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THE AMENDING FORMULA AND THE AGENDA FOR CHANGE

J. Peter Meekison

The recently released Allaire report contains a brief mention of a new amending formula. It says,

The new agreement will include a new amending formula that will stipulate that any constitutional change will require the approval of a substantial majority of provinces representing at least 50 per cent of the population of Canada, Québec necessarily being included.

The proposed formula is similar to the existing one with one very important difference. Québec has to agree to amendments. Therefore, Québec must have a veto. This one statement captures the central dilemma of the amending process in Canada — the Québec veto. Throughout our long search for an amending formula, this principle or some variant thereof was uppermost in people's minds.

Once this reality has been identified, then a second dimension very quickly materializes, namely the question of provincial equality. If Québec or any province has a veto, then, within a federal system, all constituent units, regardless of their population, should be treated alike. Combining the principle of provincial equality and the principle of a Québec veto inevitably leads to a requirement for unanimity. It is the only way that both principles can be fully satisfied.

If one looks back over the various efforts to find an amending formula, it soon becomes clear that those confronting this task began to compartmentalize the constitution in an effort to limit the unanimity list. Agreement on this approach was not too difficult to achieve; the problem was identifying what to include under unanimity and under a general formula. The classic example of this approach is the Fulton-Favreau formula where the division of powers was subject to provincial unanimity while other matters could be amended by two-thirds of the provinces representing 50 per cent of the population. The framers of the 1971 Victoria formula overcame the problem by adopting a regional approach to constitutional amendment. While giving Québec and Ontario a veto, the other eight provinces were put in a less favourable position which led,

ultimately, to the rejection of this approach by the provinces of Alberta and British Columbia.

The 1982 amending formula came well after Confederation and after a number of amendments had been approved. By coming after the fact, governments had some notion of, and experience with, the Constitution. In many respects, the amending formula became seen as a defensive mechanism, for example, how to make change difficult or protective of the status quo (e.g., language provisions and natural resources, etc.) as opposed to how to facilitate change. It also meant that in its design it became far more detailed than one finds in other federal constitutions. As a result, the Constitution was compartmentalized with a different threshold for each part.

It should also be remembered that the amending formula was developed as part of a comprehensive constitutional review. In other words, it was not the only issue under consideration, although, it would be fair to say that the search for an amending formula was the "*raison d'être*" of constitutional reform for a number of years. Several phrases contained within the amending formula reflect this fact, in particular the two references to the Supreme Court, a phrase not found elsewhere in the Constitution.

(continued on page 94)

TABLE OF CONTENTS

The Amending Formula 93

MENTAL HEALTH AND THE CHARTER

► Insanity and the Constitution 99

► Indeterminate Custody after *Swain* 103

► Psychiatric Treatment and the
Charter 106

The European Social Charter 107

Expression on Public Property 109

However, while developed as part of a package of constitutional changes in 1980, in the final analysis, only a few matters found their way into the *Constitution Act, 1982*: the principal ones being the *Charter*, the amending formula, section 92A on natural resources, and equalization. The remainder was and remains unfinished business.

What was the basic design of the amending formula? The general formula is contained in section 38 of the *Constitution Act, 1982*. Under this formula, amendments could be made to the Constitution by Parliament and 2/3 of the provinces representing 50 per cent of the population. However — and this next part is the key to understanding the formula — if an

amendment were one which “derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province” a province not only could register its dissent (i.e., try to defeat the amendment) but also could opt out of it. In other words, the amendment would not take effect in that province.

Implicit in its design is the following premise. English Canada, or most of it, may at some time desire a different vision of Canada particularly with respect to the division of powers and this vision will run counter to that of Quebec. Opting out preserved the status quo as far as the division of powers was concerned.

It must be remembered that to this point all amending formulae considered have contained clauses designed either to protect Quebec or all provinces’ interests. In the Fulton-Favreau formula, for example, unanimity was required for amendments to the division of powers. Under the Victoria formula, Ontario and Quebec had vetoes on all amendments. Under the so-called 1978 Toronto formula of two-thirds of the provinces representing 85 per cent of the population, Quebec had a veto on every amendment. In other words, there was no serious discussion of any amending formula which did not protect Quebec’s interests (and, of course, Ontario’s at the same time). A dilemma then and today is whether or not Quebec should have a veto on any or all amendments. The notion of special status in this area has been difficult to sell to other provinces, particularly those in Western Canada.

