Background Paper **BP-283E**

THE CONSTITUTION OF CANADA: A BRIEF HISTORY OF AMENDING PROCEDURE DISCUSSIONS

Daniel Dupras
Law and Government Division

January 1992

Library of Parliament

Bibliothèque du Parlement

Parliamentary Research Branch

The Parliamentary Research Branch of the Library of Parliament works exclusively for Parliament, conducting research and providing information for Committees and Members of the Senate and the House of Commons. This service is extended without partisan bias in such forms as Reports, Background Papers and Issue Reviews. Research Officers in the Branch are also available for personal consultation in their respective fields of expertise.

CE DOCUMENT EST AUSSI PUBLIÉ EN FRANÇAIS

TABLE OF CONTENTS

PAGE

CANADA

LIBRARY OF PARLIAMENT
BIBLIOTHÈQUE DU PARLEMENT

THE CONSTITUTION OF CANADA: A BRIEF HISTORY OF AMENDING PROCEDURE DISCUSSIONS

INTRODUCTION

The constitution of a country is a unique document that influences the validity and interpretation of all other laws. Subsection 52(1) of the *Constitution Act, 1982* provides for this supremacy of the Constitution of Canada in the following terms:

> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

As well, subsection 52(2) defines the Constitution of Canada as follows:

> 52(2) The Constitution of Canada includes:
>
> (a) The *Canada Act, 1982*, including this Act;
> (b) the Acts and orders referred to in the schedule; and
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).

The *Canada Act, 1982* is the Act passed by the Parliament of the United Kingdom to give effect to Canada's adoption of the *Constitution Act, 1982*.[1] The Acts and orders referred to are constitutional laws and orders in council passed since 1867 by the Parliament of the United

---

(1) Canada's first Constitution, the *British North America Act, 1867*, 30-31 Victoria, c 3 (UK) and the Acts amending it, were always Acts of the Parliament of the United Kingdom. The *British North America Act* was passed on 29 March 1867 and come into force on 1 July 1867. Since 1982, each constitutional Act has been referred to as the "Constitution Act," followed by the year of passage. Thus, the *British North America Act of 1867* is now referred to as the *Constitution Act, 1867*.

Kingdom and are just as applicable to Canada as the laws and orders of a constitutional nature passed by the Parliament of Canada since that date.

From Confederation on, various constitutional discussions and government reports have dealt with the constitutional amending procedure. Below is a summary of events, together with a description of the amending procedures proposed.

THE CHARLOTTETOWN CONFERENCE (1864-1866)

The first constitutional conferences were held even before Canada became a Dominion in 1867. Indeed, the Fathers of Confederation met first in Charlottetown in September 1864. The *Constitution Act, 1867* contained no formula for amending the Constitution in Canada; consequently, only another Act by the Parliament of the United Kingdom could amend our fundamental piece of legislation. This anomaly was corrected in the *Constitution Act, 1982*, which includes an amending procedure whereby the Parliament of Canada and the provincial legislatures can amend the Constitution of Canada without the need for intervention by the Parliament of the United Kingdom. In 1982, by including this amending procedure in the last United Kingdom Act to amend the Constitution of Canada, our Constitution was "patriated." The amending procedure thus enshrined in the *Constitution Act, 1982* will be discussed below.

THE 1927 CONFERENCE

Several constitutional conferences were required before a domestic constitutional amending procedure was achieved. During a federal-provincial conference held in Ottawa from 3 to 10 November 1927, on the initiative of Prime Minister Mackenzie King, the issue was addressed for the first time. One topic on the agenda was a proposal by the Honourable Ernest Lapointe, Minister of Justice, for the patriation of the Constitution and the adoption of an amending procedure. The Balfour Declaration, made in the context of the Imperial Conference that had begun in 1926, was then a topical issue that quite naturally led to discussions on a domestic procedure for amending the Constitution; as a result, Mackenzie King took the opportunity to place the issue on the conference agenda.

