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THE CONSTITUTIONAL AMENDMENT PROCESS:
A Case Study of the Policy Process

by

(C) Brooke Jeffrey

Dissertation submitted in partial fulfilment of the requirements for the degree of
Doctor of Philosophy
In the Department of Political Science
Carleton University
1983
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Chairman, Department of
Political Science

Thesis Supervisor

External Examiner

Carleton University
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ABSTRACT

The proclamation of the Constitution Act, 1982 represented a major accomplishment in Canadian constitutional history. The process by which this came about is remarkable: first, because it was successful -- in forty years no other attempt at constitutional reform, and there were many, had borne fruit -- and second because, unlike all of the previous attempts, this one was accomplished largely outside of the executive federalism format. Indeed, this thesis contends that the very reason why this latest effort was successful is precisely because the executive federalism format was excluded from much of the process. At the same time, however, it is also argued that the federal government, which made the conscious decision to circumvent the provinces and minimize their input by restructuring the constitutional process, was also constrained, if not actually thwarted, by its own plan.

The decision to shift the forum for constitutional negotiation from executive federalism to Parliament, while it did achieve to a large extent the primary objective of limiting the input of the provinces, also produced a number of unanticipated consequences and contributed to the alteration not only of the federal timetable, but also of the ultimate nature of the Resolution. Backbench parliamentarians, promotional interest groups and Great Britain were all new actors on the constitutional scene, and can be shown to have had a significant impact on the final outcome, the former two with respect to content and the latter with respect to process. By contrast none is traditionally considered to play an important role in the Canadian policy process in general or the constitutional process as described in the literature.

Similarly, the provinces played an appreciably different role in this process than had come to be expected. Oblied to participate on the federal government's terms in a forum of its choosing, they were forced to negotiate from a position of relative weakness which brought out all the inherent conflicts among the eight dissenting provinces and allowed a new accord to be forged with relatively minimal concessions on the part of the federal forces. The Charter, for example, remained basically intact and
binding, unless a province risked being a politically charged non obstante clause. While the provinces achieved some measure of success with respect to the amending formula, this must be weighed in contrast with their failures regarding natural resources and the other nine items on their original twelve-point shopping list—which were never even discussed during the entire process.

Finally, neither Quebec nor any of the western provinces were able to simply exercise a veto and bring the entire process to a standstill, as they had done in previous constitutional negotiations which took place in the executive federalism forum. In the end, despite Quebec's absence from the accord, the constitutional package was approved and the Constitution Act, 1982 was proclaimed. This alone is perhaps the most telling evidence of the way in which this policy process differed from the traditional practice.

Whether this process represents a new departure in policymaking and federal-provincial relations or, more likely, it comes to be viewed as a milestone in a process already underway, it is probable that it will have significant implications for future efforts, notably through the increased use of parliamentary task forces, greater input by interest groups and greater use of bilateral negotiation by the federal government with the provinces. Recent federal initiatives in such areas as Senate reform, medicare and Indian self-government suggest this may indeed be the case.
TABLE OF CONTENTS

Chapter I Introduction ........................................... 1

Chapter II The Policy Process and Federal-Provincial
Relations in Canada -- A Theoretical
Perspective ......................................................... 20

Chapter III Historical Background and Issues in
Constitutional Negotiation ................................. 58

Chapter IV The Case: Scenario and Plot ................. 109

A) Preparatory Phase ........................................... 110
B) Parliamentary Phase (Part I) .............................. 119
C) Committee Phase ............................................. 125
D) Parliamentary Phase (Part II) ............................ 144
E) Judicial Phase ................................................ 155
F) Parliamentary Phase (Part III) ......................... 175

Chapter V The Case: Dramatis Personae .................. 178

A) Interest Groups ............................................. 179
B) The Provinces ................................................. 202
C) Great Britain ................................................ 230

Chapter VI Conclusion ........................................... 255

Appendices
I List of Individuals Interviewed
II Chronology
III Victoria Charter
IV Proposed Resolution (as tabled October 1980)
V Proposed Resolution (as amended February 1981)
VI Constitution Act, 1982
VII Detailed Analysis of Amendments
VIII Positions of the Federal Government and
Provinces by Issue

Selected Bibliography
La constitution de l'homme est l'ouvrage de la nature, celle de l'État est l'ouvrage de l'art. Il ne dépend pas des hommes de prolonger leur vie, il dépend d'eux de prolonger celle de l'État aussi loin qu'il est possible, en lui donnant la meilleure constitution qu'il puisse avoir.

Jean-Jacques Rousseau

...one of the characteristics of federalism is that it obliges countries which adopt it to re-think their constitutional situation constantly and redefine intergovernmental relations in the light of their experience and development.

Maurice Lamontagne
CHAPTER I

INTRODUCTION

On April 17, 1982 the Queen personally proclaimed Canada's new constitution in a colourful ceremony on Parliament Hill. The proclamation of the Constitution Act, 1982 marked the end of an era. It was the final act in an 18-month drama played out in Canada and Great Britain to arrive at an amending formula and patriate the Canadian constitution after 115 years of uncertainty and ultimate British authority. The process by which this came about is remarkable: first, because it was successful -- in forty years no other attempt at constitutional reform, and there were many, had borne fruit -- and second because, unlike all of the previous attempts, this one was accomplished largely outside of the executive federalism format. Indeed, this thesis contends that the very reason why this latest effort was successful is precisely because the executive federalism format was excluded from much of the process. At the same time, however, it is also argued that the federal government, which made the conscious decision to circumvent the provinces and minimize their input by restructuring the constitutional process, was also constrained, if not actually thwarted, by its own plan. Although in theoretical terms the federal plan originally envisaged Mr. Trudeau the director of a neatly constructed one-act play, as events unfolded the subject matter quickly proved unwieldy and the cast unmanageable.
The drama opened in September 1980 with a televised nationwide address by the Prime Minister, explaining his government's decision to proceed unilaterally with patriation by means of a proposed joint resolution of Parliament, after a federal-provincial constitutional conference earlier in the month had failed to arrive at any consensus on twelve previously agreed-upon issues -- patriation, an amending formula and an entrenched bill of rights being among them. The action picked up rapidly as the scene shifted to the parliamentary forum, first in debate in the House of Commons, then in televised meetings of a Special Joint Committee on the Constitution which held hearings and deliberated on the proposed resolution between November of 1980 and February of 1981. With the tabling of the Committee's report the House of Commons returned to the spotlight for a lengthy debate before an all-party agreement was reached and the package was finally referred to the Supreme Court in April 1981.

The Court's judgement, brought down in September of that year, was sufficiently ambiguous to be used by both sides in the constitutional debate -- those who favoured the package and/or its unilateral proclamation (primarily federal Liberals, the NDP, the premiers of Ontario and New Brunswick along with various human rights groups and a sizeable proportion of the general public), as well as those who opposed the package and/or especially the unilateral process (notably federal Conservatives and eight provincial premiers along with several native groups). The judicial decision eventually contributed to the
dénouement, in which Prime Minister Trudeau, at the urging of several other members of the cast, agreed to meet with the 10 provincial premiers in Ottawa in November 1981 for one final negotiating session. After three days of debate an agreement was hammered out, to which all of the participants except the Premier of Quebec agreed.

The resulting package, modified to a certain extent from the version submitted by Parliament to the Supreme Court, was subsequently revised by Parliament to resemble this earlier version even more closely before it was adopted by both Chambers in December 1981 and sent to Britain for passage by Parliament.

Implications of the Constitution Act, 1982

The proclamation of the Constitution Act, 1982 represents a major accomplishment in Canadian constitutional history. In addition to an amending formula which provides for complete control of future constitutional change in Canada, the resolution adopted by Parliament in December 1981 and proclaimed in Ottawa the following April contains six other sections, most notably an entrenched bill of rights:

I. Canadian Charter of Rights and Freedoms
II. Rights of the Aboriginal Peoples of Canada
III. Equalization and Regional Disparities
IV. Constitutional Conference
V. Procedure for Amending the Constitution of Canada
VI. Amendment to the Constitution Act, 1982
VII. General
The importance of the actual result of the process being examined, the Constitution Act, 1982, can hardly be overestimated when analysing the impact of this process on the future of policy-making in Canada. If the entire procedure had come to naught, or to very little of substance, one might well have concluded that the process should not be regarded as significant either. But, on the contrary, the new constitution is a major accomplishment likely to have far-reaching implications. Moreover, the Constitution Act, 1982 may well have an impact on the future policy process by virtue of several of its own provisions. Any discussion of the potential effects of the process must therefore take into consideration the concrete results as well.

In the broadest context the recent process of constitutional reform is remarkable in that no other modern state has had to face the peculiar Canadian dilemma of the lack of a constitutional amending formula and the need to make amendments through requests to a foreign state. It is also significant in that, as opposed to implementing piecemeal amendments to an existing constitutional document by an established formula, the Canadian Constitution Act, 1982 included relatively major substantive revisions as well as additions to the Constitution -- a feat which few other federal systems have been able to accomplish. The extent of the reforms and their likely impact are easily demonstrated.

The aboriginal rights section (s.35) and the inclusion of aboriginal rights in the agenda for the scheduled constitutional
conference of March 1983 (s.37-2), for example, ensured that one area of federal-provincial confrontation was guaranteed to develop quickly. The process of close consultation between the federal government and native interest groups begun with the Special Joint Committee on the Constitution (SJCC) has already continued through the medium of a special parliamentary committee. Certainly native groups received more publicity for their cause during the period in question than they have over the past several decades and it is highly unlikely that they will be willing to let the momentum lapse. At the same time, as SJCC cochairman Serge Joyal indicated on several occasions, parliamentarians were directly exposed to the natives' concerns, many for the first time, and they may now be more likely to push within the federal government for a settlement of the various issues. (The special committee report on Indian self-government tabled on 3 November 1983 appears to be a case in point.)

The amending formula also is likely to have a substantial impact on the federal-provincial component of the policy process. It has made Canada the only federation in the world with an opting-out element in its constitutional amending procedure, a feature which Mr. Trudeau had earlier rejected because of the checker-board effect he feared would develop and eventually lead to an incremental separatism. For the Prime Minister, the danger in the formula therefore lay in its looseness or excessive flexibility. If his vision is correct it could mean a number of federal-provincial differences will actually be encouraged by the formula and formalized by a province's decision to opt out.
However another observer, former Clerk of the Privy Council Gordon Robertson, has suggested that if the P.M. is wrong the alternative could be worse; he believes that the real danger may be a total stalemate in federal-provincial negotiations — that is, too much rigidity rather than too much flexibility. In a recent article, Robertson concluded that the very existence of the opting-out option might well mean that the federal government will continue to feel negotiations will be necessary to achieve provincial unanimity before any action is taken on an issue, so that no province does in fact opt out:

If that were to be the result, we would in substance have a formula requiring unanimous consent for any future change affecting the powers, rights, resources or assets of a province ... It will be ironical if we find, as our future unfolds, that we have moved, seventeen years later and after immense agony, to the same system and the same rigidity as was rejected in 1964.(1)

In addition Robertson argued that some issues may not be resolved by federal-provincial negotiation because of the "hidden veto" that the formula contains, in effect creating second-class provinces:

The principle virtue of the Vancouver accord formula over the Victoria formula for the seven dissident provinces other than Quebec was that, under it, there would be no second class provinces because there would be no veto for the big ones, Ontario and Quebec. The virtue is more apparent than real...

The amending formula requires that the consenting provinces include fifty per cent of the population of Canada. If both Ontario and Quebec are opposed to any change it cannot be approved even if it is supported by the Parliament of Canada and the legislatures of the other eight provinces. The two governments in combination have a veto over the other nine governments of Canada. However, it is not at all impossible that experience may show that it is really Ontario, all by itself, that has the veto.

If we do not find in future that opting out is avoided by a de facto policy of amending only when there is unanimous consent, both logic and experience tell us that Quebec will normally be the province that will opt out. The result will be to give Ontario a veto: no amendment will be possible without its agreement because only that agreement will provide fifty per cent of the population of Canada. No other province will have that power. No second class provinces?(2)

**Federal-Provincial Relations and the Policy Process**

Apart from the obvious significance of the final product, there is, however, another reason for noting this event, namely, the process by which the product was arrived at. Flying in the face of 40 years of policy-making precedents, the 1980-1982 constitutional process was not essentially a federal-provincial one. On the contrary, it was primarily a parliamentary process. Although it began with a federal-provincial conference in September of 1980, at which the resolution of twelve constitutional issues had been described by the provinces as essential to any agreement, it very quickly moved to the parliamentary

---

forum and was narrowed to only three items by the federal government in its unilateral initiative. From then on any substantive changes which were made to the Resolution were primarily the result of interventions by various interest groups which appeared before the Special Committee. Similarly, although the federal government did in the end return to the bargaining table one last time with the provinces in November of 1981, it was not as a result of their intervention but rather as a result of the input of federal opposition parties, the Supreme Court and, to an unanticipated extent, the government of Great Britain. Furthermore the changes effected at this last encounter, in which the federal government demonstrated that it believed for once it had the upper hand by indicating it would proceed with or without agreement, were basically quite minimal. This is especially true when viewed against the backdrop of the provinces' original twelve agenda items, nine of which were not even discussed during the two-year process and remain unresolved. A detailed examination of the constitutional process of 1980-82 will therefore not only provide evidence about the ways in which this process differed from previous attempts at constitutional reform, but should also afford insights regarding the future of the policy process in Canada, and in particular of the federal-provincial component of that process.

Between 1964 and 1978 a number of federal-provincial conferences were held on the constitution, none of which was successful in achieving a consensus. At the same time the 1960s saw the evolution
of full-blown "cooperative federalism," in which agreements on a wide range of other issues involving shared jurisdiction or financial resources were concluded. During the 1970s this tendency to resolve major issues through federal-provincial negotiation rather than in the federal parliament was heightened by a dramatic increase in the number of bureaucratic meetings and the creation of numerous continuing committees of federal-provincial officials. However, while this mechanism was increasingly becoming prevalent in the decision-making process, it was also becoming less "cooperative" in terms of the mindset of the participants. As issues emerged which were more political than technical in nature, such as constitutional reform, the mechanism became even less effective, particularly as decisions were increasingly being taken at the level of elected representatives. A meeting of middle management level bureaucrats was more likely to arrive at a consensus on a highly technical detail of EPF financing than was a First Ministers' Conference discussing the philosophical merits of language rights in an entrenched Charter. Nevertheless, up to the 1980-82 process efforts at constitutional reform continued to focus on the executive federalism forum, beginning with preliminary meetings of officials and progressing to a final round of negotiations between federal and provincial politicians.

In terms of this federal background, the 18-month process by which Canada finally arrived at a new constitution was neither bureaucratic nor did it focus on the executive federalism model.
It was at one and the same time a model of participatory democracy and a classic example of federalism at its least workable -- consultation and confrontation personified. The high degree of consultation evidenced at the federal level by the hearings of the Special Joint Committee was countered by the complete breakdown of the cooperative federalism approach at the federal-provincial level, the replacement of the executive federalism forum by the parliamentary, and the development of a highly confrontational mindset, all of which may have far-reaching implications for the policy process in general.

This is so because of the number of contentious issues which have yet to be resolved that involve shared jurisdiction, either formally or by custom, such as communications, fisheries and aboriginal rights. The new elements of the constitution have not, after all, altered the fact that there are few areas of importance in which the federal government has exclusive jurisdiction. Thus, at precisely the point in our history when the pressing issues are those which involve both levels of government, the negative impact of the confrontational-style executive federalism which developed during this process may prevail over the consultative approach developed within the federal level and produce deadlock once again.

The development and direction of the 1980-82 constitutional process becomes ever more striking when one considers that government policy was developed in large measure in full view of journalists and the public, and with full participation of backbench parliamentarians.
Where major policy decisions are normally taken by Cabinet with input from bureaucrats, and later refined, affirmed and legitimated by parliament, this policy appears to have been arrived at with a markedly reduced bureaucratic influence and a high degree of parliamentary participation via the Committee mechanism.

Similarly, the role played by interest groups was highly significant. Not only were they and their inputs visible during the Committee stage, but the effects which they had on the proposal are demonstrable. The Trudeau government did not manage to control the process as it had expected, not because of the provinces, but as a result of several new actors entering the drama. In this respect the role of the Supreme Court in the process is also notable. For many years judicial input was avoided by those involved in constitutional disputes, largely because of precedents developed by the Judicial Committee of the Privy Council. It is noteworthy, therefore, that the Court's participation should have been considered desirable by the provinces, thereby expanding the traditional context of federal-provincial constitutional negotiation since the Second World War. Similarly Great Britain, which was not expected by the Liberals to play any significant role in the drama, ended up exercising a surprising amount of influence on the final outcome.

But most important from the perspective of this study is the exclusion from this process of the traditional role of executive federalism. The 1980-82 constitutional process was the culmination
of decades of unsuccessful debate and numerous rounds of unproductive federal-provincial negotiation which sorely tried the Canadian federal system. Although the provinces participated in this latest process both visibly and behind the scenes their impact was considerably less than that of other actors, many of whom had little or no role to play in previous constitutional negotiations. Moreover it is argued that the provinces were forced to participate on the federal government's terms, in a forum of its choosing.

But although the process in question provides an excellent opportunity to analyse the decline of executive federalism, it must be recognized that it was not an isolated event which singlehandedly changed the course of the policy process. Some Canadian academics had already begun to question the continued applicability of the executive federalism in the policy process in general, and particularly with respect to constitutional policy-making. Speaking to the Canadian Political Science Association in June of 1977 Alan Cairns began with the statement that "The Canadian political system ... can no longer be taken for granted." Referring to the historical development of political "languages" in Canadian federalism, he then concluded that:

the destruction of a customary historical language was accelerated by the recent process of constitutional review which downgraded the Canadian constitutional heritage and promised new beginnings which it failed to deliver. The present language situation is clearly in flux as disputants talk past each other, rather than to each other.
No new linguistic paradigm in which debate can be
couched has emerged. Linguistic instability and
federal instability reinforce each other.(3)

In terms of the executive federalism model this breakdown in accepted
language patterns among the political elites has meant that "the con-
temporary search for intergovernmental coordination confronts a set of
conditions inimical to conflict resolution."(4)

Two years later Cairns continued his theme from a similar
perspective. In a paper entitled "The Other Crisis of Canadian Federa-

Thus
tion, and the stakes of that competition
have increased. In addition, future cyclical
changes in the responsibilities and powers of the
government of Canadian federalism will occur at a
higher threshold of government activity than in the
past. Quite distinct, therefore, from the Quebec
crisis, although impinging on it, is this larger

the new circumstances of Canadian federalism now
include the coexistence of powerful, dirigiste
government at both levels. As a result, as I will
subsequently indicate, the ratio of cooperative to
competitive tendencies has shifted to the detriment
of the former, and the stakes of that competition
have increased. In addition, future cyclical
changes in the responsibilities and powers of the
government of Canadian federalism will occur at a
higher threshold of government activity than in the
past. Quite distinct, therefore, from the Quebec
crisis, although impinging on it, is this larger

(3) Cairns. "The Governments and Societies of Canadian Federa-


(5) Cairns. "The Other Crisis of Canadian Federalism", CPA, Summer

Put another way by Garth Stevenson, "The curious expression 'the eleven governments' which has recently found its way into Canadian political discourse is symptomatic of this factual equality of bargaining power, whatever the B.N.A. Act may say to the contrary." (7)

Speaking from the perspective of the consociational model, Herman Bakvis also analyzed new trends in the policy process in Canadian federalism. (8) He rejected not only the efficacy of executive federalism as a tool of conflict resolution but also questioned the continued relevance to Canada of underlying consociational notions of elite agreement and citizen isolation (particularly relevant here with regard to the constitutional debate). While accepting that in modified form Lipjart's "pillar cleavages" (9) were valid descriptions of certain Canadian societal phenomena, Bakvis believed that the addition of a federal institutional structure as an element in policy issues such as the constitution precluded rather than enabled a consociational solution. Thus Bakvis referred to Noel's argument that


difficulties arise when elite accommodation takes place within two separate arenas (cabinet and federal-provincial conferences) and between two sets of elites (federal Cabinet ministers and provincial premiers). Consociationalism combined with federalism raises the possibility of a conflict between competing federal and provincial elites within the same provincial subculture. Thus, according to Noel, the duality of political elites in a federal system makes the outcome of subcultural conflict more uncertain than it would be in a unitary state.\(^{(10)}\)

The "new" federalism is anything but cooperative; it could be described as confrontational, competitive, autonomous or even dual federalism. Although its origins can be traced to developments in the preceding decade, it was this last round of constitutional negotiation which definitively brought the cooperative era to a close.

Elements of the new mindset were evident in the thinking of the Prime Minister from the outset of the 1980-82 constitutional debate. A comparison of his position on the efficacy of federal-provincial relations in October of 1974 and in April of 1980, when the constitutional process was about to begin, is highly instructive. In 1974 he stated:

\[
\text{Dans la plupart des secteurs importants de l'administration, il est impossible d'établir une distinction nette entre les responsabilités exclusivement fédérales et celles qui tombent exclusivement sous la juridiction provinciale. Pas plus qu'il n'est réaliste de croire que les décisions prises à un palier n'auront pas, dans la plupart des cas, d'importantes répercussions sur les responsabilités qui incombent à un autre palier de gouvernement.}
\]

Qu'on le veuille ou non, et que les députés d'en face le comprennent ou non, le gouvernement consacre beaucoup de temps, comme nous le faisons au cabinet, aux relations fédérales-provinciales, en faisant en sorte que nos décisions qui touchent de près les problèmes provinciaux dans certains domaines tiennent compte de la grande complexité de notre société.(11)

While in his comment on the Throne Speech in 1980, the "enemy within" speech, he declared:

Nous sommes le seul groupe, la seule assemblée du pays qui puisse parler pour la nation tout entière, qui puisse exprimer la volonté nationale et l'intérêt national. Il est important que nous en tenions compte en remplissant notre mandat, que ce soit au sein du gouvernement ou de l'opposition, et si nous ne sommes pas d'accord, il faut que ce soit non pas à cause d'intérêts régionaux ou provinciaux, mais à propos de ce grand tout que nous essayons de servir chacun à sa manière. Partout au Canada, il en est qui se claquent réciproquement la porte au nez et entravent le libre mouvement des personnes - et, je suppose des idées et de la culture - ce qui, à mon sens, est le plus grand danger qui nous guette au cours de cette nouvelle décennie. Voilà le danger qui pourrait causer l'effondrement du Canada si nous, du Parlement, ne nous faisons pas un devoir d'exprimer d'une seule voix la volonté et l'intérêt national... Ce sont là de graves dangers mais, en un sens, le pire ennemi est dans nos murs et non au dehors. Je me souviens que Pogo disait: "Nous avons rencontré l'ennemi, et c'est nous."(12)

In Fredericton in June of 1980 these thoughts had been expanded:

(11) House of Commons, Débats, October 2, 1975, p. 45.
The question which now faces us is whether this form of national coordination and decision-making has gone about as far as it can go. They have many successes to their credit, these federal-provincial meetings, and we can take pride in them, but in some areas, especially the thorny ones of economic policy and economic management, in these areas, the record is less encouraging.

One cannot help but wonder whether this is the only, or even the best way to go about achieving the necessary level of consensus among the regions of Canada. Perhaps there is only so much that can be accomplished by bodies that meet only occasionally and which possess no power of their own. Perhaps there is a need to create or to reconstruct national institutions which meet more continuously, which can deal with national issues on a day-to-day basis, which can take the hard decisions this country requires, and which can be held accountable for them by the people. (13)

This was followed by his October 2, 1980 address to the nation in which he referred to the “tyranny of unanimity.” By November of the following year he had clearly buried the concept of cooperative federalism and gave its funeral oration in Vancouver:

In the late seventies, negotiations surrounding cost-sharing and constitutional reform brought the issues to a head, pitting against each other two clearly defined and radically different visions of Canada. There was a real danger that continued transfers of power to the provinces would so diffuse the strength of the nation as to damage its unity and cohesion.

It was time to stop the swinging of the pendulum in that direction. It was time to reassert in our national policies that Canada is one country which must be capable of moving with unity of spirit and

(13) Notes for Remarks by the Prime Minister at the Tenth Anniversary of the Council of Maritime Premiers, Fredericton, N.B., June 1, 1980, p. 4.
purpose towards shared goals. If Canada is indeed to be a nation, there must be a national will which is something more than the lowest common denominator among the desires of provincial governments. And when there is conflict, I know this is a shattering theory today, but I say when there is conflict between the national will and the provincial will, the national will must prevail. Otherwise we are not a nation.

Consequently while the latest constitutional process resulted in a high degree of consultation and consensus among actors at the federal level, involving those such as interest groups which rarely in the past had been given a large role to play, in federal-provincial terms it is argued that the process epitomized the failure of executive federalism, decisively marking the shift to confrontational policy-making. Viewed from this perspective, the eventual accord could be seen not as the result of successful elite accommodation or a consociational mindset but as the end product of a process in which several elites persisted with certain demands in spite of the possible consequences while others, (e.g., Quebec), refused to even participate. The document produced is certainly not the best one possible but, more importantly, even taking into account the fact that politics is the art of the possible, it may still not be the one which best meets the needs of the Canadian population, but rather one which reflects certain self-interested elite goals and leaves many unresolved conflicts within the political system.

Another consequence of this process and the conflict which it engendered may be a reordered priority for policy-making structures themselves. The process may signal a new trend towards heightened parliamentary input and a general decline in the importance or use of the executive federalism forum. Recent federal initiatives in such areas as Senate reform, medicare and Indian self-government suggest this may indeed be the case.

Thus this thesis contends that the constitutional process of 1980-82 is significant because it was successful -- it produced a concrete result, (despite the fact that the process and the final nature of the result may not have been what the federal government originally intended) -- and it was successful precisely because it deviated from the traditional constitutional policy-making process. Therefore, any further examination of the 1980-82 case must be preceded by an examination of the conventional wisdom on the policy process in Canada and the historical evolution of constitutional negotiation. The following chapter begins this examination by outlining the way in which the policy process in general has traditionally been thought to function at the national and federal-provincial levels.
CHAPTER II

THE POLICY PROCESS AND FEDERAL-PROVINCIAL RELATIONS IN CANADA -- A THEORETICAL PERSPECTIVE

This chapter examines the literature on the policy process in Canada to determine what roles the various actors have traditionally been thought to play in the national and federal-provincial decision-making process. It is intended as a backdrop for comparison with the discussion below (Chapter IV) of the 1980-82 constitutional process, where it is argued that many of these actors had substantially altered roles to play while several other new actors were also recruited to participate in the drama.

However, any analysis of these traditional roles must first begin by outlining the context in which this literature has been developed. The policy process in most western democratic nations has undergone a definite shift in emphasis in the past hundred years from the legislative to the executive and bureaucratic institutions of government. The global literature on policy-making has traced these trends, which are frequently referred to as the "decline of legislatures" and rise of bureaucracies phenomena.(1) The usual explanation is that

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the expansion of the role of government and the dawning of the technological era of necessity decreased the importance of individual (non-expert) legislators and reduced or redefined their role in the policy process to one of policy refinement and scrutiny of implementation, while at the same time it limited the office of the executive and produced a highly specialized, expert bureaucracy which increasingly participated in policy decisions as well as policy implementation.

What is at issue in the literature is the degree to which each of the three institutions now participate in the policy process, or how changes could be effected. In general the Canadian literature has followed these trends and approaches closely, (2) but a unique body of literature has also evolved in Canada regarding the role which the federal nature of the political system, and particularly the institutionalization of federal-provincial negotiations, have come to play in the policy process. Indeed, the literature on the general policy process is somewhat limited as much emphasis has been placed on the federal-provincial component.

A). The Policy Process at the National Level

The study of policy-making cannot be said to have occupied a central place in Canadian political science in a direct sense. Aspects ... of policy-making are of course related to our historic preoccupation with such issues as brokerage and

consensus politics but, generally speaking, we have not zeroed in on the more explicit and philosophy which have been associated with the immediate environment of the executive-bureaucratic levels.

-- Bruce Doern ("Recent Changes in the Philosophy of Policy-Making in Canada.")

Although the above passage was written a decade ago, the literature on the policy process in Canada cannot be said to have expanded considerably and, as suggested above, it has tended to focus on one or another of the institutional components at a time. (3) At the federal level these components can be broken down into three institutional categories -- the legislative, executive and bureaucratic -- with several subcategories such as backbenchers or committees for the legislative and departmental or central agency mandarins for the bureaucratic. Of these components, the executive and the bureaucracy are the ones most frequently examined in the Canadian literature on the policy process because of their perceived greater relevance: "The importance of Parliament does not lie in its capacity to be a centre for the detailed construction of public policy, for this capacity is meagre indeed." (4)


The bulk of the Canadian literature on Parliament has tended to concentrate on ways and means to increase and improve the input of legislators to the policy process. (5) The fact that the most frequent method chosen to accomplish this is an overhaul of the parliamentary committee system to enlarge the scope and authority of committees demonstrates the extent to which individual backbenchers have been thought practically irrelevant to the policy process. "Very little attention has been paid by political scientists to the interaction between Canadian M.P.'s and bureaucrats in relation to the initiation of public policy for the reason that the former's role in the process is ... so very limited." (6)

With respect to the bureaucracy and the executive, the debate in the literature has centred around the issue of which component actually initiates policy. The introduction of rationalist management tools (PPBS, MBO, policy planning units, etc.) by the Trudeau government in the late sixties heightened this debate, as did the strengthening of central (PCO) and extra-bureaucratic (PMO) agencies and the expansion of the Cabinet committee system. Some observers have argued that the Prime Minister and Cabinet are still the most important source of policy, and that the system still functions in a "top down"


direction, (7) while others maintain that there is increasing evidence for a "bottom up" view of the hierarchy in decision-making, a development which they generally lament. (8) Supporters of the top-down theory have frequently been former or current bureaucratic "insiders," such as Gordon Robertson and Michael Pitfield, and have consequently been vulnerable to criticisms of bias. Unfortunately, given the constraints of cabinet secrecy, ministerial responsibility and a closed bureaucracy, few "outsiders" have been in a position to closely examine the bureaucratic-executive relationship in the policy process. As a result, many of the bottom-up proponents have had to base their arguments on observable variables such as the expanded size of PCO/PMO or the increased number of Cabinet committees.

Moreover, the degree to which each of these actors exercises control in the policy process can depend on a number of variables. The type of policy being analysed, for example, may greatly affect the way in which a policy decision is arrived at. Lowi has consequently categorized policies as "distributive, redistributive and regulatory," (9) which could also be referred to as a distinction between economic, social and legal/symbolic policies.


Another problem in determining relative importance of the actors in the policy process is the nebulous definition of the term itself. Van Loon and Whittington have broken the policy process down into four parts -- initiation, priority determination, formulation and refinement. Clearly policy in this sense must apply to major issues, and policy initiation must involve the establishment of priorities and goals, which must then be translated into specifics. Doern refers to this as a distinction between values and programmes. Depending on the subject, however, it may be possible for the bureaucracy to formulate a policy initiative and articulate values (e.g., native rights, welfare issues or arts and culture policy), as the Cabinet Document mechanism demonstrates. Preparation of such a document for submission to the appropriate Cabinet committee can easily span several months, during which time it ascends and descends the departmental hierarchy many times, undergoing countless modifications at all levels.

It is also in this context of decision-making that the crucial role of the Privy Council Office, Treasury Board and other central agencies becomes evident. Many observers and participants see these agencies as fulfilling primarily a liaison function -- a transmitter or clearing-house -- while others maintain there is actual input into the content during transmission.

In addition to different types of decisions there are also different kinds of power to influence policy. Apart from classic positional authority in a hierarchy there is the "knowledge is power" phenomenon which can result from the possession of either technical or political information. Deputy Ministers and central agencies can also exercise power through their control over the flow of information, and finally, political and bureaucratic actors can sometimes rely on charismatic authority to force implementation of their decisions.

A recent policy development has been the introduction of the envelope system, which was designed to ensure that the policy process and expenditure management would be unequivocally integrated. Essentially the system has two significant features -- (1) the designation by Cabinet of overall expenditure limits and specific sub-limits for policy sectors, and the allocation of all departments to one or another of the ten policy sectors or envelopes and (2) the realignment of the Cabinet committee system to deal with the policy sectors. This initiative has generally been viewed in the literature as one more attempt by the executive to reassert its control over the bureaucracy through the commitment to rational planning,(13) thereby suggesting that the executive's success to date has been less than hoped for.

The perceived relative importance of the bureaucrat, the M.P. and the cabinet in the Canadian policy process can also be determined

indirectly by examining some of the literature on another of the actors in the policy process, interest groups.

It has been stated that:

power of any kind cannot be reached by a political interest group without access to one or more of the key points of decision-making in government. Access, therefore, becomes the facilitating intermediate objective of political interest groups.(14)

In Canada numerous studies have indicated that interest groups traditionally have vastly preferred senior bureaucrats or cabinet ministers to backbenchers as their point of access to the political system.(15) This point has also been made by backbench parliamentarians themselves:

It is well known that the process by which organizations put forth their views tends to bypass Parliament ... If, however, these efforts (lobbying the bureaucracy and the executive) are unsuccessful and legislation is proposed to which it is opposed, the group may then decide to ... eventually appear at the hearings on the bill before a committee of the House of Commons. Parliament, in other words, is the last line of defence.(16)

More recently several studies have documented a "sharp increase in the number and activities of interest groups operating at all levels of government,"(17) a phenomenon which is generally attributed to the decline of the party system and to a lesser extent...


elite accommodation. However, as Gillies and others have pointed out, despite increased activity the success rate of these groups remains very low.

