would survive only until "entrenchment" of the new provisions by the United Kingdom Parliament (cls. 18, 131(4)); but the question here is precisely whether implementation by the Westminster Parliament would be meaningful in the face of cl. 92(1)—in other words, whether the guarantees would be really entrenched at all.

⁴⁹ Why give less protection to other guarantees? For example, cl. 15 (concerning bilingualism in statutes and legislative records) does not create "individual rights and freedoms" (see cl. 27).

⁵⁰ An alternative draft of this clause, maintaining its substance, is offered below.

authority. Clauses 91(1) and 92(1), as far as they go, explicitly define the authority to effect constitutional amendments. Not only are the terms of these two clauses wide enough to cover much, even most, of the Charter, but such a construction is if anything assisted by the manner in which they differ from the corresponding sections of the amended 1867 Act. The very presence of the new saving clauses to protect *exactly three* clauses of the Charter militates strongly against the entrenched character of the rest. For there is a presumption that words in a statute are not without some effect. Thus the presence of the new saving provision in clause 91(1) strongly implies that at least *some* portions of the Charter come within the ambit of clause 91(1) before the saving provision is applied. Similarly, the presence of the new saving provision in clause 92(1) strongly implies that at least *some* portions of the Charter come within the ambit of "the constitution of the province", and, accordingly, within the provincial amending power. The Charter, in sum, does not seem inherently beyond the reach of the unilateral amending powers of Parliament and the provincial legislatures—despite the contrary impression created by the white paper.

From this Sargasso sea of complex and confusing provisions, there emerges an overall impression of a poorly-drafted and technically deficient constitutional text whose real legal effect, in vital matters, is often belied by its appearance and the professions of its sponsors.

II. *Some Illustrative Points of Form and Substance.*

"Its language is obscure and anachronistic, its style plodding and uninspiring."⁵¹ These are the white paper's strictures upon "the present Constitution"—that is, the Imperial Acts and in particular that of 1867. These criticisms are grossly exaggerated, but to try to show that here would involve too much of a digression.⁵² Suffice it to say that they invite, and entitle, the reader of Bill C-60 to expect a constitution drafted in clear,—perhaps even distinguished,—modern English, couched in terms as simple as the subject-matter permits.

Disappointment comes quickly. The early clauses of Bill C-60 (clauses 3 to 5) are largely of a preambular nature. Their deficiencies are most easily perceived when they are read aloud—and why not read aloud a new constitution intended to replace an old, "uninspiring", one? A reading aloud of (say) the preamble to the United States Constitution, or the Declaration of Independence, will afford all too instructive a basis for comparison. Perhaps the authors of Bill

⁵¹ White Paper, p. 20.

⁵² S. 133 of the 1867 Act is a good example of a great deal of law enacted in a very short and clearly-drafted provision far superior in standard to anything contained in Bill C-60.

C-60 aimed at Madisonian or Jeffersonian grandeur. They have produced nothing better than schoolboy grandiloquence. The clauses of Bill C-60, beginning with the flatulent terms of clauses 3 to 5, are clumsily-constructed, verbose, tortured, often obscure, and much given to clichés. A few illustrations must suffice. In an excess of pious zeal, clause 35 causes the constitution to “hallow” conventions, customs, and usages:

The Constitution of Canada shall be the supreme law of the Canadian federation, and all of the institutions of the Canadian federation shall be governed by it and by the conventions, customs and usages hallowed by it, as shall all of the people of Canada.

Cannot this be said more succinctly, without an unnecessary passive verb, and without a clause dangling loosely at the end? Try this, for example:⁵³

The Constitution of Canada shall be the supreme law of the Canadian federation, and, with its conventions, customs, and usages, shall govern the institutions and people of the federation.

More shortly still (the total length being about half that of the original):

The Constitution of Canada, as supreme law, and its conventions, customs and usages, shall govern the institutions and people of the Canadian federation.

Again, if it is desired that the Governor General be a distinguished Canadian, is it necessary to adopt the language of second-rate journalism, and to speak (clause 45(2)) about “the stature in Canada adjudged to be suitable to that office”—a description which could even be employed by a cynic? Is there no more attractive manner of formulating the prescription of clause 44:

The Governor General of Canada shall have precedence as the First Canadian, and the office of Governor General shall stand above and apart from any other public office in Canada.