When the amending formula was agreed to by the so-called Gang of Eight in the spring of 1981, it contained not only a provision for opting out of certain amendments but also a provision for fiscal compensation for those provinces choosing to do so. It should be recalled that Quebec’s main objection to the 1971 Victoria Charter was the lack of a compensation clause should the province choose to exercise its proposed new authority over family allowances. Therefore, the principle of compensation was important to Quebec and was one reason why it was attracted to the formula. When agreement was reached on the constitutional amendment in November, 1981, the compensation clause was deleted at the insistence of the federal government. A modified version was added later in an attempt to bring Quebec on side.

One of Quebec’s five conditions in the Meech Lake agreement was to have certain changes made to the amending formula. This included removal of any limits or restrictions on the principal of financial compensation. The other change was a veto over changes to central institutions which are found in section 42 of the Constitution Act. It was this latter change which evoked considerable criticism because the other provinces were unwilling to give Quebec a veto without having one themselves. It was argued that unanimity would make those parts of the constitution impossible to change and that senate reform, for example, would never happen. While Quebec’s position is understandable, given its isolation in 1981, the

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position adopted is at variance with the position it took on the Fulton-Favreau formula in 1964. A comparison of the items found in section 42 of the 1982 Constitution Act with section 6 of the Fulton-Favreau formula shows a considerable degree of overlap.

Surprisingly, the principle of expanding the compensation clause was not that problematical, although it had been extremely controversial a few years earlier. Criticism was directed at the potential rigidity being built into the constitution. While it was pointed out that unanimity had been achieved in the past, the failure of Meech Lake highlighted the difficulty of achieving unanimity and critics breathed a collective sign of relief when it failed.

Our experience with Meech Lake identified certain problems with the amending formula which require further consideration. Paradoxically, the original criticisms of checkerboard federalism or incremental separatism have proven to be groundless. (It may well be that the critics have been silent because that part of the formula has not been tested to date.)

The principal criticisms of the amending formula from our experience with Meech Lake appear to be the lack of public participation and the time limits. Let me deal with each of them in turn.

There are four ways in which the public can participate in constitutional amendments. The first is what I would call the grand inquest; the second is educative; the third is negotiating the text; and the fourth is ratification. Each stage is very different and each involves the public in very different ways. Hence it is important to identify exactly what is meant by public participation.

1. THE GRAND INQUEST

Beginning with the 1935 parliamentary committee on the amending formula, to the 1937 Rowell-Sirois commission, to the 1990 Spicer Commission, Canadians have been asked to express their views on the constitution, its characteristics, and the need for major overhauls. A number of recent examples come to mind including the 1970 joint committee of the Senate and the House of Commons, the 1977 Pepin-Robarts commission, and the 1983 Macdonald Commission. The Beaudoin-Edwards committee is an extension of this approach. The public have been invited to make submissions and they have expected that their comments will influence the final recommendations. In each instance, it was recognized that the objective of the exercise was to develop a comprehensive proposal for constitutional reform and modifications to the federal system. There was no guarantee that reform would eventually occur, but at the outset each committee had high expectations that it could develop a series of proposals to solve the nation's problems. These various committees or commissions have helped to set the agenda for reform and to bring issues into focus.

2. THE EDUCATIVE FUNCTION

Beginning with the 1968 Constitutional Conference, many such conferences have been televised in their entirety. In this way, the public could be involved in the dialogue, rather like spectators at a sporting event. Occasionally there were complaints that certain favourite television programs had been preempted for what, to many, had become a national pastime.

Although the public was not directly involved, they did respond to what they watched with letters, phone-calls, and telegrams. They let their governments know their views in no uncertain terms. The value of the open process is that the public became sensitized to the issues. This was very evident during the constitutional conferences on aboriginal rights.