It is, of course, one thing to recognize that special interest groups have grown in numbers and now have a recognized place in the policy formulation process. It is another matter to say how much influence they wield, either in pressuring the executive or in persuading the members of the legislature to follow their advice. 

Given the nature of the interest groups which participated in the 1980-82 process, it is also important to note a further distinction which has been made in the literature between "self-interested" and "promotional" groups. The former are exemplified by various business or professional associations, such as the Canadian Manufacturers' Association or the Canadian Medical Association, while the latter are exemplified by voluntary organizations of like-minded but unrelated individuals, such as human rights and civil liberties organizations. Members of this second category of groups may come from diverse backgrounds or professions, and share basically "ideological" concerns.

Social scientists have recognized that interest group politics does not require ... that all group function to achieve some tangible interest of immediate benefit for its members. A certain type of interest group may advocate long-range goals which, if the welfare of its participants were taken into account, have no relation to individual aspirations. 

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(20) Van Loon and Whittington. The Canadian Political System, p. 301.

The difficulties encountered by this category of interest groups include those of all interest groups, but are compounded by some of their unique characteristics. Promotional groups, for example, are thought to be more susceptible to goal displacement because of their perennial shortage of funds. Unlike business or professional organizations they simply cannot rely on strong financial backing from their members or access to expensive facilities.

Access is determined in large measure by a group's status and/or credibility, and once again groups with large, organized memberships and independent financial sources are at an advantage. We learn that promotional groups generally are dependent on outside financing (e.g., other than membership dues), much in the form of grants from the very government whose policies they are trying to influence, and that this usually leads to their perception by legislators and bureaucrats as "clients" rather than prestigious spokesmen for major interests.

Whether a group is able to maintain an on-going relationship with legislators or bureaucrats is generally considered indicative of its status and/or expertise. Attempts to influence specific pieces of legislation are more likely to succeed, it is reasoned, if channels of communication are continuously open and contacts frequent between the group and decision-makers involved. Once again promotional interest groups such as the human rights organizations which participated in the constitutional process are traditionally seen to be at a disadvantage as they are rarely able to afford the services of a professional lobbyist or to maintain a member of their own working full time in the national capital. The problem of legitimacy is heightened by
government's desire to avoid conflict -- it wishes to assume that the Canadian Bar Association speaks authoritatively for all lawyers, and would prefer other groups to be as unified, thus placing the onus on promotional groups to attempt to solidify positions and appoint one spokesman, a task particularly difficult for ideologically-motivated memberships. As Key points out, "The reconciliation of differences within interest groups facilitates the work of legislatures and of Congress by reducing the number of conflicts with which they have to deal..."(22)

Within the bureaucratic-executive structures there are many points of access, only some of which are readily accessible to promotional groups, primarily for socio-economic reasons. As Clement has demonstrated(23) it is the corporate elite cum self-interest group representatives who are most likely to have access to Cabinet members. Kwavnick and others have demonstrated that these self-interest groups also make heavy use of senior departmental mandarins.(24) Promotional groups, on the other hand, spend more time lobbying lower-level bureaucrats. For one thing, the groups are unlikely to have any Cabinet contacts. For another, those working at lower levels in the bureaucracy, and particularly in social action programs in government, may be more sympathetic to the goals of such groups. This is of course not without its tactical advantages, as a fair amount can be


accomplished in the area of human rights, for example, without legis-
lation, certainly in terms of promotion and education, and moreover it
is generally accepted that legislation can more easily be affected in
its formative stages than once it is presented to the political arena.
"With the growing complexity of government, legislative bodies have had
to delegate authority to administrative agencies to make rules and
regulations. Administrators become legislators, and pressure groups
inevitably direct their activities to the point at which authority to
make decisions is lodged."(25)

On the other hand the standard letter-writing campaign
tactic, used extensively by promotional organizations, has proven to be
one of the least successful weapons in their arsenal. Zeigler con-
cludes that it is "probably the least effective and most relied-upon
lobbying technique. Its extensive use results from the fact that many
pressure groups simply do not have the resources to engage in more
elaborate techniques."(26)

Speaking of promotional groups, Presthus has stated that:
"It is also true that such groups tend, along with labor unions, to
have somewhat higher refusal rates than other types of associa-
tions."(27) He attributes this in the Canadian context primarily to
the closed nature of the Canadian bureaucracy; this also, he points
out, makes efficacy or even access extremely difficult to measure, and

greater possibilities may exist for influencing decision-makers on golf courses or in clubs. (28) Pross concurs with this assessment, indicating that in his view issue-oriented (promotional) groups "... tend to be considerably less favored by the relatively closed nature of the Canadian policy structures than are the most fully institutionalized (self-interest) groups." (29)

Furthermore human rights groups are more often involved in legislative issues because of possibilities for discrimination or violation of fundamental freedoms and civil liberties in almost any subject area; unfortunately most of this involvement centres around pressure for new or altered legislation, rather than prevention of proposed legislation. Presthus once again paints a gloomy picture: "Directors agree it is easier to prevent the passage of new legislation ... than it is to effect such measures. Since fully four-fifths of the case study issues involve innovative situations, we are dealing here with the more difficult task." (30)

Finally, federalism requires groups either to function at both levels (involving extra financial difficulties and possible conflicts between federal and provincial levels), or to concentrate on one level exclusively. In Canada human rights associations, for example, were hard-pressed in this respect as specific issues could alternately

(28) Ibid., p. 175.


involve provincial, federal or joint jurisdiction due to the lack of clarity within the B.N.A. Act. For groups with low budgets and personnel the fact that "access by a particular group to one branch of government does not necessarily mean access to another"(31) could be an almost insurmountable problem.

All of the above constraints on the efficacy of interest groups in the Canadian context have led to a dearth of analyses, particularly with regard to promotional groups. Much of the literature which does exist is of the case-study variety, and concentrates heavily on organized, self-interest groups.(32) The unspoken assumption appears to be once again that promotional groups have a negligible role to play in the policy process at any level, an assumption which makes the success of such groups during the 1980-82 constitutional process particularly striking.

In summary, then, we can conclude that the conventional wisdom on the policy process at the national level attributes little importance to the roles of promotional interest groups, backbenchers and Parliament in general; at the same time a consensus exists that the executive and the bureaucracy are the most important actors in policy formulation, and the major debate revolves around their relative importance.

(31) Zeigler. op. cit., p. 49.

However these are not the only actors in the policy process. In addition to the three national institutions a fourth component, federal-provincial negotiation, must be included. This federal-provincial aspect of the policy process, in which provincial executives and bureaucracies have come to be involved on a near-equal footing with their national counterparts over a broad spectrum of policy areas, is rooted in the nature and origins of Canadian federalism.

B) Federal-Provincial Aspects of the Policy Process

The Canadian federal system established in 1867 was not an example of "classic" federalism as defined by Wheare,\(^{33}\) primarily due to the lack of an amending formula and the existence of the federal powers of reservation and disallowance. Nevertheless, as Livingston pointed out,\(^{34}\) the system functioned as a federal one, and therefore could be analysed from that perspective, a point which Friedrich also made by stressing the importance of the process rather than the structure:

The review of selected issues in contemporary federal relations has, it would seem, shown that federalism is more fully understood if it is seen as a process, an evolving pattern of changing relationships rather than a static design regulated by firm and unalterable rules. What it means is that any federal relationship requires effective and built-in arrangements through which these rules can be recurrently changed upon the initiative and


with the consent of the federated entities. In a sense, what this means is that the development (historical) dimension of federal relationships has become a primary focal point, as contrasted with the distribution and fixation of jurisdictions (the legal aspect). In keeping with recent trends in political science, the main question is: What function does a federal relationship have?—rather than: What structure? (35)

In his classic study of federalism, Riker has divided federal systems into the four categories below:

A. The central government can completely overawe the constituent governments.

B. The central government cannot completely overawe the constituents, but it can keep them from overruling its own decisions.

C. The constituent governments cannot completely overawe the rulers of the center, but they can significantly vary the behavior of officials of the center, though central officials cannot overawe them.

D. The constituent governments can unilaterally completely overawe the rules of the center.

Manifestly, if either situations A or D exist then the federal bargain cannot be maintained. If A exists, then the bargain can be broken by depriving the constituent governments of all independence of action. If D exists, then the bargain can be broken by depriving the center. Hence, neither can be conditions for keeping the bargain. On the other hand, if situations B or C exist, either is sufficient to maintain the bargain. If B exists, then the center can guarantee its own independence and may not take it away from the constituent units. If C exists, the constituents can guarantee their own independence and may not take it from the center. Either B or C is thus a sufficient condition for keeping the bargain. Condition B is centralized federalism and condition C is peripheralized federalism. (36)


From this description Canada today would fall under category C while the United States, for example, would probably be classified as a 'category B' federal system. In fact, it has been argued that the Canadian system is currently one of the most decentralized in the world;\(^{(37)}\) and moving further in that direction, while the American federal system is increasingly moving towards a more centralized format.\(^{(38)}\) The injunction by Livingston to examine processes rather than intents is particularly appropriate here, as the trends in these two systems appear to fly in the face of the intentions of their respective founding fathers. The Canadian Fathers of Confederation, and particularly Sir John A. Macdonald, were basically strong centralists who mistrusted a federal system such as that of the Americans, and deliberately provided the federal government with the "peace, order and good government" clause, federal paramountcy, and all residual powers, believing they had thus clearly ensured the ultimate supremacy of the federal government. Having in mind the then recent and tragic experiences of the Civil War in the United States, Macdonald wanted to see as centralized a federal system as the provinces would accept. "We should concentrate power in the federal government and not adopt the decentralization of the United States."\(^{(39)}\) Indeed, there is even some evidence that Macdonald viewed federalism as a temporary

\(^{(37)}\) See for example G. Stevenson. Unfulfilled Union. Toronto: Macmillan, 1979, particularly pp. 27-86.


arrangement to secure initial unity, and that "he fully expected the provinces to wither away from lack of exercise, leaving a basically unitary system in Canada."(40)

In the Canadian context it was judicial decisions which played a major role in altering the power balances originally intended. Until 1949 the highest court of appeal in Canadian constitutional matters was a foreign tribunal, the British Judicial Committee of the Privy Council. By the time the Supreme Court Act was finally amended in 1949 to make the Canadian Supreme Court supreme in fact as well as name, the Judicial Committee's line of constitutional interpretation, regarded by many as unduly rigid and overwhelmingly decentralist in tenor,(41) had irrevocably altered the course of Canadian federalism. In fact, the most serious opposition to the Supreme Court Act came from the provinces, who recognized their vested interest in maintaining the Judicial Committee. (This is particularly noteworthy in the context of the 1980-82 process, where the provinces opposed to the federal proposal strongly supported the idea of its referral to the Supreme Court.)

The decentralizing trend resulted primarily from the Committee's decision to treat the Canadian Constitution in the same manner as an ordinary statute, thus applying an extremely narrow, legalistic and abstract approach to their decisions. Briefly, the Committee placed a


(41) A detailed critique of the Judicial Committee can be found in Canada, Senate. Report by the Parliamentary Counsel Relating to the B.N.A. Act 1867, 1939, while a more favourable evaluation is provided by Alan Cairns. "The Judicial Committee and its Critics." C.J.P.S., IV, 1971, 301-5.
very narrow interpretation on the "peace, order and good government clause," reducing the federal power to enumerated subjects in section 91, and expanding on the provinces' enumerated powers in section 92, in such cases as the Parsons (1881) and Local Prohibition (1896) decisions.\(^{42}\) Lord Watson's statement on a later case epitomized the thinking of the Committee:

... the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which in supplement of its enumerated powers is conferred upon the Parliament of Canada by s. 91 would, in their Lordships' opinion, not only be contrary to the intendment of the act but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate to the exclusion of the provincial legislatures.\(^{43}\)

Having subordinated the "peace, order and good government" clause to the enumerated subjects, their Lordships then proceeded to further emasculate it in a series of decisions in the 1920s, notably

\(^{42}\) Attorney-General for Ontario vs Attorney-General for Canada, Privy Council. [1896], A.C. 348; I Olmstead 343; Citizens Insurance Co. v. Parsons; and Privy Council. [1881], 7 App. Cas. 96; I-Olmshtead 94.

\(^{43}\) Attorney-General for Ontario vs Attorney-General for Canada [1896]. A.C. 360.
Board of Commerce (1922), Fort Francis (1923) and Snider (1925), which restricted its application solely to a state of national emergency. (44)

In addition, both the Judicial Committee and subsequently the Supreme Court have historically considered their role in constitutional judicial review to be a very narrow and passive one. While it can be argued that the Committee's decisions were not strictly passive, given their overriding preference for provincial autonomy, they evidently perceived themselves to be strictly interpreting the Act. More recently, the predominant sentiment of Supreme Court jurists was expressed in the statement that there is no "legal justification for an attempt by Canadian courts to mould and fashion the Canadian Constitution by judicial legislation so as to make it conform according to their views to the requirements of present-day social and economic conditions." (45)

The various federal-provincial jurisdictional disputes which eventually found their way to the courts resulted from differing conceptions of the nature of Canadian federalism. "Arguments over concepts of federalism became, as they have remained a characteristically Canadian form of political controversy, or a language in which controversy was expressed." (46) Two major works which have attempted to


delineate these differing historical perspectives have each arrived at a five-part categorization scheme. Mallory's analysis refers chronologically to "quasi" federalism, "classic" federalism, "double-image" federalism, "emergency" fédéralisme and "co-operative" federalism. (47) In the first, provincial governments are perceived to be clearly subordinate to the federal, the view identified with Macdonald; in the second, each level of government is considered independent and supreme within its own clearly defined jurisdiction, thereby eliminating the need for interaction. The third approach, that the central government can assume broader powers in emergency situations, was accepted by the provinces during the Depression and World War II, and by the Supreme Court in situations such as the federal government's decision to implement anti-inflation legislation in 1975. (48) The co-operative federalism approach is explained by Mallory as a perception of jurisdictions and the need for considerable interaction between the two levels, while double-image federalism conceives of the federal system as a union between two linguistic/cultural groups rather than 11 constituent bodies, and argues that all federal practices must take this into account, a position which Quebec premiers of all political stripes have consistently supported.


In Divided Loyalties Edwin Black's five categories, although they differ in terminology, closely parallel the different perceptions of Canadian federalism outlined by Mallory. Classic federalism becomes "coordinate" federalism, the cooperative approach is "administrative" federalism, the double-image approach is renamed "dual" federalism and the quasi-federalism/emergency categories are roughly equivalent to Black's "centralist" perspective. However Black also discusses the "compact" theory of federalism, which basically held that Confederation was the result of a solemn agreement between equal colonies. (49)

This approach, while more an ideological concept than a perception of how the system should function as a historical categorization, has nevertheless played a key role in the area being examined by the case study -- constitutional amendment -- as the following chapter demonstrates. This is because seeing the Confederation as the result of an agreement between colonies permitted supporters of the compact theory to demand that no changes be made in the British North America Act without the consent of all the provinces, or, at the very least, without the consent of the original partners that were said to have created the federation.

(Emphasis added) (50)

Quebec has continued to support this perception, up to and including its arguments to the Supreme Court over the "loss" of its veto in the


(50) Ibid., p. 150.
1982 constitutional accord, (51) despite the theory's increasingly widespread rejection by other actors.

More recently, Garth Stevenson has proposed reducing these five categories to just two conflicting ones -- "centripetal" and "centrifugal" federalism. He perceives Mallory's and Black's categories to be points on a continuum whose poles are complete centralization and decentralization. The concepts and the continuum are only possible because

federalism itself is a compromise between unity and diversity, symbolized by two levels of government which ostensibly represent these two aspects of the federal polity ... Centripetal federalists prefer to strengthen the federal government's power at the expense of the provincial governments; centrifugal federalists prefer to do the reverse. (52)

The federal government and the governments of the various provinces have indeed often differed in their visions of Canadian federalism. The traditional recourse for such a conflict in classic federalism would have been the courts, but in Canada, as we have seen, the judiciary was not only unable to clarify the situation, but actually contributed to its further complication. Although the degree and nature of the role played by the Judicial Committee of the Privy Council has been widely debated, one result of its decisions was

(51) Attorney General of Quebec vs. Attorney General of Canada. Supreme Court of Canada. (Not yet published.) In the Matter of a Reference to the Court of Appeal of Quebec concerning the Constitution of Canada, December 6, 1982.

clearly the prevention of any effective action by the federal government to solve the economic problems of the Depression. Mallory feels that the Committee "was so deficient in sense and sensibility that the allocation of power in the constitution, by the end of the 1930s, had achieved a remarkable incongruity between the resources, capacities and responsibilities of the federal and provincial governments." (53) Canada obviously did not have the option of substituting "litigation for legislation" as Dicey had suggested.

Basically there were two problems which needed to be addressed: (1) many issues were emerging which the BNA Act did not foresee and hence did not clearly define as federal or provincial responsibilities and (2) the necessary social policies required to deal with the Depression clearly fell under provincial jurisdiction but the constitution did not provide concomitant economic authority to finance such policies. (54)

In a classic federal system the ultimate option then would be amendment of the constitution, to alter the jurisdictional balance, but once again this option was not open to Canadian politicians. Consequently the players were forced to improvise. Ottawa decided to try another tack, and

after the war, took massive initiatives in the field of social policy, basing its activity on the federal spending power and using shared-cost

programmes. Their constitutionality has seldom been tested in the courts, at least partly because no government has been willing to risk the programmes being shot down. (55)

This approach allowed provinces to retain their responsibility for social policy programs at the same time that it provided for redistribution of resources. "The provincial governments have lacked the finances to develop the desired programmes alone. As a result such problems have often been defined as 'national' problems and demands have been made to the national level for their resolution." (56)

The negotiations which were conducted between the federal and provincial levels to establish these various cost-sharing programs gave rise to the cooperative/administrative concept of Canadian federalism -- "cooperative" in style and mindset because of the blurred jurisdiction which necessitated interdependence, and "administrative" in format because of the substantial role which bureaucrats played in arriving at a package before their political masters met to sign an accord. Smiley distinguishes between two types of interrelationship, first the "periodic renegotiation of the five-year arrangements for sharing tax sources and revenues" and second the "continuing relations which were concerned with specific shared-cost programmes." (57)

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(56) Ibid.

Simeon's examination of some of the more important policy negotiations -- the Canada/Quebec pension plans (1963-4), the federal-provincial fiscal arrangements (1966) and the negotiation on a constitutional amending formula (1971) -- which were conducted in the past 25 years under the aegis of cooperative federalism demonstrates a number of significant trends. (58) First there is a striking change in the format of the negotiations, from an informal meeting of first ministers, based on a letter of invitation written almost as an afterthought by Prime Minister Pearson during the pension exercise, to detailed advance preparation, several bureaucratic meetings and an extremely formal first ministers' conference format during the 1971 amendment negotiations.

This change is indicative of the more important shift which occurred during this period, from near complete federal dominance and provincial passivity during the early negotiations to vigorous provincial participation and opposition by the end. This in turn is attributable in large measure to the activist role which Quebec began to play in the negotiations as a result of the resurgence of nationalism during the Quiet Revolution of the 1960s. Bryden's analysis of the pension process concurs in identifying both of these trends:

Yet, in spite of the traditional views regarding the paramountcy of provincial responsibility and the constitutional uncertainty surrounding federal participation, the provinces exercised minimal initiative at most in policy-making on public pensions. Articulators of demands for such pensions invariably looked to the federal government for

action. One infers that they regarded a pension plan as fulfilling a national purpose. On the whole, provincial governments accepted or at least did not dissent from this viewpoint. It is necessary, however, to deal separately with Quebec and the other provinces because there have been important differences in their attitudes to federal involvement in public pensions.

... Duplessis kept the way open for future provincial action by insisting that the constitutional amendment of 1951 provide to his satisfaction for the paramountcy of provincial over federal legislation in the pension field. This proved to be of central importance in policy-making on contributory pensions more than a decade later. Within the framework of the positive Quebec nationalism of the 1960s, the Lesage government was determined to have its own contributory plan. The federal government believed it had no choice but to adapt to that hard fact, with the result that Quebec was a proximate policy-maker on contributory pensions. This was the only occasion on which any province played a major policy-making role in the pension field. (59)

This is not to suggest that there were no conflicts between Ottawa and the other provinces, or among provinces, during the period of federal-provincial negotiations. However the administrative approach, involving as it did many layers of bureaucratic negotiation, was designed to manage and resolve these conflicts; administrative or cooperative federalism, according to its proponents, was "based on the virtues of compromise, flexibility and pragmatism." (60) Stevenson suggests that this approach was also self-reinforcing, since "as bureaucracies became larger, more powerful, more functionally


specialized and more removed from partisan influence and pressure, they assumed increasingly autonomous roles in seeking accommodation with their counterparts ..."(61) At the same time this increased involvement of bureaucrats also contributed to the more vigorous participation of provinces as time passed. The growth of provincial bureaucracies has been well-documented. Gibbins, for example, points out that provincial bureaucracies have grown even faster than their federal counterpart:

"The rate of bureaucratic growth in the Canadian provinces and municipalities has also outstripped that in Ottawa. From 1959 to 1971, for example, federal government employment (excluding the armed forces) grew by 19 percent, provincial government employment (excluding teachers and hospital workers) by 81 percent and municipal government employment by 142 percent... Although no single provincial government rivals the federal government in expenditures or manpower, the provincial governments as a collectivity clearly do."(62)

The growth of decision-making by federal-provincial negotiation is reflected in the data shown in Table 1, which demonstrates that there has been a tremendous increase in the past quarter-century in the number of both ministerial-level and administrative (deputy ministers, assistant deputy ministers, and so on) conferences and meetings.


**Table 1**

**Federal-Provincial Meetings 1957-1977, Selected Years**

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<td>Ministerial level</td>
<td>5</td>
<td>14</td>
<td>17</td>
<td>30</td>
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<tr>
<td>Administrative level</td>
<td>59</td>
<td>105</td>
<td>142</td>
<td>121</td>
</tr>
<tr>
<td>Total</td>
<td>64</td>
<td>119</td>
<td>159</td>
<td>151</td>
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* Veilleux does not give data for frequency of meetings in 1957.

If anything, the figures in Table 1 may understate the extent of governmental interaction; Robertson states that meetings between federal and provincial governments averaged over 500 per year from 1968 to 1978. (63) A significant point about federal-provincial interaction, though, is not just the number of meetings but the purpose

they served: to enhance provincial influence over federal areas of jurisdiction:

The last two decades have witnessed the continued growth of federal-provincial committees, groups, joint boards and other bodies ... and the number had reached almost 800 by 1975 and was still climbing. The prime minister and provincial premiers met twenty times between 1968 and 1978 in meetings that were used more and more to achieve greater provincial input into federal areas of jurisdiction rather than to facilitate federal intervention into provincial fields. (64)

After the failure of the Victoria constitutional negotiations in 1971, however, federal-provincial negotiations started to become less cooperative and less administrative. Although bureaucratic meetings continued, the new trend was to increasingly active and lengthy participation by the elected officials, particularly first ministers. Thus, in terms of format, "administrative" federalism became "executive" federalism. (65) As defined by Stevenson, executive federalism is characterized by "the concentration and centralization of authority at the top of each participating government, the control and supervision of intergovernmental relations by politicians ... and the highly formalized proceedings of federal-provincial conference diplomacy. While cooperative federalism tended to subordinate the power, status and prestige of individual governments to pragmatic objectives, executive federalism does exactly the opposite." (66)

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(64) Gibbins. Regionalism, p. 91.

(65) Smiley. Canada in Question, pp. 54-82.

Other literature on Canadian federalism has concentrated on the cultural/social motivation for the cooperative approach, rather than the actual mechanisms. In general this literature falls into the categories of consociationalism and elite accommodation. Both are based upon the observation that Canada is a plural society. Arend Lijphart, one of the fathers of the consociational model, has devoted several articles to an analysis of the links between this model and the federal one:

Two constitutional models that have been proposed as solutions for the problems of plural societies are federalism and consociational democracy. The objective of both of these models is to provide political arrangements in which the tensions between the segments of a plural society can be accommodated within a single sovereign state. Because they both aim at the maintenance of the political and territorial integrity of the plural society, they differ fundamentally from the methods of partition and secession. (67)

Although structurally the models are usually quite different, there is no apparent reason for them to be incompatible, as the case of Switzerland has demonstrated. Without delving into the consociational model in depth, it is possible to conclude that its literature depends on a particular societal mindset for successful implementation, as does the federal model. Thus the literature which has attempted to apply the model to Canada has always stressed the inherent limitations of imposing a foreign concept on an existing structure. Nevertheless, both McRae and Noel have observed numerous

aspects of the federal-provincial scenario which are reminiscent of the consociational approach, particularly if one considers the provinces to be a Canadian version of "zulen" or pillars. (68)

While the consociational model is essentially a European one, it has also been referred to as the "politics of accommodation", and thus ties can be seen with the American models of "elite accommodation", which also attempt to explain the cooperative approach in plural societies to policy-making. Rather than pillar-type interest groups, however, the American approach more specifically identifies economic and social elites. This model has also been applied to Canada, primarily by Presthus. (69)

Both models have identified the need for the pillar leaders or elites to agree on the essential worth of the system and the need to preserve it at all costs; both models are also dependent on an uncontested identification of the leaders, and their acceptance by the masses, or at the least the lack of participation of the masses in the process. As the following chapters will demonstrate, after 1971 the constitutional policy process lacked clearly defined spokesmen who were accepted as such by the populace, while those who identified themselves


as such were clearly not in agreement with each other as to the necessity of preserving the system at all costs; this applied not only at the federal-provincial level but also within the federal level itself. The lack of a number of basic values accepted by the elites involved undoubtedly did much to undermine whatever accommodation or consociational spirit existed in Canadian political life.

Thus, although the 1970s continued to witness a proliferation of first ministers' conferences on matters ranging from energy to the economy, they were becoming less productive. Critics began to comment on this turn of events, notably Smiley:

My last charge against executive federalism ... is that it leads to continuing conflicts among governments and that, to borrow a horrible term from the sociologists, these conflicts are in large part dysfunctional ... I have come to the pessimistic conclusion that as governments become more sophisticated in their operations conflict among these governments will increase in scope and intensity. (70)

Cheffins and Tucker who, nevertheless, continued like most observers to believe that federal-provincial negotiation would remain the primary mechanism for policy-making, particularly in the constitutional sphere, suggested:

The mania of the sixties has been replaced by the sobriety of the seventies. In the late nineteen sixties all things seemed possible, even the adoption of a new constitution for Canada, whether needed or not. Those naive expectations were dashed with the rejection by Quebec of the Victoria Charter. Prime Minister Trudeau, however,

announced late in 1974 that there would be another attempt over the next five years to find a purely domestic amending formula, despite six previous failures to achieve this objective. It seems a realistic expectation that this objective will be achieved by 1980. It is unlikely, however, that even if this objective is achieved that widespread changes in the Constitution will result because, as in the past, it will be the lack of political consensus that will probably forestall formal legal amendment rather than technical legal difficulties.(71)

As Chapter III demonstrates, they were correct only up to a certain point. The next round of constitutional negotiations was conducted in the traditional format from 1978 up to and including the September 1980 First Ministers' Conference. Indeed, the belief that federal-provincial negotiations would continue to play an integral role in the policy process was so widespread that as late as the spring of 1980 the report of the Task Force on Canadian Unity (recommendations #54-57), the Beige Report of the Quebec Liberal party (Chapter 9, recommendations #1-7) and the Lamontagne Report of the Senate on constitutional reform all recommended institutionalizing the executive federalism format by entrenching it in a renewed constitution.(72)

C) Hypotheses

In sum, the literature surveyed tells us the following:

(1) There had been a bureaucratization of the policy process in general, in which Parliament was perceived to have lost control.


(2) The executive had come to dominate in intergovernmental relations, which in turn had come to be carried out in the executive federalism format.

(3) Parliament was perceived to play a minor role in major policy decisions, and particularly those involving constitutional change.

(4) Promotional interest groups were perceived to play a minor role in policy-making in general.

Based on these generalized conclusions about the traditional practice regarding the policy process in Canada, this thesis will make the following argument:

The 1980-82 constitutional reform process succeeded, where all other such efforts had failed for some 30 years, because the process in this case deviated from the traditionally accepted norms of constitutional policy-making in Canada.

This deviation was of paramount importance, since the issues involved were the same ones present in previous attempts; it involved a shift from the executive federalism forum to the parliamentary forum.

D) Framework of the Case Study

We have seen in this chapter what role various actors have been ascribed in the Canadian policy process by the literature, as well as the great importance attached in this literature to the executive federalism mechanism and the cooperative approach to inter-jurisdictional decision-making. This thesis contends that there were numerous reversals of these traditional roles and a major shift in forums during the 1980-82 constitutional process; it further contends that these changes were considered necessary by the federal government in order to break the deadlock in constitutional reform which had existed since World War II. (Although as a result these changes were
deliberately initiated by the federal government, the chapters which follow also demonstrate that, once begun, the federal government quickly lost control of the process as various of the new actors introduced into the drama began to *ad lib* their parts with serious unanticipated consequences.)

The case study therefore begins in the following chapter with a brief examination of the *historical background of constitutional negotiation* in Canada. It examines the overall development of federal-provincial negotiations on the constitution from the Constitutional Conference of 1960 to Bill C-60 in 1978, and then provides a more detailed chronology of developments between the Quebec Referendum in May 1980 and the First Ministers' Conference in Ottawa in September of that year, conclusively demonstrating that deadlock and failure were indeed the norm, just as it shows that the executive federalism forum was the traditional one. The chapter then moves to an analysis of the major issues which were consistently raised during these previous negotiations and remained unresolved -- unilateral action, entrenchment and an amending formula. To clarify these issues, the positions of leading constitutional experts are contrasted with respect to both the unilateral and entrenchment issues, (of necessity a brief discussion of legal problems and historical precedents is included), and the details of previous proposed amending formulae are presented, along with the traditional arguments of various provinces, in an attempt to place these issues in the context of not only the philosophical but also the regional, ethnic and linguistic concerns which resulted time and time
again in deadlock. This is necessary in order to demonstrate that the
success of the 1980-82 process must be attributed to the shift in
forum, since the issues raised on this latest occasion were exactly the
same ones which had been discussed during the earlier attempts and the
positions taken by the provinces on this occasion differed little from
those of their predecessors.

The actual case study follows in Chapters IV and V. Although
an effort has been made to follow a chronological order as much as
possible, this was not always feasible. It is divided into two sec-
tions. The first describes the process insofar as national institu-
tions provide the 'stage' on which the drama occurs:

(a) the drafting of the original Proposed Resolution and the
activities of participants in the Preparatory Phase.

(b) the Parliamentary Phase, including the tabling of the
Proposed Resolution and debate on the establishment of a Committee
(Part I), debate on the Committee's report and referral of the package
to the Supreme Court (Part II), and finally debate on the new proposal
tabled by the government after the provincial accord one year later
(Part III).

(c) the Committee Phase, including a discussion of the estab-
lishment of the committee, the hearings, the in camera sessions,
behind-the-scenes strategy and negotiations, and the eventual prepara-
tion and tabling of the report.
(d) the Judicial Phase, including an analysis of federal strategy, references to provincial Supreme Courts, the federal Supreme Court decision of September 28, 1981, and its effect on the process.

The second section of the case study then deals with the roles and input of participants other than federal ones in this process:

(a) Interest groups.

(b) the Provinces

(c) Great Britain

In the concluding chapter the case is then matched against the template of the general literature on the policy process in Canada in order to determine the fit. Finally, the implications of the results are examined and conclusions are drawn, based on the original hypothesis, about the nature of the policy process in Canada.
CHAPTER III

HISTORICAL BACKGROUND AND ISSUES IN CONSTITUTIONAL NEGOTIATION

I am not an advocate for frequent changes in laws and constitutions. But laws and constitutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, and manners and opinions change, with the change in circumstances, institutions must advance also to keep pace with the time. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their ancestors. -- Thomas Jefferson

This chapter examines the evolution of constitutional reform proposals in the post-war period, beginning with a constitutional conference in 1960 and concluding with one held in September of 1980. It demonstrates conclusively that the policy process with respect to constitutional reform traditionally had taken place in the executive federalism forum, and that all attempts at such reform had failed, thereby setting the stage for the comparison between these attempts and the successful process of 1980-82 which is described in the following chapters.

In addition to placing the case study in proper historical perspective, the chapter also examines the major issues which played a key role in the continued failure of previous federal-provincial attempts to achieve a consensus. As the following chapters demonstrate, these are the same issues which emerged as critical in the 1980-82 process. It is therefore possible to conclude that it was the shift from the executive federalism stage to the parliamentary stage, and not a change in the issues, or the positions taken on them by the
various federal and provincial participants, that was the decisive factor in the successful conclusion of this latest effort.

**Constitutional Conferences 1960-64**

Prior to 1960, the only significant constitutional negotiations of the post-war period had ended in disarray over a decade earlier. The press release issued on the last day of the December 1950 Conference of Federal and Provincial Governments convened by Prime Minister St. Laurent stated in part:

> It was also decided to suspend the further deliberations of the Federal-Provincial Conference on Constitutional Amendment and of its continuing committee of Attorneys-General pending consideration of the tax agreements and related matters. (1)

It was therefore not until the discussion of a proposed amendment to section 99 of the B.N.A. Act in respect to the tenure of judges, in early 1960, that a constitutional issue of sufficient importance emerged to once again focus federal-provincial attention on the broader issues of patriation and an amending formula. In part the initiative to hold meetings came from Premier Lesage of Quebec who, acutely aware of the importance of the "quiet revolution" taking place in his province, urged at the July Dominion-Provincial Conference on tax matters that work be undertaken immediately on the constitution.

