Amending the Constitution by Stealth

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After the Victoria Conference on revision of the Constitution had end in failure in June 1971, Prime Minister Trudeau let it be known th there would be no more federal initiatives towards reaching feder provincial agreement on constitutional matters. As a topic of useful d cussion the Constitution has become a dead duck. This everybody know

What has attracted little attention is the fact that the Parliament Canada has recently made fundamental changes in one of the most bas constitutional arrangements – the principle of representation by popul tion in the House of Commons – without any serious discussion of th issues involved in either Parliament or the country. Indeed, only a fe speakers in the debate seem to have realized that they were addressin themselves to the Constitution at all. This is surprising because few pol ticians are content to discuss a narrow issue when it can be widened t take in larger questions of principle.

How did this happen? One would have guessed that the Trudeau go ernment might have entertained a wary hope that the debate might b confined and perhaps transient, but it could not have dreamed that ther would be almost no debate at all. Was there a conspiracy of silence s general and widespread that it took in everybody in Parliament and th press for over a year?

It will be recalled that one of the principal motivating forces in bringin an end to the United Canadas and in seeking a wider federal solution w the irresistible pressure in Canada West (which became the Province o Ontario) for "representation by population" in the elected chamber o the Canadian legislature. The only way that this could be achieved wa to settle for equal representation in the Senate and a federal form o government. This basic provision was written into the British North America Act and is currently contained in sections 51, 51A, and 52. Thu any changes in the formula require a constitutional amendment.

However, not all amendments to the BNA Act require either the con- ventional consultation and agreement between the federal and provincial governments or implementation by the British Parliament. This has al- ways been so. A number of sections of the BNA Act were intended to be

nsitory and could be changed by the Canadian Parliament when it ɔse to do so, but the Parliament of Canada had no general power of ɪstitutional amendment. In this it differed from the provincial legisures, which possessed from the beginning the right of "The Amendment ɪm Time to Time, notwithstanding anything in this Act, of the Con-ɪution of the Province, except as regards the Office of Lieutenant Gov-ɪor." However, in 1949, the British North America (No. 2) Act created ɜomewhat similar power at the federal level. This did not extend to ɪtters relating to provincial rights, or to the whole question of the fedɪl distribution of legislative power between the federal and provincial ·els, and there were certain other limitations which have no bearing on ɜ present discussion. What it did include, however, was the matter of ɔresentation in the House of Commons and the Senate. It was under ɜ power that the Canadian Parliament in 1952 passed an amendment the representation formula to protect provinces against excessive loss seats at any one time.

The achievement of representation by population in the House of Comɔns has been governed, historically, by two different formulas. The origɪl provision in 1967 gave 65 seats to Quebec, and the other provinces number of seats in the same proportion to their population as 65 bore the population of Quebec. Application of this formula over time gave steadily decreasing proportionate share to Quebec as a result of two ɔtors. One was the comparatively modest provision, introduced in 1915, ɪich in effect placed a floor under the number of seats a province could ·ve. This benefited the maritime provinces with their small and stable ·pulations. The other was the creation and settlement of new provinces the west. For this reason a new formula was devised in 1946 which ɪced a ceiling on the size of the House and gave each province repreɪtation based on the same ratio as the total number of seats bore to ɜ population of Canada. It was thought that this method would be fficient to preserve an appropriate share of seats for Quebec as long as rate of population growth was at least as high as that for the rest of ɜ country. As is well known, recent demographic trends in Quebec (low rth rate, little immigration) have falsified this assumption. Hence, in ·rt, the search for a new formula.