3. THE NEGOTIATION PHASE

To date, constitutional negotiations and drafting have been done through the processes of executive federalism. The conferences referred to are first ministers' conferences, a mechanism which has evolved since 1906. Through this format, many of Canada's intergovernmental disputes including constitutional disputes have been negotiated.

In 1980-81, there was a fundamental change in the negotiating process. With the collapse of the post-referendum negotiations in September 1980, the federal government had two choices — unilateral action or deferral of the issue. They chose the former course and, as part of the process, initiated a series of televised public hearings on the draft resolution, the centrepiece of which was the *Charter of Rights*. Individuals and groups had an opportunity not only to have their say, but also to make specific suggestions for change. Accordingly, aboriginal, women's, and multicultural groups responded to the challenge to participate and continue to this day to feel a positive identification with the *Charter*. In retrospect, Canada had turned a corner vis-a-vis constitutional negotiations. This was emphatically underlined after the November 1981 agreement when both women's groups and aboriginal associations mobilized public opinion to have certain portions of the original text restored. They were largely successful.

4. RATIFICATION

The last manifestation of public participation is ratification. The 1982 amending formula requires legislative approval of constitutional amendments, a feature which is similar to what one finds in the United States. To some, legislative endorsement is sufficient; to others, more direct involvement of the public in the form of a referendum is necessary, as one finds in Australia. It must be remembered that in a referendum, the question has already been determined. All that is left to decide is whether or not it should be supported. The text cannot be changed.

In looking at these four aspects of public participation, all are important and each is distinct. The principal lesson of Meech Lake is that the public wants an opportunity to influence the text or to participate in the process before ratification. The grand inquest may be acceptable to some, because it allows them

to help set the agenda and bring issues into focus, but it is merely a beginning. The experience of 1980-81 and Meech Lake makes it clear that the public will not be content to sit on the sidelines. To me the question of ratification is a fundamentally different question and is of secondary importance if the public believes they have had a say in shaping the amendment.

The central questions, therefore, are how will the future agenda be shaped and how will changes to the constitution be negotiated. It must be realized that I am talking about a fundamental change to the Canadian constitution as opposed to a single amendment, although the foregoing arguments would continue to be valid.

The agenda will probably be a result of public discussion and input and will be found in the various reports which will be produced over the next few months from committees such as Spicer, Belanger-Campeau, Ontario, Alberta, New Brunswick, Manitoba and, last but not least, Beaudoin-Edwards. While this is certainly understandable for our current problems, what of future agendas? Serious consideration should be given to periodic reviews of the constitution, say once every decade, through either parliamentary committees or commissions like Pepin-Robarts. That way, individuals and groups will have continuing opportunities to comment on how constitutional arrangements and changes are affecting their lives. To some extent, this approach was accepted last June by first ministers when they agreed to a continuing review of the *Charter of Rights* and its interpretation.

Once the agenda has been set, the next step is to negotiate the text of the amendment. Experience has shown that not everything on the agenda finds its way into the final text. As already mentioned, the traditional technique in Canada has been the first minister's conference. I, for one, still favor this approach because it works. Although Meech Lake was not ratified, it was not because first ministers were unable to agree on a resolution. Moreover, governments will need to be involved in discussions at some point if they are to introduce and defend resolutions in their legislature. The criticism of the Meech Lake process was that the negotiators were tired and that no changes could be made once an agreement had been reached — the so-called seamless web argument. The amending formula does not contain any guidelines on how amendments are to be drafted. Nor are there any time limits for their preparation. The amending formula is concerned with ratification of amendments, not drafting them.

An alternative to first ministers' conferences is to establish and convene a constituent assembly consisting of delegates selected in some fashion to represent provincial and national interests. Although delegates are to be selected based on geographic boundaries, one can expect considerable debate on who or what these delegates represent. Favourable comparisons are usually drawn with the 1864 Charlottetown Conference or the 1787 Constitutional Convention in Philadelphia. Again, the

amending formula is silent on this approach. There is nothing preventing such a group from gathering to negotiate and draft either a new constitution or a series of amendments.

