Constitution Act, 1980: Is It Constitutional?

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The history of constitutional amendment in Canada supports the inference that the residual power of amendment in the United Kingdom Parliament was intended to preserve the federal core of the constitution where no government within Canada could act unilaterally. The courts could legally enforce this intention through their interpretation of the amending power. Recent decisions interpreting the amending powers of the Canadian Parliament and the provincial legislatures rely on historical intention. For Canadian purposes there is good reason to apply the same process of judicial review to the amending power of the United Kingdom Parliament. The author suggests that the best way out of the present constitutional stalemate within Canada, if one indeed exists, would be by reference to the Canadian people in a referendum, rather than to the Canadian Parliament which is likely to be biased.

Lorsque l'on regarde l'histoire des modifications constitutionnelles au Canada, on en déduit indubitablement que le pouvoir résiduaire de modifier confié au Royaume-Uni, avait pour but la préservation du caractère fédéral de la constitution en vertu duquel aucun gouvernement au sein du Canada ne pouvait agir unilatéralement. Par interprétation, les tribunaux pourraient soutenir et faire valoir cette approche. De récentes décisions au Canada interprétant ce pouvoir de modifier en font d'ailleurs foi. Il existe des raisons valables susceptibles de justifier l'application, au Canada, du même processus de révision judiciaire que celui existant au Royaume-Uni, en ce qui concerne ce pouvoir de modifier. L'auteur suggère que la meilleure façon de sortir d'une telle impasse constitutionnelle, si elle existe, serait de recourir à une consultation auprès du peuple canadien par voie de référendum plutôt qu'au Parlement canadien où pourrait se déceler des préjugés.

INTRODUCTION

The Canadian central government's Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada [1] has turned the procedure for constitutional reform in Canada

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[1]Canada, Senate and House of Commons, 1980.

from one of the more troublesome academic questions of our constitutional law into one of the hottest political issues of the day. This article will first examine the contention that the central government's proposals are unconstitutional to see on what foundation, legal or otherwise, this contention is based. It will then consider the leading arguments in support of the constitutionality of these proposals, and finally, it will review the practical implications of a conclusion that these proposals are unconstitutional.

It is only fair to the reader to note that the writer began his research with a bias against the course of action being taken by the central government. This bias was not against the contents of the proposed constitutional amendments, but entirely against the process by which they are being achieved. As work has progressed, a line of reasoning strongly opposed to this process has emerged. Whether the initial bias has made it impossible to fairly consider the opposite side of the argument, only an impartial reader can determine. In the short run, it may be doubtful whether this article is likely to reach the attention of any such person.

THE ARGUMENT AGAINST THE CONSTITUTIONALITY OF THE PROPOSED AMENDMENTS

The proposal of the central government involves substantial reform of the Canadian constitution in two major areas, namely, the imposition of limits on the powers of the Canadian and provincial legislative bodies by creation of a Charter of Rights and Freedoms, and the establishment of a new procedure by which any future constitutional reform would have to be carried out.[2] The procedure the central government is pursuing in introducing these reforms is the adoption of a resolution by the Senate and House of Commons requesting such amendments and the passage of legislation by the United Kingdom Parliament. This action is being taken with the consent of two provincial Premiers,[3] and over the vehement objections of six others.[4] The other two provincial Premiers are offering respectively less than complete consent[5] and less than vehement objection.[6]

[2]While much has been made of two other features, the creation of a commitment toward equalization of opportunities among the regions of Canada, and the late addition of increased provincial power over natural resources, it seems a fair assessment that neither involves major reform. Moreover, it seems unlikely that either or both, if they were being proposed separately from the rest of the central government's constitutional package, would be the cause of any constitutional crisis.

[3]Premier Davis of Ontario and Premier Hatfield of New Brunswick.

[4]Premier Bennett of British Columbia, Premier Levesque of Quebec, Premier Lougheed of Alberta, Premier Lyon of Manitoba, Premier MacLean of Prince Edward Island, and Premier Peckford of Newfoundland and Labrador.

[5]Premier Blakeney of Saskatchewan.

[6]Premier Buchanan of Nova Scotia.

Although preceded by a twenty year period of intermittent federal-provincial discussion of constitutional reform, federal-provincial consultation most directly relevant to the present proposal took the form of three months of fairly intensive discussion among officials followed by a week-long conference of the Prime Minister and Premiers in the summer of 1980. The reforms being proposed by the central government were part of a larger group of proposals under discussion at that time. The exact contents of the actual reforms now being carried forward by the central government were decided upon only after this discussion ended, although the central government had indicated throughout the discussions that it was insistent upon the inclusion of a charter of rights and patriation of the amending procedure in any constitutional reform. It also had made known that it contemplated acting alone if no agreement could be reached with the Premiers.

In discussing the procedure being followed by the central government, a distinction must be recognized between legal constitutional requirements and non-legal constitutional requirements. Legal constitutional requirements are those that will be maintained by our courts under their recognized jurisdiction to review the actions of other agencies of government. Non-legal requirements are ones which the courts will not maintain, and which therefore can ultimately be upheld only by the political process.

