

The Long-Term Influence of Failed Amendments

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I. INTRODUCTION

Richard Albert's book on comparative approaches to constitutional amendment urges that constitutions be changed in a manner that is faithful to the existing requirements in a state for doing so.¹

One of the leading theorists on constitutional amendment, Bruce Ackerman, has argued that given the high levels of consent required to amend the national constitution in the United States, an alternate route has emerged in practice.² Federal actors put forward initiatives; the courts reject them as inconsistent with the existing constitution; the people pass judgment on the initiatives in deciding whether to re-elect the politicians who favour the initiative; the court alters its interpretation of the constitution so that the initiative is now lawful. There is a *de facto* alternative to formal requirements.

In this paper, I want to explore how failed constitutional amendments nevertheless end up being incorporated into the formal Canadian

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¹ Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (New York: Oxford University Press, 2019) at 79-80, 264-64.

² See Bruce Ackerman, *We the People—Volume I: Foundations* (Harvard University Press, 1991); Bruce Ackerman, *We the People—Volume II: Transformations* (Harvard University Press, 1998); Bruce Ackerman, *We the People—Volume III: The Civil Rights Revolution* (Harvard University Press, 2014); see discussion of Ackerman in Albert, *supra* note 1 at 19-22.

constitution or into vehicles that have a practical effect that is somewhat similar, although not identical to formal amendments.

One common route is judicial interpretation; courts may reinterpret, or read into, the existing constitutional provisions in a manner that honours the principles, or even language, of failed amendment proposals.

Yet there are many other routes in Canada to effectively alter the basic rules of doing government operations in addition to formally amending the text of the written Constitution of Canada or the judicial interpretation of that document. They can include:

- enacting ordinary legislation that is considered “quasi-constitutional” in nature – of great importance, superior to ordinary legislation, and difficult politically to change;³
- entering into international agreements that embody a constitutional proposal, which is then implemented in Canadian domestic legislation. It may then be practically difficult, or impossible politically, to alter the provision, as the consent of an important treaty partner is required;⁴
- using routes to amending the constitution of Canada which do not require a high level of consent, such as the 7/50 or unanimity formulas. Some parts of the National Constitution can be changed by an ordinary act of Parliament or a provincial

³ See *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536, 23 DLR (4th) 321 [*Simpsons-Sears*]; *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 [*Information Commissioner*]; *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 [*Lavigne*]; *Thibodeau v Air Canada*, 2014 SCC 67 [*Thibodeau*].

⁴ See *SD Myers Inc v Government of Canada*, 2000 NAFTA Investor-State Arbitration Panel at para 34, Schwartz, separate opinion; *Reference re legislative powers as to regulation and control of aeronautics in Canada*, [1930] SCR 663 [*Re Aeronautics*]; *Reference re Regulation and Control of Radio Communication*, 1931 SCR 541, [1931] 4 DLR 865 [*Re Radio*]; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*Re Greenhouse*]; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 49 DLR (4th) 161 [*Crown Zellerbach*]; *R v Hauser*, [1979] 1 SCR 984, 98 DLR (3d) 193; *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32. Strictly speaking, entering into federal legislation does not enhance the scope of Parliament’s authority, but the indirect effect just referred to is significant. The SCC has also begun to say that international treaties are an important source in interpreting the Charter even though it is not expressly mentioned in the constitution of Canada; see *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, [2007] 2 SCR 391 [*Health Services*].

legislature, others by formulas that require the consent, such as that of the federal level and the legislature of a single province;⁵

- entering into federal-provincial agreements;⁶
- adopting political practices (conventions⁷) that are created and changed through the actions of government actors and their accompanying statements, rather than through formal changes to any written text;⁸

Since the 1980s, two major initiatives to amend the formal constitution of Canada failed politically. They were the Meech Lake Accord and the Charlottetown Accord. The focus of this paper is on the extent to which some of the concepts in those proposals were ultimately adopted through some of these other channels. In particular, ideas contained in the five “Quebec demands” behind the Meech Lake Accord seem to have been influential over the long run.

⁵ For example, the elimination of the denomination school system in Quebec using the one province / federal formula; changing the name of the province of Newfoundland to Newfoundland and Labrador; and changes to the denomination school status in Newfoundland.

⁶ For example, the 1978 Cullen-Couture Agreement in immigration, which was later replaced by the 1991 Canada-Québec Accord; see “Canada-Québec Accord relating to Immigration and Temporary Admission of Aliens” (5 February 1991), online: *Government of Canada* <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/federal-provincial-territorial/quebec/canada-quebec-accord-relating-immigration-temporary-admission-aliens.html>> [<https://perma.cc/YK26-FR2J>].

⁷ See *Re Resolution to amend the Constitution*, [1981] 1 SCR 753, 1981 [Re Resolution]; *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69 [Osborne].

⁸ See *Supreme Court Act*, RSC 1985, c S-26. Similarly, in *Reference Re Senate Reform*, 2014 SCC 32 [Senate Reference], some provisions of constitution on Senate are core and cannot be changed; others, like the property requirements, can be changed. See also Adam Dodek, “The Politics of the Senate Reform Reference: Fidelity, Frustration, and Federal Unilateralism” (2015) 60:4 McGill LJ 623 [Dodek].

II. THE CANADIAN CONSTITUTION HAS DIMENSIONS FAR BEYOND THE FORMAL TEXT.

The “Canadian constitution” is a multidimensional concept. There are a set of official national-level constitutional documents, identified by the Constitution of Canada, that are binding in law and enforceable by the court. Let us call them the National Written Constitution. Part of the National Written Constitution establishes initial constitutions of the provinces and “housekeeping” rules for federal institutions like the House of Commons and Senate, which can mostly be amended by ordinary provincial legislation—and later freely repealed—by ordinary level legislation.⁹

Working alongside the National Written Constitution is a set of constitutional conventions—norms of proper conduct defined by political actors through their conduct and accompanying justifications or criticism. The courts can give advisory opinions on what they are, which may be highly influential in practice, but not legally binding. The Supreme Court of Canada has indicated, however, that some unwritten principles (such as privileges of a legislative assembly) function at the level of supreme and judicially enforceable law. There is no obvious way to amend those principles; they exist largely or entirely by longstanding constitutional tradition that predates confederation. It also might be noted that the Supreme Court of Canada has been willing to express its opinion on what the content is of various political conventions without proposing that those conventions have been in any way embodied in a binding norm that is enforceable by the courts, rather than being subject to revision by further political practice.

There is also a set of quasi-constitutional norms, at both the federal and provincial levels, whose superiority is between the highest-level Constitution and ordinary legislation. These involve matters of human rights, including privacy statutes and non-discrimination statutes. What these statutes say overrides ordinary legislation unless the latter clearly expresses an attempt to depart from them. The quasi-constitution also includes judge-created norms like the principles of administrative law.

⁹ See *Constitution Act, 1982*, s 52, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*]; subsection 52(1) makes the Constitution the supreme law of Canada.

The Supreme Court has held that the National Written Constitution should be interpreted where possible to be consistent with international human rights “documents.” This doctrine creates many theoretical and practical problems. The Court was not clear in distinguishing between international norms that are justiciable in international legal courts or merely soft law (not legally binding). International treaties generally do not provide for judicial enforcement at the international level; it is problematic that they can effectively alter the constitution of Canada by way of influencing judicial interpretation by the Supreme Court of Canada and other courts. Furthermore, entering into treaties (or other “documents”) is generally within the authority of the federal executive; can it effectively change, through the treaty route, the interpretation of Canadian domestic law regardless of whether these have been approved or implemented by Parliament or provincial legislatures?

I have argued elsewhere that treaties that Canada enters into and which Parliament ratifies can also have, in practical effect, constitutional force.¹⁰ Some treaty provisions cannot realistically be renounced or changed without the consent of powerful treaty partners such as the United States. For example, the 1988 Canada-US Free trade agreement includes provisions, as in the energy sector, that had the purpose and effect of preventing Canada from adopting controversial and divisive policies like the “national energy program.”

Another route to changing the basic rules is by negotiating modern land claims agreements. In 1993, these were recognized as treaties for the purposes of section 35 of the *Constitution Act, 1982*, which recognizes and affirms “aboriginal and treaty rights.” The Supreme Court of Canada has said that treaty rights can be overridden by the exercise of the authority of Parliament or provincial legislatures. However, the Supreme Court of Canada defined a requirement for doing so that is similar to the “reasonable limits” clause for Charter rights.¹¹

There are a variety of agreement mechanisms that might not have legal protection from unilateral override or withdrawal but are still important in establishing the basis on which the federation operates. The Canadian Free Trade Agreement had an important impact. These include

¹⁰ See e.g. Bryan Schwartz & Gordon Mackintosh, “The Charter and the Domestic Enforcement of International Law” (1986) 16:2 *Man LJ* 149.

¹¹ *R v Sparrow*, [1990] 1 SCR 1075 at 1077-80.

agreements between Canada and provinces or among provinces; agreements among Canada, provinces and Indigenous governments, including on self-government. The Charlottetown Accord would have provided that intergovernmental agreements have constitutional protection, and so would agreements on Indigenous self-government. The Cullen-Couture Agreement on immigration has continued for decades to effectively govern the distribution of federal and provincial roles with respect to immigration to Quebec; it has never, however, been formally transformed into part of the constitution of Canada, whether through textual amendment or judicial interpretation of existing Constitutional provisions.¹² The Constitution of Canada was amended in 1983 to confirm that modern land claims agreements constitute treaties within the meaning of s. 35 of the Constitution Act, 1982.¹³ As a result, agreements negotiated between Indigenous authorities and federal and provincial governments can assume a role that is almost equivalent to being added as a schedule to the Constitution.

There are yet other routes to establishing durable ground rules for the operation of government in Canada. These may include declarations by a legislature, such as those by the House of Commons on effectively respecting a veto for the province of Quebec on various kinds of constitutional amendment. They may also include legislation that amounts to a program for future legislation – such as Parliament’s enactment of legislation that commitments to the eventual implementation of the U.N. Declaration to the Rights of Indigenous Peoples.¹⁴

¹² *Canada–Québec Accord*, *supra* note 6.

¹³ *Constitution Act 1982*, *supra* note 9 at s 35.

¹⁴ See Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd sess, 42nd Parl, 2021 (as passed by the House of Commons May 25, 2021).

III. THE SUPREME COURT OF CANADA EFFECTIVELY BLOCKS SOME ROUTES TO AMENDMENT OF THE CONSTITUTION, WHILE IN OTHER CASES, BY INTERPRETATION EFFECTIVELY AMENDED THE CONSTITUTION ITSELF.

The formal route to constitutional amendment has proved difficult politically. Some Canadians¹⁵ opposed elite accommodation as the means of permanently changing the constitution of Canada, and proposing rather, constitution-making should require public participation and ratification through amendment. However, after that route failed in the Charlottetown Accord, leaders lost interest in it at the federal level.

With all the channels available for reforming the ground rules for government operations and federal relations outside of the formal channel, Canadian reform flowed through other channels. The Supreme Court of Canada has given, and the Supreme Court of Canada has taken away with respect to effectively changing the ground rules without formal amendments to the Constitution.

The taking includes the *Senate Reference*, where the Supreme Court of Canada said that Parliament could not establish consultative referenda for reforming the Senate within the existing structure of the Canadian constitution, which permits Parliament to amend provisions of the constitution involving its own operations.¹⁶ These increased powers for the Senate would have increased its legitimacy, thereby effectively altering the balance established by the formal Constitution, which gives appointing power to the federal cabinet – making the Senate unelected, and so of reduced practical legitimacy.

This block by the Court is arguably out of sync with Canadian constitutional tradition as a whole. The formal constitution says the Governor General appoints the Queen's Privy Council for Canada.¹⁷ In

¹⁵ See Bryan P Schwartz, "Fathoming Meech Lake" (1987) 17-1: 1st ed Man L J; Bryan P Schwartz, *Opting in: improving the 1992 federal constitutional proposals*, 1st ed (Quebec: Voyageur Publishing, 1992); Bryan P Schwartz, *Still Thinking: A Guide to the 1992 Referendum*, (Quebec: Voyageur Publishing, 1992).