Under the proposal made by the Minister of Justice, "ordinary" amendments to the Constitution of Canada could be made if the majority of the provinces agreed, while "vital and fundamental" amendments (such as those affecting the rights of provinces, the rights of minorities or rights of nationality, language or religion) would require unanimous acceptance by the provinces. The proposal did not succeed in rallying support among the conference participants and thus became a dead letter.

THE *STATUTE OF WESTMINSTER* (1931)

The Balfour Declaration dealt with the Dominions of the British Empire and recognized their equality of status with the United Kingdom in the following terms:

> They [the United Kingdom and the dominions] are autonomous communities within the British Empire, co-equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, although united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

The *Statute of Westminster*, passed in 1931 by the Parliament of the United Kingdom, also resulted from the work of the Imperial Conference that had begun in 1926. This statute recognized Canada's autonomy except for the amending procedure, which still depended on the passage of an Act by the Parliament of the United Kingdom.

On 30 June 1931, following a federal-provincial conference held 7 and 8 April 1931 at Ontario's request, the House of Commons adopted a resolution (subsequently also adopted by the Senate) that was sent to the Parliament of the United Kingdom, requesting it to exclude constitutional Acts passed between 1867 and 1930 from the *Statute of Westminster*. The *Statute of Westminster* provided that the Dominions (including Canada) could then amend British Acts that still applied to their respective territories. Since there was no consensus on an amending procedure in Canada, it was appropriate to make an exception for constitutional Acts passed between 1867 and 1930.

THE 1935 COMMITTEE

In January 1935, the House of Commons set up a Special Committee to examine the need to amend the *British North America Act*; in its report, this Committee said nothing about a possible amending procedure.

THE 1935 CONFERENCE

At a new federal-provincial conference held from 9 to 13 December 1935, Prime Minister Mackenzie King presented an amending procedure proposal, which did not gain the assent of the provinces. The proposal provided that, if Parliament and at least two-thirds of the provinces representing at least 55% of the population agreed, the Constitution of Canada could be amended with respect to matters directly affecting the provinces; an opting-out provision was also included; for more fundamental matters, unanimity would be indispensable.

Following this conference, a Continuing Committee on Constitutional Questions was struck; it developed an amending procedure that was never adopted. According to this procedure, the Constitution of Canada would have been amended as follows:

> 1. for matters concerning the federal government alone, by an Act of Parliament;(2)
>
> 2. for matters concerning the federal government and one or more provinces, but not all the provinces, by an Act of Parliament and with the assent, expressed by resolution, of the legislatures concerned;
>
> 3. for most matters concerning the federal government and all the provinces, by an Act of Parliament and with the assent, expressed by resolution, of the legislatures of two-thirds of the provinces representing at least 55 per cent of the population of Canada;(3)

---

(2) This covered the office of Governor General, the offices of Lieutenant Governor; the constitution of the Privy Council; the constitution, composition and powers of the Senate, except for the representation of the provinces in the Senate; the constitution, composition and powers of the House of Commons, except for representation in the House of Commons; and the Treasury.

(3) If, however, the Act dealt with matters falling into classes 13 (property and civil rights) or 16 (matters of a local or private nature in a province) of section 92 of the Constitution Act, 1867, the legislature of a province whose legislative assembly had not approved or was not deemed to have approved that Act in accordance with the provisions of this section and who had expressed its dissent in a resolution could have continued to legislate exclusively on the matters that were the subject of the Act.

4. for entrenched clauses, by an Act of Parliament and with the assent, expressed by resolution, of the legislative assemblies of all the provinces.(4)

Under section 92(1) of the *Constitution Act, 1867*, each provincial legislature had the power to amend the constitution of the province, except for provisions concerning the office of Lieutenant Governor. Parliament did not enjoy a similar provision concerning the Constitution of Canada; that is, it could not by itself amend the provisions dealing exclusively with the central government and the federal institutions and affecting them only. Prime Minister Louis Saint-Laurent took steps to correct the situation; he had the Constitution amended by the Parliament of the United Kingdom to include section 91(1), which gave Parliament exclusive authority to amend the Constitution of Canada in accordance with the terms and conditions set out in that class. It should be noted that section 91(1) and section 92(1) were both repealed by and reincorporated into the *Constitution Act, 1982*.

