1981 CarswellNfld 34
Supreme Court of Newfoundland, Court of Appeal

Reference re Effect & Validity of Amendments to the Constitution of Canada Sought in Proposed Resolution for a Joint Address to Her Majesty the Queen Respecting the Constitution of Canada

1981 CarswellNfld 34, 118 D.L.R. (3d) 1, 29 Nfld. & P.E.I.R. 503, 82 A.P.R. 503, 8 A.C.W.S. (2d) 22

In The Matter of Section 6 of The Judicature Act, R.S.N. 1970, c. 187 as amended

In The Matter of a Reference by the Lieutenant-Governor in Council concerning the effect & validity of the amendments to the Constitution of Canada sought in the 'Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada"

Mifflin, C.J.N.; Morgan, J.A.; Gushue, J.A.

Judgment: March 31, 1981
Docket: Doc. 212

Proceedings: varied *Reference re Questions Concerning Amendment of Constitution of Canada as Set out in O.C. 1020/80* (1981), *(*sub nom. *Reference re Amendment of Constitution of Canada (Nos. 1, 2, 3))* 125 D.L.R. (3d) 1, *(*sub nom. *Manitoba (Attorney General) v. Canada (Attorney General))* 11 Man. R. (2d) 1, *(*sub nom. *Manitoba (Attorney General) v. Canada (Attorney General))* [1981] 6 W.W.R. 1, *(*sub nom. *Manitoba (Attorney General) v. Canada (Attorney General))* [1981] 1 S.C.R. 753, 1981 CarswellMan 110, 1981 CarswellMan 360, *(*sub nom. *Manitoba (Attorney General) v. Canada (Attorney General))* 39 N.R. 1, *(*sub nom. *Manitoba (Attorney General) v. Canada (Attorney General))* 34 Nfld. & P.E.I.R. 1, *(*sub nom. *Manitoba (Attorney General) v. Canada (Attorney General))* 95 A.P.R. 1, *(*sub nom. *Resolution to Amend the Constitution of Canada, Re)* 1 C.R.R. 59 (S.C.C.) [Manitoba]

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Subject: Constitutional

Headnote

Constitutional Law --- Amendment of constitution of Canada

Enumeration in s. 91 — Resolution proposing patriation of Constitution with amending formula, and enactment of Charter of Rights — Constitution Act, 1867, containing no provision for own amendment — Any change to be made by amending Act of British Parliament — Requested amendment by federal Parliament affecting federal-provincial relationships as well as powers, rights and privileges secured to provinces by Constitution Act, 1867 — Right of provinces to be consulted on proposed amendment.

A resolution was introduced in Parliament containing proposals for the patriation of the Canadian Constitution (the

Constitution Act, 1867) with amending formulae and for the enactment of a Charter of Rights and Freedoms enforceable by the Courts against federal and provincial governments and Legislatures alike. Newfoundland and several other provinces became concerned that the proposed legislation, which they would not consent to, would infringe upon rights, powers and privileges secured to the provinces by the Constitution Act. Accordingly a reference was inscribed and the following questions submitted to the Court for reply: (1) Whether, in fact, the proposed amendments to the Constitution would affect federal-provincial relationships or the powers, rights or privileges granted by the Constitution Act, 1867 to the provinces, their Legislatures or governments, and if so, in what respects; (2) Is it constitutional convention that the Parliament of Canada will not request Her Majesty the Queen to lay before the British Parliament a measure to amend the Canadian Constitution affecting federal-provincial relationships or powers, rights or privileges granted to the provinces without the agreement of the provinces? (3) Is the agreement of the provinces constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships or alters powers granted to the provinces by the Constitution Act, 1867? and (4) If Part V of the proposed resolution were enacted, could the Terms of Union including terms 2 and 17 contained in the Schedule of the Constitution Act, 1949 or s. 3 of the Constitution Act, 1871 be amended directly or indirectly without the consent of the government, Legislature, or a majority of the people of Newfoundland voting in a referendum?.

Held: The questions should be answered as follows: (1) Yes; (2) Yes; (3) Yes; (4) as set out below.

The Constitution Act, 1867 contained no provision for its own amendment. Since it was a statute enacted by the Parliament of Great Britain, any change in its content must be made by way of an amending Act enacted by that Parliament. The Court dealt with question 3 first, as it involved considerations having a material bearing upon the answers to the other three questions. The Parliament of Great Britain was a bare legislative trustee for both the federal Parliament and the provincial Legislatures in relation to the matters within their respective legislative competence. Any amendment enacted by the Parliament of Great Britain, affecting the legislative competence of either of the parties, without that party's consent, would not only be contrary to the intent of the Statute of Westminster, 1931 but it could defeat the whole scheme of the Canadian federal Constitution. The constitutional status of the provinces of Canada as autonomous communities was confirmed and perfected by the Statute of Westminster, 1931, which gave effect to the constitutional principle that the Dominions were autonomous communities equal in status, in no way subordinate to one another; the recognition by the Imperial Conference of the division of power among the constituent parts that make up the Dominion of Canada by which each is autonomous, in no way subordinate one to another; and the surrender by the Imperial Parliament to the provinces of its legislative sovereignty over matters declared by the Constitution Act, 1867 to be within the exclusive legislative competence of the provinces. The modification of that constitutional status was thereby withdrawn from future British parliamentary competence except with the consent of the provinces.

With regard to question 2, Canadian constitutional thinking had moved steadily toward the recognition of the right of the provinces to be consulted on any proposed amendment affecting their exclusive right to legislate on matters within the ambit of their authority. But the requirement of provincial consent went much further than mere custom and usage. The very federal nature of Canada's constitutional system required that the rights and powers of its constituent units be protected.

With regard to question l, it was clear that the proposed "Charter of Rights and Freedoms" must infringe upon the powers of the provinces to legislate in respect of property and civil rights, as granted by s. 92 of the Act. Under the proposed amending formula, there was no doubt that the rights of one or more of the provinces could be altered, abridged, or in fact, displaced without the consent of those provinces. Finally, the provisions of s. 52 of the Proposed Constitution Act, which had the effect of rendering void or repugnant legislation passed within a province which was otherwise intra vires of the provincial Legislature, must affect the provincial rights, powers and privileges.