¹⁶ *Senate Reference*, *supra* note 8 at paras 49-83.

¹⁷ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 11, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

practice, the Prime Minister does so by formally advising the Governor General; the operating part of the Council is only sitting cabinet members, not all those appointed, and cabinet powers are exercised by evolving structures such as the creation of cabinet committees. Such measures, adopted by “ordinary” legislation or policy statements, may have a considerable impact on the operation of democratic governance in Canada. In other words, it is common for “ordinary” legislation or policy, operating within the constraints of the written constitution, to change fundamentally important aspects of the operation of government.

Like much of what it does, the Supreme Court of Canada’s blocking of the reform route might arise in part from the Court’s sensitivity to ensuring that Quebec feels secure in its place in the federation. A say by the provincial government on Senate appointments was one of Quebec’s five key demands in the Meech Lake Accord round. Perhaps the Court was extra sensitive to allowing a route that departed from one of those demands. As we shall see, the five demands have been addressed in other ways, including the Supreme Court of Canada’s interpretation of the existing constitution.

The Supreme Court of Canada giveth at times, rather than taketh away - that is it effectively adds to governing norms rather than prevent them from being reformed.¹⁸ When the Supreme Court of Canada wishes to effectively update the constitution of Canada by interpretation, it sometimes cites the “living tree doctrine.”¹⁹ In *Daniels v Canada* it was announced (contrary to early decision) that “Indian” in section 91(24) of the Constitution Act, 1867 includes the Métis people.²⁰ The decision is arguably inconsistent with earlier decisions of the Supreme Court of Canada that used historical use of language as a guide to interpretation of the federal power over “Indians, and the Lands Reserved for Indians.”²¹

¹⁸ “The Lord giveth, the Lord taketh away” in Job 1:21, King James Version of the Bible (1611).

¹⁹ See e.g. *Edwards v Canada (Attorney General)*, [1930] 1 DLR 98 at 106-07, [1930] AC 124; *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 22; *Reference re Securities Act*, 2011 SCC 66 at para 56 [*Securities Reference*].

²⁰ See *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 50 [*Daniels*].

²¹ See *Constitution Act, 1982*, *supra* note 9 at s 91(24). See also *Reference as to whether “Indians” includes in s. 91 (24) of the B.N.A. Act includes Eskimo in habitants of the Province of Quebec*, [1939] SCR 104.

The end result, however, is consistent with the Métis Nation art of the Charlottetown Accord.

In the *Secession Reference*,²² the Supreme Court of Canada used the method of “derivation from founding principles” approach to effectively add to the formal constitution. The formal constitution does not address how a province can secede. The Supreme Court of Canada invented a set of doctrines by identifying basic principles in the existing formal constitution and then deriving an amending formula intended to pacify secessionist agitation. Quebec was not simply told it could not secede unilaterally. That would have riled up Quebec residents who might not want to separate but did not want to be told it was beyond their power. Rather, there must be a “clear majority on a clear question”²³ – a political formulation by various federal officials now (without explanation) turned into the supreme law of Canada by judicial fiat. No more ambiguous referendum questions (Parliament followed up with a statute specifying that Parliament determines whether a question is clear enough and a majority clear enough).²⁴ The Supreme Court of Canada also identified the doctrine that if a province proposes an amendment (including secession), the other provinces and Canada must come to the table and “negotiate.”²⁵ Exactly why? Perhaps the Court sought to preclude potential resentment at the thought that a pro-secession referendum could simply be ignored. Logically, though, how does the right to propose an idea correspond to a duty by all other senior governments to discuss? In many contexts, my duty to propose does not capture your duty to respond. When I exercise my individual constitutional right of free expression, for example, you do not necessarily have the duty to listen or respond. Should any province or federal House of Commons be able to supervene the ordinary political conversation in Canada by presenting a proposal and demanding the attention of all other governments?²⁶

²² *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Secession Reference*].

²³ *Ibid* at para 100.

²⁴ *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 [*Clarity Act*].

²⁵ *Secession Reference*, *supra* note 22 at paras 88-97.

²⁶ It might be argued that the *Secession* reference should be interpreted and applied so that the duty to respond does not necessarily apply to all proposals that a province might make to amend the constitution using the 7/50 or unanimity formula.

In the Senate Reference, the Court read out of the formal Constitution the effective requirement that Senators meet property-owning requirements.²⁷ The court does not explain exactly why those provisions are not “fundamental” and so subject to override by an ordinary act of Parliament. At the time of enactment, the provisions reflected the fact that the framers of the Canadian constitution, influenced by the model of the House of Lords,²⁸ thought that the chamber should, among other things, protect property owners from populist overreach by the House of Commons. Rather than engaging in any historical analysis, the Court simply states its conclusion. The result brings the Constitution in line with modern public opinion. The “originalist view” that at times prevails in the United States²⁹ is that courts should be bound by judicial idealism to the text and original understanding of the formal Constitution. If the Constitution is out of step with values that many in the public or the Court itself considers more modern or enlightened, holds the originalist view, the appropriate course is to amend the Constitution.³⁰

A variant of the “foundational principles” approach is the “Charter values” approach.³¹ The Court declares that certain values underlie the *Canadian Charter of Rights and Freedoms*, and then uses those broad values to construe a particular provision. In his dissents in the labour cases, Justice Rothstein—who was to some extent an “originalist” in the sense used in American constitutional debates—complained that the issue is whether a particular provision of the Charter does or does not require something, not whether that outcome is compatible with broader Charter values.³²

The Supreme Court of Canada sometimes justifies interventionist interpretations of the constitution on the basis, not of a “living tree” or

²⁷ *Senate Reference*, *supra* note 8 at paras 84-94.

²⁸ *Ibid* at para 15.

²⁹ *Dobbs v Jackson Women’s Health Organization*, 597 A US 1392 (5th Circuit 2021).

³⁰ The Supreme Court of Canada has often cited the “living tree” doctrine.

³¹ See *Doré v Barreau du Québec*, 2012 SCC 12.

³² See *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at paras 174, 253. See also *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 at paras 104-75 [SFL]; *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at paras 159-270.

“first principles” but on the contrary, of longstanding social or political tradition. The right to collective bargaining was recognized in the constitution of Canada partly because it was part of the “social fabric” of Canada.³³ Depending on what outcome the Court seeks, actual provisions of the constitution can be effectively read out by the living tree doctrine, or other provisions can effectively be read in by reference to non-legal history.

In constitutional cases, the Supreme Court of Canada, when engaging in inventive readings of the constitution, likes to create dialogic requirements in response to constitutional tensions. I noted the outcome of the *Secession Reference* that requires other governments to respond to proposals for constitutional amendment. In the *Health Services* case, the court decided (contrary to an earlier decision) that collective bargaining rights are implicitly contained in the *Canadian Charter of Rights and Freedoms*.³⁴ The Court said that it was not creating substantive economic rights, just a right of unions to make proposals and an invented “correlative” duty of governments to come to the bargaining table in good faith. Later, the Court extended this duty to bargain in good faith to a duty to permit strikes, or in lieu thereof, binding arbitration³⁵ (or, if the government wishes to take another route besides collective bargaining, it may consult with unions before legislating changes to important working conditions). In *Delgamuukw*,³⁶ the court created a “duty to consult” Indigenous groups, later explaining that it included the duty to not only engage in discussions but also to accommodate reasonable concerns.³⁷

³³ See *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016 at para 17.

³⁴ *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, rev’g *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313.

³⁵ *SFL*, *supra* note 17 at paras 75, 93.

³⁶ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010.

³⁷ See *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 47; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 66 [Mikisew]; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 59. See also *Tsleil-Waututh Nation v Canada (PG)*, 2018 FCA 153.

IV. THE SUPREME COURT OF CANADA APPEARS TO BE STRONGLY INFLUENCED BY “FAILED” CONSTITUTIONAL REFORM PROPOSALS.

It has proved difficult to muster the supermajorities expected to formally amend the constitution – the Meech Lake Accord and Charlottetown Accords both failed, the latter because majorities in many provinces rejected it in consultative referendums.³⁸

Yet, these failed proposals have had enduring impacts. Even failed proposals can be influential in many dimensions. They have some political force and momentum because they at least won the support of various governments – with Meech Lake, the federal level and all provincial premiers, with two provincial legislatures failing to approve only after three years of intense public debate across Canada. The Charlottetown Accord similarly had the support of all eleven federal and provincial governments before failing. The fact that these proposals had such support in the first place means that to some governments, they made sense in policy or politics and that there was at least some initial public support.³⁹

Failed proposals also have an anchoring effect. They articulate specific ideas in legal form, thereby overcoming some of the uncertainty or inertia involving translating a political idea into a specific legal form that can be clearly understood and adopted by a court.

Let us look at the five demands of the provincial government of Quebec in order to support the 1982 round of constitutional reforms – which the provincial government rejected at the time of adoption. That objection was overridden by the fact that the constitutional amending formula at the time was effectively enacted by the United Kingdom Parliament with the support of a substantial majority of provinces as well as the federal level of government.

A. Quebec’s “distinct society”

Quebec asked for recognition as a “distinct society” and the Meech Lake Accord would have done so while also recognizing the need to

³⁸ See Appendix for the Meech Lake Accord and Charlottetown Accord full text.

³⁹ *Ibid.*

protect language minorities across Canada.⁴⁰ In the *Ford* case, the Supreme Court of Canada—while the Meech Lake was still being debated—used the language of “promote” in resolving a Canadian *Charter of Rights and Freedoms* challenge to Quebec language laws.⁴¹ The Court recognized a right of the provincial legislature to advance the character of Quebec as a majority French-speaking province, but qualified that authority with some recognition of the need to give some protection (albeit potentially lesser status) to the use of English and other minority languages.⁴²

Following the 1995 Quebec independence referendum, both the House of Commons and the Senate passed resolutions recognizing Quebec as a distinct society within Canada.⁴³ The resolutions specifically recognized Quebec’s “French-speaking majority, unique culture and civil law tradition” and directed the House to be “guided by this reality.”⁴⁴

At the provincial level, in response to Quebec’s referendum, a declaration was signed by all other provinces (aside from Quebec) at the Annual Premier’s Conference. Known as the Calgary Declaration, it served as formal recognition by the other provinces of Quebec’s distinct and unique society.⁴⁵

In 2006, the Harper government introduced a resolution in the House of Commons recognizing “that the Quebecois form a nation within a united Canada.”⁴⁶ The resolution passed with overwhelming legislative support by a vote of 265 to 16,⁴⁷ even though the Minister for

⁴⁰ Meeting of the First Ministers on the Constitution, *The 1987 Constitutional Accord* (Ottawa: 3 June 1987), Schedule, proposed *Constitution Amendment, 1987*, clause 1 [Meech Lake Accord].

⁴¹ See *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712.

⁴² *Ibid* at 779-80.

⁴³ *House of Commons Debates*, 35-1, No 267 (29 November 1995) at 1514-15 (Right Hon Jean Chrétien). The resolution was adopted by the House of Commons on 11 December 1995 and by the Senate on 14 December 1995.

⁴⁴ *Ibid* at 1514.

⁴⁵ Manitoba, *Debates and Proceedings*, 36-4, vol 20 (18 March 1998) at 843-44 (see especially art 5-7).

⁴⁶ *House of Commons Debates*, 39-1, No 087 (27 November 2006) at 1245 (Hon Stéphane Dion).

⁴⁷ *Ibid* at 2035.