THE 1950 CONFERENCE

Fifteen years passed before another conference dealt with amending the Constitution. At this conference, held from 10 to 12 January and 25 to 28 September 1950, it was proposed that the *British North America Act* be analyzed and its provisions divided into six classes, as follows:

i) provisions concerning Parliament exclusively;

ii) provisions concerning the legislatures exclusively;

iii) provisions concerning Parliament and one or more, but not all, legislatures;

---

(4) The scope of this section was all matters falling under sections 9 (declaration of executive power in the Queen), 21 (number of Senators), 22 (representation of the provinces in the Senate), 51 and 51A (representation in the House of Commons); under subsections 4, 5, 8, 12, 14 and 15 of section 92 (legislative powers of the provinces); under section 93 and the corresponding provisions of various *Acts of Union* (education); and under section 133 and the corresponding provision of the *Manitoba Act*, 1870 (use of the English and French languages).

iv) provisions concerning Parliament and all the legislatures;

v) provisions concerning fundamental rights such as education and language;

vi) provisions to be repealed.

There would have been a specific amending procedure for each of these divisions. Negotiations came to a halt when it became clear that it was impossible to divide the sections into the various classes without first agreeing on the amending procedure governing each of them. Despite the many proposals made, it was impossible to reach an agreement.

THE FULTON FORMULA (1961) AND THE FULTON-FAVREAU FORMULA (1964)

Discussions were revived 10 years later and led, in 1961, to the "Fulton Formula," named for the Minister of Justice of the time. Under this proposal, the Constitution would have been amended as follows, (with specific cases to take precedence over more general provisions):

1. with the consent of Parliament and of all the provinces for provisions dealing with:

   a) the legislative powers of the legislatures;

   b) the rights and privileges granted or secured by the Constitution of Canada to the legislature or government of a province;

   c) the assets and property of a province;

   d) the use of English or French;

2. with the consent of Parliament and of the provinces concerned for provisions affecting one or more, but not all of the provinces;

3. with the consent of Parliament and of all the provinces except Newfoundland in matters of education, or with the consent of Parliament and of the legislature of the Province of Newfoundland exclusively in matters of education in that province;

4. for the other provisions, with the consent of Parliament and of at

> least two-thirds of the legislatures representing at least 50 per cent of the population of Canada according to the most recent census.

In order to overcome the rigidity of the unanimity clause, the proposal included the possibility of delegating the legislative power of a province to the federal government on a matter of exclusive provincial jurisdiction.

Because of persistent differences of opinion, this proposal met with the same fate as the previous proposals.

In 1964, the Honourable Guy Favreau, Minister of Justice, took up the Fulton proposal again and, after changing it slightly, presented a new proposal for an amending procedure. The new proposal retained the features of the Fulton Formula and added provisions granting Parliament exclusive power to make amendments to the Constitution of Canada concerning the executive government of Canada, the Senate and the House of Commons, except for:

1. the functions of the Queen and the Governor General in relation to the Parliament or Government of Canada;

2. the requirements of the Constitution of Canada that there be a session of Parliament at least once each year;

3. the time limit set by the Constitution of Canada for the duration of the House of Commons, provided, however, that the House of Commons might in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation were not opposed by the votes of more than one-third of the members of such House;

4. the number of Senators by which each province is entitled to be represented in the Senate;

5. the qualifications of Senators concerning residence and the requirements of the Constitution of Canada concerning their appointment by the Governor General on behalf of the Queen;

6. the right of a province to a number of members in the House of Commons that is not less than the number of Senators representing it;

7. the principles of proportional representation of the provinces in the House of Commons prescribed by the Constitution of

Canada; and

8. the use of English or French.