The only absolutely clear requirement for constitutional amendment in Canada is that an amendment must be passed as a statute by one of three legislative bodies — the United Kingdom Parliament, the Canadian Parliament, or a provincial legislature. Which of these bodies is to pass a particular amendment depends on how the amendment is properly characterized. A provincial legislature can enact an amendment:

> of the Constitution of the Province, except as regards the Office of Lieutenant Governor.[7]

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[7]*The British North America Act,* 1867, 30 & 31 Vict., c. 3 (U.K.), s. 92(1). (For convenience of reference, this Act and its amendments will be cited in subsequent footnotes simply as the *B.N.A. Act,* except where, as in footnote 8, *infra,* the existence of an amendment is itself significant.)

A side issue which is not relevant to the current dispute, but which deserves mention in the interest of comprehensiveness, is whether the Office of Lieutenant Governor is a matter for constitutional amendment by the Canadian Parliament or the United Kingdom. This writer's view is that it falls clearly under the power of the Canadian Parliament over "Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces". *B.N.A. Act,* s. 91(29). The counter-argument is that because the Preamble of the *B.N.A. Act* indicates Canada is to have "a Constitution similar in Principle to that of the United Kingdom" and since residual power to amend the constitution at Confederation rested with the United Kingdom Parliament, not the Canadian Parliament, it could not have been intended to give the Canadian Parliament power to amend the Office of Lieutenant Governor. Moreover, this Office is a right or privilege "secured to the Legislature or the Government of a province" which is expressly excluded from the Canadian government's subsequently enacted amending power: *B.N.A. Act,* s. 91(1). Neither of these arguments, in the writer's view, outweighs the express words of s. 91(29), which are also consistent with the Lieutenant Governor's status as an appointee of the Canadian government and originally as a federal watch-dog over provincial legislation: *B.N.A. Act,* ss. 58, 59 & 90.

The Canadian Parliament can enact an amendment:

> of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.[8]

Any other amendment requires an Act of the United Kingdom Parliament.[9]

There is no question that the amendments to the Canadian constitution proposed by the central government require enactment by the United Kingdom Parliament under existing amendment procedures. The area of uncertainty is with respect to other procedural requirements for such amendments. Such requirements have never been fixed in any definitive legislative form. In 1871, the Canadian Parliament did resolve, but it did not legislate, that Parliamentary approval would be required of any request from the Canadian government to the United Kingdom for the enactment of constitutional amendments.[10] Some statutory support

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[8]*B.N.A. Act*, s. 91(1), as enacted by the *British North America (No. 2) Act*, 1949, 13 Geo. VI, c. 81 (U.K.). On its face, this provision would seem to reduce the residuum of amendment power to those matters which are listed as exceptions. In its recent decision in *Re: Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54, 30 N.R. 271, the Supreme Court of Canada held the Canadian government's amending power to be limited to matters of interest only to the federal government. It held power to substantially alter the constitution of the Canadian Senate was not within this power, even though it does not appear to fall under one of the enumerated exceptions. Since the stated purpose of the Canadian government when it sought the insertion of s. 91(1) in the *B.N.A. Act* was to enable it to deal with matters which concerned only the central government, and the exceptions were drafted accordingly, it is doubtful that there are many similar unenumerated exceptions. Moreover, in light of the Senate's nominally regional and provincial make-up, which was an important consideration to the Court (at 66-67 (S.C.R.), 281-283 (N.R.)), it could conceivably be brought under the exception of rights secured to the provinces, notwithstanding the skepticism one might have as to whether any province would want this right. For a critique of this case, noting in particular the irony that the objective of proposed Senate reform was to attempt to cure its past failure to act as an effective regional voice, see Hogg, P. W., "Constitutional Law — Federal Power to Amend the Constitution of Canada — Reform of the Senate", (1980) 58 *Can. Bar Rev.* 631, particularly at 639-642.

[9]This flows from the fact that the *B.N.A. Act*, which created Canada, is a statute of the United Kingdom. Because of this, the United Kingdom Parliament could also conceivably enact amendments which are within Canadian or provincial powers. While the United Kingdom Parliament might do so in a case where real doubt existed as to the validity of an amendment enacted within Canada, in other cases it would be likely to follow the precedent established in 1894 when the lower house in Nova Scotia's then bi-cameral legislature sought a United Kingdom statute to overcome the unwillingness of the upper house to be abolished. Upon receiving the second such request, the United Kingdom Government replied that it would not intervene since the provincial legislature had the necessary power: Forsey, E. A., "Provincial Requests for Amendments to the B.N.A. Act", (1966-67) 12 *McGill L.J.* 397, at 398.

[10]See Gérin-Lajoie, P., *Constitutional Amendment in Canada*. (Toronto: University of Toronto Press, 1950), at 55-57.

for this requirement, which has taken the form of either a joint resolution or concurrent resolutions from the Senate and House of Commons, can be found in the preambles to some of the resulting amendments which cite the existence of such resolutions.[11]

The most authoritative statement of such requirements is one made by the Canadian Minister of Justice, Guy Favreau, in a White Paper in 1965.[12] The Minister, after reviewing the history of Canadian constitutional amendment by the United Kingdom Parliament, stated:

> *The first general principle* that emerges in the foregoing resumé is that although an enactment by the United Kingdom is necessary to amend the British North America Act, such action is taken only upon formal request from Canada. No Act of the United Kingdom Parliament affecting Canada is therefore passed unless it is requested and consented to by Canada. Conversely, every amendment requested by Canada in the past has been enacted.
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> *The second general principle* is that the sanction of Parliament is required for a request to the British Parliament for an amendment to the British North America Act. This principle was established early in the history of Canada's constitutional amendments, and has not been violated since 1895. The procedure invariably is to seek amendments by a joint Address of the Canadian House of Commons and Senate to the Crown.
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> *The third general principle* is that no amendment to Canada's Constitution will be made by the British Parliament merely upon the request of a Canadian province. A number of attempts to secure such amendments have been made, but none has been successful. The first such attempt was made as early as 1868, by a province which was at that time dissatisfied with the terms of Confederation. This was followed by other attempts in 1869, 1874 and 1887. The British Government refused in all cases to act on provincial government representations on the grounds that it should not intervene in the affairs of Canada except at the request of the federal government representing all of Canada.
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> *The fourth general principle* is that the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definition.