A series of meetings of Attorneys-General on the Constitution was subsequently held in Ottawa in October and November of 1960, and in January and September of 1961. A suggestion by the federal Justice Minister, the Hon. D. Fulton, that patriation of the constitution be accomplished immediately, with a later decision in Canada on a

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permanent amending formula, was rejected out of hand by all of the provinces except Quebec; they argued that an amending formula was an essential prerequisite for constitutional reform.(2) The amending formula which eventually emerged after the four sessions was however accepted only by the "great majority" of participants, and only as "an acceptable basis for legislation."(3) Essentially the formula divided amendments into four categories, three of which required unanimity while the fourth residual category required the concurrence of the legislatures of at least two-thirds of the provinces representing 50% of the population.(4) Several provinces, particularly Quebec, expressed reservations about one or another of the categories, and, in the end, the entire proposal was shelved.

However, in 1964 the issue of constitutional reform became germane once more as the federal government was dealing with the amendment of section 94A of the B.N.A. Act to provide for supplementary benefits to Old Age Pensions. In June of that year Mr. Pearson indicated his intention to place the topic of an amending formula on the agenda of the upcoming federal-provincial conference, and the premiers responded through their spokesman, Premier Manning of Alberta, that they believed an agreement could be reached "on the basis of the formula that had emerged from the Constitutional Conferences of 1960 and 1961."(5) As a result, a two-day session was held in Ottawa in

(3) Ibid., p. 29.
(4) A copy of the complete text is attached in the Appendices.
October 1964 at which the 1961 formula was essentially accepted with the addition of clauses dealing with the exclusive amending power of Parliament under 91(1) and of the provinces under 92(5). The unanimity and the 2/3, 50% provisions were upheld along with a "delegation" clause which allowed the provinces and Parliament to delegate their authority over a particular area to each other. (6) This proposal, prepared initially by the Hon. D. Fulton and revised by the Hon. Guy Favreau, was unanimously accepted by the participants on October 14, 1964. However, before the Fulton-Favreau formula could be translated into legislation the province of Quebec withdrew its assent,(7) and the proposal died.

Several years passed before constitutional reform was even mentioned again, and when it surfaced at a federal-provincial conference in 1968, it was as a minor item on an agenda dealing primarily with the Report of the Royal Commission on Bilingualism and Biculturalism, and initially in the context of whether or not any attempt should be made to review the issues of an amending formula and patriation.

Federal-Provincial Negotiations 1968-1978

Between February 1968 and June 1971 seven federal-provincial conferences of First Ministers on the Constitution were held. Spurred on by rookie Prime Minister Pierre Trudeau, the Minister of Justice who had been catapulted into the limelight by Mr. Pearson and had subsequently gained the leadership of his party and country, the

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(6) A copy of the complete text is located in the appendices.

participants at the seventh conference, held in Victoria June 14-16, 1971 were tentatively able to arrive at a compromise package of proposals for constitutional reform which has come to be referred to as the Victoria Charter. Mr. Trudeau, who wrote the introduction to the published proceedings himself, stated at the time:

Despite the failure to secure the unanimous agreement that had been hoped for, the Charter ... represents the most significant and comprehensive development in the search for a basis of constitutional revision since Confederation. It is hoped that it may still provide the foundation for agreement in order that the Constitution may be "repatriated" and made amendable entirely in Canada. (8)

The proposed Charter contained an amending formula (as discussed below), and provisions concerning "political" and language rights. It also contained sections on the Supreme Court, federal-provincial consultation, regional disparity, the repeal of disallowance and reservation, and modernization and clarification of some of the B.N.A. Act's existing wording. In addition agreement was partly conditional upon an understanding that a meeting of First Ministers would be convened at the earliest convenience to discuss all aspects of federal-provincial fiscal arrangements, including such items as equalization, tax-sharing, shared-cost programmes and tax reform.

All First Ministers were to confer with their governments and report back acceptance or rejection to the federal government by June 28 1971; although eight provinces eventually accepted, Quebec rejected the proposal as Premier Bourassa encountered widespread opposition to

the plan on his return home; while Saskatchewan failed to reply as an election on June 23 had resulted in a change of government. (9)

As a result of the rejection of the Victoria Charter, patriation and constitutional amendment spent the better part of another decade in political limbo. Despite a special report in 1972 and a few dispirited initiatives at various federal-provincial conferences it was not until 1978 that Mr. Trudeau, perhaps sensing the approaching end of his political career, perhaps reacting to the increasing impotence of federal-provincial negotiation, but most importantly reacting to the renewed threat of separatism unleashed by the stunning November 1976 election of the Parti Québécois, reasserted his long-standing commitment to patriation and constitutional reform. On June 12, 1978 the federal government tabled its White Paper on constitutional reform, A Time for Action, and on June 20 Bill C-60, the Constitutional Amendment Bill, was introduced in the House. A Special Joint Committee was then established to receive briefs and hear testimony before reporting back to both Chambers in October.

In many respects Bill C-60 was a far more comprehensive and sophisticated proposal than the Victoria Charter. In its Charter of Rights, for example, Bill C-60 contained all of the "political" rights enumerated in the Victoria Charter, but also included such concepts as

(9) It is interesting to note that, had all the provinces accepted the agreement in principle, the procedure outlined for formal approval was as follows: provincial governments were to recommend a finalized version of the Charter to their Legislative Assemblies and the federal government to both Houses of Parliament. Acceptance by all of these "would enable the necessary action to be taken to patriate the Canadian Constitution."
"due process", "principles of fundamental justice", property rights, 
equality before the law and equal protection of the law", mobility, 
rights, and a comprehensive anti-discrimination clause based on the 
grounds of race, national or ethnic origin, language, color, religion, 
age and sex. Language rights were considerably expanded as well, 
particularly in regard to education. On the other hand it did not 
touch on some of the other issues raised in the Victoria Charter. Its 
main elements concerned the Senate, Supreme Court and certain govern-
mental institutions such as the cabinet, in addition to its human 
rights charter. (Since the federal government viewed all of the 
material covered in this "Phase I" as being under its jurisdiction, it 
did not include an amending formula, leaving that for discussion with 
the provinces in a proposed future Phase II.)

The rejection of the federal proposal embodied in Bill C-60 
by the provincial premiers at their 19th annual conference in August 
1978, as well as criticism of its draft legislation by some experts, 
led the government to change its tack, producing a new "Agenda for 
Change" in time for the October 30, 1978 First Ministers Constitutional 
Conference. A list of subjects for intergovernmental negotiation was 
agreed to at this time, with results to be reported at a February 1979 
conference. Although some progress was reported to have been made, 
this second conference ended without a communiqué, and barely a month 
later, on March 26, 1979, Parliament was dissolved. Due to the various 
political events which intervened, no resumption of the constitutional 
debate took place until 1980.

In the federal election which was held in May 1979 the Con-
servatives under Joe Clark obtained a minority victory, a development
which ensured at least temporarily another hiatus in constitutional reform. Ironically, it was during this period of Conservative interregnum that a number of major developments occurred on the constitutional front, including negotiations on off-shore resources, the publication of the Quebec government's White Paper on sovereignty-association, Quebec-Canada: A New Deal, and the Supreme Court rulings on language legislation in Manitoba (Forest) and Quebec (Blaikie). (10) Shortly after the unexpected demise of the Conservative government on December 13, 1979, the Quebec government announced the wording of the referendum question, the Quebec Liberal Party under Claude Ryan released its Beige Paper, A New Canadian Federation, and the Supreme Court ruled unanimously against the section of the now defunct Bill C-60 which had attempted to restructure the Senate without its consent. (11)

September 1980 Constitutional Conference of First Ministers

The October 1980 constitutional initiative which is the object of this study received its major impetus from two events which occurred earlier in that year -- the re-election of Pierre Trudeau and the Liberal Party on February 18, 1980 after nearly a year in opposition, and the Quebec referendum campaign on sovereignty-association, which terminated with a resounding "No" vote on May 20, 1980. While some were inclined to view the referendum result as a straightforward vote against separatism, the Prime Minister and many other observers perceived it as a vote in favour of change, albeit within a "renewed" federal context. As this was precisely the platform on which


Mr. Trudeau and other major Canadian political figures had successfully campaigned to convince Quebecers to vote "No", it was a predictable perception of the situation. As a result, on May 21, 1980 Prime Minister Trudeau announced that Justice Minister Jean Chrétien, a prominent figure in the referendum campaign, would embark on a whirlwind tour of provincial capitals to discuss the possibility of a new constitutional initiative.

The First Ministers subsequently met on June 9, 1980 at Mr. Trudeau's Sussex Drive residence to establish a timetable of meetings between ministers and officials which would culminate in a Federal-Provincial Constitutional Conference September 8-12 of that year. At a press conference at the end of these meetings the Prime Minister reminded the premiers of the "solemn commitment" to change which had been made to Quebecers, and warned that there would be "very serious" political consequences if these promises were not kept.

On June 10, 1980 Mr. Trudeau therefore announced that the Government would recommend "a plan of action which will allow us to fulfill our responsibilities to the Canadian people" if the September conference did not produce consensus.\(^{[12]}\) He did this with some assurance of general support in the House from the Opposition, since during the referendum debate a motion under Standing Order 43 to submit an address to the Queen, moved by Conservative M.P. Bill Yurko, had already received unanimous consent.\(^{[13]}\) and on June 6, in a speech in Toronto, Conservative leader Joe Clark had stated that "The participants in Monday's conference speak for 11 governments.


Parliament speaks for 23 million Canadians. If the First Ministers of the Federation cannot make marked progress towards changes which fit the Canada of the 1980's, then the Parliament of the Federation may have to assert a stronger role." (14)

Throughout the month of June officials continued work on the timetable and the agenda, agreeing finally on 12 issues for discussion. Mr. Trudeau had previously suggested to them that, apart from a Charter of Rights and the federal nature of the political system, the federal government was prepared to negotiate on any item.

Meanwhile on June 25 the Prime Minister met separately with British Prime Minister Margaret Thatcher and the Queen in London to inform them of the status of the constitutional negotiation. Although both sides agreed that Mrs. Thatcher promised her government's support for the package, a subsequent British press release of January 30, 1981 indicated that the discussions had only been on patriation with an amending formula, with no mention of a Charter of Rights, and that Mr. Trudeau had expected to receive the support of most of the provinces. In a press conference immediately following the British meetings Mr. Trudeau himself indicated that there had been no discussion of a request being made without provincial consent. (15)

Possibly to maintain the momentum of the constitutional initiative and heighten the sense of urgency, the Prime Minister chose to outline the federal position once again at the federal Liberal Party policy convention in Winnipeg on July 4, 1980. In doing so again he left no doubt that he intended to bring the Constitution home even if there was no provincial agreement on patriation in September. He also


stressed his personal commitment to proceed with entrenchment of basic human and language rights.(16)

A round of constitutional discussions between federal and provincial justice and intergovernmental affairs ministers (chaired by federal Justice Minister Chrétien and Saskatchewan Attorney-General Roy Romanow), followed during the months of July and August. At the conclusion of the first meeting, in Montreal July 8-11, 1980, the federal government made public a position paper on control over the economy which argued for the free movement of labour, goods and capital across provincial borders to be guaranteed in any new constitution.

A subsequent meeting in Toronto July 15-18, which focussed on the federal proposal, also was reported to have made some progress on the issues of family law, the Supreme Court and equalization, and there was a general feeling of optimism about the negotiations. However this was quickly shattered when the third round of talks, held in Vancouver the week of July 23-24, produced no agreement on any of the issues under discussion.(17)

A meeting of Joe Clark and ranking Conservatives July 27-31 at Meach Lake to determine the party's official position on the constitutional proposal also produced no firm results and a summer hiatus ensued. This was broken on August 21, 1980, when a confidential memo from Michael Kirby (of the P.C.O.'s Federal-Provincial Relations Office) to the Prime Minister was leaked to the press. The so-called "Kirby memo", which was defended by government officials as merely one of many contingency plans, suggested the early recall of Parliament and the introduction of legislation to effect unilateral patriation of the constitution. Since this leak occurred during the annual Premiers'

(16) Based on interviews with several of the participants.
Conference in Winnipeg, it perhaps evoked more outrage and press coverage than it would otherwise have received. Nevertheless the premiers produced a relatively conciliatory communiqué concerning the constitutional discussions, but were unanimous (with the exception of Premier Davis), in their criticism of the "artificial" September ultimatum of the Prime Minister. (18)

The final round of ministerial discussions took place in Ottawa on August 26-29, 1980, and was noteworthy for its lack of consensus. While the provinces had all managed to agree on a position regarding ownership of offshore resources, communications and fisheries, namely that there should be increased provincial responsibility, this position was almost diametrically opposed to that of the federal government, and on several other issues there was no consensus at all.

The last few days leading up to the landmark First Ministers' conference were spent by the major federal parties in an attempt to consolidate their official positions and strategies. August 27-28 Joe Clark and the Conservatives' caucus committee on federal-provincial relations met in Toronto, and announced at a closing press conference their proposal for a "constitutional convention" mandated by Parliament. Meanwhile in Lake Louise, Alberta the Cabinet Planning and Priorities Committee met to finalize the government plan, a copy of which was leaked to Quebec officials and then released to the press by the disgruntled Quebec delegation on September 8.

This set the stage for the Federal-Provincial Conference which began in Ottawa the same day. The 12 items on the agenda were as follows: 1) Statement of Principles (Preamble); 2) Charter of Rights (Language Rights); 3) Patriation and an Amending Formula;

(18) Ibid., pp. 52-4.

In general, although there was some agreement on several issues, there was no overall agreement. After three days in front of television cameras the participants held an in camera session Thursday evening at 24 Sussex Drive in an attempt to iron out various difficulties. The following morning all premiers met early at the Chateau Laurier Hotel and arrived at what is generally referred to as the "Chateau Laurier Consensus" - a combination of (1) the earlier joint provincial positions on resources, communications, etc.; (2) Quebec's minimum demands as elaborated earlier at the conference; (3) Alberta's demand that there be no federal export tax on gas and a re-examination of its position vis-à-vis natural resource sales.

The provinces then offered this package to the federal government in exchange for their agreement on patriation with an amending formula (one which they chose, basically a revised form of the Vancouver proposal allowing opting-out), and a severely restricted Charter of Rights which eliminated language rights. As most of these proposals had already been unsuccessfully presented to the federal government, it was hardly surprising that they were rejected again. This conference therefore closed with most observers agreeing that it too had ended in failure. (20)

Thus the history of attempts at constitutional reform between 1960 and 1980 is a history of failure. It is also a chronicle of endless rounds of federal-provincial negotiations, clearly demonstrating

(19) A detailed outline of provincial positions on each issue is provided in Appendices.
the inefficiency of the executive federalism approach in constitutional policy-making. (Needless to say, it is additionally a history of "closed-door" decision-making in which neither Parliament nor interest groups had a role to play, the emphasis being on the provincial and bureaucratic actors.) While this failure, it is argued, resulted primarily from the inappropriateness of the forum, at the micro level it resulted from a failure to arrive at a consensus on the major issues. These issues, which were also to emerge during the 1980-82 process, are discussed below.

Issues in Constitutional Reform

As this brief historical overview has demonstrated, previous attempts at constitutional reform were preoccupied with three major issues, issues which incidentally occupied the attention of scholars and constitutional experts as well as the politicians of the day who attempted to come to grips with them. The first of these was the question of unilateral federal action; quite simply, could the federal government proceed with constitutional reform and patriation without the unanimous consent of the provinces? As nearly 50 years had elapsed since the passage of the Statute of Westminster without the governments of the constituent parts arriving at a consensus, the issue took on increasing importance in recent years.

Related to this, of course, was the issue of an amending formula. Although many were suggested over the years none received the unanimous consent of the constituent bodies and, in fact, the conditions laid down by various members appeared to change considerably over a period of time. Yet patriation without an amending formula would be a meaningless accomplishment.

Finally, there had been heated debate since (and before) the creation of the Diefenbaker Bill of Rights on the relative merits of a constitutionally entrenched bill of rights. Not surprisingly a number
of key rulings by the Supreme Court fueled this debate, as did the establishment in all provinces and at the federal level of formal human rights commissions, most of which have authority to recommend changes to legislation in their annual reports.

**Constitutionality of Unilateral Federal Action**

During the 1978 hearings of the Special Joint Committee on the Constitution on Bill C-60, the *Constitutional Amendment Bill*, debate centered on whether or not the federal government could enact all of its proposals unilaterally, including changes to the Supreme Court and the Senate. Although a reference to the Supreme Court resulted in a ruling that Parliament on its own via s.91(1) could not make substantial changes to the structure of the Senate (21) there was no resolution of the broader issue of unilateral action.

Historically, the amending practice of the *BNA Act* had been that a joint resolution from the Senate and the House of Commons of Canada was sent to the Monarch to request enactment from the British Parliament. With the passage of the Statute of Westminster in 1931, Canada was granted sovereignty in external affairs, but Parliament nevertheless asked (via a joint address) that this dependent amending practice continue.

Section 92(1) of the *BNA Act* had always provided for the amendment by provincial legislatures of "provincial constitutions" except as it may affect the office of the Lieutenant-Governor. In 1949, section 91(1) became s. 91(IA) and a new s. 91(1) was added to establish a mechanism whereby the federal Parliament had the power to amend the constitution in all areas except those concerned with the

(21) Reference re: Legislative Authority of Parliament to alter or replace the Senate, 102 D.L.R. (3d) 1.
the division of powers, the protection of confessional educational rights, language rights, the five-year term of Parliament and annual sessions of Parliament. Thus in some areas the provincial and federal governments were already unquestionably competent to enact amendments at will.

However, when an amendment involved one of the areas of exception it was still necessary to submit a joint address to Westminster, and it is here that controversy arose. One school of thought argued that no other legislature or governmental body had any official role to play in the passage of a joint address but the Parliament of Canada, while a second argued that by constitutional convention the 10 provincial legislatures must also give consent to the address before submitting it to Westminster. Thus the second argument could be broken down to two: one of unilateral federal action vs. provincial consent; and one of provincial unanimity vs. a simple majority to constitute consent.

It is a fact that there was no written provision requiring provincial consent to a joint address concerning amendment of the BNA Act. However, the case for requiring provincial consent was based not on strict written law but rather on the application of a constitutional convention. Conventions are defined by one expert as "rules of political practice which are regarded as binding by those to whom they apply, but which are not enforced by the courts or by the Houses of Parliament." However other experts have disagreed, stating that legal conventions, and particularly constitutional ones, are

(22) Led by Professors Hogg and LaForest, whose arguments follow at pp. 76-80.
(23) As exemplified by Professors Driedger and McWhinney, at pp. 78-79.
"basic constitutional laws in every sense and should be recognized as such by the governments and Parliaments concerned."(25) Consequently from a legal point of view the question becomes specifically whether or not a constitutional convention exists, and if so whether such a convention is binding.

Since its enactment in 1867 the BNA Act has been amended on 20 occasions by a request in the form of a joint address by the Parliament of Canada to Britain. Seven of these amendments were proposed without any provincial consent at all, yet a number of important constitutional matters were addressed by these unilateral amendments, namely the establishment of new provinces and the administration of the territories and representation of the territories in Parliament (1871), privileges, immunities and powers of the Houses of Parliament (1875), redefinition of divisions in the Senate (1915), the postponement of redistribution of seats in the House of Commons (1943), and the readjustment of representation in the House (1946). Lastly the 1949 amendment of the BNA Act mentioned above, which gave Parliament the authority to amend certain aspects of Canada's constitution, was proposed unilaterally with respect to matters falling exclusively within federal jurisdiction.

Of the remaining amendments, unanimous consent of the provinces was sought and obtained on four occasions. In 1940 the BNA Act was amended to transfer the authority to legislate on unemployment insurance from provincial to federal jurisdiction. Then in 1951 an amendment gave the federal Parliament jurisdiction over the Canadian old age pension scheme, while a third amendment in 1964 gave Parliament

the right to legislate in relation to supplementary benefits in the old age pension field. The fourth amendment, enacted in 1960, provided for compulsory retirement at age 75 for provincial Superior Court judges.

However, in four cases the federal government proceeded with amendments pursuant to having obtained only partial consent. The first occasion on which the federal government consulted with the provinces prior to proposing an amendment was in 1907, when it sought agreement with the provinces for changes relating to the subsidies paid to all of the existing nine provinces. Although eight provincial governments agreed to the proposal, the government of British Columbia opposed the amendment both in Canada and in Britain. Despite this the amendment was passed after the British government made only minor changes in the text of the draft bill.

Because the British North America Act of 1930 did not directly concern all provinces (it contained an amendment relating to the jurisdiction of the western provinces over natural resources), the federal government consulted only those provinces affected. Consent was obtained and the amendment was adopted, with little apparent concern being expressed by those provinces left out of the discussions.

Similarly the British North America Act(26) of 1949 provides another example of constitutional amendment with only partial consent of the provinces. The amendment in question concerned the entry of Newfoundland into Confederation, and was enacted without any provincial consultation. None of the provincial governments formally objected to this. However, two provincial governments did state that they felt discussion should have taken place; namely Quebec and Nova Scotia.

Historically, therefore, in three out of the four amendments for which unanimous provincial concurrence was sought and obtained the subject matter related to the division of powers within Canada. On the other hand other amendments which involved the division of powers were passed with only partial or no provincial consent, and on only seven of the 15 occasions were the provinces consulted at all. Thus while in every case an amendment was initiated by a joint address of Parliament, thereby providing the basis for the widely accepted existence of that constitutional convention, the case historically for the existence of a constitutional convention of unanimity was much less clear.

Essentially four arguments were presented. There were those such as Professor Lederer who stated that a convention of unanimity existed for all constitutional amendments, while others limited the unanimity convention to matters relating to the division of powers, and a third group, exemplified by Professor Hogg, suggested that no such convention existed at all. Proponents of this latter position often were willing to agree to the existence of a developing constitutional tradition, but pointed out that this carried much less weight than a true constitutional convention. Finally, certain experts agreed with Professor Phillips that the existence of a constitutional convention were irrelevant, since they were not legally binding.

This latter position had been taken by various constitutional experts long before the tabling of the 1980 proposal in the House. Peter Hogg, for example, stated the case forcefully some years ago in his standard text on Canadian constitutional law:

The United Kingdom Parliament has never required that the provinces also give their consent; it has never even required consultation with the provinces. It seems likely then that an Imperial Statute
amending the BNA Act will always be enacted by the United Kingdom Parliament at the request of the Federal parliament alone. The provinces have no legal role in the amending process and their interests can be affected by the unilateral action of the Federal Parliament. (27)

The introduction of the 1980 Constitutional Resolution nevertheless prompted several experts to take sides anew, some through the forum of the Special Joint Committee on the Constitution, others by airing their views in scholarly journals. Formal written submissions to the Committee opposing unilateral federal action were received from, among others, Elmer Driedger (Emeritus Professor of Law, University of Ottawa), Gil Rémillard (Professor of Law, Laval), and Peter Russell (Professor of Political Science, University of Toronto); the latter two also testified in person before the Committee as expert witnesses selected by the Conservative members. (28) Of the three Professor Russell took the least aggressive stance, indicating that he considered the unilateral nature of the proposal "in the teeth of bitter opposition" from a majority of provincial governments and with a lack of popular consensus, to be at the very least "unwise and unfortunate". Unlike the other two, however, Professor Russell separated the concept of patriation from that of a Charter of Rights and amending formula, and argued that if the government insisted on acting unilaterally:

... the proper course of action for the Canadian Parliament and for the British Parliament is to confine unilateral amendment of our Constitution (i.e. amendment without the consent of the


(28) It should perhaps be noted that while each party was allowed to submit names for invitation as expert witnesses, individuals were invited by the Committee as a whole, and did not represent the opinion of any political party.
provinces) to what is needed for patriation. We should first take custody of our Constitution in Canada, then use an all-Canadian method of constitutional amendment to entrench our fundamental rights and freedoms. (29)

Professor Driedger not only opposed the unilateral action as unconstitutional, but referred to a number of concomitant legal problems which he perceived, both in his written submission and in an earlier article:

We are therefore driven to the conclusion that a sure constitutional amendment cannot be made merely by the enactment of an amendment to the B.N.A. Act, or by calling the amendment of a B.N.A. Act and adding it to the series. Something must be done to or with the Westminster Act. (30)

Similarly Professor Rémillard indicated both in his brief to the Committee and in his book, Le fédéralisme canadien, that he considered the proposal to be illegal and unconstitutional. He argued:

Il faut dire que la force d'une coutume ou convention est beaucoup plus politique et morale que juridique. En ce sens, une coutume ou convention vaut en autant qu'on la respecte. Toutefois, il faut bien comprendre que les coutumes et conventions font partie intégrante de notre constitution matérielle. Elles sont à la base même tant de notre parlementarisme que de notre fédéralisme. Aller à l'encontre de la coutume de l'unanimité pour amender les éléments fédératifs du pacte de 1867, comme le fait l'actuel projet de résolution, équivaut à mettre en cause tout notre système constitutionnel en établissant un dangereux précédent.

En conclusion, il nous apparaît donc que l'actuel projet de résolution concernant la constitution du Canada est illégal puisque dans son essence même il nous apparaît être:


1) contraire à la théorie du pacte et du compromis telle que développée par nos tribunaux;
2) contraire à l'article 91(1) de l'A.A.N.B. qui ne vise pas à permettre au Parlement fédéral "... de modifier de quelque façon les dispositions des articles 91 et 92 régissant l'exercice de l'autorité législative par le Parlement du Canada et les législatures provinciales";
3) contraire à la convention ou coutume constitutionnelle de l'unanimité pour modifier le partage des compétences législatives et tout autre élément fédéral du pacte de 1867.(31)

He admitted, however, that in his view if Westminster acceded to Parliament's request it could render legal what in Canada was unconstitutional, simply by passing a bill under the Statute of Westminster. He nevertheless maintained that even if such a bill were passed, the Constitution Act, 1981 would not apply to the provinces without their consent in certain areas, since the agreement between Ottawa and London would amount to an international treaty.

Among those experts taking the opposing point of view and defending the legality of the federal government's actions before the Committee were Dr. Edward McWhinney (Professor of Law, Simon Fraser University), Professor Peter Hogg (Osgoode Law School) and Professors G.V. LaForest and Dr. Maxwell Cohen (Law Faculty, University of Ottawa), the latter two appearing as expert witnesses selected by the Liberal members. Viewing the proposal as only the first phase in a major overhaul of the constitution, Professor McWhinney stated that "I endorse the decision to proceed to completion of this first 'repatriation' phase with all deliberate speed"(32) while Professor Hogg

(31) Rémillard, G. Brief to the S.J.C.C., January 8, 1981.
(32) McWhinney, E. Brief to the S.J.C.C., November 18, 1980.
in the introduction to his submission indicated that he considered the concepts of unilateral action and entrenchment to be settled, and would therefore address himself only to specific items of the proposal which might be improved upon.

Under severe questioning by Opposition members of the Committee, both Professors Cohen and LaForest defended uncategorically the legality of the federal government's action. Professor Cohen indicated that he believed the Courts would have no alternative to declaring the proposal valid.

I do not believe that the achievement of a consensus on the part of the provinces is binding at all upon Parliament and binding upon the Courts before it moves in this kind of direction to ask Westminster (to pass the constitutional package). I think to make it a rule of law from the way in which it has developed would be to overstate the mechanism of converting custom-convention into a binding rule of law. (33)

Professor LaForest also entertained no doubts about Parliament's power to act unilaterally. He did not believe that the practice or usage of securing the provinces' approval before calling upon Westminster to amend the constitution had crystallized into a constitutional convention. Nevertheless, in his opinion even a convention would not be legally binding. Moreover, he contended that Parliament's power, under section 4 of the Statute of Westminster, was unfettered, thus disputing the position taken by Professor Driedger.

I think the law is quite clear. It is in Section 4 of the Statute of Westminster that the Imperial Parliament can pass a Law so long as there is a declaration in that consent was obtained, and the

British have never debated the nature of that consent when there was a Senate and House of Commons resolution.\(^{(34)}\)

He then concluded by saying that the issue was essentially a political rather than a legal one, and should not be referred to the Courts. (This was the position which the federal government subsequently took throughout the debate and in its factum before the Supreme Court.)

Generally we think of law as operating on the basis of rules that one is compelled to obey and that are usually enforceable or at least defineable by courts of law... Conventions are generally more flexible, more malleable in the face of particular situations. Even the basic convention that a government must resign if it is defeated on a vote of confidence is subject to great uncertainties in its specific application. Its interpretation is left, as it should be, to politicians and not to courts.\(^{(35)}\)

After the Committee hearings a number of experts offered their views in the public forum. Prominent among them was Professor William Lederman (Faculty of Law, Queen's University), who spoke to the question at a seminar sponsored by the Canadian Study of Parliament Group in Ottawa. Echoing the sentiments of Professor Rémillard, he stated in part:

The present proposal of the Government of Canada is that the British should enact this charter of rights for Canada. The British Parliament should do so under the direction of the British Government as part of the patriation process. The Government of Canada maintains that it would be proper, and indeed obligatory as a matter of constitutional convention, for the British to do this at the


request of the Canadian Parliament and government alone without the consent of the provinces, or at least without the consent of most of them. Well, for a long time now, many of you know, I have taken a strong public stand against these proposed unilateral methods, not only concerning the new charter of rights but concerning other substantive changes in the Canadian Constitution, especially the procedures for basic amendment. I maintain that these methods are unconstitutional in the fullest sense and that if they are pursued they may in the end be found, in spite of all the efforts, to have been quite ineffectual. (36)

Another supporter of Prof. Rémillard, Professor Pierre Patenaude of the Law Faculty at the University of Sherbrooke, published an article which stated categorically that the proposal was unconstitutional because it would alter the legislative competence of the provinces; and particularly the competence of Québec to legislate in the matter of language policy. As Gil Rémillard had done he also frequently referred to the compact theory of Confederation and the intent of the framers, an approach which is still prevalent among Québec constitutional lawyers. (37)

Conversely, noted constitutional expert Eugene Forsey, when he expressed an opinion on the proposal, not only stated that he believed the federal action to be legal and valid, but also used historical precedents involving the Fathers of Confederation to defend his line of reasoning.


In the early years after Confederation, the Liberals, who were then the party of "provincial rights", made two attempts to get the House of Commons to adopt the doctrine of unanimous provincial consent. Both failed. On the 1869 measure granting "better terms" (more money) to Nova Scotia, Mr. Holton moved that there should be no change in the financial arrangements between the Dominion and the provinces except with the unanimous consent of the provinces. This was decisively voted down, with every Father of Confederation present voting in the majority: Macdonald, Cartier, Langevin, Galt, McDougall, Tilley, and Tupper. In 1871, on the admission of British Columbia, the Liberals tried again, in a motion asserting that there should be no change in the representation in the House of Commons without the consent of the provinces. Sir George Cartier moved the adjournment of the debate. That was the last that was ever heard of the motion; and British Columbia got its representation in both Houses without any consultation with, let alone consent of, the original provinces. (38)

Thus, while one could find noted experts supporting and opposing unilateral action, the final statement on the matter awaited the decision of the Supreme Court, as even one of the most vociferous opponents of unilateral action stated:

There is one thing that is clear about the constitutional law of Canada. The judicial power is fully patritiated in all respects, and rests finally in the hands of the Supreme Court of Canada. This purely Canadian institution has the last word in the fullest constitutional sense concerning what is law, here and now, in and for Canada. (39)

However, when the Supreme Court brought down its decision on September 28, it was sufficiently complex that it allowed both sides


to claim a victory. Although the contents of the decision are discussed in detail in Chapter IV(D), the brief résumé below indicates the thrust of the arguments made by the brethren, who clearly were themselves split on this issue.

In effect there were two decisions. On the one hand, the Court ruled decisively (7-2) that Ottawa's plan was legal, and conclusively rejected the provincial argument that a convention had "crystallized into law." Moreover, the decision stated that conventions are political practices which can sometimes be in conflict with law, thus lending support to the federal argument that the constitutional debate was a political issue which should not have been referred to the Court, since there is "no parental role" to be played by the courts in deciding the force of convention.

On the other hand, in a separate decision (6-3), the Court concluded that a constitutional convention of provincial consent exists, and that the current process "offends the federal principle." However, the decision also stated that the convention does not require unanimity. It added:

It would not be appropriate for the Court to devise in the abstract a specific formula which would indicate what measure of provincial agreement is required for the convention to be complied with ... it will be for the political actors, not this Court, to determine the degree of provincial consent required."(40)

Thus we can see that the federal government's decision to proceed unilaterally in October of 1980 was a controversial one which,

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(40) Reference Re Amendment of the Constitution of Canada (Nos. 1, 2, 3), 125 DLR (3d), 1982, 104.
although legally permissible, clearly marked a break with the political tradition of past attempts at constitutional reform. Similarly, its decision to include a full-blown charter of rights binding on all levels of government was also a bold move, particularly given the lengthy unresolved debate on the issue which led up to the 1980-82 process.

Entrenchment of a Charter of Rights

"Of all the loose terms in the world, 'liberty' and 'rights' are among the most indefinite."

-- Edmund Burke (1789)

Unfortunately, Burke's statement is equally true nearly two centuries later. The logical successor to natural law, now most frequently referred to as human rights, has acquired an emotional appeal which often surpasses any fixed meaning and is frequently used to justify legal or political ends.(41) Originally thought of by 19th century liberalism as guarantees -- a series of political and legal rights -- aimed at protecting the individual against the powers of the state, the term "human rights" in the 20th century has come to include not only such "negative" rights, but also "positive" rights(42) such as equal access and opportunity, and social, economic and cultural rights as defined by the United Nations in its international human rights covenants.

