Diversity Within Unity: Constitutional Amendments Under Section 43

by Kathy Brock

Section 43 of the Constitution Act, 1982 is used for amendments affecting one or more but not all provinces. Such amendments require the consent of provincial legislature(s) affected plus consent of the House of Commons and Senate. However, if the Senate defeats the amendment it may still be adopted if it is approved a second time by the House. The recent amendment to Term 17 of the Terms of Union between Newfoundland and Canada is an example of such an amendment. This article asks a number of important questions about the internal logic of section 43; the appropriate roles of the provincial and federal governments in these amendments; the limits on the roles of the House of Commons, the Senate and the provincial legislatures; the use of referenda and hearings; and finally, the lessons to be gained from the section 43 amendments that have occurred.

A constitutional guarantee of public funding for denominational schools and a role for churches in education were written into the Terms of Union by which Newfoundland joined Confederation in 1949. Following a Royal Commission Report on educational reform in 1992, the Government of Newfoundland released a proposal to restructure the school system. On September 5, 1995 a non binding referendum was held in Newfoundland on the question of amending Term 17. Close to 55% of the voters favoured reforming the school system.

The issue was brought to the House of Assembly for debate in October 1995, and was approved, 31 to 20, in a free vote after seven days of debate. In November, the Speaker of the House of Assembly sent a certified copy of the resolution to the Clerk of the Privy Council in Ottawa. In reaction to the federal government's slow response, on May 23, 1996, Premier Brian Tobin introduced a second resolution asking Ottawa to deal expeditiously with the amendment. Members of the Newfoundland House unanimously passed this resolution. The House debated the amendment for two days in June 1996 and approved it, sending it on to the Senate.

The resolution was referred to the Senate Standing Committee on Legal and Constitutional Affairs which held hearings in Ottawa and Newfoundland. On July 17, the Committee presented its Report to the Senate. It recommended adoption of the resolution without amendment, although a dissenting opinion written by Progressive Conservative members of the committee called for amendments to the resolution before passage. Specifically, Tory Senators wanted to ensure continued protection for the denominations privileged under the traditional schools regime by including in the amendment a "where numbers warrant" test which would be applied by the courts to determine whether or not uni-denominational schools should be established rather than leaving it to the discretion of the elected legislature. The Tory Senators also feared the amendment would transfer control over programmes to

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the government of Newfoundland and thus requested a change in wording to ensure that uni-denominational school boards retained control over their programmes.[1] These proposals reflected the positions taken by representatives for the Roman Catholic and Pentecostal boards, the amendments's staunchest critics.[2] After some delay, the Senate resumed debate on the resolution and, on November 27th, by a vote of 46-35, passed the resolution as amended in accordance with the recommendations of the Conservative Senators. On December 4, shortly after the expiry of the 180 day limit for the Senate's suspensive veto, the House of Commons, rejected the motion as amended by the Senate and passed the original amendment by a vote of 172-42, thus ensuring its proclamation.

The Newfoundland Amendment, as it came to be known, raised some important questions about the handling of Section 43 amendments.

- Should the Senate have held hearings and delayed consideration and passage of the Resolution after it had been approved by two duly elected representative bodies?
- What are the options for the Senate in considering section 43 amendments?
- Should the House of Commons have acted more quickly on the original request by the Newfoundland government, and conversely, should it have acted with what some perceived as undue haste when it did consider the amendment?
- What are the role and responsibilities of the House of Commons in considering amendments requested by provinces which impact directly only on their citizens?
- What are the responsibilities of both levels of government in ensuring that citizens are aware of proposed changes and have an opportunity to address those changes?

The internal logic of section 43 provides guidance in that it recognizes two essential facts about the Canadian constitution and the Canadian confederation compact. First, it acknowledges a commitment to local autonomy over local affairs. That is a principle instilled in our constitution from 1867, and one that is of central importance to all provinces.[3] This commitment allows provinces to make amendments which affect them directly without having to secure the approval of other provincial governments not directly affected. This releases the provinces from the strictures of both the general amending formula and the unanimity rules for other amendments.[4] As further recognition of the principle of local control, the requirement of provincial consent ensures that no province may have a change in its internal affairs thrust upon it or imposed without its consent. If an amendment is initiated at the federal level of government, the province has a veto over it.