Intergovernmental Affairs, Michael Chong, had resigned earlier in the day in protest.⁴⁸

B. The Amending Formula

Quebec asked for a veto on various constitutional matters, including Senate reform. Again, following the 1995 independence referendum, Parliament introduced Bill 70, more commonly known as the Quebec Veto Bill. This legislation promised that the government of Canada would only give its formal support to constitutional amendments if there was enough regional support, including that of Quebec, defined as its own region.⁴⁹ This new legislative requirement effectively gave British Columbia, Quebec, and Ontario a veto power over any proposed amendment via the general amending formula, essentially enacting the proposal from the Meech Lake Accord for an expanded use of the unanimity formula for amendments.⁵⁰ Senate reform was also a key element of the Charlottetown Accord, and will be discussed later in this paper. More recently, the Supreme Court of Canada rejected the right of Parliament to proceed with Senate reform by ordinary legislation. A factor behind the decision might have been that the Court did not wish to countenance the possibility that important changes to the Senate could be implemented without the assent of the provincial legislature of Quebec.⁵¹

C. The Supreme Court

Quebec asked for a role in appointing Supreme Court of Canada judges from Quebec. While no amendment was made to the constitution, the Supreme Court of Canada read in certain “fundamental” provisions of

⁴⁸ “Tory cabinet minister quits post over motion”, *CBC News* (27 November 2006), online: <www.cbc.ca/news/canada/tory-cabinet-minister-quits-post-over-motion-1.585951> [perma.cc/4S66-6FZ2]. See also David R. Cameron & Jacqueline D. Krikorian “Recognizing Quebec in the Constitution of Canada: Using the Bilateral Constitutional Amendment Process” (2008) 58(4) *UTLJ* 389 at 395.

⁴⁹ *An Act respecting constitutional amendments*, SC 1996, c 1.

⁵⁰ Mary Dawson, “From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown” (2012) 57:4 *McGill LJ* 955 at 990.

⁵¹ *Senate Reference*, *supra* note 8.

the existing federal legislation⁵² to the constitution of Canada, including the requirement that three of nine judges be from Quebec. The Supreme Court of Canada, in *Nadon*, also effectively rejected a proposed appointment of a judge from Quebec who did not at the time belong to the Quebec bar, although he was from Quebec and had earlier belonged to its bar.⁵³ It does not appear that the provincial government of Quebec was consulted or supported the appointment. As the court decision was close to a provincial election, the Court might have been concerned that allowing the appointment to proceed could be inflammatory at a sensitive time. Later, the government of Canada promised a special consultative process involving the provincial government of Quebec on appointments to the three Quebec seats on the Supreme Court of Canada.⁵⁴

D. Immigration

Quebec asked for a role in selecting immigrants to Quebec, expanding upon and constitutionalizing the policies enacted under the bilateral Cullen-Couture Agreement. That was agreed to politically in the Meech Lake Accord, and later most, if not all of the key provisions were incorporated into the 1991 Canada-Quebec immigration agreement.⁵⁵ Notably, the 1991 agreement guaranteed a percentage of immigrants to Quebec proportional to its share of the population (with the ability to increase by up to five percent),⁵⁶ required Quebec to accept a level of

⁵² *Supreme Court Act*, RSC 1985, c S-26, s 6.

⁵³ *Reference re Supreme Court Act*, ss. 5 and 6, 2014 SCC 21 [*Nadon*].

⁵⁴ Prime Minister of Canada Justin Trudeau, “Arrangement concerning the appointment process to fill the seat that will be left vacant on the Supreme Court of Canada following the departure of Justice Clément Gascon” (15 May 2019), online: <pm.gc.ca/en/news/backgrounders/2019/05/15/arrangement-concerning-appointment-process-fill-seat-will-be-left> [perma.cc/6LWK-FHT4].

⁵⁵ *Canada-Québec Accord relating to Immigration and Temporary Admission of Aliens*, 5 February 1991, online: *Government of Canada* <www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/federal-provincial-territorial/quebec/canada-quebec-accord-relating-immigration-temporary-admission-aliens.html> [perma.cc/VB7G-M5RV]. See also Joseph Garcea, “The Immigration Clause in the Meech Lake Accord” (1991) 21 *Man LJ* 274.

⁵⁶ *Ibid.*, ss 6, 7.

refugees in proportion to its level of immigrants annually,⁵⁷ allowed Quebec to utilize federal criteria as well as provincial criteria in evaluating applicants,⁵⁸ and authorized Quebec to replace the federal government in providing integration services for immigrants to Quebec.⁵⁹ The Supreme Court of Canada has not been called upon to deal with the matter.

E. Limitation of the Federal Spending Power

The Meech Lake Accord proposed a requirement for the federal government to provide “reasonable compensation” to any province opting out of a federal shared-cost program, as long as the province provided a program that was “compatible with the national objectives.”⁶⁰ As we will see, this proposal was renewed in the Charlottetown Accord, with further details on a framework for federal spending in areas of exclusive provincial jurisdiction.

At the federal level, the Chrétien government, influenced by the recent events of the Quebec independence referendum, referred to the spending power in their 1996 Speech from the Throne. Namely, the federal government would only establish a new shared-cost program if it first had the agreement and assent of a majority of the provinces. Moreover, provinces were given the option to opt-out of the shared cost program and establish their own equivalent program, with compensation from the federal government.

During the Harper government, the federal spending power was the subject of renewed focus and debate, mainly due to the government’s policy of “open federalism.”⁶¹ In practice, this “open federalism” took the

⁵⁷ *Ibid*, s 8.

⁵⁸ *Ibid*, s 14, 15.

⁵⁹ *Ibid*, s 22-29.

⁶⁰ Meech Lake Accord, *supra* note 43 at 16-17. See also Dawson, *supra* note 53.

⁶¹ During a campaign stop in Quebec City in December 2005, Stephen Harper made a speech (now known as the “open federalism speech”) outlining his vision for the Canada-Quebec relationship and the role of Canadian federalism. See Thomas J Courchene, “Reflections on the Federal Spending Power: Practices, Principles, Perspectives” (2008) IRPP Working Paper No 2008-01 at 1, online (pdf): *Institute for Research on Public Policy* <irpp.org/wp-content/uploads/2014/09/wp2008-01.pdf> [perma.cc/E84G-DFFPM].

form of developing a new equalization payment formula and establishing a ceiling on transfer payments.⁶²

V. THE IMPACT OF THE FAILED CHARLOTTETOWN ACCORD

Many of the Meech Lake Accord proposals were carried forward into the broader Charlottetown Accord three years later.⁶³ A number of the broad provisions of the Charlottetown Accord were cast so as to be not immediately or eventually justiciable. The provisions for equalization payments, section 36 of the *Constitution Act, 1982*, were cast using language that appears to preclude court enforcement, and the Charlottetown Accord took a similar approach on similar issues involving broad economic and social policy issues, including further development of the “equalization clause,” the principles of Canada’s Medicare system, and the concept that Canada is an internal free trade union. Let us see if any of the Charlottetown-only add-ons had an impact at the Supreme Court of Canada or governmental practice.

A. Senate Reform

The proposals for Senate reform outlined in the Charlottetown Accord included a smaller, elected Senate with equal provincial representation. In 2011, the Harper government introduced Bill C-7, a Senate Reform Act.⁶⁴ The bill prescribed for provinces to elect Senator nominees, to be ratified at the discretion of the Governor General and Prime Minister, and imposed term limits of nine years. The provinces, particularly Quebec, voiced their opposition to the measure. The Quebec Court of Appeal opined that the federal government could not impose these changes to the Senate without going through the constitutional amendment procedure outlined in section 38(1) of the *Constitution Act*,

⁶² Julián Castro-Rea, “Harper’s Legacy on Federalism: “Open Federalism” or Hidden Agenda?” (2016) 21: *Rev Const Stud* 257 at 262-65.

⁶³ *Consensus Report on the Constitution: Final Text*, Charlottetown (28 August 1992), online (pdf): <www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document27_en.pdf> [perma.cc/48CX-GCAW] [Charlottetown Accord].

⁶⁴ 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).

1982.⁶⁵ In the *Senate Reference*, the Supreme Court of Canada essentially agreed with the Court of Appeal, ruling that imposing term limits on Senators, and creating provincial elections for nominees required a constitutional amendment per sections 38 and 42(1)(b) of the *Constitution Act, 1982*.⁶⁶

B. Indigenous Self-Government

The Charlottetown Accord would have recognized a duty of governments to negotiate self-government agreements, although the duty would not have been immediately justiciable. The government of Canada has recognized an inherent right to self-government. The Supreme Court of Canada has adopted the view, consistently with the Charlottetown Accord, that the right of self-government is “generative,”⁶⁷ rather than fully justiciable. As noted by Felix Hoehn:

Recognition of some Indigenous jurisdiction outside of a treaty is also consistent with Slattery’s theory of a generative constitutional order, with s. 35 binding the Crown to negotiate treaties reconciling the interests of Indigenous peoples with Canadian society as a whole. The Supreme Court of Canada has repeatedly expressed approval of Slattery’s approach.⁶⁸

Thus, indigenous self-government has not been elaborated fully by the courts, but by negotiations with other orders of government, with the latter having a duty to negotiate.⁶⁹

⁶⁵ *Projet de loi fédéral relative au Sénat (Re)*, 2013 QCCA 1807 at para 85.

⁶⁶ *Senate Reference*, *supra* note 5 at paras 111-112.

⁶⁷ See *Rio Tinto Alcan v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 38; *Mikisew* *supra* note 40 at paras 21, 87; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 67.

⁶⁸ Felix Hoehn, “The Duty to Negotiate and the Ethos of Reconciliation” (2020) 83(1) *Sask L Rev* 1, online: *CanLII* <canlii.ca/t/ssc3>.

⁶⁹ *Ibid.* For more on Slattery’s theory of generative rights, see Brian Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 *SCLR* (2d) 595; Brian Slattery, “The Metamorphosis of Aboriginal Title” (2006) 85:2 *Can Bar Rev* 255; Brian Slattery, “Aboriginal Rights and the Honour of the Crown” (2005) 29 *SCLR* (2d) 433 at 436, 440.

C. Métis people under Section 91(24)

Prior to the Charlottetown Accord, there was ambiguity over whether Métis peoples were “Indians” within the meaning of section 91(24), which would result in a nation-to-nation relationship with the Federal government, rather than a Provincial government. Within the Charlottetown Accord was a sub-accord known as the Métis Nation Accord, which would have resolved this issue.⁷⁰ It proposed an amendment to the constitution that would clarify the relationship between the Federal government and the Métis people. The Accord outlined a unified definition of “Métis,” and a commitment of the parties to negotiate the right to self-government. The Supreme Court of Canada later took up this definition in *Daniels*, where the court ruled that Métis and non-status Indians “are all ‘Indians’ under section 91(24) by virtue of the fact that they are all Aboriginal peoples.”⁷¹

D. The Social and Economic Union

Article 4 of the Charlottetown Accord proposed a new provision to be added to the Constitution that would commit the federal and provincial governments to the creation and preservation of “Canada’s social and economic union.”⁷² Article 4 proposed that these provisions be adopted as objectives, rather than binding rules, and that they be non-justiciable. Given that initial framing, it is not surprising that the norms set out in Article 4 do not seem to have had a great impact on judicial interpretation of the Constitution. The concepts set out in Article 4 have instead been developed through other forms of policy-making.

i. Social Union

In 1999, the Social Union Framework Agreement (SUFA) was signed by the federal government and all provinces except for Quebec and the territories.⁷³ While not a constitutional measure, this agreement did

⁷⁰ Charlottetown Accord, *supra* note 66 art 56.

⁷¹ *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 46. See also Paul Chartrand, “Rethinking the Doctrine of Aboriginal Rights: The Métis Cases” (2020) 57 *Osgoode Hall LJ* 173.

⁷² Charlottetown Accord, *supra* note 66, art 4.