These principles have, in fact, dominated thinking about the amendment process for the last three decades. They were convincingly supported at the beginning of this period by the leading scholarly work on Canada's amendment process[13] and by the central government's statements of position at the time that it obtained its own amending power by the enactment of section 91(1) of the *B.N.A. Act.*[14] They have

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[11]See, for example, *British North America Act,* 1964, 12-13 Eliz. II, c. 73 (U.K.).

[12]Favreau, G., *The Amendment of the Constitution of Canada.* (Ottawa: Queen's Printer, 1965), at 15.

[13]Gérin-Lajoie, *supra,* footnote 10, at 135-203.

[14]See Favreau, *supra,* footnote 12, at 23-26, and Gérin-Lajoie, *supra,* footnote 10, at xxxv-xl.

been followed in practice throughout this period in the handful of amendments that have actually been made and in the approach to constitutional reform during the short-lived 1950 discussions and the protracted discussions of the 1960's and 1970's.

While in earlier periods the dominant view may have been that involvement of the provinces was entirely at the discretion of the federal government,[15] the last three decades represent the contemporary period in Canadian constitutional development. In 1949, not only did the Canadian Parliament acquire the power to actually make limited amendments to the constitution of Canada without involving the United Kingdom Parliament, but also the Canadian Supreme Court acquired final jurisdiction free from a right of appeal to the Judicial Committee of the Privy Council.[16] These two steps completed the development of Canadian independence from United Kingdom institutions (apart from the figure-head role of the Crown) insofar as such independence could be achieved in the absence of some new arrangement for constitutional amendments jointly concerning the central and provincial governments.

In light of the experience since 1949, it seems fair to say that, at least in the non-legal sense, the proper procedure for constitutional amendment in Canada has been as set out by the Minister of Justice in 1965. On this basis, the central government's present course of action is unconstitutional, at least in the non-legal sense. It is so because, contrary to the "fourth general principle", there is no agreement with at least

[15]These views are reviewed by Gérin-Lajoie, *supra*, footnote 10, at 204-217. Similar views have been expressed in some subsequent writings, for example, B. Laskin, "Amendment of the Constitution", (1963) 15 *U. Toronto L.J.* 190, at 191, and E. R. Alexander, "A Constitutional Strait Jacket for Canada", (1965) 43 *Can. Bar Rev.* 262, at 264-268. Alexander's article provides little more than his personal preference for the earlier view over that of Gérin-Lajoie. While Laskin's opinion could be of particular significance in light of the fact that he is now Chief Justice of Canada, in this article he expressed little more than a passing comment. He described the amending procedure as "legally flexible". This was written prior to the 1965 White Paper, *supra*, footnote 12. The White Paper constituted the first clear articulation of the amending procedure. Laskin's comment merely reflects the uncertainty over that procedure which still existed when he wrote. The opinion of the Minister of Justice, formally expressed in the White Paper, should carry more weight. See also the strongly expressed view supporting the requirement of provincial consent in W. R. Lederman, "The Progress of Constitutional Amendment for Canada", (1966-67) 12 *McGill L.J.* 371, at 376-381. Significantly this view was expressed after the procedure had been articulated by the 1965 White Paper.

A more recent contrary view is that expressed in M. Lalonde and R. Basford, *The Canadian Constitution and Constitutional Amendment* (Ottawa: Federal Provincial Relations Office, 1978), at 13. In a section entitled "Observations Based on Past Practice", this paper makes four "observations" which closely parallel the four "principles" of the 1965 White Paper. There is one important difference, however. The 1978 paper states that the central government was "not constitutionally obliged to do so" when it sought provincial consent to amendments involving the distribution of powers. Although it might be contended that this paper, under the co-authorship of the Minister of Justice, should be given weight similar to the 1965 White Paper, it is submitted that this cannot be the case. The 1978 paper was clearly a self-serving position paper of the central government prepared in support of another proposal for unilateral action, the *Constitutional Amendment Bill*, Canada, 1978, Bill C-60. Moreover, the *Constitutional Amendment Bill* itself recognized that constitutional amendments must be dealt with in accordance with "accepted usage" in the absence of any express procedure in the Constitution itself: s. 125.

[16]*Supreme Court Act*, R.S.C. 1970, c. S-19, s. 54. This was enacted by *An Act to amend the Supreme Court Act*, S.C. 1949 (2d Sess.), c. 37, s. 3.

seven and possibly eight of the provinces. It is even arguable that there was insufficient prior consultation with most of the provinces since the discussions which took place occurred without knowledge of what the central government proposed to introduce by way of constitutional amendment. The process of negotiation over a variety of options, some rather far-reaching, is not the same thing as a process of consultation on relatively limited and specific proposals. While little information has been made public about consultations which may have taken place after the central government announced its intention to proceed unilaterally, it seems doubtful that there has been much real consultation, particularly in the case of those provinces which have announced strong opposition.