I would propose a change in the process as it has evolved so far. When a draft text or set of principles has been prepared, the next phase should include public consultation. This could take the form of legislative hearings or members of the constituent assembly convening hearings to obtain feedback. Had this occurred after the Meech Lake agreement and before the Langevin Block meetings in provinces other than Quebec, much of the subsequent criticism would have been blunted. Following an appropriate interval, a second meeting would be convened to finalize the text. Obviously not all suggestions would be accepted, but people will have felt they at least had had an opportunity to influence the outcome.

The public reacted negatively to the fact that, while hearings were held on the Meech Lake agreement, they could not change the document unless there was a fundamental error. While I still subscribe to the view that the agreement, once made, could not be amended, hindsight would suggest that public input immediately after the Meech Lake agreement and before the final text had been negotiated would have been a more prudent course of action.

The next questions to be considered is that of ratification. The amending formula requires legislative approval of amendments. In my mind, there is nothing to suggest that the ratification process itself is flawed. The criticisms are related to the three year time limit and the need for public input, not to the involvement of legislatures. Indeed, having legislatures participate in the process now is a major difference between how amendments are approved today and how they were approved before 1982.

An alternative to legislative approval is a referendum. Another variation would be a combined approach where a referendum might be used under certain circumstances such as when a legislature refuses to act on an amendment. Under a referendum there can be no changes to the text; it is simply a yes or no decision. While the same is true of legislative approval, there is nothing to prevent amendments from being attempted or companion resolutions being adopted. Nor, as we have seen in the case of Newfoundland, is there any legal impediment to a legislatures changing its position and rescinding a resolution of assent.

Before adopting a referendum model, many questions need to be answered, the principal one being what constitutes acceptance. Is it a national majority of voters or, as in Australia, a double majority consisting of a national majority in a majority of states. While such an approach is certainly consistent with the majoritarian principle of democratic theory, is it the best method for Canada? We will still need to confront the issue of a Quebec veto and the very real population imbalance between the two central provinces and the other eight.

There are lots of other questions such as who will prepare the wording on the ballot and the supporting literature. In Australia this is all done centrally because state governments have no role in the initiation of amendments.

We have had very limited experience in Canada with referenda. Newfoundland had a referendum on union with Canada. There was the all-important referendum in Quebec in 1980. There was the 1942 referendum on conscription. The federal government in the 1970s introduced a referendum bill authorizing it to conduct referenda on certain issues. There is nothing to prevent this device from being used to obtain public input on any matter, but to me it is not an effective alternative to legislative review and approval of amendments. The issue is not how amendments are approved but how they are initiated, drafted, and reviewed prior to ratification.

The second major criticism of the amending formula is the question of the three-year time limit. Time limits were included in the amending formula as a means of providing some framework within which amendments would be reviewed and either fail or succeed. With the failure of Meech Lake, the time limits, particularly the three-year limit, suddenly became an issue. That in itself is not necessarily a bad thing if it allows for an informed discussion. In retrospect one might well conclude that the time limit was the major stumbling block — that if more time could have been found, the necessary consensus would have materialized. I am not convinced an agreement would have resulted from an extension of the time limit. Elimination of the time limit would have removed the pressure to take action. It is doubtful that such a decision would have been acceptable to Quebec and other governments who wanted to get on with other matters of constitutional reform such as Senate reform.

To understand the importance of time limits, one must go back to the question of why an amending formula in the first place. The purpose is to provide for future constitutional change, presumably incremental change over an indefinite period. There are basically two ways the formula can be employed. Let me give two examples.

Example 1. The province of British Columbia wanted to include property rights in section 7 of the *Charter of Rights* and introduced an amendment providing for the change to the *Charter* in the B.C. legislature. It was subsequently passed in their legislature, thereby giving the province three years to convince the ten other governments. Although the province made a great effort to explain the merits of its position, it was unsuccessful in securing the necessary agreement and the amendment expired after three years. It must be realized that B.C. could have reintroduced the amendment, starting the cycle over again.

Example 2. This is the one we are most familiar with because it is how we have approached constitutional amendment in Canada. After a few years of

intergovernmental discussion, negotiation, compromise etc., an agreement is struck among the eleven governments which leads to a constitutional amendment being drafted and submitted for legislative approval. A reasonable assumption one would make is that the amendment is likely to pass because negotiations have been completed, compromises made and the agreement of all eleven governments secured. Prior to 1982, this was sufficient to secure passage because the only legislative involvement was that of the Parliaments of Canada and the United Kingdom.