The second principle recognized by section 43 is that the needs and aspirations of all the provinces may vary greatly, and these differences may not be understood by all other provinces. Again, release from the requirement of the 7/50 and unanimity procedures acknowledges these provincial differences and implies that provinces must be treated separately and differently from each other on certain matters.

> ***Section 43 reflects and further enshrines the principle of provincial diversity.***

Section 43 also allows for flexibility in the application of the amending procedure. Amendments may be initiated by a provincial legislative assembly, the Senate or the House of Commons. This means that if representatives from a province perceive a need for a change, they have different avenues of ensuring that the proposed change is considered. While co-ordinated action between the three bodies may be advisable given that it will help ensure passage of an amendment, it is not required by this section. Indeed, in contrast to the previous amendments made under section 43 all of which were drafted by the federal Department of Justice,[5] the 1996 Newfoundland experience sets the precedent that the provincial government may act independently of the federal government. Thus, implicit in the section is the understanding that the three bodies may form independent judgments on each amendment brought before them and may respond to each as they see fit.

By omission, section 43 allows the federal and provincial governments to set their own timetables for these amendments. Unlike the general amending formula, there is no minimum or maximum time limit. The section leaves this matter to the discretion of the politicians. Flexibility, accommodation, reasonableness, cooperation and respect for differences are all implied.

Section 43 specifically provides a role for the federal Parliament regarding changes to the Constitution of Canada even if the changes affect only one province. Just as the provincial role is important and must be respected, so must the role of the federal Parliament.[6] The formal inclusion of this section in 1982 assumes a role for the federal level of government in assessing the effects of changes made within provinces on the federation as a

whole. The House of Commons and Senate should not just legitimize actions by the province(s) proposing the amendments. They must treat each amendment independently and evaluate its merits according to objective criteria. Thus, while the two levels of government should try to cooperate, these amendments require independent judgement and, ultimately, agreement on the necessity for change. Thus, diversity within the union is the hallmark of the section, with the federal government assuming the crucial role of arbiter of the effects of any proposed amendments on the Canadian political system.

While allowing for diversity of method in public policy and provincial differences, the federal government should reflect upon the original purpose of the section of the Constitution being amended. While the Constitution should adapt to changing provincial needs, it should not be treated cavalierly. In the case of the 1996 amendment, it is important to consider the purpose and understanding of Term 17 when Newfoundland entered Confederation.

Term 17 was part of a promise given to denominational groups in order to secure their support for Confederation.[7] Under what terms should that promise be altered? Fairness to the parties to Confederation requires that only through negotiation and consultation with the provincial government and consideration of the position of the affected minorities, can the federal government make this determination. While this involves consideration of similar commitments made in other provinces, each amendment must be treated separately and its particular circumstances must be given special deliberation. Thus, while Term 17 is analogous to section 93 recognizing denominational education rights in other provinces, it is substantively and historically different. These differences require that any amendments to it be treated independently of section 93 amendments and vice versa.

Use of section 43 has been limited. Prior to the 1996 Newfoundland amendment, there were three successful attempts and one unsuccessful attempt using this section. Somewhat ironically, the first successful amendment was made in 1987 by Newfoundland to extend the denominational school rights of Term 17 to the Pentecostal Assemblies. The second successful use was by the Government of New Brunswick to recognize the role of the legislature and government in promoting the equality of status and equal rights of the French speaking and English speaking communities within that province. That amendment was proclaimed in March, 1993. It was used a third time in 1994 to amend Prince Edward Island's Terms of Union to include the federal obligation to maintain the fixed link between PEI and the mainland. The fourth attempt, which was unsuccessful, was made in 1983-4 to amend the *Manitoba Act* to provide for recognition of French as an official language of the province and for the translation, editing and publishing of statutes in both official languages. After much furore and the creation of wounds which have yet to heal, the amendment died on the Order Paper when the Session prorogued.[8]

These precedents, albeit limited, raise significant considerations which should be borne in mind when examining amendments under section 43. First, were the amendments initiated unilaterally or jointly by the federal and provincial governments concerned? Should the 1996 Newfoundland amendment be accepted as broadening the precedent to allow provinces to bring forward amendments without prior consultation with the federal government or should the House of Commons and Senate encourage all future amendments under section 43 to be the product of prior cooperation and mutual discussions between the two levels of government? The first choice encourages independent initiative and differences of judgement while the second emphasizes intergovernmental harmony and comity within the federal system.