With regard to question 4, both s. 3 of the Constitution Act, 1871 and s. 43 of the Constitution Act, 1981 could be changed by the amending formulae prescribed in s. 41 and the Terms of Union could then be changed without the consent of the Newfoundland Legislature. If the amending formulae in s. 42 were utilized, both s. 3 and s. 43 could be changed by a

referendum held pursuant to s. 42. In this event, the Terms of Union could then be changed without the consent of Newfoundland Legislature, but not without the consent of the majority of the Newfoundland people voting in a referendum.

CONSTITUTIONAL reference on effect and validity of amendments to Constitution of Canada that were sought in proposed resolution.

For the Court:

1 By Order in Council dated December 5, 1980, the Lieutenant Governor in Council, pursuant to Sec. 6 of The Judicature Act, R.S.N. 1970, cap. 187, as amended, referred to this Court for hearing and consideration the following four questions:

> 1. If the amendments to the Constitution of Canada sought in the 'Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada', or any of them were enacted, would federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments be affected and, if so, in what respect or respects?
>
> 2. Is it constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britain and Northern Ireland a measure to amend the Constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the provinces?
>
> 3. Is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships or alters the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments?
>
> 4. If Part V of the proposed resolution referred to in question 1 is enacted and proclaimed into force could
>
> > (a) the Terms of Union, including terms 2 and 17 thereof contained in the Schedule to the British North America Act 1949 (12 - 13 George VI, c. 22 [U.K.]), or
> >
> > (b) section 3 of the British North America Act, 1871 (34 - 35 Victoria, c. 28 [U.K.])
>
> be amended directly or indirectly pursuant to Part V without the consent of the Government, Legislature or a majority of the people of the Province of Newfoundland voting in a referendum held pursuant to Part V?

2 This reference arose out of the introduction into Parliament of a "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada". That Resolution contains proposals for patriation of the Constitution with amending formulae and for the enactment of a Charter of Rights and Freedoms enforceable by the courts against Federal and Provincial Governments and Legislatures alike.

3 The patriation of the Constitution, with the requested amendments, including amending formulae, would be accomplished in the following manner. The power of the Parliament of Great Britain to legislate for Canada would be terminated by Sec. 2 of a United Kingdom Act to be entitled the "Canada Act", and Sec. 1 of that Act would enact the "Constitution Act, 1981". Part I of the Constitution Act, 1981 is entitled 'Canadian Charter of Rights and Freedoms'; Part II, 'Equalization and Regional Disparities'; Part III, 'Constitutional Conferences'; Part IV, 'Interim Amending Procedure and Rules for its Replacement'; and, Part V is entitled 'Procedure for Amending Constitution of Canada'. Sec. 52 of the "Constitution Act, 1981", states that the Constitution of Canada is the supreme law of Canada, and that any law (in any

jurisdiction) that is inconsistent with its provisions is of no force and effect to the extent of the inconsistency. It should be noted here that some references and section numbers in the Proposed Resolution have been changed since this Reference was inscribed. There are however no substantive changes of concern to us here and we are utilizing the original documentation.

4 Because the Government of Newfoundland was concerned that the above proposed legislation would infringe upon the rights, powers and privileges of the Province of Newfoundland, this Reference was inscribed and the questions set forth above submitted to this Court for reply. In his argument, which was supported by the Attorneys-General of Quebec, Manitoba, British Columbia, Prince Edward Island and Alberta, counsel for the Attorney-General of Newfoundland submitted that the four questions submitted should be answered in the affirmative. Counsel for the Attorney-General of Canada took the opposite view.

5 Counsel for the Attorney-General of Canada, in defining the nature of the questions, submits that "speculative and vaguely worded questions are not appropriate for a reference procedure. Non-legal matters of politics or political science are not appropriate subjects for a traditional court action". It is his contention that, for these reasons, questions 1 and 2 are inappropriate and should not be answered. If, however, we deem it appropriate to answer them, the answer to both, in his submission, should be "no". While conceding that questions 3 and 4 are not inappropriate, his submission is that question 3 should receive a negative response while the simple answer to 4(a) should be "no" and the answer to 4(b) should be "technically yes but in reality no".

6 We agree with the Attorney-General of Canada that, as a broad generalization, questions that are speculative and premature, and those that are purely political in nature, are not appropriate for judicial response. The first question submitted may be considered in part speculative and premature, and the second question undoubtedly has some political connotation. They none the less pose questions that are of a constitutional nature and in our opinion require an answer. We therefore propose to answer them, not unmindful of our legitimate province in a Reference of this nature as stated by Duff, C.J. in the *Alberta Statutes Reference*, [1938] S.C.R. 100 at page 106:

> It is no part of our duty (it is, perhaps, needless to say) to consider the wisdom of these measures. We have only to ascertain whether or not they come within the ambit of the authority entrusted by the constitutional statutes ... and our responsibility is rigorously confined to the determination of that issue. As judges, we do not and cannot intimate any opinion upon the merits of the legislative proposals embodied in them, as to their practicability or in any other respect.

7 For a proper consideration of the questions posed, regard must be had to the Federal character of Canada's constitutional system and the practice and procedures that have prevailed, since Canada's federation, in obtaining constitutional amendments.

8 The British North America Act, 1867, united Upper Canada (Ontario), and Lower Canada (Quebec), Nova Scotia and New Brunswick into one federal country. Provision was made for the subsequent admission of other colonies or Provinces into the Union. It is not relevant to this discussion to narrate the manner in which the remaining six Provinces joined the federation. Suffice it to say that, to the Provinces originally brought within the Union and to those afterwards admitted to it, the relevant provisions of the British North America Act equally apply.

9 The very nature of a Federal system of government involves division of legislative power between central and regional governments. The division of legislative power in Canada as between the Federal Parliament and the Provincial Legislatures was made by the provisions of SS. 91 and 92 of the Act.

10 Sec. 92 gives to the Provinces the exclusive authority to legislate in respect of the classes of subjects therein enumerated and generally to make laws in respect of matters of a local or private nature. It also gives the Provincial Legislatures the authority to amend the Constitution of the Provinces except as regards the Office of Lieutenant Governor. Sec. 91 of the Act conferred on the Federal Parliament, not only the paramount legislative power in relation to the many classes of subject matter enumerated in that Section, but also a general power to make laws for the 'Peace, Order and good Government of Canada in relation to all matters not coming within the Classes of Subjects by this Act' assigned exclusively to the Provincial Legislatures. (As to whether the Federal general power is "overriding rather than residual" is not relevant to this discussion.) The division of powers in toto embraced the whole area of self-government. To quote the language of Lord

Loreburn, L.C. in delivering the judgment of the Judicial Committee of the Privy Council in *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571 at page 581:

> In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada.

