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Reforming the Amending Formula
THE CASE FOR A CONSTITUTIONAL CONVENTION

Clyde K. Wells

The failure to achieve implementation of the constitutional proposals contained in the Meech Lake Accord has thrown the country into a state of constitutional turmoil. It has created great apprehension about the constitutional future of Canada and even greater confusion about the manner in which the problem can best be resolved.

After the emotional trauma of the Meech Lake debates, most Canadians were hoping for a year or two of dealing with economic and social problems. Circumstances, however, would permit no such rest. The failure of the Meech Lake Accord not only left Québec in a situation where its legitimate concerns were not addressed, but the manner in which acceptance of the Meech Lake Accord was pressured on the rest of Canada and ultimately refused, inevitably led to a great sense of rejection in Québec. Thus, Québec reacted immediately and created the Belanger-Campeau Commission to consider Québec's constitutional future, amidst increasing expression of support for some form of sovereignty ranging from total sovereignty to a variety of sovereignty-association proposals.

The federal government appointed the Spicer Commission with a mandate to listen to Canadians from coast to coast and try and come to a conclusion as to the kind of nation and the kind of constitutional structure Canadians wanted. Some of the provinces, New Brunswick, Ontario, Manitoba Alberta, and British Columbia, established some form of commission task force or committee to deal with the constitutional desires of their respective provinces.

I cannot speak for the other provinces that did not appoint such commissions, but I can explain why Newfoundland has not. While it is entirely appropriate, and in some cases essential, to refer proposals for constitutional change to separate provincial commissions for public evaluation and approval, it is almost impossible to develop constitutional proposals or alternatives through eleven separate commissions. Each of the individual provincial commissions will tend to focus on the prime concerns of that province and the national issue is not likely to be discussed, at least not in a national context. Thus, instead of narrowing the differences between the different parts of the country, individual commissions are likely to widen them. Such processes will tend to produce even firmer provincial positions and make the achievement of the essential compromise even more difficult.

Quite apart from the understandable narrowness of the focus of each provincial commission, even the federal Spicer Commission is not structured to enable the give and take of dialogue amongst the provinces that is absolutely essential if a compromise is to be achieved. While it may not be the only forum suitable, I believe the forum most suited to dealing with the constitutional dilemma in which Canada now finds itself, is a constitutional convention.

The use of a constitutional convention has been suggested by others and by myself in the past. It has most recently been mentioned in the discussion paper on *Amending the Constitution of Canada* issued by the federal government at the time that the Prime Minister announced the appointment of a

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Special Joint Committee of the Senate and House of Commons on Amending the Constitution, co-chaired by Québec Senator Gérald Beaudoin and Alberta Member of Parliament, Jim Edwards. It is the amending formula and the contents of that discussion paper that I want to specifically address today.

Some have dismissed the discussion paper as an apology for the failure of the Meech Lake Accord. No doubt the paper contains a clear implication that the Meech Lake Accord failed partly at least because of the three year time period allowed for approvals by provincial legislatures and suggests that the private First Ministers process used in the case of the Meech Lake Accord is implicitly approved in the 1982 amending formula. These items, however, are only a small part of the discussion paper. Read as whole, the discussion paper reasonably fairly sets out the background and origins of the current amending procedure, the results of its attempted usage, and suggestions for alternative approaches to constitutional amendment. It deserves the full and fair consideration of Canadians.

Yet, in one particular area, I think the paper is deficient. While there is extensive discussion about the difficulties experienced by including amendments that would require unanimity in the same resolution as amendments requiring the approval of only seven out of the ten provinces having fifty percent of the population, there is no discussion about the necessity or desirability of requiring unanimity for any amendment.

My personal view is that the requirement for unanimity should be eliminated entirely. Our amending formula is absurd insofar as it allows a single province to hold up important reforms. That absurdity would have been exacerbated under the Meech Lake Accord which would have extended the unanimity requirement to even more areas. No one province should be in a position, ever, to hold up the constitutional development of the nation. The general amending formula should be used for all amendments.