In addition, the provinces would have been given the exclusive right to enact laws amending their respective constitutions, except for provisions concerning the office of Lieutenant Governor.

At the 1964 conference, the proposed procedure received agreement in principle from all the premiers. However, Jean Lesage, Premier of Quebec, then backtracked and refused to ratify the agreement, apparently because of popular opposition to it. As well as calling into question the content of the agreement, its critics emphasized that during the review and the drafting of the amendment procedure the public had not been clearly informed of the content of the discussions or of the agreement.

THE *VICTORIA CHARTER* (1971)

Discussions were revived in 1968 and several conferences were held between 1968 and 1971. At the conference held in Victoria from 14 to 16 June 1971, the premiers drew up the document known as the *Victoria Charter*; it constituted a major constitutional review.

With regard to the amending procedure, the *Victoria Charter* provided that amendments to the Constitution of Canada could be made as follows:

1. Amendments dealing with matters not specifically referred to elsewhere could be made with the agreement of:

    a) each province having, at any previous census, more than 25 per cent of the population of Canada;

    b) at least two of the Atlantic provinces; and

    c) at least two of the Western provinces having, together, at least 50 per cent of the population of those provinces.

2. Amendments concerning the following matters would also follow this procedure:

    a) the offices of the Queen, Governor General and Lieutenant Governor:

b) the requirement that there be a session of Parliament and of the legislatures at least once each year;

c) the time limit set for the duration of the House of Commons and of the legislatures;

d) the powers of the Senate;

e) the composition of the Senate;

f) the right of a province to a number of members in the House of Commons equal to or greater than the number of Senators representing it;

g) the principle of proportional representation of the provinces in the House of Commons;

h) the use of English or French.

3. Amendments dealing with provisions specific to one or more, but not all, of the provinces could be made with the agreement of Parliament and of the legislatures concerned.

4. Amendments to the Constitution of Canada concerning the executive government of Canada, the Senate or the House of Commons could be made exclusively by the Parliament of Canada.

5. Amendments dealing with the constitution of a province could be part of the exclusive jurisdiction of the province.

The amending procedure also provided that a resolution for amendment not adopted by the Senate within 90 days following its adoption by the House of Commons could be replaced by a second resolution of the House of Commons. The initiative for a resolution could come from the House of Commons, the Senate or the legislatures, and each legislative body could revoke its resolution before it was proclaimed. Despite the agreement among the premiers at Victoria, the Quebec Cabinet rejected the Victoria Charter.

THE MOLGAT-MACGUIGAN COMMITTEE (1972)

In its report to Parliament in 1972, the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada stated that the new Constitution of Canada should adopt the procedure provided for in the *Victoria Charter*.

FEDERAL PROPOSALS (1975-1976)

In 1975, Prime Minister Trudeau launched the constitutional discussions again on the basis of the amending procedure provided for in the *Victoria Charter*, but he did not succeed in obtaining the assent of all the parties concerned. In 1976, the Prime Minister sent a new message to his provincial counterparts but received lukewarm responses. First, the Premier of Alberta indicated partial opposition, demanding unanimity on the expanded role and powers of the provinces. Subsequently, the Premier of British Columbia stated that he agreed with the *Victoria Charter* process, while the Premier of Alberta indicated that he preferred a return to the more rigid Fulton-Favreau formula.

PROPOSED RESOLUTION (1977)

On 19 January 1977, Prime Minister Trudeau sent a letter to his provincial counterparts and included a proposed resolution addressed to the Queen, setting out the following constitutional amending procedure.

1. Unless there was a specific incompatible provision, the Constitution could be amended if the Senate, the House of Commons and the legislative assemblies of a majority of the provinces adopted a resolution to that effect. This majority would have to include:

    a) each province whose population had, at any time prior to the adoption, at least 25 per cent of the population of Canada;

    b) at least two of the Atlantic provinces;

    c) at least two of the Western provinces, provided that the consenting provinces had at least 50 per cent of the population of those provinces.

