

# Amending the Constitution

I. Introduction: Why Amend .....	26:1
II. Constitutional Amendment in Canada Before 1982 .....	26:2
A. Constitutional Amendment at Confederation .....	26:2
B. Toward a Domestic Amendment Procedure .....	26:6
III. Constitutional Amendment After 1982 .....	26:8
A. Design Issues .....	26:8
B. The Law and Convention of Provincial Consent .....	26:9
C. The Constitution's Amendment Formula .....	26:24
D. Meech Lake and Charlottetown: Failed Constitutional Reforms .....	26:28
1. The Meech Lake Accord .....	26:29
2. The Charlottetown Accord .....	26:38
E. Is Comprehensive Constitutional Reform Possible? .....	26:49
IV. Modern Challenges to Constitutional Change .....	26:56
A. Constitutional Amendment and Quebec Sovereignty .....	26:56
1. A Quebec Veto and the Regional Veto Act .....	26:56
2. Quebec Secession .....	26:57
B. Senate Reform .....	26:71
C. The Status of the Supreme Court .....	26:91
V. Comparative and Theoretical Perspectives on Constitutional Amendment .....	26:101
A. The World's Most Rigid Constitution? .....	26:101
B. Formal and Informal Amendment .....	26:103
C. An Unconstitutional Constitutional Amendment? .....	26:109

## I. INTRODUCTION: WHY AMEND

A constitution and procedures for its amendment are like hockey and pucks—one can hardly work as it is supposed to without the other. It is no surprise, then, that only a few of the world's constitutions—by one count fewer than 4 percent—do not entrench amendment procedures authorizing alterations to their text: see Francesco Giovannoni, “Amendment Rules in Constitutions” (2003) 115 *Public Choice* 37 at 37. Why do almost all constitutional designers choose to write amendment procedures into their constitutional texts? There is certainly some soft pressure to conform to what appears to be a global norm of entrenching rules of constitutional amendment. But “other constitutions have them, so ours should too” just does not seem like a good enough reason to justify including anything in a constitution, especially because the process of constitution-making ordinarily involves fiercely competing interests, finite time and resources, and the highest of all costs in the event of failure.

The main purpose of amendment is evident in the word itself. The verb “to amend” derives from the Latin *emendare*, meaning “to free from fault”: see Walter W Skeat, *A Concise Etymological Dictionary of the English Language* (Oxford: Clarendon Press, 1885) at 133. Where a political community identifies something in need of updating in its codified constitution or discovers an outright error in its text, the actors authorized to amend the constitution can initiate the process of constitutional amendment to free their constitution from the observed fault without having to write an altogether new constitution. This orderly process of piecemeal and peaceful constitutional change has many advantages over its alternatives—either living with a faulty constitution unsuited to the times or outright revolutionary change accompanied perhaps by violence and the need to start from scratch.

Not all constitutional amendments are adopted in an orderly process, nor are they all done in piecemeal fashion. Here in Canada, as we show in Section II of this chapter, the successful patriation of the Constitution in 1982 and the failed Meech Lake and Charlottetown accords were far from orderly and they were all efforts at wholesale constitutional transformation. These exceptions to how constitutional amendment has typically unfolded in Canada reinforce the rule that the procedures for constitutional amendment are designed to provide a clear and actionable roadmap for the amending actors to respond to the changing political, social, and economic needs of the country. At their best, amendment procedures in constitutional democracies aggregate and translate popular preferences into constitutional rules while balancing these preferences against the larger backdrop of a constitutional commitment to human rights and the rule of law.

Still, as Peter Hogg has quite rightly observed, “[i]t is always difficult to amend a country’s constitution”: see Peter W Hogg, “The Difficulty of Amending the Constitution of Canada” (1993) 31 *Osgoode Hall LJ* 41 at 60. Yet whether or not the process of amendment is ever successfully used at all, constitutional designers nonetheless regard as important the entrenchment of amendment procedures. Perhaps the most basic motivation is to distinguish the constitutional text from ordinary law—constitutions are generally susceptible to alteration only with recourse to procedures that are more demanding than the simple parliamentary majority required to change or repeal an ordinary statute. Constitutions can confer fundamental rights and freedoms, create and constrain public institutions, and establish rules for the exercise of democracy—and it is commonly believed that the content of constitutions ought to be insulated from change by the variable whims of electoral majorities.

## II. CONSTITUTIONAL AMENDMENT IN CANADA BEFORE 1982

The power of constitutional amendment is an important marker of sovereignty. As the materials that follow show, until 1982 this power was not fully exercisable by Canadian actors.

### A. Constitutional Amendment at Confederation

The *British North America Act, 1867* (since renamed the *Constitution Act, 1867*) did not include a procedure for its own amendment in Canada by Canadian actors. The Act instead remained amendable by the same body that had written it to begin with—the Parliament of the United Kingdom. There were a few exceptions, none particularly notable in their scope, to this rule that amendments to the Constitution of Canada were possible only by the sovereign

legislature of another country. First, s 92(1) of the 1867 Act (since repealed) authorized a provincial legislature to amend its own constitution as to the matters falling within its jurisdiction:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

And s 101 of the Act authorized the Parliament of Canada to make amendments concerning courts:

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

When compared with the otherwise plenary amendment power of the Parliament of the United Kingdom in respect of the Constitution of Canada, these narrow domestic powers of amendment in Canada were a reminder that the *British North America Act, 1867* was little more than a colonial statute. The *British Statute of Westminster* later began to transform the Act from a colonial statute to a quasi-constitution. As discussed in Chapter 1, Introduction, the *Statute of Westminster* provided that no further British statute would apply to Canada unless it had been enacted at the request and with the consent of Canada. Canadian legislative bodies were also authorized by the *Statute of Westminster* to repeal or amend imperial statutes applicable to Canada. There was, however, one major exception—s 7(1) of the *Statute of Westminster* exempted the *British North America Act, 1867* from the power attendant to Canada's new legal and political autonomy, with the result that the Parliament of the United Kingdom retained its role as the body responsible for constitutional amendments to the most significant parts of the Constitution of Canada. But even this exception was softened by a convention, adopted at the 1930 imperial conference that preceded the enactment of the *Statute of Westminster*, that the Parliament of the United Kingdom would amend the Constitution of Canada only at the request and with the consent of Canada. Writing 20 years after the *Statute of Westminster*, William Livingston took stock of the evolution of the power of constitutional amendment in Canada:

From the beginning this [amendment] process has been surrounded with a certain mysterious imprecision, deriving from the fact that Canada's basic constitutional statute—the *British North America Act, 1867*—contained no provision for its own amendment. In other words, until 1949 there was no clause in the constitution setting out a procedure whereby its own provisions might be legally changed. Hence through the long years all amendments have had to be made by the Parliament at Westminster which enacted the original statute—a necessity that has produced all sorts of difficult problems for students of constitutional law in both Canada and the United Kingdom. It has long been settled practice that the Imperial Parliament will enact whatever amendments are requested by the appropriate authorities in Canada, but a question remains as to which are the appropriate authorities. It seems now to be settled, after considerable controversy, that the executive government, acting alone, may not make such a request; practice requires a joint address by the two houses of Parliament. But is it necessary for the Dominion authorities to consult with the provinces before going to London with this request or may the Dominion do this by itself? If consultation is conceived to be necessary, must all the

provinces be consulted? And if so, is it necessary that they all consent to the amendment before it is requested? If all need not consent, what part is necessary? These questions and other similar ones have plagued Canadians for years, and there is not yet any accepted solution either in precedent or in law.

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Before 1931, Canada, along with other colonies and dominions, was limited by the Colonial Laws Validity Act, 1865, under which any colonial legislation in conflict with British statutes was invalid. Canada could not amend British legislation at all; all British statutes that affected the British North America Act in any way were part of the Canadian constitution, untouchable by Canadian legislation. By the Statute of Westminster in 1931, however, Canada gained the right to alter any British statutes that were operative in the Dominion. This Statute repealed the restrictive provisions of the Colonial Laws Validity Act, gave to dominions the right to enact extra-territorial legislation, and surrendered the right of the British Parliament to legislate for the dominions without their consent. If this new competence of the Dominion Parliament had not been qualified, it would have bestowed upon that body the power to alter at will all the provisions of the British North America Act, 1867, including Sections 91 and 92. But the provinces insisted that a clause be inserted in the Statute to continue the protection of the distribution of powers, and this was done. Section 7 of the Statute provides that "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 to any order, rule or regulation made thereunder." Moreover, it extended the powers granted in Section 2 to the provinces as well as to the Dominion, and restricted the legislative powers thus granted to the already existing competences of the Dominion and the provinces. The purpose of Section 7 was to retain at Westminster the legal power to amend the constitution of Canada.

See William Livingston, "The Amending Power of the Canadian Parliament" (1951) 45 *Am Political Science Rev* 437 at 437, 438, and 441.

The Livingston extract above referenced the year 1949: "[U]ntil 1949 there was no clause in the constitution setting out a procedure whereby its own provisions might be legally changed." What happened that year to change how the Constitution could be amended? The Parliament of the United Kingdom passed the *British North America (No 2) Act, 1949*, which conferred on the Parliament of Canada the power to amend, by simple majority, a limited category of matters concerning the "Constitution of Canada." The amendment was inserted into the *British North America Act, 1867*, as s 91(1):

91. ... [T]he exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

(1) The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

The amendment was not without its critics, some fearing that it would allow the Parliament of Canada to amend the Constitution in respect of matters of importance to provinces without their consent. FR Scott explored the basis for this concern in an important article the year after the amendment was adopted:

Canada has now embarked upon the difficult process of bringing to her shores that ultimate legislative authority which, in spite of her complete political autonomy, has continued to rest in the Parliament of the United Kingdom, and which has from time to time been invoked for the purpose of amending the British North America Act. ... On October 17, 1949 Prime Minister St. Laurent, employing the customary procedure [of petitioning for enactment of an amendment in London], moved the adoption of a joint address praying His Majesty to cause a measure to be laid before the Parliament of the United Kingdom for the enactment of certain provisions granting a limited power of amendment of the Canadian constitution to the Parliament of Canada. After approval of this joint address by the House of Commons on October 27 and by the Senate on November 9, a bill incorporating its provisions, with minor verbal changes, was introduced into the British Parliament and adopted by the House of Lords on November 22 and by the House of Commons on December 2, under the title of the British North America (No. 2) Act, 1949. Royal assent was given on December 16.

It is clear that the refusal of the Canadian government to consult with the provinces before the adoption of the amendment, as urged by the Conservative party and by several provincial premiers, indicates its rejection of the compact theory of Confederation. Mr. St. Laurent in effect admitted this in his opening speech on the joint address, though he stressed that his proposal involved no change except a change of the venue where the amendments can be made, since only matters "within the exclusive concern of the federal authorities" were being dealt with. As no one knows, however, just what such matters may be, and as the provinces might take a different view from that of the Canadian government, or even of the Supreme Court were the question referred to it, we must consider this unilateral action by the federal Parliament as further evidence against the claims of those who would treat the constitution as a compact, either in law or in political theory.

As already noted, the federal amending power is an all-inclusive power, the "amendment from time to time of the Constitution of Canada," subject to certain exceptions. The phrase "the Constitution of Canada" includes the provincial constitutions. There is no separate "federal" constitution; the constitution is a single body of law setting up and apportioning authority to different organs of the state, some federal and some provincial. If the section had stopped there, it would have crystallized into law the present practice by which, through the joint address, Ottawa can secure any amendment it desires from the Parliament of the United Kingdom. But the section goes on to subtract from the generality of the opening words, and stipulates that the federal power of amendment shall not extend over: (i) Matters coming within the classes of subjects by this Act assigned exclusively to the Legislature of the provinces; (ii) rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province; (iii) or to any class of persons with respect to schools; (iv) or as regards the use of the English or the French language; (v) or as regards the requirements as to the annual session of Parliament and the five-year term (provided that the House of Commons may extend that term under the prescribed conditions).

In thus limiting its amending powers the federal Parliament has indicated its willingness to give a protection to provincial and minority rights which did not formerly exist. Formerly, only convention restrained Parliament from requesting any amendment—even one affecting so fundamental a right as the right to the two official languages in section 133 of the British North America Act. Now Parliament has withdrawn certain defined classes of matters from its competence, leaving them to be amended by a process to be agreed upon at the Dominion–provincial

conference. Thus it has voluntarily retreated, so to speak, from the position which, by subjecting the legal supremacy of the Parliament of the United Kingdom to the conventional control of the Canadian Parliament, had accidentally resulted in giving Canada a federal constitution as flexible as the English constitution itself. However should there be a failure to achieve agreement on the amending procedure for matters falling within any of the excepted classes (i) to (v) above, then presumably the former conventional method of amendment in London after a joint address from Ottawa will continue. This would indeed create an anomalous situation, since Ottawa would then possess both processes of amendment itself—one, over exclusively federal matters, by its own legislation, and the other, over all other matters, by joint address that Westminster cannot refuse to implement. In either case a mere majority vote in both Houses is sufficient for the adoption of the amendment. There may be political wisdom in consulting with the provinces before adopting a joint address requesting an amendment affecting provincial rights, but there is certainly no legal necessity for so doing.

See FR Scott, “The British North America (No. 2) Act, 1949” (1950) 8 UTLJ 201 at 201, 202, and 203-4. The Parliament of Canada requested this amendment from the Parliament of the United Kingdom without first having consulted the provinces. The obvious question is whether the provinces *should* have been consulted. On the one hand, the amendment did not affect the powers or prerogatives of the provinces, so on what basis could they object to the Parliament of Canada proceeding without their input? On the other hand, the amendment conferred a new power on the Parliament of Canada—a power that, as Scott suggests, could conceivably have been deployed to amend the Constitution in respect of provincial matters. There may have been political constraints militating against the Parliament of Canada’s use of its new amendment power in this way, but as a matter of law the Parliament of Canada was unfettered. Had you been a legal adviser to Prime Minister St. Laurent at the time, would you have advised him to consult with the provinces?

## B. Toward a Domestic Amendment Procedure

The 1949 amendment did not withdraw from the Parliament of the United Kingdom the power to formalize constitutional amendments to the Constitution of Canada. But by then the power of constitutional amendment in Canada was divided across the Atlantic between the two acts of approval and formalization—Canada would approve the amendment before officially requesting its entrenchment by the Parliament of the United Kingdom and the United Kingdom, no longer able to exercise the discretion to deny Canada’s request, would thereafter formalize the constitutional amendment by passing a parliamentary statute.

There still remained an open question—on what authority could Canada request an amendment concerning matters of federal–provincial concern? It was clear that, as a matter of legal authority, the Parliament of Canada could make the request unilaterally without consulting the provinces. But only a multilateral process of federal–provincial consultation and approval could clothe the Parliament of Canada in the political authority it needed to request an amendment affecting federal–provincial matters. By 1965, four general principles could be identified from a historical study of the procedures that had been used since Confederation to make amendments to the *British North America Act, 1867*. Guy Favreau, then minister of justice, explained these four principles after listing and briefly describing important amendments to the Constitution of Canada until that point:

*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 to 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 degree of provincial participation in the amending process, however, have not lent themselves to easy definition.

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, and twice in 1949] 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.

See Guy Favreau, *The Amendment of the Constitution of Canada* (Ottawa: Queen's Printer, 1965) at 15-16. As we will see below, in Section III, "Constitutional Amendment After 1982," the fourth general principle—that the Parliament of Canada would not request from the Parliament of the United Kingdom an amendment affecting federal–provincial matters without prior consultation with the provinces—would feature prominently, one might fairly say decisively, in the Supreme Court of Canada's reasons in *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 (the *Patriation Reference*).

Whether the practice of prior provincial consultation had matured into a convention was critical to designing a fully domestic amendment procedure for Canada. Had the practice matured into a convention, there would be a political requirement to entrench the convention into whatever amendment process was ultimately designed for Canada. But had the practice been a mere practice all along—not a convention—there would be less pressure as a political matter, and certainly none rooted in constitutional law, to translate the practice into a constitutionally entrenched rule requiring provincial consultation for constitutional amendments involving matters of federal–provincial relations.

Serious efforts to design a domestic process of constitutional amendment had begun even before the coming into force of the *Statute of Westminster*. These efforts finally culminated with the adoption of the *Constitution Act, 1982*, which included in its text a complicated structure of constitutional amendment, reviewed in Section III, which follows. For a detailed account of the many steps toward Canada's adoption of its new process of constitutional amendment, see James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Minister of Supply and Services Canada, 1996) at 25-67. Hurley explains the nearly 15 failed attempts along the way to the *Constitution Act, 1982*, beginning in 1927 with an intergovernmental conference attended by the prime minister and the premiers of the provinces. Canadian actors tried and tried again until they finally succeeded, 55 years later, in bringing the Constitution home.

### III. CONSTITUTIONAL AMENDMENT AFTER 1982

#### A. Design Issues

Designing an amending formula for a constitution raises many difficult issues. In the Canadian context, two have predominated. The first is the locus of sovereignty—that is, which institutions should be vested with the power of constitutional amendment. Should the power of constitutional amendment be directly vested with citizens, or instead with governments that are accountable to them? If the former, should there be provision for the election of a constituent assembly that would deliberate on constitutional amendments in advance of voting on them, or would ratification by a popular referendum with universal suffrage suffice? If the latter, are legislative assemblies the appropriate governmental institutions, and if so, given the federal nature of our polity, should some combination of legislative assemblies (both provincial and federal) be necessary to achieve constitutional change? Should certain groups, such as Indigenous peoples in Canada, be required to consent to amendments affecting their rights? As these questions make clear, identifying the locus of sovereignty for constitutional change is parasitic on an underlying conception of the nature of the political community whose terms of association are found in that constitutional document. And to the extent that there is a lack of an agreement on that conception—as is arguably the case in Canada—the process for constitutional amendment becomes a forum through which competing conceptions of the Canadian political community come into conflict.

Closely related to the first issue is a second—the correct balance to be struck between stability and flexibility. On the one hand, a constitution is meant to provide a framework within which the ordinary politics of political communities take place. If this framework were easily subject to change, it would be more difficult for it to provide a set of background rules for political decision-making. Moreover, since a constitution often addresses controversial issues, making constitutional change difficult arguably protects political decision-making because it reduces the ability of constitutional politics to crowd out ordinary politics—that is, the politics of non-constitutional issues. On other hand, should a constitution prove to be too difficult to change, it may be incapable of responding to the changing nature of the political community or to fundamental challenges to the constitutional order itself. A constitution that is overly rigid risks becoming illegitimate, a “suicide pact,” rather than the foundation for the ongoing existence and functioning of a political order. The balance between



stability and flexibility plays out in the level of support required for constitutional change—for example, should there be a super-majority requirement within legislative assemblies? Is a simple majority sufficient for referenda?

## B. The Law and Convention of Provincial Consent

The process for amending the Canadian Constitution—often referred to as the amending formula—has been a source of ongoing controversy. As we discussed above, until 1982, amendments to the most important parts of the Canadian Constitution required legislation by the Parliament of the United Kingdom. The process was initiated by a joint resolution of the Canadian House of Commons and the Senate. Generally, the agreement of the provinces was sought when amendments affected provincial rights and interests. However, in 1980, in the face of failure to secure the agreement of the provinces on what would become the *Constitution Act, 1982*, the federal government announced its attention to secure the necessary constitutional amendment without provincial consent.

This federal move prompted a series of constitutional challenges before several provincial courts of appeal that were heard together by the Supreme Court in the 1981 *Patriation Reference*, excerpted below. The provinces argued that Canadian constitutional practice had crystallized into a *legal* requirement for provincial consent to constitutional changes affecting provincial interests. The federal government took the position that no such consent was required. Moreover, the provinces made the additional argument that a constitutional *convention* existed for provincial consent, a position that the federal government rejected as well. A majority of the court held, in a 7:2 ruling, that there was no *legal* requirement of provincial consent. But a slightly smaller six-person majority also held that a constitutional *convention* had been established requiring a “substantial degree” of provincial consent to amendments affecting the provinces’ interests.

### Re: Resolution to amend the Constitution

[1981] 1 SCR 753

[Reproduced first are the majority reasons on the issue of whether there was a *legal* requirement for provincial consent.]

LASKIN CJ and DICKSON, BEETZ, ESTEY, McINTYRE, CHOUINARD, and LAMER JJ:

The References in question here were prompted by the opposition of six provinces, later joined by two others, to a proposed Resolution which was published on October 2, 1980 and intended for submission to the House of Commons and as well to the Senate of Canada. It contained an address to be presented to Her Majesty the Queen in right of the United Kingdom respecting what may generally be referred to as the Constitution of Canada. The address laid before the House of Commons on October 6, 1980, was in these terms:

To the Queen’s Most Excellent Majesty: Most Gracious Sovereign:

We, Your Majesty’s loyal subjects, the House of Commons of Canada in Parliament assembled, respectfully approach Your Majesty, requesting that you may graciously be pleased

to cause to be laid before the Parliament of the United Kingdom a measure containing the recitals and clauses hereinafter set forth:

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1981* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.
2. No Act of Parliament of the United Kingdom passed after the *Constitution Act, 1981* comes into force shall extend to Canada as part of its law.
3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.
4. This Act may be cited as the *Canada Act*.

... The proposed Resolution, as the terms of the address indicate, includes a statute which, in turn, has appended to it another statute providing for the patriation of the *British North America Act* (and a consequent change of name), with an amending procedure, and a *Charter of Rights and Freedoms* including a range of provisions (to be entrenched against legislative invasion) which it is unnecessary to enumerate. The proposed Resolution carried the approval of only two provinces, Ontario and New Brunswick, expressed by their respective governments. The opposition of the others, save Saskatchewan, was based on their assertion that both conventionally and legally the consent of all the provinces was required for the address to go forward to Her Majesty with the appended statutes. Although there was general agreement on the desirability of patriation with an amending procedure, agreement could not be reached at conferences preceding the introduction of the proposed Resolution into the House of Commons, either on the constituents of such a procedure or on the formula to be embodied therein, or on the inclusion of a Charter of Rights.

...

There are two broad aspects to the matter under discussion which divide into a number of separate issues: (1) the authority of the two federal Houses to proceed by resolution where provincial powers and federal-provincial relationships are thereby affected and (2) the role or authority of the Parliament of the United Kingdom to act on the Resolution. The first point concerns the need of legal power to initiate the process in Canada; the second concerns legal power or want of it in the Parliament of the United Kingdom to act on the Resolution when it does not carry the consent of the provinces.

The submission of the eight provinces which invites this Court to consider the position of the British Parliament is based on the *Statute of Westminster, 1931* in its application to Canada. The submission is that the effect of the Statute is to qualify the authority of the British Parliament to act on the federal Resolution without previous provincial consent

where provincial powers and interests are thereby affected, as they plainly are here. This issue will be examined later in these reasons.

Two observations are pertinent here. First, we have the anomaly that although Canada has international recognition as an independent, autonomous and self-governing state, as, for example, a founding member of the United Nations, and through membership in other international associations of sovereign states, yet it suffers from an internal deficiency in the absence of legal power to alter or amend the essential distributive arrangements under which legal authority is exercised in the country, whether at the federal or provincial level. When a country has been in existence as an operating federal state for more than a century, the task of introducing a legal mechanism that will thereafter remove the anomaly undoubtedly raises a profound problem. Secondly, the authority of the British Parliament or its practices and conventions are not matters upon which this Court would presume to pronounce.

The proposition was advanced on behalf of the Attorney General of Manitoba that a convention may crystallize into law and that the requirement of provincial consent to the kind of resolution that we have here, although in origin political, has become a rule of law. (No firm position was taken on whether the consent must be that of the governments or that of the legislatures.)

In our view, this is not so. No instance of an explicit recognition of a convention as having matured into a rule of law was produced. The very nature of a convention, as political in inception and as depending on a consistent course of political recognition by those for whose benefit and to whose detriment (if any) the convention developed over a considerable period of time is inconsistent with its legal enforcement.

The attempted assimilation of the growth of a convention to the growth of the common law is misconceived. The latter is the product of judicial effort, based on justiciable issues which have attained legal formulation and are subject to modification and even reversal by the courts which gave them birth when acting within their role in the state in obedience to statutes or constitutional directives. No such parental role is played by the courts with respect to conventions.

...

Turning now to the authority or power of the two federal Houses to proceed by resolution to forward the address and appended draft statutes to Her Majesty the Queen for enactment by the Parliament of the United Kingdom. There is no limit anywhere in law, either in Canada or in the United Kingdom (having regard to s. 18 of the *British North America Act*, as enacted by 1875 (U.K.), c. 38, which ties the privileges, immunities and powers of the federal Houses to those of the British House of Commons) to the power of the Houses to pass resolutions. Under s. 18 aforesaid, the federal Parliament may by statute define those privileges, immunities and powers, so long as they do not exceed those held and enjoyed by the British House of Commons at the time of the passing of the federal statute.

...

How Houses of Parliament proceed, how a provincial legislative assembly proceeds is in either case a matter of self-definition, subject to any overriding constitutional or self-imposed statutory or indoor prescription. It is unnecessary here to embark on any historical review of the "court" aspect of Parliament and the immunity of its procedures from judicial review. Courts come into the picture when legislation is enacted and not before

(unless references are made to them for their opinion on a bill or a proposed enactment). It would be incompatible with the self-regulating—"inherent" is as apt a word—authority of Houses of Parliament to deny their capacity to pass any kind of resolution. Reference may appropriately be made to art. 9 of the *Bill of Rights* of 1689, undoubtedly in force as part of the law of Canada, which provides that "Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament."

It is said, however, that where the resolution touches provincial powers, as the one in question here does, there is a limitation on federal authority to pass it on to Her Majesty the Queen unless there is provincial consent. If there is such a limitation, it arises not from any limitation on the power to adopt resolutions but from an external limitation based on other considerations which will shortly be considered.

Although the *British North America Act* itself is silent on the question of the power of the federal Houses to proceed by resolution to procure an amendment to the Act by an address to Her Majesty, its silence gives positive support as much as it may reflect the negative. ... Moreover, if the two federal Houses had the power to proceed by resolution, how is it that they have lost it?

For the moment, it is relevant to point out that even in those cases where an amendment to the *British North America Act* was founded on a resolution of the federal Houses after having received provincial consent, there is no instance, save in the *British North America Act, 1930* where such consent was recited in the resolution. The matter remained, in short, a conventional one within Canada, without effect on the validity of the resolution in respect of United Kingdom action. ...

...

This Court is being asked, in effect, to enshrine as a legal imperative a principle of unanimity for constitutional amendment to overcome the anomaly—more of an anomaly today than it was in 1867—that the *British North America Act* contained no provision for effecting amendments by Canadian action alone. Although Saskatchewan has, alone of the eight provinces opposing the federal package embodied in the Resolution, taken a less stringent position, eschewing unanimity but without quantifying the substantial support that it advocates, the provinces, parties to the References and to the appeals here, are entitled to have this Court's primary consideration of their views.

The effect of those views, if they are correct in their legal position, is, of course, to leave at least the formal amending authority in the United Kingdom Parliament. Reference will be made later to the ingredients of the arguments on legality. The effect of the present Resolution is to terminate any need to resort to the United Kingdom Parliament in the future. In line with its rejection of unanimity, Saskatchewan asserted that it sees no violation of the principles of federalism in the Resolution so far as concerns the amending formula proposed thereby.

...

The provincial contentions asserted a legal incapacity in the federal Houses to proceed with the Resolution which is the subject of the References and of the appeals here. Joined to this assertion was a claim that the United Kingdom Parliament had, in effect, relinquished its legal power to act on a resolution such as the one before this Court, and that it could only act in relation to Canada if a request was made by "the proper authorities." The federal Houses would be such authorities if provincial powers or interests would not be affected; if they would be, then the proper authorities would include the provinces. It

is not that the provinces must be joined in the federal address to Her Majesty the Queen; that was not argued. Rather their consent (or, as in the Saskatchewan submission, substantial provincial compliance or approval) was required as a condition of the validity of the process by address and resolution and, equally, as a condition of valid action thereon by the United Kingdom Parliament.

...

The Court was invited to regard the Balfour Declaration of 1926 as embracing the provinces of Canada (and, presumably, the states of the sister dominion, Australia) in its reference to "autonomous communities." That well-known statement of principle, a political statement in the context of evolving independence of the dominions in their relations with the United Kingdom, is as follows:

They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to 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.

It is impossible to seek nourishment for the provincial position in these appeals in this Declaration. The provinces did not come into the picture in the march to the *Statute of Westminster, 1931* until after the 1929 Conference on the Operation of Dominion Legislation, although to a degree before the Imperial Conference of 1930. ...

Although the Balfour Declaration cannot, of itself, support the assertion of provincial autonomy in the wide sense contended for, it seems to have been regarded as retroactively having that effect by reason of the ultimate enactment of the *Statute of Westminster, 1931*. That statute is put forward not only as signifying an equality of status as between the Dominion and the provinces *vis-à-vis* the United Kingdom Parliament, but also as attenuating the theretofore untrammelled legislative authority of that Parliament in relation to Canada where provincial interests are involved. ...

...

The submissions made on the *Statute of Westminster, 1931* by counsel who were before this Court engage (1) the preamble to the Statute; (2) s. 2(1), (2); (3) s. 3; (4) s. 4 and (5) s. 7(1), (2), (3). These provisions are in the following terms:

Whereas the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences:

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom:

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained:

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

2(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation,

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to the enactment thereof.

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.

• • •

The *Colonial Laws Validity Act* was intended to be a liberating statute, releasing colonial legislatures from subservience to British common law (subject to Privy Council authority) and from subservience to British statute law unless such statute law applied expressly or by necessary implication to the colony. In the evolution of independence of the dominions, it came to be recognized that the United Kingdom should no longer legislate at its own instance for any dominion; and that the latter should be free to repeal any British

legislation that was or would be made applicable to it. Hence, the statement in the preamble and hence ss. 2 and 4 in their application to a dominion. Following the Imperial Conference of 1930 and as a result of the Dominion–Provincial Conference of 1931, the provinces obtained an assurance that they too would benefit by the repeal of the *Colonial Laws Validity Act* and by being empowered to repeal any British legislation made applicable to them. This was achieved by s. 7(2) of the *Statute of Westminster, 1931*. There did not appear to be any need to include them in s. 4.

The most important issue was, however, the position of the Dominion *vis-à-vis* the *British North America Act*. What s. 7(1), reinforced by s. 7(3), appeared to do was to maintain the *status quo ante*; that is, to leave any changes in the *British North America Act* (that is, such changes which, under its terms, could not be carried out by legislation of the provinces or of the Dominion) to the prevailing situation, namely, with the legislative authority of the United Kingdom Parliament being left untouched. ...

...

It was also urged upon this Court that s. 7(1), which in terms (“Nothing in this Act shall be deemed to apply to ... the British North America Acts, 1867 to 1930”) removes the *British North America Act* (at least as it then stood) from the application of any terms of the *Statute of Westminster, 1931* was addressed to ss. 2 and 3 and not to s. 4. The argument goes that s. 7(1) does not exclude the application of s. 4; that s. 4 must be read in its preclusive effect on a dominion as having the provinces in view; that the “request and consent” which must be declared in a British statute to make it applicable to Canada, is the request and consent of the Dominion and the provinces if the statute is one affecting provincial interests or powers, for example, an amendment of the *British North America Act* as envisaged by the Resolution herein. The word “Dominion” in s. 4, it is said, must be read in what may be called a conjoint or collective sense as including both the Dominion and the provinces; otherwise, it is submitted, the purpose of the *Statute of Westminster, 1931* would be defeated. A difference, said to be significant, is pointed up in the reference to “Parliament of a Dominion” in s. 3 and the bare word “Dominion” in s. 4.

Nothing in the language of the *Statute of Westminster, 1931* supports the provincial position yet it is on this interpretation that it is contended that the Parliament of the United Kingdom has relinquished or yielded its previous omnipotent legal authority in relation to the *British North America Act*, one of its own statutes. ...

...

At least with regard to the amending formula the process in question here concerns not the amendment of a complete constitution but rather the completion of an incomplete constitution.

We are involved here with a finishing operation, with fitting a piece into the constitutional edifice; it is idle to expect to find anything in the *British North America Act* that regulates the process that has been initiated in this case. Were it otherwise, there would be no need to resort to the Resolution procedure invoked here, a procedure which takes account of the intergovernmental and international link between Canada and Great Britain. There is no comparable link that engages the provinces with Great Britain. Moreover, it is to confuse the issue of process, which is the basic question here, with the legal competence of the British Parliament when resort is had to the direct–indirect argument. The legal competence of that Parliament, for the reasons already given, remains unimpaired, and it is for it alone to determine if and how it will act.

...

Support for a legal requirement of provincial consent to the Resolution that is before this Court, consent which is also alleged to condition United Kingdom response to the Resolution, is, finally, asserted to lie in the preamble of the *British North America Act* itself, and in the reflection, in the substantive terms of the Act, of what are said to be fundamental presuppositions in the preamble as to the nature of Canadian federalism. ...

What is stressed is the desire of the named provinces “to be federally united ... with a Constitution similar in Principle to that of the United Kingdom.” The preamble speaks also of union into “One Dominion” and of the establishment of the Union “by Authority of Parliament,” that is the United Kingdom Parliament. What, then, is to be drawn from the preamble as a matter of law? A preamble, needless to say, has no enacting force but, certainly, it can be called in aid to illuminate provisions of the statute in which it appears. Federal union “with a Constitution similar in Principle to that of the United Kingdom” may well embrace responsible government and some common law aspects of the United Kingdom’s unitary constitutionalism, such as the rule of law and Crown prerogatives and immunities. The “rule of law” is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. Legislative changes may alter common law prescriptions, as has happened with respect to Crown prerogatives and immunities. There is also an internal contradiction in speaking of federalism in the light of the invariable principle of British parliamentary supremacy. Of course, the resolution of this contradiction lies in the scheme of distribution of legislative power, but this owes nothing to the preamble, resting rather on its own exposition in the substantive terms of the *British North America Act*.

There is not and cannot be any standardized federal system from which particular conclusions must necessarily be drawn. Reference was made earlier to what were called unitary features of Canadian federalism and they operate to distinguish Canadian federalism from that of Australia and that of the United States. Allocations of legislative power differ as do the institutional arrangements through which power is exercised. This Court is being asked by the provinces which object to the so-called federal “package” to say that the internal distribution of legislative power must be projected externally, as a matter of law, although there is no legal warrant for this assertion and, indeed, what legal authority exists (as in s. 3 of the *Statute of Westminster, 1931*) denies this provincial position.

At bottom, it is this distribution, it is the allocation of legislative power as between the central Parliament and the provincial legislatures, that the provinces rely on as precluding unilateral federal action to seek amendments to the *British North America Act* that affect, whether by limitation or extension, provincial legislative authority. The Attorney General of Canada was pushed to the extreme by being forced to answer affirmatively the theoretical question whether in law the federal government could procure an amendment to the *British North America Act* that would turn Canada into a unitary state. That is not what the present Resolution envisages because the essential federal character of the country is preserved under the enactments proposed by the Resolution.

That, it is argued, is no reason for conceding unilateral federal authority to accomplish, through invocation of legislation by the United Kingdom Parliament, the purposes of the Resolution. There is here, however, an unprecedented situation in which the one constant since the enactment of the *British North America Act* in 1867 has been the legal authority of the United Kingdom Parliament to amend it. The law knows nothing of any requirement



of provincial consent, either to a resolution of the federal Houses or as a condition of the exercise of United Kingdom legislative power.