⁷³ *A Framework to Improve the Social Union for Canadians*, 4 February 1999, online: *Canadian Intergovernmental Conference Secretariat* <scics.ca/en/product-

address and clarify the roles and responsibilities of federal and provincial governments for social policies. The agreement restrained the exercise of the federal spending power in those areas of exclusive provincial jurisdiction. The SUFA provisions closely parallel the proposals in the Charlottetown Accord.⁷⁴ The Accord outlined four principles to “guide the use of the federal spending power in all areas of exclusive provincial jurisdiction,” namely that the federal spending power should:

- (a) contribute to the pursuit of national objectives;
- (b) reduce overlap and duplication;
- (c) not distort and should respect provincial priorities; and
- (d) ensure equality of treatment of the provinces, while recognizing their different needs and circumstances.⁷⁵

As discussed by Margot Young, these four principles are closely mirrored in the SUFA.⁷⁶ Proposals for block-funded and shared-cost federal programs address the first principle regarding national objectives. A commitment to reducing overlap and duplication is expressed in sections 4 and 5 of the SUFA, namely in its provisions for joint planning and consultations between governments. Section 5 also addresses the third principle above, to respect provincial priorities, by stating that these transfers “should proceed in a cooperative manner that is respectful of the provincial and territorial governments and their priorities.”⁷⁷ Lastly, equality of treatment is taken up by section 4 of the SUFA, where it mandates that any arrangement entered into with one province or territory will be available to all other provinces and territories.⁷⁸

In addition, as discussed in the previous section on the Meech Lake Accord, the Charlottetown Accord also included a provision to amend the constitution to require the federal government to provide “reasonable compensation” to any province opting out of a federal shared-cost program

produit/agreement-a-framework-to-improve-the-social-union-for-canadians>
[perma.cc/MVV2-W5JZ] [SUFA].

⁷⁴ Charlottetown Accord, *supra* note 66, art 25.

⁷⁵ *Ibid.*

⁷⁶ Margot Young, “The Social Union Framework Agreement: Hollowing Out of the State” (1999) 10:4 Const Forum Const 120 at 126.

⁷⁷ *Ibid.* See SUFA, *supra* note 76, s 5.

⁷⁸ SUFA, *supra* note 76, s 4.

so long as the program was “compatible with the national objectives.”⁷⁹ This “opt-out” provision can be found in section 5 of the SUFA, where it specifies that

[a]ll provincial and territorial governments that meet or commit to meet the agreed Canada-wide objectives and agree to respect the accountability framework will receive their share of available funding.”⁸⁰

Another illustration of the ‘opt out’ provision occurred when Quebec opted out of the Health Accord, agreed to at the First Minister’s Meeting in September 2004. Under this proposal, Quebec maintained its existing program and would receive “comparable compensation” for the program undertaken by the federal government.⁸¹ The agreement recognized Quebec specifically, although it was later agreed that Alberta and British Columbia could also opt-out and pursue the same deal as Quebec.⁸²

Medicare

As part of its commitment to developing a social union, the Charlottetown Accord specified five policy objectives, including providing “throughout Canada a health care system that is comprehensive, universal, portable, publicly administered and accessible.”⁸³

In *Chaoulli*, a Quebec Charter of Rights dispute over Medicare, the Court came to no clear majority opinion, but half the judges were prepared to accept a claim that the public interest in a comprehensive public health insurance system did not override an individual’s right to

⁷⁹ Charlottetown Accord, *supra* note 66, art 25.

⁸⁰ SUFA, *supra* note 76, s 5; Young, *supra* note 62 at 125-26.

⁸¹ The Council of the Federation, News Release, “Premiers’ Action Plan for Better Health Care: Resolving Issues in the Spirit of True Federalism” (30 July 2004) at 2, online (pdf): *Canada’s Premiers* <www.canadapremiers.ca/wp-content/uploads/2017/09/healtheng.pdf>[perma.cc/78ST-HYKP]; Government of Canada, News Release, “Asymmetrical Federalism that respects Quebec’s Jurisdiction” (15 September 2004), online: *Government of Canada* <www.canada.ca/en/health-canada/services/health-care-system/health-care-system-delivery/federal-provincial-territorial-collaboration/first-ministers-meeting-year-plan-2004/asymmetrical-federalism-respects-quebec-jurisdiction.html> [perma.cc/C5L7-4D69].

⁸² Courchene, *supra* note 64 at 19.

⁸³ Charlottetown Accord, *supra* note 66, art 4.

make their own health arrangements.⁸⁴ The “Medicare” provisions of the Charlottetown Accord are not referenced by any of the judges. It may be that those provisions would have had more impact on the Court’s deliberations in *Chaoulli* if those provision had not been preceded by language that appears to make it non justiciable.⁸⁵

ii. Economic Union

Article 4 of the Charlottetown Accord also contained five objectives for a strengthened economic union, including the “free movement of persons, goods, services and capital.”⁸⁶ The main venue for promoting the Canadian economic union concept has been the Canadian Free Trade Agreement),⁸⁷ The latter does not amend the Constitution of Canada, although it does contain some penalties for non-compliance.⁸⁸

The Court has sometimes steered away from adopting an expansive approach to the powers of the central government to promote a single economic union. The *Securities Reference*, an opinion on the proposed federal *Securities Act*, saw the Supreme Court rule the legislation was invalid and *ultra vires* the federal trade and commerce power under section 91(2) of the Constitution.⁸⁹

In *Comeau*, Judge LeBlanc of the New Brunswick Provincial Court read down the guarantee in section 121 of the *Constitution Act, 1867* that there can be no internal tariff barriers.⁹⁰ Section 121 states that “[a]ll

⁸⁴ See *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35.

⁸⁵ The “social Union provisions of the Charlottetown Accord are framed in the same way as the equalization principle contained in the 1982 package of amendments to the Constitution of Canada.

⁸⁶ Charlottetown Accord, *supra* note 66, art 4.

⁸⁷ *Canadian Free Trade Agreement – Consolidated Version*, 24 April 2020, online (pdf): *Internal Trade Secretariat* <www.cfta-alec.ca/wp-content/uploads/2020/04/CFTA-Consolidated-Text-Final-English_April-24-2020.pdf> [perma.cc/HXB2-CU25]. See David Cohen, “The Internal Trade Agreement: Furthering the Canadian Economic Disunion” (1995) 25:2 *Can Bus LJ* 257 at 274; Ryan Manucha, “Internalizing International Trade Law: A Critical Analysis of the Canadian Free Trade Agreement’s National Treatment Jurisprudence” 2020 57:2 *Osgoode Hall LJ* 427 at 431.

⁸⁸ Manucha, *supra* note 90.

⁸⁹ See *Reference re Securities Act*, *supra* note 19.

⁹⁰ *R v Comeau*, 2016 NBPC 3 at paras 185-193.

Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.”⁹¹ His decision to read down this section turned on historical evidence provided by an expert witness for the interpretation of section 121 and a “reconsideration” of the previous Supreme Court decision in *Gold Seal*. The Supreme Court, however, disagreed with Judge LeBlanc, ruling that as a lower court judge, he did not have authority to overturn the *Gold Seal* precedent in this case.⁹² As argued by Carissima Mathen, the Supreme Court is typically deferential to issues of economic regulation and intergovernmental relations, leaving these issues instead for the government to decide on what policies it deems best for the interests of its citizens.⁹³

While the Supreme Court of Canada has often been cautious about using the “economic union” as a basis for its decisions, it has referred to it positively in several contexts, including *Black v. Law Society of Alberta*.⁹⁴ It is not clear whether or how some other principles of the Charlottetown Accord will influence the Supreme Court of Canada. In my opinion on the Carbon Tax, commissioned by the government of Manitoba, I mentioned the right of the equality of the provinces that is mentioned in the Charlottetown Accord. The Accord also refers to equal treatment of the provinces.⁹⁵

E. Conclusion

Canada’s focus on formal constitutional amendment of the national written constitution in the Meech Lake and Charlottetown Accord era consumed an enormous amount of attention and caused multiple conflicts within the general public. The initial impetus was to address the

⁹¹ *Constitution Act, 1867*, *supra* note 17, s 121.

⁹² *Gold Seal Ltd v Attorney-General for the Province of Alberta*, [1921] 62 SCR 424. See *R v Comeau*, 2018 SCC 15 at paras 34-35.

⁹³ Shannon Proudfoot, “Why the Supreme Court didn’t ‘free the beer’”, *Maclean’s* (19 April 2008), online: <www.macleans.ca/news/canada/why-the-supreme-courts-didnt-free-the-beer> [perma.cc/UHB4-7RQ9].

⁹⁴ [1989] 1 SCR 591

⁹⁵ Bryan P Schwartz, “The Constitutionality of the Federal Carbon Pricing Benchmark & Backstop Proposals” (2018) 41:1 MLJ 211

province of Quebec's demands for accepting the 1982 package of amendments. The proposals crafted at the time did not achieve sufficient acceptance to be formally adopted as part of the national written constitution. This essay has attempted to show, however, that aspects of those proposals did prove influential. Some may have contributed to the Supreme Court of Canada's decision-making such as whether to permit actions under the existing constitution or through judicial interpretation, to effectively add to the written text. A significant number of the Meech Lake and Charlottetown Accord proposals, ultimately were embodied in other forms of lawmaking - such as intergovernmental agreements or legislation. The extent to which ideas in these proposals found an authoritative home somewhere appears is correlated with at least two major factors: whether the idea was one of the government of Quebec's original demands, and whether the idea was expressed in the form of a clear, court-enforceable norm or whether the idea from the outset was stated more as non-justiciable set of principles or objectives.

There are many advantages to the routes that were ultimately taken, apart from judicial interpretation. These alternate routes required a lower level of initial consensus to establish and remain open to refinement or repeal in light of experience or evolving new political ideas. They are, moreover, routes that are conducted by democratic means, rather than the exercise of authority by a non-elected judiciary. Formal constitutional amendments, by contrast, constraint the democratic choices of future generations and effectively delegate further policy making authority to the unelected judiciary in the form of interpretation.

VI. APPENDIX

A. Meech Lake Accord: Document⁹⁶

1987 Constitutional Accord: Complete Text June 3, 1987

WHEREAS first ministers, assembled in Ottawa, have arrived at a unanimous accord on constitutional amendments that would bring about

⁹⁶ Full text available at "Meech Lake Accord: Document" (16 December 2013), online: *The Canadian Encyclopedia* <<https://www.thecanadianencyclopedia.ca/en/article/meech-lake-accord-document>> [<https://perma.cc/LC3H-AZQ6>].

the full and active participation of Quebec in Canada's constitutional evolution, would recognize the principle of equality of all provinces, would provide new arrangements to foster greater harmony and cooperation between the Government of Canada and the governments of the provinces and would require that annual constitutional conferences composed of first ministers be convened not later than December 31, 1988;

AND WHEREAS first ministers have also reached unanimous agreement on certain additional commitments in relation to some of those amendments;

NOW THEREFORE the Prime Minister of Canada and the first ministers of the provinces commit themselves and the governments they represent to the following:

1. The Prime Minister of Canada will lay or cause to be laid before the Senate and House of Commons, and the first ministers of the provinces will lay or cause to be laid before the legislative assemblies, as soon as possible, a resolution, in the form appended hereto, to authorize a proclamation to be issued by the Governor General under the Great Seal of Canada to amend the Constitution of Canada.

2. The Government of Canada will, as soon as possible, conclude an agreement with the Government of Quebec that would

(a) incorporate the principles of the Cullen-Couture agreement on the selection abroad and in Canada of independent immigrants, visitors for medical treatment, students and temporary workers, and on the selection of refugees abroad and economic criteria for family reunification and assisted relatives,

(b) guarantee that Quebec will receive a number of immigrants, including refugees, within the annual total established by the federal government for all of Canada proportionate to its share of the population of Canada, with the right to exceed that figure by per cent for demographic reasons, and

(c) provide an undertaking by Canada to withdraw services (except citizenship services) for the reception and integration (including linguistic and cultural) of all foreign nationals wishing to settle in Quebec where services are to be provided by Quebec, with such withdrawal to be accompanied by reasonable compensation, and the Government of

Canada and the Government of Quebec will take the necessary steps to give the agreement the force of law under the proposed amendment relating to such agreements.