Under the provisions of the amending formula, legislative ratification is necessary in order to secure an amendment. This feature of the amendment process does not preclude public hearings. Indeed, they are required in Manitoba. New Brunswick held hearings as did Ontario. There is, however, a dilemma or potential Catch 22 in that the hearings could result in recommendations for change in the agreement thereby presenting government with the difficult choice of reopening the negotiations to change the resolution. Here one encounters the seamless web argument. It is for this reason that I would propose a second stage — hearings followed by a final round of negotiations.

There is nothing in the amending formula which prohibits changes from being proposed and considered, or for that matter, introduced in the form of a companion or amended resolution. Until one of the legislatures adopts the resolution, the constitutional amendment clock does not start ticking. The formula also provides for legislatures to change their minds by permitting them to withdraw a resolution of assent any time prior to proclamation. The possibility is increased if there is a change in government, a distinct possibility if, for example, the subject of the amendment had been the major issue in the election.

Our experience with the new amending formula is very limited. The one and only amendment to date was aboriginal rights and it emerged from the 1983 conference on aboriginal questions. One successful amendment and one failed one is insufficient evidence upon which to judge the effectiveness of the amending formula.

When viewed closely, the Meech Lake agreement represents a series of different amendments to the Constitution as opposed to a single change. It combined some matters which fall under the general formula and other which are subject to the unanimity rule. Since unanimity had been achieved at the Langevin Block and since a package had been negotiated, no thought was given to the possibility, or necessity, of two different resolutions being approved. In retrospect, this may very well have been a mistake. Those parts of the amendment which fell under the general formula could have been proclaimed when the two-thirds, 50 per cent threshold was achieved. The balance would have been proclaimed when and if unanimity was achieved and, since no deadline was necessary, there would have been no pressure on governments. Whether or not Quebec would have

agreed to a two-stage process is unknown. For future amendments, their composition will need to be considered.

The flip side of the coin is that in the future, both timing and process will also need to be considered. Again, looking at Meech Lake, it was assumed that the necessary approvals would be secured fairly quickly. This was a major oversight and it is unlikely future negotiators will overlook the timing problem.

Let me summarize. The dilemma confronting us is to find a way for public participation in the amending process that will give Canadians an opportunity to influence what is eventually submitted for ratification. All of this discussion must be seen in the context of a total revision of the constitution — something which we have been working on since 1968. Because we are dealing with the constitution in its entirety, there is an obvious need for public involvement. But it should not stop there. Any process developed for an omnibus amendment should be equally applicable to a single amendment. Given the context of the review to date, we tend to think in terms of multiple amendments and that they are a result of intergovernmental dialogue and negotiation. To a great extent, this image had conditioned our thinking. We tend to concentrate more on the mega-amendment and less on the single amendment. While the amending formula can accommodate either, it was designed with the latter needs in mind.

The formula tells us how amendments are to be ratified, not how they are formulated. I would strongly encourage the committee to concentrate on this facet of constitutional amendment because, to me, that is the clear lesson of Meech Lake.

I would recommend:

1. public involvement in setting the agenda for change;
2. public involvement through legislative hearings after a draft text has been formulated;
3. that, as part of the draft text, a ratification schedule be included;
4. that omnibus amendments be compartmentalized according to which part of the formula is relevant; and
5. that a periodic review of the constitution be undertaken either by a parliamentary committee, a federal commission of inquiry or a joint federal-provincial committee.

None of these recommendations requires an amendment to the amending formula and can be easily incorporated into our constitutional fabric as we gain more experience with the amending process.

[The Beaudoin-Edwards Committee reported to Parliament at the end of June 1991. The Committee recommended the adoption of a new amending formula essentially along the lines contained in the 1971 Victoria Charter; four regional vetos with Ontario and Quebec each constituting a region. This recommendation has been met with widespread opposition amongst provinces outside of Quebec. (ed.)]

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