(41) For a detailed analysis of the development historically of these terms, see R. Claude, Comparative Human Rights. Baltimore, John Hopkins, 1976, pp. 6-49.

Thus the role of the state is now seen to be not merely a passive one of non-interference with the individual, whenever possible, but also an active one of guaranteeing and even promoting, through legislation and other means. In many western nations the common phrase has become "human rights and fundamental freedoms" to accommodate this dichotomy between "freedom from" and "right to".

The question then logically arises as to what is the best means of guaranteeing and protecting human rights in a political system: this in turn led to a philosophical dispute between those who favour the American model of a constitutionally entrenched charter of rights, and those who favour the British model of rule of law and parliamentary supremacy. In the United States the first ten amendments to the Constitution are collectively known as the Bill of Rights. This document clearly limits the legislative power of both the federal and state governments, either by direct prohibition or by the prescription of unalterable laws. In England, on the other hand, there is no formal constitution and hence no entrenched bill of rights. Instead, there are several historic documents which, taken together, represent the sum of guarantees for individual rights. These include the Petition of Rights of 1627, the 1688 Bill of Rights, the Magna Carta and the Habeas Corpus acts. However, these acts do not limit the legislative power of the state against the individual. As Driedger has pointed out:

The British Parliament could today validly repeal, amend, or override any provision of those charters.
There is no legal remedy against the infringement by Parliament itself of civil liberties, rights or freedoms. The protection or remedy is political, rather than legal, so that in the end the citizen must depend upon public opinion and the good sense of the legislators. (43)

Those who opposed the entrenchment of a bill of rights in the Canadian constitution in the past did so primarily on the basis of two arguments. First, there were those such as former Manitoba Premier Sterling Lyon who believed that entrenchment is a concept foreign to the British parliamentary system and incompatible with it, and one which would unthinkably override the principle of parliamentary supremacy. Proponents of this position usually added that there was also no need to entrench, since British common law, the rule of law and parliamentary tradition provided ample guarantees for the protection of individual rights. While they did not deny that some injustices occurred under both the British and Canadian parliamentary systems, they argued that such instances were rare, and would occur as often if not more so under an entrenched system. Finally they pointed to the fact that an entrenched charter is no guarantee of individual rights, particularly if there is an opposing political will -- many countries with repressive political régimes (such as the U.S.S.R.) currently have, on paper, some of the broadest and most humane constitutionally entrenched charters of rights in the world.

Second, there were those who stressed that the problem was more one of application than of principle. They argued that it was

extremely unwise to combine the British parliamentary system with an entrenched charter because, unlike the American system, Canada has no experience with judicial review. Given some of the past decisions of Canada's somewhat conservative Supreme Court, they argued, it might even be that entrenching a Charter of Rights would have the opposite effect to what was intended, and in any event such a move would vest enormous powers with the judicial branch of government and the men who fill these positions.

Commenting on the 1980 federal Resolution from this perspective, Professor Donald Smiley stated:

Although I can be at least partially convinced of the need for decisive action to end the patriation/amending formula impasse, I can find no persuasive reason at all for including the Canadian Charter of Human Rights and Freedoms... Contrary to the federal propaganda, the issue is not between those who support the protection by law of human rights and those who don't, or even which rights are to be recognized and protected. Rather the matter in contention involves the prudential political judgment as to whether the courts or legislatures will protect such rights... more effectively. (44)

Similar concerns were expressed by Paul Weiler in a detailed analysis of the Canadian and American judicial systems. Beginning with an example of judicial decisions on abortion in the 1970s in the U.S. (supported on the basis of constitutional individual rights), West Germany (restricted on the basis of individual constitutional rights), and Canada (the issue a political rather than legal one and therefore not to be dealt with by the courts), he then attempted to delineate the

immense degree of authority on essentially moral issues rather than legal ones which has devolved onto judges as a result of judicial review.

We can see the number of revolutions in public policy which have been accomplished by the U.S. Supreme Court, and the number which have stuck regardless of what the Gallup polls said. The fact is that judicial appointments are infrequent and erratically spaced (President Carter has not yet had any in his presidency, nor did Lester Pearson have any in his five years as Canadian Prime Minister). A tremendous momentum can be built up by which novel principles get embedded in the law, and are extracted only with extreme difficulty. And in any event it is terribly difficult to ensure that new judges will behave as the appointing President or Prime Minister anticipate. After all, that is the whole point of judicial tenure, and is a lesson experienced by Nixon with his strict constructionists and by Trudeau with his appointments from Quebec and their negative attitude toward the Canadian Bill of Rights. (45)

However, perhaps the most telling argument against entrenchment in principle can be found in the introduction to James McRuer's report on civil rights commissioned by the Ontario government:

A philosophy of government should not be adopted which deprives the people of the ultimate right to determine their own social affairs through democratic processes and transfers the final power of decision in certain areas to appointed officials - the judges ... It would be unwise for a government to lock itself into a constitutional straitjacket where the making of new laws to meet changing social conditions would be made almost impossible by reason of the difficulty in obtaining relief through amendment to the constitution. (46)


Finally, on a practical level, certain experts predicted that entrenchment of a bill of rights would dramatically increase the amount of litigation before the courts, since lawyers could seize on human rights aspects of a variety of otherwise straightforward cases to achieve a desirable verdict. Referring to this potential phenomenon, two such experts concluded:

The result will be an increase in the level of litigation and the enshrinement of the legal profession as the power brokers of our society... We must choose between government and lawyers as the passage between the two powerful forces. The political process has its drawbacks... Those drawbacks will not diminish because of an entrenchment of rights. But if individual rights become entrenched, individuals and corporations with powers and money will be able to manoeuvre for advantages in two arenas, one political, the other legal. The increased level of lawyer domination and legal wrangling will be astounding.(47)

These same authors also pointed out that there is always the problem of judicial interpretation, and that Canadians risk the development of situations similar to the Miranda doctrine in the U.S.; that is, judicial interpretation could cumulatively lead to the evolution of doctrines infinitely far-removed from the original intentions of the framers. Given the Canadian experience with the Judicial Committee of the Privy Council, this is clearly not a frivolous concern.

On the other hand, those supporting the entrenchment of a bill of rights in the Canadian constitution, such as Eugene Forsey, produced compelling reasons for doing so. In essence they argued that, despite the limitation on parliamentary supremacy and the problems of

of judicial review which might result from entrenchment, the existing situation would produce far greater injustices and was incapable of adapting to the new concepts of human rights.

There were at least four specific reasons given as to why the entrenchment of a Charter of Rights was necessary to protect the basic rights and fundamental freedoms of Canadians. The first of these was the historical pattern of decisions which the judicial system had rendered, based on existing legislation and the B.N.A. Act. As one noted authority on civil liberties pointed out:

In the past in Canada, great issues of civil liberties have often been decided not on their merits, but on the grounds of whether or not an alleged denial of civil liberties was within the power of the offending government.

Section 91 of the British North America Act sets out the heads of power under which the Parliament of Canada has exclusive legislative authority. Section 92 does the same for the provinces. An ultra vires judgment invalidating either a federal or provincial law leaves the disturbing inference that if the other sector had passed it, it would have been all right. (48)

In 1899, for example, when the Judicial Committee of the Privy Council declared unconstitutional a British Columbia statute prohibiting the employment of "Chinamen" in any below ground coal mine (49), the reasoning of their lordships was not that the law was discriminatory, but rather that the provincial legislation dealt with a federal power under section 91(25) "naturalization and aliens", and


(49) Union Colliery Company of B.C. v. Bryden, [1899], A.C. 580.
hence was ultra vires. (This apparently leads to the presumption that if Ottawa had passed the legislation it would have been valid.) Since then a number of celebrated civil liberties cases were decided by the same type of approach -- Birks and Sons (Montreal) Ltd. v. Montreal (1955) S.C.R. 799 and Switzman v. Ebbling and A.-G. for Quebec (the so-called Padlock Law) (1957) S.C.R. 285 -- on the grounds that the legislation in question in each of these cases was in respect of criminal law and hence ultra vires provincial power since it constituted an invasion of the federal "criminal law" power. In the celebrated Saumur case of 1953 (Saumur v. Quebec and A.-G. for Quebec (1953) S.C.R. 299) in which a Jehovah's Witness challenged a Quebec City by-law prohibiting distribution on city streets of pamphlets, etc., without the permission of the Chief of Police, the plaintiff claimed that citizens' rights to freedom of expression and religious practice were being restricted in contravention of the preamble of the B.N.A. Act and the provincial Freedom of Worship Act. Although the case was decided on a narrower point of law, the Justices took positions on the general relationship between civil liberties and the division of powers which not only reinforced the impression of the foregoing cases, but also extended it, since two Justices concluded that restrictions on civil liberties were only invalid if they formed the pith and substance of a piece of legislation rather than resulted as an incidental effect of legislation. (50)

Peter Russell concluded the implication of this decision was that "both Parliament and the provinces could validly limit freedom of worship providing they did so in the course of legislating on some

other subject which lay within their respective powers."(51) Lest one assume that these cases are only reminders of the past one can point to the Dupond and McNeil decisions (re Nova Scotia Board of Censors et al. and McNeil (1978) S.C.R. 662 and Attorney-General of Canada et al. v. Dupond et al. (1978) S.C.R. 770); in both cases provincial legislation was upheld, despite its effect of violating fundamental freedoms, because it was intra vires. Chief Justice Laskin, who dissented in both cases, only did so with the ultra vires argument regarding federal criminal law rather than on the broader issue of civil liberties.

A major reason for these decisions had been the lack of clearly defined references to and jurisdiction over civil liberties in the B.N.A. Act. As a result decisions had to be based on subjective interpretation of various unrelated legislative categories such as "property and civil rights", the "criminal law" power and the preamble's reference to "a constitution similar in principle to that of the United Kingdom." It is not surprising, therefore, that many of these decisions tended to concentrate on the issue of division of powers to the exclusion of the civil liberties issues. The addition of a formal Charter of Rights to the constitution, it was argued, would clearly eliminate the necessity for such interpretation.

A second major reason given for entrenching a Charter of Rights was the judicial ineffectiveness of the 1960 Bill of Rights, which as an ordinary statute in any event left the federal Parliament free to set the Bill aside at will, and did not apply at all to the provinces.

Apart from the Drybones decision (The Queen v. Drybones (1970) S.C.R. 282), a string of subsequent decisions failed to recognize the overriding effect of the Bill with respect to other legislation, notably the Lavell-Bédard [(1974) S.C.R. 139], Canard [(1976) S.C.R. 170] and Burnshine [(1975) S.C.R. 693] decisions. As a result there was a dramatic decrease in recent years in the number of rights cases before the Supreme Court, and a general feeling of disenchantment in human rights circles which was summed up in an article in The Canadian Lawyer.

The advent of a Bill of Rights in 1960 created wide expectations for the Supreme Court as arbiter of our public conscience ... Yet when the few opportunities arose to flex the new Bill's muscles, the Court seemed unmindful of ... its own tradition ... To aggravate matters, the public was largely unaware of the Bill's weak substance as a comprehensive, enforceable statute: it had sway only in peacetime; provided no sanctions; and was powerless to affect federal legislation in which draftsmen had shrewdly inserted the exculpatory non obstante clause. As a sword of Damocles, the Bill was decidedly blunt-edged. (52)

A third reason given for an entrenched Charter of Rights was the significant amount of discriminatory legislation which had been in effect from time to time at various provincial and the federal levels. (During their presentations before the Special Joint Committee on the Constitution in 1980-81, many human rights and civil liberties groups made reference to the legislation which resulted in the incarceration of Japanese Canadians during the Second World War, and the invocation of the War Measures Act in 1970.) While it was argued by some that parliamentary tradition was a sufficient guarantee against

(52) D. McGillis and C. McNaught, "In the Last Resort", Canadian Lawyer, February 1979, pp. 15-16.
such violations of fundamental freedoms, proponents noted that history has demonstrated lapses are possible even in the most democratic of societies unless there are certain constitutionally guaranteed rights which cannot be revoked or circumvented by any level of government. Moreover, despite the protests of some that such an entrenched Charter was incompatible with the British parliamentary system, it was further noted that the British have always considered the various pieces of their legislation listed above to comprise a constitutional Bill of Rights. In addition the United Kingdom had signed the European Convention of Human Rights and its Parliament was considering a formal Bill of Rights to complement the Convention. A parliamentary committee under Lord Allen, which earlier examined the proposal, reported to the House under "Arguments For" that:

Embodying the Convention in our domestic law would provide the individual citizen with a positive and public declaration of the rights guaranteed him, thus complementing the United Kingdom's traditionally "negative" definition of his common law rights. This would have special value at the present time for the many individuals and groups who tend to feel impotent in the face of the size and complexity of the public authorities which seem to dominate their lives.

Although when the United Kingdom acceded to the Convention, and thus allowed the right of individual petition to the Court at Strasbourg, it was believed that our law had nothing to fear from any appeal to the Articles of the Convention, a number of doubts have emerged since that time. Experience has shown that there are a number of areas where the British subject must at present take the long road to Strasbourg as a court of first instance, since the domestic law provides no remedy in the courts of the United Kingdom. (53)

A fourth major reason why proponents argued that a Charter should be entrenched in the Canadian constitution was Canada's international obligations. (Almost all of the civil liberties and human rights organizations which presented briefs to the Special Joint Committee made pointed reference to the fact that Canada has not yet met its obligations under international law, which resulted from the ratification of the two United Nations International Covenants on Human Rights and the Optional Protocol in 1976.) For example, the brief of the Canadian Human Rights Commission to the S.J.C.C., which strongly supported the entrenchment of a Charter of Rights, stated that:

The Charter of Rights should offer protection at least as comprehensive as, and close to the language and spirit of, the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. These instruments were ratified by Canada in 1976 with the concurrence of the provincial governments.

In this connection it should be noted that Canada, with agreement of the provinces, has also ratified the Optional Protocol to the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. Canada has also made a declaration under Article 41 of the International Covenant on Civil and Political Rights, which allows other countries to call attention to any failure on Canada's part in fulfilling her obligations under that Covenant. Canada has thus increased her accountability to the world community in this regard. (54)

In conclusion, then, it was argued that in addition to the safeguards of the parliamentary system and existing legislation, such as the Bill of Rights and the Canadian Human Rights Act, a constitutionally entrenched Charter of Rights would be a highly desirable if not essential mechanism for ensuring the preservation of human rights.

and fundamental freedoms. The establishment of basic minimum standards on a national scale was a particularly important aspect of this mechanism since provincial human rights acts varied widely in their coverage, and the Federal Human Rights Act had major gaps in its coverage which had become increasingly evident as cases involving the Indian Act and the Income Tax Act continue to be declared ultra vires the Commission's jurisdiction.

As a result, when presenting the brief of the New Brunswick Human Rights Commission its Chairman, Dr. Noel Kinsella, concluded that:

The New Brunswick Human Rights Commission enthusiastically supports the entrenchment of a statement of rights in the Canadian Constitution ... it is the view of the Commission ... that a variety of human rights instruments and institutions will always be necessary for the enhancement of human rights in Canada, but ... a Charter of Rights has very special status among the other instruments. The proposed Charter will serve to supplement ... laws by establishing some basic standards for the enjoyment of human rights throughout Canada. (55)

Consequently it was suggested that the Charter could also be viewed as having a symbolic value. From the point of view of promoting human rights, even if no remedial measures were included, it could serve a useful educational function.

The decision to include a Charter in the 1980 Resolution therefore demonstrates once again the continuing nature of the central issues in constitutional reform. Apparently it was believed that the Charter would have symbolic value as a unifying force, something with which all Canadians, if not provincial spokesmen, could identify. (56)

Certainly Mr. Trudeau had long been concerned with the issues of national unity and Canadian identity, and the advantages of making a


(56) Based on information obtained in interviews with participants.
charter the centrepiece of his constitutional proposal can hardly have escaped him. (The emphasis which was placed on the Charter in the federal advertising campaigns tends to confirm this as speculation.) Furthermore, the continued overwhelming popularity of the Charter in public opinion polls suggests that the symbolic value of an entrenched charter during the process may well have been significant indeed in establishing the legitimacy of the federal initiative.

This leads to a discussion of the last of the three major issues which repeatedly emerged during debate on constitutional reform between 1960 and 1980, an amending formula. Of the three, this may have been the most critical issue, and was certainly the one which caused the most difficulty for the federal government during the 1980-82 reform process.

Amending Formula

Although Canada became a Dominion in 1867 and acquired complete sovereignty in external matters in 1931 with the passage of the Statute of Westminster, there is no question that the country in 1980 was not yet fully autonomous. What Prime Minister Trudeau had frequently referred to as "the last vestige of colonial status" was the lack of a domestic amending formula, which obliged Canada more than once to petition London for various constitutional amendments.

While the British themselves would have preferred that Canada assume this responsibility, the inability of the provinces and the federal government to agree on an amending formula in 1931 forced Prime Minister Bennett to opt for the status quo. The result was 50 years of constitutional navel-gazing and sporadic rounds of federal-provincial negotiation. To some, Canada's slightly impaired sovereign status had been an issue of low priority, while for others it had been a cause of great concern. The latter opinion was succinctly stated recently by
Chief Justice Freedman of the Manitoba Court of Appeal in the introduction to his decision:

Whether Canada's slightly diminished sovereignty is more a matter of appearance than of fact is something on which I need not linger. Even an appearance of incomplete sovereignty is something that calls for correction ... one should not underestimate the importance or the gravity of the constitutional problem here involved. (57)

Yet while all provinces had agreed in theory on the desirability of patriation, they disagreed profoundly among themselves and with the federal government as to how this should be accomplished. Under Mr. Trudeau the federal government lobbied for patriation with an amending formula, so that major revisions could be accomplished when it was brought home, but several provinces protested, indicating they would prefer a package of changes to be worked out here in advance, with the federal government petitioning London for simple patriation. The federal government always rejected this approach, expressing its concern that since no amending formula had been agreed upon, patriation would accomplish nothing and Canada would be left with one of the most rigid constitutions in the world.

Of course, the chief problem which Canada faced, in attempting to arrive at an amending formula over 100 years after Confederation, was that it was attempting to close the barn door after the horses had escaped. The provinces had expanded their roles considerably since Confederation, and in fact the entire federal-provincial structure had been significantly altered, partly by judicial decisions, partly by

legislative encroachment and partly by the emergence of myriad subjects as issues which the Fathers of Confederation would not possibly have foreseen.

No other modern (federal) state lacks an amending formula, and hence while constitutional amendment be a more or less complicated procedure, it is not a contentious issue in and of itself -- subjects such as female emancipation in Switzerland and the Equal Rights Amendment in the U.S. may be, but the mechanism by which they are (or are not) accomplished is not. One author has further observed that no federal state in the modern era has successfully re-negotiated its constitution per se; either the component parts have agreed to dissolution of the federation or the attempts at major change have been dropped. (58)

The literature on federalism has not failed to recognize the importance of the amendment procedure. In his major work Livingstone (59) observed four common elements present in amending procedures in successful modern states: (1) the presence of a bicameral government structure, and the need for both houses to approve any proposed amendment; (2) the ability of either the federal or state level to initiate amendments; (3) consultation of the states by the federal government; and (4) constitutional limits on what can be amended.

He also observed that a precondition for successful functioning of the system was the existence of a "federal society",

otherwise referred to as a federal culture, spirit or mindset by Watts, Friedrich, Stein et al. (60) Finally, almost all observers of this phenomenon have concluded that an amending formula is a critical and essential element of a federal system, since federalism itself is a process, not a static entity, and its structure must be flexible enough to adapt to change.

Certainly generations of Canadian politicians had been aware of the importance of this constitutional lacuna, and there were numerous attempts to remedy the situation. However, while these had resulted in partial agreement on some occasions there had yet to be a sustained consensus on any specific amending formula.

The overall problem was the concept of unanimity. Over the course of years of federal-provincial negotiation the provinces had come to expect to be consulted on all issues of major importance, and as a result the federal government had been loathe to pursue a particular course of action on the constitutional amendment issue without unanimous or near unanimous consent of the provinces. While it had claimed to do so on the basis of courtesy and prudence rather than legal obligation, it nevertheless had fallen into a pattern from which it had been unable to extricate itself until 1980. More striking still, the actual formulae which had been proposed over the years

frequently included the concept of unanimity, or at the very least substantive vetoes, as part of the amendment mechanism.

Yet if one examines the amending procedures of other federal states, one finds no precedent for the unanimity principle. No other federal country requires unanimity from its constituent parts to amend its constitution. In fact, in Australia the state legislatures have no role at all to play in constitutional amendment -- a proposed amendment must pass both Houses of the federal Parliament, a majority of voters in the country as a whole and a majority of voters in a minimum of four of the six states. In the U.S., approval of two-thirds of both houses of Congress and three-quarters of the state legislatures is the preferred method, while in Switzerland passage by the Federal Assembly, a majority of citizens in the country and in the cantons is required.

The amending formulae proposed over the past decade in Canada have much in common with certain elements of those above, but at the same time the unique exigencies of the Canadian political reality have appeared to produce unique solutions as well. The 1980-82 round of constitutional negotiation has its roots in Victoria in 1971; this was the closest that Canada had previously come to a consensus on the constitutional issue, lending a heightened sense of credibility to the amending formula which was agreed upon there.

Basically, the Victoria Formula required the consent of: (1) both Houses of the federal Parliament; (2) the legislatures of at least two of the western and two of the Atlantic provinces, with a minimum of 50% of the region’s population; and (3) any province which at any time had had at least 25% of the nation’s population –- Ontario and Quebec.
Since 1971 British Columbia had proposed a modification which would give it status as a fifth region, with its own veto, and Alberta had expressed its concern about the possibility that certain property and natural resources rights of a province could be altered by the others without its consent. Obviously the fact that in a decade all provinces had experienced changes in political leadership is of significance from this perspective.

In the spring of 1980 the provinces, led by B.C. and Alberta, met in Vancouver and, no longer content with the Victoria proposal, they devised a new amending formula. The so-called Vancouver Formula required: (1) the support of the federal Parliament; (2) three-quarters of the provincial legislatures (seven out of 10) with three-quarters of the nation's population; and (3) an "opting-out" provision, in which on certain matters relating to provincial rights, (natural resources or property), up to three dissenting provinces could opt out of the amendment. This latter concept raised more difficulties than it resolved, according to the federal government, which feared a "checkerboard" Canada with different rights and powers in different provinces. (61) However, as indicated above, at the failed September 1980 conference there did appear to be general provincial support in principle for the Vancouver Formula.

It was therefore with some surprise that many provinces viewed the amending formula put forward by the federal government in its October 1980 proposal. The proposal first provided for two years in which amendments must have the unanimous consent of the provinces.

and the federal government. Thereafter it provided two alternatives if the provinces and the federal government failed to agree on a new amending formula. The first involved a referendum whereby citizens would choose between a plan approved by eight of the 10 provinces, having 80% of the population, and a plan devised by the federal government. If the provinces could not agree on a formula to submit to a referendum, however, the second alternative would automatically come into effect -- a modified Victoria Formula which included a referendum mechanism.

This referendum mechanism in particular caused much consternation among the provincial leaders, numerous federal politicians and the general public. It was even referred to as "undemocratic." (62)

Yet the concept of a referendum is one which many modern states, both federal and unitary, have found extremely appealing and workable. In addition to Switzerland, Australia and the United States, there are referenda provisions in Austria, France, Denmark, Ireland, Italy and Sweden. In Switzerland the referendum has been since 1874 a tool by which citizens may initiate constitutional amendment.

As Eugene Forsey stated:

"It is the provision for referendum which has aroused most opposition. It is attacked as destructive of federalism. But Australia is a federal state, and in Australia the state legislatures do not come into the amending process in any way, shape or form. A proposed constitutional amendment must be passed by both Houses of the Commonwealth Parliament and then approved by a majority of the voters of the whole country and a majority of the voters in at least four of the six States. And federalism in Australia is alive and well. Why anyone should be"

(62) By several Opposition MPs in confidential conversations with the author.
so scandalized by a proposal to let the people decide, rather than legislatures elected on other questions (and legislatures where the majority may not represent a majority of the voters, even on those other questions) is a mystery to me. (63)

In opposition Gordon Robertson, former Clerk of the Privy Council and preeminent public servant, argued that the referendum mechanism, while certainly democratic, is unsuitable in the Canadian context, because of our unique historical development. Speaking during the height of the constitutional debate at a conference in Ottawa, Robertson concluded:

I am not suggesting that there is anything contrary to the principle of federalism in having an arrangement under which amendments are by referendum. There are at least two federal systems in the world where that is the method - Australia and Switzerland, and certainly they are valid federalisms. I am simply raising the question whether this approach is not contrary to our system of federalism in which the provinces have had a direct role. As far as our practice, over one hundred and thirteen years, would seem to indicate, we have required consent of the provincial governments and it has been for those governments to determine whether they involve their legislatures or not. I think it can be argued that our tradition in this respect is not the tradition of Australia and Switzerland, but is rather the tradition of the United States and Germany where the system of amendment requires a proportion of consent from the provincial governments. In the United States there has to be the consent of three-quarters of the states legislatures, and this is why the Equal Rights Amendment is not succeeding. In Germany there has to be the approval of a two-thirds vote in the Bundesrat which is the federal second chamber, but the Bundesrat is made up entirely of ministers of the Länder governments and they vote on instruction from the governments of the Länder or states there. (64)

(63) Forsey, op. cit., p. 569.

(64) Robertson, op. cit., p. 49.
Meanwhile, political scientist Garth Stevenson maintained that, given the track record of amendments in the countries mentioned, those who viewed the referendum mechanism as a key element in the October proposed amending formula seriously overestimated its potential importance. According to Stevenson, not only do relatively few proposed amendments ever pass, but the initiator of the particular proposal appears to have no particular advantage in wording the question.

In the light of Quebec's recent referendum it should be impossible seriously to sustain the argument that the government framing the question for a referendum will invariably secure the desired response in Australia, where the referendum is the only mechanism available for constitutional amendment, only eight out of thirty-six proposals have been approved by the electorates in a sufficient number of states to be adopted. There is little reason to suppose that the results in Canada would be much different. (65)

In addition to criticism of the concept of referenda, there had also been criticism of the specific proposal introduced by the federal government. Robertson, for example, criticized the legislation for not making clear that Parliament would vote on the substance of the resolution and approve the actual referendum question, rather than merely authorize the Governor-General to issue a proclamation of the referendum. Similarly some provincial concerns centred on the actual wording and structure of the proposal. Premier Blakeney, for example, stressed that he viewed the paramount issue to be one of fairness and

stance in that the provinces should also have been given the right to initiate referenda. (66)

Essentially, however, the dispute over an amending formula remained one of regional conflicts and centralist-decentralist concerns. Newly prosperous provinces in the west and Newfoundland now saw any Victoria-based formula as contrary to their decentralist objectives, while Quebec had always favoured the provincialist position on linguistic/cultural grounds. On the other hand economically beleaguered Ontario and the remaining have-not provinces perceived a Victoria-type formula as providing them with a counterbalance to the provincialist extremism of Newfoundland and Alberta.

Although it is true that 10 years after Victoria some provinces had consequently reversed their positions, the result -- a deadlock -- remained the same. It is also possible to speculate that the unique combination of the awkward size of Canada's federal structure (10 state components as opposed to far fewer in Australia, far more in the U.S. and Switzerland), and the existence of a multi-party parliamentary system of government, had combined until now to perpetuate this deadlock.

The eventual acceptance, in November 1981, of a formula by the federal government and nine of the 10 provinces can therefore be seen as a stunning breakthrough. Essentially the formula is the so-called Vancouver consensus of April 1981. There are still three categories of amendments: some amendments require the unanimous consent of all provinces, others may be accepted with the agreement of

seven provinces representing 50% of the Canadian population. On amend-
ments affecting provincial powers, although seven provinces with 50% of
the population might accept the amendment, up to three provinces would
be permitted to "opt out". However, the accepted amending formula
differed from the April consensus in two respects. A provision for
financial compensation for provinces who would "opt out" of an accepted
amendment was deleted as was the proposal for the delegation of legis-
lative authority from one level of government to another. The former,
however, was restored by Mr. Trudeau in an attempt to win approval from
Quebec. Nevertheless, Mr. Trudeau's fears of a chequer-board Canada
may well materialize with this formula, and many observers have
questioned whether the price of this accord was too high.

In conclusion, then, this chapter has traced the historical
evolution of constitutional reform efforts to demonstrate that (1) in
the past they were conducted exclusively in the executive federalism
forum and (2) they were also conspicuously unsuccessful. Last but not
least, it has demonstrated that (3) the issues involved remained
constant -- hence the success of the 1980-82 process was not the result
of a different drama, but rather of a new cast and setting.

The following chapters examine the 1980-82 process, which
must therefore be considered significant if for no other reason than
because it succeeded. They further demonstrate that this process
largely excluded the executive federalism forum, forcing the provinces
to participate in the process on the parliamentary stage, at the same
time that the change in venue also appears to have introduced many new
actors to the drama, several of whom participated with unexpected
consequences.
CHAPTER IV

THE CASE: SCENARIO AND PLOT

"There is nothing more difficult to arrange, more doubtful of success, and more dangerous to carry through, than initiating changes in a State's constitution."

-- Machiavelli, The Prince.

This chapter examines in chronological sequence the various phases of the constitutional process of 1980-82, namely the preparatory, parliamentary, committee and judicial phases. The parliamentary phase itself is actually divided into three periods -- the initial examination of the proposal from October-December 1980, the debate on the S.J.C.C.'s amended version of the proposal from February 17-April 28, 1981, and the final deliberations on the revised accord as agreed to by nine provincial premiers, from November 4-December 8, 1981. In each of these phases the recurring themes of unilateral patriation, an amending formula and entrenchment of a Charter of Rights is evident, and in each the lack of accommodation on the part of the actors becomes more apparent. As the previous examination of the literature and the historical background has indicated, the very existence of parliamentary, committee and judicial phases is uncharacteristic of the constitutional policy process in Canada to date. This chapter demonstrates how important the change of stage was to the process, and to the ultimate resolution of the constitutional issues.
A. Preparatory Phase

In one sense the federal government had been preparing this constitutional reform policy for 10 years, but in another sense its immediate preparation was rushed and at times haphazard. Certainly in the beginning of this phase it was extremely arbitrary. Once Mr. Trudeau decided to proceed with the issue in earnest, he became the conductor of a highly orchestrated process whose participants were chosen with great care, (but with little regard for the conventional wisdom of who is normally involved in the policy process, or how it operates). Because of his intense personal interest in the issue this was definitely Mr. Trudeau's show, and everyone involved knew it. As one senior official remarked, "Don't underestimate the guy's commitment on the constitution. He's not obsessed, he's monomaniacal." (1)

During the course of the summer negotiations (chaired on the federal side by Justice Minister Jean Chrétien), memos on the progress being made (or lack of it) were prepared each week for Mr. Trudeau's perusal, and on Mondays Mr. Chrétien would return to Ottawa with two key advisers, Deputy Minister of Justice Roger Tassé and FPRO Secretary Michael Kirby, to brief the Prime Minister personally. The two advisers named above were in fact part of a special 11-man team set up by the Prime Minister to assist and advise on the negotiations. Others included Eddie Goldenberg, special constitutional adviser to

Mr. Chrétien, seconded from the Ministry of State for Economic Development, Nick Gwynn and David Cameron of the F.P.R.O., Barry Strayer (Assistant Deputy Minister) and Frederick Gibson of the Department of Justice, Reeves Haggan from the Department of the Solicitor General, and three outside experts -- Michel Robert (a Montreal lawyer), Pierre Genest (a Toronto lawyer) and Ronald Watts (political scientist and principal of Queen's). To this list, albeit unofficially, should be added the name of Jim Coutts, principal secretary to Mr. Trudeau and a highly influential political adviser.

But although several bureaucrats were asked to provide input, Messrs. Trudeau and Chrétien along with their top political advisers made the decisions, some of which ran directly counter to bureaucratic advice. Moreover, while this elite group was concerning itself with the narrow issue of various package options and trade-offs with the provinces on the twelve agenda items (as was the Cabinet at this point), the Prime Minister was considering a broader context with Mr. Chrétien -- the options open to the federal government if the conference failed. Probably the only other person aware of this at the time was Eddie Goldenberg, no doubt because of his relationship to Mr. Chrétien, and it was he who first drafted a memo (on his own

(2) Throughout the remainder of this paper, this small group will be referred to variously as the Liberal hierarchy, the Liberal establishment, the inner circle or the Liberal forces, although at times it could simply be read as Trudeau. Much of the information following on the activities of this group was obtained in confidential discussions.

(3) See for example the section on the Judicial Process.
initiative), outlining federal options, which included unilateral action. Although it was presented to the special team, it was barely discussed and not seriously considered at this time. (4)

However the subsequent public statements made by Mr. Trudeau about the need for the federal government to act on its commitment to Quebec even if the September First Ministers' conference failed provided ample evidence of the direction his thoughts were taking. Mr. Chrétien's increasingly pessimistic reports on the series of federal-provincial meetings fueled this fire, and by mid-August Mr. Trudeau had made up his mind to proceed unilaterally if necessary.

It was only at this point that the special team was hastily requested to prepare a document for the meeting of the Cabinet Priorities and Planning Committee at the end of the month, outlining federal options and their possible consequences.