11 The Federal nature of the union and the distinct division of powers between the Federal Parliament and Provincial Legislatures are described by Lord Watson in *Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick*, [1892] A.C. 437 (P.C.) at page 441:

> Their Lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces. The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But, in so far as regards those matters which, by sect. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act.

and, again, at page 442:

> It is clear, therefore, that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by sect. 92 of the Act of 1867, these powers are exclusive and supreme.

(See also *Hodge v. The Queen*, [1883] 9 A.C. 117 (P.C.) per Sir Barnes Peacock, at p. 132.)

12 From these authoritative interpretations of the provisions of the British North America Act, it can be seen that in relation to matters enumerated in Sec. 92 of the Act, the authority of the Provinces to legislate is exclusive and supreme. While in the exercise of its overriding power in matters of shared or overlapping jurisdiction the Federal Parliament may to some extent affect local matters, it is undisputed that there can be no encroachment by the Federal Parliament in the legislative field reserved exclusively to the Provinces. In this connection, we adopt the language of Lord Atkin in *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355, at page 367:

> In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain.

Nor does the Federal power of disallowance of Provincial legislation found in Sec. 90 of the British North America Act,

1867, permit of encroachment. While, in theory, the power of disallowance could be used to paralyse a Provincial Legislature, it does not carry with it a power to substitute any Federal legislation for the disallowed Provincial one. In our opinion, the Federal power of disallowance is but a check on specific legislation, and does not materially affect the plentitude and exclusiveness of Provincial legislative authority.

13 So far we have discussed the federal nature of Canada's Constitutional system and the division of powers among its constituent parts. The Act of 1867, however, contains no provision for its amendment. As it was a Statute enacted by the Parliament of Great Britain, any change in its content has to be made by way of an amending Act enacted by that Parliament. The practice, since 1875, has been to seek amendment of the Act by a Joint Address of the House of Commons and Senate. In some cases, the consent of the Provinces was sought and obtained.

14 By an amendment to the Act, enacted by the Parliament of Great Britain on December 16, 1949, (hereinafter referred to as the "2nd, 1949 amendment") Class 1 of Sec. 91 was added which conferred on the Dominion Parliament the power to amend the Constitution of Canada except as regards (i) classes of subjects assigned exclusively to the Legislatures of the Provinces, (ii) the rights or privileges granted or secured to the Legislature or Government of a Province, (iii) the rights or privileges granted to any class of persons with respect to schools, (iv) the use of the English or the French language, and (v) requirements that there be a session of the Canadian Parliament at least once a year and that no House of Commons continue for more than five years (save in defined circumstances of emergency).

15 The meaning of the term, "Constitution of Canada", as used in the 2nd, 1949 Amendment was determined by the Supreme Court of Canada in *Re: Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54, ("*the Senate Reference*") where it was stated at page 70 that "it does not mean the whole of the British North America Act, but means the constitution of the federal government, as distinct from the provincial governments. The power of amendment conferred by s. 91(1) is limited to matters of interest only to the federal government". For the purpose of this Reference, however, we take the term "Constitution of Canada" as meaning The British North America Act, 1867.

16 We must now consider the need, if any, for Provincial consent to any proposed amendment in derogation of Provincial legislative autonomy, with due regard to the intendment of the British North America Acts and other Constitutional enactments, notably the Statute of Westminster, 1931, (22 Geo. V. c.4 [U.K.]). This we now propose to do in the context of question 3 which, in our view, should be answered in the first instance as it involves considerations which have a material bearing upon the answers to the other three questions, and in particular the second question.

Question 3

17 Is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships or alters the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments?

18 While the autonomy of the Provinces and the Federal Government within their respective fields of authority was clearly defined by the British North America Act, it could not be said until 1931, and the passing in that year of the Statute of Westminster, that Canada as a nation gained complete independence from Great Britain. Before 1931, the Federal Parliament was subject to the limitations imposed by the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), (as were the Provincial Legislatures) by which any Canadian legislation repugnant to an Act of the Imperial Parliament was declared void. It was also subject to the limitations imposed by Sec. 129 of the B.N.A. Act which forbids the altering or repealing in Canada of laws made under British statutes, and by the doctrine forbidding extra-territorial legislation.

19 However, all restrictions on Canada as an independent, self-governing country were removed by the Statute of Westminster. That Act, of great constitutional importance to this country, was passed, as its sub-title states, "to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930". Before considering the provisions of that Act, it is proper, we think, to briefly review the background events leading to its passing.

20 At the Imperial Conference held in October, 1926, the positions and mutual relations of Great Britain and the Dominions were defined thus:

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

21 To implement the resolutions passed at that Conference, the Conference on the Operation of Dominion Legislation (O.D.L. Conference) met from October to December, 1929, and settled the main lines on what became the Statute of Westminster, 1931. Of some significance in the O.D.L. Conference Report is the following statement:

> Canada alone among the Dominions has at present no power to amend its Constitution Act without legislation by the Parliament of the United Kingdom ... It was pointed out that the question of alternative methods of amendment was *a matter for future consideration by the appropriate Canadian authorities* and that it was desirable therefore to make it clear that the proposed (Statute of Westminster) would effect no change in this respect.
>
> (Emphasis added)

22 The Report of the O.D.L. Conference of 1929 was approved by the Imperial Conference of 1930. The 1930 Conference recommended the enactment of the Statute of Westminster and "that with a view to the realisation of this arrangement, Resolutions passed by both Houses of the Dominion Parliaments should be forwarded to the United Kingdom" and that "the statute should contain such further provisions as to its application to any particular Dominion as are requested by that Dominion".