Just how ludicrous the requirement for unanimity is was obvious in the case of the Meech Lake Accord. The citizens and governments of Newfoundland and Manitoba were castigated by some as nation-wreckers, when acting in accord with the sincere conviction of the overwhelming majority of their people, they did not approve of the constitutional changes proposed in the Meech Lake Accord thereby denying the unanimity required. Yet, if the amendments in the Meech Lake Accord had required only the general amending formula, the actions of Manitoba and Newfoundland in refusing to approve would have been entirely acceptable. It is an absurdity to suggest that all provinces have a right to approve or refuse approval, as they in conscience see fit, but small provinces dare not withhold approval in cases where unanimity is required and the larger provinces have approved. I cannot think of a view more offensive to the democratic process than that.

While there is no justification for unanimity, I believe there is justification for a limited constitutional veto for Québec. Even while recognizing that our aboriginal people were the first citizens of this land, and that Canada is today, as it will be in the future, the beneficiary of contributions of people from a variety of cultural and ethnic backgrounds, we cannot ignore the historical fact that the Canadian nation was founded on the basis of an understanding between the French- and English-speaking peoples of the colonies in North America then administered by Britain, to build a nation encompassing their two cultures and using their two languages and two legal systems. If that understanding is to be honoured today, I believe that it can only be so honoured by a commitment to promote those two cultures, accommodate the two legal systems and build, in the decades ahead, a bilingual nation from coast to coast. If this is accepted as the constitutional precept I believe it to be, then it must also

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be appropriately reflected in Parliament and the functioning of our national institutions, and appropriately accommodated in our constitutional amending formula.

That accommodation can be achieved through the implementation, in a reformed Senate, of a mechanism of separate linguistic voting on constitutional changes affecting language, culture, and the civil law system. Such changes would require the approval of the majority of senators from Québec separately from, and in addition to, the approval of the majority of the senators from the other provinces collectively. This double majority principle could also be extended in appropriate cases to certain types of federal legislation specifically altering language or cultural matters. A reformed Senate and the linguistic voting divisions could be used as well to approve appointments to the Supreme Court of Canada with an effective veto over appointment of civil law judges given to Québec senators and over appointment of common law judges given collectively to the senators from the other provinces.

Other than amendments affecting culture, language, and the civil law system, I believe every amendment to the Constitution should become effective upon receiving the approval of the Senate, the House of Commons, and the legislatures of seven of the ten provinces having fifty percent of the population. Our constitutional development should never be held captive by the straightjacket of unanimity.

A matter that did receive a great deal of attention in the discussion paper was the question of the three-year time limit. It has been suggested that if there had been a one-year time limit the Meech Lake constitutional changes would have been approved. Many others would say that that is in itself the soundest possible argument against a shorter time limit. Those who blame the changes in provincial governments within the three-year period for the failure of the Meech Lake Accord avoid facing the real reason. The truth is that the impact and nature of the constitutional changes proposed in the Meech Lake Accord became known to, and sufficiently if not perfectly understood by, the Canadian people during those three years and that by the end of the period the proposed changes were totally unacceptable to an overwhelming majority of Canadians. One can only marvel at the insensitivity to democratic rights displayed by those who would suggest the time limit should be shortened in order to avoid a similar opportunity to assess and understand amendments in the future.

Whether we have unanimity for some amendments and the general amending formula for others or the general amending formula for all, proposed changes should be implemented if, as and when the appropriate level of approval is achieved. If any legislature thinks the proposal is outstanding for an undue length of time, it can take action to rescind its resolution of approval. Either the House of Commons or Senate could do likewise. The United States, the original federal state, has never had any difficulty with an amending formula without such a time limit. Thus, instead of being shortened, I would suggest the time limit should be eliminated. It serves no purpose.

The discussion paper invites consideration of replacing or supplementing what it describes as our existing "legislative model" with a "referendum model" or a "constituent assembly model", what I would call a "constitutional convention". I don't think there is any merit whatsoever in suggesting that our existing legislative procedure could be replaced with either a constitutional convention or a referendum procedure or even with both. The three methods have different functions. The legislative procedure provides a means of approving or rejecting a proposal: to issue a proclamation to amend the constitution. A referendum is a means of ascertaining the wishes of the people but it can also be used as a means of directly approving or rejecting approval for the issue of the proclamation. A constitutional convention is a gathering of representatives of the people, either appointed or elected, or a combination of both, whose mandate it is to consider all of the alternatives and put forward a specific proposal or alternative proposals for approval or rejection by either the legislatures or the people directly in a referendum.