3. Nothing in the Accord should be construed as preventing the negotiation of similar agreements with other provinces relating to immigration and the temporary admission of aliens.

4. Until the proposed amendment relating to the appointments to the Senate comes into force, any person summoned to fill a vacancy in the Senate shall be chosen from among persons whose names have been submitted by the Government of the province to which the vacancy relates and must be acceptable to the Queen's Privy Council for Canada.

Motion for a Resolution to Authorize an Amendment to the Constitution of Canada

WHEREAS the Constitution Act, 1982 came into force on April 17, 1982, following an agreement between Canada and the provinces except Quebec;

AND WHEREAS the Government of Quebec has established a set of five proposals for constitutional change and has stated that amendments to give effect to those proposals would enable Quebec to resume a full role in the constitutional councils of Canada;

AND WHEREAS the amendment proposed in the schedule hereto sets out the basis on which Quebec's five constitutional proposals may be met;

AND WHEREAS the amendment proposed in the schedule hereto also recognizes the principles of equality of all the provinces, provides new arrangements to foster greater harmony and cooperation between the Government of Canada and the governments of the provinces and requires that conferences be convened to consider important constitutional, economic and other issues;

AND WHEREAS certain portions of the amendment proposed in the schedule hereto relate to matters referred to in section 41 of the Constitution Act, 1982;

AND WHEREAS section 41 of the Constitution Act, 1982 provides that an amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and the House of Commons and of the legislative assembly of each province;

NOW THEREFORE the (Senate) (House of Commons) (legislative assembly) resolves that an amendment to Constitution of Canada be authorized to be made by proclamation issued by Her Excellency the Governor General under the Great Seal of Canada in accordance with the schedule hereto.

Schedule - Constitutional Amendment, 1987

Constitution Act, 1867

1. The Constitution Act, 1867 is amended by adding thereto, immediately after section 1 thereof, the following section:

2. (1) The Constitution of Canada shall be interpreted in a manner consistent with

(a) the recognition that the existence of French-speaking Canadians, centered in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and

(b) the recognition that Quebec constitutes within Canada a distinct society.

(2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to in paragraph (1) (a) is affirmed

(3) The role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed.

(4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language.

2. The said Act is further amended by adding thereto, immediately after section 24 thereof, the following section:

25. (1) Where a vacancy occurs in the Senate, the government of the province to which the vacancy relates may, in relation to that vacancy, submit to the Queen's Privy Council for Canada the names of persons who may be summoned to the senate.

(2) Until an amendment to the Constitution of Canada is made in relation to the Senate pursuant to section 41 of the Constitution Act, 1982, the person summoned to fill a vacancy in the Senate shall be chosen from among persons

whose names have been submitted under subsection (1) by the government of the province to which the vacancy relates and must be acceptable to the Queen's Privy Council for Canada.

3. The said Act is further amended by adding thereto, immediately after section 95 thereof, the following heading and sections:

Agreements on Immigration and Aliens

95A. The Government of Canada shall, at the request of the government of any province, negotiate with the government of that province for the purpose of concluding an agreement relating to immigration or the temporary admission of aliens into that province that is appropriate to the needs and circumstances of that province.

95B. (1) Any agreement concluded between Canada and a province in relation to immigration or the temporary admission of aliens into that province has the force of law from the time it is declared to do so in accordance with subsection 95C (1) and shall from that time have effect notwithstanding class 25 of section 91 or section 95.

(2) An agreement that has the force of law under subsection (1) shall have effect only so long as and so far as it is not repugnant to any provision of an Act of the Parliament of Canada that sets national standards and objectives relating to immigration or aliens, including any provision that establishes general classes of immigrants or relates to levels of immigration for Canada or that prescribes classes of individuals who are inadmissible into Canada.

(3) The Canadian Charter of Rights and Freedoms applies in respect of any agreement that has the force of law under subsection (1) and in respect of anything done by the Parliament or Government of Canada, or the legislature or government of a province, pursuant to any such agreement.

95C. (1) A declaration that an agreement referred to in subsection 95B (1) has the force of law may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of the province that is party to the agreement.

(2) An amendment to an agreement referred to in subsection 95B (1) may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized

(a) by resolutions of the Senate and House of Commons and of the legislative assembly of the province that is party to the agreement; or

(b) in such other manner as is set out in the agreement.

95D. Sections 46 to 48 of the Constitution Act, 1982 apply, with such modifications as the circumstances require, in respect of any declaration made pursuant to subsection 95C (1), any amendment to an agreement made pursuant to subsection 95C (2) or any amendment made pursuant to section 95E.

95E. An amendment to sections 95A to 95D of this section may be made in accordance with the procedure set out in subsection 38(1) of the Constitution Act, 1982, but only if the amendment is authorized by resolutions of the

legislative assemblies of all the provinces that are, at the time of the amendment, parties to an agreement that has the force of law under subsection 95B(1).

4. The said Act is further amended by adding thereto, immediately preceding section 96 thereof, the following heading:

General

5. The said Act is further amended by adding thereto, immediately preceding section 101 thereof, the following heading:

Courts Established by the Parliament of Canada

6. The said Act is further amended by adding thereto, immediately after section 101 thereof, the following heading and sections:

Supreme Court of Canada

101A. (1) The court existing under the name of the Supreme Court of Canada is hereby continued as the general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a superior court of record.

(2) The Supreme Court of Canada shall consist of a chief justice to be called the Chief Justice of Canada and eight other judges, who shall be appointed by the Governor General in Council by letters patent under the Great Seal.

101B. (1) Any person may be appointed a judge of the Supreme Court of Canada who after having admitted to the bar of any province or territory, has, for a total of at least ten years, been a judge of any courts in Canada or a member of the bar of any province or territory.

(2) At least three judge of the Supreme Court of Canada shall be appointed from among persons who, after having been admitted to the bar of Quebec, have, for a total of at least ten years, been judges of any court of Quebec or of any court established by the Parliament of Canada, or members of the bar of Quebec.

101C. (1) Where a vacancy occurs in the Supreme Court of Canada, the government of each province may, in relation to that vacancy, submit to the Minister of Justice of Canada the names of any of the persons who have been admitted to the bar of the province and are qualified under section 101B for appointment to that Court.

(2) Where an appointment is made to the Supreme Court of Canada, the Governor General in Council shall, except where the Chief Justice is appointed from among members of the Court, appoint a person whose name has been submitted under subsection (1) and who is acceptable to the Queen's Privy Council for Canada.

(3) Where an appointment is made in accordance with subsection (2) of any of the three judges necessary to meet the requirement set out in subsection 101B(2), the Governor General in Council shall appoint a person whose name has been submitted by the Government of Quebec.

(4) Where an appointment is made in accordance with subsection (2) otherwise than as required under subsection (3), the Governor General in Council shall

appoint a person whose name has been submitted by the government of a province other than Quebec.

101D. Sections 99 and 100 apply in respect of judges of the Supreme Court of Canada.

101E. (1) Sections 101A to 101D shall not be construed as abrogating or derogating from the powers of Parliament to make laws under section 101 except to the extent that such laws are inconsistent with those sections.

(2) For greater certainty, section 101A shall not be construed as abrogating or derogating from the powers of the Parliament of Canada to make laws relating to the reference of questions of law or fact, or any other matters, to the Supreme Court of Canada.

7. The said Act is further amended by adding thereto, immediately after section 106 thereof, the following section:

106A. (1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared cost program that is established by the Government of Canada after the coming force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.

(2) Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces.

8. The said Act is further amended by adding thereto the following heading and sections.

XII - Conferences on the Economy and other Matters

148. A Conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once each year to discuss the state of the Canadian economy and such other matters as may be appropriate.

XIII - References

149. A reference to this Act shall be deemed include a reference to any amendments thereto.

Part VI

Constitutional Conferences

50. (1) 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 at least once each year, commencing in 1988.

(2) The conferences convened under subsection (1) shall have included on their agenda the following matters:

- (a) Senate reform, including the role and functions of the Senate, its powers, the method of selecting Senators and representation in the Senate;
- (b) roles and responsibilities in relation to fisheries; and
- (c) such other matters as are agreed upon.

14. Subsection 52(2) of the said Act is amended by striking out the word "and" at the end of paragraph (b) thereof, by adding the word "and" at the end of paragraph (c) thereof, and by adding thereto the following paragraph:

(d) any other amendment to the Constitution of Canada.

15. Section 61 of the said Act is repealed and the following substituted therefor:

61. A reference to the Constitution Act, 1982, or a reference to the Constitution Acts, 1867 to 1982, shall be deemed to include a reference to any amendments thereto.

General

16. Nothing in Section 2 of the Constitution Act, 1867 affects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982 or class 24 of section 91 of the Constitution Act, 1867.

Citation

17. This amendment may be cited as the Constitution Amendment, 1987.

Constitution Act, 1982

9. Sections 40 to 42 of the Constitution Act, 1982 are repealed and the following substituted therefor:

40. Where an amendment is made under subsection 38(1) that transfers legislative powers from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

41. An amendment to the Constitution of Canada in relation to the following matters may be made 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 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) 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 was entitled to be represented on April 17, 1982;

(e) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(f) subject to section 43, the use of the English or French language;

(g) the Supreme Court of Canada;

(h) the extension of existing provinces into the territories;

(i) notwithstanding any other law or practice, the establishment of new provinces; and

(j) an amendment to this part.

10. Section 44 of the said Act is repealed and the following substituted therefor:

44. Subject to section 41, 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.

11. Subsection 46(1) of the said Act is repealed and the following substituted therefor:

46. (1) The procedures for amendment under sections 38, 41, and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

12. Subsection 47(1) of the said Act is repealed and the following substituted therefor:

47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41 or 43 may be made without a resolution of the Senate authorizing the issue if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing the issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

13. Part VI of the said Act is repealed and the following substituted therefor:

B. Charlottetown Accord: Document⁹⁷

Preface

Consensus Report on the Constitution, August 28, 1992, Final Text

This is a product of a series of meetings on constitutional reform involving the federal, provincial and territorial governments and representatives of Aboriginal peoples.

These meetings were part of the Canada Round of constitutional renewal. On September 24, 1991, the government of Canada tabled in the federal Parliament a set of proposals for the renewal of the Canadian federation entitled "Shaping Canada's Future Together." These proposals were referred to a Special Joint Committee of the House of Commons and

⁹⁷ Full text available at "Charlottetown Accord: Document" (1 June 2020), online: *The Canadian Encyclopedia* <<https://www.thecanadianencyclopedia.ca/en/article/charlottetown-accord-document>> [<https://perma.cc/42YB-9ZW8>].

the Senate which travelled across Canada seeking views on the proposals. The Committee received 3000 submissions and listened to testimony from 700 individuals.

During the same period, all provinces and territories created forums for public consultation on constitutional matters. These forums gathered reaction and advice with a view to producing recommendations to their governments. In addition, Aboriginal peoples were consulted by national and regional Aboriginal organizations.

An innovative forum for consultation with experts, advocacy groups and citizens was the series of six televised national conferences that took place between January and March of 1992.

Shortly before the release of the report of the Special Joint Committee on a Renewed Canada, the Prime Minister invited representatives of the provinces and territories and Aboriginal leaders to meet with the federal Minister of Constitutional Affairs to discuss the report.

At this initial meeting, held March 12, 1992 in Ottawa, participants agreed to proceed with a series of meetings with the objective of reaching consensus on a set of constitutional amendments. It was agreed that participants would make best efforts to reach consensus before the end of May, 1992 and that there would be no unilateral actions by any governments while this process was under way. It was subsequently agreed to extend this series of meetings into June, then into July.

To support their work, the heads of delegation agreed to establish a Coordinating Committee, composed of senior government officials and representatives of the four Aboriginal organizations. This committee, in turn, created four working groups to develop options and recommendations for consideration by the heads of delegation.