The tradition of constitutional change in Canada is evolutionary, not revolutionary. Even if the principles in the 1965 White Paper are purely non-legal, and therefore subject to change without any formal action being necessary, the change in procedure announced by the Prime Minister was radical. This provides further grounds for labelling the intent to proceed unilaterally as unconstitutional in the non-legal sense.

This leaves the question of whether the central government's proposal is also unconstitutional in the legal sense. Its radical nature is obviously of no relevance to this question, but the violation of the principles of the 1965 White Paper may be.

A number of factors can be advanced in support of the proposition that these principles are legally binding in Canada. At the level of fundamental policy is the federal structure of Canada. It has been recognized by our courts since the decision in *Hodge* v. *The Queen*[17] that the central and provincial governments are each, within their constitutional powers, sovereign and supreme. It is quite inconsistent with this concept that in relation to the constitution which determines what those powers are the central government should have the unilateral power to make fundamental changes. It is equally in violation of this concept that the United Kingdom Parliament in exercising a formal amending power at Canada's request should make fundamental changes in response to a unilateral initiative of the central government.

In two recent cases involving the attempted or proposed exercise of the amendment powers of the provinces and the central government respectively, the courts have drawn upon Canadian constitutional history to determine the real intent of the constitution.[18] A similar examination of the amending powers as a whole strongly supports the conclusion that

[17](1883), 9 A.C. 117, at 132 (P.C.).

[18]*Att.-Gen. Quebec* v. *Blaikie*, [1979] 2 S.C.R. 1016, 101 D.L.R. (3d) 394; at 1017 (S.C.R.), 401 (D.L.R.), adopting the reasons on appeal and at trial in Quebec as to history: [1978] C.A. 351, 95 D.L.R. (3d) 42; affirming [1978] C.S. 37, 85 D.L.R. (3d) 252; *Re: Authority of Parliament in Relation to the Upper House*, *supra*, footnote 8, at 60-69 (S.C.R.), 276-285 (N.R.).

the power remaining today in the United Kingdom Parliament was intended for exercise only with the mutual consent of the central and provincial governments. The passage of the *Statute of Westminster,* 1931,[19] as well the *British North America Act,* 1867 and the *British North America (No. 2) Act,* 1949 mark major stages in this history.

During the period from 1867 to 1931, Canada was evolving from a colony to an independent nation. At the beginning of this stage there was a real possibility of occasional intervention by the United Kingdom in Canadian affairs. When the power to revise the federal constitution was left in the hands of the United Kingdom Parliament, and at the same time the provinces were granted their own powers of constitutional amendment, it was surely conceived that the preservation of the basic federal structure was to be ensured by the United Kingdom Parliament. If it had been intended that the Canadian Parliament was to effectively control constitutional amendment, it would have been given amendment powers.

During this period the actual history of involvement of the United Kingdom government indicates that, although it pursued a policy of non-intervention in Canadian constitutional affairs, it did not renounce the possibility of such intervention. Indeed it exercised an interventionist role in 1907 when it revised an amendment proposal submitted by the central government following a provincial objection so that, arguably at least, it eliminated the feature most objectionable to the province.[20]

United Kingdom intervention in Canadian affairs became unacceptable for general purposes as the attainment of full political independence from the United Kingdom came closer. Under the *Statute of Westminster,* the legal framework for such intervention was abolished. However, the *Statute* was not to apply to the amendment of the *British North America Act.*[21] This provision was adopted with the unanimous consent of the provinces. It cannot have been intended to transfer any new power over amendments to the central government; rather, on its face it preserves the legal power of intervention by the United Kingdom government which had previously existed. It was realized, of course, that the likelihood of such intervention, should it be desired to resolve some future Canadian constitutional crisis, had become extremely remote. This placed a certain urgency on the development of a Canadian mechanism for constitutional amendment and efforts to achieve agreement on such a mechanism ensued in the 1930's.

Following the Second World War, Canada moved to the contemporary stage of the history of constitutional amendment power

[19]22 Geo. V, c. 4 (U.K.).

[20]See Gérin-Lajoie, *supra,* footnote 10, at 74-83.

[21]*Supra,* footnote 19, s. 7(1).

with the adoption of the central government's amending power. This gave the central government, for the first time, the power to pass amendments without involvement by the United Kingdom Parliament. Again it could hardly have been intended that amendments not covered by this provision, but still requiring United Kingdom involvement, should be enacted upon the sole initiative of the central government. Otherwise, power to make such amendments would have been included directly in the central government's amending power. On the contrary, the limited scope of this amending power confirms the intention that amendments concerning the provinces require provincial agreement since it eliminated United Kingdom involvement in those matters where provincial consent is not required, that is, up to the limit of the central government's power to amend the constitution on its unilateral initiative.[22]

This constitutional history underlies the legislative provisions presently governing the process of constitutional reform in Canada and it is enforceable by the courts in the process of interpreting and applying these provisions. Section 7(1) of the *Statute of Westminster,* preserving the power of the United Kingdom Parliament to intervene in Canadian affairs, was intended to protect the integrity of the federal system. Section 91(1) of the *British North America Act,* by conferring power on the Canadian Parliament to unilaterally amend the constitution insofar as previously it could be amended on the unilateral initiative of the central government, precludes other unilateral amendments, whether by the Canadian Parliament acting alone or by the United Kingdom Parliament acting on the unilateral initiative of the Canadian Parliament.