Because of the time constraint the team essentially pieced together the work of various members, using the previously ignored Goldberg document as its base. (It was this piecemeal creation that eventually became known as the "Kirby memo" when leaked to the provinces). Although prepared in haste it was a comprehensive analytical document; however, it was prepared for a select readership, and the manner in which it became public tended to take away from its professional competence, as did the use of a Machiavelli quote in the conclusion.

(4) This information was obtained in interviews with various individuals involved in this stage.
In terms of the September conference the memo concluded that the best possible scenario (after success) for the federal side would be total failure; anything close to a deal would inhibit the moral authority of a federal unilateral initiative. For a number of reasons total failure is exactly what resulted. Disregarding months of planning by his advisors on how to make deals and play off provinces against each other, Mr. Trudeau chose to do it his own way, expounding on his personal vision of Canada in a lengthy soliloquy during the televised sessions in September. While this was an initial success which appeared to throw the premiers offguard, it eventually spurred them on to greater heights as well.

Any chance of an agreement appeared to slip away on the third day when the Prime Minister and the premiers used the debate over an entrenched Charter of Rights to articulate, often brilliantly, competing views of the country. Some of the premiers gloated privately afterward how they had "put it to Trudeau" on that issue. As well some of the participants talked in hindsight about the growing sense of regional politics that "overrode the fear of Quebec" and prevented the premiers from responding to other than their own constituencies in forming a view of the nation.(5)

Of course it is impossible to determine whether the approach of the bureaucrats would have been more successful; quite possibly not, since the provinces after months of preparatory negotiations would have been expecting such an approach. In any event the "Kirby memo" phenomenon was a wild card which might have been capable of breaking up the game on its own regardless of which approach the federal side took.

Moreover there was evidence that not everyone had come to play -- Mr. Lévesque in particular gave no public evidence of an interest in compromise, with Messrs. Bennett and Lougheed apparently not far behind.

With the September conference acknowledged as a failure Mr. Trudeau was free to discuss the unilateral option in detail with various political elements of the system: the Cabinet as a whole, the caucus and the party strategists. In the early meetings of the Cabinet as a whole some Ministers were apparently surprised to find that the unilateral issue had already been decided, but very quickly they closed ranks behind this approach and the major topic of debate became how much to include in such a package.\(^6\)\(^\) Patriation and an amending formula were foregone conclusions, but the Charter of Rights was a highly contentious issue. What to include and whether or not to make it binding on the provinces were the key sources of conflict. While deciding to include it in the package, Cabinet did not commit itself to making it binding on the provinces until much later, because of the fear of provincial reaction.

According to several sources Mr. Trudeau, while indicating a preference for a binding Charter, did not insist on this point in the Cabinet meetings and indicated that he would abide by the decision of his Ministers. However, given his historical position on the issue it is certainly possible that this was a ploy, especially since he knew he could count on forceful interventions by a number of ministers whose philosophical bent or departmental portfolios favoured his position.

\(^6\) This information and much of what follows in this section was obtained in interviews with various individuals connected with the participants as well as some of the participants themselves. A complete list of persons interviewed for all sections is included in the Appendices.
Cabinet heavyweight such as Jean Chrétien, Marc Lalonde, and Allan MacEachen, and other ministers such as John Roberts, Mark MacGuigan and Robert Kaplan all argued strongly in favour of an entrenched and provincially binding Charter of Rights. In addition Jim Fleming and Lloyd Axworthy intervened strenuously to promote the inclusion of protection for their particular interests - multiculturalism and women's rights.

At the same time, the entire Liberal caucus and especially the powerful Quebec wing were calling for immediate unilateral action with as comprehensive a package as possible. Language rights in particular were a strong element of their concern, and most Cabinet ministers agreed with this position, although there was fear of an anglophone backlash. (It does not appear that the possibility of a strong Quebec backlash was considered.)

However, while the Prime Minister was apparently content to let others argue the case for a binding charter (there was never any question that a charter of some type would be included), he personally led the debate on the addition of a referendum mechanism to the amending formula. More specifically, he was almost the only proponent of this option. He imposed it on the Cabinet over the vociferous objections of his senior Quebec ministers, including Jean Chrétien. (The Prime Minister did reportedly discuss the option with close aides Jim Coutts and Michael Pitfield, both of whom supported it as an ideal tie-breaking concept.)

Within the Department of Justice there was conflict at this time as well, not only with regard to content but also in deciding who would be involved in the actual drafting process. In the end a
constitutional lawyer, Fred Jordan, was responsible for the first draft. Despite the fact that the major component of the package was a Charter of Rights, none of the human rights specialists in the department was involved in the actual drafting. (7) (This became a topic for heated internal debate, particularly in retrospect as the first draft was subjected to intense criticism by human rights experts during the committee stage.)

Finally, after a last-minute flurry of changes, a package which contained a weak but binding Charter, an amending formula with a referendum option, and a limited set of language guarantees was presented to the Canadian people by Mr. Trudeau on October 2, 1980. His timetable envisaged a parliamentary committee reporting back to Parliament by December 9, with the package being sent to Westminster early in the New Year for return in time for joyous festivities on July 1, 1981.

Thus the government plan was complete. In keeping with the conventional wisdom Mr. Trudeau appeared to consider that the policy formulation process was essentially over. What remained were minor refinement by Parliament and eventual implementation of certain aspects such as the Charter by the bureaucracy. However, in the same way that he had not followed the traditional approach to constitutional policy formulation to date, the next stages would also deviate significantly from the norm. The Prime Minister apparently believed that it would be

(7) Several officers of the department interviewed disclosed not only the details of the internal drafting squabble but also the fact that disension continues long after Proclamation because of their continued exclusion from the interpretation of the Charter.
a relatively simple matter to stick to the timetable proposed, and expected a large measure of parliamentary and public support for the package. While he anticipated some provincial dissent, his public statements to that date indicated that he did not anticipate the extent of the dissension or the vociferousness of it. Conversations with various aides and advisers have indicated that Mr. Chrétien was more cautious in his outlook, but that he also was unprepared for the tidal wave of opposition which was about to wash over the planners and their supporters.

Both Messrs. Clark and Broadbent were allocated television time to reply to the proposal. Mr. Clark termed the action "alarming" and "arbitrary" and declared that his party would lead the attack against it, while Mr. Broadbent praised what he referred to as a "basically humane and civilized set of proposals", nevertheless stressing the need to strengthen provincial control over resources, and withholding official party support until this was included. The following day Premier Davis indicated his approval of the federal action and promised his full support, while Premiers Blakeney and Hatfield remained noncommittal, but several other premiers threatened immediate action to challenge the federal unilateral initiative.

On October 5, 1980 a Canadian delegation led by External Affairs Minister Mark McGuigan and Environment Minister John Roberts visited London to discuss the proposed Address to the Throne. In a
statement to the press upon his arrival Mr. McGuigan warned that Canada would not tolerate judgment of the package by Westminster, and indicated that the British Parliament's task was to comply with the Canadian request.\(^8\) After the meetings, Mr. MacGuigan announced that the British government "supports totally" the Canadian plan to patriate the constitution, but that Mrs. Thatcher had raised some concerns regarding timing as the British parliament already had scheduled a heavy agenda for the winter session.\(^9\)

As mentioned above, a further account of these meetings released by British sources on January 30, 1981, indicated that Mrs. Thatcher had foreseen difficulties in passing the legislation quickly due to the lack of broad consensus and provincial support while Lord Carrington, who had been present in his capacity as Foreign Secretary, apparently indicated delays could also be expected in the House of Lords.

The same day on which Parliament returned early from its summer recess, October 6, 1980, the government nevertheless introduced its Proposed Resolution for a Joint Address to the Queen Respecting The Constitution of Canada. The Resolution, which constituted an attempt at unilateral patriation, contained provisions for an entrenched

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\(^8\) Ottawa Citizen. October 6, 1980.

\(^9\) Ibid.
Charter of Rights, binding on the provinces, and an amending formula similar to Victoria but with the inclusion of a referendum mechanism.\(^{(10)}\)

B. Parliamentary Phase (Part I)

The recall of Parliament was not only the first step in the government’s plan to patriate the Canadian constitution, it was also the only step which proceeded on time and as expected - after this the universe did not unfold as it was supposed to. In fact, what followed was a series of palace revolts and "false hésitations" at all levels in all forums. The Liberal timetable for patriation was doomed almost from the beginning, but more importantly, there is substantial evidence, documented throughout this chapter, of how the procedure and the content of the proposal were altered significantly by the input of the various other actors in the constitutional drama.

The federal Parliament, originally scheduled to reconvene on October 15, 1981, was recalled a week early, on October 6, in order to debate the Proposed Resolution, tabled the same day by Justice Minister Chrétien. Mr. Chrétien then moved that a Special Joint Committee be established to consider the proposal and report back to Parliament by December 9. Speaking to his motion Mr. Chrétien stressed that:

\(^{(10)}\) Complete text in Appendices.
The constitutional proposals of the federal government do not affect the division of powers in Canada. There is no transfer of powers from the provinces to the federal government. All that has been done is to prohibit both levels of government from interfering with fundamental rights of Canadians.

He then dealt with the issue of unanimity, outlining the government's official position:

Past practice shows that there is no hard or fast rule concerning whether or how the federal government should consult with and obtain the consent of the provinces before presenting a resolution seeking to amend the British North America Act. Theoretically, the legal sovereignty of the Parliament of the United Kingdom is such that it can amend the British North America Act with or without the consent of Canada. But precedent tells us that the Parliament of the United Kingdom will amend the BNA Act only at the request of the Parliament of Canada and will do so despite any objections from any particular province or provinces.

On the subjects contained in this resolution, the Government of Canada has consulted for years with the provinces. We failed, yet again, to reach agreement, and therefore the government decided to proceed on its own in the spirit of the resolution passed unanimously by this House on May 9. Whatever the merits of unanimous agreement as a condition for change, the kind of constitutional deadlock we have had in this country for the last 53 years cannot be allowed to continue forever. However, the amending formula which we propose will ensure that in future there cannot be any unilateral action by the federal government. In other words, the changes we are proposing actually reduce the future powers of Parliament with respect to the amendment of the constitution. (11)

The Official Opposition reaction to the proposal was immediately negative. Mr. Clark referred to the government's plan as a "divisive" one which could "destroy the federal system."

On the basis of this resolution, the central government would have the authority to deprive unilaterally the provinces of their powers. And because this authority would not be limited, this central government could, if it chose to, deprive the provinces of all their powers and for all times.

Under this resolution, the central government could destroy what makes Canada a federation. And if it did, I am afraid it would signal the end of Canada as a country. As a matter of fact, because of the mere mention of the possible creation of this authority, as stated in the resolution, we are very much in doubt about the ability of this government to understand, promote and unite the diverse factors which make up our federal system. (12)

Mr. Broadbent on the other hand was more conciliatory, although at the same time he continued to stress the N.D.P. concern with the issues of resources and native rights:

I want to conclude by saying on behalf of my colleagues that there is much in this proposal that is attractive to us, not because it comes from a Liberal Prime Minister but because it reflects resolutions and motions passed by my party over the years. If the government will show flexibility in committee and accept some amendments, we can have a decent piece of legislation. If the government wants our support in the House of Commons, the very minimum it must do is to make reasonable, fair changes in the constitution in the resource sector which are important to Canadians wherever they may live in this land.

I conclude by saying that this is an historic event because if this measure passes, we shall be changing the fundamental law of our land. I hope when the bill comes back to the House from committee, it will be so improved that members of all parties can be proud to support it. (13)


(13) _Ibid_. , p. 3299.
Debate continued on the proposal throughout the following three weeks. Then, on October 21, a major breakthrough occurred for the federal government when N.D.P. leader Ed Broadbent indicated his party's firm support for the proposal after the government had agreed to amendments strengthening provincial control over natural resources. This move allowed the federal government to claim that it had the support of a substantial number of western MPs, a critical issue because of the lack of Liberal representation in the west and their desire to refer to a national consensus.

At this point the government began to express concern that the committee would not be able to meet the December 9 deadline if it were not struck in the near future. Finally, arguing that the government was only "moving the debate" from the Commons to committee so that amendments could be considered and witnesses heard, the government announced on Wednesday, October 22, its intention to invoke closure at 1:00 a.m. on Friday in order for the House to move on to pressing matters such as the budget. Opposition members reacted extremely critically to the closure motion; Mr. Clark referred to the move as "anti-democratic" while Mr. Broadbent termed the decision to invoke closure "premature" and "completely counterproductive."

This same day the Liberal and New Democrat MPs combined to defeat a Conservative non-confidence motion by Tory Leader Clark, who called on the House to support the immediate patrfation of the constitution incorporating only the "Vancouver" amending formula. The vote was defeated 158 to 93.

Thursday evening, during a particularly stormy session in which some Conservative members left their seats and approached the
Speaker's chair to protest the invoking of closure, Mr. Chrétien's motion was approved by a margin of 156 to 83. At one point before the vote Commons security officials allegedly entered a lobby of the House but hastily retreated after their presence was discovered; just prior to the vote all Conservative MPs withdrew from the Chamber, although Mr. Clark eventually convinced most of them to return and vote against the motion.

In the Senate a number of Senators spoke to the motion, some expressing concern that they would not be able to directly effect amendments, but the motion carried on November 4 with a vote of 45 to 29. In a statement on October 27 Mr. Trudeau also indicated that if necessary the government might be obliged to invoke closure on the constitutional debate once it returned to the House, since the package had to reach the United Kingdom early in the New Year to be approved in time for July 1. The Tories meanwhile threatened to insist on following House procedures in minute detail in the months to come because of the Liberal's use of closure.

As a result a lengthy and somewhat acrimonious debate followed in the House on the budget introduced by Finance Minister MacEachen on October 28 before it was finally approved on November 6 by a vote of 135 to 88. After that, due in part to Conservative displeasure over the use of closure during the debate on the proposed constitutional resolution, and also due to the maximum attention focussed on the resolution in committee stage, little legislation of significance passed the House during the period in question.

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Meanwhile, on November 26 the Standing Senate Committee on Legal and Constitutional Affairs tabled its Report on Certain Aspects of the Canadian Constitution. A 15-member sub-committee chaired by Senator Maurice Lamontagne (Lib.) rejected the idea of an elected Senate and argued for a "younger, larger and more dynamic" Senate which would replace its veto power by the authority to effectively suspend legislation for six months while returning it to the House for further examination.

The report also recommended entrenching the role of federal-provincial First Ministers' Conferences in an institution to be referred to as the Federal-Provincial Council:

We believe that a solution truly compatible with a genuine federation can be found at the level of intergovernmental relations, by establishing in the Constitution the unique Canadian institution of the First Ministers' Conference to be called the Federal-Provincial Council, and by assigning to it, among other functions, the responsibility for overseeing the use of federal overriding powers. It could also oversee provincial decisions and proposals that might infringe upon federal areas of jurisdiction.

In the light of current intergovernmental practices in Canada, such a constitutional arrangement would not be revolutionary. It would mark, however, an important evolution because it would, in the best practical way, guarantee the sovereignty of the provinces de facto and de jure and eliminate one of their most deeply-rooted grievances. We believe this new arrangement would mean that, for the first time in their history, Canadians would live in a political system based on a genuine federation. (16)

(Although it does not specifically refer to the term, it is clear that this recommendation would institutionalize the executive federalism format discussed earlier.)

Then on December 19, after a dramatic all-night emergency debate on an N.D.P. motion concerning the economy, which delayed adjournment, the House finally recessed until January 12. For nearly a month after it reconvened it was able to consider a number of bills and urgent government business while the constitutional debate raged in another forum, the Special Joint Committee.

C. Committee Phase

On October 28, 1980, 15 backbench Members of Parliament were named to the Special Joint Committee on the Constitution (S.J.C.C.); of these eight were Liberals, five Conservatives and two New Democrats. Shortly thereafter 10 Senators, seven Liberals and three Conservatives, were named. Selection of these Committee members by their respective parties was in itself indicative of the differing perspectives they held. In an effort to epitomize participatory democracy, the Liberals opted for regional representation and linguistic balance, picking a number of untested and occasionally rookie Members (e.g. Ron Irwin and Coline Campbell) who were sometimes lacking in knowledge of parliamentary procedure as well as the constitutional issues.

(17) A complete list of members follows at the end of this section.
Few if any of the Liberals had expertise in the areas involved, nor had they a lengthy record of interest in the subject.

The Conservatives on the other hand elected to consider selection to the Committee as a choice political plum. They picked five former Cabinet Ministers on the House side and one on the Senate side in an effort to assuage egos still smarting from parliamentary defeat and loss of power. However, some of these members had an avowed interest in the area, and the selection of Senator Arthur Tremblay assured them some constitutional expertise.

The N.D.P. stressed expertise almost exclusively in its selection of members for the committee, although it should be noted that its two representatives were both from western ridings. (Although Stanley Knowles was one of the official members on the first day, this was essentially an honorary appointment and he was quickly replaced by Svend Robinson for the duration.) Both the P.C.s and the N.D.P. were severely hampered in any attempt they might have made to obtain linguistic balance by their lack of francophone members.

Once the committee was struck deliberations began behind the scenes to select the co-chairmen. Mr. Trudeau, aware that Bryce Mackasey was still unhappy at having been left out of the Cabinet and that he had the necessary negotiating and public relations skills to control the Committee, had already spoken to him about the job and Mackasey had been led to believe that it was his. However, in the first of many palace revolts, the Quebec caucus objected strongly to his appointment due to his views on language rights, and Senator Maurice Lamontagne (who had been eyed as the other co-chairman),
indicated that he did not wish the chairmanship. The Senate then apparently refused to opt for a number of alternatives suggested by the hierarchy and settled instead on an Alberta Liberal, Harry Hays. (There also was a Liberal establishment blacklist of certain senators, primarily western, who were considered undependable even as Committee members.) The selection of an anglophone by the Senate then forced the Liberals to select a francophone, Serge Joyal, as the House co-chairman.

Having settled the matter of the co-chairmen, the S.J.C.C. met for the first time on November 6, 1980. The day was spent in procedural wrangling, first over seating arrangements and then in a lengthy debate on whether the hearings should be televised. In general it appeared that the Liberal establishment did not originally want this while both opposition parties did; the issue was clouded by conflicting statements of Ministers, the co-chairmen, etc. as to whether this could actually be done in view of Parliament's existing arrangements on televising and agreements with the CBC. In the end the opposition carried the day, with several Liberal committee members supporting them, and it was agreed that proceedings of the hearings would be broadcast on radio and television. These committee hearings thus became the first ever to be broadcast on a regular basis, thereby enhancing the legitimacy of this new forum for constitutional negotiation.

Although much larger than an ordinary standing committee, the S.J.C.C. basically followed traditional parliamentary protocol and layout. In the huge and ornately impressive Room 200 in the West Block of
the Parliament Buildings a large square of tables was set up for Members, witnesses and the co-chairmen, with other tables behind and to the sides for other participants. The public was provided for at one end of the room, as was the press, with rows of auditorium-style chairs; there was no specific or separate provision for provincial representatives. Finally the ubiquitous cameras were set up on platforms at either end of the room, and rows of lights were suspended from the gilded ceiling.

In short this was perhaps the most impressive symbolic display of pomp and pageantry in government that Canadians have ever witnessed, and it was created deliberately by the Liberals to assure a high degree of credibility. There was unquestionably an air of history in the making. Many times during the hearings observers were overheard making reference to the similarity with American televising of the Watergate proceedings. While at first glance this may appear to have an unfortunate connotation it does in fact indicate the degree of importance which was attached to these hearings, as did the oft-heard references to the committee members as the new Fathers of Confederation.

On November 14 the Committee commenced public hearings with the appearance of the Justice Minister. While Mr. Chrétien defended the government's proposal, he also indicated during questioning that an effort would be made to be flexible, and to accommodate as much as possible the suggestions and the eventual recommendations of the Committee.(18)

Meanwhile the Committee had previously authorized its clerks to place advertisements across the country inviting written submissions and requests to appear as witnesses. A total of 323 groups and 639 individuals made written submissions, for a grand total of 962, although it should be noted that only 163 of these groups actually submitted briefs, while the remaining 160 sent letters or telegrams. A total of 314 of these groups and individuals requested to appear before the Committee. Keeping in mind that certain of these groups were actually invited and then changed their minds, the Committee heard from 92 groups and 5 individuals between November 14 and January 9, 1981 when the hearings terminated.

During these public hearings original members of the Committee were replaced by alternates on several occasions. While this is standard committee practice it was particularly significant here, as the alternates were frequently selected for their relevance to a specific session of witnesses, and then never appeared again. During presentations by women's groups, for example, both the Liberals and PCs packed their benches with female members and senators. During presentations by native groups the Liberals insured that Senator Adams was conspicuously present and the NDP sent Peter Ittinuar, while during the presentation of the handicapped (C.O.P.O.H.) not only Liberal chairman David Smith but most of the Special Committee on the Handicapped and the Disabled were present. While this had the double advantage of impressed witnesses (and the public via television) with the Committee's representativeness and expertise, it also meant that

(I9) A copy of the advertisement is included at the end of this section of the chapter.
regular members, who would in the end be the ones to submit amendments to the proposal, often missed crucial sections of testimony. Moreover, to the experienced observer it was obvious that regular members who were present devoted much less attention to certain of these witnesses than was normal.

During the course of its hearings a total of 51 Senators and 131 MPs attended the deliberations. Although this also indicates the importance which parliamentarians attached to this part of the process, it does raise questions about continuity. The Committee held a marathon 106 meetings on 56 sitting days (a total of 267 sitting hours). No member could have been expected to be present the entire time, especially since the House was still sitting, but the number of alternates could have diminished the overall appreciation of the issues by original members.

That it probably did not to any appreciable degree is due in large measure to the widespread press coverage of sessions and the extensive support structure which the Committee enjoyed. Staff from the Research Branch of the Library of Parliament provided extensive briefing notes on all witnesses to all Committee members in advance; these notes included personal data, background of organizations, detailed outlines of the position taken on the proposal and suggested lines of questioning. Bilingual transcripts of hearings were available the following day. Background papers and collations of evidence were prepared by the Research Branch, various caucus research staffs and the FPRO staff, and papers on specific issues were prepared by the Research Branch at the request of individual members. Peter Dobell and his
staff from the Parliamentary Centre for Foreign Affairs and Foreign Trade performed a coordinating function concerning the invitation and scheduling of witnesses, while the two clerks assigned to the committee handled the myriad administrative and logistical problems as well as procedural references.

As the hearings progressed certain members began to emerge as the "stars" of the committee - Jake Epp and David Crombie of the PCs, Jack Austin and Bryce Mackasey in the Liberal ranks, and Lorne Nystrom of the NDP, for example. They became overnight household names through a combination of personality, political finesse, knowledge and obvious sincerity. Debates developed on certain issues, in front of and with witnesses, which were a microcosm of the philosophical differences the proposal raised, and on many occasions these differences rose above a partisan level and reflected the genuinely held convictions of the individuals involved. (This did not preclude periods of fierce partisan wrangling, however.)

To a lesser extent certain other members of the committee became known for their interest or expertise in certain specific issues - Arthur Tremblay on constitutional law, Svend Robinson on international human rights conventions and human rights issues in general, and several members on language issues. While the public may have been somewhat less impressed with the technical nature of their interventions, those involved more closely in the process appreciated the expertise which was brought to bear on these issues.

But perhaps the brightest "star" was that of House co-chairman Serge Joyal. A former maverick Liberal backbencher who had crossed
Mr. Trudeau on the War Measures Act and on language issues, he had recently undergone a rehabilitation within the party, culminating in an appointment as a parliamentary secretary. His legalistic approach, fastidious appearance and cool, detached demeanour could hardly have contrasted more with the jovial, folksy approach of his Senate counterpart, and when the latter proceeded to make a series of well-publicized verbal gaffes and faux pas, this contrast was heightened.

It should be noted that the role of the co-chairmen had been clearly spelled out by the Liberal hierarchy in advance; their task was to keep the Committee to its timeframe and the members in line. To the extent of his authority Mr. Joyal performed this role well, and did so with an even-handedness that gained him the respect of members of all parties. However, to ensure solidarity, there were also a series of early-morning briefing sessions for the Liberal members of the Committee with Eddie Goldenberg, in which they were told specifically what the party line was and more importantly what not to discuss. (These meetings eventually petered out due to the sheer weight of committee work and scheduling, with the result that Liberal members of the Committee increasingly improvised along with their colleagues.)

That the Committee was a highly orchestrated instrument on the Liberal side was also evident in the behind-the-scenes activities of the non-elected participants, many of whom were involved in the planning stage discussed above.

Basically Mr. Goldenberg performed liaison and coordination functions, although he could also be considered a general trouble-shooter - a "legman" for Messrs. Trudeau and Chrétien. During the
course of the hearings he appeared everywhere. At the same time both
the PMO/PCO and FPRO had contingents of observers. Several people,
some hired on contract, represented these organizations on a regular
basis, taking copious notes and preparing card catalogues of evidence
or recommendations by witnesses, while some of the more senior represen-
tatives appeared only rarely but were clearly kept abreast of develop-
ments. A battery of experts from the Justice Department attended not
only the sessions with Mr. Chrétien, but all sessions with witnesses,
and during the clause-by-clause examination of the proposal they
appeared to serve as consultants for all parties on the wording of
draft amendments, as did the various research staffs. In addition a
representative of the Ontario government was in attendance, while
representatives of the Alberta and Saskatchewan offices frequently were
present. (20)

Meanwhile the Opposition now argued that the Committee could
not possibly hear a credible number of witnesses and still report back
to the House by December 9. Negotiations began in camera to reach an
agreement on extending the deadline. Once again pressure was put on
the Liberal hierarchy to alter its original timetable, and once again
the Opposition was able to wield public opinion as a sword of Damocles
to press its case, the desire for credibility and the need for the
democratic process to be perceived to have been served having forced
the Liberals to accede to the opposition's demand and extend the
Committee's reporting deadline to February 6, 1981.

(20) A more detailed list of participants and organizations is
included at the end of this section.
Another in camera debate had raged on the issue of witnesses, with various arguments having been made as to why no individuals should be invited; only groups, or individuals as representatives or spokesmen for groups, were to be invited originally. However, in the end an agreement was reached whereby each party would be able to put forward names of individual experts to the Committee as a whole (Liberals two, PCs two, NDP one), for invitation early in the New Year. These five individuals then testified on January 8 and 9, concluding the public testimony of witnesses.

While the witness recommended by the NDP, the Most Reverend Archbishop Edward Scott, Primate of the Anglican Church of Canada, confined his testimony primarily to the issues of native rights and citizen participation, and was treated with deference by committee members, the other four witnesses did not fare nearly so well. Chosen because of their positions on the legitimacy of the unilateral process, the amending formula and entrenchment, they faced much tougher questioning and a more highly partisan group of members than had any of the other witnesses. The Conservatives in particular spared no mercy in their attacks on Dr. LaForest and to a lesser extent Dr. Cohen.

Although no new ground was broken these sessions served to delineate the very clear differences of opinion which existed on these three issues. It also served to demonstrate the two sides of the committee's work; on the one hand, all parties were working to improve specific details of the actual proposal, and this had resulted in a relatively non-partisan and productive set of hearings. On the other hand, these sessions and the witnesses who testified at them
concentrated overwhelmingly on only the content and wording of the proposal, primarily the Charter. There had been almost no discussion of unilateral action etc., until the individual witnesses testified, and it was at this point that the second aspect, the Opposition's profound disapproval of the process as a whole, was brought back into sharp focus.

On Monday January 12 the Justice Minister returned before the Committee to present a greatly revised version of the proposal, including an extensively re-written Charter of Rights, a strengthened reference to aboriginal rights and equalization, and changes to the amending formula. (21)

The Minister read a prepared text in which he stated,

I have studied with great care both the written briefs and the oral testimony ... and I have taken into account the points which have been made by all members of this Committee. The government has listened to the views of Canadians. (22)

At the same time an information kit was distributed, which included a news release that began, "The Government of Canada will accept major changes to the Charter of Rights and Freedoms and the amending formula as set out in the Constitutional Resolution." Perhaps even more striking was the format of the document. Entitled "Government Response to Representations for Change to the Proposed Resolution", it actually listed the names of a number of witnesses who had supported such a change beside each of its proposed amendments!

(21) A copy of the complete text of this revised version is included in the Appendices.

(22) Department of Justice. Notes for the Minister of Justice for an appearance before the Special Joint Committee on the Constitution, January 12, 1981.
A subsequent in camera session to determine the procedure for the duration of the Committee's sessions finally arrived at a plan for a clause-by-clause study of the revised proposal to which all parties were agreeable. Sufficient time was requested by the Conservatives to prepare their own package of proposed amendments, and as the NDP supported them in this it was assumed that they also would follow this procedure. However, when Jake Epp presented the Conservative package at a session on January 20 the NDP, in what appeared at the time to be a clever strategical move which infuriated the PCs, announced that they would supply NDP proposals for amendment on a clause-by-clause basis as the study progressed.

Mr. Epp's opening remarks on that day outlined the Conservative position in general:

In presenting our proposed amendments to the government's resolution we do so in the knowledge that it is the popular will of Canadians that our Constitution rest in this country. It is also the popular will that we have a Charter of Rights and Freedoms for the Canadian people embedded in the Constitution. The Progressive Conservative Party's position in these matters reflects the popular will.

However:

Our consistent and unalterable principle is that the nature and foundations of the Canadian federal partnership make utterly unacceptable the current federal government policy of unilateral action. (23)

As a result the Conservatives recommended splitting the proposal into a Patriation Package and a Canadian Package, the first priority of which would be a Charter of Rights, although they conceded that agreement of the provinces on this point was highly unlikely. Specific changes to articles of the proposal were then suggested. Some

which were unique to the PCs were the inclusion of God, the family, "moral and spiritual values" and the rule of law in section 1, property rights in section 2, and a new section which would add a non-obstante clause to permit Parliament to continue to legislate on abortion and capital punishment if it so chose. Mr. Epp concluded:

Our amendments have two objectives. First, to improve the protection of rights and freedoms. Second, to show the way out of the current divisive impasse. With good will, imagination and leadership we can find the ways .... We oppose the government's unilateral action precisely because it divides Canadians.

The New Democratic Party, on the other hand, apart from numerous technical and wording amendments, was concerned primarily with the areas of aboriginal rights and resources, and was instrumental in obtaining federal concessions on both, as well as achieving acceptance of their proposal to add an independent referendum rules commission as part of the amending formula.

Throughout the clause-by-clause study which followed the Conservatives did not deviate from the position outlined by Jake Epp. For additional guidance the Office of the Leader of the Official Opposition distributed a position memo to the entire caucus. Conservative organization and party discipline were in marked contrast to the nearly anarchical state of the NDP. To begin with Committee member Lorne Nystrom as well as other western members of the caucus were known to be extremely unhappy about their party's alliance with the Liberals. In addition, while Svend Robinson was competent and well-informed he was also a loner who rarely informed his colleagues of his intentions in time for them to react. The combination of personalities and
discontent made for some extremely heated caucus sessions at which little was accomplished; as a result NDP moves such as the gradual unveiling of amendment proposals were more the result of lack of party policy and chaotic organization than brilliant strategy, and some amendments were worded on the floor of the Committee room while sessions were in progress.

In any event by the time the study was completed, after 90.5 hours of debate, a total of 67 amendments had been made to the proposal. Although the Liberals received credit for 58, (PCs seven of 22 proposed, NDP two of 45 proposed), it should be kept in mind that many of Mr. Chrétien's amendments of January 12 incorporated ideas which had been initiated or strongly supported by one or both of the opposition parties. (By February 9 Mr. Chrétien had appeared before the Committee 39 times, and Acting Justice Minister Robert Kaplan nine times.)

Then, for a second time, Opposition members requested an extension of the Committee's deadline. On this occasion there was little formal opposition from the Liberals as it involved merely one additional week, which was clearly necessary to prepare the Committee's report. An agreement was reached to submit the report to Parliament by February 13, and once again the Liberals did not succeed in obtaining Conservative assent to a limitation of debate in the House in exchange for their "generosity".

The Steering Committee then began deliberations on a report to submit to Parliament. Partly because of the time constraint, but more importantly due to the Liberal desire to avoid contentious issues and achieve as wide a consensus as possible, it was finally decided not
to submit a real report at all. Instead, a three-page summary of the timetable and activities of the Committee, as well as statistical tables of witnesses and submissions prepared by the Research Branch, comprised the "report" section of the revised proposal which Serge Joyal tabled in the House and Harry Hays in the Senate on February 13.

As Mr. Joyal indicated, the mandate of the Committee had been not only to consider what amendments were necessary, but also whether or not the Address as amended should be forwarded by both Houses of Parliament to the Queen. Therefore perhaps the most important part of the report was the recommendation that "upon adoption by the Senate and the House of Commons the Address (published by the government on October 2 as amended and approved by this Committee), be presented to Her Majesty the Queen."(24)

At the final Committee meeting the Conservatives had voted against this report. As the system does not permit the submission of minority reports to Parliament, they then decided to prepare, publish and distribute an "unofficial" minority report which they did on February 16. In content it was practically a carbon copy of the proposed amendment package which Jake Epp had presented, criticizing the unilateral and divisive nature of the Liberal plan and once again suggesting a split package:

Thus one of the most extensive Committee (and legitimation) exercises in Canadian history came to an end, at a cost of $1,059,000.

Co-chairman Serge Joyal summed up his view of the Committee experience in terms of the political processes as follows:

I must tell you it has been almost a new element in political life, that the members who were there at the beginning are still there now this morning. It ensures that the interest grows and that members acquire a knowledge of the dossier and a knowledge of the issue which should be used in one way or the other when this process is over, because this process, as I understand it, is a preliminary one.