There is, however, another matter which is relevant to the present urɪt concern with the representation formula. This is the matter of the ·ocess of redistribuiton of seats. The Constitution requires that, after each ·cennial census, there shall be a reapportionment of seats based on the ɔpulation disclosed by the census. However, the Constitution is silent on ɔw seats are to be allocated *within* provinces and this was done (with ·casional loud complaints about gerrymandering) by the Canadian Parɪment itself. In 1964 permanent provision was made through the Elec-

toral Boundaries Act of that year for individual constituency boundar to be determined by ten boundary commissions, operating under a fede Representation Commissioner, according to a formula which sought equalize the populations of all constituencies in a province. Thus, t whole matter was taken out of politics, and placed in the hands of nc political and impartial bodies.

The number of seats allotted to each province in the decennial rec tribution has been a source of difficulty under the present formula becat it has been more likely to reduce representation than to increase it l cause of the fixed ceiling on the size of the House of Commons (nc 264). It has not only failed of its purpose in preserving Quebec's pr portionate share of representation, but has threatened with a loss of se all but the three fast-growth provinces of Ontario, Alberta and Briti Columbia. Furthermore, the various safeguarding provisions (the "floc which protected New Brunswick and Prince Edward Island, the provisi that no province could have fewer seats than another province with t same population, and the rule which limits loss of seats to fifteen perce at any one redistribution) seemed to deprive the growing provinces seats to which they felt entitled on the basis of population.

In any event reducing seats is far more difficult than increasing ther since it impels Representation Commissions to make hard choices in elir inating constituencies and devising new boundaries. Thus there was growing danger that dissatisfaction with the redistribution formula wou spill over onto the work of the Redistribution Commissions and thus ir peril the whole process of "non-political" boundary drawing. To avc this danger, which seems to have been keenly felt by the political esta lishment in all parties, the decision was taken in 1973 to call a tempora halt to redistribution and to rethink the whole representation formula.

Accordingly, the House Leader (who was then Mr. MacEachen) i troduced a bill into the House in 1973 to halt the redistribution proc until January 1975, and on 11 January 1974 it was ordered "that t system of readjusting representation in the House of Commons, includi the method of determining the number of Members for each provin established by Section 51 of the British North America Act be referr to the Standing Committee on Privileges and Elections." The intentic was that the Committee should reconsider the whole matter thoroughl hear expert witnesses, and come up with a new formula before the el of 1974. In fact, the dissolution of Parliament prevented lengthy cor mittee study shortly after the government had proposed several possil options.

The debate on the suspension bill (C-208) revealed some interestir features. The House seemed scarcely aware that it was debating a co stitutional change of major importance. A quick reading of the debat

lded only five references to the British North America Act, and no dis-
sition whatever to open up the wider question of constitutional amend-
:nt. There is one possible exception to this. A number of members on
: Conservative side, mostly from the West, challenged the existing sys-
n because it undermined the principle of representation by population,
d there were more or less veiled references to the "over-representation"
the Atlantic provinces. Much of the attack fell upon the Representa-
n Commissions themselves and the problems which had been created
· a member to represent adequately the needs of large and scattered
·al seats.

There was one sober warning of another grave matter. Mr. René Matte
d: "Mr. Speaker, by virtue of the underlying principles of the legis-
ion, it could happen, in theory, that the French Canadian element of
: country, for example, would have almost no representation in this
)use. it could happen that the number of members from Quebec in
s House would drop alarmingly, and we would thus be admitting that
)se who no longer believe in Canada are completely right."[1]

ı 20 February 1974, the House Leader laid before the Standing Com-
ttee of the Commons on Privileges and Elections his proposals for deal-
; with the problem.[2] There were several ways of dealing with the matter
l he proposed to allow the Committee to digest his proposal, call ex-
·t witnesses and then reach a conclusion before the deadline laid down
the suspension bill. In any event, the witnesses were never called be-
ıse of the dissolution of Parliament. Before the matter was raised again
ɔ things seem to have convinced the government to proceed without
·ther delay. In the first place, the government had been returned with a
)stantial majority, and was no longer faced with the need to compro-
se with the opposition parties as it had been during its minority period.
the second place, the government seems to have sensed that there was
ıeral agreement that its own proposal was the best that was likely to
erge in the circumstances. In a situation in which, under the old rules,
wfoundland, Nova Scotia, Quebec, Manitoba, and Saskatchewan were
to lose seats in spite of population increase, while Ontario with an
solute increase three times that of British Columbia would only receive
: same increase in seats (3), it seemed that almost any change was a
ınge for the better.