Even if the relevant legislative provisions were not subject to this interpretation, the constitutional conventions outlined in the 1965 White Paper could be judicially enforceable in Canada. The view that conventions are not legally enforceable derives from the constitutional law of the United Kingdom. Judicial review of the conduct of other agencies of government plays a fundamentally different role in the Canadian constitution. For example, judicial review of the Acts of

[22]It may be noted that, in the interval between the *Statute of Westminster,* 1931, and the enactment of section 91(1) of the *B.N.A. Act,* there occurred the one clear instance when the United Kingdom Parliament passed an amendment over the actual objection of a province. Quebec objected in 1943 to an amendment to defer redistribution of Parliament to the end of the War: see Gérin-Lajoie, *supra,* footnote 10, at 109-117. Although the Prime Minister, Mr. King, made some statements to the effect that constitutional amendments by the United Kingdom Parliament should be automatically adopted upon the request of the Canadian Parliament, the principal theme of the central government, and in particular of the Minister of Justice, Mr. St.-Laurent, was that this amendment was purely a matter of concern to the central government. While some statements in the United Kingdom Parliament also support the view that it should not inquire into possible provincial objections, it appears that there was no real canvass of this issue. Although, in light of the decision in *Re: Authority of Parliament in Relation to the Upper House, supra,* footnote 8, this amendment was close to the borderline of provincial concern, redistribution of seats in Parliament now seems clearly accepted as a matter for amendment under s. 91(1) of the *B.N.A. Act:* see, for example, *British North America Act (No. 2),* 1974, as enacted by the *Representation Act,* 1974, S.C. 1974-75-76, c. 13, ss. 2-3. This confirms that it was a matter of exclusive concern to the central government and that provincial objections were irrelevant.

Parliament is virtually unknown in the United Kingdom constitution because of parliamentary supremacy. Such judicial review is a keystone of the Canadian constitution even though it is recognized that the central and provincial legislatures share parliamentary supremacy. "Share" is the crucial word here for it is the fact of shared supremacy which necessitates a constitutional arbiter and hence judicial review. It is this same fact of sharing which gives rise to the constitutional convention of requiring provincial consultation and agreement to constitutional amendments affecting the provinces. The central government's present violation of this convention renders judicial intervention equally necessitous.

These conventions were judicially recognized in *Re: Authority of Parliament in Relation to the Upper House.*[23] This is an important step toward judicial enforcement of these conventions. Indeed, in interpreting the federal power of amendment as limited to matters of interest to the federal government only, the Court was effectively enforcing the very convention in issue here, namely, that amendments affecting federal-provincial relationships require prior consultation and agreement with the provinces.

THE CASE SUPPORTING THE FEDERAL PROPOSAL

The principal arguments available to the central government in support of the legality of its course of action would appear to be, first, there has been substantial compliance with conventional requirements; second, these requirements are not legally enforceable in any event; and third, even if they are legally enforceable, the passage of an Act of the United Kingdom Parliament will cure any legal defect.

It is not clear whether the substantial compliance theme which appears in the central government's position in support of its proposals[24] is intended purely to gain political support, or might actually form the basis of a legal argument. Elements of this theme are that the amendment formula was essentially agreed to by the provinces during the round of discussions which terminated in Victoria in 1971, the items on regional disparity and provincial resource rights were areas of accord in the 1980 constitutional discussions, the provisions on language in education conform to positions taken by the Premiers at their Conferences in 1977 and 1978, and the rest of the Charter of Rights does not affect the balance of power between the central and provincial governments which is presumably the principal legitimate concern of federalism.

[23]*Supra*, footnote 8, at 63-64 (S.C.R.), 279-80 (N.R.). It should be noted that no similar honour is paid to the crucially differing observations on amending procedures in the central government's 1978 paper: *supra*, footnote 15.

[24]See, for example, Chrétien, J., "Constitutional Reform, Notes for a Speech", House of Commons, October 6, 1980.

In the first place, actual practice favours the view that only full compliance with the provincial consent requirement is acceptable. For example, under the conditions of economic depression in the 1930's, the central government delayed more than two years in order to obtain provincial consent after it had decided to seek a constitutional amendment permitting it to enact valid unemployment insurance legislation.[25]

Even if substantial compliance is sufficient, the compliance has been far from substantial. The 1971 amending formula was only tentatively approved at Victoria, and the Quebec Premier later exercised the right, which he had reserved, to refuse consent. The Premiers' 1977 and 1978 agreements on language in education were reached in the context of an understanding that education was an area of exclusive provincial concern which, to some Premiers at least, meant that this should be a matter of provincial government policy and not one of constitutional mandate. A constitutionally entrenched Charter of Rights has the potential for reducing provincial legislative power. Whether power is shifted to the central government or simply subtracted from the provinces, it is nonetheless a diminution of provincial competence.