A constitutional convention cannot be used for an approval process. Its function is to develop proposals or achieve a compromise that can subsequently be submitted either to the legislatures or a referendum for approval. While a referendum can be used to directly approve or reject a proposal, in my view it is unwise to eliminate the existing legislative process and replace it with a referendum process because a referendum is inappropriate to deal with routine or ordinary amendments where there is no real doubt or strong opposition. Instead, the legislative model should remain the basic constitutional amending process with a referendum or constitutional convention being used to supplement the normal legislative process where circumstances prevent that process from working properly.

A referendum might be called where there is great controversy as to whether or not a particular proposal should be accepted. A constitutional convention might be used where major issues might be involved and there is great divergence of opinion as to what proposal should be put to the legislatures or the people for approval.

To summarize, I suggest we should have an amending formula that would provide as follows:

1. A legislative procedure based on our present general amending formula which allows the Governor General to issue a proclamation implementing the proposed constitutional amendment upon the approval of the Senate and House of Commons and the legislatures of seven of the ten provinces having fifty percent of the population.

   No amendment should require unanimity and the three-year time limit should be removed.

   Amendments affecting culture, language, and the civil law

system, should be subject to a double majority in the Senate. Such amendments would require the approval of the majority of senators from Québec separately from and in addition to the approval of the majority of senators from the other provinces collectively. This would, of course, necessitate the elimination of the override of the Senate by the House of Commons provided for in section 47 or an exception to that override in the case of amendments requiring a double majority in Senate.

2. A referendum could be resorted to where substantial amendment was involved and there was great doubt or uncertainty as to the level of approval in the country. It could also be used where the necessary legislative approval had not been received after the passage of a substantial period of time or when any political, economic or social circumstance warranted. Depending on the circumstances a referendum could be called upon a resolution approved:

   (a) by the Senate and House of Commons plus any five legislatures, or

   (b) by the Senate and House of Commons plus the legislatures in provinces having in total fifty percent of the population, or

   (c) by seven of the ten legislatures having fifty percent of the population.

   In the case of a referendum, no matter how called, the Governor General should be required to issue the proclamation upon receiving the approval by referendum that would otherwise have been required by legislative action, namely, an overall majority plus a majority in each of seven of the ten provinces having fifty percent of the population.

3. A constitutional convention, or constituent assembly as the discussion paper calls it, should be convened when there are major colutitutional issues outstanding and there is no clear consensus as to how these issues should be addressed so as to attract the support of the majority of the people reasonably representative of the various parts of the country. In such circumstances it would be impossible to get legislative approval because there would be no agreement as to how the proposal or alterative proposals could be structured. It would be equally impossible to seek approval through a referendum for the same reason. In that kind of dilemma a constitutional convention should be able to be convened in the same manner as a referendum could be called.

A constitutional convention would provide the two things essential to achieve a legitimate and enduring compromise that could then be presented to Parliament and the Legislatures for entrenchment. Those two things are: first, a means of exchange and development of compromise between Québec and the other provinces of Canada and amongst Canadians generally and, second, the legitimacy that can only come from a compromise accepted after open public debate of issues, positions and proposals where the debaters will be aware of and feel the pressures of public opinion.

Neither the Spicer Commission nor the provincial commissions can provide those two essential elements. In fact, the provincial commissions not only will not provide an opportunity for such dialogue, their focus will tend to be on matters that are exclusively or predominantly of concern to the particular province.

Clearly the outstanding constitutional issues in Canada today are of such a magnitude that they cannot be dealt with on a simple amendment basis. As well as all of the major issues involved in responding to Québec's five proposals to address its legitimate concerns and the amending formula issues set out in the discussion paper, there is also the major question of Senate reform. When you add to this the fact that there are strong differences as to the basic concept of the nation as a federal state, and recognize that a level of acrimony does exist, it is difficult to imagine any other process that could be used to resolve such problems and achieve an acceptable compromise.