...

What is central here is the untrammelled authority at law of the two federal Houses to proceed as they wish in the management of their own procedures and hence to adopt the Resolution which is intended for submission to Her Majesty for action thereon by the United Kingdom Parliament. The *British North America Act* does not, either in terms or by implication, control this authority or require that it be subordinated to provincial assent. Nor does the *Statute of Westminster, 1931* interpose any requirement of such assent. If anything, it leaves the position as it was before its enactment. Developments subsequent thereto do not affect the legal position.

[The next excerpt is from the majority reasons on the issue of a constitutional *convention* requiring substantial provincial consent.]

MARTLAND, RITCHIE, DICKSON, BEETZ, CHOUINARD, and LAMER JJ:

... The issue raised by the question is essentially whether there is a constitutional convention that the House of Commons and Senate of Canada will not proceed alone. The thrust of the question is accordingly on whether or not there is a conventional requirement for provincial agreement, not on whether the agreement should be unanimous assuming that it is required. ...

...

The main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period. For example, the constitutional value which is the pivot of the conventions stated above and relating to responsible government is the democratic principle: the powers of the state must be exercised in accordance with the wishes of the electorate; and the constitutional value or principle which anchors the conventions regulating the relationship between the members of the Commonwealth is the independence of the former British colonies.

Being based on custom and precedent, constitutional conventions are usually unwritten rules. Some of them, however, may be reduced to writing and expressed in the proceedings and documents of imperial conferences, or in the preamble of statutes such as the *Statute of Westminster, 1931*, or in the proceedings and documents of federal-provincial conferences. They are often referred to and recognized in statements made by members of governments.

The conventional rules of the constitution present one striking peculiarity. In contradistinction to the laws of the constitution, they are not enforced by the courts. One reason for this situation is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and duty of the courts to obey and enforce. Furthermore, to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach.

Perhaps the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts

are bound to enforce the legal rules. The conflict is not of a type which would entail the commission of any illegality. It results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all.

...

It was submitted by counsel for Canada, Ontario and New Brunswick that there is no constitutional convention, that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament at Westminster a measure to amend the Constitution of Canada affecting federal–provincial relationships, etc., without first obtaining the agreement of the provinces.

It was submitted by counsel for Manitoba, Newfoundland, Quebec, Nova Scotia, British Columbia, Prince Edward Island and Alberta that the convention does exist, that it requires the agreement of all the provinces and that the second question in the Manitoba and Newfoundland References should accordingly be answered in the affirmative.

Counsel for Saskatchewan agreed that the question be answered in the affirmative but on a different basis. He submitted that the convention does exist and requires a measure of provincial agreement. Counsel for Saskatchewan further submitted that the Resolution before the Court has not received a sufficient measure of provincial consent.

We wish to indicate at the outset that we find ourselves in agreement with the submissions made on this issue by counsel for Saskatchewan.

...

The requirements for establishing a convention bear some resemblance with those which apply to customary law. Precedents and usage are necessary but do not suffice. They must be normative. We adopt the following passage of Sir W. Ivor Jennings, *The Law and the Constitution* (5th ed., 1959), at p. 136:

We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.

...

An account of the statutes enacted by the Parliament at Westminster to modify the Constitution of Canada is found in a White Paper published in 1965 under the authority of the Honourable Guy Favreau, then Minister of Justice for Canada, under the title of “The Amendment of the Constitution of Canada” (the White Paper). ...

...

Of these twenty-two amendments or groups of amendments, five directly affected federal–provincial relationships in the sense of changing provincial legislative powers: they are the amendment of 1930, the *Statute of Westminster, 1931*, and the amendments of 1940, 1951 and 1964.

Under the agreements confirmed by the 1930 amendment, the western provinces were granted ownership and administrative control of their natural resources so as to place these provinces in the same position vis-à-vis natural resources as the original confederating colonies. ...

The preamble of the Act recites that “each of the said agreements has been duly approved by the Parliament of Canada and by the Legislature of the Province to which it relates.” ...

All the provinces agreed to the passing of the *Statute of Westminster, 1931*. It changed legislative powers: Parliament and the legislatures were given the authority, within their powers, to repeal any United Kingdom statute that formed part of the law of Canada; Parliament was also given the power to make laws having extraterritorial effect.

The 1940 amendment is of special interest in that it transferred an exclusive legislative power from the provincial legislatures to the Parliament of Canada.

...

In November 1937, the Government of Canada had communicated with the provinces and asked for their views in principle. A draft amendment was later circulated. By March 1938, five of the nine provinces had approved the draft amendment. Ontario had agreed in principle, but Alberta, New Brunswick and Quebec had declined to join in. The proposed amendment was not proceeded with until June 1940 when Prime Minister King announced to the House of Commons that all nine provinces had assented to the proposed amendment ...

The 1951 and 1964 amendments changed the legislative powers: areas of exclusive provincial competence became areas of concurrent legislative competence. They were agreed upon by all the provinces.

These five amendments are the only ones which can be viewed as positive precedents whereby federal-provincial relationships were directly affected in the sense of changing legislative powers.

Every one of these five amendments was agreed upon by each province whose legislative authority was affected.

In negative terms, no amendment changing provincial legislative powers has been made since Confederation when agreement of a province whose legislative powers would have been changed was withheld.

There are no exceptions.

...

In 1965, the White Paper had stated that

The nature and the degree of provincial participation in the amending process ... have not lent themselves to easy definition.

Nothing has occurred since then which would permit us to conclude in a more precise manner.

Nor can it be said that this lack of precision is such as to prevent the principle from acquiring the constitutional *status* of a conventional rule. If a consensus had emerged on the measure of provincial agreement, an amending formula would quickly have been enacted and we would no longer be in the realm of conventions. To demand as much precision as if this were the case and as if the rule were a legal one is tantamount to denying that this area of the Canadian constitution is capable of being governed by conventional rules.

Furthermore, the Government of Canada and the governments of the provinces have attempted to reach a consensus on a constitutional amending formula in the course of ten federal-provincial conferences held in 1927, 1931, 1935, 1950, 1960, 1964, 1971, 1978,

1979 and 1980 (see Gérald A. Beaudoin ... [*Le partage des pouvoirs* (1980)], at p. 346). A major issue at these conferences was the quantification of provincial consent. No consensus was reached on this issue. But the discussion of this very issue for more than fifty years postulates a clear recognition by all the governments concerned of the principle that a substantial degree of provincial consent is required.

It would not be appropriate for the Court to devise in the abstract a specific formula which would indicate in positive terms what measure of provincial agreement is required for the convention to be complied with. Conventions by their nature develop in the political field and it will be for the political actors, not this Court, to determine the degree of provincial consent required.

It is sufficient for the Court to decide that at least a substantial measure of provincial consent is required and to decide further whether the situation before the Court meets with this requirement. The situation is one where Ontario and New Brunswick agree with the proposed amendments whereas the eight other provinces oppose it. By no conceivable standard could this situation be thought to pass muster. It clearly does not disclose a sufficient measure of provincial agreement. Nothing more should be said about this.

...

The reason for the rule is the federal principle. Canada is a federal union. The preamble of the *B.N.A. Act* states that

... the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united ...

The federal character of the Canadian Constitution was recognized in innumerable judicial pronouncements. ...

The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. ...

...

It was contended by counsel for Canada, Ontario and New Brunswick that the proposed amendments would not offend the federal principle and that, if they became law, Canada would remain a federation. The federal principle would even be re-inforced, it was said, since the provinces would as a matter of law be given an important role in the amending formula.

It is true that Canada would remain a federation if the proposed amendments became law. But it would be a different federation made different at the instance of a majority in the Houses of the federal Parliament acting alone. It is this process itself which offends the federal principle.

...

We have reached the conclusion that the agreement of the provinces of Canada, no views being expressed as to its quantification, is constitutionally required for the passing of the "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" and that the passing of this Resolution without such agreement would be unconstitutional in the conventional sense.

## NOTES

1. *Catalytic effect*. This decision has been credited with forcing the federal government and the provinces back to the negotiating table, because although the court acknowledged the legality of a unilateral federal move, it effectively declared that such a move would be illegitimate. The negotiations culminated in an agreement between the federal government and the nine provinces other than Quebec. In a later case brought by the Quebec government raising the issue of whether Quebec's agreement to constitutional change was required for the requirement of "substantial consent," the court concluded that there was no convention of a "Quebec veto"—that is, Quebec need not be among the provinces granting consent: *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793.

2. *Unanimous or substantial agreement?* The court relied on the Jennings test to evaluate whether a convention of provincial consent to amendments involving provincial legislative powers existed. Andrew Heard has observed that the Supreme Court

appeared to assume that there must be a consistent and unanimous voice across the actors in order for a convention to exist. Such an assumption is not found in Jennings's writings on the subject or in subsequent academic discussions on the matter.

Instead, Heard writes that

one only needs to discern where the preponderant opinion lies, rather than search in vain for complete unanimity on the precise terms of conventions; the differences usually hinge on the context in which a rule would operate and the relative importance of other constitutional principles that might come into play.

According to Heard,

to focus only on the words of political actors involved in the precedents under review will exclude a whole range of opinions expressed in other contexts by other political actors and observers. The enormous scholarly and journalistic literature that discusses political events would also be ignored.

Heard concludes his point:

Had the members of the Supreme Court looked at the broader literature from the 1960s and 1970s about constitutional amendment, they would have found a widespread belief that unanimity was considered necessary to any broad constitutional package being negotiated.

See Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 2014) at 176-77.

3. *The precedents*. The court determined that only five of all previous amendments in Canada were relevant to determining whether, and if so how much, provincial consent was required to make an amendment affecting federal–provincial relations. But there had been a total of 22 amendments to the *British North America Act, 1867* by the time the court heard the *Patriation Reference* (reviewed in detail by the court at 888-91). Should only 5 of these 22 previous amendments have been relevant to the court's determination? Should all of them be examined to arrive at an answer? More than 5? Fewer than 5? Were some more relevant than others?

4. *Conventions in courts.* In the common law tradition, courts do not enforce conventions but they do recognize them, as the court did in the *Patriation Reference*. The court explained the basis for this distinction between enforcement and recognition (at 880-81):

The conventional rules of the constitution present one striking peculiarity. In contradistinction to the laws of the constitution, they are not enforced by the courts. One reason for this situation is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and duty of the courts to obey and enforce. Furthermore, to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach.

Perhaps the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules. The conflict is not of a type which would entail the commission of any illegality. It results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all.

But does it really matter that the court does not enforce a convention if it recognizes it as valid? Recognition may be an equally effective, albeit indirect, way of enforcing a convention, provided the court is perceived by political actors and the public as authoritative on the matter. As William Lederman has argued, judicial recognition of a convention may induce voluntary compliance:

I suggest that the non-enforceability of conventions by the Court is of only marginal importance, at least in nearly all situations. In nearly all cases, the power authoritatively to identify and declare the terms of established constitutional conventions will be enough to attract voluntary compliance from the political actors. At the end of the day, if the prestige of the Supreme Court of Canada and the legitimacy of its power of judicial review in our federal system are widely accepted by the official political actors and by the people at large, the judicial declaration will induce willing compliance. If there is no such official and general acceptance of the role of the Court, what effective enforcement measures would be possible anyway? Fortunately, it appears that we do have this kind of acceptance in Canada.

See William Lederman, Comment: "The Supreme Court of Canada and Basic Constitutional Amendment: An Assessment of *Reference Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)*" (1982) 27 McGill LJ 527 at 537-38.

The court's choice to recognize a constitutional convention may not have been without consequence. According to Adam Dodek, the Supreme Court has "unnecessarily invited future controversy and conflict between the courts and the executive." Having recognized a convention—Dodek actually suggests that what the court did amounted to "declaration," something more than mere "recognition"—the court has opened itself to the possibility that it would inaccurately articulate the relevant constitutional convention and thereby "set the stage for confusion, conflict and potential crisis": see Adam Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*" (2011) 54 SCLR (2d) 117 at 131, 138, and 141.

5. *The case for unilateralism.* The court held hearings on April 28-30 and again on May 1 and 4, 1981, and issued its reasons on September 28 of the same year. This four-month period may have offered then Prime Minister Pierre Trudeau an opportunity to go it alone. This route was suggested by Bruce Ackerman and Robert Charney:

[R]eturn to 25 June 1981, the day on which the justices recessed for the summer without letting the country know the procedure it should follow in repatriating the Constitution. At that point, one could have readily imagined an energetic liberal nationalist declaring that it would be better if the People of Canada themselves had a say on this critical question rather than leaving it for the courts to decide. In short, why didn't Trudeau call an extraordinary national referendum on the proposed Liberal constitution: Charter of Rights, patriation, amending procedure, the works? The Supreme Court had already made it impossible to repatriate by Canada's 114th Dominion Day on the sheer assertion of parliamentary sovereignty. Why waste the summer in the way it was wasted—for, as you will recall, constitutional discussion did in fact tend to peter out as Canadians turned their attention to the problems of energy pricing and a bank rate that was rising to record heights. ...

So far as we can tell, moreover, Trudeau might well have won such a referendum in a big way. A charter of rights is not very easy to oppose in sixty-second television advertisements; nor does the provincial interest in oil and gas and fish and the rest constitute the stuff of a strong majority against a constitution. Indeed, such a referendum would have given Trudeau that wide electoral support from all regions of the country that his Liberal Party so evidently lacked in a normal parliamentary election. To make the mystery more complete, Trudeau's proposed constitution makes it plain that the prime minister was perfectly aware of the legitimating power of a national referendum. His own proposal for replacing the constitution's interim amending procedure contemplated a special referendum if seven premiers, representing 80 per cent of the Canadian population, could agree on a counter-proposal to Trudeau's own general amending procedure. ...

Why, then, did Trudeau not break the impasse caused by provincial opposition and judicial delay by calling the Canadian People to the polls to speak on the legitimacy of the Liberal constitution? If he had taken this step and won, the justices' discussion of Canada's distinctive constitutional conventions would have been different when they finally rendered their famous judgment in September. At the very least, the court would have been obliged to discuss the significance of the recent referendum, no less than the continued provincial resistance. Wouldn't a landslide victory have vastly enhanced the perceived legitimacy of the liberal nationalist effort at repatriation?

See Bruce Ackerman & Robert Charney, "Canada at the Constitutional Crossroads" (1984) 34 UTLJ 117 at 128-30.

6. *Autochthony*. The view advanced by Ackerman and Charney appears to have been rooted in the concept of autochthony. As Peter Hogg explains:

[A]utochthony requires that a constitution be indigenous, deriving its authority solely from events within Canada. ... The legal force of the *Canada Act 1982* and the *Constitution Act, 1982*, like other United Kingdom statutes extending to Canada, depends upon the power over Canada of the United Kingdom Parliament. These instruments have an external rather than a local root. If patriation means the securing of constitutional autochthony, I conclude that it has not been achieved.

See Peter Hogg, "Patriation of the Canadian Constitution: Has It Been Achieved?" (1983) 8 Queen's LJ 123 at 125-26. Hogg does not believe that patriation made the Constitution of Canada autochthonous. Would a national referendum as suggested by Ackerman and Charney have done the trick? Is the Canadian Constitution autochthonous today? Does it matter if it is not?

### C. The Constitution's Amendment Formula

If we define sovereignty as the power to make the final choice about how to structure the institutions of government, how to allocate powers, and how these and other fundamental choices should be reflected in the Constitution, then patriation formalized Canada's sovereignty by transferring the power to amend the Canadian Constitution from the Parliament in Westminster to Canadian political institutions. But, as it turns out, there is not one single-decision rule for amending the Canadian Constitution. Rather, there are five rules—five rules that make up the amendment formula, as it is called—contained in Part V of the *Constitution Act, 1982*, each of which purports to apply to different types or categories of amendments:

1. The “general amending formula,” or the “7/50 formula,” found in s 38(1), requires the consent of the Parliament of Canada and the legislative assemblies of two-thirds of the provinces having at least 50 percent of the population of all the provinces. This general amending formula gives no province alone a veto on amendment, which has been a source of dissatisfaction in Quebec. This procedure is the only one in the Constitution subject to time limits: an amendment cannot be proclaimed until one year after the initiation of the amendment process unless every province has indicated assent or dissent (s 39(1)), and an amendment dies unless it has received the appropriate degree of support within three years of the start of the process (s 39(2)). Section 38(3) permits a province to opt out of an amendment derogating from its legislative powers, proprietary rights, or other rights and privileges. If the amendment transfers legislative powers from the provinces in relation to education or cultural matters, the province opting out is also entitled to reasonable compensation (s 40). Section 38 is the default formula for constitutional amendments—that is, it applies to amendments that do not fall under the other amending formulas. Moreover, s 42 specifically assigns some amendments to s 38—for example, “the principle of proportionate representation of the provinces in the House of Commons” (the amendments specified by s 42 cannot be the subject of opting out).
2. The “unanimity procedure,” found in s 41, requires that consent be provided by Parliament and the legislative assemblies of all the provinces in relation to amendments to the office of the Queen, the governor general, and the lieutenant governor of a province; the minimum number of members to which a province is entitled in the House of Commons as of 1982 (because of the “Senate floor rule” found in s 51A of the *Constitution Act, 1867*); the general use of the English and French languages; the composition of the Supreme Court of Canada; and any amendment to the amending formula.
3. The “bilateral procedure,” found in s 43, deals with provisions of the Constitution affecting only some provinces. Where an amendment is in relation to a provision affecting one or more but not all provinces, only the legislative assemblies of the provinces affected and Parliament need consent to the amendment.
4. The “federal unilateral procedure,” in s 44, allows Parliament alone to make amendments to the federal executive or the House of Commons or Senate (provided amendments to the Houses of Parliament do not affect their powers or their method of selection in ways protected by other parts of the amending formula). Section 44 replaces the old s 91(1) of the *Constitution Act, 1867*, which was similarly worded.



5. The “provincial unilateral procedure” in s 45 replaces the old s 92(1) of the *Constitution Act, 1867* and permits the province to amend its constitution, provided that the amendment does not affect matters governed by other parts of the amending formula, such as the office of the lieutenant governor.

In addition to Part V, s 35.1 provides that amendments affecting Aboriginal rights or changes to s 91(24) of the *Constitution Act, 1867* will be preceded by a constitutional conference of first ministers and representatives of Aboriginal peoples. However, s 35.1 does not impose a duty to obtain the consent of Aboriginal peoples.

### NOTES

1. *Using Part V.* The amending formula in Part V of the *Constitution Act, 1982* has been used successfully on 11 occasions since 1982. The “7/50” formula has been used only once to pass the *Constitutional Amendment Proclamation, 1983*. Most notably, this amendment altered the Aboriginal rights provisions in ss 25 and 35 of the *Constitution Act, 1982*; added ss 35(3), 35(4), and 35.1; and amended s 25(b). Section 44 has been relied on by Parliament three times. The *Constitution Act, 1985* (Representation) repealed and replaced s 51 of the *Constitution Act, 1867* (which had been amended many times since 1867) to lay down new rules governing representation in the House of Commons; the *Constitution Act, 1999* (Nunavut) amended the relevant provisions of the *Constitution Act, 1867* to provide for the representation of Nunavut in the House of Commons and the Senate; and the *Fair Representation Act* (2011) replaced s 51(1) of the *Constitution Act, 1867* to readjust the number of members of the House of Commons and provincial representation in it.

The remaining seven amendments have been made through s 43, and have all involved the federal government and one other province. For example, s 43 was used in 1993 to extend language rights in New Brunswick, by adding s 16.1 to the *Constitution Act, 1982*. The most controversial amendments involving s 43 have concerned denominational school rights in Newfoundland (three amendments) and Quebec (one amendment). The Newfoundland amendments all involved changes to Term 17 of the Newfoundland Terms of Union (which were constitutionalized by the *Newfoundland Act, 12 & 13 Geo VI, c 22* (UK)). Term 17 replaced s 93 of the *Constitution Act, 1867* with respect to Newfoundland, and entrenched a set of denominational school rights. In 1987, Term 17 was amended to extend those rights to Pentecostal schools (Constitution Amendment, 1987). However, in 1997 (Constitution Amendment, 1997 (*Newfoundland Act*)), and again in 1998 (Constitution Amendment, 1998 (*Newfoundland Act*)), Term 17 was amended first to dilute and then to remove the constitutional protection accorded to denominational schools. Both these amendments were made after province-wide referenda in which a majority of Newfoundlanders voted in favour of the amendments.

During the parliamentary debate surrounding the first amendment, a number of religious groups argued that Parliament should not pass the resolution approving the proposed amendment because of the impact on minority rights. Nevertheless, the House of Commons passed the necessary resolution. Is there a federal obligation to enact such a measure, simply because the majority in the province so wishes? Conversely, does the federal Parliament owe a special obligation to protect the denominational school rights of minority groups who are liable to be outvoted in the political process?

The second amendment was challenged in the courts on the ground that the appropriate amending formula was s 38, not s 43, because denominational school rights were elements of national citizenship. The challenge was rejected on the grounds that Term 17 applied only to Newfoundland and hence s 43 was the appropriate provision to amend it: *Hogan v Newfoundland (Attorney General)*, 2000 NFCA 12, leave to appeal refused, [2000] SCCA No 191. The Quebec amendments also abolished denominational school rights in that province by providing, in a new s 93A, that s 93 no longer applied to Quebec (Constitutional Amendment, 1999 (Quebec)). A similar constitutional challenge was rejected by the Quebec courts: *Potter c Québec (Procureur général du)*, [2001] RJQ 2823 (CA), leave to appeal refused, [2002] CSCR No 13. Do you agree with these holdings?

2. *Consultation and consent.* In addition to Part V, s 35.1 provides that amendments affecting Aboriginal rights or changes to s 91(24) of the *Constitution Act, 1867* and to Part II and s 25 of the *Constitution Act, 1982* will be preceded by a constitutional conference of first ministers and representatives of Aboriginal peoples. However, s 35.1 does not impose a duty to obtain the consent of Aboriginal peoples. Should the Constitution be revised to give Aboriginal peoples the right to withhold consent on amendments affecting these matters? If yes, how would consent be obtained—directly from the Aboriginal peoples of Canada, from their representatives, or in some other way?

3. *Population and power.* The general amending formula creates asymmetries among provinces with regard to their power to drive or block an amendment. A professor of mathematics has concluded that “under paragraph 38(1)(b), the provinces are not all equal. The inequality is a consequence of the different provincial populations and the requirement that, to succeed, an amendment must be supported by a coalition of at least seven provinces containing at least one-half of the total population of the provinces.” As a result, at the time he conducted his study, “an amendment supported by all provinces except Ontario and Quebec will fail, whereas one supported by all except British Columbia and Alberta will succeed”: see D Marc Kilgour, “A Formal Analysis of the Amending Formula of Canada’s *Constitution Act, 1982*” (1983) 16 Can J Political Science 771 at 772. Does this exacerbate regional divisions in Canada? Is there any other way to design the general amending formula without requiring unanimity?

4. *Opting out.* The right to opt out provided in s 38(3) is not without its critics. On one view, the incompleteness of the opt-out right—it does not authorize compensation on all matters—has the potential to generate provincial inequalities:

Consider, for example, environmental protection, which falls under both federal and provincial jurisdiction. If the other provinces agreed to hand over all authority in this area to Ottawa, Quebec could express its disagreement and withdraw from such a constitutional amendment; it would not, however, have a constitutional right to receive any federal funding for environmental projects, since they would fall outside the areas of education and culture. The citizens of Quebec, by paying federal taxes, would be paying for the environmental protection of all the provinces while at the same time taking on the expense of their own protection system. In other words, except for matters of culture and education, a province choosing to opt out of a particular amendment would see its citizens doubly taxed.

See Gil Rémillard, “The Constitution Act, 1982: An Unfinished Compromise” (1984) 32 Am J Comp L 269 at 277. Do you agree with Rémillard that the opt-out right raises the risk of provincial inequalities?

5. *Public participation in the amendment process.* The amendment procedure in Part V of the *Constitution Act, 1982* imposes no requirement of public participation (such as a referendum) and has been criticized for being elitist and undemocratic. We will consider this criticism in more detail below, after we examine the failed attempts at constitutional reform associated with the Meech Lake and Charlottetown accords.

6. *A complicated process.* Writing in the year of patriation, an American scholar observed that “perhaps as a reflection of the complex politics of Canadian federalism, the new domestic amendment procedures are unusually complicated.” It reflected, he said, “the inescapable fact” that “Canada is a society of weak national loyalties.” For him, “an amendment process which reflects the decentralized quality of such a society is neither good nor bad. It is only accurate”: see Walter Dellinger, “The Amending Process in Canada and the United States: A Comparative Perspective” (1982) 45 *Law & Contemp Probs* 283 at 297, 302. Do you agree that Canada’s amendment formula is too complicated? Would we be better served with only one amendment procedure to amend any part of the Constitution? If so, how would you design that single procedure? What degree of provincial agreement would be necessary, if any, to amend the Constitution? One scholar has argued that the varying levels of difficulty reflected in the five procedures of Canada’s amending formula serve an important purpose—the hierarchy of amendment difficulty signals which provisions of the Constitution are more important, and therefore harder to amend, than others: see Richard Albert, “The Expressive Function of Constitutional Amendment Rules” (2013) 59 *McGill LJ* 225.

7. *Amending the amending formula.* Section 49 of the *Constitution Act, 1982* required the prime minister to convene a first ministers’ conference by 1997 in order to review the amending formula: “A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.” The amending formula was discussed at a meeting of first ministers on June 20–21, 1996, but so little time was devoted to them—only a few minutes, it is said—that one observer has stated that “clearly no review of the provisions of Part V was actually conducted”: see John D Whyte, “A Constitutional Conference ... Shall Be Convened ...: Living with Constitutional Promises” (1996) 8 *Const Forum Const* 15 at 16. The prime minister at the time nonetheless declared after the meeting that the constitutional obligation imposed by s 49 had been fulfilled. Do you believe the first ministers should have devoted more time to reviewing the amending formula? Why do you think they spent so little time on them? Had you been sitting at the first ministers’ table on the day the amending formula came up for discussion, how would you have suggested it be amended, if at all?

7. *Thinking about Part V.* There remain many open questions about the amending formula. For further readings, see Hoi L Kong, “Deliberative Constitutional Amendments” (2015) 41 *Queen’s LJ* 105; Warren J Newman, “Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada” (2007) 37 *SCLR* (2d) 383; Katherine Swinton, “Amending the Canadian Constitution: Lessons from Meech Lake” (1992) 42 *UTLJ* 139; Peter W Hogg, “Formal Amendment of the Constitution of Canada” (1992) 55 *Law & Contemp Probs* 253; and Samuel V LaSelva, “Federalism and Unanimity: The Supreme Court and Constitutional Amendment” (1983) 16 *Can J Political Science* 757.

## D. Meech Lake and Charlottetown: Failed Constitutional Reforms

Notwithstanding the eleven constitutional amendments that have been made since 1982, there have been two significant failures. These are the Meech Lake Accord and the Charlottetown Accord. Both accords began as efforts to win Quebec's acceptance of the 1982 constitutional amendments. The Meech Lake Accord included constitutional recognition of Quebec as a distinct society, entrenchment of the Supreme Court of Canada and provincial nomination of its justices, an increase in the number of items requiring unanimity under the amending formula, and controls on the federal spending power. Many of these elements reappeared in the Charlottetown Accord, along with changes to the distribution of powers, an entrenched Aboriginal right to self-government, an elected Senate with equal provincial representation, and a guaranteed level of Quebec representation in the House of Commons. How did we get to these efforts at wholesale constitutional reform in Canada, so soon after the *Patriation Reference*? Richard Simeon offers a useful summary:

[The April 1981 accord that paved the way for the constitutional reform of 1982] had a fatal flaw; it had been signed over the bitter objections of the government of Quebec. It represented a defeat not only for the PQ's objective of sovereignty, but also for the goals of a redefined role for Quebec in Canada, goals which had been pursued by every provincial government in modern times. Not only did it fail to grant Quebec extended powers or recognition of a distinct status in Canadian federalism, but it also arguably reduced the autonomy and authority of the provincial government. For example, the Charter threatened Quebec's ability to determine its own language regime; and the amending formula repudiated the Quebec veto, which, while not enshrined in law, had been assumed by virtually all political actors. Indeed, Quebec's last ditch defence against the 1982 Constitution Act—a claim that constitutional convention embodied a Quebec veto over constitutional change—was rejected by the courts.

For many, the exclusion of Quebec grievously undermined the legitimacy of the new constitutional order. In the short run, it meant that Quebec would proclaim a blanket use of the “notwithstanding clause” exempting all Quebec legislation from challenge under important sections of the new Charter; and that Quebec would refuse to engage in further discussion of constitutional renewal. In the longer run, it was feared that, however muted the Quebec independence movement now seemed, the imposition of the constitution on Quebec would be a powerful weapon in the hands of a future separatist movement. Many commentators felt that the country had reneged on a moral commitment, the 1980 promise that a “no” vote in the referendum was a vote for a renewed federalism and that no constitution could be fully secure without the voluntary accession of the second largest province, and the only one with a French-speaking majority.

From this perspective, then, the overriding constitutional question which remained was to find some way to “Bring Quebec in” to the Canadian constitutional family. Two essential conditions had to be met before the “Quebec round” could succeed. First, there had to be a federal government in office which placed reconciliation with Quebec at the top of its agenda, and, more important, which was prepared to accept at least some of the fundamental assumptions about the distinctive character of Quebec which had underlain the aspirations of all Quebec governments since the Quiet Revolution of the 1960s. Second, there must be a government in Quebec which was equally committed to this goal, and which was unequivocally federalist in orientation.

The first condition was met with the federal election of September, 1984. The new Conservative government was pledged to “national reconciliation”—including restoring harmony to the embittered state of federal–provincial relations and, more particularly, to constitutional reconciliation with Quebec (Mulroney, 1984). The second condition was met with the defeat of the PQ

and the election of the federalist Liberals under Robert Bourassa in 1985. With the Tories anxious to cement their new-found gains in Quebec, and the Quebec Liberals anxious to demonstrate their effectiveness on the national scene, the stage was set for the discussions which culminated in the Meech Lake Accord.

See Richard Simeon, "Meech Lake and Shifting Conceptions of Canadian Federalism" (1988) 14 *Can Pub Pol'y* S7 at S8-S9.

### **1. The Meech Lake Accord**

For the rest of the story of how the Meech Lake Accord came to be, we now turn to Mary Dawson, the person responsible for drafting all constitutional amendments starting in 1981 and the lead legal adviser to the government of Canada on constitutional matters from 1986 until her retirement. In 2012, Dawson gave a lecture at McGill University in which she offered a glimpse, from her unique perspective, into Canada's constitutional evolution:

The constitutional negotiations known as the "Quebec Round" began quietly, indeed secretly. The foundation was laid in May 1986 at a symposium at Mont Gabriel, Quebec, where the Quebec minister of intergovernmental affairs confirmed Quebec's five conditions for acceptance of the patriation package of 1982. The Government of Quebec was asking for changes to the constitution that would have symbolic meaning but that it felt would have minimal impact on the constitution for those outside Quebec. The changes would relate to Quebec's distinctiveness, immigration agreements, the Supreme Court of Canada, the federal spending power, and the amending formula. This relatively short list was in sharp contrast to the much longer lists of demands that had been coming from Quebec in recent years.

The provincial premiers agreed, in August 1986 at a meeting in Edmonton, to make the issues identified by Quebec their first priority and to set aside their other priorities until Quebec's demands had been addressed. Prime Minister Mulroney had written to them earlier in the summer to request that they consider this approach. ...

Through the fall of 1986 and the winter of 1987, a series of bilateral meetings took place out of the public eye, between Quebec representatives and representatives of the other provinces, with Quebec representatives reporting back to their federal counterparts. During this period, federal officials began to work on draft amendments with their Quebec counterparts. As a rule, no paper was exchanged. ...

While the Government of Quebec was reaching out to the rest of Canada through this process, at the same time it appeared to be doing everything that it could to avoid what it would consider to be yet another humiliation in the event of a public failure to achieve its modest set of conditions. ...

When all the governments met at Meech Lake on April 30, 1987, the five conditions of Quebec had been well canvassed even though there had only been one meeting of officials, held early in March. ...

The main point of contention was the "distinct society" clause, and this was the last component of the package to be agreed upon. ...

Although the first ministers had before them detailed draft provisions for most of the elements of the package, the Meech Lake Communiqué issued that night contained only general descriptions of these various elements. The one exception was the distinct society clause. ...

The agreement covered the five elements requested by Quebec, some of them generalized to apply to all provinces either at or before the April 30 meeting at Meech Lake or in the months immediately following that meeting, and there was a sixth element added at the April 30 meeting. This addition was to entrench in the constitution a requirement for annual first ministers'

conferences, which were to cover Senate reform and fisheries roles and responsibilities, as well as for annual first ministers' conferences on the economy.

It was also agreed that, until the Senate amendments were achieved, Senate appointments were to be made from lists provided by the provinces, so long as they were acceptable to the federal government. Senate reform was a high priority for the Western provinces. In recognition that this was intended to be the Quebec Round, detailed proposals for Senate reform were not developed, but the interim arrangement was included in the package. This procedure was to apply until comprehensive Senate amendments were made.

The Meech Lake Communiqué of April 30, 1987, was approved unanimously by the prime minister and the premiers of all the provinces, including Quebec, and was met with great enthusiasm and the hope that this might be the end of our constitutional difficulties. That mood held through the technical discussions over the next month or two at the officials' level as small changes were discussed.

See Mary Dawson, "From the Backroom to the Frontline: Making Constitutional History or Encounters with the Constitution—Patriation, Meech Lake, and Charlottetown" (2012) 57 McGill LJ 955 at 979-82.

The Meech Lake Accord contained within it many items that required unanimous approval for constitutional amendment—for example, changes to the amending formula—as well as items that could be approved under the general formula in s 38. As a consequence, the question of how the different amending formulas would interact was an important one. In theory, the Accord could have been voted on by legislative assemblies in two ways. The first route would have been to break down the Accord into its constituent components, and to vote on each component separately according to the appropriate amending formula. This approach would have raised the possibility that some aspects of the Accord would have been adopted but others rejected, an unacceptable political outcome because the package represented a compromise that its proponents believed stood or fell together. The second route was to present the amendments for approval as a package. The requirements of ss 38 and 41 were taken to apply to the entire package, meaning that unanimous approval was required within three years. The Accord died in June 1990, having failed to meet these requirements. The Charlottetown Accord, which was voted down in a national referendum in 1992, also contained a mix of amendments, some requiring approval under s 38, others under s 41.