23 In April, 1931, a Dominion-Provincial Conference was held to consider a draft Statute prepared from the proceedings of the Imperial Conferences of 1926 and 1930, and to reach agreement on a separate section to be included in that Statute dealing with the special problems created by Canada's Federal system of government. At this Conference, the representatives of the Provinces expressed concern that the increased powers being granted the Federal Parliament would permit that Parliament (without the agreement of the Provinces) to request and consent to amendments of the British North America Act infringing on the rights of the Provinces. (see Report of Dominion-Provincial Conference 1931.) The representatives of the Provinces and the Federal Government therefore unanimously agreed on the provisions of a protective section to be included in the Statute, and both Houses of Parliament, with the concurrence of the Provinces, requested the Parliament of Great Britain to enact a special provision of the Statute of Westminster. That provision was enacted as Sec. 7 to which we shall refer in detail below.

24 From the foregoing, it is clear that the Provinces were content at that time that the status quo be maintained, relying on the Parliament of Great Britain to protect their rights until an alternative method of amendment was agreed on. Thus, responsibility for amending the British North America Acts was retained by the British Parliament at the express wish of all the appropriate Canadian authorities.

25 The practice for constitutional amendment had been, and still is, to seek and obtain amendment of the Act by a Joint Address of the House of Commons and Senate. Many amendments have been passed in that way. A more detailed reference to these amendments can more appropriately be made on consideration of question 2. It is necessary only to state at this time that no amendment affecting the rights, powers or privileges granted the Provinces by the Act of 1867 has been passed over the objections of the Provinces.

26 The resolutions confirmed by the Imperial Conferences of 1926 and 1930 were passed into law by the Statute of Westminster. The recitals in the preamble of that Act affirm that the delegates of the Governments of the United Kingdom, Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland, had concurred in the resolutions; that with the Crown as the symbol of the free association of the members of the British Commonwealth of Nations, united by a common allegiance, it would be in accord with the established constitutional position of all the members in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles should hereafter require the assent of the Parliaments of all the Dominions as of the British Parliament; that it was in accord with the same position that no law thereafter made by the British Parliament should extend to any one of the Dominions as part of its law otherwise than at the request and with the consent of the Dominion; and that the associated Dominions had severally

requested and consented to the submission of a measure to the British Parliament making provision for such matters.

27 By subsection (1) of Sec. 2, it was provided that the Colonial Laws Validity Act, 1865, would not apply to any law made after the commencement of the Act by the Parliament of a Dominion (which by definition includes the Dominion of Canada), and by subsection (2) of Sec. 2 it was provided that no law and no provision of any law made after the commencement of the Act by the Parliament of a Dominion would be void or inoperative on the ground that it was repugnant to the law of England, or to the provisions of an existing or future Act of Parliament of the United Kingdom or to any order, rule or regulation made under any such Act. Further, the powers of the Parliament of a Dominion would include the power to repeal or amend any such Act, order, rule or regulation in so far as the same was part of the law of the Dominion. By Sec. 3, it was declared and enacted that the Parliament of a Dominion had full power to make laws having extra-territorial operation. By Sec. 4, it was provided that no Act of Parliament of the United Kingdom passed after the commencement of the Act would extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it was expressly declared in that Act that the Dominion in question had requested and consented to such an enactment.

28 Sec. 7 is, as stated, of application only to Canada and reads as follows:

> 7.(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.
>
> (2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.
>
> (3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

29 The dissolution of the bonds with Great Britain was complete upon the passing of that Statute, and Canada, in the totality of its legislative powers, Federal and Provincial combined, attained sovereign independence, qualified only by Great Britain's role, retained at the request of the Canadian community, to enact amendments to Canada's constitution. However, there is no doubt that, to all intents and purposes, the Parliament of Great Britain renounced all external legislative sovereignty over the land and people of Canada.

30 It is not without significance that the fetters, imposed on Canada as a whole by the Colonial Laws Validity Act 1865 and removed from Federal legislative jurisdiction by Sec. 2 of the Statute of Westminster, were also specifically removed from Provincial Legislatures by Sec. 7(2) of that Statute. The legislative sovereignty of the Parliament of Great Britain over matters of local concern as defined in Sec. 92 of the British North America Act was thereby surrendered to, and confirmed in, the Provinces in the same sense as authority over all other matters of concern to Canada was surrendered to the Federal Parliament. Each in its own field was supreme and in no way subordinate one to the other.

31 It remains only to consider the legal effect of Sec. 7(1) in which it is stated that nothing in the Act "shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder".

32 Under a strict interpretation of that section, one might conclude that it is within the power of the British Parliament to amend the British North America Acts in any manner it thought fit, regardless of the wishes of either the Federal Parliament or the Provincial Legislatures. However, such an interpretation would be contrary to the established constitutional position declared by the Imperial Conference and would defeat the declared intention of the Statute as set forth in its sub-title "An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930".

33 In our opinion, the intent, and the effective result, of that enactment was to place the Parliament of Great Britain in the role of "a bare Legislative trustee", as enunciated by Hon. Ivan C. Rand (then a retired Judge of the Supreme Court of Canada) in an address delivered at the Harvard Law School in 1960, the text of which was reported in the Canadian Bar Review of May 1960 (Vol. XXVIII, No. 2) where he is reported as saying:

> *Legislatively, a unique situation has been created. The British Parliament has in effect become a bare legislative trustee for the Dominion*; the constitutional organ for altering the provisions of the Canadian constitution contained in the Act of 1867 remains so far the British Parliament; but the political direction resides in the Parliament of the Dominion; the former has conceded its residue of legislative power vis-a-vis Canada, to be no more than means for effecting the will of Canada. It might happen although it is most unlikely, that the British Parliament should demur to a request for a legislative amendment, as, for example, involving important legislative effects not concurred in by one or more of the provinces; but that amounts to no more than saying that the Canadian people would not yet have agreed on the mode of modifying their internal constitutional relations. Once that means has been agreed upon, legislative independence, not only in substance but in form, will have been attained.
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> (Emphasis added)

34 We adopt that statement fully with the important addition that the Parliament of Great Britain is a 'bare legislative trustee' for *both* the Federal Parliament and the Provincial Legislatures in relation to the matters within their respective legislative competence. Any amendment enacted by the Parliament of Great Britain affecting the legislative competence of either of the parties, without that party's consent, would not only be contrary to the intendment of the Statute of Westminster, but it could defeat the whole scheme of the Canadian Federal constitution.

35 In this regard the statement of Lord Sankey, L.C. in *British Coal Corporation v. The King*, [1935] A.C. 500 (P.C.) at 520 is apt:

> It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute. But that is theory and has no relation to realities. In truth Canada is in enjoyment of the full scope of self-government: its Legislature was invested with all necessary powers for that purpose by the Act, and what the Statute did was to remove the two fetters which have already been discussed.