There is further potential for shifting the balance of power under the Charter, even though it purports only to subtract power from government. This is because the courts, whether or not expressly directed as under the proposed Charter,[26] are likely to uphold legislation which apparently infringes fundamental rights if they find some countervailing interest outweighing the infringement in question. Under the double aspect approach to central and provincial powers in Canada, there are many areas where the respective powers effectively overlap. However, the double aspect arises because the underlying central and provincial interests are distinct. It is possible, if not indeed likely, that in a particular area legislation based on one interest will survive a Charter of Rights challenge, while that based on the other interest will not. The practical result could be to exclude one level of government or the other from an area in which both formerly had power, that is, a shift in the balance of power.

The argument has been set out above for legal enforcement of the convention of provincial consultation and agreement to constitutional amendments such as those proposed. Apart from the possibility that this is what the Supreme Court of Canada was really doing in *Re: Authority of Parliament in Relation to the Upper House,*[27] there is as yet no legal precedent for judicial enforcement of constitutional conventions in

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[25]See Gérin-Lajoie, *supra,* footnote 10, at 105-107.

[26]*Constitution Act,* 1980, s. 1, Schedule B of Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada, *supra,* footnote 1.

[27]*Supra,* footnote 8.

Canada. The central government's argument would be that such a precedent should not be set.

Presumably one of the main objections to setting such a precedent is that conventions should be flexible to allow for appropriate change, and that after fifty years of constitutional stalemate change is appropriate. In response, it is submitted that one of the fundamental characteristics of a constitution, particularly in a federal system, is that it contains provisions that are relatively immutable. Therefore, the procedure for change ought to be difficult. The fact that the procedure has made change too difficult is not a valid argument for changing it. Judicial enforcement is the ultimate guarantee of the constitution against expediency.

Perhaps the weakest point in the argument for judicial enforcement of the convention, and therefore a point which the central government's case is likely to emphsize, is that the convention does not apparently require anything more in the way of provincial consent than the word of the Premier. Recent decisions involving the anti-inflation program have emphasized the necessity of legislative action to support changes in the law.[28] Constitutional reform fundamentally changes the law. The fact that convention requires no more than the word of the Premier suggests there is no real legal requirement of provincial consent. Only the provincial legislature could properly give any required provincial consent on such a matter.

The answer to this argument is that the anti-inflation cases only assert the necessity of some valid legislative authority for a change in the law. Since the federal legislation did not provide authority for changes being effected in provincial law, provincial legislation was necessary. In the case of constitutional amendment, legislation is also necessary, but the only appropriate legislative body is the United Kingdom Parliament.

While legislative involvement in the form of a Parliamentary resolution is required with respect to the central government's request for an amendment, this is because the Canadian Parliament itself has imposed such a requirement, as it is entitled to do under the principles of responsible government. Provincial legislatures are free to impose similar limitations on the provincial executive. In the absence of any such limitations, however, the lack of provincial legislative involvement has no legal significance because the only legislative action which constitutionally is either necessary for or capable of amending the constitution as proposed is that of the United Kingdom Parliament. This does not mean that the courts should not recognize or enforce an existing requirement, whether that of the Canadian Parliament or a provincial legislature, that amendment should be made only upon its

[28] *Reference re Anti-Inflation Act* [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, at 427-436 (S.C.R.), 499-506 (D.L.R.); *Re Manitoba Government Employees Association and Manitoba*, [1978] 1 S.C.R. 1123, 79 D.L.R. (3d) 1, at 1136-1146 (S.C.R.), 10-18 (D.L.R.).

resolution. It merely means that it is not the concern of the courts where such requirements do not exist. Since it has no necessary legislative role in the matter, it is up to the provincial legislature whether it wishes to leave the expression of consent or denial of consent to the Premier and Cabinet who presumably have its confidence.

Similarly there is no significance to the lack of formality in the way in which provincial agreement has been expressed in the past. This agreement is essentially a political act, and not an act of state. Informality may pose certain evidentiary problems for a court being asked to review the validity of a constitutional amendment, but the substance of the issue is too important to justify the courts turning a blind-eye merely because occasionally the picture may be a bit blurred. The political nature of the provinces' agreement does not mean that the courts are asked to perform a political act by enforcing the constitutional convention since the role of the courts is purely one of finding the facts, whether or not there was agreement, and not one of judging the motivation.

The legal force of passage by the United Kingdom Parliament is probably the strongest branch of the central government's argument. It seems likely that this is the main explanation for the central government's haste in the matter. If a judicial ruling that the central government was acting unconstitutionally were obtained prior to passage by the United Kingdom Parliament, normal respect for the law would likely halt further action by the central government. It would also provide the United Kingdom Parliament with an excellent excuse for taking no action in what, for it, is a no-win situation since it is going to be accused of interference in Canadian affairs whether it passes or rejects the proposed constitutional reform. However, if passage can be obtained before a definitive judicial ruling is made, there is a good chance that the historically unreviewable supremacy of the United Kingdom Parliament will effect a *fait accompli* that the courts will be compelled to accept.

While the United Kingdom Parliament is recognized as being above judicial review within its own constitution, it is submitted that it should not be so viewed in its Canadian constitutional context. Judicial review of legislation is an accepted part of the Canadian constitution. There is no reason why such review should not apply to the United Kingdom Parliament when it acts as a constitutional legislature for Canada, as much as to the central and provincial legislatures when they are so acting. Canada, since the abolition of appeals to the Judicial Committee of the Privy Council, has a legal system independent of the United Kingdom. Thus, the fact that the United Kingdom Parliament is absolutely supreme as a matter of United Kingdom law does not mean that it must be absolutely supreme as a matter of Canadian law.