The choice to apply the three-year time limit to ratify the Meech Lake Accord was controversial. In a comment published in 1989, Gordon Robertson, a former high-ranking civil servant in Canada, argued that contrary to the approach taken to approve the Meech Lake Accord, there should be no time limit on its ratification: Gordon Robertson, "Meech Lake—The Myth of the Time Limit" (1989) III:3 Institute for Research on Public Policy. Robert Hawkins responded in a comment of his own that the three-year time limit did indeed apply to the Meech Lake Accord: RE Hawkins, "Meech Lake—The Reality of the Time Limit" (1989) 35 McGill LJ 196. In a subsequent response written that same year—one year before the initially agreed-on deadline to approve the Accord—Ted Morton considered the implications of removing the three-year time limit in the middle of the ratification process and proposed a solution to improve the amendment process going forward:

Every discussion and every legislative vote since the details of the Meech Lake Accord were agreed to by the eleven first ministers in June, 1987, have assumed that the Accord had to be ratified within a three year time limit or die. This apparently unanimous understanding was

recently challenged by Gordon Robertson, former Secretary to the Privy Council and senior policy advisor to the Pearson and Trudeau governments. Mr. Robertson has argued that there is no three year time limit on the ratification of the Meech Lake Accord. Mr. Robertson contends that the heretofore accepted view rests on a misinterpretation of the amendment provisions of the Constitution. Robertson's position, if correct, would have immediate and significant consequences for the Meech Lake Accord and thus Canadian politics more generally. The "removal" of the three year time limit would give the flagging Accord a new lease on life. Indeed, it would extend indefinitely the opportunity to ratify the Accord, thus eliminating the political crisis predicted by many if Meech were to fail in June, 1990.

Mr. Robertson has summarized his position as follows. The three year time limit imposed by section 39 of the Constitution applies only to amendments made pursuant to the section 38 formula—seven provinces with fifty percent of the population. The Meech Lake amendment "package" is not and could not be ratified under the "7/50 rule" because it contains two amendments that touch upon matters specified in section 41 of the Constitution—the composition of the Supreme Court of Canada and changes to the amending formula. Section 41 requires amendments on these matters to have the unanimous consent of all provinces. Section 41 amendments do not have any time limits.

For Mr. Robertson, it follows that since the Meech Lake Accord can only be ratified under the unanimity rule of Section 41, it does not have any time limit. To settle this issue Mr. Robertson advocates referring it to the Supreme Court of Canada. If his analysis is correct, Mr. Robertson concludes, the Supreme Court will save Meech Lake from "death by the clock," and a constitutional crisis will have been avoided.

To uncover the flaw in Mr. Robertson's logic, one must separate out what Meech Lake has blended together: two separate amending formulas. The problem arises because the eleven first ministers combined in one constitutional "package" a collection of amendments, some of which fall under the section 38 rules ("7/50" with a 3 year limit) and some under the rule section 41 rules (unanimity with no time limit). If the first ministers had had the foresight to separate their amendments into two distinct proposals—a section 38 package and a section 41 package—there would be no controversy about time limits. (The section 38 package would have one; the section 41 package would not). Unfortunately, this is not the case. The result is confusion: Which amending rules govern the Meech Lake Accord?

Mr. Robertson's solution is to subsume the section 38 amendments under the section 41 requirements—unanimity, and no time limit. He reasons—correctly—that if the section 38 "7/50 rule" were to apply to the whole package, the section 41 amendments would be made more easily than intended. Indeed, since the "7/50 rule" has already been met within the three year time limit, the Accord would be a *fait accompli*. Thus a "package" containing both kinds of amendments must follow the section 41 rule of unanimity.

Since the Accord is a package, it must be approved by the procedure necessary for whatever part or parts of the package requires the highest level of approval. That "highest level" is unanimity of the legislatures of all the provinces. Constitutional changes that require unanimity must be made pursuant to Section 41 and this is what is being done.

Mr. Robertson's argument is plausible but not persuasive. Another solution is to import the three year time limit of section 38 into the section 41 procedure. The result is a procedure that requires unanimity (per section 41) and imposes a three year time limit (per section 38). This is truly "the highest level of approval," to use Mr. Robertson's own phrase, and it is the option the first minister (and the rest of Canada) thought they were choosing in the Spring of 1987. It is certainly as plausible as the Robertson option, and for the same reasons. While there are irrefutable reasons for preferring the unanimity requirement of section 41 to the "7/50 rule" of section 38, there is not any obvious reason for jettisoning the three year time limit. True, this makes it more difficult to gain approval for the Accord, but this may be its virtue not its vice.

The Meech Lake Accord proposes a mind-numbing array of amendments to Canada's constitution. Cumulatively, these amendments contain a very distinctive—and it turns out, controversial—vision of Canada's future. Surely when constitutional changes of this magnitude and extent are contemplated, it makes sense to require the highest degree of political consensus to effect these changes. This is accomplished by combining the most stringent aspects of both amending procedures, and it is not at all surprising that it is the option the eleven first ministers agreed to when they drafted Meech Lake. Fundamental constitutional change should not be lightly undertaken.

Mr. Robertson might well respond that our political leaders are not free to create hybrid amending formulas by combining different elements of sections 38 and 41. I would tend to agree. But by this same logic, they are not free to turn section 38 constitutional matters into section 41 issues by lumping them together in a single "package." If the politicians should not be permitted to tack a three year rule onto section 41-type amendments, neither should they delete it from section 38-type amendments.

One conclusion is the intriguing possibility that the Accord itself may be invalid and "unratifiable," because it violates the "manner and form" requirements of the Constitution by lumping together matters that must be treated separately.

This unfortunate "package" approach to constitutional amendments can be attributed to a combination of arrogance and inexperience. The development of "executive federalism" has led to an attitude among our first minister and their advisors that the constitution is theirs to defend and amend. Prior to 1982, this was pretty much the case. But the *Constitution Act, 1982* "patriated" the Constitution not just by severing the link to Britain but also by replacing the unwritten conventions by an explicit, written amending formula. The Meech Lake Accord suggests that our first ministers have not yet understood this. Perhaps old habits are hard to break, but this does not excuse them from violating the new constitution. By this reading, the "package" approach adopted in Meech Lake may very well render the Accord itself unconstitutional.

A less draconian solution is that when governments combine section 38 and section 41 amendments into a single constitutional "package," they must meet the full requirements of both sections: unanimity and the three year time limit. This approach satisfies all the requirements of both amending formulas. With the June, 1990 deadline approaching, Mr. Robertson's modest proposal would be a welcome lifeboat indeed.

The problem is that it would be much more than a lifeboat. It would be an indefinite extension of Meech Lake into the future, without end! Is it really acceptable that constitutional change as far-reaching as Meech Lake should hang in the balance for five, ten, twenty years, until sometime down the road the governments of New Brunswick and Manitoba either change their mind or are voted out of office? Meech Lake opponents would surely denounce such a scenario as intolerable. Would Meech supporters be any more receptive? Are Premier Bourassa and the people of Quebec willing to wait five, ten, twenty years for an answer? There is a logic behind the practice of setting deadlines for the approval of constitutional amendments. If not a legal logic—such as section 38—then a political logic, such as Meech Lake.

Political logic also precludes another recently rumored solution to the "deadline problem": retrospectively dividing the Accord into two separate packages—section 38 amendments and section 41 amendments. According to this scenario, the Prime Minister could then recommend that the former be proclaimed as law, since eight of ten provinces with more than ninety percent of the population have approved them. The section 41 amendments could remain "alive," since they are not subject to any formal time limit.

While this division is probably what should have been done at the outset—in June, 1987—it is much too late to do it now. How many times have Meech critics been told that the Accord is a "seamless web" [*sic*], to be accepted or rejected intact. For governments suddenly to reverse themselves on this issue would be perceived as a hypocritical and self-serving attempt to win



by trickery what they appear to be losing in the political arena. It would further poison the well of public opinion and further divide the country.

The lesson for the future seems clear. At a minimum, future proposals to amend the Constitution must not mix section 38 and section 41 type amendments in a single “package.” Serious consideration should be given to adding a time limit to the section 41 amending formula. It’s omission was probably an oversight in the first place. More generally, the very concept of a “package” approach to constitutional amendments may no longer be politically acceptable. This type of constitutional deal-making—consummated by eleven first ministers, behind closed doors, and then presented as a *fait accompli*—is a hangover from the pre-Charter era.

The Charter has created the perception that the Constitution is no longer the exclusive preserve of the First Ministers. As the opposition to Meech Lake has so clearly demonstrated, there are now many groups in Canadian society who see themselves as stakeholders in the “new” constitution. These “Charter Canadians,” as they have been labelled, are not going to accept exclusion from future constitutional changes. While the initiative for proposing constitutional amendments will still rest with Canada’s eleven first ministers, they will have to defend any future changes in a public process that allows all interested parties to participate in a meaningful manner.

See FL Morton, “How Not to Amend the Constitution” (1989-90) 12:4 Can Parliamentary Rev 9. Had you been advising the first ministers on whether or not the Constitution of Canada requires the three-year limit to apply to the Meech Lake Accord, what would have been your advice? Would your answer have been different if the first ministers had asked you for your advice not about what the Constitution requires, but about what would make it more likely for the Accord to be approved? Setting aside your advice as it relates specifically to the Meech Lake Accord and thinking more dispassionately about how best to design the rules for constitutional amendment, do you think it is a good idea to impose a time limit to approve an amendment? Is it a good idea for all kinds of possible constitutional amendments or only for certain kinds?

The sequence of events leading ultimately to the defeat of the Meech Lake Accord suggests that defeat was a result of much more than the three-year time limit alone. As Ian Peach explains, the Accord faced substantial resistance from many corners of the country:

By the time of the 1988 federal election, support for the Meech Lake Accord was beginning to unravel. The concerns of Indigenous peoples provided a key platform for those seeking amendment to the Accord. From this began to arise a greater understanding of Indigenous claims among the public and sympathy for their constitutional aspirations. Thus, when Elijah Harper stood up against the passage of the Meech Lake Accord, he was strongly backed by not only Indigenous groups, such as the Assembly of Manitoba Chiefs (who provided Harper with direct support and encouragement), the Assembly of First Nations, the Inuit Tapirisat of Canada, the Native Council of Canada, and the Dene Nation but also by many Canadians who applauded his action and viewed him as championing their own dislike of the Accord. ...

Premiers who were elected subsequent to the negotiation of the Accord also articulated concerns about it, most notably Frank McKenna in New Brunswick, who was elected in October 1987, and Clyde Wells in Newfoundland, who was elected in April 1989. As well, in the wake of Quebec premier Bourassa’s decision to use the notwithstanding clause to preserve Quebec’s sign law, Manitoba premier Gary Filmon, who was leading a minority government after his election in May 1988 with a Liberal Official Opposition that was opposed to the Accord, declared that he would not bring the Accord forward to the Manitoba legislature unless substantial changes were made to it. Between challenges to the Accord from new premiers and growing

public opposition to the Accord, it became clear by the spring of 1990 that something had to be done to secure acceptance of the Accord in the three provinces that had not yet approved it.

Several provinces, including Manitoba, New Brunswick, Newfoundland, and Ontario, struck committees to study the Meech Lake Accord during this period. All shared concerns about the exclusion of Indigenous peoples, among others. In an effort to move beyond the impasse that had developed over the Accord, McKenna introduced a “companion resolution” to the Accord in the New Brunswick Legislative Assembly on 21 March 1990, as a strategy to address concerns about the Accord and secure the necessary support to allow its passage in the New Brunswick, Newfoundland, and Manitoba legislatures. On 27 March 1990, the government of Brian Mulroney decided to study this option with the establishment of the Special Committee to Study the Proposed Companion Resolution to the Meech Lake Constitutional Accord, commonly known as the Charest Committee.

The Charest Committee tabled its report on 17 May 1990. The report generally agreed with the content of the New Brunswick companion resolution and recommended its adoption. On the treatment of Indigenous issues, the committee recommended that the companion resolution provide for a separate process of constitutional conferences every three years, beginning no later than one year after the companion resolution came into force, and that first ministers recognize Indigenous peoples in the body of the constitution, building on the “Canada clause” proposed by Manitoba.

With the results of the Charest Committee and the provincial studies in hand, the Mulroney government called a final First Ministers Conference for 3 June 1990, principally to discuss the companion resolution and secure the concurrence of the premiers of the non-consenting provinces to introducing a motion in their legislatures to approve the Accord. This conference lasted for six days, but the outcome was an agreement by all premiers to secure passage of the Accord and the companion resolution by the 23 June 1990 deadline. Among other elements, the agreed-upon companion resolution contained a commitment to future constitutional conferences on Indigenous issues. The commitment to future discussions instead of addressing Indigenous issues directly in the companion resolution, however, generated a negative reaction among Indigenous leaders, who argued that it continued the “two founding nations” myth and the hierarchy of recognition contained in the Meech Lake Accord itself. Indigenous leaders also protested their exclusion from the June 1990 First Ministers Conference.

Three days after the conclusion of the June 1990 First Ministers Conference, Premier Filmon attempted to introduce a resolution to approve the Accord into the Manitoba legislature, but Elijah Harper refused to provide the necessary unanimous consent to introduce the motion. Four days later, on June 16th, the Assembly of Manitoba Chiefs made public its intention to defeat the Meech Lake Accord. The following day, Prime Minister Mulroney sent Senator Lowell Murray and others to negotiate with the Assembly of Manitoba Chiefs in an attempt to persuade them to end their efforts to defeat the Accord, but to no avail. Although Premier Filmon eventually introduced the motion to approve the Accord on June 20th, there was insufficient time for the legislature to approve it prior to a scheduled adjournment on June 22nd. With passage in Manitoba impossible, Premier Wells adjourned the Newfoundland House of Assembly for an indeterminate period on June 22nd, thereby cancelling the proposed free vote on a motion to approve the Meech Lake Accord and ensuring the Accord’s defeat.

See Ian Peach, “The Power of a Single Feather: Meech Lake, Indigenous Resistance and the Evolution of Indigenous Politics in Canada” (2011) 16 *Rev Const Stud* 1 at 8-11 (footnotes omitted).

Although one cannot know for certain, it is likely that the Manitoba legislature would have approved the resolution had it been put to a vote, and Newfoundland’s House of Assembly would have thereafter approved the resolution as well, thus making the Meech

Lake Accord official. But history took a different path and, for better or worse, the name Elijah Harper will forever be linked to the defeat of the Meech Lake Accord. Harper, you will remember, was the Manitoba MLA who refused to give his consent to allow the Manitoba premier to introduce the resolution to approve the Accord. Below, is how he was remembered in an obituary written shortly after his death:

Not since Louis Riel in the late 19th century had a person of aboriginal descent had such an impact on Canadian history. Except in mid-June, 1990, Elijah Harper, a 40-year-old Ojibwa-Cree and Manitoba MLA, made his bold stand peacefully, though defiantly, holding an eagle feather.

In his opposition to the Meech Lake Accord, which included Quebec's five demands before it would sign the Constitution of 1982, Mr. Harper became an instant media sensation. He was the Canadian Press newsmaker of 1990 and the subject of hundreds of newspaper and television stories and commentaries. He became an overnight celebrity, and people started wearing T-shirts with his photograph on them and badges that proclaimed, "Elijah Harper for Prime Minister." A CTV movie, *Elijah*, was even made about him in 2007.

For Mr. Harper, however, his refusal to support the accord was always much more than a quest for his 15 minutes of fame. Indeed, he did not even want it. "I don't like this notoriety," he told former Manitoba NDP premier Howard Pawley in the midst of the deliberations. "I am looking forward to getting back to the trapline and looking at the stars at night."

Nonetheless, few images from the constitutional battles of the 1980s and 90s are as memorable as that of Mr. Harper, with his long black hair pulled back in a ponytail sitting in the Manitoba Legislature with an eagle feather in his hand refusing to give his consent so that Manitoba premier Gary Filmon could introduce a motion to ratify the accord by the June 23, 1990, deadline.

As Mr. Filmon recalls, Mr. Harper spoke to him before the crucial session began. "I don't want to do this," he told Mr. Filmon, "but I have to do it for my people." Added Jack London, who was at the time the legal counsel for the Assembly of Manitoba Chiefs (AMC): "The emotional toll on Elijah was immense. But he did not take his decision lightly or without considerable thoughtfulness."

Mr. Filmon, head of a Conservative minority government, required unanimous consent from all MLAs to introduce the motion for debate, which was to be followed by 10 days of public hearings. It was going to be close to meet the deadline. Yet eight times between June 12 and June 21, on each occasion that the Speaker asked if there was unanimity to proceed, Mr. Harper said, "No, Mr. Speaker."

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The next day, the Manitoba legislature adjourned without voting on the accord, essentially killing it (a deed completed when, soon after, Newfoundland premier Clyde Wells refused to allow a vote on the accord).

In Ottawa, prime minister Brian Mulroney was naturally livid that a technicality could derail his prized accord. Later, in one of Mr. Mulroney's unguarded conversations with Peter C. Newman, he put it like this, "Aboriginals are not to blame for Meech Lake's failure despite Elijah Harper's stupidity. ... He turned down a sweetheart deal."

Mr. Harper saw the situation much differently. A spiritual man, he had a dignified calming influence on Manitoba and Canadian politics. "I was listening to the people," Mr. Harper said in 2005 when Mr. Mulroney's comments became public. "When he says I'm stupid, he calls our people stupid. We're not stupid. We're the First Nations people. We're the very people who welcomed his ancestors to this country and he didn't want to recognize us in the Constitution."

Elijah Harper died on May 17 from cardiac failure resulting from complications from diabetes and kidney problems.

See Allan Levine, "Native Leader Elijah Harper Helped Scuttle Meech Lake," *The Globe and Mail* (20 May 2013), online: <<http://www.theglobeandmail.com/news/politics/native-leader-elijah-harper-helped-scuttle-meech-lake/article12033338/>>.

There were many criticisms levelled against the Meech Lake Accord. As one scholar has written:

Women's organizations, aboriginal peoples and multicultural groups were among the more vigorous dissenters from the Accord. Many women were concerned that the loose language of the Accord, referring to certain Charter guarantees but not to others, would undermine sexual equality which was not expressly mentioned. Aboriginal peoples were dismayed that a constitutional agreement could be concluded with such secrecy and swiftness to meet Quebec's demands when no progress had been made towards their quest for self-determination at four successive constitutional conferences.

See WH McConnell, "The Meech Lake Accord: Laws or Flaws" (1988) 52 Sask L Rev 115; see also Beverley Baines, "Women's Equality Rights and the Meech Lake Accord" (1988) 52 Sask L Rev 265 (arguing that Meech Lake put the Charter-based equality rights of women in jeopardy); David Taras, "Television and Public Policy: The CBC's Coverage of the Meech Lake Accord" (1989) 15 Can Pub Pol'y 322 (arguing that media coverage was oriented toward conflict and gave Canadians a distorted view of what was at stake); and Thomas J Courchene, "Meech Lake and Socio-Economic Policy" (1988) 14 Can Pub Pol'y 563 (arguing that the implications for socio-economic management were positive). In an important article written shortly after the demise of the Meech Lake Accord, Roderick Macdonald summarized the five major legal critiques of the Accord that had gained traction by the fall of 1988, fewer than two years before its defeat:

The first of these to emerge was the "progressive" critique, in which the *Meech Lake Accord* was condemned for the succor which it offered to the discredited constitutional agenda of federal/provincial relations, language rights, and provincialism. The *Meech Lake Accord* was also criticized on this basis for reinforcing the political ethic of executive federalism and elite accommodation. Implied in this critique was the more general claim that traditional (or pre-1982) constitutional politics in Canada was outdated because it served only the interests of the country's political and economic elites. Those who advanced this claim were especially anxious to argue that the 1982 round empowered ordinary Canadians and enfranchised previously excluded constituencies.

Closely linked with this first critique was a second—the "Charter" argument. These skeptics of the *Meech Lake Accord* were deeply troubled by the "distinct society" clause. They feared, notwithstanding their quasi-entrenchment in 1982, that modern and more fundamental concerns about the relationship of individual and state were being moved once again to the bottom of the constitutional agenda. This critique found support in the refusal at the Langevin meetings to amend section 16 of the Schedule so that the "distinct society" clause would be made explicitly subordinate to all sections of the Charter. This, it was claimed, revealed that Canadian and Quebec politicians had conspired successfully to recapture legislative authority to override recent constitutional gains relating to respect for individual liberty, to the promotion of equality, and to the greater enfranchisement of women.

The "distinct society" clause also provided a focus for the third, or "provincial egalitarian" critique of the Meech Lake Accord. On this view, the clause was inimical to a true federalism. By creating a special status for one province it fundamentally undermined the notion of equality of citizens, regardless of provincial residence, upon which Canadian political institutions were

argued to have been built. Many who took this position also suggested that the clause would confer additional legislative jurisdiction on Quebec, not exercisable by other provinces.

A fourth criticism of the Meech Lake Accord, the “centralist” critique, found its roots in the belief, first advanced by Sir John A. Macdonald a century ago, that the federal government must be ascendant for Canada to resist assimilation by the United States. Critics argued that the spending power provisions of the agreement would enfeeble the federal government. These provisions would also operate a massive power shift to larger and more economically self-sufficient provinces such as British Columbia, Alberta, Ontario, and Quebec at the expense of the country’s poorer provinces. Coupled with this critique of the spending power clauses was the assertion that, by giving up exclusive control over national institutions such as the Senate and the Supreme Court, the central government was destroying, in a manner even more complete than the Judicial Committee of the Privy Council, the quasi-unitary model of federalism upon which the country was built.

A final objection advanced by opponents of the Meech Lake Accord may be characterized as the “paralysis” critique. Many early Meech Lake Accord opponents argued that the extension to all provinces of a constitutional veto over amendments relating to federal institutions such as the Senate would nullify all hope for their reform. Reform of these institutions was seen as necessary to permit non-central regions of the country to acquire a meaningful voice in national policy-making. Also connected with this concern was the belief that other pressing items of constitutional reform—Western alienation, Aboriginal rights, the accession of the territories to provincehood, multiculturalism, and regional economic disparity—would never be addressed if every province were given an enlarged veto power.

Roderick A Macdonald, “... Meech Lake to the Contrary Notwithstanding (Part I)” (1991) 29 Osgoode Hall LJ 253 at 269-70.

Quite apart from the *content* of the Meech Lake Accord, many questioned the *process* by which the text had been written and ultimately proposed to Canadians. One especially critical view identifies some of these concerns:

The “merits” of the 1987 Accord cannot be discussed without reference to the unworthiness of the process. The haste, secrecy and elitism of the process up until June 3, the date of the signing of the Langevin Block text, make it essential that governments listen respectfully and receptively to criticism and proposed improvements. Furthermore, much of the proposed 1987 Accord is concerned with constitutional reform processes and we must be concerned with the precedent set by the 1987 Accord for the conduct of further constitutional reform. Particularly disturbing in this regard is the proposal in the 1987 Accord to entrench an indefinite series of annual First Ministers’ Conferences on the Constitution. In itself, the idea is highly objectionable. It is liable to lead to the trivializing of the Constitution through constant tampering; it invites excessive decentralization, as it is politically and legally much easier to take power from the centre; it leads to the unhealthy and permanent intertwining of ordinary politics with constitutional politics. If the deplorable process leading to the 1987 Accord is to be the model for the future, the damage to the nation and the discredit to democracy will be especially grave.

See Brian Schwartz, “Fathoming Meech Lake” (1987) 17 Man LJ 1 at 4.

Perhaps the most vocal critic of all was former Prime Minister Pierre Trudeau, the driving force behind the patriation of Canada’s Constitution. After Prime Minister Brian Mulroney and the provincial premiers had agreed in principle to the Meech Lake Accord, Trudeau published the following commentary, appearing simultaneously in French and English:

What a magician this Mr. (Brian) Mulroney is, and what a sly fox! ...

In a single master stroke, this clever negotiator has thus managed to approve the call for Special Status (Jean Lesage and Claude Ryan), the call for Two Nations (Robert Stanfield), the call for a Canadian Board of Directors made up of the 11 first ministers (Allan Blakeney and Marcel Faribault), and the call for a Community of Communities (Joe Clark).

He has not quite succeeded in achieving sovereignty-association, but he has put Canada on the fast track for getting there. It doesn't take a great thinker to predict that the political dynamic will draw the best people to the provincial capitals, where the real power will reside, while the federal capital will become a backwater for political and bureaucratic rejects.

What a dark day for Canada was this April 30, 1987! In addition to surrendering to the provinces important parts of its jurisdiction (the spending power, immigration), in addition to weakening the Canadian Charter of Rights, the Canadian state made subordinate to the provinces its legislative power (Senate) and its judicial power (Supreme Court); and it did this without hope of ever getting any of it back (a constitutional veto granted to each province). It even committed itself to a constitutional "second round" at which the demands of the provinces will dominate the agenda.

All this was done under the pretext of "permitting Quebec to fully participate in Canada's constitutional evolution." As if Quebec had not, right from the beginning, fully participated in Canada's constitutional evolution!

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The possibility exists, moreover, that in the end Mr. Bourassa, true to form, will wind up repudiating the Meech Lake accord, because Quebec will still not have gotten enough. And that would inevitably clear the way for the real saviours: the separatists.

As for Mr. Mulroney, he had inherited a winning hand.

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But since 1982, Canada had its Constitution, including a Charter which was binding on the provinces as well as the federal government. From then on, the advantage was on the Canadian government's side; it no longer had anything very urgent to seek from the provinces; it was they who had become the supplicants. From then on, "Canada's constitutional evolution" could have taken place without preconditions and without blackmail, on the basis of give and take among equals. Even a united front of the 10 provinces could not have forced the federal government to give ground: With the assurance of a creative equilibrium between the provinces and the central government, the federation was set to last a thousand years!

Alas, only one eventuality hadn't been foreseen: that one day the government of Canada might fall into the hands of a weakling. It has now happened. And the Right Honourable Brian Mulroney, PC, MP, with the complicity of 10 provincial premiers, has already entered into history as the author of a constitutional document which—if it is accepted by the people and their legislators—will render the Canadian state totally impotent. That would destine it, given the dynamics of power, to eventually be governed by eunuchs.

See Pierre Elliott Trudeau, "Say Good-bye to the Dream of One Canada," *La Presse* and the *Toronto Star* (27 May 1987).

## 2. The Charlottetown Accord

After the failure of the Meech Lake Accord, the first ministers went back to the drawing board. In contrast to the closed-door process that had produced the Meech Lake Accord, the Charlottetown process was more open. Patrick Monahan has argued that the process surrounding the Charlottetown Accord illustrates the democratic potential of constitutional amendment in Canada. Monahan notes that before the formulation of the Charlottetown

Accord, the federal government established the Citizens Forum on Canada's Future (chaired by Keith Spicer) in November 1990, and established a joint House–Senate committee to consider proposals for changes to the amending formula (the Beaudoin–Edwards Committee) in December 1990. The federal government's constitutional proposals were then released in September 1991. Initially, these proposals were put before a second joint House–Senate committee (the Beaudoin–Dobbie Committee). However, in response to public demand for greater participation, the federal government convened five conferences held in early 1992, attended by federal and provincial politicians, interest groups' representatives, and ordinary Canadians. The final phase of the Charlottetown process was an intergovernmental negotiation, in which governments and Aboriginal representatives were the sole participants. See Patrick J Monahan, "The Sounds of Silence" in Kenneth McRoberts & Patrick J Monahan, eds, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) at 222.

The Charlottetown process culminated in a national referendum on October 26, 1992, asking Canadians the following question: "Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?" See *Proclamation Directing a Referendum Relating to the Constitution of Canada*, SI/92-180, Registration 1992-10-07, online: <<http://laws.justice.gc.ca/eng/regulations/SI-92-180/page-1.html>>. This agreement was the package of amendments known as the Charlottetown Accord—an ambitious group of proposals agreed to by Canada's first ministers, including the leaders of the Yukon and the Northwest Territories, as well as Aboriginal leaders. Two questions present themselves: first, why was the Charlottetown Accord put to a referendum; and second, what did the Charlottetown Accord propose to begin with? In an article published the year after the failure of the Accord, Robert Vipond explained what the Accord had sought to do and how the referendum came to be.

**Robert C Vipond, "Seeing Canada Through the Referendum:  
Still a House Divided"**

(1993) 23 *Publius* 39 at 40-47

Quebec and the rest of Canada drew quite different lessons from Meech's defeat. In Quebec, a sense of national rejection was both widespread and deeply felt. The failure of Meech was particularly bitter because this was the first time in living memory that the government of Quebec had actually accepted the risk of agreeing to a multilateral and comprehensive package of constitutional reforms with English Canada, only to have the agreement scuttled by provincial legislatures in English Canada. Put differently, the Meech Lake Accord dealt centrally with the Quebec question on terms acceptable to Quebec itself. For many Quebecers, the rejection of Meech entailed the rejection of Quebec.

The powerful sense of rejection engendered by the failure of Meech had several consequences. At the public opinion level, it pushed support for greater Quebec sovereignty to unprecedented heights—60-65 percent in some polls. At the intergovernmental level, the death of Meech led Bourassa to announce that he would boycott all multilateral intergovernmental negotiations, especially whatever post-Meech constitutional negotiations might be proposed. Within Quebec itself, the failure of Meech produced two large-scale efforts to chart Quebec's constitutional future on its own terms and, if necessary, unilaterally.

The first, popularly known as the Allaire report, was commissioned by the governing Liberal party in Quebec and was adopted as party policy in March 1991. The second, the Bélanger-Campeau Commission, was a sort of Quebec “Estates General” and included representatives from the Quebec National Assembly, business, labor, the cooperative movement, and the arts community among others. Although different in detail, Allaire and Bélanger-Campeau shared a number of traits. Both argued that Quebec must have the jurisdictional space needed to redeem its national promise—if not within a radically restructured and decentralized federation, then without. Both were clearly influenced by what has been called the new business class in Quebec—mid-level entrepreneurs deeply confident of Quebec’s ability to respond to the opportunities of globalization and deeply frustrated by the sort of state regulation and governmental duplication they associate with the Canadian federation. Both called for a referendum in Quebec, by the end of October 1992, on Quebec’s constitutional future.

Bourassa accepted the referendum recommendation, but he also left open the possibility that a constitutional referendum in Quebec could be framed around a new federalist constitutional proposal from the rest of Canada—should one be forthcoming. Bourassa thus purchased some maneuverability at the same time as he “laid down the gauntlet to the Rest of Canada.”

The rest of Canada was initially slow to respond to the demise of Meech and these further developments in Quebec. As Ronald Watts noted two years ago, some prominent public figures began to wonder aloud whether keeping Canada together was “still worth the effort.” Some others drew the conclusion that the differences between Quebec and the rest of Canada were essentially irreconcilable, arguing that Quebec’s nationalist collectivism was incompatible with the liberal individualism of the rest of Canada. Still others—and this theme resonated particularly strongly among citizens—were simply fed up with their governments’ preoccupation with constitutional questions.

The intergovernmental class responded quite differently. However reluctantly, the federal and provincial governments concluded that the national unity question was perhaps even more urgent than ever before, that sentiment favoring separation in Quebec had grown dangerously since the failure of Meech, and that it therefore was crucial to respond fairly (though not cravenly) to Quebec’s constitutional demands.

This time, however, the approach would be different. One popular interpretation of Meech was that the accord failed less for what it included than for what it excluded, from which it followed that the success of the next attempt to reform the Constitution would depend on broadening the focus of debate beyond the Quebec question. As Richard Johnston observed, the basic idea was to create a constitutional logroll, in which the rest of Canada would get something it wanted out of constitutional reform in return for accommodating Quebec. With that premise in place, the Quebec round of constitutional negotiations gave way to the Canada round.

Two candidates for inclusion on the constitutional agenda stood out. One was Senate reform. Several provincial governments, especially in western Canada, had argued for some time that the Canadian upper house should be reformed and strengthened to provide more robust regional representation in the federal Parliament. The exclusion of Senate reform from earlier constitutional discussions had been a sore point with several provincial governments in outer Canada; beyond this, the rapid growth of the conservative, populist Reform party seemed to show the political potential of institutional reform. The Reformers’



slogan was “The West Wants In”; their goal was to create an equal, elected, and effective institution that would broker regional interests on the American model; and their leader, Preston Manning, quickly became a fixture of the national constitutional debate.

The other compelling subject of constitutional reform was aboriginal self-government. The demands of Canada’s aboriginal peoples were voiced eloquently by a leadership that liked to point out the irony of a country that was attempting to produce a fundamental law while ignoring or excluding the very people who were there at the foundation. The aboriginal community’s demand for recognition as a coequal (or third) order of government followed directly from this insight, and a series of violent confrontations between Indians and police in Quebec in the summer of 1990 underscored the urgency of the problem.

The demands for Senate reform and aboriginal self-government arose from radically different grievances, but both were couched in the powerful language of equality. Here, too, the experience of Meech spoke forcefully. One of the central characters in the demise of the Meech Lake Accord was the premier of Newfoundland, Clyde Wells. Explaining his opposition to the accord, Wells developed a constitutional theory built on the premise that individual and provincial equality are the fundamental principles on which the Constitution rests. Wells argued unyieldingly that Quebec must not be given a “special legislative status,” for this would violate the egalitarian foundation of Canada’s federal constitution. This uncompromising defense of individual and provincial equality captured the public imagination at the time of Meech and quickly entrenched itself in the post-Meech debate.

There was also the question of process. If the intergovernmental class learned nothing else from Meech, it learned that the prevailing constitutional reform process was deeply flawed. One problem was essentially tactical and, in principle, easily corrected. By the terms of the Constitution Act of 1982, constitutional amendments proceed differently according to their subject matter. Most amendments require the consent of the Parliament of Canada and at least seven of the ten provincial legislatures (providing that those seven include more than 50 percent of the country’s population). Some others—principally concerning such things as the nature of national institutions and the amending formula itself—require the consent of the Parliament of Canada and all of the provincial legislatures. Meech was a set of proposed amendments drawn from both categories. When the accord was negotiated in 1987, the first ministers agreed to submit all of the amendments to the more rigorous requirement of unanimity rather than sever the package into two distinct lots. The clear, yet largely unforeseen, consequence of this tactic was to straitjacket the process, so that when two provincial legislatures (Manitoba and Newfoundland) refused to ratify the package, all was lost. This time the federal government promised that things would be different, either by uncoupling the two sorts of amendments or by leaving those that required unanimity to another day.

The other process problem ran considerably deeper. In the fallout from Meech, the intergovernmental class learned very quickly that the Canadian public would no longer tolerate the closed processes of “executive federalism” (i.e., high-level intergovernmental bargaining). Nurtured by the symbolism of the Charter of Rights, many critics of the Meech Lake Accord directed their anger as much at the elite-managed process by which it was framed as at its content. Meech, the argument ran, was unacceptable because it had been produced by and for governments, not citizens. Determined not to repeat the error, virtually all of the governments engaged in constitutional discussions set about to create

a more open and consultative process that would forestall the sort of populist and democratic criticism that helped to derail Meech. The result was that, between mid-1990 and the fall of 1992, one roving federal commission, two peripatetic parliamentary committees, six mini-constitutional conferences, and ten provincial commissions all engaged in taking the constitutional pulse of the nation.

The challenge of creating a constitutional package that could negotiate these different and often cross-cutting priorities was formidable. Quebec's demand for significant—even massive—decentralization was unacceptable to those who looked to the national government for leadership on matters of redistributive social and economic policy and who wanted a strong Ottawa to resist the pressures of continental economic integration. One possible solution was to create an “asymmetrical” federal system in which Quebec would have jurisdiction over a number of policy areas not available to the other provinces, thus giving Quebec the control it wanted without producing wholesale decentralization. As the advocates of this approach were quick to point out, the history of Canadian federalism is rife with examples, both in constitutional theory and political practice, in which individual provinces have been treated differently or have been allowed to act differently from the rest. Yet, the argument that asymmetry is a legitimate and well established part of Canadian federalism was simply no match for the sleek principle, now become orthodoxy, that provincial equality or uniformity is a fundamental and inviolable constitutional value. Though much discussed by academics and endorsed by many of the participants at one of the mini-constitutional conferences held in early 1992, direct and extensive asymmetry was simply a nonstarter among first ministers.