36 This statement applies with equal authority to legislation of the British Parliament extending to the Provinces, as does the statement of Lord Denning in the case of *Blackburn v. Attorney-General*, [1971] 2 A.E.R. 1380 at page 1382 where he said:

> We have all been brought up to believe that, in legal theory, one Parliament cannot bind another and that no Act is irreversible. But legal theory does not always march alongside political reality. Take the Statute of Westminster 1931, which takes away the power of Parliament to legislate for the Dominions. Can any one imagine that Parliament could or would reverse that Statute? Take the Acts which have granted independence to the Dominions and territories overseas. Can anyone imagine that Parliament could or would reverse those laws and take away their independence? Most clearly not. *Freedom once given cannot be taken away*. Legal theory must give way to practical politics.
>
> (Emphasis added)

37 In our opinion, the constitutional status of the Provinces of Canada as autonomous communities was confirmed and perfected by (a) the Statute of Westminster giving effect to the constitutional principle declared by the Imperial Conference that both the United Kingdom and the Dominions are autonomous communities equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs; (b) the recognition by that Conference of the division of power among the constituent parts that make up the Dominion of Canada by which each is autonomous, in no way subordinate one to another; and, (c) the surrender by the Imperial Parliament to the Provinces of its legislative sovereignty, over matters declared by the British North America Act to be within the exclusive legislative competence of the Provinces. The modification of that constitutional status was thereby withdrawn from future British parliamentary competence except with the consent of the Provinces.

38 While the Parliament of Great Britain, in the absence of notice to the contrary, is constitutionally entitled to accept a

Resolution passed by both Houses of the Canadian Parliament as a proper request for a constitutional amendment from the whole Canadian community, it is nonetheless precluded, for the reasons stated above, from enacting an amendment restricting the powers, rights and privileges granted the Provinces by the British North America Act, and enlarged by the Statute of Westminster over the objections of the Provinces.

39 We would accordingly answer Question 3 affirmatively.

Question 2

40 Is it constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britain and Northern Ireland a measure to amend the Constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the provinces?

41 In essence, though not so stated, this question asks whether the Federal Parliament has the jurisdiction to request the Parliament of Great Britain to pass an amendment to the Act of 1867 affecting Federal-Provincial relationships or the powers, rights or privileges granted or secured by the British North America Act 1867 to the Provinces, their Legislatures or governments without first obtaining the agreement of the Provinces.

42 As seen above, since 1875, amendments to the British North America Act have been enacted by the British Parliament in response to a Joint Address of both Canadian Houses of Parliament. It does not necessarily follow, however, that the Federal Parliament has an unconditional authority to request any amendment it desires. Much will depend on the legal effect of the amendment requested.

43 The Federal Government White Paper of 1965 entitled “The Amendment of the Constitution of Canada” lists some 22 amendments to the British North America Act and contains the following resume of those amendments:

> There have been five instances - in 1907, 1940, 1951, 1960 and 1964 - of federal consultation with all provinces on matters of direct concern to all of them. There has been only one instance up to the present time in which an amendment was sought after consultation with only those provinces directly affected by it. This was the amendment of 1930, which transferred to the Western provinces natural resources that had been under the control of the federal government since their admission to Confederation. There have been ten instances (in 1871, 1875, 1886, 1895, 1915, 1916, 1943, 1946, 1949, and 1949(2)) of amendments to the Constitution without prior consultation with the provinces on matters that the federal government considered were of exclusive federal concern. In the last four of these, one or two provinces protested that federal-provincial consultations should have taken place prior to action by Parliament.
>
> Under the 1964 amending formula, the requirements for provincial consultation and consent are for the first time clearly defined.

44 It then enunciated four general principles emerging from their resumé:

> *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.
>
> *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.

> *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.
>
> *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.

45 The White Paper recognized that a clear distinction must be made between the manner of changing provisions which fundamentally affect the Federal nature of the Constitution and the manner of changing those that do not. That distinction has been recognized throughout the amending process. Amendments that were of exclusive Federal concern have been sought and enacted without the consent of the Provinces. Indeed, some of the pre-1949 amendments could have been enacted by the Federal Parliament under the provisions of the 2nd, 1949 amendment (supra) had that enactment been then in force. Those amendments of direct concern to the Provinces were enacted after the consent of the Provinces had been sought and obtained, namely in 1907, 1940, 1951, 1960 and 1964. These are detailed in the White Paper of 1965 and, for easy reference, restated here:

> 1907 The British North America Act, 1907 established a new scale of financial subsidies to the provinces in lieu of those set forth in section 118 of the British North America Act of 1867. While not expressly repealing the original section, it made its provisions obsolete.
>
> 1940 The British North America Act, 1940 gave the Parliament of Canada the exclusive jurisdiction to make laws in relation to Unemployment Insurance.
>
> 1951 The British North America Act, 1951 gave the Parliament of Canada concurrent jurisdiction with the provinces to make laws in relation to Old Age Pensions.
>
> 1960 The British North America Act, 1960 amended section 99 and altered the tenure of office of superior court judges.
>
> 1964 The British North America Act, 1964 amended the authority conferred upon the Parliament of Canada by the British North America Act, 1951, in relation to benefits supplementary to Old Age Pensions.

46 The amendment of 1907 requires further comment in that it was passed despite the objection taken by British Columbia. That amendment was enacted following resolutions passed by Provincial conferences approved by all the Provinces except British Columbia. It did not in any way impair the rights of the Provinces. Sir Wilfred Laurier, in his address to the House of Commons on the Resolution for a Joint Address, explained the reason for British Columbia's dissent as follows:

> Sir WILFRED LAURIER. British Columbia has agreed to the general terms to which all the other provinces have agreed, but in addition it asks for special treatment for itself. There is a great difference, under such circumstances, between asking parliament to agree to what has been already agreed to by all the provinces and asking parliament immediately, without any reference at all to the views of the other provinces to enter the thin edge of the wedge into the fabric of our constitution.
>
> (House of Commons Debates Jan. 28, 1907, at page 2199.)