Basically, the proposal sought to attain three objectives: (*a*) no prov-
:e should lose seats and that the small provinces would continue to have
quitable" representation; (*b*) there would be better representation by
pulation among the provinces; and (*c*) Quebec would remain the
·otal element in the redistribution process. For this purpose provinces
uld be classified into three groups according to population:

Small Provinces: Those with less than 1.5 million population, wh comprise Newfoundland, Prince Edward Island, Nova Scotia, New Bru wick, Manitoba, and Saskatchewan. If the population of a province creases, the total number of seats to which it will be entitled will be det mined by dividing its population by the average constituency populat of the small provinces in the previous redistribution.

Medium Provinces: Those with populations between 1.5 and 2.5 n lion, which at present comprise British Columbia and Alberta. (In sub quent redistributions British Columbia is expected to move up into t next category.) A population increase will lead to one seat for every t the province would have received if treated as a small province with t largest average constituency.

Large Provinces: Those with more than 2.5 million population, whi comprise Ontario, Quebec and – after 1981 – British Columbia. Quet is attributed 75 seats in the present redistribution and an additional fo at each following decennial census. The number of seats assigned to t others will be based on the average constituency population of Queb

Two qualifications are included in the new rules: remainders are d regarded in the calculations; and any province which, because of red tribution, would have a lesser number of seats than another province wi less population will be attributed the same number of seats as that pro ince. Nor can any province have an average constituency populati greater than that of Quebec.

In the initial forecast the House would increase to a size of 276 in t present redistribution and rise to 352 by the year 2001. Apart from taki the pressure off the redistribution system, an increase in the size of t House may in itself be useful. The present committee structure impos an excessive burden on members and would function more effectively wi an increase in their number. The enlarged House seems capable of bei accommodated in the present Chamber, and modest structural alteratio such as shortening the end galleries might well be sufficient for the for seeable future.

On 2 December 1974, Hon. Mitchell Sharp (who had succeeded M MacEachen as House Leader) moved second reading of a bill based the above proposals. While it did not have completely plain sailing, it d pass quickly through all of its stages and received Royal Assent on 2 December. Unlike previous changes in redistribution, it was not describ as an amendment to the British North America Act, but simply as Th Representation Act, 1974. Whether this change of name was a delibera choice or not, it had the effect of distracting attention from the fact th the bill was a constitutional amendment of some importance. Certainl there were few references in the subsequent debate to the Constitutio and no attempt to discuss it in the wider terms of constitutional amen

ent. It is possible that members were more reticent than usual because a natural desire to achieve a Christmas recess.

A number of Conservative members, mostly from western Canada, ere clearly unhappy with the bill and continued to return to the theme unalloyed representation by population. Compromise, however, saved e day. One grievance was removed before the bill was introduced by aking provision for a second seat for the Northwest Territories, while ntinuing representation of the Yukon at one. Alberta and British olumbia were each given an additional seat over the initial 20 and 27 ovided in the bill.[3] This was enough to prevent the Conservatives from ocking the bill, though they voted against it on third reading.