Senate reform posed a different sort of problem. Premier Bourassa's boycott of multi-lateral constitutional negotiations made it relatively easy for the supporters of an equal, elected, and effective Senate to put the issue on the table. However, everyone also knew that Quebec, already wary of its declining demographic position in Canada, could never support a scheme that would reduce its representation to that of any other province—especially if one of the other goals of institutional reform was to create the conditions under which the Senate could stand up effectively to the House of Commons. What Senate reformers were less prepared for was the still more fundamental question concerning the definition of representation. If the Senate exists, in part, to protect those voices that are otherwise marginalized by the national legislative process, why assume that territorial identity is the best or only basis of representation? Why not, alternatively, create a Senate that would be apportioned on the basis of gender, dividing representation equally between women and men?

Even the question of aboriginal self-government proved nettlesome. One might have thought that recognizing a right of self-government for aboriginal peoples was morally unambiguous and politically compelling, but it was not. For one thing, it was unclear what would happen if the claims of aboriginal self-government conflicted with those of Quebecois self-determination. What if, for instance, aboriginal communities in Quebec wanted to remain part of Canada and Quebec chose to leave? What if, in the course of governing themselves, aboriginal communities violated the rights protected by the Charter of Rights? Which would prevail? That question sharply divided both white and aboriginal communities until the very end. ...

The federal government tabled its constitutional proposals before Parliament in September 1991. Published under the title *Shaping Canada's Future Together*, the proposals

left no doubt that Brian Mulroney's government was willing to entertain an extraordinary range of constitutional changes. Most of the subjects addressed by the Meech Lake Accord reappeared, albeit in slightly different form. The reform of national representative institutions received prominent treatment. The government proposed some recalibration of the division of powers toward the provinces. It also recommended the entrenchment of a lavish "Canada Clause," an introductory constitutional statement "to affirm the identity and aspirations of the people of Canada." Once tabled, these proposals were considered by an all-party, special joint parliamentary committee. The Beaudoin-Dobbie Committee subsequently held hearings across Canada on the proposals and, after considerable tribulation and six mini-constitutional assemblies, produced a refined version of the federal proposals at the end of February 1992.

With such an extensive and fraught agenda, it is hardly surprising that the Canada round of constitutional negotiations produced a number of false starts. The September proposals included several economic policy recommendations that stood no chance of winning provincial consent and seemed only to clutter an already over-burdened constitutional agenda. For its part, the Beaudoin-Dobbie report proposed the following poetic preamble to the Constitution: "We are the people of Canada/drawn from the four winds/a privileged people/citizens of a sovereign state." Widely ridiculed as bad poetry and worse political theory, the preamble vanished as quickly as it had appeared.

Despite these missteps, the outlines of a constitutional reform package began to take shape by the spring of 1992. Between March and early July 1992, federal Minister of Constitutional Affairs Joe Clark chaired a series of multilateral constitutional meetings at which the federal government, representatives from nine provincial governments, territorial leaders, and the representatives of four major aboriginal groups worked toward a constitutional consensus. The agreement at which they arrived in early July, the so-called Pearson Accord, became the basis of further multilateral discussions—this time including Quebec's premier, Robert Bourassa. Though many observers remained pessimistic about the possibility of finding common ground among such deeply entrenched and diverse interests, multilateral meetings continued throughout the summer of 1992 until an agreement was reached in Charlottetown in late August. Quebec, British Columbia, and Alberta were already committed to holding constitutional referenda. Following suit, the federal government announced that it would introduce legislation calling for a full national referendum on the Charlottetown Accord, to be held 26 October 1992.

Like the federal proposals from which it grew, the Charlottetown Accord was a complex compromise among several divergent constitutional claims. First, the accord attempted to respond to Quebec's constitutional demands by replicating the major elements of Meech, albeit with several new twists. Like Meech, the Charlottetown Accord included a provision delimiting the federal spending power, another guaranteeing Quebecois representation on the Supreme Court, and a third that would give Quebec (and any other province) a veto over constitutional amendments that would materially alter national institutions. Finally, Charlottetown followed Meech in recognizing Quebec as a "distinct society" and allowed that this fact could guide judicial interpretation of the Constitution, including the Charter of Rights. However, the clause was more narrowly circumscribed than its predecessor in Meech, and it was placed within a larger statement of the fundamental values underlying the Canadian nation—the Canada Clause.

Second, Charlottetown proposed several changes to the division of powers, all of them essentially decentralizing in nature. Thus, labor market development and training, together with “cultural matters within the provinces,” were to be identified as matters of exclusive provincial jurisdiction, although various qualifications were added to avoid the appearance that the federal government had to abandon these areas altogether. In several other areas (e.g., forestry, mining, tourism, housing, recreation, and municipal and urban affairs), the Constitution would recognize the de facto provincial jurisdiction that already exists, while putting in place a mechanism to tailor the federal government’s role and any spending on these matters to the needs of each province. As to immigration (again a holdover from Meech), the accord obliged the federal government to negotiate an agreement with any province that wanted it.

Third, the Charlottetown Accord envisioned important changes to the structure and functioning of Parliament. Responding to calls for Senate reform, the upper house would be reconstituted, providing equal representation for each province. It was unclear, however, just how effective such a renovated Senate would be in representing regional interests. Under the proposal, the Senate would not be a “confidence chamber” in the sense that its disagreement with the House of Commons would not bring down the government. Rather, in most cases, the Senate was to have a suspensive veto that, when exercised, would trigger a joint sitting with the House of Commons. Concurrently, the House of Commons would be enlarged, principally to compensate large provinces (e.g., Ontario and Quebec) for the equalization of representation in the Senate. Moreover and more controversially, the final negotiations with Bourassa produced a provision to guarantee Quebec at least 25 percent of the seats in the House of Commons in perpetuity, a hedge against the demographic trends that show Quebec’s population declining as a proportion of Canada’s population.

Fourth, the Charlottetown Accord enshrined the “inherent right” of aboriginal self-government, recognizing aboriginal governments as one of three orders of government in the country. The self-government provisions tugged in different directions. On one hand, Charlottetown committed itself to an “inherent” right of self-government that would allow aboriginal peoples “to safeguard and develop their languages, cultures, economies, identities, institutions, and traditions.” On the other hand, aboriginal laws would be subject both to the Charter of Rights (though aboriginal governments, like others, would be allowed to use the override clause), and to the requirement that aboriginal laws be consistent with “peace, order, and good government in Canada.” How aboriginal self-government was to be realized was left to a series of political agreements that would define the process. To buy time for this process to take shape, the accord explicitly delayed judicial enforcement of the self-government provisions for five years.

It was perhaps inevitable that even the supporters of the Charlottetown Accord would have difficulty finding a common thread to hold this sprawling agreement together. In point of fact, however, there was a basic idea that underlay both the accord and other recent attempts at constitutional reform, namely, the idea of inclusion. One of the basic goals of those who promoted the Constitution Act of 1982 was to create a greater sense of popular attachment to the Canadian polity by defining a set of values that Canadians could use to constitute their political identity. The Constitution Act went so far, indeed, as to create what Alan Cairns has called “Charter Canadians”—individuals and groups whose civic identity, previously denied or marginalized, is now nurtured by its specific and explicit inclusion in the Charter of Rights. The Meech Lake Accord, for its part,

attempted to respond to modern Quebec nationalism by creating a sense of belonging among Quebecers who considered their political identity first threatened then rejected by English Canada. To be sure, the chief instrument of this strategy, the “distinct society” clause, was deeply paradoxical in that it attempted to foster a commitment to a common Canada by reinforcing what was different about Quebec. Paradoxical or not, the explicit purpose of Meech remained, as Mulroney repeatedly said, to bring Quebec “back into the constitutional family.”

In an important sense, Charlottetown was but the next stage of this inclusionary constitutional politics. The purpose of the accord was to reach out constitutionally to Quebec, outer Canada, and aboriginal peoples—all of whom, in different ways, complained bitterly of their exclusion from or marginalization within the Canadian federation. Yet there was one crucial difference between Charlottetown and previous attempts at constitutional reform. Both in 1982 and again at the time of Meech, the communities that stood to gain from the inclusionary thrust of the effort largely supported constitutional reform. This time they did not—at least not among the general citizenry. Put to the test of a national referendum, the Charlottetown Accord was defeated in Quebec, rejected decisively in western Canada, and both supported and opposed by aboriginal communities. In short, the accord was unpopular in the very communities that were meant to benefit most from its provisions.

## NOTES

1. *The outcome.* The people of Canada voted against the Charlottetown Accord. Canadian electors outside Quebec rejected the Accord by a margin of 54.3 percent to 45.7 percent. In British Columbia, 68.3 percent voted against; in Manitoba, Alberta, and Saskatchewan, the votes against were, respectively, 61.6 percent, 60.2 percent, and 55.3 percent. In the Yukon Territory, the final vote was 56.3 against and in Nova Scotia the Accord was rejected by 51.2 percent of voters. Only in New Brunswick (61.8 percent), Newfoundland (63.2 percent), the Northwest Territories (61.3 percent), and Prince Edward Island (73.9 percent) did a significant majority of the province or territory support the Accord. In Ontario, the Accord secured the approval of the slimmest majority (50.1 percent): see Elections Canada, *The 1992 Federal Referendum: A Challenge Met—Report of the Chief Electoral Officer of Canada* (17 January 1994) at 58, online: <[http://www.elections.ca/res/rep/off/1992/1992\\_Referendum\\_Part\\_2\\_E.pdf](http://www.elections.ca/res/rep/off/1992/1992_Referendum_Part_2_E.pdf)>. In Quebec, where 83 percent of the province turned out to vote, the Accord was rejected by 56.6 percent of voters: see Le Directeur général des élections du Québec, October 26, 1992, referendum, online: <<http://www.electionsequbec.qc.ca/english/provincial/media/referendums.php>>.

2. *Mega-constitutional politics.* Peter Russell has argued that in the wake of the Meech Lake and Charlottetown accords, the politics of constitutional reform has become so-called mega-constitutional: see Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd ed (Toronto: University of Toronto Press, 2004). The characteristic feature of mega-constitutional politics is the unwillingness of various constitutional actors to undertake piecemeal or incremental constitutional reform through constitutional amendment, tackling issues one at a time—for example, Senate reform and the spending power. Instead, complex amendment packages of the sort found in the Meech Lake and Charlottetown accords will be the norm for major constitutional amendment proposals into the

foreseeable future. Arguably, one of the legal implications of mega-constitutional politics is that ss 38 and 41 will apply cumulatively to future packages of constitutional amendments, making major amendments extraordinarily difficult, if not impossible, as we discuss in Section V of this chapter. But it appears that piecemeal or incremental constitutional reform outside the procedures in Part V of the *Constitution Act, 1982* has since become a new strategy, and may perhaps be more probable now than pursuing major reforms using the procedures in Part V. We have seen evidence of this new strategy of non-constitutional reform with respect to the process for Senate appointments. We discuss these reforms and their implications in Section IV of this chapter.

3. *Is Part V undemocratic?* Alan Cairns has argued that the dominance of governments in the amending formula is inconsistent with popular sovereignty and the “citizens’ constitution” enshrined with the Charter of Rights in 1982:

In Pierre Trudeau’s oft-repeated phrase, the Charter says that the rights of people precede those of governments. The amending formula states that sovereignty resides in a collective of governments that can amend the constitution in terms of their own self-interest and announce their results as a *fait accompli*, assuming that legislatures can be kept under control.

In somewhat different language, the *Constitution Act, 1982*, displays two competing visions of the relation of the constitution to the peoples and governments of Canada. The amending formula presupposes that federalism is the most important constitutional organizing principle, that governments are the major actors in federalism, and that accordingly amendment of the constitution that determines their status and power within federalism is properly a matter for those governments to handle. This “government’s constitution” contrasts with the “citizens’ constitution” generated by the Charter, which presupposes that the citizen state axis is no less fundamental than the federal–provincial constitutional axis. Accordingly, citizens via the Charter are just as much part of the constitution as are provincial governments by virtue of section 92 of the *Constitution Act, 1867*, allocating law-making power to provincial legislatures.

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The amending formula defines Canada as a country of governments presiding over and speaking for the national and provincial communities that federalism sustains. Its implicit assumption is that only the cleavages defined by federalism have to be catered to in the amending formula, and they can be represented by governments. The Charter, however, defines Canadians as a single community of rights-bearers, makes only limited concessions to provincialism, and clearly engenders a non-deferential attitude toward those who wield government power. The community message of the Charter contradicts the community message of the amending formula. The Charter, in addition to defining Canadians in terms of rights, also singles out specific categories for particular recognitions and rights—women, official-language minorities, multicultural Canadians, and others. By so doing it states that the federal–provincial cleavage, and the communities derived from it, do not exhaust the constitutionally significant identities that Canadians now possess. Succinctly, the Charter states what the amending formula denies, that “federalism is not enough”—that Canadians are more than a federal people.

See Alan C Cairns, *Charter Versus Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill-Queen’s University Press, 1991) at 6-8. Do you agree with Cairns? If so, should there be some guarantee of popular input in the amendment process? Should it come at the stage of formulating an amendment—for example, in the form of a constituent assembly—or at the time of approval—for example, in a referendum? Cairns levelled his criticism at the process that led to the negotiation of the Meech Lake Accord, which occurred almost entirely behind closed doors and with minimal input from legislatures (which were presented with the

Accord by first ministers as a *fait accompli*), let alone citizens. Matthew Mendelsohn agrees, but takes a different route to reach the same answer that citizens must participate in the process of constitutional reform. He argues that the key is to “elaborate an appropriate process for the inclusion of the public in a nonmajoritarian manner” because we in Canada “have not yet fully accepted that the requirement of citizen participation must go beyond ratification in a referendum.” He adds that “the process of constitutional reform is flawed because the negotiation process relies on elites and brokerage, while the ratification process is public and majoritarian, with public participation grafted onto institutions that remain essentially unchanged in their requirement of executive leadership”: see Matthew Mendelsohn, “Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics” (2000) 33 Can J Political Science 245 at 271.

4. *A constitutional convention requiring a referendum.* Some commentators have argued that resort to a referendum during the Charlottetown process established a constitutional convention of popular ratification of amendments. Recall from Chapter 1 that conventions are not legally binding. In the 1981 *Patriation Reference*, discussed above, the majority on the convention issue adopted (at 888) the following passage:

We have to ask ourselves three questions: first, what are the precedents; second, did the actors in the precedents believe that they were bound by a rule; and third, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded themselves as bound by it.

See Sir William Ivor Jennings, *The Law and the Constitution*, 5th ed (London: University of London Press, 1959) at 136.

Do you think a convention exists that there should be a referendum before any constitutional amendment? Before a package of major constitutional changes? What about prior to a major reform to our electoral system—even though Part V makes no express mention of whether any of its five procedures should be used to formalize changes to Canada’s electoral system? It has been argued that the current federal government should hold a referendum on its proposed electoral reforms in order to allow Canadians “to pass judgment on the most fundamental process linking them to the state”: see Emmett Macfarlane, “Why a Referendum on Electoral Reform? Because This Isn’t Ordinary Legislation,” *The Globe and Mail* (1 August 2016), online: <<http://www.theglobeandmail.com/opinion/why-a-referendum-on-electoral-reform-because-this-isnt-ordinary-legislation/article31205599>>.

5. *Lessons learned.* What lessons can we draw from the failure of the Charlottetown Accord? Ten years after the Charlottetown referendum, Joe Clark, a former prime minister of Canada who later served as minister of constitutional affairs during the negotiation of the Charlottetown Accord, reflected on the failed effort. He wrote that the fundamental question that remained unanswered was this: “What is the nature, what is the identity, of the community whose constitution we are seeking to define?” He elaborated on this question and challenged us to find a way to answer it:

Those of us who went into the trenches and fought for Charlottetown know that some of the most ferocious opposition was triggered by language that was designed to describe elements of our identity which some of our citizens still find controversial. That was the case with the distinct society as it was with the inherent right of self-government, to mention just two elements. A constitution can contribute to identity, but it can’t proclaim it, at least not alone.

This issue of identity—of the contemporary nature of this extraordinary community—is at the heart of the challenge. When we brought together, in those interminable meetings, people who genuinely reflected most of the formal interests of the country, we found real agreements. That has to encourage us.

And certainly, incrementalism and passivity do not contribute to the kind of identity we would want to have define the Canadian community. In fact, another corrosive consequence of preferring the incremental to the bold is that voter participation is down, Western alienation is up and public cynicism is high, and as our young achievers reach out to the world, from their bases in Calgary or Quebec, they step over Canada. We are their passport now, and we must become again their country.”

See Joe Clark, “Charlottetown 10 Years On: From Activism to Incrementalism” (December 2002/January 2003) 24 Policy Options at 61.

Immediately after the defeat of the Accord, Kathy Brock suggested three lessons that could be learned from the failure of the Charlottetown Accord. First, “in future any rounds of macro-constitutional change must necessarily be inclusive and open.” Second, “the roles and responsibilities of the political leaders must be significantly altered.” Brock specifies that “leaders must be responsible to public demands but willing to make independent decisions and then to defend those decisions before the public in terms that are meaningful to them.” And third, “any amendments intended to respond to the needs of specific groups or provinces within the Canadian community must strengthen the nation as a whole.” Brock concludes her third lesson by suggesting that “perhaps the *Economist* summed up this aspect of the Canadian mind-set when it observed that Canada is the only country that could have a popular revolution in favour of the status quo”: see Kathy L Brock, “Learning from Failure: Lessons from Charlottetown” (1993) 4 Const Forum Const 29 at 31-32. Are these the only lessons to be learned from the failure of the Charlottetown Accord? Imagine you are the lead constitutional adviser to the prime minister and you are asked to design a new package of major constitutional reforms to finally bring constitutional peace to Canada. What would you put in the package and how would you advise the prime minister to pursue its approval? One idea, as suggested by David Beatty, would be to convene a specialized constitutional assembly that would be responsible for setting the framework for the new package: “Rather than thinking of constitutional renewal as a process of cobbling together a long list of competing and often conflicting ideas, it would explore the possibility of organizing the constitutional framework of our country around a set of very basic and widely accepted first principles.” See David Beatty, “Amending the Canadian Constitution” (1993) 4 Const Forum Const 53 at 54. Would this strategy get us any closer to finally reforming the Constitution?

6. *Money and the referendum.* The Charlottetown Accord campaign complicates what we know about the effect of money in politics. It is commonly believed that the expenditure of money—in advertisements, individual voter contact, and get-out-the-vote operations—can determine outcomes in elections. Supporters of the Charlottetown Accord spent \$11.25 million to promote it while its opponents spent \$883,000 against it: see Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012) at 115. How can we explain the Accord’s rejection in light of this imbalance in expenditures? Could it be that money does not matter as much in politics as we might think?

7. *Markets and the referendum.* In the course of the Charlottetown campaign, some supporters resorted to financial arguments to persuade voters to approve the Accord. They



argued that economic disaster would befall Canada if the Accord were rejected; the other side described this argument as a scare tactic. The day after Canada rejected the Accord, the TSE 300 (a now-obsolete stock market index linked to the performance of 300 stocks listed on the Toronto Stock Exchange) rose 48.27 points, and the one-month treasury bill rate fell 0.45 percent—both evidence that the financial market did not collapse as had been predicted: see Pauline M Shum, “The Canadian Constitutional Referendum: Using Financial Data to Assess Economic Consequences” (1995) 28 *Can J Economics* 794 at 795.

### E. Is Comprehensive Constitutional Reform Possible?

The failure of the Meech Lake and Charlottetown accords has raised the question of whether constitutional amendment on such a scale is possible in Canada. Before we can determine whether major reforms are possible, it is helpful to understand why the two most recent constitutional amendment packages in Canada failed to succeed. Two scholars have developed a theory of “amending process overload” that may explain constitutional amendment failure in Canada.

**Christopher P Manfredi & Michael Lusztig, “Why Do Formal Amendments Fail? An Institutional Design Analysis”**  
(1998) 50 *World Politics* 377 at 381-93

Amending process overload is the product of a superficially simplistic phenomenon: too much and overly intense competition among groups to control or alter the redistributive impact of comprehensive constitutional modification. More specifically, we argue that conditions are ripe for amending process overload where (1) constitutions are difficult to amend, (2) the institutional structure allows for the existence of numerous constitutional actors (both state and societal), and (3) the existing constitutional language and judicial practice provide for a wide range of interpretation.

The proximate cause of amending process overload is what might be termed *redistributive indeterminacy*. Redistributive indeterminacy entails uncertainty on the part of constitutional actors about the redistributive impact of constitutional modification. This redistributive indeterminacy has three sources: what we call *amending process rigidity*, *interpretive fluidity*, and *institutional inclusiveness*. In turn, redistributive indeterminacy manifests itself in two ways, through what we refer to as regulative rule demands and interpretive rule demands.

. . .

[H]igh levels of amending process rigidity increase the importance of redistributive indeterminacy. Mistakes are more difficult to redress. Rather than imitating the fluidity of the legislative process, high amending process rigidity ensures that each amendment is treated as a discrete issue. As a result, not only are groups less willing to compromise on their demands for the sake of maintaining policy coalitions, but these groups are also more likely to make their demands in unambiguous language that is invulnerable to interpretations that may run counter to the sponsoring group’s intent.

Interpretive fluidity is a second variable impacting on redistributive indeterminacy, and it is a function of how much scope constitutional language leaves for interpretation. . . .

Indeed, judicial interpretation is especially important because it alone has the status of constitutional law; it is therefore more authoritative and less easily challenged or altered than other types of interpretation. Thus, while political actors must be concerned with future interpretation by all sources, it is judicial interpretation that contributes most to interpretive fluidity.

Obviously interpretive fluidity contributes to redistributive indeterminacy. Occasionally certain groups, typically those that have historically not had political status and that have fared poorly in the public policy arena, will seek ambiguous language in proposed constitutional amendments. They do this as an innocuous means of entrenching constitutional objectives, subsequently hoping for the chance of favorable interpretations through the courts. The aboriginal movement in Canada attempted this strategy in both the 1981 Patriation Round and the 1992 Charlottetown Round. By contrast, groups that are more firmly established in the political process are more likely to seek the entrenchment of carefully worded amendments, even if it is more difficult to secure agreement on such amendments. This is because groups that enjoy a high degree of political status do not want to risk losing gains already made to the vagaries of interpretively fluid constitutional language.

Of course, as mentioned, interpretive fluidity is more contentious where constitutions feature high levels of amending process rigidity. It is especially contentious in circumstances where there is a large and indeterminate number of constitutional actors—thus the importance of our third variable.

The relevance of the institutional inclusiveness variable is based on the presumption that constitutionally entrenched institutions reflect the interests of those who brought about their creation. ... [T]he constitutional arena is confined to those who can mobilize for special or enhanced constitutional status ... .

Enhanced constitutional status offers groups entrée to the constitutional arena. The number and types of groups that can claim enhanced constitutional status is conditioned by constitutional rules in two ways. First, rules can specifically privilege certain groups. A federal constitution, for example, privileges national and subnational governments to the exclusion of other collectivities. This explicit recognition of status provides a power base that privileged groups seek to protect and, where possible, expand. The history and development of Canadian constitutional politics can be understood from such a perspective.

The second means by which rules condition enhanced constitutional status is that they have the potential to provide market niches for aggressive new political entrepreneurs. Indeed, an externality associated with the construction of certain types of rules is that such rules may provide unanticipated opportunities for groups to acquire enhanced constitutional status.

Redistributive indeterminacy conditioned by the three factors described above manifests itself in two types of demands by constitutional actors: *regulative rule demands* and *interpretive rule demands*. Regulative rule demands are direct attempts to reduce the ambiguity of redistributive indeterminacy. They constitute, in other words, attempts to entrench specific policies, as opposed to broad principles, in a constitution. Regulative rules determine policies across “a limited set of policy outcomes” and are “generally indistinguishable in form from the rules contained in ordinary legislation.” They are, in the simplest possible terms, new constitutional rules designed to privilege the interests of sponsoring groups.

Constitutional actors also make demands for interpretive rules to clarify the impact of existing rules and principles. In other words, they seek to ensure that the redistributive impact of rules and policies will be as favorable as possible, and while interpretive rules tend not to be as directly valuable as regulative rules, they are still important. Indeed, the constitutional strategy of more marginal constitutional actors may well entail a two-stage process: entrench ambiguous language into the constitution as a preliminary step and then seek interpretive modifications to ensure favorable redistributive impact.

Both regulative and interpretive rule demands are attempts by groups to overcome redistributive indeterminacy by limiting the maneuverability of judicial decision makers. These demands are typically contentious and invite counterdemands by groups that are hostile or even indifferent to such demands. Such counterdemands are most likely, we argue, where a large number of constitutional actors perceive a one-shot opportunity to amend an interpretively fluid constitution. This perception, in turn, increases the likelihood that the politics of constitutional modification will generate multiple demands for regulative and interpretive rules designed to ensure particular policy outcomes. The result is a degree of overload that may cause the amending process to collapse. ...

The Meech Lake era provides the first illustration of the amending process rigidity that has characterized the Constitution since 1982. The 1982 amending formula allows for two types of amendment. Some require the support of the federal parliament and two-thirds of the provinces that collectively constitute 50 percent of the country's population; others require unanimity. Moreover, all amendments must be ratified by the requisite legislatures within three years of the date that the first legislature ratifies. Meech Lake would have made the formula even more rigid, by increasing the number of amendment categories that require unanimous ratification.

The 1982 amending formula intensifies amending process rigidity in two ways. First and most obviously, it gives all provinces a veto over many comprehensive reforms. Thus, all constitutional actors are aware that constitutional change will be more difficult to achieve than in the past. The result is an incentive for elites to front-load their constitutional demands into one omnibus package, rather than deal with issues sequentially and discretely. This incentive is one reason the Meech Lake Accord was so unpopular in Western Canada. Western leaders were not successful in securing concrete amendments for reform of the Senate during that round. The explicit promise that Senate reform would be the next item on the constitutional agenda, coupled with an even more restrictive amending formula under Meech Lake, caused many Westerners to believe that Senate reform would forever be frozen out of the constitutional process. To many, in the colorful words of Eugene Forsey, Senate reform after Meech would be as likely as Forsey's becoming "the Archbishop of Canterbury, the Pope or the Dalai Lama." Similarly, supporters of aboriginal rights, such as Premier Frank McKenna of New Brunswick, and, more famously, Elijah Harper of the Manitoba legislative assembly, believed that the exclusion of aboriginal issues from the accord compromised the likelihood that aboriginal issues would be dealt with successfully in the future.

Second, the 1982 amending formula intensifies amending process rigidity through the inclusion of a sunset clause (section 29(2)), whereby all amendments must be ratified by the appropriate legislatures within three years of the date that the first legislature ratifies. Section 29(2) therefore creates an incentive for provinces to delay ratification in the hopes of extracting concessions from other provinces (or the federal government) with a

stronger intensity of preference for the amendment under consideration. Provinces that delay ratification can thus make public demands for concessions that are very difficult to retract. As such, bargaining that once took place in private—so-called elite accommodation—is subjected to a second, more public round of bargaining in the ratification stage. It is in this second stage that the original agreement can potentially break down. The Charlottetown Accord process institutionalized this second round of bargaining through the use of a nationwide series of referenda.

The post-1982 era also witnessed a number of problems associated with interpretive fluidity. The preponderance of these problems involved constitutional litigation designed to put jurisprudential flesh on the bare bones of the new Charter of Rights and Freedoms. It is thus logical to assume that latent and potential constitutional demands were postponed in the early charter years until groups had a chance to determine, at least minimally, the redistributive effects of the charter. However, there was one area of interpretive fluidity that created almost immediate demands: aboriginal rights.

The Constitution Act (1982) entrenched a weak commitment to aboriginal rights under sections 25 and 35. However, the act left the precise meaning and function of aboriginal rights undefined, to be worked out in a series of constitutional conferences held between 1983 and 1987. Thus, aboriginal leaders came to the bargaining table in 1983 with regulative rule demands regarding a native charter of rights and freedoms and an aboriginal veto. In addition, they made a series of interpretive rule demands dedicated to clarifying the operation of native self-government; these included the powers to choose citizenship and form of government, determine their own institutions, make laws to govern their own communities, be exempt from federal and provincial taxation, and enjoy full mobility across provincial or national borders. These interpretive rule demands have been fairly consistent since 1983. Indeed, it was intransigence on the part of many governmental actors that led to the failure of constitutional conferences on aboriginal rights in 1983, 1984, 1985, and 1987. It also explains why, in June 1990, aboriginal leaders rejoiced in the irony that Elijah Harper—a native Indian—was afforded the opportunity to scuttle the Meech Lake Accord single-handedly.

The Meech Lake era was not as famous for the problems associated with institutional inclusiveness. Indeed, while many groups, such as those representing aboriginals, women, and multiethnic Canadians were vocally opposed to the Meech Lake Accord, they had little impact on its substance. This relative lack of impact may be attributable to the fact that many groups singled out for status in the charter were just beginning to recognize the potency of this privilege. However, with the demise of the accord in 1990 and the criticisms leveled at the exclusiveness of the Meech Lake bargaining process, the subsequent Charlottetown Accord provided opportunities for greater input from groups that had previously been shut out of the constitutional negotiating and ratification process.

The Charlottetown Accord affords the best illustration of the problems associated with the amending process overload model. By 1992 the degree of amending process rigidity inherent in the 1982 amending formula was apparent to all constitutional actors. Thus, these actors were not willing, as were the Western provinces during the Meech Lake negotiations, for example, to postpone discussion of their objectives to future constitutional rounds. There was a general consensus that Charlottetown represented a one-shot opportunity to effect constitutional change and that opportunities missed were opportunities lost. The result was a host of regulative rule demands that contributed in part to

the Charlottetown Accord's ballooning to sixty amendments—a dramatic increase from the seven amendments contained in the Meech Lake Accord. These regulative demands included all of Quebec's demands from the Meech Lake Accord. In addition, there were demands brought by social, labor and business groups, through provincial governments sympathetic to their causes, for a “nonjusticiable” social charter and provisions for internal free trade. Finally, the devolutionist provinces received a Triple-E (elected, effective, and equal) Senate, albeit a watered-down version, as well as the devolution of a number of joint constitutional responsibilities to the provinces.

Interpretive fluidity also played an important role at Charlottetown. The most controversial component of the Meech Lake Accord was the Distinct Society Clause—an interpretive clause designed to influence the reasonable limitations section (section 1) of the Charter of Rights and Freedoms as it pertained to Quebec. At Charlottetown other constitutional actors had become aware of the potential significance of interpretive clauses on the redistributive impact of existing constitutional language. As a result of a number of (often contradictory) interpretive rule demands by constitutional actors, the Charlottetown Accord included a “Canada Clause” that sought to accommodate these demands. The clause was an ensemble that recognized both the equality of the provinces and Quebec's status as a distinct society; it committed Canadians to a respect for individual and collective rights, without specifying how inevitable clashes between the two might be resolved; and it committed Canadians to racial, ethnic, and gender equality, despite the fact that racial and ethnic equality were already guaranteed under section 15 of the charter and gender equality was guaranteed under section 15 and section 28. The only rationale for this redundancy would be to influence the redistributive impact of competing rights claims and hence to privilege certain social cleavages over others. Interpretive fluidity and the interpretive rule demands that resulted also account in large part for the size of the Charlottetown Accord. Indeed, a full twenty-two amendments were dedicated to interpreting “aboriginal rights” as they exist under sections 25 and 35 of the Constitution Act (1982).

Finally, the Charlottetown Accord also conforms to the third source of amending process overload described in our model: it featured unprecedented societal input. Indeed, leaders of four aboriginal organizations representing status Indians, nonstatus Indians, Métis, and Inuit were accorded full bargaining rights along with the eleven first ministers and two territorial representatives. In addition, because the accord was subject to informal popular ratification through nationwide referenda, groups such as women, ethnic minorities, minority language education activists, and social and labor leaders had a great deal more input into the constitutional process than they had ever had in the past. Indeed, the referendum campaign witnessed the emergence of a number of societal opinion leaders who evidently carried a good deal of influence with their respective constituents. The referenda resulted in the defeat of the accord in most provinces, as well as at the aggregate level.

In summary, the 1982 Constitution Act was a watershed document in more than the obvious ways, since it changed the institutional context of constitutional modification in Canada. It transformed a flexible and exclusive modification environment without the unique interpretive fluidity of rights-based litigation into one that was inflexible, inclusive, and dominated by judicial interpretation of individual rights. As a result, a much higher level of redistributive indeterminacy became attached to proposals for constitutional

modification. The impact of this change became fully apparent during the Charlottetown Accord process, when amending process overload contributed to the accord's ultimate failure.

It is one thing to look backward to understand why the Meech Lake and Charlottetown accords failed. But what about the future of constitutional reform in Canada? Michael Lusztig has made a pessimistic but perhaps realistic diagnosis of the challenge of constitutional amendment in Canada. For him, major amendment proposals like the ones in the Meech Lake and Charlottetown accords are "doomed to fail" because they create the wrong incentives and they require compromises too great for political actors to swallow:

In Canada, the primary lesson to be learned from the failed Charlottetown Accord is that substantive constitutional reform is not possible, and will not be for some time. This claim does not reflect "constitutional fatigue" on the part of Canadians and their leaders. Rather, it is structurally grounded—a reflection of inherent limitations to successful constitutional negotiations. Specifically, it contends that the requirement of mass input into and legitimization of constitutional bargaining in deeply divided societies is incompatible with successful constitution making. There are two reasons for this. First, mass input/legitimization undermines effective elite accommodation. Where societal divisions are deep, as in Canada, the degree of compromise necessary to forge a constitutional agreement at the elite level among different societal groups—the constitutional aspirations of which are styled competing constitutional orientations—alienates too many mass supporters of each orientation. As a result, elites cannot deliver the support of their constitutional constituents.

Second, mass input/legitimization is a catalyst for the creation of constitutional interest groups. Because constitutions often institutionalize special privileges for certain groups, constitutional reform creates powerful incentives for groups to mobilize in pursuit of special status. Mass input/legitimization lowers costs associated with seeking constitutional status. Groups that are not part of the "inner-circle" of constitutional elites still have access to the process by mobilizing mass support for their cause.

See Michael Lusztig, "Constitutional Paralysis: Why Canadian Constitutional Initiatives Are Doomed to Fail" (1994) 27 *Can J Political Science* 747 at 748.

Another way to describe the Constitution of Canada is to call it unamendable. Many constitutions around the world expressly identify rules, principles, procedures, symbols, and values as unamendable, meaning that no measure of support for changing any of them is sufficient to amend them in any way. For example, republicanism is unamendable in France, as is secularism in Turkey and human dignity in Germany. The Constitution of Canada is not unamendable in the same manner, yet it may nonetheless be unamendable in the sense that major constitutional reform is now virtually impossible. Richard Albert has argued that the Constitution of Canada is "constructively unamendable" for matters that are in theory amendable using the general amending formula or the unanimity procedure:

Constructive unamendability "takes root where the political climate makes it practically unimaginable, though nonetheless always theoretically possible, to achieve the necessary agreement from political actors to entrench a formal amendment. This type of unamendability derives from deep divisions among political actors who reach the point of stalemate in their dialogic interactions. Under these conditions, formal amendment becomes impossible unless constitutional politics somehow manages to perform heroics to break the stalemate. The

stalemate may itself derive from political incompatibilities, unpalatable pre-conditions to formal amendment, or a simple unwillingness to entertain thoughts of formal amendment despite the constitutional text authorizing the change political actors are unwilling to attempt. Alternatively or in addition, the stalemate may derive from the structural design of the constitution, for instance, a complex horizontal and/or vertical separation of powers that creates multiple veto points along the path to formal amendment.”