Second, what was the nature of public consultation and participation in the amendments? Should referenda be required or expected where proposed amendments affect rights? How should the consent of minorities affected by the changes be ascertained? Do the Senate and House of Commons have an obligation to be especially vigilant where the rights of provincial minorities are threatened by the changes?

In the case of the Newfoundland amendment, the referendum was especially controversial. Critics pointed out that the question was vague and that the government had not released its legislation outlining the reforms at the time of the vote.[9] Questions surfaced on how minority interests could be determined by a simple majority vote. After the referendum, debate centred on whether a 55% majority should be considered valid when only 51.9% of eligible voters participated. In the Prince Edward Island plebiscite on the fixed link, the approval rate was 59%. The appropriate level of approval required to authorize an amendment is open to debate and may vary according to the type of amendment under consideration. However, if referenda are used then it must be determined whether minorities have been otherwise consulted and whether their views have been taken into account either through hearings or other means of consultation. Whereas the onus would rest with the provincial government to conduct the referendum and to decide what level of approval is required for it to feel comfortable proceeding with the amendment, the

obligation to ensure that the provincial government has consulted the minorities and taken their interests into account should rest with the federal government.

The section 43 amendments also have raised questions about the constructive use of public hearings in the amendment process. Hearings provide a means for dissident voices to be heard and compromises to be considered. During the Newfoundland amendment, the question arose as to whether the Senate should have held hearings on the amendment after it had been considered by the two elected bodies. Opponents had criticized the Newfoundland government for not holding hearings on the legislative scheme for reform of the schools after it was released in January 1996 or on the wording of the amendment.[10] There were no formal hearings in the House of Commons. The hearings undertaken by the Senate Standing Committee on Legal and Constitutional Affairs thus filled a void, reinforcing what unites rather than divides Canadians. They required the Newfoundland government to ensure that it had a sound justification for the amendment. They provided opponents and minorities within the province with an avenue to express concerns with the amendment and the legislation and to suggest modifications and constructive compromises. The Report powerfully registered the division within Newfoundland over the amendment.

> ***While the Senate could not stop the amendment, the Report served as an important caution and reminder of minority interests to the government as it proceeds with the schools reform, thus providing an incentive for a political compromise as reforms are enacted.***

Section 43 amendments have highlighted the importance of the respective legislative bodies in considering proposed changes to the constitution. On the 1987 Newfoundland amendment, there was one morning of debate in the provincial legislature with no hearings. On the PEI amendment, there was one day of debate in the provincial house, one day in the House of Commons and three days in the Senate with no hearings in any case. The New Brunswick amendment received extensive public scrutiny over the two years preceding it but only two days debate in the province, and one each in the House of Commons and Senate with no public hearings.[11] The 1996 Newfoundland Amendment was debated for seven days in the House of Assembly, two days in the House of Commons, and was debated and subject to hearings in the Senate. By comparison, this amendment received considerable scrutiny, however, the amount of time allocaated for debate is less important than the quality of debate. Has the legislative debate been adequate and have the various opinions been heard? Not everyone must be heard but all sides to a debate should be aired for proper consideration and scrutiny of an amendment. In accordance with its traditional duty as a body of sober second thought, the Senate has a special obligation to ensure that due and proper deliberation has been accorded to the amendment by the elected officials.