I reserve, of course, the decision of the committee and I reserve the decision of the government. But if at this point we were to lose that knowledge which has been acquired by 25 members and senators on the eve of a new parliament - because we have three years ahead to go - with that interest shown and really professionally expressed - and I say it as a private member, or as a member of Parliament - that would really be a tragedy, because we have the know-how at one point and we have a bunch of interests, as expressed by different groups, which really need and call to be put into another effective process for the next step...(25)

This examination of the Committee phase has therefore demonstrated several key ways in which this constitutional process differs from previous experiences. First of all, and most important, the provinces were reduced to the position of being only one category of participants; like interest groups they appeared before the Committee as witnesses, or did not appear at all. Second, attention was focussed not on them but on the parliamentarians involved, not on the executive federalism format but on the parliamentary committee format. Third, the Committee phase had a major input into the content of the proposal; as the following chapter demonstrates, the presentations of interest groups in that forum were far more effective than those of the provinces in bringing about changes. Lastly, this phase served to greatly heighten the legitimacy of the federal package and thereby made opposition by the provinces more difficult.

### Table 1

List of Original Committee Members

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<thead>
<tr>
<th>HOUSE</th>
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<tr>
<td><strong>Liberals</strong></td>
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<td>1. Serge Joyal (co-chairman)</td>
<td>1. Harry Hays (co-chairman)</td>
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<td>2. Robert Bockstael</td>
<td>2. Jack Austin*</td>
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<td>3. George Henderson</td>
<td>3. Maurice Lamontagne</td>
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<td>5. Eymard Corbin*</td>
<td>5. William Petten</td>
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<td>6. Ron Irwin</td>
<td>6. P. Lucier</td>
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<td>8. Coline Campbell</td>
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<th><strong>Conservatives</strong></th>
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<td>2. James McGrath</td>
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<td>3. Perrin Beatty</td>
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<td>4. David Crombie</td>
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<td>5. John Fraser</td>
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<td>1. Lorne Nystrom*</td>
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<td>2. Stanley Knowles (Svend Robinson)</td>
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**Other Actors**

Jean Chrétien  
Robert Kaplan  
Yvon Pinard

*Steering Committee
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<tr>
<th>Carole Presseau</th>
<th>Justice - Eddie Goldenberg</th>
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<tr>
<td>Roger Tassé (DM)</td>
<td>Barry Strayer (ADM)</td>
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<td>Fred Jordan</td>
<td>Edith MacDonald</td>
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**External Affairs**

Janice Thordason
Catherine Anderson

**Solicitor General**

Reeves Haggan

**PMO/PCO**

John Tait

(Michael Pitfield)
(Jim Coutts)

**FPRO**

Barbara Darling
Linda Geller-Schwartz

(Michael Kirby)

**ONT. FRO**

Ian Shugart

**ALTA. FRO**

**Liberal Caucus Research**

David Husband
Charles Bouchard
The mandate of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada which is holding meetings to consider the document entitled "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada", published by the Government of Canada on October 2, 1980, has been extended.

Individuals and organizations may forward requests to appear before the Committee until December 17, 1980, and may forward written submissions until December 31, 1980.

Witnesses invited to appear before the Committee will be chosen from among those who will make submissions or who have requested to be heard.

All briefs, correspondence or inquiries should be addressed to:

Joint Clerks,
Special Joint Committee on the Constitution of Canada,
Postal Box 1044,
South Block,
Parliament Buildings,
Ottawa, Ontario.
K1A 0A7

Joint Chairman,
Honourable Senator Harry Hays, P.C.
Mr. Serge Joyal, M.P.

Le mandat du Comité mixte spécial du Sénat et de la Chambre des communes sur la Constitution du Canada qui tient présentement des séances pour examiner le document intitulé "Projet de résolution portant adresse commune à Sa Majesté la Reine concernant la Constitution du Canada", publié par le gouvernement du Canada le 2 octobre 1980 a été prolongé.

Les individus et les organismes peuvent faire parvenir des demandes de comparaître jusqu'au 17 décembre 1980 et des opinions par écrit jusqu'au 31 décembre 1980.

Les témoins invités à comparaître devant le Comité seront choisis parmi ceux qui auront fait parvenir leurs opinions par écrit ou fait part de leur demande de comparaître.

Tout mémoire, toute correspondance ou toute demande de renseignements devra être envoyé aux:

Coppriéreurs,
Comité mixte spécial sur la Constitution du Canada,
Casier postal 1044,
Édifice du sixt,
Édifices du Parlement,
Ottawa, Ontario.
K1A 0A7

Coprésidents.
Honorable sénateur Harry Hays, C.P.
M. Serge Joyal, député
D. Parliamentary Phase (Part II)

Debate on the constitutional issue resumed in both the House and the Senate on 17 February 1981. The resolution was moved in the House by Justice Minister Chrétien who opened the debate:

Madame le Président, c'est cela que nous offrons aux Canadiens à ce moment-ci, des bases nouvelles pour donner un pays plus uni, plus grand et plus généreux. Mais pour y parvenir, il nous faut rapatrier la Constitution canadienne. ....

Dès le début, les députés de l'opposition se sont dits en faveur du rapatriement. C'était un grand progrès. Il y a quelques mois ou environ un an, la question du rapatriement ne faisait pas l'opinion et c'est le député d'Edmonton-Est (M. Yurko), appuyé par le député de Provencher, qui a proposé une motion approuvée par la Chambre au moment du référendum, motion proposant le rapatriement de la constitution. ....

Tous les députés préconisent une charte des droits. C'est très important. J'ai cité les propos éloquents du député de Provencher et nous sommes tous de son avis. Les députés sont tous désireux de constitutionnaliser les droits des autochtones, ainsi que les paiements de péréquation. Tout ce que nous avons fait, c'est dans le meilleur intérêt du pays, mais cela ne suffit pas; nous ne devons pas nous en tenir là. Mais, nous dit-on, le processus suivi est mauvais. Que propose l'opposition? Elle propose deux ou trois formules d'amendement mais la façon de procéder reste la même.6v

Madame le Président, on ne peut pas être des deux côtés de la rue en même temps. On ne peut pas dire qu'on est en faveur d'une charte des droits. Comme je prévois ce qui va arriver bientôt à la Chambre, les honorables députés vont se lever un à un pour nous proposer des amendements fantastiques à la charte des droits. Ensuite, le lendemain, ils vont voter contre la charte des droits. Je trouve cette situation ridicule, ce n'est pas une charade que nous faisons à l'heure actuelle. Si on veut avoir une charte des droits, elle doit s'appliquer à tous les Canadiens. (26)

Just before the debate was to get under way the Government House Leader, the Honourable Yvon Pinard, had tried to secure an all-party agreement in setting out special conditions for the debate. He argued that in order for all members to have an opportunity to speak there should be extended hours for the debate and speeches should be limited to 20 minutes rather than the customary 40. He indicated that he was open to alternative suggestions. His appeal was rejected by the Official Opposition, who argued that it was simply another form of closure, which was unacceptable. The Government withdrew the suggestion for the time being but their concern with setting some time constraints on the debate would reappear.

Debate on the resolution continued on an almost daily basis until 23 March with little incident. The Leader of the New Democratic Party, Ed Broadbent, spoke on 17 February in support of the resolution, praising the Charter of Rights and Freedoms as "the most effective charter of rights in the Western World"; he promised his caucus' support so long as "the government ensures a full and fair debate and adds nothing objectionable."(26) He had indicated at an earlier news conference that members of his caucus would be free to vote their conscience on this issue. Four members of the 26-member NDP caucus had already indicated that they would not support the resolution. All four were from Saskatchewan, where NDP Premier Allan Blakeney had declared his opposition to the constitutional proposals, and included Constitutional Committee spokesman Lorne Nystrom.

The Right Honourable Joe Clark, Leader of the Progressive Conservative Party, addressed the House on the constitutional resolution on 24 February. He described the resolution as divisive. "Only the blind would believe that the anger will pass away," he said. "Neither a vote to approve this resolution nor colonial action in Britain will end the divisions which are growing in Canada." He warned that the aftermath of the constitutional debate "will have us looking around at the breaking of our federation and, perhaps, at the breaking of our nation itself." Mr. Clark, as had many Conservative spokesmen, described the constitutional measures as the obsessions of one man - Pierre Trudeau. (27)

On 5 March the Government House Leader again tried to secure all-party agreement to shorten speeches on the constitutional debate but his suggestions were rebuffed by the Official Opposition. However, on 19 March he gave notice of a very detailed motion which, if approved, would have had the effect of limiting the constitutional debate to an additional four days. Commons hours would be extended to as many as 13 hours a day and speeches would be limited to 20 minutes apiece. During the first two days of the four-day period debate would continue on the amendments already under discussion - the original amendment moved by Jake Epp on 17 February had still not come to a vote. At the end of the second day a vote would be called on that amendment. This would clear the way for new amendments which could be debated for the remaining two days, when the final vote on any amendments and on the entire resolution would be called. The Government House Leader indicated that the longer hours and shorter speeches would

allow practically all members to participate in the debate. However if some were still unable to do so there was an innovative clause in the proposed motion which would allow for written speeches of 3,000 words to be printed as an appendix to Hansard. The Honourable Walter Baker, House Leader for the Official Opposition, criticized the motion as an "absolutely flagrant disregard of the way this House should operate."(28) The Government House Leader protested his willingness to negotiate; he accused the Progressive Conservative Party of "stalling" on their one amendment by not allowing it to come to a vote.

The first period of debate ended on 23 March after Prime Minister Trudeau addressed the House in a two-hour speech. He admitted that the constitutional resolution had caused "deep divisions" in the country, but took consolation from the fact that the division had arisen more from the process and timing than the content of the resolution itself. To prove that point he cited opinion polls, referred to statements by Progressive Conservative Leader Clark and other Conservative MPs, and recalled the unanimous approval given the previous year to a motion by Conservative MP Bill Yurko calling for immediate patriation of the Constitution. He recalled that other times of constitutional change in Canada, including the 1964 Flag Debate, were the occasion for similar arguments for procrastination, that the process of national maturation was never easy. Members of Parliament, he said, were being asked to choose between action and inaction. He noted that there is no permanent equilibrium in the political affairs of any nation. "It is always a moving equilibrium. This is particularly true of a federation ... What we are doing today is merely providing Canadians with a means of seeking that equilibrium."(29)

On 24 March, when the time came to debate the motion to extend sittings during debate on the Constitution tabled on 19 March, the Official Opposition began by raising a number of points of order. In fact the first matter was a highly unusual vote on who should speak to the question first. Points of order were debated for the rest of the sitting that day with the effect that the motion was never properly moved. The following day was an allotted "Opposition" day. However Joe Clark had told the press that his party intended to fight the imposition of closure "with every tool available to us in Parliament." When the Commons reassembled on 26 March the mood was one of anger. The Leader of the Opposition started off question period by noting that the Government of the Province of Manitoba had appealed the decision of the Manitoba Court of Appeal, which had been against the provincial position on the constitutional resolution, to the Supreme Court of Canada. He then demanded that the Government withdraw its constitutional resolution from Parliament until its legality had been decided by the Supreme Court. (30) He and other members of his party challenged the Prime Minister to call an election on the issue. Questions of Privilege and Points of Order consumed the rest of the day. Walter Baker, House Leader of the Official Opposition, told the House that while the motion to limit debate on the Constitution stands, "I will resist with every legitimate procedural device there is ... the opportunity for the government to call the motion ... we are going to use parliamentary time and we are going to waste it." (31)

The procedural filibuster carried into the beginning of the next week. Indeed on 31 March the Opposition forces received new

ammunitions when the Newfoundland Court of Appeal declared against the federal government's position on the resolution. The Opposition renewed its call for the resolution to be withdrawn arguing that it had been declared illegal by the courts. In the House Prime Minister Trudeau retreated from his previous position and offered to wait until the Supreme Court had ruled on the legality of the constitutional resolution before asking Westminster for final approval. This was not acceptable to the Official Opposition, who were still insisting that the resolution be withdrawn, but it did start renewed meetings among the House Leaders.

In an attempt to break out of the procedural filibuster, Opposition leader Clark, on 1 April, began a most interesting series of public negotiations on the floor of the House of Commons. In order to overcome the Prime Minister’s concern that if the resolution was not passed by the House the courts could only regard it as "hypothetical", Mr. Clark proposed that the three parties identify all potential amendments and refer them, along with the main resolution - which would be withdrawn from Parliament - to the Supreme Court for a decision. The Leader of the NDP called this proposal constructive and suggested that all amendments be rapidly put to a vote, but that final approval of the entire resolution be withheld until after the Supreme Court had ruled. Since no party would agree completely with the suggestions of the others, the Conservatives resumed their procedural questions. On the following day, the Prime Minister and the Leader of the NDP seemed to reach an accord on the proposal to vote on amendments as soon as possible, but to allow the court to pass judgment before final approval.

would be sought from the British Government. Mr. Clark argued that this was "fundamentally unacceptable" because it would require Parliament to vote on proposed amendments to the constitutional package before the Supreme Court ruled on its legality. A temporary truce was called later that night. The Conservative caucus agreed to suspend their procedural filibuster for two days to allow the government to proceed with a two-day debate on a crucial borrowing authority bill that should have been passed by the end of March.

The stage was thus set for further accommodations. The Conservative Opposition had been demanding that the Prime Minister meet with the Premiers in an attempt to resolve their differences - there was to be a meeting of the eight Premiers opposing the federal government in Ottawa on 16 April and they had asked the Prime Minister to meet with them once they had completed their negotiations. The Prime Minister had indicated that, as far as he was concerned, the Premiers had yet to reach an accord and he was not inclined to meet with them until after the Constitution had been "patriated". However in response to a question by Jake Epp during question period on 7 April - the day following the Third Reading of the borrowing Bill - Mr. Trudeau was more conciliatory on the question. Mr. Clark questioned him further on this matter and offered a suggestion of his own. The House then took the very unusual step of suspending its sitting at 15:17 to give the House Leaders time to explore the possibilities of further accommodation. When the House resumed sitting at 17:18 Mr. Pinard announced that progress was being made but that the House Leaders required further consultations. In the meantime it had been
agreed that the House would continue with Bill C-42 to repeal the Post Office Act and establish the Canada Post Corporation. The procedural filibuster was over. The three parties reached agreement later that night, and a motion to that effect was introduced the following day which received unanimous consent. It was an exceedingly complex motion which consisted of the following elements: there would be a three-day debate on amendments to the resolution on 21, 22 and 23 April; not counting the Epp amendment on the referendum, each party would be allowed one amendment which could affect one or more provisions of the resolution; the vote on the amendments would be called on 23 April. This timetable was important as the Supreme Court was set to hear the appeals from the various provincial courts on 28 April. It would also allow some time for the Prime Minister to meet with the Premiers during or after their meeting of 16 April. The resolution would then be in abeyance until the first sitting day following the rendering of a verdict by the Supreme Court of Canada. The Government could then designate two days, with extended hours, to conclude the debate on the resolution. During these days speeches would be limited to 20 minutes and no amendments would be proposed. At 15 minutes before adjournment time on the second day the question would be put.

With the procedural filibuster thus settled by an all-party agreement the House took up Bill C-42, and other legislative matters; this Canada Post Corporation Act passed unanimously on Third Reading on 14 April.

On 15 April the Quebec Court of Appeal in a 4 to 1 decision came down decisively on the side of the federal government respecting
the legality of the process of constitutional amendment by joint resolution to the British Parliament without provincial consent. The eight Premiers gathered in Ottawa that evening to come to an agreement on an alternative package of constitutional reforms.

This provincial agreement was announced in a signing ceremony on 16 April. In essence they had only agreed to "patriation" with an amending formula; there was no mention of a charter of rights. However they did agree to a three-year period of continuing constitutional discussions, at which time presumably a Charter of Rights could be discussed, although several of the Premiers had reiterated their rejection of the idea. The amending formula they had agreed to was a modified version of the "Vancouver" formula that had been discussed throughout the spring and summer of 1980. Amendments would require the agreement of the House of Commons - the Senate would only have a suspensive veto - and seven of the 10 provinces provided they had 50% of the population. However up to three provinces by majority vote in their legislature could opt out of any amendment "derogating from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province" and not be financially penalized for doing so. To this was added a method of delegation of powers from a province or group of provinces to the federal government and the reverse. The concept of "opting out" of amendments was known to be unacceptable to the federal government, which had also insisted that the Charter of Rights be included in any package. It was therefore not unexpected that the Minister of Justice and the Prime Minister, in separate news conferences, rejected the
plan of the Premiers. Similarly the Premiers of Ontario and New Brunswick found the alternative plan wanting.

The House agreement of 7 April anticipated a meeting between the Prime Minister and the Premiers. When the Premiers heard of this agreement they indicated that the Prime Minister and the other Premiers supporting him were not invited to their 16 April meeting. They also said that they were not interested in meeting over the Easter weekend - before the House deadline for amendments on 21 April. When their news conference was over they left Ottawa. Nevertheless they reiterated their interest in a full federal-provincial meeting to be held while the Supreme Court was considering the question.

On 21 April the three-day debate on amendments to the constitutional resolution began. The New Democratic Party offered two amendments which already had the support of the Government. One guaranteed that the rights and freedoms in the Charter would be "guaranteed equally to male and female persons." The other amendment placed the guarantees of Indian, Inuit and MÉtis rights under the general amending formula for added protection. The government proposed four amendments; two were technical amendments concerning translation between French and English. One offered a preamble to the Charter of Rights which would "recognize the supremacy of God and the rule of law". The other made a minor change in the amending formula - the consent of any two western provinces was now required for an amendment (a population requirement having been dropped). All of these amendments flowed from recommendations made by witnesses who had appeared before the Committee.
The Progressive Conservative Party presented an omnibus amendment. Its main proposal was that the entire package or any part it would require the approval of seven provinces with at least 50% of the Canadian population. There was to be a three-year time period to seek agreement. It would also remove the Government's amending formula and replace it with the version agreed to by the Premiers with the exception that the Charter of Rights - if one were to survive - would be placed in a special category not subject to the opting-out provision.

On 23 April the original amendment by Jake Epp to remove the referendum provision from the amending formula was rejected by a vote of 170 to 98. The New Democratic Party amendments were accepted by a vote of 265 to nil. The omnibus amendment by the Progressive Conservative Party was defeated by 93 to 175 and the government amendment passed 173 to 94. Following the vote the House recessed until 12 May 1981. On 24 April the Senate considered and voted upon the same amendments to the same effect as in the House.

Although the Proposed Resolution went to the Supreme Court on April 28 and it was hoped that the Court would be able to render a decision by early June, it became evident that this would not be the case. As a result when Parliament finally adjourned at the end of June Members and Senators were left in suspense as to the eventual outcome.
E. Judicial Phase

Although the federal position, that the constitutional proposal was a political rather than a legal issue, had been made crystal clear on a number of occasions by Messrs. Trudeau and Chrétien, the possibility of referral to the courts had been discussed by the inner cabinet in the early planning stages. While the federal forces had no intention of doing so, firmly believing that Parliament was the only appropriate forum for resolution of the constitutional issue, Justice officials had nevertheless been ordered by the Liberal hierarchy to prepare confidential briefs on the legality of the federal plan and potential lines of attack by the provinces in a legal dispute.

These documents told Liberal planners what they wanted to hear, namely that unilateral action was legally valid, but they also warned of some potential problems. The one leaked to the Quebec delegation, for example, indicated that a province could refer the proposal to its own provincial court of appeal, and that if unsuccessful the province could then appeal to the Supreme Court, thereby circumventing the federal government's refusal to refer the matter directly to the Supreme Court. However the document estimated that such a process would take one and a half to two years. In that event the Liberals would hardly have to worry about any province demanding that a fait accompli be returned to Britain!

The document also recommended that the federal government take the initiative in referring the proposal, since it would then have the advantage of drafting the questions in the most favourable light.

(33) Notably by Mr. Trudeau at the very beginning of the parliamentary phase, House of Commons, Debates. October 14, 1980, pp. 3629-3631.
If not,

The provinces could frame the reference question without our agreement and could for example focus on whether the procedure is in accordance with Canadian conventions rather than whether the patriation measure adopted is legal. Also... there would be the additional risk of an earlier, possibly critical, provincial court judgment.(34)

That he chose to ignore this input from the bureaucracy is once again indicative of the way in which Mr. Trudeau controlled the planning stage of the policy process.

Thus when on October 14, 1980 five provinces (Alberta, Newfoundland, Quebec, Manitoba and British Columbia - PEI joined them on October 17) announced that they would challenge the proposal in the courts, Justice Minister Chrétien stated, "We do think that what we're doing is absolutely legal", adding that Ottawa would refuse to act on provincial demands for the federal government itself to refer the proposal to the Supreme Court. He also stated that the government would not suspend action until there was a court ruling, since this could lead to a "dangerous precedent" where challenges to the legality of any government action could suspend Parliament's ability to pass legislation.

On October 15 in the House Mr. Trudeau echoed this sentiment when he rejected a Conservative request to refer the matter, stating that he would not ask the courts to decide a matter over which Parliament already had authority. Replying to Mr. Clark he stated:

Comme l'honorable chef notait prudemment lui-même, c'est la bataille politique. C'est une vision différente de différents sortes de Canada. Je pense que ce serait une erreur d'aller devant

(34) Department of Justice, Internal working document, August 1980.
The provinces nevertheless went ahead with their plan. After a six-hour meeting on October 29 the Attorneys-General of the six provinces decided that the federal proposal would be challenged in three provincial courts of appeal - those of Manitoba, Quebec and Newfoundland. Although at the time the explanation given by them for picking these three provinces related to the differing ways in which they entered Confederation, there was much speculation among lawyers, politicians and journalists that these courts had been handpicked as the ones most likely to render decisions favourable to the provinces.

Hearings before the Manitoba Court of Appeal began on December 4 and continued to December 9. The questions referred to the Court can be summarized as follows: (1) Do the amendments contained in the federal proposal affect provincial powers under the BNA Act? (2) Is there a constitutional convention requiring the federal government to obtain the agreement of the provinces before requesting amendments at Westminster affecting the federal-provincial relationship? (3) If so, is it legally binding and constitutionally required?

The provincial argument in this case centred around the evolutionary theory of conventions, using various historical precedents as well as the Favreau White Paper (1965) on the amendment of the constitution as justification. The federal defence, prepared by a team led by Toronto lawyer J.J. Robinette, Q.C., rejected the first question as "purely speculative", the second as "purely political" and

(35) Chambre des Communes, Débats, le 15 octobre, p. 3680.
the third as without legal foundation. The Court’s decision of February 3, 1981, the first of the three appeal decisions to be handed down, supported the federal proposal by a vote of 3-2, Justices Freedman, Hall and Matas supporting and Justices O’Sullivan and Huband dissenting.

Writing the majority decision, Chief Justice Freedman stressed:

The attempt by the Federal power to patriate the constitution unilaterally may be an act of high statesmanship or political folly. That is not a determination that we are called upon to make .... We are concerned not with the wisdom or policy of the Proposed Resolution but only with its constitutional legality.

He then addressed each of the questions, agreeing with the federal argument that the first was too speculative, as amendments to the proposal were not only possible but likely at that stage, and he therefore did not answer. Most of his decision was then devoted to the second question, in which he examined the historical precedents and White Paper, as well as the 1979 Supreme Court decision, and rejected each as providing insufficient support for the existence of a constitutional convention. He concluded:

In my view there is no such constitutional convention in Canada, at least not yet. History and practice do not establish its existence, rather they believe it. That we may be moving towards such a convention is certainly a tenable view. But we have not yet arrived there .... A convention should be certain and consistent; what we have is uncertain and variable.

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(37) Ibid., p. 36.
(38) Loc cit.
On the third question, in which he stated that a negative response to the second question automatically brought a negative response to the third - "no convention, no rule of law" - he also attacked the compact theory, which he found to be "supported neither by history nor by subsequent usage."

Perhaps even more significant was the dissenting opinion written by Justice O'Sullivan, who "virtually rejected" the provinces' evolutionary theory of conventions and supported their position instead on the basis of the compact theory of confederation:

In my opinion the answer to the question whether it is constitutional for the federal Houses of Parliament to petition for an amendment to the constitution affecting the provinces without their consent cannot therefore be answered simply by recognition of a line of precedents which themselves create a convention which has crystallized into law. Rather, the answer must be sought from an examination of the fundamental principles of our constitution as applied to the question. I have already stated that in my opinion it is unconstitutional and unlawful for the federal power to seek amendments to the constitution infringing on provincial sovereignty or rights because the federal power itself has a limited sovereignty which does not extend to provincial matters. Provincial consent is required not so much because the federal power has by a series of precedents agreed to obtain provincial consent, but it is necessary because of the very nature of the powers that constitutionally belong to the provinces and to the Queen in right of the provinces.\(^{(39)}\)

Reaction to the Manitoba decision was swift, with the federal government claiming a moral victory and the provincial opposition announcing that an appeal to the Supreme Court would be launched within

\(^{(39)}\) O'Sullivan, J., Dissenting opinion in Reference ... Canada (Manitoba) (1981), p. 29.
weeks. Almost simultaneously the Newfoundland Court of Appeal began hearings (February 10-12) on four questions; the first three were identical to Manitoba's, and the fourth related specifically to Newfoundland. If enacted, would the constitutional proposals allow the federal government to change the terms of Union or boundaries of Newfoundland without the consent of the provincial legislature or people?

Hearings in the Quebec Court of Appeal, where the three reference questions were similar, but ignored convention and asked for a ruling on the effect the proposal would have on provincial status and legislatures, ran from March 9-12.

Although there were indications from officials in Britain after the Manitoba decision that they would prefer to have a statement from the Supreme Court before being presented with a request, the Prime Minister continued to insist that he would press ahead and not wait for the lengthy judicial process to be completed. However, already burdened by the split-decision uncertainty which buoyed the opposition, he then suffered a substantial setback on March 31 when the Newfoundland Court of Appeal unanimously rejected the constitutionality of the federal proposal by responding "Yes" to the first three questions, and "Possibly" to the fourth.

Justices Mifflin, Morgan and Gushue, in accepting the provincial arguments, not only stated that a convention existed but that because of the nature of the federal bargain (shades of the compact theory again), it was constitutionally required to obtain the consent of the provinces in matters which affect them. In an ironic

(40) See Chapter IV, Part (D).
twist the Justices referred at length to the Favreau White Paper for support, as well as to the words of Louis St. Laurent and Mackenzie King, two former Prime Ministers generally known for their staunch centralist concept of Canadian federalism. They concluded in part:

There can be no doubt that the direction of Canadian constitutional thinking, as recognized in the 1965 White Paper, has been toward the recognition of the right of the Provinces to be consulted on any proposed amendment that affected their exclusive right to legislate on matters within the ambit of their authority and of a duty on the Federal Parliament not to forward to the Parliament of Great Britain a request for amendment of that nature without their consent .... The requirement of provincial consent thus goes much farther than custom and usage. In our view it would be inconsistent with the Federal character of Canada's constitutional system to treat the Canadian Parliament alone as having the power to secure the amendment of any part of that system .... The very nature of the federation requires that the rights and powers of its constituent units be protected. (42)

Combined with the spirited and prolonged debate which the Official Opposition was carrying on in the House, the Newfoundland decision (and the possibility of an unfavourable Quebec decision ever-present) was too much even for Mr. Trudeau; the original timetable, already unrecognizable, was totally abandoned at this point to obtain some semblance of parliamentary agreement. In a series of verbal minutes described in a preceding section, the Prime Minister and Joe Clark negotiated on the floor of the Commons. The day of the Newfoundland decision Trudeau offered to delay sending the proposal to London until the Supreme Court reached a decision. (On March 26 it had agreed to hear the decision of the Manitoba Court of Appeal on appeal on April 28.) This was not sufficient for the Opposition, who were in an

extremely strong bargaining position, and they continued to press for more. Finally on April 7 after many hours of behind-the-scenes negotiation between Yvon Pinard, Walter Baker and Stanley Knowles, Mr. Trudeau publicly offered to postpone voting on the reform proposal until the decision was handed down. After a night ironing out details the Commons was presented with an agreement the next day to vote within 48 hours of re-introduction after the decision, with no amendments permitted. This was accepted unanimously by the House.

During the two-month period after the Manitoba decision, and perhaps even before, there is reason to believe that Mr. Trudeau continued to receive considerable pressure to refer the matter to the courts. While many senior officials apparently did so primarily for reasons of strategy and political sagacity, others did so because of moral convictions. Although no firm confirmation is available, several sources have indicated that Chief Justice Bora Laskin himself broached the subject with the Prime Minister on more than one occasion, arguing for the need to involve the judiciary in the process to ensure its democratic credibility. (43)

Nevertheless none of this input was successful; only the concrete and immediate threat of total anarchy in the House was sufficient to cause Mr. Trudeau to alter his plan, and he continued to maintain that referral to the Courts was inappropriate and unnecessary.

(43) Ironically, as the eventual split decision clearly demonstrated, having succeeded the Chief Justice was then unable to convince his colleagues that his interpretation, which supported the federal approach, was the correct one.
Had the Quebec Court of Appeal decision (which upheld the constitutionality of the federal proposal by a resounding vote of 4-1 on April 15), come a week earlier, it is quite conceivable that the Prime Minister would have attempted to brave the storm in the Commons and that it would have abated as the Quebec decision took the wind out of the opposition's sails.

Thus the Supreme Court became involved in the constitutional policy process. From April 28 to May 4 the nine justices heard arguments by provincial and federal lawyers on the constitutional resolution. The questions referred by Manitoba and Quebec - there could be no appeal from Newfoundland - and the answers of the Supreme Court were as follows:

MANITOBA

Question 1 - If the amendments to the constitution of Canada sought in the "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada", or any of them, were enacted, would federal-provincial relationships or the powers, rights or privileges granted or secured by the constitution of Canada to the provinces, their legislatures or governments be affected and if so, in what respect or respects?
Answer - Yes. 9-0.

Question 2 - Is it a constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britain and Northern Ireland a measure to amend the constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted or secured by the constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the provinces?
Answer - Yes. 6-3.
Question 3 - Is the agreement of the provinces of Canada constitutionally required for amendment to the constitution of Canada where such amendment affects federal-provincial relationships or alters the powers, rights or privileges granted or secured by the constitution of Canada to the provinces, their legislatures or governments?

Answer - For the reasons stated in answer to Question 2, as a matter of constitutional convention, yes, 6-3. As a matter of law, no. 7-2.

QUEBEC

Question A - If the Canada Act and the Constitution Act 1981 should come into force and if they should be valid in all respects in Canada would they affect:
(i) the legislative competence of the provincial legislatures in virtue of the Canadian constitution?
(ii) the status or role of the provincial legislatures or governments within the Canadian federation?

Answers - (i). Yes. 9-0
(ii) Yes. 9-0

Question B - Does the Canadian constitution empower, whether by statute, convention or otherwise, the Senate and the House of Commons of Canada to cause the Canadian constitution to be amended without the consent of the provinces and in spite of the objection of several of them, in such a manner as to affect:
(i) the legislative competence of the provincial legislatures in virtue of the Canadian constitution?
(ii) the status or role of the provincial legislatures or governments within the Canadian federation?

Answers - (i)(a) By statute, no. 9-0.
(b) By convention, no. 9-0.
(c) As a matter of law, yes. 7-2.
(ii)(a) By statute, no. 9-0.
(b) By convention, no. 9-0.
(c) As a matter of law, yes. 7-2.

The factum of the appellant, the Attorney General of Manitoba, combined many of the provincial arguments presented in other cases and also took advantage of the O'Sullivan and Newfoundland

decisions. The concluding paragraph of the discussion of questions 2 and 3, taken together, indicates in summary form many of the issues which were raised in support of this position.

If provincial consent to amendments affecting provincial powers is unnecessary, then the Parliament of Canada has effectively avoided the pronouncements of the Supreme Court of Canada and of the Privy Council in:

- Re Regulation and Control of Aeronautics in Canada, [1932] A.C. 54, at p. 70.

The colourability doctrine, i.e., that Parliament or the legislatures may not do indirectly what they cannot do directly, would be breached if the convention requiring provincial consent is not enforced by the Courts. The Appellant adopts the judgment of the Newfoundland Court of Appeal on this issue at pp. 46-51.

Why should the Court recognize the convention requiring provincial agreement as having crystallized? One must return to the reasons for the recognition of the convention and observe the historical developments in the amendment process, including the care with which the autonomy of the provinces was safeguarded in the Canadian section of the Statute of Westminster and the limits to the amending power sought and obtained by the Canadian Parliament in 1949. Finally one must look at the consequence of a failure to recognize the convention as binding: a diminution of the provincial autonomy and of the supremacy within their subject areas granted them in 1867, and a rejection of the federal system. (45)

The federal factum approached the issue from a very different perspective. While the main concern of the provinces was to demonstrate that a constitutional convention of provincial consent existed,

(45) Factum of the Attorney-General of Manitoba, pp. 35-6.
and that such a convention was binding as a rule of law, the federal argument was that conventions and laws are two separate issues, and the court should deal only with the latter. Thus the provinces tended to place the most emphasis on the second question while the federal government emphasized the third. Specifically, the factum stated that:

The essential issue raised by the questions referred to the Court is whether a statute along the lines set out in the Resolution if enacted by the United Kingdom Parliament in response to a request from the Senate and House of Commons of Canada without the consent of provincial governments would have the force of law in Canada.