See Richard Albert, “Constructive Unamendability in Canada and the United States” (2014) 67 *SCLR* (2d) 181 at 195.

Even if the Constitution of Canada is constructively unamendable today, it may not be tomorrow as political forces realign into a configuration more open to major constitutional change. In addition, moments of crisis or emergency could overcome the present constructive unamendability of the Constitution, if indeed it has reached this point of stasis. Kate Glover cautions that we should not overdo claims of the impossibility or complexity of constitutional amendment in Canada. The reason why is important for democracy and legitimacy in Canadian constitutional law and government:

When we start from the position that Part V is unclear and difficult to apply, political actors can too easily avoid the hard work of negotiating multilateral reform. They can rely on interpretive uncertainties to feed claims about political impossibilities and to challenge alternative proposals. Further, when we frame our understanding of Part V in terms of complexity, the courts become the default site for resolving disputes about formal amending procedure. The courts’ involvement has benefits. It ensures that the issues are canvassed in a public forum. It provides the opportunity for a range of perspectives to be heard. And, it can resolve disputes that stall reform, providing analytical frameworks for future deliberations. But there are downsides. A judge-centric approach to understanding Part V grounds constitutional legitimacy in judicial interpretation rather than in the effective action of government or the lived experience of the community. That is, it shifts beliefs about where governance happens. Moreover, when procedural issues are resolved judicially, the actors involved in the amending process miss out on the potential benefits of working through problems of procedure cooperatively before sitting down to negotiate the merits of particular reforms. The potential benefits include building collegiality, articulating common ends, narrowing issues, enhancing political investment in the amending process, learning others’ positions, adjusting expectations, constructing frameworks for further negotiation, accommodating competing interests, reconciling rights and responsibilities, suspending absolutes, agreeing to disagree, and so on.

See Kate Glover, “Complexity and the Amending Formula” (2015) 24 *Const Forum Const* 9 at 10.

The amendment process overload thesis helps explain why the Meech Lake and Charlottetown accords failed. The theory of mass input/legitimization predicts that future constitutional amendment proposals are unlikely to succeed. The idea of constructive unamendability suggests that the Constitution of Canada may be just as unamendable, if only temporarily, as some of the world’s constitutions that explicitly take certain items off the amendment table. These theories, however, have consequences not only for how we think about the Constitution but also about how its meaning changes over time, and who does the changing. When, if ever, might it be profitable for a constitution to be difficult, and perhaps even impossible, to amend? Are there certain periods of time in the life of a constitutional democracy when we might want to discourage major constitutional reforms or at least complicate them more than would ordinarily be the case?

## IV. MODERN CHALLENGES TO CONSTITUTIONAL CHANGE

### A. Constitutional Amendment and Quebec Sovereignty

#### 1. A Quebec Veto and the Regional Veto Act

Quebec governments have pressed for the inclusion of a Quebec veto in the amending formula. To date they have been unsuccessful, except for the list of matters in s 41 (the unanimity formula), which gives a veto to all the provinces. The Meech Lake and Charlottetown accords would have expanded the list of matters subject to s 41. Would this have been advisable?

In October 1995, a referendum on sovereignty was narrowly defeated in Quebec (discussed below). This prompted the federal Parliament to enact *An Act respecting constitutional amendments*, SC 1996, c 1 (“the regional veto Act”), which provides a regional veto—including a veto for Quebec—in the form of a federal government promise not to propose any constitutional amendment without the agreement of the five regions of Canada, except in circumstances where a province affected can exercise a veto or opt out of the amendment. The Act reads:

1(1) No Minister of the Crown shall propose a motion for a resolution to authorize an amendment to the Constitution of Canada, other than an amendment in respect of which the legislative assembly of a province may exercise a veto under section 41 or 43 of the *Constitution Act, 1982* or may express its dissent under subsection 38(3) of that Act, unless the amendment has first been consented to by a majority of the provinces that includes:

(a) Ontario;

(b) Quebec;

(c) two or more of the Atlantic provinces that have, according to the then latest general census, combined population of at least fifty per cent of the population of all the Atlantic provinces; and

(d) two or more of the Prairie provinces that have, according to the then latest general census, combined population of at least fifty per cent of the population of all the Prairie provinces;

(e) British Columbia.

(2) In this section,

“Atlantic provinces” mean the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland;

“Prairie provinces” means the provinces of Manitoba, Saskatchewan and Alberta.

Does this make the amending formula unnecessarily rigid? As we discuss below in Section V, the Constitution of Canada is already difficult to amend. The regional veto Act makes it harder. But is it now too hard? Quite apart from the question of amendment difficulty, there is another matter of federalism.

Two scholars have shown that the effect of the regional veto Act is to end the legal equality of the provinces in the constitutional amendment process. Whereas Part V of the *Constitution Act, 1982* treats all provinces equally, with no province having any special power in the amendment process, the regional veto Act creates two classes of provinces—those with veto power, and those without: see Andrew Heard & Tim Swartz, “The Regional Veto Formula and Its Effects on Canada’s Constitutional Amendment Process” (1997) 30 Can J Political Science 339. There is another point to note: the regional veto Act now imposes new requirements for



a constitutional amendment under s 38—requirements that do not appear in Part V of the *Constitution Act, 1982*. Do either of these provide grounds to argue that the regional veto Act is constitutionally invalid?

## 2. Quebec Secession

In recent years, discussions of the amending formula have centred on the potential secession of Quebec. This issue has attracted the attention of legal commentators because of the 1995 sovereignty referendum in that province, which rejected sovereignty by an extremely narrow margin. Part of the federal government's response was to convince Quebecers that the road to independence would be costly and difficult. In particular, the federal government sought to respond to the view, asserted by some Quebec sovereigntists, that a "yes" vote would automatically effect the legal secession of the province. They did this by asserting that a "yes" vote had no concrete legal effect, and would at best result in a political process of intergovernmental negotiations that might culminate in a package of constitutional amendments that would have to comply with the rules spelled out in Part V to become effective. The centrepiece of this part of the federal strategy—referred to as "Plan B"—was the posing of the following three reference questions to the Supreme Court of Canada on September 30, 1996:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

The expectation among legal commentators was that the court would answer the first two questions in the negative and that, as a consequence, it would decline to answer the third question. With respect to question 1, it was thought that the court would simply point out that although the Constitution contains no provisions governing secession of a province, the Constitution does not expressly prohibit it, meaning that secession is legally possible. However, what secession requires is a constitutional amendment and, hence, compliance with the amending formulas in Part V of the *Constitution Act, 1982*. The legal secession of a province from Canada would require many constitutional amendments: for one list, see Peter Russell & Bruce Ryder, *Ratifying a Postreferendum Agreement on Quebec Sovereignty* (Toronto: CD Howe Institute, 1997). Legal commentators were generally of the view that most of the required changes would engage amending formulas other than s 45 (the provincial unilateral procedure), because the required changes would go much further than the constitution of a province. And because every other amending formula requires the consent of the federal government, it was thought that the court would simply hold that a unilateral secession, by definition, is unconstitutional.

In its judgment, the Supreme Court confounded those expectations. The following extract contains the part of the court's judgment dealing specifically with the constitutionality of unilateral secession. The earlier portions of the judgment, in which the court set out the principles of the Canadian Constitution on which it drew to deal with the secession issue, are found in Chapter 1.

### Reference re Secession of Quebec

[1998] 2 SCR 217

THE COURT (Lamer CJ and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, and Binnie JJ):

[83] Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. By the terms of Question 1 of this Reference, we are asked to rule on the legality of unilateral secession "[u]nder the Constitution of Canada." This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. ...

[84] The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.

[85] The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada. ... By the terms of this Reference, we have been asked to consider whether it would be constitutional in such a circumstance for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada *unilaterally*.

[86] The "unilateral" nature of the act is of cardinal importance and we must be clear as to what is understood by this term. In one sense, any step towards a constitutional amendment initiated by a single actor on the constitutional stage is "unilateral." We do not believe that this is the meaning contemplated by Question 1, nor is this the sense in which the term has been used in argument before us. Rather, what is claimed by a right

to secede “unilaterally” is the right to effectuate secession without prior negotiations with the other provinces and the federal government. At issue is not the legality of the first step but the legality of the final act of purported unilateral secession. The supposed juridical basis for such an act is said to be a clear expression of democratic will in a referendum in the province of Quebec. This claim requires us to examine the possible juridical impact, if any, of such a referendum on the functioning of our Constitution, and on the claimed legality of a unilateral act of secession.

[87] Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution’s amendment process in order to secede by constitutional means. In this context, we refer to a “clear” majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.

[88] The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

[89] What is the content of this obligation to negotiate? At this juncture, we confront the difficult inter-relationship between substantive obligations flowing from the Constitution and questions of judicial competence and restraint in supervising or enforcing those obligations. This is mirrored by the distinction between the legality and the legitimacy of actions taken under the Constitution. We propose to focus first on the substantive obligations flowing from this obligation to negotiate; once the nature of those obligations has

been described, it is easier to assess the appropriate means of enforcement of those obligations, and to comment on the distinction between legality and legitimacy.

[90] The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. Those principles lead us to reject two absolutist propositions. One of those propositions is that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to negotiation of the logistical details of secession. This proposition is attributed either to the supposed implications of the democratic principle of the Constitution, or to the international law principle of self-determination of peoples.

[91] For both theoretical and practical reasons, we cannot accept this view. We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details. The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.

[92] However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose *no* obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.

[93] Is the rejection of both of these propositions reconcilable? Yes, once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others. This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation. The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives

of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities “trumps” the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.

[94] In such circumstances, the conduct of the parties assumes primary constitutional significance. The negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of *all* the participants in the negotiation process.

[95] Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party’s assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.

[96] No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized. Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec. As the Attorney General of Saskatchewan put it in his oral submission:

A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation, ... when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation ... .

[97] In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable

that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated.

[98] The respective roles of the courts and political actors in discharging the constitutional obligations we have identified follows ineluctably from the foregoing observations. In the *Patriation Reference* [*Re: Resolution to amend the Constitution*, [1981] 1 SCR 753], a distinction was drawn between the law of the Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions. It is also the case, however, that judicial intervention, even in relation to the *law* of the Constitution, is subject to the Court's appreciation of its proper role in the constitutional scheme.

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[100] The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities. Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other.

[101] If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences.

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[104] Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and

operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights.

## NOTES

1. *Clear majority, clear question, and the duty to negotiate.* Until the judgment, it had been thought that referenda played no role in constitutional amendment. Indeed, an earlier draft of Part V had included an additional formula that would have permitted amendment on the basis of a positive result in a national referendum; this procedure was removed during federal–provincial negotiations. The central holding in the *Secession Reference* is that “a decision of a clear majority of the population of Quebec on a clear question to pursue secession” would trigger a duty to negotiate the required constitutional amendments to give effect to the desire to secede. However, the court did not define what a “clear majority” or a “clear question” was. Commentators have offered a range of views on both issues. The clear majority requirement has been given varying interpretations: that it imposes a super-majority requirement—for example, 60 percent or two-thirds; that it means a simple majority but with the results free from doubt that could be created, for example, by voting irregularities; or that it means a majority of eligible voters, as opposed to simply a majority of votes cast. What do you think? On the issue of what a clear question would be, the court says no more than that the question should be on secession. Would this preclude posing a question that omitted any reference to secession—for example, a question that referred to sovereignty, or to renewed federalism? In this context, consider the question posed to voters in the 1995 referendum:

Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?

Is this question “a clear question to pursue secession”? As well, the court did not specify who the parties to constitutional negotiations would be—that is, which parties would be under the duty to negotiate. The judgment refers variously to “the other provinces and the federal government,” “the representatives of two legitimate majorities,” and “participants in Confederation.” Does this mean that negotiations would be bilateral—that is, between Quebec and the federal government—or multilateral? If the negotiations are multilateral, would they be limited to representatives of the federal and provincial governments, or would they include Aboriginal peoples?

2. *No judicial supervision.* Arguably, the ambiguities in the judgment would not have posed a difficulty if the court had indicated its future willingness to flesh out the legal framework governing secession, and to supervise both the process and outcome of constitutional negotiations. However, the court declined to do so, effectively leaving the interpretation and application of the rules of the Canadian Constitution governing secession to “the political actors.” Is this the normal division of labour between courts and legislatures in constitutional

interpretation? If not, what reasons did the court give for departing from this norm? Are these reasons convincing? Consider the following explanation offered by Sujit Choudhry and Robert Howse:

[O]nce we examine the political context surrounding the *Quebec Secession Reference*, it becomes evident that the Court acted in the face of the failure of federal political institutions to face the challenge posed by the referendum process in Quebec to the legitimacy of the Canadian constitutional order . . . . Before the reference questions had been issued, it was entirely open to the federal government to lay down principles governing referenda and secession.

See Sujit Choudhry & Robert Howse, "Constitutional Theory and the *Quebec Secession Reference*" (2000) 13 Can JL & Jur 143.

Both the federal Parliament and the Quebec National Assembly have accepted the court's invitation to contextualize the constitutional norms regarding secession: see *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 26 (the federal *Clarity Act*) and *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, SQ 2000, c 46 (*Quebec's Fundamental Rights Act*). On the question of what constitutes a clear majority, s 2 of the *Clarity Act* provides:

2(1) Where the government of a province, following a referendum relating to the secession of the province from Canada, seeks to enter into negotiations on the terms on which that province might cease to be part of Canada, the House of Commons shall, except where it has determined pursuant to section 1 that a referendum question is not clear, consider and, by resolution, set out its determination on whether, in the circumstances, there has been a clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada.

(2) In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account

- (a) the size of the majority of valid votes cast in favour of the secessionist option;
- (b) the percentage of eligible voters voting in the referendum; and
- (c) any other matters or circumstances it considers to be relevant

(3) In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account the views of all political parties represented in the legislative assembly of the province whose government proposed the referendum on secession, any formal statements or resolutions by the government or legislative assembly of any province or territory of Canada, any formal statements or resolutions by the Senate, any formal statements or resolutions by the representatives of the Aboriginal peoples of Canada, especially those in the province whose government proposed the referendum on secession, and any other views it considers to be relevant.

(4) The Government of Canada shall not enter into negotiations on the terms on which a province might cease to be part of Canada unless the House of Commons determines, pursuant to this section, that there has been a clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada.

By contrast, s 4 of the *Fundamental Rights Act* provides (citations omitted):

When the Québec people [are] consulted by way of a referendum under the *Referendum Act*, the winning option is the option that obtains a majority of the valid votes cast, namely 50% of the valid votes cast plus one.



Do these provisions potentially conflict? How? If they do, do you think the court will intervene in a subsequent case? Note that the court did seem to suggest that it would pronounce on the correct amending formula for achieving secession (although the note below raises some questions about this).

3. *Secession without a constitutional amendment?* In the *Secession Reference*, the court refers to the need for a constitutional amendment to effect secession, states that the constitutional negotiations to secure such an amendment could be unsuccessful, and refuses to speculate on what the consequences of a failure of negotiations would be. However, consider the following paragraph:

[103] To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.

Does this passage effectively create a right to unilateral secession after good-faith negotiations? If so, can this be squared with the court's holding that unilateral secession is unconstitutional? Conversely, does it explain the court's statement that a right to unilateral secession is "the right to effectuate secession without prior negotiations with the other provinces and the federal government" (at para 86), as opposed to the right to secede without prior consent? Does it leave the enforcement of the rules of the Canadian Constitution governing secession to the international community?

4. *Section 43 and Quebec's future in Canada.* It has long been assumed that securing Quebec's constitutional future in Canada would require the use of either the general amending formula in s 38 or the unanimity procedure in s 41. For some matters of constitutional importance, it is clear that recourse to one of these sections is mandatory; but for others, it is an open question that David Cameron and Jacqueline Krikorian have recently answered by suggesting that the bilateral procedure in s 43 could be used to amend the Constitution to give Quebec the reassurance and recognition that many of its political leaders have in the past demanded.

**David R Cameron & Jacqueline D Krikorian, “Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process”**

(2008) 58 UTLJ 389 at 414-20

Canada has ... been trapped in an unsatisfactory state of irresolution with respect to national unity since 1982. Quebec—as reflected in its government, its legislature, and, arguably, its people—has not assented to the constitutional arrangements by which it is governed. While this appears at the moment to make little difference in the day-to-day lives of ordinary citizens, it is a state of affairs widely regarded as unsatisfactory for a constitutional democracy. Moreover, it is seen by many as exposing the country to an unacceptable risk of fracture should a crisis arise. Yet while many would acknowledge that there remains some unfinished business as far as Quebec is concerned, doing nothing seems to be the best option available to policy makers. There has been a sense that an impasse between Quebec and the rest of Canada is better than another round of failed constitutional talks.

Canadians were taken by surprise, therefore, when, in November 2006, their national government initiated a constitutional discussion by introducing a resolution in the House of Commons proclaiming that it “recognize[d] that the Québécois form a nation within a united Canada.” Although the minister for intergovernmental affairs resigned in protest, legislative support for the initiative was overwhelming. Members of Parliament from all political parties, including the Bloc Québécois, endorsed the resolution, and it was adopted in a vote of 265 to sixteen.

As Prime Minister Stephen Harper explained, the rationale for the motion was simple: “Quebeckers want recognition, respect and reconciliation ... they do not want another referendum.” He noted that recognizing the Québécois as a nation was intimately “linked” to the province’s French language, explaining that “if you’re speaking of a Québécois nation you’re speaking of French.” Stéphane Dion, now Liberal Opposition leader, effectively agreed. He said that he supported the motion because, in a “sociological sense, we, the Québécois, are a nation, because we form a large group within Canada—nearly a quarter of the population—and we have an awareness of our unity and a desire to live together.”

Three days later, in a 107 to 0 vote, Quebec’s legislative body, the National Assembly, formally responded to Ottawa’s initiative by “recogniz[ing] the positive nature of the motion.” The Harper resolution, however, was viewed as an “opening gesture” rather than as a full response to the historical grievances of the province. As former Bloc Québécois and later Liberal MP Jean Lapierre explained, although the motion is “symbolic,” it is only a “small step.” For him, “[reconciliation with Quebeckers and Quebec’s acceptance of the Constitution will require a great deal more work.” Exactly what he thought needed to be done, however, was not explicitly set out.

It would seem, therefore, that there is now an opportunity to move forward to address the constitutional issue in a substantive manner. The broad political support for the Harper initiative indicates that there is considerable common ground between Quebec City and Ottawa. Arguably, the resolution could be built upon by incorporating its essential elements into the Constitution. Such an amendment could recognize the specificity of the province by effectively acknowledging the Québécois nation in Canada by

entrenching its core characteristic, the French language (and possibly the French culture), into the Constitution via the bilateral amendment process. ...

To date, Quebec's constitutional concerns have not been addressed in a manner that would make it acceptable for its residents, its government, or its legislature to formally consent to the 1982 Constitution. For reasons outlined above, events are at an impasse. The recent success of the initiative of the government of Canada, however, appears to suggest that there may be an opportunity for progress. Building on the resolution recognizing the Québécois as a nation within Canada, the House of Commons and the National Assembly could introduce a bilateral constitutional amendment that would give official status to the French language in the province of Quebec and possibly recognize the French culture in the province.

A bilateral constitutional amendment addressing language issues is expressly permitted under s. 43 of the *Constitution Act, 1982*. New Brunswick, in conjunction with the federal government, adopted such an amendment for this very purpose when it bestowed a kind of enhanced status on the French and English languages. Moreover, the Supreme Court of Canada has already both accepted and endorsed the notion that French is the predominant language in Quebec. In [*Ford v Quebec (Attorney General)*, [1988] 2 SCR 712], it held that the National Assembly could adopt a law providing that French would have greater public visibility than English, expressly stating that the government of Quebec could require the French language to be given predominance on signage in order to reflect the "*visage linguistique*" of the province. In the process, the Court effectively acknowledged and endorsed the notion that the vitality of the French language and culture in Quebec is a valid public-policy goal.

In this context, it would be possible for the governments of Canada and Quebec to use New Brunswick's bilateral constitutional amendment as a precedent to introduce a measure that builds upon the essence of the November 2006 House of Commons resolution recognizing the Québécois nation in Canada. We are arguing, in other words, that a bilateral constitutional amendment is a potential *process* by which the long-standing concerns of Quebec could begin to be addressed in the Constitution. Our overall objective here is not to provide solutions to the constitutional impasse, or even the text of a possible provision; rather, our goal is to map out a process by which the real and valid concerns of the francophone community in Quebec might successfully be addressed and to indicate the issues that could be considered if and when such discussions should occur.

We envision that such an amendment would reaffirm Quebec's existing legislative authority and act as an interpretive provision that informs how the Constitution is read and understood in Quebec. We are not advocating a measure that allocates new powers or redistributes existing heads of power; such a proposal would change the nature and balance of Canadian federalism and require the consent of all the provinces. Rather, we are arguing for consideration of a bilateral constitutional amendment that pertains only to Quebec. To this end, we believe there are at least two options worthy of consideration. The first is to introduce an amendment to s. 16 of the Charter dealing with official languages, while the second is to introduce a provision similar in nature to s. 27 of the Charter that would apply exclusively to Quebec.

The first option for a bilateral constitutional amendment would be a variation of the existing constitutional provisions governing New Brunswick's language rights, as set out in ss. 16 and 16.1 of the Charter:

16(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

• • •

16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

The focus of the proposed bilateral constitutional amendment would pertain to the French language, and possibly the French culture, in Quebec. It could entrench French as the official language of the province and acknowledge that the National Assembly has the authority to both preserve and protect Quebec's distinct cultural institutions. Such a provision would, in effect, simply reflect the existing status of the French language in Quebec by constitutionalizing the *raison d'être* of the provisions legally enacted in Bill 101. Although the government of Quebec already has the legislative capacity to adopt such measures and, in this sense, would not be gaining new powers or rights, a constitutional amendment of this nature would entrench the status of one of the core elements of the Québécois nation in the province, as well as beginning to address one of Quebec's legitimate core concerns, namely, the amendment of the Canadian Constitution in 1982 without Quebec's priorities being addressed and without Quebec's consent. In this sense, our proposal is positive in nature—to constitutionalize the rights of the French community, not to detract or take away from the existing rights of anglophones in the province. In fact, a provision in the proposed bilateral amendment expressly recognizing and protecting the existing rights of the English community in the province of Quebec would be an essential part of any bilateral amendment, in order to reassure the anglophone community in the province that their status has not been altered.

A second option for a bilateral amendment recognizing the predominance of French in Quebec would be to adopt a provision akin to s. 27 of the Charter:

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Section 27 is an interpretive provision in the Constitution that reflects how Canadians wish to have their constitutional statute read and understood. It provides a context and guide for legislatures and courts. It informs how the Constitution is to be interpreted, but it does not give special powers or legislative authority to one government or community over another; rather, it acknowledges the importance and value that Canadians accord to multiculturalism and provides an assurance that these considerations will give guidance to any court that must render a decision in a constitutional challenge to a government measure or action.

We believe that a provision similar in nature to s. 27 could be introduced as a bilateral constitutional amendment, with the proviso that it applied to Quebec. Like s. 27, such a measure would act as an interpretive clause that would recognize the value and status of the French language and culture in the province. It is our position that the Québécois

nation is no less deserving of recognition in the Constitution than is our multicultural heritage and that, in the context of Quebec, such recognition is extremely important both politically and symbolically.

Although the phrases “Québécois nation” and “distinct society” could be part of a bilateral amendment, and the issue should certainly be debated, we believe that they are probably best left out. If such a proposal introduced either of these expressions into the lexicon of Canadian constitutional debates, understandable concerns would be raised that the ambit and impact of this phraseology is unknown. Moreover, the use of “distinct society” language would evoke memories of earlier divisive and unsuccessful efforts at recognizing Quebec. Better, we think, to leave the parliamentary resolution as the background and context of a clear and more focused undertaking. Thus, we would suggest that the nature of the bilateral amendment should be focused on the use and status of the French language and, possibly, the French culture. The overwhelming success of the Canadian government’s resolution recognizing the Québécois as a nation—which Harper explained was specifically linked to the French language—suggests that Parliament accepts that the specificity of Quebec and the French language is a distinctive feature of the Quebec reality, a position that is obviously accepted by the National Assembly of Quebec.

The governments of both Canada and Quebec would need to satisfy themselves that the criteria used in previous bilateral amendments had been met in this case, namely, that broad consultation had occurred, that there was a strong measure of public support in Quebec for the measure, that minority opinions had been taken into account, and that the proposed initiative was consistent with the spirit of the Charter.

We also think it is worth noting that one of the main reasons that the Meech Lake and Charlottetown Accords were so strongly contested was not simply the fact that the amendments required the consent of other provinces but also that each purported to declare something about the country as a whole. Thus the notion of Quebec as a distinct society collided with that of Canada as a federal society characterized by equal provinces, cultural diversity, gender equality, and the presence of Aboriginal peoples. This is not the case with the suggestions we have put forward. The bilateral amendment process involves two government actors—the National Assembly and government of Quebec, on the one hand, and Parliament and the government of Canada, on the other—not all the provinces and territories. Furthermore, the amendment makes no attempt to capture a Canadian vision and situate Quebec within it; rather, it identifies one vital element in Quebec’s existing laws and complex reality and offers that element a degree of constitutional recognition.

Such a bilateral amendment would serve two important public-policy objectives. First, the constitutional provision would have considerable symbolic importance for Canadians both inside and outside of Quebec. It would draw some of its symbolic power from the fact that the national status of the Québécois has been affirmed by the legislatures of Canada and Quebec. It would solidify the existing law and policy of Quebec as well as the jurisprudence of the Supreme Court of Canada. Moreover, it would provide a greater sense of security to francophones who, in the future, may be faced with challenges to their language rights that we cannot anticipate today.

A second rationale for this type of bilateral amendment is that it would be used as an interpretive aid in any future constitutional litigation challenging measures to promote or protect the French language in Quebec. Like the New Brunswick bilateral constitutional amendment, it would not provide any new rights or “goods” but, rather, would ensure

that the courts would recognize the constitutional value of the French language and culture when they render decisions involving constitutional challenges to measures enacted in Quebec. Although Quebec legislation entrenching French language rights might still be found to violate, for example, the Charter's freedom-of-expression or equality measures, a bilateral constitutional amendment of this nature would, in effect, mandate the courts to carefully balance the language rights of the Québécois community within the province and the rights of the individual before striking down a contested statute. In Canada, rights and freedoms are not absolute. When a court finds that a legislative measure violates the rights and freedoms set out in the Charter, the impugned provision does not automatically become null and void; rather, the court is mandated to take a second step and to consider whether the need to protect the rights of the individuals affected by the impugned provision outweighs society's interest in maintaining it. In other words, judges balance the public interest in maintaining a law against the individual's interest in having his or her rights and freedoms unfettered by government regulation. A bilateral constitutional amendment that entrenched French as the official language of Quebec in the Constitution would ensure that judges carefully consider the needs of the Québécois as a community within the province of Quebec before striking down a language law that curtails the rights of an individual.

The proposed amendment, moreover, would not limit existing language rights for anglophones in Quebec. Section 133 of the *Constitution Act, 1867*, ensures that the English and French languages are used in both the National Assembly and the federal and provincial courts operating in the province. Similarly, the education provisions in the Constitution under s. 23 of the Charter, which provide for access to English-language education for some students, would remain in effect. And, to avoid any confusion or uncertainty among the population on this issue, the bilateral constitutional amendment could and should, as we have suggested, specifically provide that it does not abrogate existing constitutional rights set out in these sections.

We recognize that this proposal may provoke controversy because some may feel that it has the potential to affect the standing of the English minority in Quebec. In the years since the passage of Bill 101, however—through court cases, legislative adjustment, and social adaptation—Quebec has achieved a condition of “linguistic peace,” in which the anglophone minority, by and large, has accepted the basic provisions of Bill 101, has learned French, and has accommodated itself to the position of English in the linguistic landscape of Quebec. The proposed amendment would recognize contemporary reality and give greater security to the French language and to francophones within the framework of the Constitution of Canada. We also believe that, in the “big picture,” by assuring the Québécois nation that they have a secure future within the Canadian federation, we would be providing stability and security to the anglophone community in Quebec.

Our discussion of possible amendment strategies is by no means meant as the last word on the subject. In fact, our goal is simply to illustrate how the s. 43 *process* might be used to recognize Quebec's historic concerns in the Constitution. The exact wording of a possible amendment and the decision as to which of these (or other) approaches might be adopted should arise out of discussions among individuals and communities within Quebec and between the governments of Canada and Quebec. Our aim here is simply to indicate a viable process for constitutional change, set out some of the possible options, and invite further analysis and consideration.

From our perspective, the insertion of constitutional protection for the French language in Quebec into the Canadian Constitution would be a powerful declaration that the health and majority status of French in its *foyer principal* is a constitutive feature of Quebec and a legitimate object of Canadian public policy. Symbolically, Canada would be making a long-overdue peace with Québécois nationalism. Despite being an amendment not directly involving the nine other provinces, such a step, because of the necessary assenting role of Parliament, would be regarded as a direct and powerful recognition of the enduring importance and legitimacy of the French fact in Canada. While it may not fully address the Canadian constitutional impasse, it would be a step (and a long-overdue one at that) in remedying the country's incapacity to recognize the reality of Quebec in an idiom the Québécois themselves understand and accept.

### QUESTIONS

Does your reading of s 43 accommodate the range of amendments that Cameron and Krikorian suggest is possible? Would amendments of the kind suggested be accepted as legitimate outside Quebec? Would Quebec be satisfied by amendments like these without their being approved by the rest of Canada?

### B. Senate Reform

Since Confederation, the Senate has been the subject of several reform proposals. No major constitutional amendments have been made with regard to the function of the institution, but it has been amended in two noteworthy ways over the years. First, the size of the Senate, as detailed in s 22 of the *Constitution Act, 1867*, has changed by amendment. In its initial version s 22 created a Senate consisting of three regional divisions—Ontario, Quebec, and the maritime provinces (Nova Scotia and New Brunswick) each with 24 senators. When Prince Edward Island joined Canada in 1873, it was given four senators and Nova Scotia and New Brunswick were reduced to ten seats each. In 1915, the Senate was reorganized into four regional divisions to accommodate a new Western division. This new division consisted of already-admitted provinces—Alberta, British Columbia, Manitoba, and Saskatchewan—and it was given an equal complement of 24 senators. The addition of Newfoundland into Canada in 1949 entitled the province to six senators. The Yukon and the Northwest Territories were given one senator each in 1975, and, in 1999, the new territory of Nunavut was also given one senator.

There was a second noteworthy change to the Senate—the term of service was amended. At Confederation, according to s 29 of the *Constitution Act, 1867*, a senator could serve for life. However, in 1965, an amendment imposed a mandatory retirement age of 75 for all new senators. Other changes were proposed, but none were successful.

**Heather Hughson, “Senate Reform: The First 125 Years”**

Policy Options (21 September 2015), online: Policy Options

<<http://policyoptions.irpp.org/magazines/september-2015/the-future-of-the-senate/senate-reform-thefirst-125-years>>

The Senate is an institution about which we—citizens, academics and politicians alike—know very little, except that we dislike it, and so concocting new ideas for reform is something of a Canadian pastime. But as significant as Senate reform could be, it has always had a low priority. Few governments have the political will to see through a plan whose benefits will not be immediately visible to voters and whose potential costs, in the event of failure, could be astronomically high. The result is a long trail of discarded and forgotten alternative Senate models, dating back nearly all the way to Confederation.

Most of the delegates at the 1864 Quebec conference, where the institutions of government for Canada were conceived, had direct experience with elected upper houses, and many of them were even the same people who had pushed for the change to election in the united Province of Canada (now Ontario and Quebec) and Prince Edward Island only a few years earlier. Despite this, the delegates at the conference were nearly unanimous in their disapproval of an elected upper house, fearing that it would become a chamber filled with men who were there by sole virtue of being able to afford the cost of campaigning, and that an elected Senate would lead to partisan politics and increased agitation between the two houses of Parliament, eventually threatening the lower house’s control over money bills. Their eventual solution was to have a second chamber that was democratically illegitimate by design, so that it could not challenge the House of Commons for parliamentary supremacy yet could still perform vital democratic functions.

Delegates at the Quebec conference spent more time discussing the Senate—its functions, purpose and design—than any other institution of governance. Nevertheless, dissatisfaction arose almost immediately. Long-standing concerns about regional or provincial representation at the federal level had not been dispelled by a Senate where seats were distributed equally by region but the regions had no choice in who those representatives would be; and subsequent proposals have overwhelmingly aimed to make the Senate into a proper chamber of federalism, usually by devolving powers to the provinces in some way.

This tendency appears clearly in the very first times that Senate reform came to the floor of Parliament, in 1874 and 1875, when Liberal MP David Mills tabled a motion calling for the devolution of Senate appointment powers to the provinces, calling federal appointment “inconsistent with the Federal principle.” Although the Commons agreed to the 1875 resolution, he never produced any actual plan for reform and eventually withdrew his motion; but the same phrase appeared again in a motion at [the] 1893 Liberal Party convention, where it received unanimous support. Devolution first appeared in an official party campaign platform in 1908 under Robert Borden’s Liberal-Conservatives, and it became such a frequent fixture in election campaigns that by 1925, when it appeared once more in the Liberal Party’s campaign platform, Conservative Leader Arthur Meighen sarcastically remarked, “So that old bird is to be provided with wooden wings and told to fly again.” Devolution, in some form or another, remained the dominant model for Senate reform in Canada until the 1980s.



In the early 20th century, devolution was joined by three other ideas that gained little traction. Term limits for senators and a mandatory retirement age first appeared in 1906 and again in 1908 in a set of motions tabled by Liberal MP David McIntyre, but both were withdrawn without any action. Between McIntyre's two motions, Liberal MP Henry H. Miller called for the government to form a joint committee on parliamentary reform, suggesting it consider age or term limits and elimination of the prime minister's monopoly on appointment powers. Abolition was the next new idea, proposed by Conservative MP Edward Lancaster each year from 1909 to 1911. In his speeches before Parliament, he implied that any restrictions upon majoritarianism—such as the Senate's distribution of seats by region rather than population, its ability to block government legislation and even the federal principle itself—were incompatible with responsible government; the one time his motion came to a vote, it was resoundingly defeated. Nevertheless, abolition became a rallying cry for many Progressives throughout the 1920s, and eventually it was a key component of both CCF and NDP policy. Finally, election made its first appearance in 1909 in a set of resolutions from Ontario Senator Sir Richard Scott. Among the resolutions was a term limit of seven years, and the election of two-thirds of the Senate. No vote was ever taken on Scott's resolutions.

It was not until the 1960s that Senate reform began to look like a credible possibility—because Canadian federalism had evolved to include more power-sharing between levels of government and a greater role for the provinces in national affairs. While the new plans retained an emphasis on devolving appointment powers—either some or all—to the provinces, they also introduced other institutional changes meant to increase provincial influence over national policy in a “devolution plus” series of models.