2. This amending procedure rule would apply to provisions concerning the following matters in particular:

   a) the offices of the Queen, Governor General and Lieutenant Governor:

   b) the requirement that there be a session of Parliament and of the legislatures at least once each year;

   c) the time limit set for the duration of the House of Commons and of the provincial legislatures;

   d) the power of the Senate;

   e) the number of Senators to which each province is entitled to be represented in the Senate and the qualifications of Senators concerning residence;

   f) the right of a province to be represented in the House of Commons by a number of members at least as great as the number of its Senators;

   g) the principle of proportional representation of the provinces in the House of Commons;

   h) the use of English and French.

3. For provisions that apply to one or more provinces, an amendment to the Constitution could be adopted by approval of the Senate, the House of Commons and the legislative assemblies of the provinces concerned.

4. Any amendment to the Constitution of Canada concerning the executive power of Canada, the Senate and the House of Commons would require the approval of Parliament alone.

In addition, under this amendment procedure, the Senate would have had only a 90-day suspensive veto on amendments.

As a result of widespread opposition, the proposal was not pursued.

A *TIME FOR ACTION* AND BILL C-60

In June 1978, the federal government published a white paper entitled *A Time for*

Action, in which it proposed that the Constitution of Canada be renewed in two stages.

First, the federal government, after consultation with the provinces, would amend the Constitution with respect to those matters that could be altered by the federal government acting alone. Second, the federal government and the provinces would try to reach an agreement on the subjects requiring intervention by the Parliament of the United Kingdom, for example the distribution of powers.

Also in 1978, the federal government published another study dealing directly with the amending procedure of the Constitution of Canada.

After briefly summarizing the discussions to date on this topic, the document set out four possible procedures for amending the Constitution:

1. the Fulton-Favreau formula;
2. the formula contained in the *Victoria Charter*;
3. the formula contained in the *Victoria Charter* combined with referendums;
4. use of referendums alone.

Also in 1978, the Prime Minister tabled Bill C-60, An Act amending the Constitution, in the House of Commons. Because of the opposition it raised, the bill was referred to the Supreme Court of Canada.(5) The Supreme Court concluded that the power granted to Parliament by class 1 of section 91 of the *Constitution Act, 1867* concerned only matters of exclusive federal jurisdiction. Since several of the amendments proposed by Bill C-60 exceeded this limitation, the government did not pursue the bill.

THE PEPIN-ROBARTS COMMISSION (1979)

(5) *Re British North America Act and the Federal Senate* (1979), 30 NR 271.

The Task Force on Canadian Unity tabled its report in January 1979 and recommended adoption of an amending procedure for the Constitution of Canada. The proposed amending procedure restated the proposal in the *Victoria Charter*. It provided that the Constitution would be amended by the passage, by majority vote, of an Act by the House of Commons and the Council of the Federation[6] and by the ratification of this Act by a Canada-wide referendum with majorities in each of the four regions constituted by the Atlantic provinces; Quebec; Ontario; and the Western provinces and the territories.[7] This procedure would have applied to the provisions of the Constitution dealing with:

1. the distribution of legislative powers;
2. the constitution of the two Houses of Parliament, the existence and composition of the Supreme Court of Canada and the method of appointing and revoking the appointments of Supreme Court justices;
3. the offices of Governor General and Lieutenant Governor;
4. the protected list of fundamental rights;
5. protected language rights; and
6. the amending procedure.

In accordance with the recommendations of this report, Parliament would have been given the right to amend other sections of the Constitution except those dealing with the constitutions of the provinces, which could be amended only by the legislative assembly of the province concerned.

THE 1980 FEDERAL GOVERNMENT INITIATIVE

(6) In accordance with the recommendations contained in the report, the Senate would have been replaced by a Council of the Federation.

(7) Any province that later acquired at least 25% of the population of Canada would automatically have become a separate region.

Following the referendum held in Quebec on 20 May 1980, in which a majority of persons refused to give the government of that province a mandate to negotiate sovereignty association between Quebec and the rest of Canada, discussions were revived on 9 June; the purpose was to allow the various parties concerned to reach an agreement, particularly on patriation of the Constitution and an amending procedure.