This issue is posed directly by question three: is the agreement of the provinces "constitutionally required"? If this question is answered in the negative, as the Attorney General of Canada will submit that it should be, the Court need not answer questions one and two since they will then become irrelevant. Questions one and two are, moreover, for reasons to be stated below inappropriate for judicial determination.(46)

Hence federal lawyers argued that question 2 was a) inappropriate for judicial examination, b) nevertheless no convention requiring provincial consent existed, and c) even if it did, conventions do not create legal rights or obligations. Attacking provincial use of the Favreau White Paper, the factum stated that

Far from supporting the contention of those Attorneys General, the 1965 publication makes it abundantly clear that nothing in the varying practices that have been followed in the past concerning the provincial role in the amendment process approaches the degree of clarity and consistency required of a constitutional convention.(47)

(47) Ibid., p. 48.
It then continued by maintaining that the "non-existence of the alleged convention" was demonstrated by the fact that it could not be defined. It was not clear, federal lawyers argued, who the convention bound, when it came into existence, to what type of amendments it applied or even to what degree provincial consent was required.

This latter point was particularly important, since the facts of some provincial intervenants made it clear that to them the unanimity principle was not essential; the Saskatchewan lawyers stated this clearly, namely:

there is both a constitutional convention and a constitutional requirement that the agreement of the provinces be obtained for a proposed constitutional amendment changing legislative powers, but it does not follow that the agreement of all the provinces must be obtained.(48)

Of course the federal lawyers then used the provincial differences to advantage, arguing that a convention would have to involve all provinces, for if it did not how or who would determine sufficient agreement?

Similarly the federal position on question 1 was that a) the court could choose not to answer the question, and that b) in any event the proposal did not change the equilibrium between the federal and provincial orders of government. This latter approach was an attempt to defuse the claim that provincial powers were affected, which the federal government did not deny. However, it did argue that either power was being transferred to the provinces, as in the case of equalization and natural resources, or both, levels were ceding powers

(48) Factum of the Attorney General of Saskatchewan, p. 19.
to a third arena, the courts, as in the case of the Charter, and therefore the traditional arguments affecting provincial jurisdiction did not apply.

When all the intervenants had been heard the Supreme Court retired to consider its verdict. While many insiders had expected an early decision, and certainly one by the end of June, it became increasingly evident that this was not to be the case. Although for the general public the issue dropped from view it presumably did not leave the minds of the politicians, but fewer public statements were made while they awaited the outcome. Behind the scenes federal officials were being instructed to prepare position papers related to all possible scenarios for the Court's decision.

Then in June it was announced that a decision would not be handed down before the Court recessed for the summer. Since the Court does not normally reconvene until early October, it was assumed that this was now the earliest possible date for the decision to be handed down.

Although no specific or dramatic public incidents occurred to prompt this, the mood of the federal forces changed visibly over the course of the summer recess, and by late August it was clear that they were quite optimistic, while at the same time various provincial spokesmen began to speculate on what they would do if they lost the decision!

In Britain expectations were high that with a favourable decision from the Supreme Court under his belt the Prime Minister could push his package through Westminster with a minimum delay. In short it
appeared that the British, and the Canadian public, wanted a quick and
decisive conclusion to an affair they had tired of, and the provinces knew it.

As September progressed several provincial premiers as well as Opposition Leader Clark became increasingly vocal about their intention to continue to oppose the package and possibly pursue the matter in Britain if the Court ruling went against them. Obviously the Prime Minister now found himself in a very favourable position. He could and did say that he was in court at the insistence of the provinces, and that he was prepared to abide by the decision so they would also have to do so, or risk appearing ridiculous and untrustworthy in the eyes of the Canadian public.

When the announcement of a decision finally came it caught many of the actors off-guard; the Supreme Court was planning to read its verdict on Monday, September 28, a day when the Prime Minister and at least one provincial premier would be out of the country. In a communications first, the proceedings were to be broadcast on national television and radio.

The day of decision also provided the unexpected. Not only did the federal government not obtain the clearcut victory which most observers had anticipated, but rather the decision was so complex and convoluted that it allowed both sides to claim a victory, and prompted Joey Smallwood, when interviewed by the CBC the same day, to call it "as clear as mud." Whether in retrospect the historic decision will come to be perceived as deliberately and strategically brilliant or simply a confusing result of profound conflict on the bench, it had the practical effect of returning the ball to the political arena.
The federal inner circle had expected to lose the first question, but had been extremely hopeful of a favourable decision on the second question and had been absolutely confident of a favourable response to the third. The major concern beforehand had been what degree of split might occur, since few were hopeful of a unanimous decision. Thus the Court's substantial acceptance of the existence of a convention in question two, and the splitting of the third question into two parts, were unpleasant surprises.

However while the provinces were more successful than they appear to have expected, they lost on the strictly legal issue, which was the one the federal government had been emphasizing all along. Perhaps most important, the Court did not split the federal proposal itself by ruling sections of the Charter of Rights unconstitutional per se -- the package and thus the Charter were left intact.

In a majority decision (Mortland, Ritchie, Dickson, Beetz, Chouinard and Lamer), the six Justices stated that:

It is true that Canada would remain a federation if the proposed amendments became law. But it would be a different federation, made different at the instance of a majority in the House of the Federal Parliament acting alone. It is this process itself which offends the federal principle ... It was to guard against this process that the constitutional convention came about. (49)

However, they did not support the principle of unanimity as part of that convention:

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

(49) Reference: Re-Amendment of the Constitution of Canada (Nos. 1, 2, 3) [1982] 125 DLR (3d) 1, 104.
It is sufficient for the Court to decide that at least a substantial measure of provincial consent is required, and to decide further whether the situation before the Court meets this requirement ... By no conceivable standard could this situation be thought to pass muster ... Nothing more should be said about this. (50)

Nor did they accept the provincial argument that the convention had evolved into a rule of law. "The conventional rules of the constitution present one striking peculiarity. In contradistinction to the laws of the Constitution they are not enforced by the Courts." Hence while the passing of the federal Resolution without provincial consent would be "unconstitutional in the conventional sense", four of these justices sided with their three dissenting colleagues and ruled in question 3 (part B) that it would not be illegal.

On the other hand the Chief Justice, along with two of his colleagues, (Estey and McIntyre) dissented from the majority opinion on questions 2 and 3(A), arguing that no convention existed. Many observers interpreted the Court's decision as one which said at the same time that the federal proposal is legal but not moral, or that the federal government could go ahead but ought not to.

Justice Minister Chrétien, interviewed by the press immediately after the reading of the decision, chose to interpret the ruling as a solid victory for the federal side on the only issue which counted -- legality. Having spoken to the Prime Minister by telephone (the latter being stranded in Korea at the time), he informed the reporters present that the government would press on.

(50) Ibid., pp. 5-6.
Later the same day in a televised news conference from Korea Mr. Trudeau appeared somewhat more flexible, offering the possibility of some further negotiation with the provinces, but nevertheless insisted that they would proceed.

Not surprisingly, Joe Clark interpreted the Court's ruling quite differently: "What the Trudeau Government is doing in its resolution would violate the constitutional traditions or our country", Mr. Clark argued,(51) as did several provincial premiers and spokesmen. Mr. Blakeney said that the provinces and Ottawa should return to the bargaining table and at least agree on patriation and an amending formula "so we can turn to some of the pressing economic problems in Canada."(52) Alan Williams, the B.C. Attorney-General said "Most certainly I see there being some extensive debate in the House of Commons as the result of the decision today", noting that he saw it as "a very favorable result," while Gerald Ottenheimer, Newfoundland's Intergovernmental Affairs Minister, stated the Trudeau Government would be erring if it imposed its package on unwilling provinces. "I think it would be quite wrong to go ahead with that package now when the Supreme Court of Canada has said that it is contrary to the conventions of our constitution."(53)

Thus while the constitutional issue had left the judicial stage, it was far from being resolved. The ambiguity of the decision

(51) Ottawa Citizen. September 29, 1981.
(53) Ibid.
forced all actors in the process to reconsider their positions, at least tentatively, before proceeding on with the drama.

When the Supreme Court finally brought down its decision on September 28 the House was not in session. By the time Parliament resumed sitting on 14 October 1981 discussions were already underway on the possibility of another federal-provincial conference, and Ed Broadbent had already withdrawn NDP support for the proposal if such a meeting did not take place. Once again unexpected federal Opposition and British pressures combined, this time to force another federal-provincial meeting on the federal government, something which the provinces alone could not have achieved.

The final conference took place November 2-4 in Ottawa, and resulted in an accord signed by the federal government and nine of the 10 provinces in which the Prime Minister and the nine premiers agreed to immediate patriation of the British North America Act from London. They accepted the so-called Vancouver amending formula as presented by the eight dissident premiers in April 1981. Under this formula there are three categories of amendments: some amendments require the unanimous consent of all provinces, others may be accepted with the agreement of seven provinces representing 50% of the Canadian population. However, on amendments affecting provincial powers, although seven provinces with 90% of the population might accept the amendment, up to three provinces would be permitted to "opt out". The accepted amending formula differed from the April consensus in two respects. A provision for financial compensation for provinces which might choose to "opt
out" of an accepted amendment was deleted, as was the proposal for the
delegation of legislative authority from one level of government to
another. As both the referendum mechanism and several aspects of the
Victoria formula were eliminated, it would appear that this was the
most successful of the provincial interventions with respect to the
original proposal.

However, the Charter of Rights and Freedoms to which several
provinces had been diametrically opposed was generally accepted as
written. The most significant change was the inclusion of "notwith-
standing" clauses covering the sections dealing with Fundamental
 Freedoms, Legal Rights and Equality Rights. This enabled the federal
or the provincial governments to expressly state that a particular
 provision of an Act would be valid, notwithstanding the fact that it
 conflicted with a specific provision of the Charter. However, any not-
withstanding enactment would have to be reviewed and renewed every five
years by the enacting legislature if it were to remain in force. In
essence this meant that in the case of a conflict over the application
of the Charter of Rights between the courts and a legislature, the
 legislature would be able to assert its supremacy. (The next chapter
will demonstrate that most human rights organizations had little
problem with this addition.)

There was a relatively minor change with respect to the
mobility rights section (s. 6). It was agreed to include "the right of
a province to undertake affirmative action programs for socially and
economically disadvantaged individuals as long as a province's
employment rate was below the national average." In an unexpected move, the nine premiers also agreed to have the provisions of Minority Language Education Rights apply to their provinces.

Clause 25 of the Charter guaranteeing that the rights and freedoms in the Charter shall not abrogate or derogate from any aboriginal or treaty rights or freedoms, specifically including the Royal Proclamation of 1763, remained intact. However, Clause 34 which recognized and affirmed aboriginal and treaty rights was deleted. The accord stressed the intention of the signatories to call a federal-provincial conference under Clause 36 of the proposed resolution in which the aboriginal peoples of Canada would be invited to discuss matters affecting themselves.

F. Parliamentary Phase (Part III)

In the Commons, Opposition Leader Clark welcomed the progress shown by the accord but indicated that Parliament should have sufficient time to study the new arrangements and hopefully modify them in order to include Quebec.(54) Ed Broadbent, on behalf of the New Democratic Party, congratulated the Premiers and Prime Minister on their accomplishment. He regretted the position of Quebec and hoped that his party would be able to support the accord.(55) The Prime

(55) Ibid., pp. 12539-40.
Minister then indicated that he was willing to delay submitting the final package to Parliament in order to talk with representatives of the Quebec government in the hope of finding some language that would meet that government's objections.\(^{(56)}\)

Meanwhile women's groups and natives continued to lobby at both provincial and federal levels to restore the sections affecting them. After intense pressure and much behind-the-scenes discussion, an agreement was finally reached between federal and provincial negotiators to remove the \textit{non obstante} clause from section 28 (equality rights), and this amendment was passed by the House on 24 November. The return of section 34 (with the addition of the word "existing" at the insistence of Premier Lougheed) was subsequently approved by the House on 26 November.

The complete package was approved in the Commons (amidst much applause and the singing of "O Canada" by members and spectators alike) on December 2, 1969 by a vote of 246 to 24, and in the Senate on December 8 by a vote of 59 to 23. A long and arduous process had finally come to an end.

\textbf{Conclusion}

In this chapter we have seen how the traditional executive federalism format of first ministers' conferences on constitutional

\(^{(56)}\)\textit{Ibid.}, pp. 12536-8.
issues was effectively circumvented by a new process of parliamentary and public debate. For much of the time, from the preparatory stage through to the conclusion of the parliamentary stage, this process was marked by a confrontational mindset on the part of the federal government and the provinces, who were forced to participate essentially on the former's terms. At the same time we have seen the entry of several major participants who would heretofore not have been involved at all, notably federal backbenchers and promotional interest groups, and the unanticipated impact which they had on the process, primarily during the Committee stage. The following chapter now examines in detail the role which each of the major participants played in this process in order to demonstrate conclusively the relative lack of influence of the provincial actors with respect to both process and content, the uncharacteristically high degree of influence on the part of promotional interest groups concerning content and the unexpected importance of Great Britain concerning the process.
CHAPTER V

THE CASE: DRAMATIS PERSONNAE

"[The patriation exercise] seems to have been ... an exercise in political theatre in which personalities were often more important than the ideas they claimed to represent. If it was not, at times, a dress rehearsal in the theatre of the absurd, some of the players seemed casual characters wandering on and off stage in search of an author and a script, without always being certain about the lines or why they were there in the first place."

-- E. McWhinney,
(Canada and the Constitution 1979-1982)

This Chapter discusses the roles played by three of the major participants in the constitutional process under review: promotional interest groups, the provinces and Great Britain. Having seen in Chapter II that the literature on the general policy process accords little importance to promotional interest groups, the significance of their role in this particular process is noteworthy; having also seen that in previous constitutional processes their input was essentially non-existent, their efficacy here becomes striking.

Similarly in the previous constitutional processes discussed earlier Great Britain was not an actor, partly because the processes never progressed far enough to warrant her involvement, but more importantly because the unilateral option had not been attempted by a federal government before. Thus the decision to circumvent the traditional executive federalism format of constitutional negotiation was also responsible for the inclusion of an additional, foreign actor in the latest Canadian constitutional drama. The section on Great Britain
demonstrates this fact along with the key role which that country involuntarily played in facilitating and accelerating the federal-provincial confrontational mindset, contrary to the traditional literature. It could also be argued that it was Great Britain's reluctance, and not provincial input, which triggered the 11th hour deal between the federal government and the provinces.

Most important from the perspective of this study, the section on the provinces demonstrates the way in which they were forced to alter both the nature of their participation and their original agendas for constitutional reform. In addition there is substantial evidence of an increasingly hostile attitude towards the federal government and its role in the process which threatened to call into question not only the legitimacy of that process but also the executive federalism format in general and perhaps the very nature of the Canadian federal system.

A. Interest Groups

During the summer of 1978 a joint Senate-House Committee on the Constitution met to analyse Bill C-60 and hear testimony from concerned Canadians. At that time only 35 groups and 218 citizens requested to appear before the Committee and only 12 witnesses were actually heard - three provincial/territorial governments, three native groups, the Commissioner for Official Languages, the Chairman of the Canadian Human Rights Commission and four private expert witnesses. Their influence on the bill was minimal and irrelevant since the proposal was scuttled by the government after widespread opposition before it ever received serious consideration.
This experience in futility is striking when viewed in contrast with the experience of those interest groups which participated in the constitutional policy process of 1980-81. Not only did many more groups consider that the issue was sufficiently important to merit their attention, but also a broader cross-section of types of groups participated. A total of 317 groups communicated with the Committee in response to the Canada-wide publication of invitations published in local newspapers. Of these, 308 requested to appear before the Committee to testify; 87 eventually were heard. In addition 163 of these groups sent written submissions.

A complete list of witnesses is included in the Appendices but the statistics in the following table give a good idea of the diversity of the groups involved:

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<td>- Women's Orgs.</td>
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If the categories of groups listed in the non-political section of the table are further classified in terms of the promotional and self-interest definitions discussed earlier, we find that only 19 of these groups, those in the business and professional, labour and law enforcement categories, could definitely be classified as self-interest groups. These included:

   Business Council on National Issues
   Canada West Foundation
   Media Club of Canada
   Alberta Chamber of Commerce
   Canadian Life Health Insurance Association
   Community Bus. & Prof. Association
   of Vancouver
   Conseil d'expansion économique
   Canada Cattle Consultants Ltd.
   Secor Inc. (Mtl.)
   Can. Organization of Small Businesses
   Atlantic Provinces Chamber of Commerce
   B.C. Medical Association
   Engineering Institute of Canada
   Realty Owners of Canada
   B.C. Chamber of Commerce

2. Labour (did not appear) — B.C. Federation of Labour

3. Law Enforcement (appeared) — Can. Assoc. of Chiefs of Police
   Can. Assoc. of Crown Counsels

A problem arises as to the classification of the native groups. On the one hand they have most of the characteristics of the promotional groups, but on the other hand their membership is homogenous and self-interested. Moreover, the disproportionate number of native groups which made application to the Committee tends to overwhelm the statistics on participation. Nevertheless, even when the data are rearranged to control for this the participation of interest groups in the policy process remains very high:
### TABLE II

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</table>

|       | 308   | 87      | 212            | 9                     |

Turning first to the obvious self-interest groups mentioned, it is clear that this category had the lowest participation rate. But even more significant is the total absence of certain groups which one might have expected to find represented here. Hardly any professional associations were heard from; the Canadian Medical Association, for example, did not even submit a written brief despite widespread concern over the abortion/right-to-life issue. Most important of all, labour interests were virtually unrepresented. The Canadian Labour Congress did not even present a written brief, while of the provincial organizations only the B.C. Federation of Labour indicated an initial interest in appearing before the Committee, and in the end they withdrew their request.

Considering that the Proposed Resolution contained key sections on mobility rights and equalization payments which would directly affect the labour force, this lack of participation was particularly distressing to many of the Committee members. Co-chairman Serge Joyal summed up this concern:
Parmi les groupes syndicaux, et l'aspect syndical est très important, un seul groupe a demandé à comparaître pour ensuite y renoncer, ce qui est très révélateur... Les groupes syndicaux ne semblent pas s'intéresser au processus constitutionnel, ce qui est très étrange. Selon moi, il est important d'insister sur ce point. (1)

Among the business and professional groups which did appear or send written submissions there were few substantial recommendations and none which were accepted. For example the Canadian Association of Chiefs of Police was unhappy with the term "freedom of conscience" in Section 2 on fundamental freedoms, referring to it as "vague and unnecessary", while the Canadian Association of Crown Counsels felt it would render inoperable sections of the Criminal Code dealing with morals and drug offences. These arguments were rejected by the Committee and the phrase remained. The Chiefs of Police also strongly supported the original section 26 concerning the laws of evidence, but this was removed anyway, at the urging of several of the voluntary groups. (2)

Similarly the Business Council on National Issues and the Canadian Chamber of Commerce argued quite unsuccessfully in favour of a more comprehensive section on mobility rights. The Business Council also put forward recommendations concerning the inclusion of certain fundamental rights for the "corporate person", a concept which not even the Tories had espoused. On the other hand only one of the groups even made a passing reference to the right to own property, an item which was high on the Tories' eventual list of recommended changes.

(1) Remarks to the Canadian Study of Parliament Group, Ottawa, January 9, 1981.

(2) Copies of the Proposed Resolution as tabled in October 1980, as amended by the Committee and tabled in February 1981, and as passed by the House and Senate on December 8, 1981, are attached in full in the appendix.
Among other self-interest groups which were heard before the Committee the only other point of note was the concern raised by the Canadian Life Insurance Association that Section 15(1) could be construed as prohibiting life insurance companies from differentiating on the basis of sex and age in the establishment of premiums and other matters related to life insurance plans. However this argument also was rejected by the Committee, which considered that sufficient discretion had been left to the judiciary.

Moving then to the voluntary groups, the concerns raised by the different categories of groups within this sector were in sharp contrast to those raised by the self-interest groups. These groups, predominantly representing human rights and women’s organizations, were totally supportive of the concept of an entrenched charter but were also unanimous in their criticism of certain sections. (3)

For example, it soon became apparent to the Committee that Sections 1 and 15 of the Charter in particular were in deep trouble. For a variety of reasons all of the voluntary groups found fault with one or both of these sections. In the descriptive summary which follows some of the major issues raised by different categories of groups will be discussed grosso modo; Table IV, (in the Appendices), catalogues specific criticisms and recommendations clause by clause, and identifies the amendments which were made in response to them.

All of the human rights groups which testified before the SJCC stressed their support for the concept of an entrenched charter of

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rights and therefore focussed on ways of improving the actual document which the government introduced. Most of these groups were extremely unhappy with the drafting and the content of various sections. Gordon Fairweather of the Canadian Human Rights Commission referred to the proposed charter as a "seriously flawed" document which would provide an inadequate guarantee of the rights it sought to protect,(4) while Alan Borovoy of the Canadian Civil Liberties Association stated that this organization felt it would actually be preferable to have no charter at all than the one which the federal government had presented.(5)

In general none of the groups liked section one. This so-called limitations clause did not, for example, follow the wording of the international human rights covenants to which Canada is a signatory. This point was raised over and over again by the witnesses concerned with human rights:

It is the view of the Canadian Human Rights Commission that any general limitation clause in the Charter should accord with the accepted clauses in the International Bill of Rights (i.e. the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to that Covenant).(6)

Worse still in their view was the fact that its coverage applied to section 15(1):

We note in particular that under the Covenant on Civil and Political Rights, non-discrimination rights are non-derogable and cannot be made subject to limitations, even in war-time.

(4) Brief of the Canadian Human Rights Commission (C.H.R.C.) to the SJCC.


(6) C.H.R.C. Brief.
Article 4 of the International Covenant on Civil and Political Rights provides for certain limitations on rights to be made in time of emergency but specifies that such measures may not involve discrimination. (7)

In addition the use of the terms "generally accepted" and "with a parliamentary system of government" as qualifiers was severely criticized as being not only unnecessarily restrictive but potentially regressive:

With the limitation provision in section 1, the government is attempting, at one and the same time, to eat and have its constitutional cake. The whole idea of an entrenched bill of rights is to subject even the authority of Parliament to a certain range of judicial scrutiny. But this limitation would unduly restrict the courts in the exercise of that function.

Indeed, the language of section 1 appears to encourage judicial abdication of this review function. Just what are the "reasonable limits" which are "generally accepted" in parliamentary democracies? Could not such terminology serve to validate whatever limits exist at any point in Canadian society? What better measure is there of what is "generally accepted" than the decisions of Parliament and the Provincial Legislatures? Thus this Charter might well have been impotent against the internment of the Japanese Canadians and the harassment of the Jehovah's Witnesses. (8)

With regard to section 15(1) the major issue was how broadly expressed the non-discrimination rights should be. Many groups argued that it might be better to have no specific categories delineated at all, but all agreed that if the government insisted on doing so then the grounds would have to be expanded:

(7) Ibid.

(8) Brief of the Canadian Civil Liberties Association to the SJCC.
We feel, for instance, in section 15, that the right to equality before the law should not be limited to specific kinds of discrimination. We feel that the individual should be protected against all forms of unreasonable discrimination by a general recognition of the right of the individual to equality before the law. (9)

and:

The Commission's first preference would be for a general proscription of discrimination, with no grounds enumerated, thus offering the broadest possible protection. (10)

Many of these groups also argued for the inclusion of a sui generis clause, that is, an indication that the list of grounds was not conclusive but open-ended and for purposes of example only.

In addition both the Canadian Jewish Congress and the New Brunswick Human Rights Commission stressed the importance of the affirmative action component in section 15(2), but argued for a more precise wording. Almost all of the groups made reference to the need for some sort of remedy clause if the Charter was to be truly effective.

We think that to deal with problems like this, as well as the full panoply of rights which will be entrenched in the charter, than an enforcement clause is crucial, that the charter would be hollow without it and we think that this is in conformity with our international obligations under the Covenant on Civil and Political Rights, the text of which is set out for you. There is also a right in the Covenant to damages which is set out for you in the brief. (11)

Finally, a number of these groups had objections to the wording in various of the legal rights and fundamental freedoms


(10) CHRC. Brief to the SJCC.

sections. As the amended version of the proposal (in the Appendices) indicates, almost all of the concerns raised by these groups were met. Sections 1 and 15 were substantially altered before the SJCC tabled the amended version. In the House and before the Committee Justice Minister Chrétien praised the presentations of these groups, especially the CHRC and the CJC, stating that their contributions had been a significant factor in the amendment of the Charter. (12)

None of the women's groups which testified before the Committee was happy with sections 1 or 15 either; their primary concern related to the failure of the charter to make explicit mention of the equal applicability of section 15 and the charter as a whole to both sexes, something which was done in the international covenants. Their concern was based on past experience with judicial decisions, and many key legal cases were mentioned repeatedly by the various groups which appeared:

The wording proposed in the government's Charter of Rights, and used in the present Canadian Bill of Rights, has been interpreted to mean only that laws, once passed, will be equally applied to all individuals in the category concerned. The law as written could discriminate against women, which is neither just nor acceptable. The courts have been concerned with maintaining the just administration of the law, but not with discrimination built into the law itself. Thus the Supreme Court of Canada decided against Lavell and Bedard, (Bliss, Burnshine, etc.) (13)

Similarly, the women expressed concern that the affirmative action section 15(2) as written might not be interpreted by the courts


that it has not been necessary to define "religion" in the Charter, despite the plain fact that we will continue to discriminate against religions which practice human sacrifice.

The fearful spectre of a court interpreting non-discrimination because of disability in the Constitution to mean that suddenly all buildings, airplanes, train coaches, ferries, bus systems, etc., in Canada are in violation of the Constitution because they are not accessible to persons in wheelchairs has been suggested. We are familiar with this phantom.

The level of (popular) support for our inclusion in the non-discrimination rights section of the Charter demands that the objections to this amendment cannot be vaguely stated drafting or definition concerns as at present; surely this level of support demands that objections to the amendment must be clearly demonstrable and justifiably sound ones.

Surely Section 1, which has been widely criticized for its very broad wording, also protects society from the spectre of future bankruptcy because of a court order for universal and complete wheelchair accessibility. The Canadian Human Rights Commission's proposed 15(3) would serve this purpose as well, allowing legislative distinction based on a proscribed ground of discrimination which is justifiably necessary for reasons of compelling state interest... (14)

Nevertheless by the time the Charter left the SJCC to be tabled in the House it did contain the additional grounds of mental and physical handicap in Section 15(1). Furthermore the groups had managed to obtain a commitment from Mr. Chrétien for similar changes to the federal Human Rights Act.

Similarly a significant number of ethnic groups appeared before the Committee and requested the inclusion of a specific clause on the multicultural identity of Canada. In their view there was a need

for this "positive" type of statement in addition to the "negative" guarantees provided for in section 15(1). As a direct result of these interventions a new section 26 was introduced which required that the Charter be interpreted in "such a way as to be "consistent with the preservation of the multicultural heritage" of Canadians.

Because of the large number of native groups which intervened in the process and their lack of consensus it is difficult to provide anything but the most general résumé of their concerns in this section. This could probably best be summed up as a desire to obtain better guarantees for, and clearer definitions of, aboriginal rights. The substantial amendments introduced by Mr. Chrétien during the Committee stage (and the inclusion of several historic documents), after several days of behind-the-scenes negotiating could only be viewed as a victory for these groups, regardless of whether they felt these changes went far enough. Similarly the effectiveness of their lobby to reinstate section 34 after it was deleted in the November accord is undeniable.

Changes also were made at the instigation of various ethnic and minority language groups, as well as the Commissioner of Official Languages, to better ensure minority language education rights and certain bilingual governmental services.

In Table III, (which follows), criticism of the original Charter is broken down by section, clearly revealing the high level of dissatisfaction with those clauses dealing with legal rights, equality rights and aboriginal rights, and especially sections 1 and 15. Table IV (in Appendices) demonstrates how these sections were altered to accommodate this criticism.(15)

(15) Material for Table IV was compiled from several sources, including a document produced by the government to demonstrate its responsiveness to witnesses' concerns.
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*Section/Article 7: Substantive Reservations comprises the following single-issue submissions: Substantielles réserves comprises les présentations traitant un seul sujet.

G = 6 "rights of the unborn child/droit du fœtus"; and 3 "pre-choice/avortement libre".

1-2 "rights of the unborn child/droit du fœtus"; and/or 1 "property rights/droit à la propriété privée".

*Reject comprises the following single-issue submissions/Rejetant comprises les présentations traitant un seul sujet:

G = 6 "rights of the unborn child/droit du fœtus"; and/or 3 "pre-choice/avortement libre".

1-2 "rights of the unborn child/droit du fœtus"; and/or 1 "property rights/droit à la propriété privée".

(1) Material and tables were prepared by the author in collaboration with colleagues in the Research Branch; Table III appeared in this format in the Committee's Report as tabled, Feb. 13, 1981, Issue no. 57:94-6.
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* Section / Article 15
Substantive Reservations comprises the following single-issue submissions:
Réserve sur le contenu comprend les présentations traîtant un seul sujet
G-4 "women's rights/droits des femmes", 4 "sexual orientation/orientation sexuelle", and 2 "handicap/handicapé".
1-3 "women's rights, droits des femmes".

* Section / Article 15(1)
Substantive Reservations comprises the following single-issue submissions:
Réserve sur le contenu comprend les présentations traîtant un seul sujet
G-3 "women's rights/droits des femmes", 3 "native women's rights/droits des femmes autochtones", 5 "handicap/handicapés", 1 "sexual orientation/orientation sexuelle".
1-3 "women's rights, droits des femmes", 3 "handicap/handicapés".

9 pages contented the following single-issue submissions:
9 pages contented les présentations traîtant un seul sujet
G-4 "women's rights/droits des femmes".
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It is important to note that the groups themselves perceived their input to have been effective. For example, Gordon Fairweather of the Canadian Human Rights Commission announced that he was "delighted" with the "substantive changes" proposed by the Minister. With regard to the reformulation of the limitations clause, he felt that the minister had gone to "extraordinary lengths" to meet the concerns of the Commission.\(^\text{(16)}\)

Max Yalden, the Commissioner of Official Languages, was pleased that official bilingualism was to be extended to New Brunswick although he was dissatisfied with the fact that the same language rights would not be granted within Ontario.\(^\text{(17)}\) He was pleased also to see a change in the wording of the minority language education rights provision, clause 23, which followed his and other recommendations with respect to the inclusion of the concept of minority language "instruction".

Doris Anderson, President of the Canadian Advisory Council on the Status of Women, called the amendments "a major step forward" adding, "the Government's come a very long way toward meeting the concerns of Canadians, including women."\(^\text{(18)}\) The Canadian Advisory Council remained generally pleased with the amended Charter; other women's groups which banded together to press for further changes nevertheless agreed that substantial improvements had been made.

\(^\text{(16)}\) Toronto Star, January 13, 1981.
\(^\text{(17)}\) Citizen, Ottawa, January 14, 1981.
\(^\text{(18)}\) Citizen, Ottawa, January 13, 1981.
A letter from the Select Committee on the Canadian Constitution of the Canadian Jewish Congress to the Special Joint Committee expressed the view that amendments to the resolution "reflect a substantial adoption of the many constructive ideas coming out of the hearings and from the submissions made by a large number of organizations that appeared before your committee." (19) Although not completely satisfied with the revised Charter, the Select Committee was gratified that the Congress' suggestions had been adopted with respect to many of the legal rights provisions and the inclusion of the general reference to Canada's multicultural heritage. It noted that the amendments with respect to self-crimination, clause 13, and the enforcement procedure, clause 24, had gone beyond the recommendations of the Congress' submission.

Even more enthusiastic was the response of Walter Tarnopolsky, President of the Canadian Civil Liberties Association: "They've responded to just about everything that we in the Civil Liberties Association asked for. It's very difficult to see how one can criticize it." (20) Professor Tarnopolsky was particularly pleased with the new provisions relating to the concerns of women, the aboriginal peoples of Canada and the multicultural groups; however, he indicated that there were still some concerns which he wished to press.