Recommendations made in the report of the Special Joint Committee on a Renewed Canada served as the basis of discussion, as did the recommendations of the various provincial and territorial consultations and the consultations with Aboriginal peoples. Alternatives and modifications to the proposals in these reports have been the principal subject of discussion at the multilateral meetings.

Including the initial session in Ottawa, there were twenty-seven days of meetings among the heads of delegation, as well as meetings of the Coordinating Committee and the four working groups. The schedule of the meetings during this first phase of meetings was:

March 12 Ottawa

April 8 and 9 Halifax
April 14 Ottawa
April 29 and 30 Edmonton
May 6 and 7 Saint John
May 11, 12 and 13 Vancouver
May 20, 21 and 22 Montréal
May 26, 27, 28, 29 and 30 Toronto
June 9, 10 and 11 Ottawa
June 28 and 29 Ottawa
July 3 Toronto
July 6 and 7 Ottawa

Following this series of meetings, the Prime Minister of Canada chaired a number of meetings of First Ministers, in which the Government of Quebec was a full participant. These include:

August 4 Harrington Lake
August 10 Harrington Lake
August 18, 19, 20, 21 and 22 Ottawa
August 27 and 28 Charlottetown

Organizational support for the full multilateral meetings has been provided by the Canadian Intergovernmental Conferences Secretariat.

In the course of the multilateral discussions, draft constitutional texts have been developed wherever possible in order to reduce uncertainty or ambiguity. In particular, a rolling draft of legal text was the basis of the discussion of issues affecting Aboriginal peoples. These drafts would provide the foundation of the formal legal resolutions to be submitted to Parliament and the legislatures.

In areas where the consensus was not unanimous, some participants chose to have their dissents recorded. Where requested, these dissents have been recorded in the chronological records of the meetings but were not recorded in this summary document.

Asterisks in the text that follows indicate areas where the consensus is to proceed with a political accord.

I: Unity and Diversity

A: People and Communities: 1. Canada Clause

A new clause should be included in section 2 of the Constitution Act, 1867 that would express fundamental Canadian values. The Canada

Clause would guide the courts in their future interpretation of the entire Constitution, including the Canadian Charter of Rights and Freedoms.

The Constitution Act, 1867 is amended by adding hereto, immediately after section 1 thereof, the following section:

2. (1) The Constitution of Canada, including the Canadian Charter of Rights and Freedoms, shall be interpreted in a manner consistent with the following characteristics:

(a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;

(b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of the three orders of government in Canada;

(c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;

(d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;

(e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;

(f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;

(g) Canadians are committed to the equality of female and male persons; and

(h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.

(2) The role of the legislature and government of Quebec to preserve and promote the distinct society of Quebec is affirmed.

(3) Nothing in this section derogates from the powers, rights or privileges of the Parliament

II: Institutions

A: The Senate: 7. An Elected Senate

The Constitution should be amended to provide that Senators are elected, either by the population of the provinces and territories of Canada or by the members of their provincial or territorial legislative assemblies.

Federal legislation should govern Senate elections, subject to the constitutional provision above and constitutional provisions requiring that elections take place at the same time as elections to the House of Commons and provisions respecting eligibility and mandate of senators.

Federal legislation would be sufficiently flexible to allow provinces and territories to provide for gender equality in the composition of the Senate.

Matters should be expedited in order that Senate elections be held as soon as possible, and, if feasible, at the same time as the next federal general election for the House of Commons.

III: Roles and Responsibilities

25. Federal Spending Power

A provision should be added to the Constitution stipulating that the Government of Canada must provide reasonable compensation to the government of a province that chooses not to participate in a new Canada-wide shared-cost program that is established by the federal government in an area of exclusive provincial jurisdiction, if that province carries on a program or initiative that is compatible with the national objectives.

A framework should be developed to guide the use of the federal spending power in all areas of exclusive provincial jurisdiction. Once developed, the framework could become a multilateral agreement that would receive constitutional protection using the mechanism described in Item 26 of this report. The framework should ensure that when the federal spending power is used in areas of exclusive provincial jurisdiction, it should:

- (a) contribute to the pursuit of national objectives;
- (b) reduce overlap and duplication;
- (c) not distort and should respect provincial priorities; and
- (d) ensure equality of treatment of the provinces, while recognizing their different needs and circumstances.

The Constitution should commit First Ministers to establishing such a framework at a future conference of First Ministers. Once it is established, First Ministers would assume a role in annually reviewing progress in meeting the objectives set out in the framework.

A provision should be added (as Section 106A(3)) that would ensure that nothing in the section that limits the federal spending power affects the commitments of Parliament and the Government of Canada that are set out in Section 36 of the Constitution Act, 1982.

IV: First Peoples

A. The Inherent Right of Self-government: 41. The Inherent Right of Self-Government

Note: References to the territories will be added to the legal text with respect to this section, except where clearly inappropriate. Nothing in the amendments would extend the powers of the territorial legislatures.

The Constitution should be amended to recognize that the Aboriginal peoples of Canada have the inherent right of self-government within Canada. This right should be placed in a new section of the Constitution Act, 1982, section 35.1(1).

The recognition of the inherent right of self-government should be interpreted in light of the recognition of Aboriginal governments as one of three orders of government in Canada.

A contextual statement should be inserted in the Constitution, as follows:

The exercise of the right of self-government includes authority of the duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction:

- (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and,
 - (b) to develop, maintain and strengthen their relationship with their lands, waters and environment
- so as to determine and control their developments as peoples according to their own values and priorities and ensure the integrity of their societies.

Before making any final determination of an issue arising from the inherent right of self-government, a court or tribunal should take into account the contextual statement referred to above, should enquire into the efforts that have been made to resolve the issue through negotiations and should be empowered to order the parties to take such steps as are appropriate in the circumstances to effect a negotiated resolution.

V: The Amending Formula

57. Changes to National Institutions

Note: All the following changes to the amending formula require the unanimous agreement of Parliament and the provincial legislatures.

Amendments to provisions of the Constitution related to the senate should require unanimous agreement of Parliament and the provincial

legislatures, once the current set of amendments affecting the House of Commons, including Quebec's guarantee of 25 percent of the seats in the House of Commons, and amendments which can now be made under Section 42 should also require unanimity.

Sections 41 and 42 of the Constitution Act, 1982 should be amended so that the nomination and appointment process of Supreme Court judges would remain subject to the general (7/50) amending procedure. All other matters related to the Supreme Court, including its entrenchment, its role as the general court of appeal and its composition, would be matters requiring unanimity.

VI: Other Issues

Other constitutional issues were discussed during the multilateral meetings.

The consensus was not to pursue the following issues:

- personal bankruptcy and insolvency
- intellectual property
- interjurisdictional immunity
- inland fisheries
- marriage and divorce
- residual power
- legislative interdelegation
- changes to the "notwithstanding clause"
- Section 96 (appointment of judges)
- Section 125 (taxation of federal and provincial governments)
- Section 92A (export of natural resources)
- requiring notice for changes to federal legislation respecting equalization payments
- property rights
- implementation of international treaties

Other issues were discussed but were not finally resolved, among which were:

- requiring notice for changes to federal legislation respecting Established Programs Financing
- establishing in a political accord a formal federal-provincial consultation process with regard to the negotiation of international treaties and agreements

- Aboriginal participation in intergovernmental agreements respecting the division of powers
- establishing a framework for compensation issues with respect to labour market development and training
- consequential amendments related to Senate reform, including by-elections
- any other consequential amendments required by changes recommended in this report

58. Establishment of New Provinces

The current provisions of the amending formula governing the creation of new provinces should be rescinded. They should be replaced by the pre-1982 provisions allowing the creation of new provinces through an Act of Parliament, following consultation with all of the existing province at a First Ministers' Conference. New provinces should not have a role in the amending formula without the unanimous consent of all the provinces and the federal government. Territories that become provinces could not lose Senators or members of the House of Commons.

The provision now contained in Section 42(1)(e) of the Constitution Act, 1982 with respect with the extension of provincial boundaries into the Territories should be repealed and replaced by the Constitution Act, 1871, modified in order to require the consent of the Territories.

59. Compensation for Amendments that Transfer Jurisdiction

Where an amendment is made under the general amending formula that transfers legislative powers from provincial legislatures to Parliament, Canada should provide reasonable compensation to any province that opts out of the amendment.

60. Aboriginal Consent

There should be Aboriginal consent to future constitutional amendments that directly refer to the Aboriginal peoples. discussions are continuing on the mechanism by which this consent would be expressed with a view to agreeing on a mechanism prior to the introduction in Parliament of formal resolutions amending the Constitution.

2. Aboriginal Peoples and the Canadian Charter of Rights and Freedoms

The Charter provision dealing with Aboriginal peoples (section 25, the non-derogation clause) should be strengthened to ensure that nothing in the Charter abrogates or derogates from Aboriginal, treaty or other rights of Aboriginal peoples, and in particular any rights or freedoms relating to the exercise or protection of their languages, cultures or traditions.

3. Linguistic Communities in New Brunswick

A separate constitutional amendment requiring only the consent of Parliament and the legislature of New Brunswick should be added to the Canadian Charter of Rights and Freedoms. The amendment would entrench the equality of status of the English and French linguistic communities in New Brunswick, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of these communities. The amendment would also affirm the role of the legislature and government of New Brunswick to preserve and promote this equality of status.

B: Canada's Social and Economic Union: 4. The Social and Economic Union

A new provision should be added to the constitution describing the commitment of the governments, Parliament and the legislatures within the federation to the principle of the preservation and development of Canada's social and economic union. The new provision, entitled the Social and Economic Union, should be drafted to set out a series of policy objectives underlying the social and the economic union, respectively. The provision should not be justiciable.

- providing throughout Canada a health care system that is comprehensive, universal, portable, publicly administered and accessible;
- providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities;
- providing high quality primary and secondary education to all individuals resident in Canada and ensuring reasonable access to post-secondary education;
- protecting the rights of workers to organize and bargain collectively; and,

- protecting, preserving and sustaining the integrity of the environment for present and future generations.

The policy objectives set out in the provision on the economic union should include, but not be limited to:

- working together to strengthen the Canadian economic union;
- the free movement of persons, goods, services and capital;
- the goal of full employment;
- ensuring that all Canadians have a reasonable standard of living; and
- ensuring sustainable and equitable development.

A mechanism for monitoring the Social and Economic Union should be determined by a First Minister's Conference.

A clause should be added to the Constitution stating that the Social and Economic Union does not abrogate or derogate from the Canadian Charter of Rights and Freedoms.

5. Economic Disparities, Equalization and Regional Development

Section 36 of the Constitution Act, 1982 currently commits Parliament and the Government of Canada and the governments and legislatures of the provinces to promote equal opportunities and economic development throughout the country and to provide reasonably comparable levels of public services to all Canadians. Subsection 36(2) currently commits the Canadian government to the principle of equalization payments. This section should be amended to read as follows:

Parliament and the Government of Canada are committed to making equalization payments so that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

Subsection 36(1) should be expanded to include the territories.

Subsection 36(1) should be amended to add a commitment to ensure the reasonably comparable economic infrastructures of a national nature in each province and territory.

The Constitution should commit the federal government to meaningful consultation with the provinces before introducing legislation relating to equalization payments.

A new Subsection 36(3) should be added to entrench the commitment of governments to the promotion of regional economic development to reduce economic disparities.

Regional development is also discussed in item 36 of this document.

6. The Common Market

Section 121 of the Constitution Act, 1867 would remain unchanged.

Detailed principals and commitments related to the Canadian Common Market are included in the political accord of August 28, 1992. First Ministers will decide on the best approach to implement these principles and commitments at a First Minister's Conference on the Economy. First Ministers would have the authority to create an independent dispute resolution agency and decide on it's role, mandate and composition. (*)

42. Delayed Justiciability

The inherent right of self-government should be entrenched in the Constitution. However, its justiciability should be delayed for a five-year period through constitutional language and a political accord. (*)

Delaying the justiciability of the right should be coupled with a constitutional provision which would shield Aboriginal rights.