The Senate can only serve as a gadfly to the House of Commons and provincial legislatures since it is restricted to a suspensive veto but this role is important nevertheless. The Senate must be mindful of its traditional duties within the federal system when faced with section 43 amendments. Over the years the Senate has assumed the mantle of protector of minority rights within the federation. This is a complex task. On one level, this means that the Senate must vigilantly guard the rights of subminorities within Canada. Where minorities fear that their rights will be adversely affected as in the case of the Newfoundland amendment and the traditionally recognized denominations, the Senate has an obligation to understand these views, but not to the exclusion of other minorities who have been denied recognition traditionally, such as Aboriginal peoples and other denominations in Newfoundland. On another level, this duty requires the Senate to represent and guarantee provincial and regional interests within the federal government. This role as guardian of provincial diversity and difference places it at odds with the House of Commons and Supreme Court whose roles are to attend to the national interest. In the Newfoundland amendment, these two obligations of the Senate clashed, resulting in a divided Report.

In considering similar amendments in future which bring its obligations into conflict, the Senate should attempt to balance its obligations to represent and protect the rights of minorities within the federation (provinces) and within the provinces (citizen groups). As an unelected body with the right of delay but not veto, the Senate is cast in the role of only declining to accept the judgments of the elected provincial and federal legislatures and recommending modifications to or rejecting a proposed amendment where the flaws in process and substance are significant and of future importance. Where flaws are a matter of judgment or where the elected bodies have taken proper precautions to ensure due and proper deliberation, then the Senate should defer to those bodies and assent to the amendment while still reserving the right to caution or

advise on potential problems through its debates or reports.

Canada is at a critical juncture in its history. The question of national unity underlies any attempts at constitutional change. Section 43 provides one means of recognizing and accommodating provincial differences within the federation. The province of Quebec is contemplating an amendment affecting denominational schools in its province under section 43. The Newfoundland amendment in particular, and the previous section 43 amendments more generally, provide guidance to the constructive roles each level of government may play in securing changes which provinces deem necessary to address changing circumstances and needs within their borders. Successful execution of these responsibilities in future may provide a powerful example of how Canada can continue to recognize and achieve diversity within unity.

Notes

1. Senate, The Standing Senate Committee on Legal and Constitutional Affairs, *Report on the Amendment to the Constitution of Canada, Term 17 of the Terms of Union of Newfoundland with Canada*, Ottawa, July 17, 1996, 48-9. See also Leader of the Opposition of the Senate John Lynch Staunton, "PC Senators to Move Amendments to Term 17 Resolution," *Press Release*, September 30, 1996 and November 12, 1996.
2. See testimony by Michael Harrington with the Canadian Conference of Catholic Bishops and as Legal Counsel to the Pentecostal Assemblies of Newfoundland, and by Colin Irving, a constitutional advisor to the Newfoundland Catholic and Pentecostal education councils, Senate, *Proceedings of the Senate Standing Committee on Legal and Constitutional Affairs*, June 25, 1996, 21:14, 21:21-2, July 9, 1996, 23:20-2, 23:32; July 10, 1996, 24:76-83.
3. See Robert Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution*, (Albany: State University of New York Press, 1991); and Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* Second edition, (Toronto: University of Toronto Press, 1993).
4. However, as Peter Meekison cautions in" The Amending Formula," (1983) *Queen's Law Journal*, vol. 8, 99-122, section 43 is not meant to circumvent the 7/50 formula and thus cannot be used for amendments affecting all provinces.
5. James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects*, (Ottawa: Minister of Supply and Services Canada, 1996) 97-98.
6. As Peter Hogg observes in *Constitutional Law of Canada*, 3rd edition, (Scarborough: Carswell, 1992), pp. 83-84, these amendments are distinguished from amendments pertaining to the provincial constitutions which fall under the section 46 unilateral amending formula.
7. See Ki Su Kim, "J.R. Smallwood and the Negotiation of a School System for Newfoundland, 1946-48," (1995) *Newfoundland Studies*, vol. 11, 53-74.
8. For a discussion of these amendments, see Hurley, pp. 92-8, 103-5.
9. In a trenchant analysis of the referendum, Mr. Gerald Fallon, Executive Director of the Catholic Council of Newfoundland, pointed out a number of these criticisms (Telephone interview, June 10, 1996).
10. *Ibid.*
11. *Supra*, note 8.