47 There can be no doubt that the direction of Canadian constitutional thinking, as recognized in the 1965 White Paper, has been toward the recognition of the right of the Provinces to be consulted on any proposed amendment that affected their exclusive right to legislate on matters within the ambit of their authority, and of a duty on the Federal Parliament not to forward to the Parliament of Great Britain a request for an amendment of that nature without their consent.

48 In this regard, it is proper we think to refer to passages in speeches delivered in the House of Commons in debates on motions to seek amendments to the Constitution.

(1) 1907

49 Sir Wilfred Laurier (Prime Minister), in reference to the "compact" of Confederation:

> It should be altered only for adequate cause and after the provinces themselves have had an opportunity to pass judgment on the same.
>
> (House of Commons Debates Jan. 28, 1907, at page 2199.)

(2) 1925

50 Hon. Ernest Lapointe (Minister of Justice):

> ...the British North America Act itself is not only the charter of the Dominion of Canada; it is just as much the charter of the provinces of Canada. We derive our powers from the British North America Act; so do the provinces. They have no constitution other than the British North America Act; all their powers they derive from that act. Would it then be fair for us to arrogate to ourselves the right to change the act which is just as much the constitution of the provinces as it is our own? Second, my hon. friend speaks of protection to minorities. That is not the only thing in the British North America Act in which the provinces are interested. They have all their powers which they have kept to themselves and which have been agreed by everybody to be their powers. Have we a right to amend the constitution without their consent, in the way, for instance, of taking away from them some of the powers which have been theirs since confederation.
>
> ...within their sphere the provinces enjoy the powers of self-government just as much as the Dominion parliament does, and if so, surely the Dominion parliament cannot take upon itself the right to change a statute which gives to those provinces the powers which they enjoy.
>
> (House of Commons Debates Feb. 18, 1925, at page 298.)

(3) 1925

51 Rt. Hon. Arthur Meighen (Leader of the Opposition):

> No one in this parliament of Canada could dream, for a moment, of asking the British House of Commons and House of Lords to tear up the securities to which we and others are parties on the mere demand of this House itself. Undoubtedly, the pact of confederation is a contract and there are rights involved therein not represented by the Parliament of Canada. We could not put ourselves in the position of asking that rights so secured should be disturbed on our motion alone. The speech of the Minister of Justice determines, I think, without power of dispute, that there should never be suggestion of amendment affecting other parties to the contract save after conference and consent of those other parties.

(House of Commons Debates Feb. 19, 1925, at page 335.)

(4) 1940

52 Rt. Hon. MacKenzie King (Prime Minister):

We then immediately sought to bring in a measure of unemployment insurance which would be beyond question as to its validity. The difficult but most necessary part of the whole business was to get the consent of the several provinces.

(House of Commons Debates June 25, 1940, at page 1117.)

(5) 1951

53 Rt. Hon. Louis St. Laurent (Prime Minister):

I submit again that the statute (the B.N.A. Act) apportioned the sovereignty to Parliament for certain purposes and to the legislatures for other purposes, and what is assigned to the legislatures is in no wise under the jurisdiction of this Parliament and cannot be touched without the consent of those who have jurisdiction over it.

(House of Commons Debates 1951, at page 2621.)

54 At the Constitutional Conference of January, 1950, the Prime Minister, Mr. St. Laurent stated:

I should like to repeat again the opinion I have expressed on many occasions that, regardless of the legal position, nothing placed by the constitution under the jurisdiction of the provincial legislatures should be dealt with or altered without provincial participation.

I stated in the House of Commons on January 31, 1949:

> With respect to all matters given by the constitution to the provincial governments, nothing this house could do could take anything away from them. We have no jurisdiction over what has been assigned exclusively to the provinces.

I expressed similar views in the House of Commons on July 5, 1943, and again on May 28, 1946.

It has always been my view that any procedure for amendment of the joint portion of the constitution must make proper provision for participation by both the federal and the provincial authorities.

55 The above quotations are but a few of many similar opinions expressed by parliamentarians on this important issue. There are as well others in support of the view that the need for Provincial consent is politically desirable, though not constitutionally necessary. The overall consensus, however, is in support of the statement made at page 37 above that Canadian constitutional thinking has moved steadily to the recognition of the right of the Provinces to be consulted.

56 In our view, the correct constitutional position is that stated in 1931 by Mr. Louis St. Laurent, later Prime Minister of Canada, in a Presidential Address to the Canadian Bar Association. The text of his address was reported in Vol. IX, Canadian Bar Review, dated October 1931. At page 533-534, he is reported as saying:

> But after the declaration of 1926 that both the United Kingdom and the Dominions are autonomous communities equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, it would hardly seem probable that the Parliament of the United Kingdom would undertake to legislate for the territory of any one of those Dominions, unless it be expressly declared in the Act that that Dominion had requested and consented to the enactment of the proposed legislation. And if the United Kingdom and the Dominions are equal in status and in no way subordinate one to another in any aspect of their domestic or external affairs, does not the provision of section 92 of the Act of 1867, that in each province the legislature may exclusively make laws in relation to the amendment from time to time of its constitution, except as regards the office of Lieutenant Governor, seem to indicate that the Houses of the Dominion Parliament would have no jurisdiction to request or to consent to enactments that might extend or abridge Provincial legislative autonomy? It is true that one of the proposed sub-sections of the Statute of Westminster is to declare that nothing in that Statute shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder; but the declaration of the Imperial Conference purports to be a statement of the established constitutional position, and if it is so in fact, is anything further required to make it clear that the constitution of the provinces can be amended or affected only by the provinces themselves?
>
> Section 92 excludes federal jurisdiction over them, and the declaration of 1926 does seem to state a constitutional position that precludes interference with them by any other Parliament to which they are said to be in no way subordinate.

57 Direct formal communications, in a constitutional sense, between Canada and Her Majesty is through the Governor General, Her Majesty's personal representative in Canada. There is no such communication open to the Provinces. Unquestionably, the Federal Government represents and speaks for the whole of Canada in its external relations and foreign policy, but as regards constitutional amendments there is a limitation on the plentitude of its authority to act, placed there by the Canadian Constitution itself. The division of powers prescribed by the Constitution excludes Federal jurisdiction over Provincial autonomy within their legislative competence, and thus a proper request to Her Majesty's Parliament in Great Britain to change such fundamental aspects of the Constitution can only be made after the Provinces have agreed to such change.