Our Constitution, at the moment, makes no provision for a constitutional convention but that should not be an impediment. The current amending procedures do not specify what process is to be pursued in arriving at the wording of constitutional amendments to be submitted to the legislatures and Parliament. It could just as well come from a constitutional convention as from a first ministers' conference. Any proposal coming out of the convention would still require the approval of Parliament and either seven or all ten legislatures to be effective. Even if a compromise were achieved, feelings are running so high and opinion so divided, a referendum may still be necessary in order to determine if the proposal would meet with an acceptable level of approval across the country.

One difficulty that might arise is in achieving agreement on the manner in which the convention should be constituted. Because it would have no jurisdiction to enact or implement a recommendation or decision, the voting of its members would only be a factor in determining the final recommendations it would put forward. An argument could be made for having equal representation for each province but, then again, an argument could clearly be made for having representation weighted to take into account population. Perhaps a fair solution might be to have one half of the membership divided equally amongst the provinces and the other half based on population. There would remain the question of whether they should be elected or appointed by the provincial governments. Perhaps they should be partly appointed and partly elected.

These issues should be able to be resolved. In the event that agreement could not be reached, the matter could be resolved by Parliament. Clearly, as matters now stand, Parliament would have jurisdiction to establish such a convention in any event.

Unless somebody has a better idea for a means to resolve our constitutional dilemma, the provincial and federal governments and Canadians generally had better start thinking fairly soon about a constitutional convention. Not only does it make sense in these difficult circumstances, I believe it may offer the only realistic way out of our present constitutional dilemma.

In our present political and constitutional disorder we are unable to give proper attention to, or provide appropriate remedies for, the many important economic and social problems facing the country. These problems will not stand idly by while we fiddle over constitutional issues. They will grow and continue to damage our economy and society until they are properly addressed.

Political leaders, federal and provincial, have a responsibility to find and use a forum to deal effectively with our constitutional problems. The country needs it and the people of Canada have a right to expect it.

The Honourable **Clyde K. Wells**, Premier of Newfoundland and Labrador. This is the text of a speech delivered to the Constitutional and International Law Section of the Northern Alberta Branch of the Canadian Bar Association and the Centre for Constitutional Studies, University of Alberta at the Law Centre on January 24, 1991.

S.C.C. APPOINTMENTS

The two most recent appointments to the Supreme Court of Canada were Justice William A. Stevenson and Justice Frank Iacobucci. Their appointments sparked considerable public interest in their personal histories as well as their judicial views on individual rights and liberties.

Justice Stevenson was appointed to the Court in October of 1990 to fill the seat left vacant by the retirement of Chief Justice Brian Dickson. Prior to his appointment to the Supreme Court, Justice Stevenson was a member of the Alberta Court of Appeal. Justice Stevenson has a long record of judicial service having also served on the District Court of Alberta and the Alberta Court of Queen's Bench. He was also a professor of law at the University of Alberta and one of the driving forces behind the Canadian Judicial College. Justice Stevenson is fifty-six years of age, is married with four children.

Justice Iacobucci was Chief Justice of the Federal Court of Appeal at the time of his appointment to the Supreme Court. He occupies the position on the Court previously filled by Justice Bertha Wilson. Prior to his appointment to the Federal Court Justice Iacobucci served as the Deputy Minister of Justice for Canada. Prior to entering Government service, he was Dean of Law at the University of Toronto.

The following lists of *Charter* cases decided by Justices Stevenson and Iacobucci were compiled by Mr. Brett Nash of the Charter of Rights Data Base at the University of Alberta. The Charter of Rights Data Base has been in operation since 1983 and is one of the principle research resources of the Centre for Constitutional Studies. It contains abstracts of over 3,000 reported and unreported cases involving the *Charter of Rights and Freedoms*. In addition to cases, the data base contains abstracts of selected periodicals and books dealing with the *Charter* and other rights documents. The Charter of Rights Data Base is available on QuickLaw.

(Charter cases follow on pages 74 & 75)