The position of Quebec, described as pivotal by Mr. Sharp, may not protected indefinitely unless its population growth continues to be the me as that of the country as a whole. "Should these assumptions," he id, "prove to be wide of the mark, Parliament may choose at some later ıte to add fewer or more seats to Quebec, which is the pivot of the hole system, as it was until the law was last amended."[4] This half-omise is not likely to be wholly reassuring to Quebec. Senator Martial sselin expressed what many others must have felt when he said:

> say that amalgamation formula, which other members of the House of ommons and myself did study does not live up to the expectations of the ople of Quebec at the present time. Quebec cannot put up with such an ıbalanced representation as compared with the representation of Ontario the years to come. I am saying that, and I repeat it, because Quebec has particular character, because it is not a province like the others—even ough other senators and other members of the House of Commons believe at there should be a melting pot, and Quebec should be blended with the st of Canada, and I think Quebec deserves particular treatment.
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> I am not asking for any favours from other provinces of Canada. But if that anadian Confederation is to be kept alive Quebec should have the same ımber of members as the largest province, Ontario.[5]

This is an argument that takes us back to the Confederation Debates, ıd its appeal has been heightened by the spectre of a sharp decline in uebec's population relative to the rest of Canada. *Le Devoir*, for ample, gave considerable prominence to Statistics Canada projections ıich, on certain assumptions, would reduce Quebec from 28 percent 22 percent of the population of Canada by the end of the present ntury.[6]

hose members of the House of Commons who regarded the principle of presentation by population as a basic, overriding democratic principle d not press their point on historical and constitutional grounds, as they ight have done. Whether they were restrained by a sense of the irrele-

vance of constitutional history or by a sense that a second and conflict principle of representation was also at stake is not clear. The other p ciple is one of "equitable" as distinct from proportional representat and has deep roots in Candian history. It applies, and will continue apply, to the historic communities of the Atlantic provinces, as proba population growth will continue to concentrate in southern Ontario a the two most western provinces. It applies even more forcibly to Quel If that province remains within the union, and continues to face a clining share of the population of Canada, its sense of insecurity v compel some sort of recognition of the "two nations" as a basic elem in confederation.

The two historic constitutional principles were – not for the first tim in conflict. Indeed, they underlie much of Canadian history, and pr tically all of it that deals with the relations between the French- a English-speaking communities. English-speaking Canadians, particula perhaps Westerners, have tended to believe in the liberal North Americ tradition that democracy means that majorities should rule. But the wh history of constitutional government is a demonstration that the author of government needs also to rest on the willing consent of the minorit a point perhaps more obvious to a French Canadian or a Nova Scoti than to others. Representation in adequate numbers is a necessary sa guard for such minorities, hence the importance of modifying "rep. pop." with "equitable" representation. It is not a matter of surprise th in the present case the responsible politicians have come up with a pra matic compromise which solves the present problem but holds out lit hope of settling the problem forever. Very few constitutional arrang ments ever do, for they must be adapted to altered circumstances.

But the mystery remains. How did they manage the affair without a serious public discussion at all? Was there a well-managed conspiracy on the part of the party establishments to arrange matters so that no skeleto were brought rattling out of closets? Probably not, if only for the simp reason that it worked too well to have been the result of delibera management.

Probably it was just another example of an old Canadian habit wisely refusing to discuss insoluble questions which can only add ext heat to the political system, and which stand in the way of managing th problems for which compromises are possible. It is a good example the "closed politics" of a past age which would not have understo participatory democracy.

Canada. House of Commons Debates, 9 July 1973. p. 5438.
The proposals, complete with details of the calculations, appear in *Canada House of Commons Standing Committee on Privileges and Elections. Minutes of Proceedings and Evidence*, No. 3, 9 April 1974, pp. 3: 27–33: 145.
The new numbers are as follows (current seats in parentheses): Ontario 95 (88); Quebec 75 (74); British Columbia 28(23); Alberta 21 (19); Saskatchewan 14 (13); Manitoba 14 (13); and Nova Scotia 11, New Brunswick 10, Newfoundland 7, and Prince Edward Island 4 – all unchanged.
Canada House of Commons Debates, 2 December 1974, p. 1864.
Canada. Senate Debates, 17 December 1974, pp. 423–24.
"Quand le Québec tombe de 28% à 22% de la population," *Le Devoir*, 20 août 1974.