Delaying the justiciability of the right will not make the right contingent and will not affect existing Aboriginal and treaty rights.

The issue of special courts or tribunals should be on the agenda of the First Ministers' Conference on Aboriginal Constitutional matters referred to in item 53. (*)

43. Charter Issues

The Canadian Charter of Rights and Freedoms should apply immediately to governments of Aboriginal peoples.

A technical change should be made to the English text of Sections 3, 4 and 5 of the Canadian Charter of Rights and Freedoms to ensure that it corresponds to the French text.

The legislative bodies of Aboriginal peoples should have access to section 33 of the Constitution Act, 1982 (the notwithstanding clause) under conditions that are appropriate to the circumstances of Aboriginal peoples and their legislative bodies.

44. Land

The specific constitutional provision on the inherent right and the specific constitutional provision on the commitment to negotiate should

not create new Aboriginal rights to land or derogate from existing aboriginal or treaty rights to land, except as provided for in self-government agreements.

B: Method of Exercise of the Right: 45. Commitment to Negotiate

There should be a constitutional commitment by the federal and provincial governments and the Indian, Inuit and Metis peoples in the various regions and communities of Canada to negotiate in good faith with the objective of concluding agreements elaborating the relationship between Aboriginal governments and the other orders of government. The negotiations would focus on the implementations of the right of self-government including issues of jurisdiction, lands and resources, and economic and fiscal arrangements.

46. The Process of Negotiation

Political Accord on Negotiation and Implementation

- A political accord should be developed to guide the process of self-government negotiations. (*)

Equity of Access

- All Aboriginal peoples of Canada should have equitable access to the process of negotiations.

Trigger for Negotiations

- Self-government negotiations should be initiated by the representatives of Aboriginal peoples when they are prepared to do so.

Provision for Non-Ethnic Governments

- Self-government negotiations should take into consideration the different circumstances of the various Aboriginal peoples.

Provision for Agreements

- Self-government agreements should be set out in future treaties, including land claims agreements or amendments to existing treaties, including land claims agreements. In addition, self-government agreements could be set out in other agreements which may contain a declaration that the rights of Aboriginal peoples are treaty rights, within the meaning of Section 35(1) of the Constitution Act, 1982.

Ratification of Agreements

- There should be an approval process for governments and Aboriginal peoples for self-government agreements, involving Parliament, the legislative assemblies of the relevant provinces and/or territories and the legislative bodies of the Aboriginal peoples. This principle should be expressed in the ratification procedures set out in the specific self-government agreements.

Non-Derogation Clause

- There should be an explicit statement in the Constitution that the commitment to negotiate does not make the right of self-government contingent on negotiations or in any way affect the justiciability of the right of self-government.

Dispute Resolution Mechanism

- To assist the negotiation process, a dispute resolution mechanism involving mediation and arbitration should be established. Details of this mechanism should be set out in a political accord. (*)

47. Legal Transition and Consistency of Laws

A constitutional provision should ensure that federal and provincial laws will continue to apply until they are displaced by laws passed by governments of Aboriginal peoples pursuant to their authority.

A constitutional provision should ensure that a law passed by a government of Aboriginal peoples, or an assertion of its authority based on the inherent right provision may not be inconsistent with those laws which are essential to the preservation of peace, order and good government in Canada. However, this provision would not extend the legislative authority of Parliament or of the legislatures of the provinces.

48. Treaties

With respect to treaties with Aboriginal peoples, the Constitution should be amended as follows:

- treaty rights should be interpreted in a just, broad and liberal manner taking into account the spirit and intent of the treaties and the context in which specific treaties were negotiated;
- the Government of Canada should be committed to establishing and participating in good faith in a joint process to clarify or implement treaty rights, or to rectify terms of treaties when agreed to by the parties. The governments of the provinces should also be committed, to the extent that they have jurisdiction, to

participation in the above treaty process when invited by the government of Canada and the Aboriginal peoples concerned or when specified in a treaty;

- participants in this process should have regard, among other things and where appropriate, to the spirit and intent of the treaties as understood by Aboriginal peoples. It should be confirmed that all Aboriginal peoples that possess treaty rights should have equitable access to this treaty process;
- it should be provided that these treaty amendments shall not extend the authority of any government or legislature, or affect the rights of Aboriginal peoples not party to the treaty concerned.

C. Issues Related to the Exercise of the Right: 49. Equity of Access to Section 35 Rights

The Constitution should provide that all of the Aboriginal peoples of Canada have access to those Aboriginal and treaty rights recognized and affirmed in Section 35 of the Constitution Act, 1982 that pertain to them.

50. Financing

Matters relating to the financing of governments of Aboriginal peoples should be dealt with in a political accord. The accord would commit the governments of Aboriginal peoples to:

- promoting equal opportunities for the well-being of all Aboriginal peoples;
- furthering economic, social and cultural development and employment opportunities to reduce disparities in opportunities among Aboriginal peoples and between Aboriginal peoples and other Canadians; and
- providing essential public services at levels reasonably comparable to those available to other Canadians in the vicinity.

It would also commit federal and provincial governments to the principle of providing the governments of Aboriginal peoples with fiscal or other resources, such as land, to assist those governments to govern their own affairs and to meet the commitments listed above, taking into account the levels of services provided to other Canadians in the vicinity and the fiscal capacity of governments of Aboriginal peoples to raise revenues from their own sources.

The issues of financing and its possible inclusion in the Constitution should be in the agenda of the first Ministers' Conference on Aboriginal Constitutional Matters referred to in item 53. (*)

51. Affirmative Action Programs

The Constitution should include a provision which authorizes governments of Aboriginal peoples to undertake affirmative action programs for social and economically disadvantaged individuals or groups and programs for the advancement of Aboriginal languages and cultures.

52. Gender Equality

Section 35(4) of the Constitution Act, 1982, which guarantees existing Aboriginal and treaty rights equally to male and female persons should be retained. The issue of gender equality should be on the agenda of the first Ministers' Conference on Aboriginal Constitutional Matters referred to under item 53. (*)

53. Future Aboriginal Constitutional Process

The Constitution should be amended to provide for four future First Ministers' Conferences on Aboriginal Constitutional Matters beginning no later than 1996, and following every two years thereafter. These conferences would be in addition to any other First Ministers' Conferences required by the Constitution. The agendas of these conferences would include items identified in this report and items requested by Aboriginal peoples.

54. Section 91(24)

For greater certainty, a new provision should be added to the Constitution Act, 1867 to ensure that Section 91(24) applies to Aboriginal peoples.

The new provision would not result in a reduction of existing expenditures by governments on Indians and Inuit or alter the fiduciary and treaty obligations of the federal government for Aboriginal peoples. This would be reflected in a political accord. (*)

55. Metis in Alberta/Section 91(24)

The Constitution should be amended to safeguard the legislative authority of the government of Alberta for the Metis and Metis settlement lands. There was agreement to a proposed amendment to the Alberta Act

that would constitutionally protect the status of the land held in fee simple by the Metis Settlements General Council under letters patent from Alberta.

56. Metis Nation Accord (*)

The federal government, the provinces of Ontario, Manitoba, Saskatchewan, Alberta, British Columbia and Metis National Council have agreed to enter into a legally binding, justiciable and enforceable accord on Metis Nation issues. Technical drafting of the accord is being completed. The Accord sets out the obligations of the federal and provincial governments and the Metis Nation.

The Accord commits governments to negotiate: self-government agreements; lands and resources; the transfer of the portion of Aboriginal programs and services available to Metis; and cost sharing arrangements relating to Metis institutions, programs and services.

Provinces and the federal government agree not to reduce existing expenditures on Metis and other Aboriginal people as a result of the Accord or as a result of an amendment to Section 91(24). The Accord defines the Metis for the purpose of the Metis Nation Accord and commits governments to enumerate and register the Metis Nation.

26. Protect of Intergovernmental Agreements

The Constitution should be amended to provide a mechanism to ensure that designated agreements between governments are protected from unilateral change. This would occur when Parliament and the legislature(s) enact laws approving the agreement.

Each application of the mechanism would cease to have an effect after a maximum of five years but could be renewed by a vote of Parliament and the legislature(s) readopting similar legislation. Governments of Aboriginal peoples should have access to this mechanism. The provision should be available to protect both bilateral and multilateral agreements among federal, provincial and territorial governments, and the governments of Aboriginal peoples. A government negotiating an agreement should be accorded equality of treatment in relation to any government which has already concluded an agreement, taking into account different needs and circumstances.

It is the intention of governments to apply this mechanism to future agreements related to the Canada Assistance Plan. (*)

27. Immigration

A new provision should be added to the constitution committing the Government of Canada to negotiate agreements with the provinces relating to immigration.

The Constitution should oblige the federal government to negotiate and conclude within a reasonable time an immigration agreement at the request of any province. A government negotiating an agreement should be accorded equality of treatment in relation to any government which has already concluded an agreement, taking into account different needs and circumstances.

28. Labour Market and Training

Exclusive federal jurisdiction for unemployment insurance, as set out in Section 91(2A) of the Constitution Act, 1867 should not be altered. The federal government should retain exclusive jurisdiction for income support and its related services delivered through the Unemployment Insurance System. Federal spending on job creation programs should be protected through a constitutional provision or a political accord. (*)

Labour market development and training should be identified in Section 92 of the Constitution as a matter of exclusive provincial jurisdiction. Provincial legislatures should have the authority to constrain federal spending that is directly related to labour market development and training. This should be accomplished through justiciable intergovernmental agreements designed to meet the circumstances of each province.

At the request of a province, the federal government would be obligated to withdraw from any and all training activities, except Unemployment Insurance. The federal government should be required to negotiate and conclude agreements to provide reasonable compensation to provinces requesting that the federal government withdraw.

The Government of Canada and the government of the province that requested the federal government to withdraw should conclude agreements within a reasonable time.

Provinces negotiating agreements should be accorded equality of treatment with respect to terms and conditions of agreements in relation to any other province that has already concluded an agreement, taking into account the different needs and circumstances of the provinces.

The federal, provincial, and territorial governments should commit themselves in a political accord to enter into administrative arrangements

to improve efficiency and client service and insure federal coordination of federal Unemployment Insurance employment functions. (*)

As a safeguard, the federal government should be required to negotiate and conclude an agreement within a reasonable time, at the request of any province not requesting the federal government to withdraw, to maintain its labour market development and training programs and activities in that province. A similar safeguard should be available to the territories.

There should be a constitutional provision for an ongoing federal role in the establishment of national policy objectives for the national aspects of labour market development. National labour market policy objectives would be established through a process which could be set out in the Constitution including the obligation for presentation to Parliament for debate. Factors to be considered in the establishment of national policy objectives could include items such as national economic conditions, national labour market requirements, international labour market trends and changes in international economic conditions. In establishing national policy objectives, the federal government would take into account the different needs and circumstances of the provinces; and there would be a provision, in the constitution or in a political accord, committing the federal, provincial and territorial governments to support the development of common occupational standards, in consultation with employer and employee groups. (*)

Provinces that negotiated agreements to constrain the federal spending power should be obliged to ensure that their labour market development programs are compatible with the national policy objectives, in the context of different needs and circumstances.

Considerations of service to the public in both official languages should be included in a political accord and be discussed as part of the negotiation of bilateral agreements. (*)

The concerns of Aboriginal peoples in this field will be dealt with through the mechanisms set out in item 40 below.