During this time of increased interest in upper house reform, one small change was actually implemented: the introduction of mandatory retirement at age 75 in 1965. Since many senators were retiring around this age anyway, it did not constitute a significant amendment to either the membership or the powers of the upper house, and so it was accomplished by simple act of Parliament. Anything more ambitious, however, would require provincial involvement, as the Pierre Trudeau government would learn in its 1979 reference case, and as the Stephen Harper government would be reminded in its own 2014 reference case.

Real Senate reform came to the national agenda in 1969, when the government of Pierre Trudeau accepted in principle some degree of devolution that would secure formal and direct expression of provincial interests in the Senate, though no agreement was reached regarding the specifics. This agreement formed the basis of the report by the 1972 Special Joint Committee on the Constitution, which recommended that half of all senators should be provincial appointees, the western provinces should have their number of seats doubled and the Senate's formal powers should be reduced to a suspensive veto of six months. The Special Joint Committee's report was roundly panned and had little impact on subsequent reform plans, but it was significant as the last instance of self-contained Senate reform.

The turning point was the government's 1978 White Paper on constitutional reform, which set out a two-stage plan for patriating the Constitution, with the first stage to be done unilaterally by the federal government. Part of this stage included the creation of a new upper house, the House of the Federation, which would be indirectly elected by the provincial and federal legislatures and have a 120-day suspensive veto over parliamentary

legislation. What followed was a back-and-forth series of plans for Senate reform as part of a constitutional overhaul, as the federal government asserted the right to proceed unilaterally while the provinces demanded to be involved in the reform of a central institution of Canadian federalism. By the end of 1979, nine similar yet distinct proposals for Senate reform had gained some degree of national prominence. The unilateral approach ended with the Supreme Court's 1979 ruling on upper house reform, which required provincial consultation for anything that would "affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process."

The Senate was left nearly untouched during the patriation of the Constitution in 1982. For once, it was not due to a lack of political will, but because Canadian political thought about the Senate was undergoing a paradigm shift. In 1981, the Canada West Foundation published a booklet advocating a completely different model from any seen before. The Triple-E model called for an equal number of senators per province, direct election of senators and effective powers capable of challenging the House of Commons. In a few years, it completely replaced "devolution plus" as the default model for upper house reform, particularly in the western provinces, and the idea that an unelected chamber could be both legitimate and representative all but disappeared from Senate reform discourse. It was less popular in larger provinces like Ontario, which objected to having the same number of senators as Prince Edward Island although it had 70 times the population.

What happened next warrants a much longer account in the history of Senate reform, as the plans changed quickly and frequently. But it was that haphazard and overly complicated approach that made the Meech Lake and Charlottetown Accords particularly frustrating for reformers.

Three more committees and royal commissions proposed their own version of Triple-E before the government presented the Meech Lake Accord, promising that Senate reform would be top priority at the next First Ministers' Conference. In the meantime, the prime minister would continue to make appointments from lists submitted by the provincial governments. The provision was meant to appease Senate reformers and win their support for the Accord, but it backfired; under the Accord's new amending formula, any deal would then have to receive unanimous consent of all 10 provinces, and so the list system was likely to persist indefinitely. With support for Meech dwindling, a last-minute attempt to save the Accord added a contingency plan for Senate reform: if the provinces could not agree to a plan for Senate reform by July 1995, seats within the existing Senate would be redistributed, but not equally by province. It was not enough to save the Meech Lake Accord, which died in June 1990.

Major Senate reform was a key part of the Charlottetown Accord, preparations for which began almost immediately after the demise of Meech. At the end of a series of meetings with all provinces but Quebec, Premier Bob Rae of Ontario agreed to a Triple-E Senate, on the condition that the House of Commons would have seats distributed purely on the basis of population, which would give Ontario an additional 18 MPs. The agreement, however, was rejected when presented to Premier Robert Bourassa of Quebec, and a final round of negotiations produced a "One and a Half E" Senate plan. There would be an equal number of seats, but provinces could decide whether to appoint or elect those senators. The third E, effectiveness, was dropped entirely, with the Senate reduced to a very brief suspensive veto, after which any disputes would be resolved in a joint sitting,

where senators would be outnumbered by MPs by over five to one. It was a quintessentially Canadian plan, combining features of nearly every prior popular proposal in an attempt to create a hybrid chamber that would satisfy all types of reformers, but ultimately it satisfied none, and the Accord was defeated.

The difficulty of large-scale constitutional amendment suggested that Senate reform, if it were to happen at all, would occur incrementally in ways that did not trigger the multilateral amendment procedures in Part V of the *Constitution Act, 1982*. A new minority government elected in 2006 took this piecemeal approach to reforming the Senate, beginning with a Senate term-limits bill that would have set an eight-year term limit for new senators: see Bill S-4, *An Act to amend the Constitution Act, 1867 (Senate tenure)*, 1st Sess, 39th Parl, 2006 (first reading 30 May 2006). The government followed this incremental approach to Senate appointments when it proposed to establish a framework for consultative provincial and territorial elections to fill vacancies: see Bill C-20, *An Act to provide for consultations with electors on their preferences for appointments to the Senate*, 2nd Sess, 39th Parl, 2007 (first reading 13 November 2007). Neither of these bills progressed anywhere under the minority government, but after winning a majority in the federal general elections of May 2011, the government reintroduced both proposed reforms in a single bill: see Bill C-7, *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*, 1st Sess, 41st Parl, 2011 (first reading 21 June 2011). These reforms entailed recourse to the federal unilateral amendment procedure in s 44—or so the government thought. Some observers, however, suggested that these reforms could be introduced only with recourse to one of the multilateral amendment procedures in Part V, either the general amending formula or the unanimity procedure. In 2014, the Supreme Court weighed in on these and other possible reforms, including abolishing the Senate and repealing the land and net worth requirements for eligibility to the Senate.

### Reference re Senate Reform

[2014 SCC 32](#), [\[2014\] 1 SCR 704](#) (footnotes omitted)

THE COURT (McLachlin CJ and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, and Wagner JJ):

#### I. Introduction

[1] The Senate is one of Canada's foundational political institutions. It lies at the heart of the agreements that gave birth to the Canadian federation. Yet from its first sittings, voices have called for reform of the Senate and even, on occasion, for its outright abolition.

[2] The Government of Canada now asks this Court [by way of a reference] to answer essentially four questions: (1) Can Parliament unilaterally implement a framework for consultative elections for appointments to the Senate? (2) Can Parliament unilaterally set fixed terms for Senators? (3) Can Parliament unilaterally remove from the *Constitution Act, 1867* the requirement that Senators must own land worth \$4,000 in the province for

which they are appointed and have a net worth of at least \$4,000? and (4) What degree of provincial consent is required to abolish the Senate?

[3] We conclude that Parliament cannot unilaterally achieve most of the proposed changes to the Senate, which require the consent of at least seven provinces representing, in the aggregate, at least half of the population of all the provinces. We further conclude that abolition of the Senate requires the consent of all of the provinces. Abolition of the Senate would fundamentally change Canada's constitutional structure, including its procedures for amending the Constitution, and can only be done with unanimous federal-provincial consensus.

...

### III. *The Senate*

[13] It is appropriate to briefly introduce the institution at the heart of this Reference.

[14] The framers of the *Constitution Act, 1867* sought to adapt the British form of government to a new country, in order to have a "Constitution similar in Principle to that of the United Kingdom": preamble. They wanted to preserve the British structure of a lower legislative chamber composed of elected representatives, an upper legislative chamber made up of elites appointed by the Crown, and the Crown as head of state.

[15] The upper legislative chamber, which the framers named the Senate, was modeled on the British House of Lords, but adapted to Canadian realities. As in the United Kingdom, it was intended to provide "sober second thought" on the legislation adopted by the popular representatives in the House of Commons ... . However, it played the additional role of providing a distinct form of representation for the regions that had joined Confederation and ceded a significant portion of their legislative powers to the new federal Parliament ... . While representation in the House of Commons was proportional to the population of the new Canadian provinces, each region was provided equal representation in the Senate irrespective of population. This was intended to assure the regions that their voices would continue to be heard in the legislative process even though they might become minorities within the overall population of Canada ... .

[16] Over time, the Senate also came to represent various groups that were under-represented in the House of Commons. It served as a forum for ethnic, gender, religious, linguistic, and Aboriginal groups that did not always have a meaningful opportunity to present their views through the popular democratic process ... .

[17] Although the product of consensus, the Senate rapidly attracted criticism and reform proposals. Some felt that it failed to provide "sober second thought" and reflected the same partisan spirit as the House of Commons. Others criticized it for failing to provide meaningful representation of the interests of the provinces as originally intended, and contended that it lacked democratic legitimacy.

[18] In the years immediately preceding patriation of the Constitution, proposals for reform focused mainly on three aspects: (i) modifying the distribution of seats in the Senate; (ii) circumscribing the powers of the Senate; and (iii) changing the way in which Senators are selected for appointment. These proposals assumed the continued existence of an upper chamber, but sought to improve its contribution to the legislative process.

[19] In 1978, the federal government tabled a bill to comprehensively reform the Senate by readjusting the distribution of seats between the regions; removing the Senate's

absolute veto over most legislation and replacing it with an ability to delay the adoption of legislation; and giving the House of Commons and the provincial legislatures the power to select Senators: *Constitutional Amendment Act, 1978* (Bill C-60), June 20, 1978, cls. 62 to 70. The bill was not adopted and, in 1980, this Court concluded that Parliament did not have the power under the Constitution as it then stood to unilaterally modify the fundamental features of the Senate or to abolish it: *Reference re: Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54 (“*Upper House Reference*”).

[20] Despite ongoing criticism and failed attempts at reform, the Senate has remained largely unchanged since its creation. The question before us now is not whether the Senate should be reformed or what reforms would be preferable, but rather how the specific changes set out in the Reference can be accomplished under the Constitution. This brings us to the issue of constitutional amendment in Canada.

#### IV. The Part V Amending Procedures

[21] The statute that created the Senate—the *Constitution Act, 1867*—forms part of the Constitution of Canada and can only be amended in accordance with the Constitution’s procedures for amendment: s. 52(2) and (3), *Constitution Act, 1982*. Consequently, we must determine whether the changes contemplated in the Reference amend the Constitution and, if so, which amendment procedures are applicable.

[22] Before answering these questions, we discuss constitutional amendment in Canada generally. We examine in turn the nature and content of the Constitution of Canada, the concept of constitutional amendment, and the Constitution’s procedures for amendment.

##### A. The Constitution of Canada

[23] The Constitution of Canada is “a comprehensive set of rules and principles” that provides “an exhaustive legal framework for our system of government”: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (“*Secession Reference*”), at para. 32. It defines the powers of the constituent elements of Canada’s system of government—the executive, the legislatures, and the courts—as well as the division of powers between the federal and provincial governments . . . . And it governs the state’s relationship with the individual. Governmental power cannot lawfully be exercised, unless it conforms to the Constitution . . . .

[24] The Constitution of Canada is defined in s. 52(2) of the *Constitution Act, 1982* as follows:

52. ...

(2) The Constitution of Canada includes

- (a) the *Canada Act 1982*, including this Act;
- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).

The documents listed in the Schedule to the *Constitution Act, 1982* as forming part of the Constitution include the *Constitution Act, 1867*. Section 52 does not provide an exhaustive definition of the content of the Constitution of Canada: *Supreme Court Act Reference*, at paras. 97-100; *Secession Reference*, at para. 32.

[25] The Constitution implements a structure of government and must be understood by reference to “the constitutional text itself, the historical context, and previous judicial

interpretations of constitutional meaning”: *Secession Reference*, at para. 32; see generally H. Cyr, “L’absurdité du critère scriptural pour qualifier la constitution” (2012), 6 *J.P.P.L.* 293. The rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophical, and historical contexts . . . . Generally, constitutional interpretation must be informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law . . . .

[26] These rules and principles of interpretation have led this Court to conclude that the Constitution should be viewed as having an “internal architecture,” or “basic constitutional structure”: *Secession Reference*, at para. 50 . . . . The notion of architecture expresses the principle that “[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole”: *Secession Reference*, at para. 50; see also the discussion on this Court’s approach to constitutional interpretation in M.D. Walters, “Written Constitutions and Unwritten Constitutionalism,” in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (2008), 245, at pp. 264-65. In other words, the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text.

### ***B. Amendments to the Constitution of Canada***

[27] The concept of an “amendment to the Constitution of Canada,” within the meaning of Part V of the *Constitution Act, 1982*, is informed by the nature of the Constitution and its rules of interpretation. As discussed, the Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution’s architecture.

### ***C. The Part V Amending Procedures***

[28] Part V of the *Constitution Act, 1982* provides the blueprint for how to amend the Constitution of Canada . . . . It tells us what changes Parliament and the provincial legislatures can make unilaterally, what changes require substantial federal and provincial consent, and what changes require unanimous agreement.

#### ***(1) History***

[29] The Part V amending formula reflects the principle that constitutional change that engages provincial interests requires both the consent of Parliament and a significant degree of provincial consent. Prior to patriation, constitutional amendment in Canada required the adoption of a law by the British Parliament following a joint resolution addressed to it by the Senate and the House of Commons, since the *Constitution Act, 1867* was an Act of the British Parliament. There was no formal requirement for consultation with the provinces. However, in practice, throughout the 20th century, the federal

government consulted with the provinces on constitutional amendments that directly affected federal–provincial relations, and obtained their consent before putting a joint address to the British Parliament . . . .

[30] Beginning in the 1930s, the federal government and the provinces held a series of conferences to discuss the possibility of adopting a formal amending formula. . . .

[The culmination was the “April Accord” of 1981, proposed by the provinces, which became the template for Part V of the *Constitution Act, 1982*.]

[31] The April Accord, and ultimately Part V, reflect the political consensus that the provinces must have a say in constitutional changes that engage their interests. The “underlying purpose” of these documents is “to constrain unilateral federal powers to effect constitutional change”: P.J. Monahan and B. Shaw, *Constitutional Law* (4th ed. 2013), at p. 204; *Supreme Court Act Reference*, at paras. 98–100. They also consecrate the principle of “the constitutional equality of provinces as equal partners in Confederation” . . . . In principle, no province stands above the others with respect to constitutional amendments, and all provinces are given the same rights in the process of amendment. The result is an amending formula designed to foster dialogue between the federal government and the provinces on matters of constitutional change, and to protect Canada’s constitutional status quo until such time as reforms are agreed upon.

## (2) *The Amending Procedures*

[32] Part V contains four categories of amending procedures. The first is the general amending procedure (s. 38, complemented by s. 42), which requires a substantial degree of consensus between Parliament and the provincial legislatures. The second is the unanimous consent procedure (s. 41), which applies to certain changes deemed fundamental by the framers of the *Constitution Act, 1982*. The third is the special arrangements procedure (s. 43), which applies to amendments in relation to provisions of the Constitution that apply to some, but not all, of the provinces. The fourth is made up of the unilateral federal and provincial procedures, which allow unilateral amendment of aspects of government institutions that engage purely federal or provincial interests (ss. 44 and 45).

### (a) The General Amending Procedure

. . . .

[34] The process set out in s. 38 is the general rule for amendments to the Constitution of Canada. It reflects the principle that substantial provincial consent must be obtained for constitutional change that engages provincial interests. Section 38 codifies what is colloquially referred to as the “7/50” procedure—amendments to the Constitution of Canada must be authorized by resolutions of the Senate, the House of Commons, and legislative assemblies of at least seven provinces whose population represents, in the aggregate, at least half of the current population of all the provinces. Additionally, it grants to the provinces the right to “opt out” of constitutional amendments that derogate from “the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province.”

[35] By requiring significant provincial consensus while stopping short of unanimity, s. 38 “achieves a compromise between the demands of legitimacy and flexibility”: J. Cameron, “To Amend the Process of Amendment,” in G.-A. Beaudoin et al., *Federalism for the Future: Essential Reforms* (1998), 315, at p. 324. Its “underlying purpose ... is to protect the provinces from having their rights or privileges negatively affected without their consent”: Monahan and Shaw, at p. 192.

[36] The s. 38 procedure represents the balance deemed appropriate by the framers of the *Constitution Act, 1982* for most constitutional amendments, apart from those contemplated in one of the other provisions in Part V. Section 38 is thus the procedure of general application for amendments to the Constitution of Canada. As a result, the other procedures in Part V should be construed as exceptions to the general rule.

[37] Section 42 complements s. 38 by expressly identifying certain categories of amendments to which the 7/50 procedure in s. 38(1) applies:

42(1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

- (a) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;
- (b) the powers of the Senate and the method of selecting Senators;
- (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
- (d) subject to paragraph 41(d), the Supreme Court of Canada;
- (e) the extension of existing provinces into the territories; and
- (f) notwithstanding any other law or practice, the establishment of new provinces.

(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

[38] This provision serves two purposes. First, the express inclusion of certain matters in s. 42 provided the framers of the *Constitution Act, 1982* with greater certainty that the 7/50 procedure would apply to amendments in relation to those matters ... Second, the provincial right to “opt out” from certain amendments contemplated in s. 38(2) to (4) does not apply to the categories of amendments in s. 42. This ensures that amendments made under s. 42 will apply consistently to all the provinces and allows the changes contemplated in the provision to be implemented in a coherent manner throughout Canada.

[39] Section 42(1)(b) of the *Constitution Act, 1982* expressly makes the general amendment procedure applicable to amendments in relation to “the powers of the Senate and the method of selecting Senators.” We discuss below the meaning of this statutory language and its bearing on the questions before us.

#### (b) The Unanimous Consent Procedure

[40] Section 41 of the *Constitution Act, 1982* sets out an amending procedure requiring unanimous consent in relation to certain matters:

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:



- (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
- (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
- (c) subject to section 43, the use of the English or the French language;
- (d) the composition of the Supreme Court of Canada; and
- (e) an amendment to this Part.

[41] Section 41 requires the unanimous consent of the Senate, the House of Commons, and all the provincial legislative assemblies for the categories of amendments enumerated in the provision. It “accords the highest level of constitutional protection and entrenchment” to the enumerated matters: W.J. Newman, “Living with the Amending Procedures: Prospects for Future Constitutional Reform in Canada” (2007), 37 S.C.L.R. (2d) 383, at p. 388. It is an exception to the general amending procedure. It creates an exacting amending procedure that is designed to apply to certain fundamental changes to the Constitution of Canada. Professor Pelletier aptly describes the rationale for requiring unanimity for the enumerated categories of amendments:

[TRANSLATION] ... the unanimity rule provided for in section 41 of the 1982 Act is justified by the need ... to give each of the partners of Canada’s federal compromise a veto on those topics that are considered the most essential to the survival of the state.

(B. Pelletier, *La modification constitutionnelle au Canada* (1996), at p. 208)

#### (c) The Special Arrangements Procedure

...

[43] Section 43 applies to amendments in relation to provisions of the Constitution of Canada that apply to some, but not all, of the provinces. The determination of its scope and of the effects of its interaction with other provisions of Part V presents significant conceptual difficulties ... . We will limit our remarks on s. 43 to what is necessary to answer the Reference questions before us.

[44] At the very least, s. 43 is triggered when a constitutional amendment relates to a provision of the Constitution of Canada that contains a “special arrangement” applicable only to one or several, but not all, of the provinces. In such cases, the use of the 7/50 procedure would overshoot the mark, by making adoption of the amendment contingent upon the consent of provinces to which the provision does not apply. Section 43 also serves to ensure that those provisions cannot be amended without the consent of the provinces for which the arrangement was devised: Monahan and Shaw, at p. 210.

#### (d) The Unilateral Federal and Provincial Procedures

[45] Sections 44 and 45 of the *Constitution Act, 1982* provide for unilateral federal and provincial procedures of amendment:

[44] Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

[45] Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

[46] These sections fulfill the same basic function as ss. 91(1) and 92(1) of the *Constitution Act, 1867*, which were repealed when the *Constitution Act, 1982* was enacted . . .

[47] Sections 91(1) and 92(1) of the *Constitution Act, 1867* granted the federal and provincial governments the power to amend their respective constitutions, provided that the amendments did not engage the interests of the other level of government. Section 91(1) was worded broadly, allowing Parliament to amend the “Constitution of Canada,” subject to certain restrictions. In 1980, the federal government asked this Court whether Parliament could unilaterally implement sweeping reforms to the Senate under s. 91(1). This Court concluded that s. 91(1) allowed Parliament to amend “the constitution of the federal government in matters of interest only to that government”: *Upper House Reference*, at p. 71. It followed that s. 91(1) did not give Parliament the power to unilaterally make constitutional changes such as the abolition of the Senate or the modification of the Senate’s essential features, since these changes engaged the interests of the provinces as well as those of the federal government: *ibid.*, at pp. 74-75 *et seq.* . . .

[48] As the successors to those provisions, ss. 44 and 45 give the federal and provincial legislatures the ability to unilaterally amend certain aspects of the Constitution that relate to their own level of government, but which do not engage the interests of the other level of government. This limited ability to make changes unilaterally reflects the principle that Parliament and the provinces are equal stakeholders in the Canadian constitutional design. Neither level of government acting alone can alter the fundamental nature and role of the institutions provided for in the Constitution. This said, those institutions can be maintained and even changed to some extent under ss. 44 and 45, provided that their fundamental nature and role remain intact.

### V. How Can the Senate Changes Contemplated in the Reference Be Achieved?

[The court went on to conclude that the majority of the changes to the Senate contemplated in the Reference could only be achieved through amendments to the Constitution, with substantial federal–provincial consensus. The implementation of consultative elections and senatorial term limits was found to require the consent of the Senate, the House of Commons, and the legislative assemblies of at least seven provinces representing, in the aggregate, half the population of all the provinces (s 38 and s 42(1)(b), *Constitution Act, 1982*). A full repeal of the property qualifications was found to require the consent of the legislative assembly of Quebec (s 43, *Constitution Act, 1982*). As for Senate abolition, it was found to require the unanimous consent of the Senate, the House of Commons, and the legislative assemblies of all Canadian provinces (s 41(e), *Constitution Act, 1982*). Select portions from the reasoning on these issues have been included below.]

#### A. Consultative Elections

[50] [Section 24] of the *Constitution Act, 1867* provides for the formal appointment of Senators by the Governor General . . . . In practice, constitutional convention requires the Governor General to follow the recommendations of the Prime Minister of Canada . . . .

[51] The Attorney General of Canada (supported by the attorneys general of Saskatchewan and Alberta as well as one of the *amici curiae*) submits that implementing consultative elections for Senators does not constitute an amendment to the *Constitution of Canada*. He argues that this reform would not change the text of the *Constitution Act, 1867*, nor the means of selecting Senators. He points out that the formal mechanism for appointing Senators—summons by the Governor General acting on the advice of the Prime Minister—would remain untouched. Alternatively, he submits that if introducing consultative elections constitutes an amendment to the Constitution, then it can be achieved unilaterally by Parliament under s. 44 of the *Constitution Act, 1982*.

[52] In our view, the argument that introducing consultative elections does not constitute an amendment to the Constitution privileges form over substance. It reduces the notion of constitutional amendment to a matter of whether or not the letter of the constitutional text is modified. This narrow approach is inconsistent with the broad and purposive manner in which the Constitution is understood and interpreted, as discussed above. While the provisions regarding the appointment of Senators would remain textually untouched, the Senate's fundamental nature and role as a complementary legislative body of sober second thought would be significantly altered.

[53] We conclude that each of the proposed consultative elections would constitute an amendment to the Constitution of Canada and require substantial provincial consent under the general amending procedure, without the provincial right to "opt out" of the amendment (s. 42). ...

[54] The implementation of consultative elections would amend the Constitution of Canada by fundamentally altering its architecture. It would modify the Senate's role within our constitutional structure as a complementary legislative body of sober second thought.

[55] The *Constitution Act, 1867* contemplates a specific structure for the federal Parliament, "similar in Principle to that of the United Kingdom": preamble. The Act creates both a lower *elected* and an upper *appointed* legislative chamber: s. 17. It expressly provides that the members of the lower chamber—the House of Commons—"shall be elected" by the population of the various provinces: s. 37. By contrast, it provides that Senators shall be "summoned" (i.e. appointed) by the Governor General: ss. 24 and 32.

[56] The contrast between election for members of the House of Commons and executive appointment for Senators is not an accident of history. The framers of the *Constitution Act, 1867* deliberately chose executive appointment of Senators in order to allow the Senate to play the specific role of a complementary legislative body of "sober second thought."

[57] As this Court wrote in the *Upper House Reference*, "[i]n creating the Senate in the manner provided in the Act, it is clear that the intention was to make the Senate a thoroughly independent body which could *canvass dispassionately the measures of the House of Commons*": p. 77 (emphasis added). The framers sought to endow the Senate with independence from the electoral process to which members of the House of Commons were subject, in order to remove Senators from a partisan political arena that required unremitting consideration of short-term political objectives.

[58] Correlatively, the choice of executive appointment for Senators was also intended to ensure that the Senate would be a complementary legislative body, rather than a perennial rival of the House of Commons in the legislative process. Appointed Senators would not have a popular mandate—they would not have the expectations and legitimacy that stem from popular election. This would ensure that they would confine themselves to

their role as a body mainly conducting legislative review, rather than as a coequal of the House of Commons. ...

...

[60] The proposed consultative elections would fundamentally modify the constitutional architecture we have just described and, by extension, would constitute an amendment to the Constitution. They would weaken the Senate's role of sober second thought and would give it the democratic legitimacy to systematically block the House of Commons, contrary to its constitutional design.

[61] Federal legislation providing for the consultative election of Senators would have the practical effect of subjecting Senators to the political pressures of the electoral process and of endowing them with a popular mandate. Senators selected from among the listed nominees would become popular representatives. ...

[62] The Attorney General of Canada counters that this broad structural change would not occur because the Prime Minister would retain the ability to ignore the results of the consultative elections and to name whomever he or she wishes to the Senate. We cannot accept this argument. ... [T]he purpose of [Bills C-20 and C-7] is clear: to bring about a Senate with a popular mandate. We cannot assume that future prime ministers will defeat this purpose by ignoring the results of costly and hard-fought consultative elections ... . A legal analysis of the constitutional nature and effects of proposed legislation cannot be premised on the assumption that the legislation will fail to bring about the changes it seeks to achieve.

[63] In summary, the consultative election proposals set out in the Reference questions would amend the Constitution of Canada by changing the Senate's role within our constitutional structure from a complementary legislative body of sober second thought to a legislative body endowed with a popular mandate and democratic legitimacy.

[The court went on to add that s 42 expressly made the general amending procedure applicable to a change of this nature and that the proposed change was beyond the scope of the unilateral federal amending procedure in s 44 both because it was covered by s 42 and because it involved a change to the Senate's fundamental nature and role.]

### **B. Senatorial Tenure**

[71] It is not disputed that a change in the duration of senatorial terms would amend the Constitution of Canada, by requiring a modification to the text of s. 29 of the *Constitution Act, 1867* ... [which provides that a Senator who is summoned to the Senate shall hold his place in the Senate until he attains the age of 75 years]. The question before us is which Part V procedure applies to amend this provision.

[72] The Attorney General of Canada argues that changes to senatorial tenure fall residually within the unilateral federal power of amendment in s. 44, since they are not expressly captured by the language of s. 42. He also contends that the imposition of the fixed terms contemplated in the Reference would constitute a minor change that does not engage the interests of the provinces, because those terms are equivalent in duration to the average length of the terms historically served by Senators.

[73] In essence, the Attorney General of Canada proposes a narrow textual approach to this issue. Section 44 of the *Constitution Act, 1982* provides: "Subject to sections 41 and

42, Parliament may exclusively make laws amending the Constitution of Canada in relation to ... the Senate ...” Neither s. 41 nor s. 42 expressly applies to amendments in relation to senatorial tenure. It follows, in his view, that the proposed changes to senatorial tenure are captured by the otherwise unlimited power in s. 44 to make amendments in relation to the Senate.

[74] We agree that the language of s. 42 does not encompass changes to the duration of senatorial terms. However, it does not follow that all changes to the Senate that fall outside of s. 42 come within the scope of the unilateral federal amending procedure in s. 44 ...

[75] We are unable to agree with the Attorney General of Canada’s interpretation of the scope of s. 44. As discussed, the unilateral federal amendment procedure is limited. It is not a broad procedure that encompasses all constitutional changes to the Senate which are not expressly included within another procedure in Part V. The history, language, and structure of Part V indicate that s. 38, rather than s. 44, is the general procedure for constitutional amendment. Changes that engage the interests of the provinces in the Senate as an institution forming an integral part of the federal system can only be achieved under the general amending procedure. Section 44, as an exception to the general procedure, encompasses measures that maintain or change the Senate without altering its fundamental nature and role.

...

[78] The question is thus whether the imposition of fixed terms for Senators engages the interests of the provinces by changing the fundamental nature or role of the Senate. If so, the imposition of fixed terms can only be achieved under the general amending procedure. In our view, this question must be answered in the affirmative.

[79] As discussed above, the Senate’s fundamental nature and role is that of a complementary legislative body of sober second thought. The current duration of senatorial terms is directly linked to this conception of the Senate. Senators are appointed roughly for the duration of their active professional lives. This security of tenure is intended to allow Senators to function with independence in conducting legislative review. This Court stated in the *Upper House Reference* that, “[a]t some point, a reduction of the term of office might impair the functioning of the Senate in providing what Sir John A. Macdonald described as ‘the sober second thought in legislation’”: p. 76. A significant change to senatorial tenure would thus affect the Senate’s fundamental nature and role. It could only be achieved under the general amending procedure and falls outside the scope of the unilateral federal amending procedure.

[80] The imposition of fixed senatorial terms is a significant change to senatorial tenure. We are not persuaded by the argument that the fixed terms contemplated in the Reference are a minor change because they are equivalent in duration to the average term historically served by Senators. ... Fixed terms provide a weaker security of tenure. They imply a finite time in office and necessarily offer a lesser degree of protection from the potential consequences of freely speaking one’s mind on the legislative proposals of the House of Commons.

[81] It may be possible, as the Attorney General of Canada suggests, to devise a fixed term so lengthy that it provides a security of tenure which is functionally equivalent to that provided by life tenure. However, it is difficult to objectively identify the precise term duration that guarantees an equivalent degree of security of tenure. ...

[82] The difficulty in determining how long senatorial terms should be in order to safeguard the Senate's role as a body of sober second thought suggests that this is at heart a matter of policy. The very process of subjectively identifying a term long enough to leave intact the Senate's independence engages the interests of the provinces and requires their input. The imposition of fixed terms, even lengthy ones, constitutes a change that engages the interests of the provinces as stakeholders in Canada's constitutional design and falls within the rule of general application for constitutional change—the 7/50 procedure in s. 38.

• • •

### C. *Property Qualifications*

[The court found that the removal of the net worth requirements would not alter the fundamental nature of the Senate and was exactly the kind of amendment intended to be covered by the unilateral federal amendment power in s 44].

[91] Similarly, the removal of the real property requirement (s. 23(3), *Constitution Act, 1867*) would not alter the fundamental nature and role of the Senate. However, the removal of the real property requirement for Quebec's Senators would constitute an amendment in relation to a special arrangement [for senators from that province]. It would thus attract the special arrangements procedure and require the consent of Quebec's National Assembly (s. 43, *Constitution Act, 1982*).

• • •

## VI. *Senate Abolition: How Can It Be Achieved?*

[95] Finally, the Reference asks which of two possible procedures applies to abolition of the Senate: the general amending procedure or the unanimous consent procedure?

[96] The Attorney General of Canada argues that the general amending procedure applies because abolition of the Senate falls under matters which Part V expressly says attract that procedure—amendments in relation to “the powers of the Senate” and “the number of members by which a province is entitled to be represented in the Senate” (s. 42(1)(b) and (c)). Abolition, it is argued, is simply a matter of “powers” and “members”: it literally takes away all of the Senate's powers and all of its members. Alternatively, the Attorney General of Canada argues that since abolition of the Senate is not expressly mentioned anywhere in Part V, it falls residually under the general amending procedure.

[97] We cannot accept the Attorney General's arguments. Abolition of the Senate is not merely a matter of “powers” or “members” under s. 42(1)(b) and (c) of the *Constitution Act, 1982*. Rather, abolition of the Senate would fundamentally alter our constitutional architecture—by removing the bicameral form of government that gives shape to the *Constitution Act, 1867*—and would amend Part V, which requires the unanimous consent of Parliament and the provinces (s. 41(e), *Constitution Act, 1982*).

### A. *Abolishing the Senate Does Not Fall Within Section 42(1)(b) and (c)*

• • •

[102] To interpret s. 42 as embracing Senate abolition would depart from the ordinary meaning of its language and is not supported by the historical record. The mention of amendments in relation to the powers of the Senate and the number of Senators for each

province presupposes the continuing existence of a Senate and makes no room for an indirect abolition of the Senate. Within the scope of s. 42, it is possible to make significant changes to the powers of the Senate and the number of Senators. But it is outside the scope of s. 42 to altogether strip the Senate of its powers and reduce the number of Senators to zero.

### ***B. Abolishing the Senate Would Alter the Part V Amending Formula***

[103] The Attorney General of Canada argues that Senate abolition can be accomplished without amending Part V and that it therefore does not fall within the scope of s. 41(e), which requires unanimous federal–provincial consent for amendments to Part V. He argues that the Senate can be abolished without textually modifying the provisions of Part V. The references to the Senate in Part V would simply be viewed as “spent” and as devoid of legal effect.

...

[106] We disagree with these submissions. Once more, the Attorney General privileges form over substance. Part V is replete with references to the Senate and gives the Senate a role in all of the amending procedures, except for the unilateral provincial procedure . . . . Part V was drafted on the assumption that the federal Parliament would remain bicameral in nature, i.e. that there would continue to be both a lower legislative chamber and a complementary upper chamber. Removal of the upper chamber from our Constitution would alter the structure and functioning of Part V. Consequently, it requires the unanimous consent of Parliament and of all the provinces (s. 41(e)).

[107] ... [T]he notion of an amendment to the Constitution of Canada is not limited to textual modifications—it also embraces significant structural modifications of the Constitution. The abolition of the upper chamber would entail a significant structural modification of Part V. Amendments to the Constitution of Canada are subject to review by the Senate. The Senate can veto amendments brought under s. 44 and can delay the adoption of amendments made pursuant to ss. 38, 41, 42, and 43 by up to 180 days: s. 47, *Constitution Act, 1982*. The elimination of bicameralism would render this mechanism of review inoperative and effectively change the dynamics of the constitutional amendment process. The constitutional structure of Part V as a whole would be fundamentally altered.

...

### ***C. Conclusion on Abolition of the Senate***

[110] The review of constitutional amendments by an upper house is an essential component of the Part V amending procedures. The Senate has a role to play in all of the Part V amending procedures, except for the unilateral provincial procedure. The process of constitutional amendment in a unicameral system would be qualitatively different from the current process. There would be one less player in the process, one less mechanism of review. It would be necessary to decide whether the amending procedure can function as currently drafted in a unicameral system, or whether it should be modified to provide for a new mechanism of review that occupies the role formerly played by the upper chamber. These issues relate to the functioning of the constitutional amendment formula and, as such, unanimous consent of Parliament and of all the provinces is required under s. 41(e) of the *Constitution Act, 1982*.