The implications of a contrary view are inimical to the very concept of Canadian independence. If Canadian law recognizes the absolute supremacy of United Kingdom Parliament, then it would have to recognize a statute of that Parliament which reduced or even abolished Canadian independence, particularly since our independence rests only upon United Kingdom statutes in the first place. Even if the United Kingdom Parliament is unlikely to actually attempt this, the foundations of Canadian independence cannot rest purely on this basis. The juristic basis of our independence must surely be that any legislative attempt by the United Kingdom to reassert such influence in Canadian affairs would be *ultra vires* where Canadian law is concerned. In other words, such legislation would fall under the powers of judicial review held by our courts.

It does not follow, of course, that the United Kingdom Parliament has lost its absolute supremacy insofar as it deals with matters such as constitutional reform where it does retain power over Canada. However, if judicial review is conceivable in the one case, then it is conceivable in the other. The obligation of the courts to uphold the integrity of the federal system is parallel to the obligation to uphold Canadian independence.

THE PRACTICAL CONSEQUENCES OF HOLDING THE PROPOSED AMENDMENTS UNCONSTITUTIONAL

A practical consideration which is likely to bear upon a court's decision is the possible constitutional dilemma that might face Canada if the United Kingdom Parliament enacted the central government's proposed amendments and the courts subsequently held them to be legally unconstitutional. Such a ruling would mean that the Canadian constitution would remain as it was prior to these amendments. In other words, the residual amending power would remain in the hands of the United Kingdom Parliament to be exercised on the request of the central government after consultation and agreement with the provinces.

From the United Kingdom perspective, however, there would be good reason for refusing to exercise this power in the future. Since the United Kingdom constitution does not have judicial review of Parliamentary legislation, the amendments would be legally valid as a matter of the law of the United Kingdom. The possibility of such different legal positions is one of the consequences of the separation of the judicial system of Canada from that of the United Kingdom in 1949, and provides an illustration of the rationale for the separation.[29] In light of this, and also in view of the political inconvenience that power over the Canadian constitution may entail, as demonstrated by the current amendment experience, the United Kingdom government might well

[29]*Supra*, footnote 16.

decline to exercise any further role in amending the Canadian constitution. While a precedent does exist for a resumption of colonial authority that had been legally relinquished, that is, the case of Newfoundland which surrendered its independent status as a result of financial disaster during the 1930's, it may be doubted whether the United Kingdom would wish to follow this precedent in the Canadian case. It should be remembered that in the 1930's the United Kingdom was still a major colonial power and Newfoundland requested a complete return to colonial status under that power.

Further involvement in relatively limited and formal role in the Canadian constitutional amendment process is likely to be singularly unattractive to the United Kingdom in the future. It is true that there would probably be no further problems with situations in which the central and provincial governments were opposed since, under the legal ruling suggested above, there would be no point in taking amendments to the United Kingdom without agreement between these governments. However, this would not necessarily prevent other interested parties from attempting to lobby in the United Kingdom, as has occurred in the current case.

If the proposed amendments are invalid under Canadian law, but valid under United Kingdom law, a question which arises is whether the Canadian constitution might be legally caught in a no-person's land, regardless of whether the United Kingdom government might be willing to act from the political perspective. Is it possible that the steps which would be necessary under United Kingdom law to get the United Kingdom Parliament to once again amend the Canadian constitution would be steps that, within Canada, it would be constitutionally impossible for the central and provincial governments to perform? This could happen if legislation is required under the amending formula for future amendments. If the proposed amendment package is valid under United Kingdom law, as it probably is, the United Kingdom Parliament could consider itself obliged not to intervene further in Canadian constitutional affairs unless the residual amending power were returned to it by a constitutional amendment adopted in accordance with the procedure prescribed by the proposed *Constitution Act.*[30] However, if the proposed amendment package is invalid under Canadian law, as is submitted, any legislation in Canada attempting to return the power to amend the constitution to the United Kingdom Parliament would be invalid because under the previously and still existing Canadian constitution such matters are beyond the power of anyone in Canada. To break out of this conundrum, either the United Kingdom Parliament or Canadian legislative authorities would have to act in deliberate disregard of what their legal systems regard as lawful.

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[30]*Supra*, footnote 26, s. 41(1).

This problem would not arise under the proposed amending formula at the point of initial action by either the central Parliament or the provincial legislatures. In each case only resolutions would be required. Since resolutions are not laws, there should be no constitutional objection to a resolution on any subject, regardless of whether or not it fell within the legislative powers of the legislature.

The problem would arise, however, at the stage when any future amendments received legislative effect. This would occur upon the proclamation of an amendment by the Governor-General. Under the present constitution the Governor-General has no legislative power whatsoever based on mere Parliamentary resolution, much less a power to amend the constitution. Thus, any such proclamation would be improper in Canada if the current proposals are unconstitutional. Unless the Governor-General were to deliberately violate constitutional law as recognized in Canada, the power to make further amendments could not formally be relinquished back to the United Kingdom. The United Kingdom Parliament, on the other hand, could be of the view that under its law it would be acting illegally to again intervene in the Canadian constitution without such relinquishment.