58 As stated by Rinfret, C.J. in *Attorney-General for Nova Scotia v. Attorney-General for Canada*, [1951] S.C.R. 31 at page 34:

> The Constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject matters referred to it by section 91 and that each Province can legislate exclusively on the subject matters referred to it by section 92. The country is entitled to insist that legislation adopted under section 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in section 92 should come exclusively from their respective Legislatures.

59 The requirement for Provincial consent thus goes much further than mere custom and usage. In our view, it would be inconsistent with the Federal character of Canada's constitutional system to treat the Canadian Parliament alone as having the power to secure the amendment of any part of that system, disregarding the views of Provincial Governments and Legislatures affected by these amendments. The very nature of the federation requires that the rights and powers of its constituent units be protected.

60 By attempting to secure from the Parliament of Great Britain an amendment that would affect the fundamental rights of the Provinces without first obtaining the consent of the Provinces, the Canadian Houses of Parliament would be arrogating to themselves an authority they do not possess, an authority that would negate the plenary and exclusive power of the Provinces to legislate on matters within their competence and would provide access for Parliament into the Provincial domain from which they are constitutionally excluded. They would, in fact, be asserting a jurisdiction that would enable them to obtain indirectly what they cannot legally attain directly.

61 As stated by Lord Atkin in delivering the judgment of the Judicial Committee in *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.), at page 352:

> It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy.

The reference to 'foreign country' is not to Great Britain, but, in our view, the principle stated applies with equal force here.

62 The framers of the British North America Act decided in their wisdom that Canada should not be a unitary state, but a federal one. Canada, however, could in effect be converted into a unitary state if that Act could be amended simply at the request of the Canadian Parliament without the concurrence of the Provinces.

63 The requisites of the Constitution in a federal state by which the legislative authority of the federating parties are defined, and supremacy circumscribed, must be strictly enforced if the rights of minorities are to be adequately protected. In this connection the words of Lord Sankey, L.C. in *re The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 (P.C.) at page 70 are apt:

> Inasmuch as the (British North America) Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.

64 Undoubtedly, the Canadian Houses of Parliament have the constitutional authority, of their own accord, to request the Parliament of Great Britain to amend the British North America Act in matters of Federal concern only, but in our opinion it has no such authority to request an amendment that would directly alter provisions of that Act affecting Federal-Provincial relations or the powers, rights or privileges secured by the Constitution of Canada to the Provinces, without first obtaining the consent of the Provinces to such amendment.

65 We would accordingly answer Question 2 affirmatively.

Question 1

66 If the amendments to the Constitution of Canada sought in the 'Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada', or any of them were enacted, would federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments be affected and, if so, in what respect or respects?

67 The question submitted has two parts. The first in effect asks whether Federal-Provincial relationships, or those powers, rights and privileges granted by the British North America Act, presently secured to the Provincial Legislatures, as seen and discussed above, would be affected, i.e. abridged or altered, if the "Constitution Act, 1981", were enacted. The second part of the question is as to the manner in which these relationships or powers, rights and privileges would be affected if the first part of the question is answered affirmatively.

68 Counsel for the Attorneys-General of the Provinces represented at the hearing argued that the proposed legislation would affect Federal-Provincial relations in a variety of ways and they referred specifically to a number of the provisions in the Charter of Rights and Freedoms that, in their opinion, would restrict the legislative competence of the Provinces. They

further submitted that the proposed amending formulae is in derogation of the powers, rights and privileges granted the provinces by the British North America Act.

69 The Attorney-General of Canada, on the other hand, submitted that this question is premature, speculative and not appropriate for a reference procedure. He contended that it is speculative and premature because of the amendments that may be made to the Resolution before it meets final approval of both Houses of Parliament. Further, he argues that it is inappropriate because it is too broadly and vaguely worded and is thus of a nature that is impossible to answer satisfactorily.

70 That argument is not without merit as related to the second part of the question. The specific sections in each part of the proposed Constitution Act have, in some instances, already been changed and doubtless other changes will be made before final approval is granted. It would therefore be speculative and wasteful on our part to express an opinion on the ultimate effect of each specific section and we decline to express an opinion thereon. It is also our view that such detailed examination is unnecessary in order for us to answer this question.

71 Different considerations arise, however, with respect to the first part of the question. Whether or not further amendments are made, it is the declared policy of the Federal Government that the Constitution Act will contain an entrenched 'Charter of Rights and Freedoms' and interim and long-range formulae for future amendments to the Act, i.e., the Constitution of Canada. Further, Sec. 52 of the proposed Act renders "of no force or effect" all Federal and Provincial legislation inconsistent with the provisions of the Constitution of Canada, to the extent of such inconsistency. These provisions of the Act are in general terms and not open to change.

72 Without getting into specifics, it is clear that a 'Charter of Rights and Freedoms' must infringe upon the powers of the Provinces to legislate in respect of property and civil rights, as granted by Sec. 92 of the Act of 1867. Further, amendments to the present Constitution of Canada which would affect Provincial rights and powers cannot at present be made without Provincial consent. Under the proposed amending formulae, there is no doubt (and this is not denied by the Attorney-General of Canada) that the rights of one or some of the Provinces could be altered, abridged or in fact displaced without the consent of those Provinces. Finally, it is patently obvious on the face of it that the provisions of Sec. 52 of the proposed Constitution Act must affect the rights, powers and privileges of the Provincial Legislatures as its effect is to render void or repugnant legislation passed within a Province which is otherwise 'intra vires' the Legislature of that Province.

73 The simple answer to Question 1, in our opinion, must be "yes".

Question 4

74 If Part V of the proposed resolution referred to in question 1 is enacted and proclaimed into force could

(a) the Terms of Union, including terms 2 and 17 thereof contained in the Schedule to the British North America Act 1949 (12 - 13 George VI, c. 22 [U.K.]), or

(b) section 3 of the British North America Act, 1871 (34 - 35 Victoria, c. 28 [U.K.])

be amended directly or indirectly pursuant to Part V without the consent of the Government, Legislature or a majority of the people of the Province of Newfoundland voting in a referendum held pursuant to Part V?

75 We note, from the 'Consolidation of Proposed Resolution and Possible Amendments' filed at the hearing that the numbers of various sections have been changed. However, we are using the draft legislation in the form in which it was first presented to us.