## NOTES

1. *The motivations for the Reference.* It is worth asking why this matter was referred to the Supreme Court to begin with. Adam Dodek has considered the possibilities and concluded that the choice was both reactive and proactive:

For over a year and a half Bill C-7 was stalled in the House of Commons, reportedly due to internal opposition within the Conservative caucus. And this came after Senate reform legislation was shifted from the Senate to the House due to opposition within the Conservative Senatorial ranks. However, the Harper Government could not simply abandon its commitment to Senate reform without significant political cost, as the Prime Minister had personally invested much political capital in the issue. Abandoning Senate reform would have injured Mr. Harper as a leader and would have hurt the image of [the] Conservative Party with its followers who actively, and often fervently, supported Senate reform. ... Mr. Harper was forced to demonstrate some action, and referring his legislation to the Supreme Court for a ruling both demonstrated action and bought him some time while the matter was under consideration by the Supreme Court.

The decision to initiate the reference supports alternative political hypotheses. Some have suggested that the reference was “tactical” in the sense of a calculated move to seek greater power than the Prime Minister expected the Supreme Court to sanction or even that he referred the reference to the Court with the full expectation that the Court would reject his Senate reform proposals. Others have submitted that it is part of a larger strategy of shifting the blame for the government’s inability to fulfill political commitments onto other actors—in this case onto the Supreme Court and the Premiers. The Prime Minister’s previous pronouncements support this theory.

In November 2013, Prime Minister Harper gave a speech to Conservative Party members in which he blamed “the courts” for standing in the way of Senate reform, presumably referring to the ruling of the Québec Court of Appeal against the government’s unilateral Senate reform proposals, but also presaging the Supreme Court of Canada’s hearing of the Senate Reform Reference later that same month. Similarly, the Prime Minister’s response in the immediate aftermath of the Supreme Court’s decision on the Senate Reference also supports this theory. On the day that the Supreme Court issued its “advisory opinion,” the Prime Minister “shut the door” on his “career pledge to reform the Senate” and blamed the Supreme Court for stranding Canadians with a scandal-plagued Senate. ...

Whether the Prime Minister expected to “lose” the reference or not, the case was a political win–win for the Harper Government. If the Supreme Court ruled in his favour, the Prime Minister could proceed unilaterally with enacting Bill C-7. In the face of a green light from Supreme Court and pressure from the Senate scandal, it is hard to imagine that internal caucus opposition would have been sufficient to overcome the Prime Minister’s will to implement his reforms to the Senate. If the Supreme Court ruled against him, as it did, then the Prime Minister would be able to claim—as he did—that he had tried but that the Supreme Court had thwarted his attempts at Senate reform. The Senate Reform Reference thus presented an opportunity for the Harper Government to both obtain political sanction and deflect political blame for desired policy choices.

A critical factor in explaining the timing of the Harper Government’s decision to bring the reference is ... the proactive strike. ... On May 2, 2012, the Québec government initiated a reference of its own to its Court of Appeal seeking that court’s opinion on the constitutionality of Bill C-7, imposing nine-year term limits for Senators and creating “consultative elections” for senators in provinces that opted for them. Since that date, a ruling on the constitutionality of Bill C-7 by the Supreme Court became inevitable because there is an automatic right of appeal from a provincial court of appeal reference to the Supreme Court of Canada. The Harper Government



could no longer escape a court ruling on the constitutionality of their Senate reform proposals: They would get one from the Québec Court of Appeal in 2013 and in all likelihood they would have gotten one from the Supreme Court of Canada in 2014 whether they had acted or not. The decision of the Québec government forced the Harper Government's hand; it had to act. By initiating a reference to the Supreme Court of Canada, the Harper Government could frame the questions and have some control over the timing and the process. Thus the decision to bring the reference can be seen as both a reaction to the Government of Québec and as a proactive strike to get ahead of the Québec Court of Appeal decision and attempt to best defend the Harper Government's strategy of federal unilateralism.

See Adam Dodek, "The Politics of the *Senate Reform Reference*: Fidelity, Frustration, and Federal Unilateralism" (2015) 60 McGill LJ 623 at 653-56. The reference procedure has been discussed in Chapter 2, *Judicial Review and Constitutional Interpretation*. Do the government's motivations for referring this matter of Senate reform to the Supreme Court give fodder to detractors of the reference procedure, who argue that the procedure politicizes the judiciary? Or are these motivations squarely within the type we expect to lead to a reference? This was not the first time that the court was asked to advise the government on the question of Senate reform; the earlier occasion, referred to in the *Senate Reform Reference was Re: Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54 (*Upper House Reference*).

2. *The court in constitutional reform.* One possible consequence of the *Senate Reform Reference* is that the court may have assured itself a central role in future constitutional reforms. Although the court has in the past invoked the idea that the Constitution has an "internal architecture," this time the court relied on this idea of the Constitution's "architecture" to conclude that the proposed reforms to the Senate would not be possible without recourse to the multilateral amendment procedures in Part V. But the court did not explain precisely what this architecture entails in connection with the amending formula. There may have been good reasons for the court not to give a full account of the Constitution's architecture and which changes to it would require recourse to which particular amendment procedure. The court has reserved to itself future room to identify and define the specificities of the Constitution's architecture, and in doing so it has all but ensured that it will be an integral player in any effort to amend the Constitution in a materially significant way, whether or not the amendment touches the Senate. Is this a positive development, in your view? Dennis Baker and Mark Jarvis have suggested that it may not be:

At one time, the Court told Canadians that "constitutional conventions plus constitutional law equal the total constitution of the country"; now Canadians have learned to expect novel constitutional components to appear whenever they are necessary to determine the outcome of a particular constitutional controversy. If it is not in the text, perhaps it is in the architecture? By failing to restrict itself to constitutional *law*, the Court has expanded the potential effect of constitutional entrenchment. Whatever the "constitutional architecture" is, it appears to be beyond the reach of ordinary statutes.

And given that "constitutional architecture" might bolster an argument that one must consider not only the form but also the substance of a reform, it becomes important for other political actors to know precisely what it entails. While we can read the constitutional text, we can only guess what the Court sees behind it. There is a certain irony in that, as the Court delves further into more informal and expansive interpretations in judgments across a variety of fields, it forces other political actors to undertake more formal and narrow amendments.

This approach privileges the Court over other institutions in controlling the content of the Constitution.

See Dennis Baker & Mark Jarvis, "The End of Informal Constitutional Change in Canada?" in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 185 at 200-1.

3. *Deliberation in democracy.* The proposal for consultative elections would have improved the democratic pedigree of the Senate insofar as its new members would have been elected by voters, assuming provinces and territories had adopted the plan. Yet the court concluded that the government could not enact this constitutional reform unilaterally using the amendment power in s 44. The court's interpretation of Part V therefore appears to be rooted in a commitment not to just any kind of democracy but to a particular vision of deliberative democracy. As Yasmin Dawood has argued, "[t]he Court's interpretation of the amending procedures is based on a fundamental democratic commitment to consultation and deliberation between and among the relevant stakeholders." She adds that, according to the court's reasons in the *Senate Reform Reference*, "constitutional change cannot take place through unilateral decision making by Parliament even if the proposed reforms improve the democratic caliber of a given institution": see Yasmin Dawood, "The *Senate Reference*: Constitutional Change and Democracy" (2015) 60 McGill LJ 737 at 760. Should the court have placed less emphasis on the procedure proposed by the government to reform the Senate in light of the likelihood that the Senate would have become more democratic? Why should process stand in the way of a favourable outcome?

4. *Reimagining the Senate's role.* If you could give the Senate a new role, what function or functions would you give to it? One proposal suggests "assigning the Senate the task of reviewing the constitutionality of bills proposed by the House of Commons with the purpose of ameliorating the democratic deficit created by the institution of judicial review of legislation, and therefore contributing to the overall democratic legitimacy of the constitutional order." In this role, the Senate "would be acting as a chamber of 'sober second thought,' not as to the desirability of the policies advanced in the relevant bills, but as to their consistency with the constitution": see Joel I Colón-Ríos & Allan C Hutchinson, "Constitutionalizing the Senate: A Modest Democratic Proposal" (2015) 60 McGill LJ 599 at 617-18. The authors describe their idea as "modest" in the sense that it is a step toward infusing more democracy into our system of government, but not so much as to transform Canada into a pure direct democracy. Although controversial, there may be a lot to commend in this proposal. It gives the Senate a role that actually matters in improving Parliament's legislative output, by helping the House of Commons steer its bills clear of constitutional invalidity. There would of course be no guarantee of constitutional validity until the Supreme Court has addressed the matter, but the senatorial review of bills for constitutionality could help reassure the House that its bills were consistent with the Constitution. The proposal may also contribute to a better use and management of judicial resources; presumably, the Senate's review could point the House of Commons's attention to problem areas in its bills and thereby perhaps reduce future claims of constitutional invalidity, which would in turn foster a more efficient use of scarce judicial resources. On the other hand, Parliament already employs legal counsel to help evaluate bills for constitutionality and the government is advised by the Department of Justice on the constitutional validity of its bills. The proposal might therefore be duplicative, at least in part, of the roles of other actors in the legislative process. Do you think this proposal is a good idea?

5. *Senate reform after the Reference.* A new majority government elected in October 2015 undertook an important reform to the method of selecting persons for eventual

appointment to the Senate. The new method involved two stages. In the first stage, introduced in early 2016, a new Independent Advisory Board for Senate Appointments was convened to give advice to the prime minister to fill vacancies in the Senate. The first batch of individuals selected through this new method was appointed in March 2016. The second stage of the new method of senatorial selection began in July 2016. In this new phase—intended by the government to be permanent—individual Canadians can apply to be considered by the advisory board, which will in turn choose from among those applicants to make recommendations to the prime minister for Senate vacancies. The purpose of these reforms was to create an independent appointments process that would, according to the new government, lessen the partisanship and improve the effectiveness of the Senate. The effect of these reforms has been to avoid the familiar and indissoluble problems that have felled prior large-scale efforts at constitutional reform across many Canadian public institutions. This incremental approach is also non-constitutional in the sense that it is said by the government not to require a constitutional amendment. Do you think this new method of senatorial selection is a good idea? Do you believe it can be adopted—it is already in use—without a constitutional amendment? For a defence and explanation of an early version of this new method of selecting senators, see Stephane Dion, “Time for Boldness on Senate Reform, Time for the Trudeau Plan” (2015) 24 Const Forum Const 61.

### C. The Status of the Supreme Court

In this section, we return to the Supreme Court of Canada, a subject we have discussed in detail in many of the previous chapters. In Chapter 13, The Role of the Judiciary, we discussed Parliament’s power under s 101 of the *Constitution Act, 1867* to constitute, maintain, and organize “a General Court of Appeal for Canada,” a power used in 1875 to pass the *Supreme Court Act*, establishing the Supreme Court of Canada. In Chapter 1, we traced the evolution of the court, highlighting the termination of appeals to the Judicial Committee of the Privy Council in 1949 as an important marker in Canada’s transformation from a colony to an independent nation state. The *Constitution Act, 1982* was another significant moment in the history of the Supreme Court. In Chapter 2, we discussed the recognition given to the power of judicial review in s 52(1) of the 1982 act, which provides that “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” We also noted the importance of s 24 of the *Canadian Charter of Rights and Freedoms*: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

The importance of the Supreme Court in Canada’s constitutional order was confirmed by the heightened degree of entrenchment it was given in Part V of the *Constitution Act, 1982*. You will recall (see Section III.C above) that Part V creates five procedures to amend the Constitution, and two require a larger aggregation of majorities than the others. Different features of the court are entrenched under each of these two amendment procedures: first, any amendment to the “composition of the Supreme Court of Canada” requires use of the unanimity procedure in s 41(d); and second, any other change to the Supreme Court of Canada not related to its “composition” but that nonetheless amounts to an amendment to the Constitution of Canada requires use of the general amending formula in s 38, as stated in s 42(d).

Patriation left open a question about the status of the Supreme Court: was the *Supreme Court Act*, which established the court, considered part of the Constitution of Canada? Section 52(2) of the *Constitution Act, 1982* tells us that “the Constitution of Canada includes ... the Acts and orders referred to in the schedule” appended to the Act. Yet the *Supreme Court Act* is not listed among the 30 Acts and orders in the schedule. What are we to make of this? On one reading, this is an insignificant omission into which little should be read because s 52(2), by using the term “includes,” is not an exhaustive list. On another reading, however, the omission of such an important Act could not have been without reason—but for what reason? Still another reading of the exclusion of the *Supreme Court Act* from the list of Acts and orders identified as forming part of the Constitution of Canada is that it would have been redundant to list it: having already entrenched the Supreme Court’s composition and its other constitutional features in Part V, why would it be necessary to list the *Supreme Court Act*, which established the Supreme Court to begin with, in the enumeration of constitutional Acts and orders?

This question of constitutional law and interpretation is not strictly academic. On the contrary, it has real consequences for the power of Parliament to legislate using its ordinary legislative authority. If the Constitution of Canada does not “include” the *Supreme Court Act*, then Parliament can freely use its legislative authority under s 101 to make amendments to it. But if the Constitution of Canada does indeed “include” it, then Parliament’s powers require some clarification. This was the subject of controversy in the *Supreme Court Act Reference*, also known as the *Nadon Reference*, which has been previously discussed in Chapter 13.

### Reference re Supreme Court Act, ss 5 and 6

2014 SCC 21, [2014] 1 SCR 433

(most footnotes omitted; some integrated into text)

[In October 2013, Justice Nadon of the Federal Court of Appeal was appointed to the Supreme Court of Canada pursuant to s 6 of the *Supreme Court Act*. Section 6 stipulates that three of the nine judges of the Supreme Court should be appointed “from among the judges of the Court of Appeal or of the Superior Court of the Province of Québec or from among the advocates of that Province.”

Justice Nadon was not at that time a member of the *barreau du Québec*, although he had been a member of the Quebec bar for more than 10 years prior to his appointment to the Federal Court. Proceedings were commenced to challenge his appointment on the basis that s 6 of the *Supreme Court Act* required current membership in the Quebec bar. The *Supreme Court Act* was subsequently amended to include, *inter alia*, s 6.1, which purported to provide that for the purpose of s 6 of the Act, an appointee to the Supreme Court was from among the advocates of the province of Quebec if, *at any time*, he or she was an advocate of at least ten years’ standing at the bar of that province. The governor in council then referred two questions to the Supreme Court. The first question asked whether a person who was, at any time, an advocate of at least ten years’ standing at the *barreau du Québec* qualified for appointment under s 6 of the Act as being “from among the advocates of that Province.” The second question asked whether Parliament could enact legislation to make such a person eligible for appointment in the event that he or she did not qualify under the statute in its unamended form, thus engaging the validity of s 6.1

By a majority of six to one, the Supreme Court answered both questions in the negative. The portion of the judgement dealing with question one has been reproduced in Chapter 13. Here we include excerpts from the court's reasons on question two.]

McLACHLIN CJ and LeBEL, ABELLA, CROMWELL, KARAKATSANIS, and WAGNER JJ:

## V. Question 2

### A. The Issue

(2) *Can Parliament enact legislation that requires that a person be or has previously been a barrister or advocate of at least 10 years standing at the bar of a province as a condition of appointment as a judge of the Supreme Court of Canada or enact the annexed declaratory provisions as set out in clauses 471 and 472 of the Bill entitled Economic Action Plan 2013 Act, No. 2 [which were subsequently enacted as ss 5.1 and 6.1 of the Supreme Court Act]?*

[72] In light of our conclusion that appointments to the Court under s. 6 require current membership of the Barreau du Québec or of the Court of Appeal or Superior Court of Quebec, in addition to the criteria set out in s. 5, it is necessary to consider the second question, which is whether Parliament can enact declaratory legislation that would alter the composition of the Supreme Court of Canada.

[73] The Attorney General of Canada argues that the eligibility requirements for appointments under s. 6 have not been entrenched in the Constitution, and that Parliament retains the plenary power under s. 101 of the *Constitution Act, 1867* to unilaterally amend the eligibility criteria under ss. 5 and 6.

[74] We disagree [with the Attorney General of Canada on this point]. Parliament cannot unilaterally change the composition of the Supreme Court of Canada. Essential features of the Court are constitutionally protected under Part V of the *Constitution Act, 1982*. Changes to the composition of the Court can only be made under the procedure provided for in s. 41 of the *Constitution Act, 1982* and therefore require the unanimous consent of Parliament and the provincial legislatures. Changes to the other essential features of the Court can only be made under the procedure provided for in s. 42 of the *Constitution Act, 1982*, which requires the consent of at least seven provinces representing, in the aggregate, at least half of the population of all the provinces.

[The text of s 41(d) states:

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolution of the Senate and House of Commons and of the legislative assembly of each province:

• • •

(d) the composition of the Supreme Court of Canada;

The text of s 42(1)(d) states:

42(1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

• • •

(d) subject to paragraph 41(d), the Supreme Court of Canada;]

[75] We will first discuss the history of how the Court became constitutionally protected, and then answer the Attorney General of Canada's arguments on this issue. Finally, we will discuss the effect of the declaratory provisions enacted by Parliament.

### **B. Evolution of the Constitutional Status of the Supreme Court**

[76] The Supreme Court's constitutional status initially arose from the Court's historical evolution into an institution whose continued existence and functioning engaged the interests of both Parliament and the provinces. The Court's status was then confirmed by the *Constitution Act, 1982*, which reflected the understanding that the Court's essential features formed part of the Constitution of Canada.

#### *(1) The Supreme Court's Evolution Prior to Patriation*

[77] At Confederation, there was no Supreme Court of Canada. Nor were the details of what would eventually become the Supreme Court expounded in the *Constitution Act, 1867*. It was assumed that the ultimate judicial authority for Canada would continue to be the Judicial Committee of the Privy Council in London. ...

[78] The *Constitution Act, 1867*, however, gave Parliament the authority to establish a general court of appeal for Canada:

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

[79] The Parliamentary debates between 1868 and 1875 over whether to create a Supreme Court were instigated by Sir John A. Macdonald, who was Canada's Prime Minister and Minister of Justice from 1867 to 1873. He introduced bills for the establishment of the Supreme Court in 1869 and again in 1870 in the House of Commons. Both bills, which did not reserve any seats on the Court for Quebec jurists, faced staunch opposition from Quebec in Parliament. ...

[80] In addition to Quebec's opposition, the nature of the court's jurisdiction was contested, and many questioned whether a general court of appeal was even needed. Since an appeal to the Privy Council was available and Ontario and Quebec already had provincial courts of appeal, a Supreme Court would only be an intermediate step on the way to London.

[81] The bill that finally became the *Supreme Court Act* was introduced in 1875 by the federal Minister of Justice ... The new Supreme Court had general appellate jurisdiction over civil, criminal, and constitutional cases. In addition, the Court was given an exceptional original jurisdiction not incompatible with its appellate jurisdiction, for instance to consider references from the Governor in Council ...

[82] Under the authority newly granted by the *Statute of Westminster, 1931* [a statute of the British Parliament that recognized the legislative independence of Canada, except for the authority to amend the *Constitution Act, 1867*], Parliament abolished criminal appeals to the Privy Council in 1933 ... Of even more historic significance, in 1949, it

abolished *all* appeals to the Privy Council ... . This had a profound effect on the constitutional architecture of Canada. ...

[83] ... [It] meant that the Supreme Court of Canada inherited the role of the Council under the Canadian Constitution. As a result, the Court assumed the powers and jurisdiction “no less in scope than those formerly exercised in relation to Canada by the Judicial Committee” ... , including adjudicating disputes over federalism. The need for a final, independent judicial arbiter of disputes over federal–provincial jurisdiction is implicit in a federal system ... .

[84] In addition, the elevation in the Court’s status empowered it to exercise a “unifying jurisdiction over the provincial courts” ... . The Supreme Court became the keystone to Canada’s unified court system. It “acts as the exclusive ultimate appellate court in the country” ... .

[85] With the abolition of appeals to the Judicial Committee of the Privy Council, the continued existence and functioning of the Supreme Court of Canada became a key matter of interest to both Parliament and the provinces. The Court assumed a vital role as an institution forming part of the federal system. It became the final arbiter of division of powers disputes, and became the final word on matters of public law and provincial civil law. Drawing on the expertise of its judges from Canada’s two legal traditions, the Court ensured that the common law and the civil law would evolve side by side, while each maintained its distinctive character. The Court thus became central to the functioning of legal systems within each province and, more broadly, to the development of a unified and coherent Canadian legal system.

[86] The role of the Supreme Court of Canada was further enhanced as the 20th century unfolded. In 1975, Parliament amended the *Supreme Court Act* to end appeals as of right to the Court in civil cases (S.C. 1974-75-76, c. 18). This gave the Court control over its civil docket, and allowed it to focus on questions of public legal importance. As a result, the Court’s “mandate became oriented less to error correction and more to development of the jurisprudence” ... .

[87] As a result of these developments, the Supreme Court emerged as a constitutionally essential institution engaging both federal and provincial interests. Increasingly, those concerned with constitutional reform accepted that future reforms would have to recognize the Supreme Court’s position within the architecture of the Constitution.

## (2) *The Supreme Court and Patriation*

[88] We have seen that the Supreme Court was already essential under the Constitution’s architecture as the final arbiter of division of powers disputes and as the final general court of appeal for Canada. The *Constitution Act, 1982* enhanced the Court’s role under the Constitution and confirmed its status as a constitutionally protected institution.

[89] Patriation of the Constitution [in 1982] was accompanied by the adoption of the *Canadian Charter of Rights and Freedoms*, which gave the courts the responsibility for interpreting and remedying breaches of the *Charter*. Patriation also brought an explicit acknowledgement that the Constitution is the “supreme law of Canada”:

52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The existence of an impartial and authoritative judicial arbiter is a necessary corollary of the enactment of the supremacy clause. The judiciary became the “guardian of the constitution” . . . . As such, the Supreme Court of Canada is a foundational premise of the Constitution. With the adoption of the *Constitution Act, 1982*, “the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy” . . . .

[90] Accordingly, the *Constitution Act, 1982* confirmed the constitutional protection of the essential features of the Supreme Court. Indeed, Part V of the *Constitution Act, 1982* expressly makes changes to the Supreme Court and to its composition subject to constitutional amending procedures.

[91] Under s. 41(d), the unanimous consent of Parliament and all provincial legislatures is required for amendments to the Constitution relating to the “composition of the Supreme Court.” The notion of “composition” refers to ss. 4(1), 5 and 6 of the *Supreme Court Act*, which codify the composition of and eligibility requirements for appointment to the Supreme Court of Canada as they existed in 1982. By implication, s. 41(d) also protects the continued existence of the Court, since abolition would altogether remove the Court’s composition.

[92] The textual origin of Part V was the “April Accord” of 1981 (*Constitutional Accord: Canadian Patriation Plan* (1981)), to which eight provinces, including Quebec, were parties. The explanatory notes to this Accord confirm that the intention was to limit Parliament’s unilateral authority to reform the Supreme Court. That sentiment finds particular expression in the explanatory note for what became s. 41, which requires unanimity for amendments relating to five matters, including the composition of the Supreme Court: “This section recognizes that some matters are of such fundamental importance that amendments in relation to them should require the consent of all the provincial Legislatures and Parliaments” . . . . Pointedly, the explanatory note to s. 41(d) states: “This clause would ensure that the Supreme Court of Canada is comprised of judges a proportion of whom are drawn from the Bar or Bench of Québec and are, therefore, trained in the civil law” . . . . The intention of the provision was demonstrably to make it difficult to change the composition of the Court, and to ensure that Quebec’s representation was given special constitutional protection.

[93] . . . Requiring unanimity for changes to the composition of the Court gave Quebec constitutional assurance that changes to its representation on the Court would not be effected without its consent. . . . [This requirement precluded] the possibility that Quebec’s seats on the Court could have been reduced or altogether removed without Quebec’s agreement.

[94] Section 42(1)(d) applies the 7/50 amending procedure to the essential features of the Court, rather than to all of the provisions of the *Supreme Court Act*. [This view is supported by, among others, Patrick J. Monahan and Byron Shaw, *Constitutional Law* (4th ed. 2013), at p. 205; Peter Oliver, “Canada, Quebec, and Constitutional Amendment” (1999), 49 *U.T.L.J.* 519, at p. 579; W.R. Lederman, “Constitutional Procedure and the Reform of the Supreme Court of Canada” (1985), 26 *C. de D.* 195, at p. 196; Stephen A. Scott, “Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes” (1982), 20 *U.W.O. L. Rev.* 247, at p. 273.] The express mention of the Supreme Court of Canada in s. 42(1)(d) is intended to ensure the proper functioning of the Supreme Court. This requires the constitutional protection of the essential features of the



Court, understood in light of the role that it had come to play in the Canadian constitutional structure by the time of patriation. These essential features include, at the very least, the Court's jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence.

[95] In summary, the Supreme Court gained constitutional status as a result of its evolution into the *final* general court of appeal for Canada, with jurisdiction to hear appeals concerning all the laws of Canada and the provinces, including the Constitution. This status was confirmed in the *Constitution Act, 1982*, which made modifications of the Court's composition and other essential features subject to stringent amending procedures.

### C. *The Arguments of the Attorney General of Canada*

[96] The Attorney General of Canada argues (i) that the mention of the Supreme Court in the *Constitution Act, 1982* has no legal force, and (ii) that the failed attempts to entrench the eligibility requirements in the Meech Lake Accord of 1987 and the Charlottetown Accord of 1992 demonstrate that Parliament and the provinces understood those requirements not to have been entrenched in 1982.

#### (1) *The "Empty Vessels" Theory*

[97] The Attorney General of Canada contends that the Supreme Court is not protected by Part V, because the *Supreme Court Act* is not enumerated in s. 52 of the *Constitution Act, 1982* as forming part of the Constitution of Canada. He essentially argues that the references to the "Supreme Court" in ss. 41(d) and 42(1)(d) are "empty vessels" to be filled only when the Court becomes *expressly* entrenched in the text of the Constitution . . . . It follows from this, he argues, that Parliament retains the power to unilaterally make changes to the Court under s. 101 of the *Constitution Act, 1867* until such time as the Court is expressly entrenched.

[98] This contention is unsustainable. It would mean that the framers would have entrenched the Court's *exclusion* from constitutional protection . . . . It would also mean that the provinces agreed to insulate this unilateral federal power from amendment except through the exacting procedures in Part V.

[99] Accepting this argument would have two practical consequences that the provinces could not have intended. First, it would mean that Parliament could unilaterally and fundamentally change the Court, including Quebec's historically guaranteed representation, through ordinary legislation. Quebec, a signatory to the April Accord, would not have agreed to this, nor would have the other provinces. Second, it would mean that the Court would have less protection than at any other point in its history since the abolition of appeals to the Privy Council. This outcome illustrates the absurdity of denying Part V its plain meaning. The framers cannot have intended to diminish the constitutional protection accorded to the Court, while at the same time enhancing its constitutional role under the *Constitution Act, 1982*.

[100] Our constitutional history shows that ss. 41(d) and 42(1)(d) of the *Constitution Act, 1982* were enacted in the context of ongoing constitutional negotiations that anticipated future amendments relating to the Supreme Court. The amending procedures in Part V were meant to guide that process. By setting out in Part V how changes were to be made to the Supreme Court and its composition, the clear intention was to freeze the

*status quo* in relation to the Court's constitutional role, pending future changes . . . . This reflects the political and social consensus at the time that the Supreme Court was an essential part of Canada's constitutional architecture.

[101] It is true that at Confederation, Parliament was given the authority through s. 101 of the *Constitution Act, 1867* to "provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada." . . . The unilateral power found in s. 101 of the *Constitution Act, 1867* has been overtaken by the Court's evolution in the structure of the Constitution, as recognized in Part V of the *Constitution Act, 1982*. As a result, what s. 101 now requires is that Parliament maintain—and protect—the essence of what enables the Supreme Court to perform its current role.

(2) *The Meech Lake Accord and the Charlottetown Accord*

[102] The Attorney General of Canada argues that the Meech Lake Accord and the Charlottetown Accord would have expressly entrenched the qualifications for appointment to the Court in the Constitution, and that the failure to adopt these constitutional amendments means that the qualifications for appointment to the Court are not entrenched.

[103] We cannot accept this argument. As discussed above, the enactment of the *Constitution Act, 1982* protected the *status quo* regarding the Supreme Court. That expressly included the Court's composition, of which Quebec's representation on the Court is an integral part. The Meech Lake Accord and the Charlottetown Accord would have reformed the appointment process for the Court, and would have required that the Quebec judges on the Court be appointed from a list of candidates submitted by Quebec. These failed attempts at reform are evidence only of attempts at a broader reform of the selection process, but they shed no light on the issue of the Court's existing constitutional protection. The failure of the Meech Lake Accord and Charlottetown Accord simply means that the *status quo* regarding the Court's constitutional role remains intact.

**D. The Effects of the Declaratory Provisions Enacted by Parliament**

[104] Changes to the composition of the Supreme Court must comply with s. 41(d) of the *Constitution Act, 1982*. Sections 4(1), 5 and 6 of the *Supreme Court Act* codify the composition of and eligibility requirements for appointment to the Supreme Court of Canada as they existed in 1982. Of particular relevance is s. 6, which reflects the Court's bijural character and represents the key to the historic bargain that created the Court in the first place. As we discussed above, the guarantee that one third of the Court's judges would be chosen from Quebec ensured that civil law expertise and that Quebec's legal traditions would be represented on the Court and that the confidence of Quebec in the Court would be enhanced.

[105] Both the general eligibility requirements for appointment and the specific eligibility requirements for appointment from Quebec are aspects of the composition of the Court. It follows that any substantive change in relation to those eligibility requirements is an amendment to the Constitution in relation to the composition of the Supreme Court of Canada and triggers the application of Part V of the *Constitution Act, 1982*. Any change to the eligibility requirements for appointment to the three Quebec positions on the Court codified in s. 6 therefore requires the unanimous consent of Parliament and the 10 provinces.

[106] Since s. 6.1 of the *Supreme Court Act* (cl. 472 of *Economic Action Plan 2013 Act, No. 2*) substantively changes the eligibility requirements for appointments to the Quebec seats on the Court under s. 6, it seeks to bring about an amendment to the Constitution of Canada on a matter requiring unanimity of Parliament and the provincial legislatures. The assertion that s. 6.1 is a declaratory provision does not alter its import. Section 6.1 is therefore *ultra vires* of Parliament acting alone.

[At the same time as it amended the *Supreme Court Act* to add s 6.1, Parliament had also amended the Act to confirm eligibility for appointment under s 5 on the basis of current or former standing at the bar for ten years. The majority concluded that this amendment was valid because it simply confirmed the status quo.]

### NOTES

1. *The process of constitutionalization.* How does a law become constitutional? A law can become constitutional at the time a constitution is written—in this case, the authors of the constitution choose to exempt a law from the ordinary legislative process and instead make it amendable only by a special procedure, usually more difficult than that required to pass or amend an ordinary law. A law can also become constitutional over time as it acquires some special public salience. There is today increasing attention given to the phenomenon of a constitutional statute or a quasi-constitutional law. These are laws that were passed in the ordinary legislative process, but which have become politically entrenched in the sense that there is unlikely to be any political will to repeal them. In the United States, this is best reflected by the concept of a “superstatute”: see William N Eskridge Jr & John Ferejohn, “Super-Statutes” (2001) 50 *Duke LJ* 1215. In the United Kingdom, Adam Perry and Farrah Ahmed have theorized the concept of a constitutional statute that is “quasi-entrenched”: see Adam Perry & Farrah Ahmed, “The Quasi-Entrenchment of Constitutional Statutes” (2014) 73 *Cambridge LJ* 514. The *Supreme Court Act Reference* suggests another way that a law can become constitutional—by judicial interpretation. The court explained that the “essential features of the Court,” detailed in the *Supreme Court Act*, are now subject to the general amending formula. These essential features, the court wrote, “include, at the very least, the Court’s jurisdiction as the final general court of appeal for Canada, including in matters of constitutional interpretation, and its independence” (at para 94). What about Parliament’s historical power under s 101? The court explained that “Parliament undoubtedly has the authority under s. 101 to enact routine amendments necessary for the continued maintenance of the Supreme Court, but only if those amendments do not change the constitutionally protected features of the Court” (at para 101). Are you persuaded by how the court arrived at its conclusion that the Constitution of Canada does indeed “include” those parts of the *Supreme Court Act* that reflect the court’s “essential features”?

2. *The court as historian.* The court’s reasons in the Reference rely on its reading of its own historical evolution from Confederation to Patriation. There are questions, however, about whether the court’s reading of evolution is complete; it may be that a selective account of history was written to reinforce the conclusion that the court sought to reach. The following account invites us to dig deeper into the court’s reading of history:

This reading of the historical record is reasonably convincing, but it does seem rather convenient, even Whiggish, in portraying the Court's inevitable trajectory towards the apex of Canada's constitutional structure. For instance, abolition of appeals to the Privy Council can be seen as yet another one of Canada's slow, halting steps along the path towards independence—perhaps a halfway marker between the *Statute of Westminster, 1931* and patriation—rather than a positive affirmation of the role of a cherished national institution. Certainly “the idea that Canadian values should be taken into account by judges” influenced the decision to remove appeals to London. Nonetheless, dissatisfaction with the work of the Privy Council, seen as unduly favourable to provincial interests at the expense of strong central government, was probably more influential than a sense of national pride in the Court. Canadian independence required the termination of appeals to the Privy Council, but “a realistic appraisal of the quality and stature of the Supreme Court [in the 1920s] demanded a delay.” In 1947, when the way had been cleared for abolition, the “government continued to hesitate, a good indication that public opinion was still ambivalent.” The Supreme Court's metamorphosis into a “keystone” could be read as emerging due to historical happenstance rather than popular or political acclaim.

There are several interesting omissions from the Court's account of its journey. I discuss these in ascending order of importance. First, the Court gave little weight to the understanding of the actors in post-patriation constitutional reform efforts. For example, the drafters of the Meech Lake Accord proposed to add new sections to the *Constitution Act, 1867* in order to formally entrench the Court. In this process, unanimity was required for anything touching the composition of the Court while the general amending formula applied to all other changes. Though not conclusive, this historical precedent lends itself to the argument that the Court was not immediately entrenched in 1982. More could have been done to address the argument.

Second, although the abolition of automatic civil appeals has generally been seen as a significant event in the Court's evolution, it remains the case that there are criminal appeals as of right. Accordingly, the Court's control over its own docket is not absolute, and its freedom to focus on matters of fundamental legal importance not unfettered. Third, it is notable that the Court does not mention its controversial, patriation-enabling decision in the *Reference Re Resolution to amend the Constitution (Patriation Reference)*. Formally, amendments to what was then the *British North America Act, 1867* were effected by Westminster on the request of the House of Commons and Senate. Prime Minister Pierre Elliott Trudeau threatened to act without the support of the provinces, provoking constitutional tumult. A UK parliamentary committee was advised by William Wade, the doyen of British constitutional lawyers, that Westminster had a duty to act “as guardian of the rights of the Provinces.” Litigation understandably ensued in Canada. Three provincial governments referred the legality of the Trudeau plan to their respective provincial courts of appeal. Consolidating the appeals, a majority of the Court recognized that there was a constitutional convention requiring “a substantial measure of provincial assent” to constitutional changes. The Court did not shrink from recognizing—as opposed to enforcing—a convention. Neither of these conclusions was inevitable: The Court could well have concluded that the matter was entirely non-justiciable, but in requiring “substantial” provincial support, the Court ensured that a single province could not veto constitutional change and that country-wide assent would nonetheless be necessary. Its own decision thereby paved the way for the very patriation process that “enhanced the Court's role under the Constitution and confirmed its status as a constitutionally protected institution.”