If there is any legal solution to this conundrum, apart from simply accepting for Canadian purposes the validity of the proposed amendments once enacted by the United Kingdom Parliament, it revolves around the issue of whether the United Kingdom Parliament is bound by "manner and form" requirements,[31] and whether it should adopt the same approach to conventional "manner and form" requirements as to statutory ones. The requirement of provincial agreement under the present amendment procedure and the requirement of a certain combination of central and provincial resolutions followed by a Proclamation by the Governor-General under the proposed amending procedure are both "manner and form" requirements from the perspective of the United Kingdom Parliament. If it is bound by both, the United Kingdom Parliament would have to accept a determination that the proposed amendments are invalid, and this would leave it free to act again. If it is bound by neither requirement, the United Kingdom Parliament would also be legally free to ignore the provisions of the *Constitution Act,* 1980 and to act again.

There is a real danger, however, that the legal view prevailing in the United Kingdom would be that the requirement of provincial agreement is not binding, but that the requirements of the proposed amending formula would be, once the latter had been enacted by the United Kingdom Parliament. Canadian courts have an obligation to the federal system, and no strong competing concern apart from legal formalism.

[31]For the view that "manner and form" requirements are binding even on the United Kingdom Parliament, see Tarnopolsky, W. S., *The Canadian Bill of Rights,* 2d rev. ed. (Toronto: McClelland and Stewart, 1975), at 92-112.

This could, and in the writer's view should, induce them to enforce the provincial agreement requirement in respect of amendments concerning the provinces. However, the United Kingdom government must consider the impact of a precedent in relation to its legal relations with other colonies and former colonies and as well in relation to its domestic Parliamentary system. If it accepts the enforceability of non-statutory "manner and form" requirements in this case, it may be called upon to do the same with respect to long observed practices in the United Kingdom Parliament. For its own purposes, the principle of supremacy of Parliament could be seen as outweighing any non-statutory requirements. On the other hand, enforcement of statutory requirements, such as those in the proposed amending formula, may actually be supportive of the concept of supremacy of Parliament. Thus, the tendency may be in favour of such enforcement.

One way the courts might avoid this dilemma would be to treat the passage of the central government's proposals by the United Kingdom Parliament as legally effective only on a conditional basis. It could be regarded as binding on the central government and the United Kingdom Parliament, but suspended in its operation until the appropriate steps were taken within Canada to give it effect by obtaining the requisite provincial consents. Since the requirement is agreement of all the provinces, this suspension would continue until such agreement had been achieved.[32]

Apart from the possibility of such a dilemma, the likelihood is that, at most, the United Kingdom might be prevailed upon to act one more time if the current proposals are held invalid by the Canadian courts. It seems almost certain they would insist that all legal objections be resolved in advance. This would mean that, in the meantime, our constitution would literally be in a strait-jacket. Up until the present, while overall agreement on general constitutional revision has been the goal, it was always possible that agreement on a particular item might be developed on an urgent basis. For example, this would have been a conceivable recourse to avoid questions over the validity of the *Anti-Inflation Act*.[33] The United Kingdom Parliament would almost certainly have responded readily in such a situation. It is unlikely to do so in the future if it passes the central government's proposals and this is held invalid by Canadian courts.

If the United Kingdom Parliament were to refuse altogether to act again in the future, the only possible ways out of the impasse would be

[32]It is interesting to note that the central government's previous proposal to proceed unilaterally with constitutional reform would have operated on a very similar basis, that is, immediate enabling legislation which, insofar as it concerned the provinces, would only have come into force and actually altered the constitution when the provinces took corresponding action: *Constitutional Amendment Bill, supra*, footnote 15, s. 125. However, a major difference is that under Bill C-60 the Charter of Rights would have come into effect immediately upon adoption on a province by province basis: s. 131.

[33]S.C. 1974-75-76, c. 75.

either subsequent provincial agreement to the existing amendments which the courts are likely realistically to accept or some other legal *coup d'état* by the central and provincial governments in concert which again the courts are likely realistically to accept. It is submitted that any such possibility, since it would preserve the federal principle, is preferable to judicial acceptance of the central government's unilateral approach.

AN OPTION FOR ESCAPING CONSTITUTIONAL IMPASSE

It must be recognized that there is some validity to the central government's concern that constitutional change has become imperative. There is also some basis for the feeling that at some stage continued negotiation can become fruitless. Even if the central government's assessment that negotiations were hopelessly deadlocked in 1980 was premature, if not indeed part of a calculated strategy by the central government, past experience has shown that at least one out of ten provinces is likely to disagree with any given proposal. It would be unfair to close, after such strong criticism of the central government's proposed impasse resolution, without offering some alternative.

In the event there is an unavoidable deadlock between the central government and the provinces, there would appear to be only one appropriate arbiter on an issue such as this. Since the issue involves substantial reform of the constitution, that arbiter is not the courts whose reforming role is interstitial. Neither is it the United Kingdom Parliament at this stage in our history.

The only possible arbiter is the Canadian people. The people cannot act in this matter through their representatives in Parliament, because those representatives are too involved with one side of the dispute: the central government. The only solution would seem to be a national referendum with the result based on provincial majorities so that no province can later protest that its people did not consent. While legally a referendum may be as questionable as the central government's unilateral action, in real terms it should resolve most legitimate doubts about the acceptability of the proposed constitutional reform. Such referenda are widely used as a means of constitutional reform. Such an approach to constitutional stalemate would seem far preferable to the course of action taken by the central government.