

Lester & Co.

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Mr Day

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CANADIAN CONSTITUTION. FEDERAL-PROVINCIAL AGREEMENT

1. It may be useful to attempt to distill important elements of the agreement between Mr Trudeau and nine out of ten of the Provincial Premiers last week (all except Quebec). The changes mainly concern the Amending Formula and the Charter of Rights and Freedoms.

AMENDING FORMULA

2. Mr Trudeau's proposals were based on the Victoria formula (see Annex) which effectively gave the veto on constitutional amendments to any Province with at least 25% of the population of Canada, i.e. Quebec and Ontario. Under the new agreement, Mr Trudeau accepted the Provinces' preferred amending formula, the Vancouver Consensus (see Annex), under which no single Province can veto. The essential elements of the Vancouver Consensus are:-

- a) Amendments can be made through a resolution of the Federal Parliament plus resolutions of the legislative assemblies of two-thirds of the Provinces representing at least 50% of the population of Canada.
- b) Provinces can opt out of any amendment with which they do not agree; but there is now to be a financial disincentive, whereby if a Province opts out it will not receive the financial benefit it would otherwise have obtained from the Federal programme flowing from the proposed amendment (e.g. a country-wide social welfare programme).
- c) The Vancouver formula involves dropping the provisions for a referendum in the event of failure by the Provinces and the Federal Government to agree on an amendment; such a referendum would have given the Federal Government the right to appeal to the Canadian people over the heads of the legislatures in the event of deadlock.
- d) The Senate veto which Mr Trudeau had added is now dropped.

/CHARTER

CHARTER OF RIGHTS AND FREEDOMS

3. There has been some dilution:-
- a) A so-called 'notwithstanding clause' has been inserted which will enable the Provinces (and the Federal Government) when legislating to override particular rights built into the Charter in the recent draft, viz Fundamental Freedoms (e.g. freedom of conscience and religion), Legal Rights (liberty and security of the person etc) and Equality Rights (no discrimination based on race, colour, religion, sex etc). It is thought unlikely that Governments would lightly resort to this clause.
- b) A Province with above average unemployment can now protect its citizens against the entrenched mobility right (whereby any Canadian can work in any Province). (Inserted for the benefit of Newfoundland where unemployment is high.)

The agreement itself is vague on the application of the controversial minority language education rights provision in the Charter, which was strongly opposed by Quebec (who do not want to be made to educate English-speakers in English in Quebec). At present it looks as though Mr Trudeau will insist on leaving the provision in the Charter untouched; if so, it will be difficult for him to get Quebec on board.

ABORIGINAL RIGHTS

4. Under the new agreement, the clauses in the original proposals recognising the rights of the aboriginal peoples of Canada are dropped. The clause providing for a constitutional conference aimed at identifying and defining native rights is retained, it being asserted that this is an important safeguard. The Indians and others have already reacted severely and are continuing their lobbying activities in London. Reinstatement of an aboriginal clause in the package is a possibility.

QUEBEC

5. The indications are that Mr Trudeau will try hard to get Quebec alongside. A major stumbling block is the apparent difficulty that Mr Levesque (of the Parti Quebecois) will have in reconciling his separatist views and political advantage with agreement on the constitution with Mr Trudeau. Less important probably (though still significant) are some of the PQ's specific objections, such as the general complaint that the Charter diminishes provincial powers and the unacceptability of the language provisions. Mr Levesque has made it clear that lobbying of British MP's in London by the Quebec Government will continue.

/TIMING

TIMING

6. There are many imponderables. Mr Trudeau has spoken of weeks or months needed to convince Quebec; but he may well want to move faster and might conclude that too much delay would lead to objections from other Provinces and the unravelling of the agreement. The New Democratic Party seem well on board; but the Progressive Conservatives have been harping on the desirability of converting Quebec and the role of the Canadian Parliament and this could cause delay. The original agreement whereby total parliamentary debate would last no more than three days is a dead letter now that the original package is to be revised.

7. The earliest the proposals could go to the Canadian Parliament is the week beginning 16 November; but considerable further delay is on the cards.

MR TRUDEAU

8. Mr Trudeau has made substantial concessions; but retained much of his original proposals, including the Charter of Rights and Freedoms. It seems likely that the Supreme Court judgment came as a blow to him and induced some change of mind; also, that he may always have been prepared to give some ground, but played a good game of poker, only revealing his hand at the last.

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PROPOSED AMENDING FORMULAE

Best Efforts Draft, the Vancouver Consensus, 1980

The legal draft based on the Vancouver consensus provided a number of ways of amending the Constitution.

The basic method would require

- i. resolutions of the Senate and House of Commons
- ii. resolutions of the Legislative Assemblies of two-thirds of the provinces representing at least 50 per cent of the population of Canada

This amending formula would be required to amend only certain constitutional matters of general application.

- a) the office of the Queen, of the Governor-General and of the Lieutenant-Governor
- b) the requirement for yearly sessions of the Parliament of Canada and the legislatures of the provinces
- c) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons and the Legislative Assemblies
- d) the powers of the Senate and provincial representation in it
- e) proportionate representation in the House of Commons
- f) the use of the English or French language.

However, any other amendment made in this way which affected

- a) the powers of the legislature of a province to make laws
- b) the rights or privileges granted or secured by the Constitution of Canada to the legislature or the government of a province
- c) the assets or property of a province, or
- d) the natural resources of a province

would have no effect in any province whose Legislative Assembly had expressed its dissent in a resolution, until that Assembly withdrew its dissent and approved the amendment.

Amendments which applied to one or more but not all of the provinces could also be made if resolutions were passed in favour of the amendment by the Senate, the House of Commons and the Legislative Assemblies of each province to which the amendments would apply.

Resolutions of the House of Commons, the Senate and the Legislative Assemblies of all the provinces would be required to change the basic method described above.

In all amending procedures, when the Senate had not passed a resolution in favour of an amendment within ninety days of its approval by the House of Commons, Senate approval would not be required if the House of Commons again approved the amendment.

(Source: Legal Texts forming Appendices to CCMC Reports to First Ministers, Document 800-14/061, Ottawa, September 8-12, pp. 1-4)

The Victoria Formula

At Victoria, BC, in 1971, all governments agreed on an amending formula, thereafter known as 'the Victoria Formula'. Under this formula, any amendment may be made by resolution of the House of Commons and the Senate, plus resolutions of the legislative assemblies of at least a majority of provinces that include:

- a) any province that has or at any time has had at least 25 per cent of the population (Quebec and Ontario),
- b) at least two Atlantic provinces,
- c) at least two western provinces whose combined populations according to the last general census form at least 50 per cent of the population of the western regions.

Certain matters could be changed only by the use of this formula and they broadly correspond to those matters of general application listed in the Vancouver formula.

(Source: Constitutional Conference Proceedings, Victoria, B.C. June 14, 1971, Appendix B, p. 63)