Fourth, there is no discussion of the clauses in the *Canadian Charter of Rights and Freedoms (Charter)*—which was entrenched by the adoption of the *Constitution Act, 1982*—that allow for the limitation of some protected rights. Notably, the notwithstanding clause contained in section 33 permits Parliament or a provincial legislature to expressly declare that legislation “shall operate notwithstanding” certain provisions of the Charter. The presence of this power has not prevented the emergence of a “highly juridical orientation to constitutionalism” . . . . Such is the

dominance of the Court in matters of Charter interpretation that the notwithstanding clause has slipped into dormancy and perhaps even desuetude.

There was nothing inevitable about this: “[C]oordinate interpretation,” which privileges the input of the executive and legislative branches in matters of constitutional law, is an alternative means “of reconciling Canadian judicial power with the other principles and norms found in the Canadian constitution.” The Court’s treatment of section 1 of the *Charter* has been influential in this respect. The provision permits the imposition of “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

Here, the Court’s *own* adoption of a proportionality test that gave it the authority to determine whether limits on *Charter* rights can be justified, and its own retention of the final word as to the compatibility of legislative modifications with judicial decisions, solidified its position at the apex of Canada’s constitutional order. My point is not that the Court’s ultimate conclusion was wrong, but that it relied on a supporting narrative that was somewhat selective. A fuller, more critical account highlights just how historically contingent the Court’s ascent was and how the Court itself paved part of the way.

Paul Daly, “A Supreme Court’s Place in the Constitutional Order: Contrasting Recent Experiences in Canada and the United Kingdom” (2015) 41 *Queen’s LJ* 1 at 9-14 (footnotes omitted).

3. *The court’s “essential features.”* The Reference made clear that the court’s “essential features” are constitutionally protected under Part V, either under the unanimity procedure or the general amending formula. What was made much less clear, however, is the identity and scope of these essential features. We know from the Reference that these essential features include the court’s composition, independence, and its jurisdiction as the final court of appeal. But, as one scholar observes, “we still do not have an exhaustive list of the Court’s ‘essential’ features, leaving considerable uncertainty as to what future reforms will or will not require constitutional amendment.” As a result, “considering Canada’s difficulty in achieving reform via constitutional amendment, in practice the Supreme Court might end up unpacking its own composition and ‘essential features’ on a case-by-case basis”: see Erin Crandall, “DIY 101: The Constitutional Entrenchment of the Supreme Court” in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) 211 at 222-23. The choice to refrain from giving an exhaustive list of its own essential features could have been made by the court for strategic reasons of self-preservation and also to reassert its authority as the ultimate interpreter of the Constitution of Canada. In this way, the court’s reasons in the Reference would have the effect of entrenching the court against future changes without the court first agreeing to them. Setting aside the constitutional politics of the Reference, should the court, in the interest of the clarity of our constitutional law, have delineated its essential features?

## V. COMPARATIVE AND THEORETICAL PERSPECTIVES ON CONSTITUTIONAL AMENDMENT

### A. The World’s Most Rigid Constitution?

We know from the recent failures of comprehensive constitutional amendment in the Meech Lake and Charlottetown accords that the Constitution of Canada can sometimes be extraordinarily difficult to amend. We qualify the statement with “sometimes” because there are five procedures of constitutional amendment in the Constitution’s amending formula and

not all of them appear to us today as dead ends. For instance, the bilateral procedure in s 43 has been used seven times to amend the Constitution. Similarly, the federal unilateral procedure in s 44 has been used three times and requires only the approval of Parliament. And the provincial unilateral procedure in s 45 may be used by any provincial legislative assembly to amend its own constitution, perhaps the easiest of all amendment procedures because the lack of a second chamber in any province means that only one house must agree, by a simple majority, to amend its own constitution.

What makes the Constitution so hard to amend is not only the difficulty of assembling the necessary approvals from the majorities required by the general amending formula in s 38 and the unanimity procedure in s 41. (With one exception, neither procedure has been successfully used: see Section III.C, above.) It is that the requirements for constitutional amendment go beyond those found in Part V. As discussed above (see Section IV.A), the 1996 regional veto Act requires the consent of a majority of provinces—including British Columbia, Ontario, Quebec, and at least two each from the Atlantic and Prairie provinces, representing at least half of the regional population—before an amendment using the general amending formula in s 38 is even proposed. There are also laws—for example, in Alberta and British Columbia—mandating a binding provincial referendum before the legislative assembly votes on a major amendment requiring provincial approval: see *Constitutional Referendum Act*, RSA 2000, c C-25, ss 2(1), 4; *Constitutional Amendment Approval Act*, RSBC 1996, c 67, s 1; and *Referendum Act*, RSBC 1996, c 400, s 4. Similar laws have been passed across the country authorizing (but not requiring) binding or advisory referenda before the legislative assembly votes on an amendment. And, as we have discussed above (see Section III.D) in connection with the Charlottetown Accord, some scholars have suggested that there now exists a constitutional convention requiring a national referendum before a major constitutional amendment is completed. What therefore makes the Constitution so difficult to amend is not only Part V itself, but the legal and political infrastructure that has developed around it: see Richard Albert, “The Difficulty of Constitutional Amendment in Canada” (2015) 53 *Alta L Rev* 85 at 96-105.

How difficult is it to amend the Constitution of Canada in comparison with the constitutions of the world? Scholars have tried to answer this question. For example, Arendt Lijphart has concluded from a study sample of 36 countries that Canada ranks among the world’s most rigid constitutions with respect to the majorities required for amendment, tied with Argentina, Australia, Germany, Japan, Korea, Switzerland, and the United States, each of which he identifies as requiring supermajorities exceeding two-thirds: see Arendt Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, 2nd ed (New Haven, Conn: Yale University Press, 2012) at 208. Another scholar, Astrid Lorenz, has studied 39 countries, concluding that Canada is tied with Chile and Switzerland, with an index of difficulty of 7.0, behind Belgium (9.5), the United States and Bolivia (9.0), and the Netherlands (8.5), followed by Australia, Denmark, and Japan, three countries tied at 8.0: see Astrid Lorenz, “How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives” (2005) 17 *J Theoretical Politics* 339 at 358-59.

In what is today the most referenced study of amendment difficulty, Donald Lutz generated a ranking of 36 countries, not including Canada, in which the United States holds the top score for amendment difficulty (5.10), followed by Switzerland and Venezuela (4.75), with Australia (4.65) and Costa Rica (4.10) next: see Donald Lutz, *Principles of Constitutional Design* (New York: Cambridge University Press, 2006) at 170. Because the study excluded Canada,

one scholar applied Lutz's methods to measure how Canada would have ranked in the study. The unanimity procedure would have scored 5.00, ranking Canada as the second on the list in terms of amendment difficulty. Measuring the unanimity procedure plus the requirements of the regional veto Act plus the provincial referenda required by some provinces prior to approving an amendment would have generated a score of 8.00, well above the index of difficulty for the United States Constitution, thought by most to be the world's most difficult constitution to amend: see Albert, "The Difficulty of Constitutional Amendment in Canada," above at 94-100.

Does it matter that our Constitution is difficult to amend? Recall from Section I of this chapter that one of the reasons why constitutions contain amendment procedures is to distinguish the constitutional text from an ordinary law, the former made harder to amend than the latter. But is it possible for the rules of constitutional amendment to be *too* difficult? What are the consequences of having a constitution that cannot be amended when it is necessary to make changes to the polity? Are there advantages to having a rigid constitution? One of the world's most difficult constitutions ever to amend—perhaps *the* most difficult—was the Articles of Confederation, the first constitution the United States adopted after its declaration of independence. The Articles of Confederation required the agreement of each of the 13 states to make any amendment. Many attempts were made but all of them failed. After years of failed efforts to amend the Articles of Confederation, the people of the United States decided to start afresh with a new constitution, the one that survives to this day: see Richard S Kay, "The Illegality of the Constitution" (1987) 4 Const Commentary 57.

## B. Formal and Informal Amendment

Our discussion of constitutional amendment has so far implicitly involved what we can identify as "formal" constitutional amendment as opposed to "informal" constitutional amendment. A formal constitutional amendment refers to a constitutional amendment that alters the text of the constitution, the term "formal" being roughly though not completely analogous to "written." In contrast, the concept of an informal constitutional amendment refers to a constitutional amendment that changes the meaning of the constitution without altering its text. The term "informal" here is, again, roughly though not completely analogous to "unwritten." Both these kinds of constitutional changes—written and unwritten—are evident in Canada, although what we call them is a matter for debate—for example, is it proper to call an informal change an "amendment"? What complicates definitional matters in the case of Canada is that we do not have a single master-text constitution in which we would expect to find most of our most important constitutional rules.

There are many ways a constitution can change informally. It can change informally as a result of a new constitutional convention that is integrated, without any change to the text, into the larger body of constitutional commitments. It can change when a statute of some particular significance becomes more important than an ordinary statute and achieves what we might call quasi-constitutional status. A constitution can also change informally by executive action, by implicit repeal and also by treaty, to name a few methods of informal constitutional change.

In Canada, the most common way the Constitution changes informally is by judicial interpretation. As Allan Hutchinson has observed, the courts "have become the preferred site for effecting important changes in the constitutional order." Hutchinson moreover argues that

this method of constitutional change is “less democratic” than the set of procedures established in Part V to update the Constitution: see Allan Hutchinson, “Constitutional Change and Constitutional Amendment: A Canadian Conundrum” in Xenophon Contiades, ed, *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Abington, UK: Routledge, 2013) 51 at 56-57. Hutchinson is not alone in taking this view of informal constitutional change by judicial interpretation in Canada. Dale Gibson has expressed what seems to be an even stronger view on what he has called “judicial amendment” in Canada.

**Dale Gibson, “Founding Fathers-in-Law: Judicial Amendment  
of the Canadian Constitution”**

(1992) 55 Law & Contemp Probs 261 at 261-62, 266-68, 271-72, 276-80  
(footnotes omitted)

There is a way, in Canada and in other countries that treat their courts of last resort as constitutional oracles, in which constitutional change can be achieved with a minimum of difficulty and a certainty of success. This is the way of judicial amendment: constitutional “interpretations” of the Constitution by the ultimate judicial tribunal (the Supreme Court of Canada in my country now; the Judicial Committee of the British Privy Council in the past) that have the result of nullifying or radically altering the constitutional text or its authoritatively accepted meaning. Such amendments, with consequences every bit as momentous as those that are brought about through formal political processes, can be accomplished swiftly and surely, and on the initiative, with no obligation of prior public notice or consultation, of the nine mellowing men and women (or a majority of them) who sit on the Supreme Court.

Some will disagree that judges can or do “amend” the Canadian Constitution. Critics will point to the fact that Part V of the Constitution Act, 1982, entitled “Procedure For Amending Constitution of Canada,” contains no reference to judicial amendment, and that section 52(3) of the same Act stipulates that “[a]mendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.” It should be noted, however, that although section 52(3) limits the amendment process to techniques “in accordance with the authority contained in the Constitution of Canada,” the description of “Constitution of Canada” set out in the preceding subsection is not an exhaustive one. While section 52(2) lists a number of documents that the Constitution of Canada “includes,” it does not deny the possibility that other norms, judicially invented ones among them, are also included.

[In *The Prince*] Machiavelli [warned] that constitutional amendment is “dangerous to carry through.” Judicial amendment is as dangerous as formal amendment, though the danger lies chiefly in the consequences rather than in the implementation. No nine people, however wise and well informed, possess the individual or collective powers of imagination necessary to foresee fully the ramifications of major alterations to the constitutional norms upon which their nation’s legal and governmental structures are founded. Even if they did, they would lack the range of experience and the moral authority required for sound determinations as to the direction such alterations should take. This is not to say



that the democratic process necessarily produces better results, but only that there is danger in entrusting constitutional change to the unaided judicial process. ...

Judicial amendment of the Canadian Constitution was not invented by the Supreme Court of Canada. Its predecessor as Canada's court of last resort, the Judicial Committee of the British Privy Council, began the process. One of the Privy Council's most audacious amendments concerned the power bestowed on the Parliament of Canada by section 91(2) of the Constitution Act, 1867, to make laws in relation to "the regulation of trade and commerce."

The fact that it was listed second among the enumerated heads of federal jurisdiction, immediately after "the public debt and property," and ahead of such vital matters as taxation, postal service, defence, navigation and shipping, currency, coinage, and banking, must say something about the significance of federal regulation of trade and commerce in the eyes of those who negotiated, drafted, and debated the 1867 Constitution. The fact that it was expressed in more expansive language than the equivalent provision to the United States Constitution was certainly no accident. But a relentless progression of restrictive Privy Council rulings between the 1880s and the 1920s pared the power to the point where it could be described by Justice Idington of the Supreme Court of Canada as "the old forlorn hope, so many times tried, unsuccessfully."

...

The Privy Council did not admit that it was "amending" the Constitution. ... Viscount Haldane claimed that the Judicial Committee's duty "now, as always, is simply to interpret the British North America Act." ... To classify an "interpretation" of section 91(2) that lacked any textual support, deprived the provision of any independent application ... as anything less than outright amendment serves only to obfuscate constitutional realities.

...

This catalogue of judicial amendments to the Canadian Constitution could be trebled in length with no difficulty. An extended study would include, for example:

- The long, tidal, line of Privy Council and Supreme Court decisions relating to the Canadian Parliament's residual power under the opening clause of section 91 to make laws for the "peace, order and good government of Canada," which has sometimes been held to confer federal jurisdiction over matters as minor as uniform national temperance laws or beautification of the national capital, and has on other occasions been found not to authorize federal laws needed to cope with problems as nationally momentous as the Great Depression of the 1930s.
- The *Patriation Reference*, in which the Supreme Court of Canada gave itself, with historic consequences, the power to pronounce on non-legal matters (political conventions of the Constitution), despite the fact that section 101 of the Constitution Act, 1867, under which the Court was created, seems to contemplate that, as a "court," its task is to administer "laws."
- The *Anti-Inflation Act Reference*, which contained prophetic pronouncements by Justice Beetz (subsequently adopted by a majority of his colleagues despite the fact that he dissented in the result), confining "national dimension" uses of the federal "peace, order and good government" power to a radically circumscribed range of circumstances, and bestowing on the Parliament of Canada the "unilateral" power,

nowhere articulated in the text of the Constitution Acts, to make a “temporary pro tanto amendment” to the Constitution in times of national emergency.

- The *Manitoba Language Reference*, in which the Court decreed that it had the authority, again nowhere to be found in the Constitution Acts, to grant temporary validity, in the interests of preserving civil order, to laws that it had found to be constitutionally invalid.

Enough has already been said, however, without examining these and similar constitutional landmarks at greater length, to demonstrate my thesis that, in Canada at least, the judiciary has been responsible for constitutional amendments of great import. ...

I do not contend that every major constitutional ruling by the courts involves amendment. The amending decisions with which this article is concerned are relatively rare. ...

The judicial decisions I classify as amendments ... are those that, whatever the sweep of their impact, are not capable of having been products of a fair construction of the Constitution Acts or of other documents of the Canadian Constitution. In “fair construction” I include not just obvious interpretations, but also imaginative rulings that, while perhaps unexpected, can be shown to flow logically from words or implications in the text.

...

It should not be supposed that I necessarily object to judicial amendments of the Constitution. The point of the earlier examples was not to criticize substance but to illustrate process. ... Nor do I find fault in general with the fact that major constitutional amendments are made by courts. Observers of a more populist persuasion than I may consider it inappropriate for judicial appointees, lacking a democratic mandate, to engage in outright alteration of the country’s most fundamental legal and political document. I do not—not absolutely, at any rate. There are, indeed, compelling reasons to believe that occasional judicial amendment of the Constitution is positively beneficial, and sometimes unavoidable.

The formal process for amending the Constitution of Canada, set out in sections 38 to 49 of the Constitution Act, 1982, is exceedingly cumbersome. As the lengthy debate over the Meech Lake Accord demonstrated, that process can consume prodigious quantities of time, energy, money, and political will, without necessarily producing change. Even in situations far less politically charged than the Meech Lake imbroglio, constitutional amendments are usually hard to achieve by the formal route. The reasons for this are several. Politicians are often too preoccupied with more immediate concerns to be much interested in the future health of the Constitution. Moreover, they are reluctant to be associated with proposals (such as suggestions to expand the constitutional rights of religious or linguistic minorities) that would risk alienating significant segments of the electorate. On certain matters (such as the consequences of restricting “fundamental justice” in section 7 of the Charter to purely procedural matters), judges are simply better qualified than politicians to decide. On others (the narrowing of the federal commerce power is a good example), the existence in the formal process of a veto power on the part of the affected government all but precludes any change by legislators. Finally, some situations (the need for a device to prevent chaos resulting from the wholesale invalidation of provincial legislation in the *Manitoba Language Reference*, for instance) call for a more rapid response than formal procedures permit. In circumstances like these, necessary constitutional amendments might never be made if they were not fashioned by judicial hands.

The fact that judges amend the Constitution is not, therefore, always a problem in itself. It is inevitable in some circumstances, and at times beneficial. The undemocratic nature of the process is a legitimate cause for concern, however. Some think that it is dangerous even to acknowledge publicly that courts sometimes amend constitutions. They seem to fear that the electorate will then insist that the power be taken away. In my view, that is a misplaced concern. The public already knows what the courts are doing, and I think its respect for the judiciary is less likely to be damaged by an open acknowledgement of the truth than by a transparent denial that the courts are going beyond mere “interpretation.”

It is nevertheless anomalous that a democratic constitution should be capable of outright amendment by an undemocratic institution and undemocratic procedures. Therefore, courts should exercise self-restraint in these matters, permitting themselves to engage in constitutional amendment only when it is either inevitable that they do so, or when it would clearly be detrimental to the nation to leave the matter to the formal amendment process. In all other circumstances, judges should restrict their interpretation to the (rather generous, after all) forms of judicial review that fall within the scope of fair construction.

Even in the circumstances where it is appropriate, judicial amendment of the Constitution involves certain serious difficulties. These difficulties concern how judges perform the task. The remainder of this article will address factors that impair the ability of the Supreme Court of Canada to perform the amendment function as effectively as it should.

...

Supreme Court judges are selected from members of Canada’s elite. Most of them know little, from personal experience, about some of the most trying problems ordinary citizens are commonly confronted with in the course of their daily lives. ...

In *all* of its work, whether constitutional or not, the Court would function more satisfactorily, in my view, if its membership better reflected the diversity of the country’s population. While this concern is not exclusively relevant to the problem of judicial amendment of the Constitution, it deserves special emphasis in the context of the Court’s role as an occasional amender of Canada’s most fundamental law. ...

Even if it were possible for any nine individuals to ever be reasonably representative of a country’s population, those nine people could not be expected to appreciate fully all the factors involved in, or all the interests affected by, a major amendment to the country’s constitution. Such amendments can have a profound influence on economic growth, political power, or cultural development; they usually affect matters having deep historical roots, and they often draw upon foreign constitutional experience. They also may have an impact upon policing, education, health care, immigration, agriculture, transportation, and many other aspects of life. No nine lawyers, however learned and wise, could ever possess the experience or the expertise necessary to understand the full future implications of major constitutional amendments.

The most significant difference between the formal constitutional amendment procedures established by the Constitution Act, 1982, and the process by which the Supreme Court of Canada amends the Constitution is that the formal route entails greater opportunities for the expression of pertinent points of view and for taking advantage of relevant expertise. Even the simplest types of amendment (such as unilateral modifications by the Parliament of Canada or by provincial legislatures to their own internal constitutions in accordance with sections 44 and 45) call at least for debates in the responsible legislative assemblies in the bright light of news media scrutiny. Other types of amendments require

much more public involvement: debates in the legislatures of all affected jurisdictions (section 43); or in the federal Parliament and at least seven provincial legislatures (section 38); or, for amendments concerning the most important matters, in all federal and provincial legislative bodies (section 41). Moreover, the governments in question customarily supplement these legislative debates concerning proposed constitutional changes with public hearings, technical studies performed by staff and commissioned experts, interminable intergovernmental discussions and negotiations, and investigations by special legislative committees. First, second, and third drafts are circulated, criticized, revised, published, editorially supported and attacked, lobbied for and against, modified, rescrutinized, renegotiated, debated in one legislative chamber after another, and eventually, months or years after the proposal was conceived, adopted or rejected.

In the case of judicial amendment, by contrast, the alteration has usually been made, in its final form, before the general public is even aware that a change is in prospect. Sometimes the amendment does not even receive much publicity at that point. Canadians are still generally unaware of the radical judicial restriction of their equality rights that occurred in *Turpin*. It is true that judicial amendments are likely to have been preceded by intense research, discussion, debate, and perhaps even negotiation, on the part of the Supreme Court judges themselves (although the unanimity of *Turpin* suggests that this is not always the case). These studies and exchanges are necessarily constrained, however, by the severe limitation of time and research resources available to the nine judges; they cannot be considered to approximate the opportunities that the formal amendment process presents for informed consideration of all factors and consequences.

It is also true that the Court has the benefit of both written and oral arguments by skilled counsel representing opposing points of view, as well as judgments prepared by lower level judges in the same case. If evidence was presented at the lower levels, that is available also. The fact that all attorney generals, federal and provincial, are entitled to be notified of, and to intervene in, all Supreme Court of Canada litigation involving constitutional issues, and the possibility of other relevant interest groups also being accorded intervenor status, reduce the likelihood that major considerations will escape the Court's notice. If they should be overlooked or dealt with in a manner considered inappropriate, there is certain to be astringent criticism from both the academic community and the public media.

These factors are not entirely satisfactory substitutes, however, for the full-tilt negotiation and public debate that usually animates the formal process of constitutional amendment. The points of view expressed in argument, and the evidence by which they are supported, are restricted in scope by the factual issues in dispute, and by the Court's limited tolerance for intervenor briefs. Time and resource pressures are severe. Public acceptance of constitutional amendments brought about in this manner is difficult to win in a democratic society. Also, *ex post facto* criticism by academics and others comes too late to prevent errors from being made. Admittedly, the relative ease with which judicial amendments can be enacted permits the Court to make future adjustments in the light of criticisms, but only at the cost of much confusion and inconvenience for those individuals, organizations, businesses, and governmental agencies whose activities are affected by constitutional considerations. It would be better if the Court, possessed of all pertinent data, got it right the first time.

[Gibson goes on to recommend the creation of a constitutional advisory committee that would research and provide recommendations on proposed constitutional amendments.]

Hutchinson and Gibson are making two different claims, though each claim is related in an important way at its core. Both are pointing to a particular phenomenon of constitutional change in Canada—that courts have changed the meaning of the Constitution in a way that suffers from a democratic deficit. But whereas Hutchinson stops short of identifying this kind of constitutional change by judicial interpretation as an “amendment,” Gibson in fact labels it a “judicial amendment.” What is at stake in calling a change an amendment? Do you agree with Gibson’s critique of the court? Taking Gibson’s critique as well-founded, is there a way to prevent “judicial amendment”?

Lest we conclude that judicial “amendment” is something to be discouraged, it is worth nothing that courts are often compelled to act in the face of legislative inaction, delay, or stalemate. If courts do in fact amend the Constitution in an informal way, it may be because political actors are unable or unwilling to do so using the formal methods that Part V offers. As Adrian Vermeule has observed, the alternative to formal constitutional amendment, where it is difficult for whatever reason, is “judicially developed constitutional law, which itself changes over time in response to political, social, and cultural shifts”—what we might describe as a “judicial updating” of the Constitution if we are not comfortable with the idea of “judicial amendment”: see Adrian Vermeule, “Constitutional Amendments and the Constitutional Common Law” in Richard W Bauman & Tsvi Kahana, eds, *The Least Dangerous Branch: The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006) 229 at 243, 245.

### C. An Unconstitutional Constitutional Amendment?

It has become common for courts around the world to rule that a formal constitutional amendment is unconstitutional. An unconstitutional constitutional amendment—how can that be? Imagine that amending actors follow all of the rules outlined in the Constitution to pass an amendment, with all required majorities or supermajorities properly assembled to approve an amendment. Further imagine that the amendment is approved by all relevant bodies and that it is promulgated and subsequently entered into the text of the Constitution. This is often the kind of constitutional amendment that courts have invalidated as unconstitutional.

To understand the basis on which courts can invalidate a constitutional amendment, it is useful to learn from India. The seeds for finding an amendment unconstitutional were planted in India in 1951, only one year after the Constitution came into force, when the Indian Supreme Court was asked whether there were any limits to the amendment power in India. The court answered no: see *Sri Sankari Prasad Singh Deo v Union of India*, 1951 AIR 458, 1952 SCR 89. Subsequently, however, the court held that the power to amend the constitution could not be used to violate fundamental rights: see *Golaknath v State of Punjab*, 1967 AIR 1643, 1967 SCR (2) 762. Shortly afterward, the court again narrowed the power of constitutional amendment when it held that the amendment power could not be used if it violated the “basic structure” of the Constitution: see *Kesavananda Bharati Sripadagalvaru v Kerala*, 1973 AIR 1361, 1973 SCC (4) 225. The “basic structure” of the Indian Constitution is not

laid out anywhere in the Constitution; it is instead a judicially constructed notion of constitutional coherence that seeks to defend the Constitution from changes that are inconsistent with its own foundations.

A key case in the modern history of the Indian Constitution is *Minerva Mills Ltd v Union of India & Ors*, 1980 AIR 1789, 1981 SCR (1) 206. For our purposes, the relevant part of the case concerned an amendment to the amendment formula in the Indian Constitution. Section 55 of the *Constitution (Forty-second Amendment) Act, 1976*, inserted two new subsections into art 368, in which the Indian Constitution's amendment formula is contained. Article 368 authorizes the two Houses of Parliament to amend the Constitution with a simple majority, subject to a few exceptions for amendments that require the approval of at least half of the states. The 42 amendment introduced subsections 4 and 5 into art 368:

(4) No amendment of this Constitution ... shall be called in question in any court on any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

The effect of the amendment was to shield all constitutional amendments from the Supreme Court's power of judicial review. The amendment asserted in the constitutional text that plenary power for constitutional amendment belonged to the two Houses of Parliament, and that all amendments would be valid irrespective of what legislators chose to add to, remove from, or repeal in the Indian Constitution using their power of amendment. In *Minerva Mills*, the Indian Supreme Court declared this amendment unconstitutional.

### **Minerva Mills Ltd & Ors v Union of India & Ors**

1980 AIR 1789, 1981 SCR (1) 206

CHANDRACHUD CJC:

In *Keshavananda Bharati* this Court held by a majority that though by Article 368 Parliament is given the power to amend the Constitution, that power cannot be exercised so as to damage the basic features of the Constitution or so as to destroy its basic structure. The question for consideration in this group of petitions ... is whether [s 55] of the Constitution (42nd Amendment) Act, 1976 transgress[es] that limitation, on the amending power.

...

The question which we have to determine on the basis of the majority view in *Keshavananda Bharati* (Supra) is whether the amendments ... damage the basic structure of the Constitution by destroying any of its basic features or essential elements.

...

[Section 55] introduces two new clauses in Article 368, namely, clauses 4 and 5. Clause 5 speaks for itself and is self explanatory. Its avowed purpose is the "removal of doubts" but after the decision of this Court in *Kesavananda Bharati* (Supra), there could be no doubt as regards the existence of limitations on the Parliament's power to amend the Constitution. In the context of the constitutional history of Article 368, the true object of the declaration contained in Article 368 is the removal of those limitations. Clause 5

confers upon the Parliament a vast and undefined power to amend the Constitution, even, so as to distort it out of recognition. The theme song of the majority decision in *Keshvananda Bharati* (Supra) is: "Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity." The majority conceded to the Parliament the right to make alterations in the Constitution so long as they are within its basic framework. And what fears can that judgment raise or misgivings generate if it only means this and no more: The Preamble assures to the people of India a polity whose basic structure is described therein as a Sovereign Democratic Republic; Parliament may make any amendments to the Constitution as it deems expedient so long as they do not damage or destroy India's sovereignty and its democratic, republican character. Democracy is not an empty dream. It is a meaningful concept whose essential attributes are recited in the preamble itself: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship, and Equality of status and opportunity. Its aim, again as set out in the preamble, is to promote among the people an abiding sense of "Fraternity assuring the dignity of the individual and the unity of the Nation." The newly introduced clause 5 of Article 368 demolishes the very pillars on which the preamble rests by empowering the Parliament to exercise its constituent power without any "limitation whatever." No constituent power can conceivably go higher than the sky-high power conferred by clause 5, for it even empowers the Parliament to "repeal the provisions of this Constitution," that is to say, to abrogate the democracy and substitute for it a totally antithetical form of Government. That can most effectively be achieved, without calling a democracy by any other name, by a total denial of social, economic and political justice to the people, by emasculating liberty of thought, expression, belief, faith and worship and by abjuring commitment to the magnificent ideal of a society of equals. The power to destroy is not a power to amend.

Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and, therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.

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Since, for the reasons above mentioned, clause 5 of Article 368 transgresses the limitations on the amending power, it must be held to be unconstitutional.

The newly introduced clause 4 of Article 368 must suffer the same fate as clause 5 because the two clauses are inter-linked. Clause 5 purports to remove all limitations on the amending power while clause 4 deprives the courts of their power to call in question any amendment of the Constitution. Our Constitution is founded on a nice balance of power among the three wings of the State, namely the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled. Clause 4 of Article

368 totally deprives the citizens of one of the most valuable modes of redress which is guaranteed by Article 32. The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitations on the amending power.

If a constitutional amendment cannot be pronounced to be invalid even if it destroys the basic structure of the Constitution, a law passed in pursuance of such an amendment will be beyond the pale of judicial review because it will receive the protection of the constitutional amendment which the courts will be powerless to strike down. Article 13 of the Constitution will then become a dead letter because even ordinary laws will escape the scrutiny of the courts on the ground that they are passed on the strength of a constitutional amendment which is not open to challenge.

Clause 4 of Article 368 is in one sense an appendage of Clause 5, though we do not like to describe it as a logical consequence of Clause 5. If it be true, as stated in clause 5, that the Parliament has unlimited power to amend the Constitution, courts can have no jurisdiction to strike down any constitutional amendment as unconstitutional. Clause 4, therefore, says nothing more or less than what clause 5 postulates. If clause 5 is beyond the amending power of the Parliament, clause 4 must be equally beyond that power and must be struck down as such.

The idea of an unconstitutional constitutional amendment has migrated across the globe, landing in both common law and civil law jurisdictions, in parliamentary and presidential systems, and also in countries that are commonly regarded as democracies and those that we might consider hybrid regimes straddling the boundary between democracy and autocracy. Although the doctrine of unconstitutional constitutional amendment has yet to reach Canada, it is prominent in its neighbour, the United States. To date, there has yet to be a federal invalidation of a federal constitutional amendment, but federal and state courts have often invalidated state constitutional amendments. Consider one example, below, in which the United States Supreme Court, in a 6–3 decision written by Justice Kennedy, held unconstitutional an amendment to the Colorado Constitution on the ground that it infringed the fundamental rights of gays and lesbians to participate in the political process.

### **Romer v Evans**

517 US 620 (1996)

KENNEDY J (Stevens, O'Connor, Suter, Ginsberg, and Breyer JJ concurring):

One century ago, the first Justice Harlan admonished this Court that the Constitution “neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado’s Constitution.

The enactment challenged in this case is an amendment to the Constitution of the State of Colorado, adopted in a 1992 statewide referendum. The parties and the state



courts refer to it as “Amendment 2,” its designation when submitted to the voters. The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities. For example, the cities of Aspen and Boulder and the City and County of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services. . . . What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation. See Boulder Rev. Code 12-1-1 (defining “sexual orientation” as “the choice of sexual partners, i.e., bisexual, homosexual or heterosexual”); Denver Rev. Municipal Code, Art. IV 28-92 (defining “sexual orientation” as “[t]he status of an individual as to his or her heterosexuality, homosexuality or bisexuality”). Amendment 2 repeals these ordinances to the extent they prohibit discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.” Colo. Const., Art. II, 30b.

Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:

“No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.” *Ibid.*

Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced in the District Court for the City and County of Denver. Among the plaintiffs (respondents here) were homosexual persons, some of them government employees. They alleged that enforcement of Amendment 2 would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation. . . .

Sweeping and comprehensive is the change in legal status effected by this law. So much is evident from the ordinances that the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies. . . .

Amendment 2’s reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings. See, e.g., Colo. Rev. Stat. 24-4-106(7) (1988) (agency action subject to judicial review under arbitrary and capricious standard); 18-8-405 (making it a criminal offense for a public servant

knowingly, arbitrarily or capriciously to refrain from performing a duty imposed on him by law); 10-3-1104(1)(f) (prohibiting “unfair discrimination” in insurance); 4 Colo. Code of Regulations 801-1, Policy 11-1 (1983) (prohibiting discrimination in state employment on grounds of specified traits or “other non-merit factor”). At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and thus forbidden basis for decision. Yet a decision to that effect would itself amount to a policy prohibiting discrimination on the basis of homosexuality, and so would appear to be no more valid under Amendment 2 than the specific prohibitions against discrimination the state court held invalid.

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The Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.

Taking the first point, even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law. . . .

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. . . .

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. . . .

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A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. ... Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not.

...

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

*It is so ordered.*

Can you imagine a constitutional amendment being ruled unconstitutional in Canada? On the one hand, the availability and frequent use of the reference procedure, discussed in Chapter 2, makes it unlikely that any amendment of questionable constitutional validity would not first be referred to the Supreme Court for its advice. Whatever the court's reasons, one could not characterize the Reference as an invalidation of a constitutional amendment, because the amendment would have yet to be proclaimed. There are of course several prominent examples of the Supreme Court giving advice on a proposed constitutional amendment *before* it is proposed and becomes effective; the *Patriation* and *Senate Reform* references are just two. But neither reference is like the Indian judgment in *Minerva Mills* or the American case of *Romer*.

On the other hand, it is conceivable that a constitutional amendment could one day be proclaimed that would only later be challenged in court. If that day ever comes, how would Canadian courts respond? We know that superior and appellate courts in Canada have weighed in on the constitutional validity of a constitutional amendment: see *Hogan v Newfoundland (Attorney General)*, 2000 NFCA 12, leave to appeal to SCC refused, [2000] SCCA No 191; *Potter c Québec (Procureur général du)*, [2001] RJQ 2823 (CA), leave to appeal to SCC refused, [2002] CSCR No 13. But the Supreme Court of Canada has not yet faced this question.

The judicial power to invalidate a constitutional amendment raises a similar problem of legitimacy as that raised by the institution of judicial review: see the discussion in Chapter 2. The principal difference is that the problem is magnified in the case of constitutional amendment. In Section I of this chapter, it was suggested that the power of constitutional amendment is an incident of democracy and a marker of sovereignty. You will recall that the context for this discussion was a question concerning who should possess the power to amend the Constitution of Canada—the Parliament of the United Kingdom, or Canada itself. Today Canada possesses the power of constitutional amendment, settling the question about whether Canada is a sovereign state. But on the horizon may await another question of

sovereignty. Which institution or institutions possess the power of constitutional amendment as a final matter in Canada—the institutions authorized by Part V of the *Constitution Act, 1982* to amend the Constitution, or the Supreme Court, which could one day be presented with an occasion to declare a constitutional amendment unconstitutional? Only if that day ever comes may we know with certainty where in Canada the ultimate power of constitutional amendment resides.