29. Culture

Provinces should have exclusive jurisdiction over cultural matters within the provinces. This should be recognized through an explicit constitutional amendment that also recognizes the continuing responsibility of the federal government in Canadian cultural matters. The

federal government should retain responsibility for national cultural institutions. The Government of Canada commits to negotiate cultural agreements with provinces in recognition of their lead responsibility for cultural matters within the province and to ensure that the federal government and the province work in harmony. These changes should not alter the federal fiduciary responsibility for Aboriginal people. The non-derogation provisions for Aboriginal peoples set out in item 40 of this document will apply to culture.

30. Forestry

Exclusive provincial jurisdiction over forestry should be recognized and clarified through an explicit constitutional amendment.

Provincial legislatures should have the authority to constrain federal spending that is directly related to forestry.

This should be accomplished through justiciable intergovernmental agreements, designed to meet the specific circumstances of each province. The mechanism used would be the one set out in item 26 of this document, including a provision for equality of treatment with respect to terms and conditions. Considerations of service to the public in both official languages should be considered as part of such agreements. (*)

Such an agreement would set the terms for federal withdrawal, including the level and form of financial resources to be transferred. In addition, a political accord could specify the form the compensation would take (i.e. cash transfers, tax points, or others) (*). Alternatively, such an agreement could require the federal government to maintain its spending in that province. A similar safeguard should be available to the territories. The federal government should be obliged to negotiate and conclude such an agreement within a reasonable time.

These changes and the ones set out in items 31, 32, 33, 34 and 35 should not alter the federal fiduciary responsibility for Aboriginal people. The provisions set out in item 40 would apply.

31. Mining

Exclusive provincial jurisdiction over mining should be recognized and clarified through an explicit constitutional amendment and the negotiation of federal-provincial agreements. This should be done in the same manner as set out above with respect to forestry. (*)

32. Tourism

Exclusive provincial jurisdiction over tourism should be recognized and clarified through an explicit constitutional amendment and the negotiation of federal-provincial agreements. This should be done in the same manner as set out above with respect to forestry. (*)

33. Housing

Exclusive provincial jurisdiction over housing should be recognized and clarified through an explicit constitutional amendment and the negotiation of federal-provincial agreements. This should be done in the same manner as set out above with respect to forestry. (*)

34. Recreation

Exclusive provincial jurisdiction over recreation should be recognized and clarified through an explicit constitutional amendment and the negotiation of federal-provincial agreements. This should be done in the same manner as set out above with respect to forestry. (*)

35. Municipal and Urban Affairs

Exclusive provincial jurisdiction over municipal and urban affairs should be recognized and clarified through an explicit constitutional amendment and the negotiation of federal-provincial agreements. This should be done in the same manner as set out above with respect to forestry. (*)

36. Regional Development

In addition to the commitment to regional development to be added to Section 36 of the Constitution Act, 1982 (described in item 5 of this document), a provision should be added to the Constitution that would oblige the federal government to negotiate an agreement at the request of any province with respect to regional development. Such agreements could be protected under the provision set out in item 26 ("Protection of Intergovernment Agreements"). Regional development should not become a separate head of power in the constitution.

37. Telecommunications

The federal government should be committed to negotiate agreements with the provincial agreements to coordinate and harmonize the procedures of their respective regulatory agencies in this field. Such

agreements could be protected under the provision set out in item 26 ("Protection of Intergovernment Agreements").

38. Federal Power of Disallowance and Reservation

This provision of the Constitution should be repealed. Repeal requires unanimity.

39. Federal Declaratory Power

Section 92(10)(c) of the Constitution Act, 1867 permits the federal government to declare a "work" to be for the general advantage of Canada and bring it under the legislative jurisdiction of Parliament. This provision should be amended to ensure that the declaratory power can only be applied to new works or rescinded with respect to past declarations with the explicit consent of the province(s) in which the work is situated. Existing declarations should be left undisturbed unless all of the legislatures affected wish to take action.

40. Aboriginal Peoples' Protection Mechanism

There should be a general non-derogation clause to ensure that division of powers amendments will not affect the rights of the Aboriginal peoples and the jurisdictions and powers of governments of Aboriginal peoples.

8. An Equal Senate

The Senate should initially total 62 Senators and should be composed of six Senators from each province and one Senator from each territory.

9. Aboriginal Peoples' Representation in the Senate

Aboriginal representation in the Senate should be guaranteed in the Constitution. Aboriginal Senate seats should be additional to provincial and territorial seats, rather than drawn from any province or territory's allocation of Senate seats.

Aboriginal Senators should have the same role and powers as other Senators, plus a possible double majority power in relation to certain matters materially affecting Aboriginal people. These issues and other details relating to Aboriginal representation in the Senate (numbers, distribution, method of selection) will be discussed further by governments and the representatives of the Aboriginal peoples in the early autumn of 1992. (*)

10. Relationship to the House of Commons

The Senate should not be a confidence chamber. In other words, the defeat of government-sponsored legislation by the Senate would not require the government's resignation.

11. Categories of Legislation

There should be four categories of legislation:

- 1) Revenue and expenditure bills ("supply bills");
- 2) Legislation materially affecting French language and French culture;
- 3) Bills involving fundamental tax policy changes directly related to natural resources;
- 4) Ordinary legislation (any bill not falling into one of the first three categories).

Initial classification of bills should be by the originator of the bill. With the exception of legislation affecting French culture (see item 14), appeals should be determined by the Speaker of the House of Commons, following consultation with the Speaker of the Senate.

12. Approval of Legislation

The Constitution should oblige the Senate to dispose of any bills approved by the House of Commons, within thirty sitting days of the House of Commons, with the exception of revenue and expenditure bills.

Revenue and expenditure bills would be subject to a 30 calendar-day suspensive veto. If a bill is defeated or amended by the Senate within this period, it could be repassed by a majority vote in the House of Commons on a resolution.

Bills that materially affect French language culture would require approval by a majority of Senators voting and by a majority of the Francophone Senators voting. The House of Commons would not be able to override the defeat of a bill in this category by the Senate.

Bills that involve fundamental tax policy changes directly related to natural resources would be defeated if a majority of Senators voting cast their votes against the bill.

The Senate should have the powers set out in this Consensus Report. There would be no change to the Senate's current role in approving constitutional amendments. Subject to the Consensus Report, Senate powers and procedures should mirror those in the House of Commons.

The Senate should continue to have the capacity to initiate bills, except for money bills.

If any bill initiated and passed by the senate is amended or rejected by the House of Commons, a joint sitting process should be triggered automatically.

The House of Commons should be obliged to dispose of legislation approved by the Senate within a reasonable time limit.

13. Revenue and Expenditure Bills

In order to preserve Canada's parliamentary traditions, the Senate should not be able to block the routine flow of legislation relating to taxation, borrowing and appropriation.

Revenue and expenditure bills ("supply bills") should be defined as only those matters involving borrowing, the raising of revenue and appropriation as well as matters subordinate to these issues. This definition should exclude fundamental policy changes to the tax system (such as the Goods and Services Tax and the National Energy Program).

14. Double Majority

The originator of a bill should not be responsible for designating whether it materially affects French language or French culture. Each designation should be subject to appeal to the Speaker of the Senate under rules to be established by the Senate. These rules should be designed to provide adequate protection to Francophones.

On entering the Senate, Senators should be required to declare whether they are Francophones for the purpose of the double majority voting rule. Any process for challenging these declarations should be left to the rules of the Senate.

15. Ratification of Appointments

The Constitution should specify that the Senate ratify the appointment of the Governor of the Bank of Canada.

The Constitution should also be amended to provide the Senate with a new power to ratify other key appointments made by the federal government.

The Senate should be obliged to deal with any proposed appointments within thirty sitting-days of the House of Commons.

The appointments that would be subject to Senate ratification, including the heads of the national cultural institutions and the heads of the federal regulatory boards and agencies, should be set out in specific federal legislation rather than the Constitution. The federal government's commitment to table such legislation should be recorded in a political accord. (*)

An appointment subject to ratification would be rejected if a majority of Senators voting cast their votes against it.

16. Eligibility for Cabinet

Senators should not be eligible for Cabinet posts.

B. The Supreme Court: 17. Entrenchment in the Constitution

The Supreme Court should be entrenched in the Constitution as the general court of appeal for Canada.

18. Composition

The Constitution should entrench the current provision of the Supreme Court Act, which specifies that the Supreme Court is to be composed of nine members, of whom three must have been admitted to the bar of Quebec (civil law bar).

19. Nominations and Appointments

The Constitution should require the federal government to name judges from lists submitted by the governments of the provinces and territories. A provision by the Constitution for the appointment of interim judges if a list is not submitted on a timely basis or no candidate is acceptable.

20. Aboriginal Peoples' Role

The structure of the Supreme Court should not be modified in this round of constitutional discussions. The role of Aboriginal peoples in relation to the Supreme Court should be recorded in a political accord and should not be on the agenda of a future First Minister's.

Provincial and territorial governments should develop a reasonable process for consulting representatives of the Aboriginal peoples of Canada in the preparation of lists of candidates to fill vacancies on the Supreme Court. (*)

Aboriginal groups should retain the right to make representations to the federal government respecting candidates to fill vacancies on the Supreme Court. (*)

The federal government should examine, in consultation with Aboriginal groups, the proposal that an Aboriginal Council of Elders be entitled to make submissions to the Supreme Court when the court considers Aboriginal issues. (*)

C. House of Commons: 21. Composition of the House of Commons

The composition of the House of Commons should be adjusted to better reflect the principle of representation by population. The adjustment should include an initial increase in the House of Commons to 337 seats, to be made at the time Senate reform comes into affect. Ontario and Quebec would each be assigned eighteen additional seats, British Columbia four additional seats, and Alberta two additional seats, with boundaries to be developed using the 1991 census.

An additional special Canada-wide redistribution of seats should be conducted following the 1996 census, aimed at assuring that, in the first subsequent general election, no province will have fewer than 95% of the House of Commons seats it would receive under strict representation-by-population. Consequently, British Columbia and Ontario would each be assigned 3 additional seats and Alberta 2 additional seats. As a result of this special adjustment, no province or territory will lose seats, nor will a province or territory which has achieved full representation-by-population have a smaller share of House of Commons seats than its share of the total population in the 1996 census.

The redistribution based on the 1996 and all future redistributions should be governed by the following constitutional provisions:

- (a) a guarantee that Quebec would be assigned no fewer than 25 percent of the seats in the House of Commons;
- (b) The current Section 41(b) of the Constitution Act, 1982, "the fixed floor", would be retained;
- (c) Section 51A of Constitution Act, 1867, "the rising floor", would be repealed;
- (d) A new provision that would ensure that no province could have fewer Commons seats than another province with a smaller population, subject to the provision in item (a) above;

- (e) The current provision that allocates two seats to the Northwest Territories and one seat to Yukon would be retained.

A permanent formula should be developed and section 51 of the Constitution Act, 1867 should be adjusted to accommodate demographic change, taking into consideration the principals suggested by the Royal Commission on Electoral Reform and Party Financing.

22. Aboriginal Peoples' Representation

The issue of Aboriginal representation in the House of Commons should be pursued by Parliament, in consultation with representatives of the Aboriginal peoples of Canada, after it has received the final report of the House of Commons Committee studying the recommendations of the Royal Commission on Electoral Reform and Party Financing. (*)

D: First Ministers' Conferences: 23. Entrenchment

A provision should be added to the Constitution requiring the Prime Minister to convene a First Ministers' Conference at least once a year. The agendas for these conferences should not be specified in the Constitution.

The leaders of the territorial governments should be invited to participate in any First Ministers' Conference convened pursuant to this constitutional provision. Representatives of the Aboriginal peoples of Canada should be invited to participate in discussions on any item on the agenda of a First Ministers' Conference that directly affects the Aboriginal peoples. This should be embodied in a political accord. (*)

The role and responsibilities of First Ministers with respect to the federal spending power are outlined at item 25 of this document.

E: The Bank of Canada: 24. Bank of Canada

The Bank of Canada was discussed and the consensus was that this issue should not be pursued in this round, except for the consensus that the Senate should have a role in ratifying the appointment of its Governor.