76 *Term 2* of the Terms of Union of Newfoundland with Canada, referred to in the question, affirms the geographic area of the Province of Newfoundland as being "the same territory as at the date of Union, that is to say, the island of Newfoundland and the islands adjacent thereto, the Coast of Labrador as delimited in the report delivered by the Judicial Committee of His Majesty's Privy Council on the first day of March, 1927, and approved by His Majesty in His Privy Council on the twenty-second day of March, 1927, and the islands adjacent to the said Coast of Labrador". *Term 17* gives the

Newfoundland Legislature the exclusive authority to make laws in relation to education, but prohibits that Legislature from making laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools or denominational colleges that any class or classes of persons had by law in Newfoundland at the date of Union. It also makes provision for such schools or colleges to share in the public funds allocated for education on a non-discriminatory basis.

77 Term 3 of the Terms of Union provides:

> 3. The British North America Acts, 1867 to 1946, shall apply to the Province of Newfoundland in the same way, and to the like extent as they apply to the provinces heretofore comprised in Canada, as if the Province of Newfoundland had been one of the provinces originally united, except in so far as varied by these Terms and except such provisions as are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more and not all of the provinces originally united.

78 Section 3 of the British North America Act, 1871, reads:

> 3. The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

79 There is no provision in the Terms of Union which provides a mechanism for their amendment. By Term 3 (supra), the provisions of Sec. 3 of the British North America Act, 1871, would apply in respect of any proposed amendment to Term 2 of the Terms of Union. Under that section, the limits of the Province of Newfoundland could then be changed only with the consent of the Newfoundland Legislature.

80 We have already expressed the opinion that the fundamental provisions of the British North America Act cannot be amended without the consent of the Provinces. It is implicit in this that the Terms of Union, incorporated in the British North America Act 1867 by the 1949 amendment, cannot be changed without the consent of the Province of Newfoundland.

81 By Sec. 43 of the proposed "Constitution Act, 1981" any provision in the Constitution that applies to one or more Provinces may be amended with the consent of the legislative assembly of the Province or Provinces affected by the change. Thus, the consent of the Newfoundland Legislature would be required for any amendment to the Terms of Union.

82 Nevertheless, while Sec. 47(2) of the "Constitution Act" declares that the operation of the general amending formulae does not apply to an amendment referred to in Sec. 43, subsection (1) of Sec. 47 provides that any provision, including Sec. 47, for amending the Constitution (which would include Sec. 43 of the Constitution Act and Sec. 3 of the British North America Act, 1871) may be amended by the general amending formulae.

83 The general amending formulae are contained in Secs. 41 and 42. By Sec. 41 the pre-requisites are:

> (a) resolutions of the Senate and House of Commons, and
>
> (b) resolutions of the legislative assemblies of at least a majority of the provinces that includes
>
> > (i) every province that at any time before the issue of the proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada,
> >
> > (ii) two *or more* of the Atlantic provinces, and

> (iii) two *or more* of the Western provinces that have *in the aggregate*, according to the then latest general census, a population of at least fifty per cent of the population of all of the Western provinces.
>
> (2) In this section,
>
> "Atlantic provinces" means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland;
>
> "Western provinces" means the provinces of Manitoba, British Columbia, Saskatchewan and Alberta.

84 It is clear that, under the amending formula in Sec. 41, constitutional amendments affecting the Province of Newfoundland (including the Terms of Union, excepting *Term 2*) may be made without the consent of the Government, Legislature or people of this Province, if Sec. 47(2) is amended to permit the repeal of Sec. 43. However, *Term 2* could also be amended without Newfoundland's consent if, in addition to the repeal of Sec. 43 above, Sec. 3 of the British North America Act, 1871, were also repealed.While the possibility of this happening may be remote because of the implications on all the Provinces of Canada, nonetheless the possibility is there, and in strict law, the answer to the question is that there is provision whereby all the Terms of Union could be changed without Newfoundland's consent.

85 The provisions of Sec. 42 are only applicable after an amendment to the Constitution has been authorized by resolutions of the Senate and House of Commons, and the legislative assemblies of the Provinces referred to in Sec. 41(1)(b) have not passed the required resolutions within twelve months after the passage of the resolutions by the Senate and House of Commons. The Governor General may then issue a proclamation under the Great Seal of Canada authorizing a referendum to be held throughout Canada and may proclaim an amendment to the Constitution where so authorized by a referendum at which:

> (a) a majority of persons voting thereat, and
>
> (b) a majority of persons voting thereat in each of the provinces, resolutions of the legislative assemblies of which would be sufficient, together with resolutions of the Senate and House of Commons, to authorize the issue of a proclamation under subsection 41(1),
>
> have approved the making of the amendment.

86 As we understand subsections (1)(a) and (b) of Sec. 42, in order for a proposed amendment to be made by way of referendum, not only must the majority of persons in Canada as a whole approve it, but as well the majority of persons in each Province must vote in its favour. Thus, while it would be possible under this Section for an amendment of the Terms of Union, and of Sec. 3 of the British North America Act, 1871, to be enacted without the consent of the Government or Legislature of Newfoundland, it appears that the approval of the majority of persons in the Province of Newfoundland voting in a referendum must be obtained. This applies not only to the amendment of Sec. 43 and Sec. 47(2) in the first instance, but also to any proposed amendment of the Terms of Union that could follow.

87 As can be seen, the possibility for change exists, but an unqualified answer to the question posed could be misleading. We would therefore answer question 4 as follows:

> (1) By Sec. 3 of the British North America Act, 1871, *Term 2* of the Terms of Union cannot now be changed without the consent of the Newfoundland Legislature.
>
> (2) By Sec. 43 of the "Constitution Act", as it now reads, none of the Terms of Union can be changed without the consent of the Newfoundland Legislative Assembly.

(3) Both of these sections can be changed by the amending formulae prescribed in Sec. 41 and the Terms of Union could then be changed without the consent of the Newfoundland Legislature.

(4) If the amending formula under Sec. 42 is utilized, both of these sections can be changed by a referendum held pursuant to the provisions of Sec. 42. In this event, the Terms of Union could then be changed without the consent of the Newfoundland Legislature, but not without the consent of the majority of the Newfoundland people voting in a referendum.

88 The questions referred to have been answered as follows:

Question 1 - Yes.

Question 2 - Yes.

Question 3 - Yes.

Question 4 - As indicated on page 63-64.

Order accordingly.

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