In October 1980, a proposed resolution that included an amending procedure was tabled in the House of Commons; its objective was to allow the federal government to proceed unilaterally, in view of the lack of success of previous discussions. This resolution included the following mechanism as an amending procedure.

1. The Constitution of Canada could be amended if there was a resolution:

   a) of Parliament;

   b) of each province having, or ever having had, at least 25 per cent of the population of Canada;

   c) of at least two of the Atlantic provinces representing at least 50 per cent of the population of those provinces; and

   d) of at least two of the Western provinces representing at least 50 per cent of the population of those provinces.

2. The Constitution of Canada could be amended if a national referendum approved the amendment as follows:

   a) the majority of electors approved the amendment; and

   b) the amendment was approved by the majority of the electors in each of the provinces from which a resolution would be required to amend the Constitution in accordance with the requirements of the preceding paragraph.

3. The provisions of the Constitution of Canada applicable to certain provinces could be amended only by resolutions of Parliament and of the provinces concerned.

4. Amendment of the Constitution would be part of the exclusive jurisdiction of Parliament in matters concerning the executive power of the federal government, the Senate and the House of Commons

5. Amendment of the constitution of a province would be part of the exclusive jurisdiction of the province concerned.

It should be noted that a resolution could be made by either of the two Houses of Parliament or a legislature, while the initiative for holding a referendum could come only from the Senate or the House of Commons.

In view of the opposition to this proposal, doubts expressed about the legality of the procedure and opinions given by the courts of appeal of Quebec, Manitoba and Newfoundland, the issue went to the Supreme Court of Canada. On 28 September 1981, the Supreme Court reached a majority conclusion that the federal initiative was legal; however, it expressed reservations about its legitimacy on the ground that it would run counter to the conventions and the spirit of the federal system.(8)

THE HAYS-JOYAL COMMITTEE (1981)

In the meantime, the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, chaired by Senator Harry Hays and Member of Parliament Serge Joyal, tabled its report on 13 February 1981. It recommended that the general rule of the amending procedure be that contained in the 1977 proposed resolution. However, the resolutions of the provincial legislative assemblies, if not made within 12 months of the resolutions of each of the Houses of Parliament, might be replaced by a referendum. A referendum would be considered adopted if it was approved by a national majority and a majority in the provinces from which approval resolutions were required. The idea of holding a referendum to overcome the difficulty of having resolutions adopted by the provincial legislative assemblies had been mentioned on several occasions by Prime Minister Trudeau.

---

(8) *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753.

THE *CONSTITUTION ACT, 1982*

A new federal-provincial conference was called. Prime Minister Trudeau once again proposed a procedure similar to the one provided for in the *Victoria Charter*. All the provinces except Ontario and New Brunswick supported the "Vancouver formula," under which the Constitution could be amended with the agreement of two-thirds of the provinces representing at least 50% of the population. This proposal also contained a provision for opting out with full compensation. During final negotiations, however, compensation was dropped for all matters except those related to culture and language. Quebec refused to be a party to this agreement, which, after slight changes had been made, became the *Constitution Act, 1982*. The *Constitution Act, 1982* included the adoption of the following amending procedure.

> **The general amending formula** (sections 38, 39, 40 and 42)
>
> Section 38 of the Act provides that the Constitution of Canada may be amended, if there is no specific provision to the contrary, by resolutions of the Senate and House of Commons and two-thirds of the provinces (seven) having at least 50% of the population of all the provinces combined. The territories have no role in the amending process. A province that does not agree with an amendment affecting provincial legislative powers, or propriety rights, or other privileges, can dissent from it, also by resolution. In that case, the amendment has no effect within that province. After the last necessary resolution is passed, the Governor General can make the amendment by proclamation.
>
> Section 39 sets out the time frames within which an amendment may be made. All of the required resolutions must be passed, and the proclamation issued, within three years from the adoption of the resolution which initiates the amending process. Conversely, an amendment cannot be proclaimed until a year after the first resolution has been passed unless all the provinces have dealt with the amendment by either a resolution of assent or a resolution of dissent.
>
> Section 40 provides that, where an amendment transfers provincial legislative powers relating to education or culture to Parliament, any dissenting province shall receive reasonable compensation.
>
> Section 42 specifies that amendments with respect to the following

matters in particular must be made using the general amending formula:

1. the principle of proportional representation of the provinces in the House of Commons;

2. the powers of the Senate and the method of selecting Senators;

3. the number of Senators representing a province and the residence qualifications of Senators;

4. the Supreme Court of Canada (except for its composition);

5. the extension of existing provinces into the territories; and

6. the establishment of new provinces.

Amendment requiring unanimity (Section 41)

Unanimity, expressed by resolution of Parliament and of all the legislatures, is required in the following matters:

1. the offices of the Queen, Governor General and Lieutenant Governor;

2. the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented;

3. the use of English and French (subject to the provision relating to the parties concerned);

4. the composition of the Supreme Court; and

5. amendment to the procedure for amending the Constitution.

Amendment of provisions relating to some but not all provinces (Section 43)

The provisions applicable only to certain provinces may be amended with the agreement of Parliament and the legislatures concerned.

In particular, this procedure applies to:

1. alterations to boundaries between the provinces;

2. amendments to provisions relating to the use of English and French within a province.

Amendment by Parliament (Section 44)

Parliament may exclusively amend the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

Amendment by provincial legislatures (Section 45)

Subject to the provisions requiring unanimity, each province may exclusively amend the constitution of that province.

THE *MEECH LAKE ACCORD* (1987-1990)

In a 1984 speech, the Honourable Brian Mulroney made a commitment to breathe new life into federalism and persuade the Quebec National Assembly to sign the Constitution.

In 1986, Robert Bourassa's government set out the five minimum conditions to be met if Quebec were to sign the Constitution. One of these conditions was that Quebec would have a veto over the constitutional amending procedure.

The Meech Lake-Langevin Accord of 30 April 1987 would have made the following amendments to the amending procedure in the *Constitution Act, 1982*:

1. The provinces would have been eligible for compensation in all cases where an amendment to the Constitution had the effect of transferring an area of provincial jurisdiction to the federal government; the present Constitution provides for the right to compensation only in matters of education and culture.

2. The classes of subjects requiring unanimity would have been expanded to include the following:

   a) the offices of the Queen, Governor General and Lieutenant

Governor:

b) the powers of the Senate and the method of selecting Senators;

c) the number of Senators for a province and the residence qualifications of Senators;

d) the right of a province to a number of members in the House of Commons at least equal to the number of its Senators;

e) the principle of proportional representation of the provinces in the House of Commons;

f) the use of English and French;

g) the Supreme Court of Canada;

h) the extension of existing provinces into the territories;

i) the establishment of a new province; and

j) amendment of the amending procedure.

For the matters referred to in (a), (d), (f) and (j), unanimity is already required by the *Constitution Act, 1982*; the matters referred to in (b), (c), (e), (g), (h) and (i) would have been added to them. With regard to the Supreme Court, only amendments relating to its composition require unanimity under the *Constitution Act, 1982*.

The *Meech Lake Accord* had to be adopted by the two Houses of Parliament and all the provincial legislatures in order to come into force. The House of Commons adopted the Accord a first time on 25 October 1987, and a second time on 22 June 1988 in order to overcome the Senate's refusal to adopt the Accord in its entirety.(9)

From 23 June 1987, the date of the Quebec National Assembly's first resolution approving the Accord, the other provinces had three years in which to approve it.

---

(9) In fact, on 21 April 1988, the Senate adopted a resolution adopting the Accord after making nine amendments to it. Since, under section 47 of the *Constitution Act, 1982*, the Senate has only a suspensive veto of 180 days on amendments to the Constitution, the House of Commons adopted a second resolution approving the Accord in order to circumvent the Senate's refusal.