If there is none, why not dispense with it altogether? Why is each House of Parliament to “decide” [sic] its own rules (clause 59(1))? Presumably what is meant is that each House shall “make”, or “establish”, or “make and interpret” its own rules. In any event, one does not *decide* rules; one *decides upon* them. Why does clause 85 establish an executive council in each province “subject as” otherwise provided in the provincial constitution, rather than *subject to* contrary provision? Is there no less awkward way of stating that in general bills may originate in the House of the Federation “equally as in” (clause 66) the House of Commons? *As well as in* the Commons? Statutes, even constitutional ones, *enact* law; they do not “proclaim” it (clauses 22 and 23)—again, the schoolboy grandiloquence.

⁵³ The writer’s preference would be to omit the reference to the conventions and so forth.

Is it worth sacrificing brevity and simplicity of language to appease doctrinaire feminists with politically-inspired Newspeak? The authors of Bill C-60 clearly thought so. But their attempts to avoid masculine pronouns and possessive adjectives altogether⁵⁴, or at worst to accompany them with feminine forms,⁵⁵ look the more ridiculous when in the end they become so cumbersome that they break down altogether. The authors of Bill C-60, forced to revert to standard English in clause 106 (concerning appointments to the Supreme Court of Canada) then declare (clause 106(7)): "For the purposes of this section, words importing a male person include a female person." Yet this clause, generalized in scope, might have been included in an interpretive part of the draft constitution, to cover the whole instrument.

The authors' attempts at constitutional decorative arts are preposterous. They appear to have retained some vestigial recollection, however incoherent, that financial measures have historically enjoyed a special constitutional status. Clause 78 is the result:

The right of the House of Commons to refuse to adopt or pass any vote, resolution, address or Bill for the appropriation of any part of the public revenue, or of any tax or impost, is a fundamental principle of the Constitution of Canada.

The bizarre, and unacceptable, implication, of course, is that the authority of the Commons as to other bills is something less than fundamental. (Nor is the authority of the Commons in either case aptly described as a right of refusal to pass a measure.) Here as elsewhere in Bill C-60, the authors display a most feeble grasp of constitutional principle and constitutional history.

It would be tempting to review Bill C-60 clause by clause, but one further provision must suffice. Like all or most of the others chosen for examination here, it has been selected because the objections to it cannot properly be dismissed as the result of differences in policy between the authors and their critics. Again, it is best savoured after it has been read aloud, recalling of course the white paper's strictures against imperial statutory language as "obscure and anachronistic"; "plodding and uninspiring". Clause 99 reads as follows:

Where authority is conferred or provided by any Act of the Parliament of Canada for the payment, otherwise than pursuant to an agreement or other arrangement having the force of a binding contractual obligation, of any public

⁵⁴ E.g., in cl. 7, "every individual shall enjoy . . . the right not to give evidence . . . if the individual is denied counsel . . ." [emphasis added]. Good standard English points to the substitution of the pronoun *he*.

⁵⁵ E.g., cl. 8, giving every Canadian citizen certain rights, "whatever the place of his or her residence or domicile". A writer of good standard English would use only the masculine.

money of Canada to or to the use of any institution of government of any province or territory of Canada subject to such terms and conditions, if any, as may be contained in or provided for by that Act, the authority for such payment, if expressly stated in that Act to create an obligation on Canada to which this section shall apply, shall, for the period of the subsistence of the authority and subject to those terms and conditions, if any, constitute an obligation accordingly by which Canada shall be bound and to which Canada shall be committed pursuant to the Constitution of Canada, and it shall not be competent for the Parliament of Canada to terminate or alter any such obligation except as one by which Canada is so bound and to which it is so committed.

The same substance⁵⁶ can very easily be rendered in several ways in plain and straightforward terms in far fewer words.⁵⁷

Any Act of the Parliament of Canada providing for the payment of public money of Canada to or to the use of any institution of government of any Canadian province or territory may, by express words applying this section, create an obligation imposed upon Canada by the Constitution and accordingly irrevocable except by constitutional amendment, but subject to every term, condition, or time limitation prescribed by the Act.

A new constitution proposed by the government should be an outstanding example of the lawyer's art. Bill C-60 is a scandal and an affront to the Canadian public in general and to the legal profession in particular. It is semi-literate in its law and in its language.

⁵⁶ This is rendered without attempts at improving the substance, such as making it clear exactly when the legislation becomes irrevocable, since that will become critical. The reference to the territories, while politically (perhaps) expedient, makes no legal sense so long as the Parliament of Canada is competent to alter or abolish the territories' institutions of government, and merge them and their property with those of Canada.

⁵⁷ The exception in cl. 99 for agreements or other arrangements having the force of binding contractual obligations seems superfluous, since the clause has no function except to enable constitutionally binding obligations to be created by the use of express words referring to cl. 99. Where no such words are used, cl. 99 will produce no legal consequences. Where they are used, is cl. 99 not to be applicable simply because an agreement or contractual arrangement exists?