In fact, only one province, Manitoba, did not adopt the Accord at some time. The Legislative Assembly of Newfoundland, which had adopted a resolution approving the Accord, later rescinded its approval by a second resolution.(10)

Shortly before the three-year time limit expired, it became increasingly likely that the Accord would not be adopted by all the legislative assemblies within the time limit. Prime Minister Mulroney therefore called a new constitutional conference, which was held in early June 1990.

On 9 June 1990, the first ministers signed an agreement under the terms of which the premiers of the three provinces that had still to ratify the Accord prior to 23 June 1990 (New Brunswick, Newfoundland and Manitoba) agreed to submit it to their respective legislative assemblies and to do everything possible for a decision to be made before 23 June 1990. Following this agreement, New Brunswick adopted the Accord within the time limit. The Legislative Assembly of Manitoba was unable to make a decision on the Accord; one of its members refused to give his consent to a change in that Assembly's procedure that might have enabled it to reach a decision by 23 June.(11)

Since, technically, the Accord could not be adopted by the Manitoba government, the Legislative Assembly of Newfoundland decided that it would not be appropriate for it to vote on the matter.

THE BEAUDOIN-EDWARDS COMMITTEE (1991)

On the assumption that failure to adopt the Meech Lake Accord had been largely due to the amending procedure contained in the *Constitution Act, 1982*, the government proposed to Parliament that a Special Joint Committee of the Senate and the House of Commons be set up

---

(10) Subsection 46(2) of the *Constitution Act, 1982* provides that a legislative assembly may revoke a prior resolution approving an agreement.

(11) The rules of procedure of the Legislative Assembly of Manitoba did not allow it to make a decision on the agreement unless a notice regarding it was given a certain number of days in advance. This notice period made it impossible to hold a debate on the Accord before 23 June 1990 unless all the members of the Assembly agreed to consider the matter before the expiry of the notice period. A single member of the Assembly, Elijah Harper, refused to give his consent; this had the effect of paralysing the entire process.

which would be responsible for holding wide-ranging consultations with Canadians and inquiring into and reporting on a procedure for amending the Constitution of Canada.

After holding hearings in all parts of Canada, on 20 June 1991 the Committee produced a report in which it recommended to Parliament that the constitutional amending procedure be changed as follows.

1. The amending procedure should be changed to adopt the procedure already proposed in the Victoria Charter as a general rule for amendment, and the time limit for ratification reduced to two years.

2. The unanimity rule should be limited to the following matters:

   a) the use of English and French, including the rights of linguistic minorities, provided for in paragraph 41(c) of the *Constitution Act, 1982*;

   b) property rights of the provinces;

   c) the offices of the Queen, Governor General and Lieutenant Governor.

3. The provisions contained in section 43, 44 and 45 of the *Constitution Act, 1982* should remain unchanged.

In addition, in accordance with other recommendations, no amendment to the Constitution that would affect the rights of aboriginal people should be made without the consent of those people. Similarly, any amendment to the boundaries of the provinces or territories would require the agreement of the federal government and the provinces or territories concerned. Provinces could be created in the territories if a federal law were passed ratifying an agreement to that effect between the federal government and the territories.

The report of the Beaudoin-Edwards Committee also noted that the proposed amending procedure should be adopted only as part of more comprehensive reform that would include Senate reform.

CONCLUSION

As can be seen, most of the formulas proposed are variations on the Fulton-Favreau formula, based on the equality of provinces, and the *Victoria Charter*, based on the equality of the regions. Depending on the degree of importance attached to the provinces and their autonomy during the political ups and downs of the Canadian federation, each of these options has been promoted at one time or another.

In the past, it was proposed that lack of approval by the provinces might be circumvented by having the population take part in the procedure by means of a referendum. Recently, this idea has regained popularity as a result of popular pressure for increased public participation in the process. Using a referendum in such a way, however, would itself first require an amendment to the amending formula and the consent of all provinces.