Lawrence Decore, the outgoing Chairman of the Canadian Consultative Council on Multiculturalism expressed genuine pleasure at the acceptance of the provision recognizing Canada's multicultural

heritage. This he stated would be of particular significance for Western Canada, where half the population is neither of English nor French origin. (21)

Jim Derkson, National Coordinator of the Coalition of Provincial Organizations for the Handicapped, congratulated the government after the acceptance of the inclusion of "physical and mental disability" in the equality rights clause, section 15. He announced that, "We will begin to feel the symbolic effects of this inclusion immediately because of its high level recognition of the discrimination problems faced by disabled Canadians every day and of our urgent need for equal rights protection." He went on to say that federal and provincial statutes will now be scrutinized to eliminate those provisions which discriminate against the handicapped. He was also very pleased with the addition of the right to a court interpreter for the deaf. (22)

Representatives of Status Indian, Inuit, Métis and Non-Status Indian groups reacted positively to the amendments announced by Mr. Chrétien on January 12. Harry Daniels, president of the Native Council of Canada, said that the inclusion of certain historic documents in the Constitution would be "a substantial step forward." Del Riley, President of the National Indian Brotherhood, indicated that the recognition of aboriginal rights and freedoms was a major part of their concerns and that the amendments to clause 24 (later 25) were a "positive step forward." (23) Nevertheless the Leaders of the


(23) Citizen, Ottawa, January 14, 1981.
National Indian Brotherhood, the Native Council of Canada, and the Inuit Committee on National Issues were convinced that the amendments of January 12 had not sufficiently secured their aboriginal rights and they would not withdraw their efforts to prevent the patriation of the British North America Act. A dramatic reversal in this attitude occurred following the behind the scenes negotiations with the Minister and several advisers which culminated on January 30, 1981 in a new Part II, clause 31, being added to the proposed Resolution that “recognized and affirmed” both aboriginal and treaty rights. The Government, the three national aboriginal groups, and the three parties on the Committee all agreed to a package of amendments concerning aboriginal rights; the amendments were passed unanimously. The Indian, M"étis and Inuit leaders then declared that they would not only support patriation of the Canadian Constitution but they would now actively work both in Canada and in the United Kingdom for the accomplishment of this fact. Del Riley called it an “historic moment” marking “a new beginning for Indian people in Canada.”(24)

However this common front disintegrated in the following months. First the most aggressive western Indian chiefs from B.C. and Alberta accused Mr. Riley of selling out and called for his resignation. Internal pressures eventually succeeded in forcing him to formally reverse his position, and by April 16, 1981 the NIB declared itself formally opposed to the amendments.(25) Soon after the NCC

(24) Ibid., February 1, 1981.

also rejected the amendment as not providing sufficient protection. The NIB then proceeded to spend large sums of money lobbying unsuccessfully in London, but left court action to the western bands. In September both NIB and NCC spokesmen expressed satisfaction with the Supreme Court ruling declaring the federal resolution unconstitutional but the Inuit Tapirisat did not, primarily because, in addition to having continued to support the government’s proposal and unilateral action, they feared a return to the bargaining table could only produce negative results as far as aboriginal rights were concerned.(26)

This in fact proved to be the case. During the November 1981 Federal-Provincial Conference which produced the accord section 34(31) was deleted. Little insight has been achieved regarding the reason for this development, although continued provincial opposition appears to have been the catalyst.(27) However, the intensive lobbying by native groups which resulted after this, at both provincial and federal levels, did once again succeed in arriving at an agreement to reinstate aboriginal rights in the constitution, albeit with the inclusion of the words “existing” at the insistence of Premier Lougheed. Parliament passed an amendment to this effect on November 25, 1981, just days after the entire accord was formally approved.

Therefore, despite the fact that many felt the clause respecting aboriginal and treaty rights did not go far enough, the


(27) Ibid.
native groups had nevertheless succeeded, as none of their predecessors had, in entrenching these basic concepts in Canada's constitution and in so doing had also heightened politicians' and public awareness of the issues. The inclusion of a guarantee that native rights would be discussed at the 1983 constitutional conference could also only be viewed as the result of the direct input of the various native groups to the process.

As a result, it is possible to conclude that promotional interest groups, contrary to the traditional literature, had a significant input in the process under review, primarily through the committee mechanism, but also through lobbying at the provincial level after the November 1981 accord. Their impact may well have been unanticipated by the federal government, which nevertheless formally acknowledged the important role which these new actors had played. Moreover, it could be argued that the fact that these groups had a demonstrable effect on the content of the proposal gave the Joint Committee added legitimacy, and hence added support for the legitimacy of the unilateral federal action. The provinces, for example, were placed in the awkward position of appearing to oppose a "motherhood issue" (the Charter of Rights) supported by all of the major human rights organizations. The role of the provinces in this drama is examined in detail in the following section.
B. Provinces

The role of the provinces in this constitutional drama was unlike any part which they had previously played. In discussing both the public and private interventions of the various provinces throughout, this section examines how they were obliged to state their positions in the press, in Great Britain, and through behind-the-scenes negotiations with the federal forces, because the traditional executive federalism stage was no longer available to them. It further demonstrates the confrontational approach which many of them took in reaction to the aggressive stance of the federal government and also the conflicting interests which existed amongst the various provincial actors.

The public role of the provinces can effectively be divided into five separate acts: the September 1980 constitutional conference, briefs and testimony to the SJCC, court actions, the April 1981 provincial accord and the final November 1981 constitutional conference. In between there were naturally an intricate series of behind-the-scenes interventions, some of which were critical to the eventual dénouement and resolution of the issue.

It was the failure of the premiers and the prime minister to reach agreement in September 1980 that set the stage for the whole process; this failure was also indicative of the confrontational mindset which both sides were to demonstrate throughout. One observer's
analysis of this Conference is striking for its use of consociational terminology:

For all the good intentions of some of the participants, there was never agreement on the urgency of constitutional reform nor the political will to compromise on the basic issues which separated the federal Government from a majority of the provinces.

The results of the Quebec referendum were supposed to give the first ministers the compelling reason for trying yet again to agree on a package of constitutional reforms. Quebeckers, having been promised a renewed federalism if they voted against sovereignty-association, were going to see results this time. Or so Mr. Trudeau and other federalist spokesmen told them during the referendum.

But, instead, the focus of constitutional debate quickly moved from what might please Quebeckers to what might please Albertans, Ontarians and Newfoundlanders. As a result, the constitutional agenda became a hodge-podge of maximum demands by many provinces and the federal Government. And, as Prime Minister Pierre Trudeau correctly said at the end of the conference, the dynamics of the negotiations were skewed by the provinces' tendency to support each others' maximum demands, even if they did not care deeply about the issue themselves.

The urgency the first ministers directed toward the different items on the agenda thus diffused the debate. Still, a package might have been shaped if the first ministers had possessed the political will to succeed. But none of the three vital ingredients for compromise were present - an external threat to the country, the possible breakup of Canada or a supreme act of statesmanship by several of the participants. Without such factors, the first ministers pursued their different visions of the country; always mindful of the public relations impact in their own corner of the country. (28)

Specifically, there were 12 issues under discussion at the September conference, at the request of the provinces: patriation (and an amending formula), a charter of rights, a statement of principles

(preamble), equalization, powers over the economy, natural resources, offshore resources, fisheries, communications, family law, a new Upper House and the Supreme Court.(29)

Despite the last-ditch attempt of the premiers' Chateau Laurier consensus on the final morning, all participants agreed that the September First Ministers' Conference had ended in failure. While the federal forces retired to "review their options" the premiers, with the exception of Ontario's Bill Davis, argued vehemently against unilateral federal action and several suggested another round of talks to be held in January of the following year. However this was not to be. In his address to the nation on October 2, 1980 Mr. Trudeau unveiled the government's package which he proposed to implement unilaterally.

At a hastily convened Premiers' meeting in Toronto on October 14, five premiers - representing B.C., Alberta, Manitoba, Quebec and Newfoundland - declared their total opposition to the federal initiative and vowed to challenge it in the courts. Ontario, Saskatchewan and New Brunswick were opposed to being involved in a court challenge at that time. The premiers of Nova Scotia and P.E.I. said they agreed substantially with the other five but wished to discuss the matter further within their cabinets before endorsing the court action. P.E.I. subsequently joined them but Nova Scotia did not. Then on October 17 Premier Hatfield of New Brunswick announced that he would support the federal government's resolution, with or without changes he considered important, thereby joining the pro-federal side with Ontario.(30)

At this point, in mid-October, Saskatchewan's Allan Blakeney became an extremely important actor. The federal forces felt that they

(29) The positions of each province and the federal government, by issue, are outlined in Table V in the Appendices.

But given that the Federal government appears determined to act, we asked ourselves whether we as a provincial government should carry on the quarrel which threatens to damage the fabric of the nation, or whether we should swallow our resentment at the unilateral nature of the action, and attempt by negotiation and persuasion to have the contents of the resolution changed to make it more broadly acceptable to Canadians.

Our present position is that we object to both the process and the contents.

If the contents cannot be improved we will renew our opposition on both counts.

So that is what we have been attempting to do - improve the contents of the package. Our priority items are:

- changes in the amending process,
- acceptable provisions dealing with regulation and taxation of resources, and
- a more satisfactory equalization provision. (32)

He reiterated this position in a speech to the Saskatchewan Wheat Pool on November 17, indicating that Saskatchewan would not make a final decision until all amendments had been made by the SJCC. But at the same time he stated that if these changes were not satisfactory, Saskatchewan would oppose the resolution "with every instrument at our disposal." (33)

In December 1980 Mr. Blakeney journeyed to Ottawa to present Saskatchewan's brief to the SJCC. He indicated once again his intention to pursue the "third option" of attempting to improve the resolution, and outlined in detail his province's recommendations on the issues above as well as a new one, native rights. He stated in part:

Since the beginning of October, I have spoken out on the specific improvements which Saskatchewan is proposing. They are based on three general principles:

1) the substance of the unilaterally-enacted changes must leave intact the essential features of Canadian federalism; 2) the changes must be accomplished in such a way that unilateral action can never be repeated; 3) the changes must address some of the real concerns of all regions.

The option we have been pursuing is to try, by negotiation and persuasion, to have the contents of the resolution changed — to remove its most glaring inequities and to make it more broadly acceptable to all Canadians. If the contents of the resolution are substantially improved, we will be in a position to consider acquiescing in the process in the interests of lessening the level of controversy. If the contents are not substantially improved, we will have no option but to oppose both the process and the contents.

Time is running out. The Prime Minister and the Government of Canada must indicate very soon their willingness to compromise and accommodate, to respect the balance so crucial to Canadian unity. If they do, and I sincerely hope that they will, perhaps we can emerge from this crisis stronger than ever, building upon our common commitment to Canada to create a federal system which will encompass and reflect the cultural and regional diversity that is the essence of Canada. (34)

After Mr. Blakeney’s testimony before the SJCC, Mr. Chrétien took the initiative in re-opening behind-the-scenes negotiations with Roy Romanow, Saskatchewan’s Minister of Intergovernmental Affairs, to determine what concrete changes would satisfy his concerns, but that province continued to demur on any firm agreement until the proposal as amended by the SJCC was complete.

Meanwhile three other premiers also personally presented proposals to the SJCC during its hearings. On November 27 Premier Angus MacLean of Prince Edward Island appeared. After noting that he

also opposed the unilateral process, he proceeded to make specific suggestions for improvement.\(^{(35)}\) Most notably he objected to the amending formula (as written), which he believed would make his province a third-class one, since it would not be possible for P.E.I. in concert with any other Atlantic Region province to represent 50% of that region's population. He consequently recommended that the 50% guideline be removed. In addition he expressed grave reservations about an entrenched charter and the referendum mechanism, and called for further delineation of the equalization clause.

On December 2 John Buchanan of Nova Scotia testified.\(^{(36)}\) After calling for a suspension of the process while the matter was before the courts he then indicated that Nova Scotia remained supportive of patriation and flexible on the amending formula, but rejected the idea of incorporating a charter in the resolution. He called instead for simple patriation with an amending formula agreed to by the provinces, and a charter subsequently drawn up with provincial consent in Canada.

Finally on December 4 Premier Richard Hatfield of New Brunswick, by now a staunch ally of the federal forces, appeared before the committee.\(^{(37)}\) Despite his support for the proposed resolution he nevertheless called for the deletion of the referendum clause, improvements to the legal rights and equalization clauses, the same change to the amending formula suggested by Premier MacLean, and of course inclusion of New Brunswick in the various sections regarding minority language rights.

\(^{(36)}\) Ibid., December 2, 1980, (17:26-17:61).
\(^{(37)}\) Ibid., December 4, 1980, (19:46-19:84.)
In late January 1981 the proposed amendments were complete. In an effort to appear as responsive as possible to provincial demands, the federal government provided information kits that demonstrated which proposed amendments were made as a result of provincial interventions. The following table provides detailed information on these changes, but basically they amounted to acceptance of the change in amending procedure to accommodate Atlantic Canada, changes to the equalization clause, the inclusion of the resources clause, and specific inclusion of New Brunswick in sections 16-20. While these went some way towards appeasing various provincial concerns, they were not sufficient for most of the premiers who appeared, and of course far from acceptable to the rest of the premiers, who were continuing with their court action and had refused even to participate in the committee process.

Premier Blakeney did not win federal support for his rejection of the referendum mechanism, nor for his argument in favor of provincial responsibility with federal paramountcy on the resources issue, and the charter continued to trouble him. However he apparently viewed the changes as an act of good faith on the part of the federal government, and agreed to keep the lines of negotiation open, to the extent that Frederick Gibson, an original member of the planning team, was sent to Hawaii (where the premier was vacationing) with a draft copy of two proposed amendments on those issues. Unfortunately for Messrs. Trudeau and Chrétien, the issues of the Senate veto and property rights both arose simultaneously with these negotiations, causing Mr. Blakeney to lose his faith in the federal forces, although it is impossible to say whether these events alone were responsible for
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<tr>
<th>Official Languages</th>
<th>PURPOSE OF AMENDMENT</th>
<th>SUPPORTED BY</th>
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<tbody>
<tr>
<td><strong>CONSTITUTION ACT 1980</strong></td>
<td><strong>CONSTITUTION ACT 1981</strong></td>
<td><strong>SUPPORTED BY</strong></td>
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<tr>
<td><strong>Section 16-20: SAME EXCEPT:</strong></td>
<td>Sections 16 to 20: In each of those sections, a new subsection (2) would make the language rights provided for in the Charter applicable to New Brunswick. Similar rights are now provided for by the law of that province.</td>
<td>Government of New Brunswick</td>
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<td><strong>31. Equalization</strong></td>
<td>(2) Parliament and the government of Canada are committed to taking such measures as are appropriate to ensure that provinces are able to provide the essential public services referred to in paragraph (1)(c) without imposing an undue burden of provincial taxation.</td>
<td>Government of Saskatchewan</td>
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<td>(2) This amendment would make express reference to the principle of making equalization payments. It would change the proposed commitment of the Parliament and government of Canada in respect of the provision of public services from one related to the burden of provincial taxation in a particular province to one related to the provision in all provinces of comparable services at comparable rates of taxation.</td>
<td>Government of New Brunswick Government of P.E.I. Government of Nova Scotia</td>
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## TABLE VI
(Cont'd.)
AMENDMENTS WITH PROVINCIAL INPUT

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<thead>
<tr>
<th>CONSTITUTION ACT 1980</th>
<th>CONSTITUTION ACT 1981*</th>
<th>PURPOSE OF AMENDMENT</th>
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<tr>
<td>41. Amending Formula</td>
<td></td>
<td>41.(1) This amendment would delete the requirement that an amendment to the Constitution be approved by provinces having at least 50% of the population of the Atlantic provinces. As amended, subsection 41(1) reflects the Victoria formula. Some minor changes in wording would also be made in subparagraphs (b)(ii) and (iii) to remove a possible ambiguity.</td>
<td>Government of P.E.I. Government of Nova Scotia Government of New Brunswick Government of Saskatchewan</td>
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<td>(ii) at least two of the Atlantic provinces that have, according to the then latest general census, combined populations of at least 50% of the population of all the Atlantic provinces, and (iii) at least two of the Western provinces that have, according to the then latest general census, combined populations of at least 50% of the population of all the Western provinces.</td>
<td>(ii) two or more of the Atlantic provinces, and (iii) two or more of the Western provinces that have in the aggregate, according to the then latest general census, a population of at least 50% of the population of all the Western provinces.</td>
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<td>42. Referendum</td>
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<td>42. This amendment would make it clear that the referendum procedure is a deadlock breaking mechanism. A referendum could be held where an amendment to the Constitution has been approved by the Senate and House of Commons but, within 12 months after such approval, sufficient provincial legislative assemblies have not approved the amendment.</td>
<td>Government of Saskatchewan</td>
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<td>(2) A referendum referred to in subsection (1) shall be held where directed by proclamation issued by the Governor General under the Great Seal of Canada authorized by resolutions of the Senate and House of Commons.</td>
<td>(2) A referendum referred to in subsection (1) shall be held where directed by proclamation issued by the Governor General under the Great Seal of Canada, which proclamation may be issued where</td>
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* as returned by the SJCC to the House. The entire amending formula was of course replaced with the Vancouver version as a result of the November accord.
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<th>CONSTITUTION ACT 1980</th>
<th>CONSTITUTION ACT 1981</th>
<th>PURPOSE OF AMENDMENT</th>
<th>SUPPORTED BY</th>
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<tr>
<td>46(2) Establishment of Referendum Rules Commission</td>
<td>(2) New. This subsection would provide for the establishment of an advisory commission, to be called a Referendum Rules Commission, consisting of the Chief Electoral Officer as chairman and two other persons, one to represent the provinces and the other to represent the government of Canada. The present subsection (1), as amended, would become subsection (4).</td>
<td>Government of P.E.I. Government of Nova Scotia Government of Saskatchewan</td>
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<tr>
<td>CONSTITUTION ACT 1980</td>
<td>CONSTITUTION ACT 1981</td>
<td>PURPOSE OF AMENDMENT</td>
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<tr>
<td>Establishment of Referendum</td>
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<td>recommendation of the Chief Justice of Canada from among persons recommended by the governments of the provinces within thirty days after the expiration of the first mentioned thirty day period or, if none are so recommended, from among such persons as the Chief Justice considers qualified.</td>
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his decision not to sign. Certainly the pressure of popular sentiment and the perceived political danger of appearing to be too friendly with Ottawa and/or Liberals may have played a major role as well. In any event Saskatchewan publicly rejected the resolution on February 19, 1981, and a short time later joined with the other provinces challenging the package through the courts. (38)

During this period the other premiers had not been idle. Having stated after a special joint cabinet meeting on October 4, 1980 that "We will fight back any way we can devise", Premiers Bennett and Lougheed proceeded to take a number of initiatives in their respective provinces. In Alberta, Mr. Lougheed tabled legislation on October 20 providing for the possibility of a referendum. His Intergovernmental Affairs Minister, Richard Johnston, denied that the provincial government was contemplating a Quebec-style referendum and stated that it was being introduced to provide the government with legislative authority to test public opinion on any matter of significant importance. (39) Nevertheless the Social Credit opposition in Alberta viewed it as a tool designed to confront Ottawa on the constitutional issue, and heated debate preceded its passage. (40)

On October 17 Conservative M.L.A. Tom Sindlinger was actually expelled from caucus because of his difference of opinion with the Premier over the constitutional question. In December a special committee of Alberta legislators began a cross-country tour to present Alberta’s position to the rest of the nation. Then in January 1981 the Alberta government published a booklet entitled Constitutional Issues for the

(40) Ibid.
People of Alberta, which attempted to clarify the government's position through a series of questions and answers on what it perceived to be the major constitutional issues.

Meanwhile, Quebec Premier Lévesque announced on October 16, 1980 that he would not hold a general election that fall, as anticipated, because it would leave a "vacuum" at the provincial government level at the very time when firm action needed to be taken to confront the federal government. Instead he stated that his plan was to recall the National Assembly earlier than originally planned and immediately introduce a resolution condemning the federal proposal. (41) On November 5, in his Inaugural Address to the Assembly, the premier therefore launched an appeal to MNA's from all parties to unanimously support his resolution. It was introduced on November 12 but did not receive this unanimous consent when the Liberal Party rejected it on November 21. (42)

On November 25 Brian Peckford of Newfoundland travelled to London, where he told a meeting of the Canada-United Kingdom Chamber of Commerce the following day that Ottawa was deceptively using the cover of "patriation" to carry out a "subtle but real demolition" of the federal system. (43)

The Quebec government's special envoy in London, Gilles Loiselle, began distributing a seven-page memorandum on the province's position at the end of November, a move which prompted Ottawa to dispatch its own special advisers to Britain. Then on November 29 the governments of Quebec, Newfoundland, Alberta, British Columbia and Prince Edward Island sent a common brief denouncing the federal plan to

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the recently-established Select Committee on Foreign and Commonwealth Affairs subcommittee which was to investigate the matter for the British Parliament.

At this point Premier Hatfield of New Brunswick decided to visit London to present the federal government's case. Speaking before the Diplomatic and Commonwealth Writers' Association on January 13, 1981 he threatened that Canada would declare independence unilaterally if necessary, thereby endangering the role of the Monarchy, if Britain did not pass the federal resolution. (44)

After the amendments proposed by Mr. Chrétien on January 12, 1981 before the SJCC were made known, the responsible ministers of the six provinces challenging the federal government in the courts met in Montreal, but decided that the changes did not affect their opposition to unilateral action.

Following the lead of Premier Hatfield, Ontario then sent Attorney-General Roy McMurtry to London, where he spent ten days meeting almost all of the major British figures involved in the debate. Both he and Premier Hatfield returned from Britain with serious concerns about the potential fate of the federal proposal in London. (45)

Not to be outdone, Manitoba's Sterling Lyon decided he also would make the trek to Westminster. During his stay in January of 1981 he managed to attract major headlines with his remark that Ottawa's proposals would lead to the eventual establishment of a presidential, republican system of government, but he saved his most severe

(45) Ibid.
for the Charter of Rights, which he described as a "fundamental invasion" of provincial powers and parliamentary supremacy. Like Mr. Peckford he accused the Prime Minister of "hucksterism" to hide the consequences of entrenchment from the Canadian people and the British government.\footnote{Globe and Mail. January 30, 1981.}

In an interesting sidelight, Premier Hatfield also gave several speeches critical of Premier Davis and his government's policy on minority language rights. He accused Ontario of bad faith and cowardice for its refusal to be included in the new language sections as New Brunswick had requested for itself. In response Mr. Davis dispatched Mr. McMurtry to Montreal to defend the Ontario position against "enforced bilingualism", arguing that Mr. Hatfield was "misguided" if he believed that Ontario was opposed to greater provision of service for franco-Ontarians. Needless to say the internal feuding between the federal government's only two supporting provinces did much to encourage the opposition of the others.\footnote{Ibid. January 16, 1981.}

In addition, premiers, ministers and officials of all the dissenting provinces - the original six were now joined by Saskatchewan and Nova Scotia - met on numerous occasions in February, March and April in an attempt to arrive at an alternative constitutional package. This was announced at a signing ceremony in Ottawa on April 16, 1981. The counter accord itself was somewhat of a let-down. In an unprecedented move the premiers had taken the offensive and had been closeted in the VIP section of the Château Laurier Hotel in Ottawa from the 15th
until early in the morning of the 16th attempting to hammer out an alternate agreement which would demonstrate to Ottawa that the "gang of eight" could present a unified front. However this proved to be an extremely difficult task. (48) While after strong pressure from Premiers Bennett and Blakeney a newly re-elected Premier Lévesque eventually agreed to give up a veto for Quebec, in exchange for removing a two-thirds vote in the legislature requirement for the opting out provision of the same amending formula, the accord which was announced did not deal with many of the other issues. In essence the eight premiers had only agreed to "patriation" with an amending formula; there was no mention of a Charter of Rights. But they did agree to a three-year period of continuing constitutional discussions, during which time presumably a Charter of Rights could be discussed. Several of the Premiers, (notably Sterling Lyon) however, continued to reiterate their total rejection of the idea.

The amending formula agreed to by the 8 was a revised and extended version of the Vancouver formula; ratification would require a vote by a majority of the members of the Senate and the House of Commons plus similar majorities by the members of at least two-thirds of the provincial legislatures, provided they represented provinces which in the aggregate possessed 50% of the Canadian population. Ratification of an amendment was to be secured within three years of initiation. There was a provision that the Senate's veto over constitutional change would be suspensive only; a proposed amendment could proceed if, after having passed the House once, it was presented

and passed again after an interim 180 days. Up to a maximum of three provinces would be allowed to opt out of any amendment derogating from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province. If a province decided to opt out of an amendment which would confer jurisdiction on Parliament, the Government of Canada would be required to provide "reasonable compensation" to the government of that province. Such compensation would take into consideration the per capita costs incurred by the exercise of that jurisdiction in the other provinces.

The consent of the Senate, House of Commons and the Legislative Assemblies of all the provinces would be required for amendments affecting: the offices of the Queen, the Governor General and the Lieutenant-Governors of the provinces; the right of a province to a number of members in the House of Commons equal to its present number of Senators; the use of the English or French language within the institutions of the federal government or nationwide constitutional changes respecting language; the composition of the Supreme Court.

Under the provincial plan amendments could be made to the following matters with only the agreement of the Senate and House of Commons and seven of the 10 provinces with 50% of the Canadian population: the principle of proportionate representation in the House; the powers of the Senate and the selection of members thereto; the number of members a province is entitled to in the Senate; matters concerning the Supreme Court of Canada other than its composition; the extension of existing provinces into the territories; the establishment of new provinces.
The provincial proposal also contained provisions for the delegation of legislative authority from a province or a group of provinces to the federal government and the reverse. Delegation could be in respect to either a whole matter of constitutional jurisdiction or merely a specific statute and any such delegation of authority could be revoked on two years' notice. There was also a provision that the order of government that acquired the right to enter a field of jurisdiction by the delegation process was also entitled to be provided with reasonable compensation from the other order of government for the exercise of that jurisdiction. This section was added primarily to appease the concerns of the federal government.

However, as this "constitutional consensus" of the eight provinces left out any mention of a Charter of Rights, and the amending formula still provided for wide-scale opting-out, it was rejected almost immediately by both Justice Minister Chrétien and Prime Minister Trudeau. The Premiers of Ontario and New Brunswick also indicated that the proposal did not merit their support. (49)

Meanwhile the all-party accord reached by the respective House Leaders had established a timetable which would have allowed some time for the Prime Minister to meet the Premiers during or after their meeting of 16 April and before the final vote in the Commons. When the Premiers heard of this agreement they indicated that the Prime Minister and the other Premiers supporting him were not invited to their 16 April meeting. They also said that they were not interested in meeting over the Easter weekend - before the House deadline for amendments on 21 April.

(49) Globe and Mail, April 17, 1981. (Of note is the fact that the amending formula accepted by the federal government some 7 months later was essentially the same one, while the Charter was included in its entirety.)
When their conference was over they left Ottawa. Nevertheless they reiterated their interest in a full federal-provincial meeting to be held while the Supreme Court considered the question over the summer. (50)

The federal government did not respond to this suggestion and, as mentioned in an earlier section, (51) both sides then began to prepare responses in anticipation of the decision. On September 28, 1981 the Supreme Court ruled. In a sense the court’s judgments contained something for everybody. All of the political protagonists concerned with the issue claimed that the court had supported their position. Justice MinisterChrétien indicated that the federal government would press ahead. (52) The Prime Minister, then visiting Korea, was of a similar mind but indicated a willingness to talk with the premiers. (53) The provincial premiers who could be reached for a response restated their previous positions. Ontario and New Brunswick wanted to press ahead, while all of the others suggested that the federal position had clearly been rejected by the court and that Ottawa should stop its unilateral action. (54) This latter position was supported by the Official Opposition. (55) The NDP made the only significant change. After a caucus meeting on the issue, Ed Broadbent indicated that he would withdraw his party’s support unless the Prime Minister would meet with the premiers in a spirit of accommodation. (56)

(50) Citizen, Ottawa, April 16, 1981.
(51) See Chapter IV, p. 161.
(52) C.B.C. Interview, September 28, 1981.
(53) Ibid.
(54) Globe and Mail, September 29, 1981.
(56) Press interview, September 29, 1981.
Immediately following the judgment, Premier Bill Bennett of British Columbia, acting as Chairman of the Premiers' Conference, began a whirlwind tour of provincial capitals to ascertain the reactions of his fellow premiers. He then communicated these reactions to the Prime Minister to see if there was the possibility for future compromise. This meeting was held on 13 October 1981, at which time the Prime Minister made proposals to be communicated to the other premiers and to be discussed at a premiers' meeting scheduled for 19 October. On that morning in a C.B.C. television interview the Prime Minister stated that Parliament would "finish up the constitution" before the end of the month, with or without a new deal with the provinces. The premiers reacted to this by saying that they would not meet with the Prime Minister until the first week in November. It is conceivable that a meeting would therefore not have taken place, had it not been for the pressure applied by the federal Opposition, (as discussed above) and by Great Britain (as discussed in the following section); the Prime Minister finally responded by inviting the premiers to attend a federal-provincial conference on the constitution on 2 November 1981. On behalf of the dissenting provinces, Premier Bennett agreed to the meeting at a news conference on October 30.

On the day before the Monday opening of the conference, each of the two camps held separate meetings to consider their negotiating strategies. The question for most observers was whether the federal side could come up with a compromise offer to split the "gang of eight" in order to form a larger consensus. The eight dissenting premiers proclaimed their desire to negotiate in good faith while at the same time maintaining their common front. The solidarity of the federal side also appeared to be intact.
The conference opened on 2 November in a televised session at which each of the participants read an opening statement. The Prime Minister indicated that he wished to be flexible and offered to allow a simple majority of the provinces to put an alternative amending formula to the people in a referendum. Premier Davis said that he was willing to forego Ontario's veto in the amending formula and New Brunswick's Richard Hatfield suggested that some of the disputed parts of the proposed Charter of Rights could be deferred up to three years and killed entirely if the six provinces opposed them. This was a coordinated attempt by the federal forces to start a movement towards compromise. The other premiers indicated their general desire for flexibility but their remarks emphasized their view of the "unconstitutionality" of the federal project as supported by the Supreme Court decision. The closed session that afternoon discussed the morning's offers but the deadlock remained. (57)

The mood on Tuesday, November 3 was not encouraging. Premier Davis, however, made a dramatic offer. He would agree to accept the eight premiers' amending formula with its opting-out provisions if they would accept the Charter of Rights. This did not seem to impress many premiers, who felt that they simply could not accept a full Charter of Rights. During the afternoon the dissenting premiers endorsed a counter-proposal which included a greatly scaled-down Charter of Rights. A delegation of Premiers Bennett, Lougheed and Buchanan presented this offer to Prime Minister Trudeau, who turned it down flatly.

At the Wednesday session Premiers Blakeney and Bennett each presented alternative methods of approaching a Charter of Rights but neither seemed to find much acceptance. Prime Minister Trudeau then

(57) This discussion of the November conference is based on information obtained from several sources, as well as material in Valpy and Sheppard, The National Deal.
made a startling offer. He would agree to hold a referendum in two years to decide acceptance of both the amending formula and the Charter. Premier Lévesque immediately accepted the challenge, sparking the short-lived Trudeau-Lévesque accord. This was the first real break in the solidarity of the gang of eight. But Premiers Davis, Hatfield and Blakeney were lukewarm to the idea, while the others were openly hostile to it, and by the end of the afternoon the talks appeared on the verge of collapse.

However, behind the scenes Justice Minister Chrétien, Saskatchewan Attorney-General Roy Romanow and Ontario Attorney-General Roy McMurtry had begun to devise a new counter proposal, the so-called "kitchen cabal". (It must be stressed that, as with much of what occurred during the conference, this proposal was the result of fortuitous accidental encounters and spur of the moment decisions.) This new accord involved a modified version of the premiers' preferred amending formula and a modified Charter. Wednesday evening, officials from Newfoundland, Saskatchewan and Alberta met in Premier Blakeney's hotel suite to refine the new proposal. Other dissenting premiers were consulted and brought into the new agreement and Ontario was consulted Thursday morning. Prime Minister Trudeau was then informed of the new proposal and after some initial hesitation he agreed.

At a breakfast of eight on Thursday morning the Manitoba and Quebec delegations were apprised of the proposals. Manitoba eventually approved, although with the caveat that it would seek the consent of the legislature, but Premier Lévesque was enraged and would not accept the accord.

After another closed door meeting of all 11 governments the proposal was accepted, with a few modifications, by nine provinces, (Quebec the exception), and by the federal government. At about
noon Thursday, 5 November 1981 the nation was told of the accord at the final televised session of the conference. The Prime Minister then left the conference centre to tell the House of Commons of the new agreement.

The Prime Minister and the nine premiers had agreed to immediate patriation of the British North America Act to Canada from London. They had also accepted the so-called Vancouver amending formula as presented by the eight dissenting premiers in April 1981. Under this formula there are three categories of amendments: some amendments require the unanimous consent of all provinces, others may be accepted with the agreement of seven provinces representing 50% of the Canadian population. However, on amendments affecting provincial powers, although seven provinces with 50% of the population might accept the amendment, up to three provinces would be permitted to "opt out". The accepted amending formula differed from the April consensus in two respects. A provision for financial compensation for provinces who would "opt out" of an accepted amendment was deleted, as was the proposal for the delegation of legislative authority from one level of government to another.

The Charter of Rights and Freedoms was generally accepted as written. The most significant change was the inclusion of "notwithstanding" (non-obstante) clauses covering the sections dealing with Fundamental Freedoms, Legal Rights and Equality Rights. This was to enable the federal or any provincial governments to expressly state that a particular provision of an Act would be valid, notwithstanding the fact that it conflicted with a specific provision of the Charter. However, any notwithstanding enactment would have to be reviewed and renewed every five years by the enacting legislature to remain in force. As was demonstrated in the preceding section, most human rights
spokesmen indicated that they did not consider the addition of the clause to be a serious problem, nor did they think it likely that it would be invoked often. Their main concern was that the Charter had remained relatively intact, and still binding on the provinces in general.

Two other clauses, one (s.28) on the equality of women and the other, (s.34), outside of the Charter, dealing with natives in Part II of the Constitution Act, were deleted, while Section 25 of the Charter guaranteeing that the rights and freedoms in the Charter would not abrogate or derogate from any aboriginal or treaty rights or freedoms, including the Royal Proclamation of 1763, remained intact. On the other hand Clause 34, in Part II, which specifically recognized and affirmed aboriginal and treaty rights, was deleted. Instead the accord stressed the intention of the signatories to invite aboriginal peoples of Canada to discuss matters affecting themselves at the next federal-provincial constitutional conference, which the accord required be held by April of 1983. Since experts had differed greatly in their interpretation of the potential implications of these 2 sections, and since natives themselves were still divided on whether or not to support them, it no doubt appeared to the federal forces to be a minor concession to make.

There was also a relatively minor change with respect to the mobility rights section. It was agreed to include “the right of a province to undertake affirmative action programs for socially and economically disadvantaged individuals as long as a province’s employment rate was below the national average.” Lastly, in a very dramatic move, the nine premiers also agreed to have the provisions of Minority Language Education Rights section apply to their provinces, a clear quid pro quo for the federal government’s concessions.
Premier René Lévesque was scathing in his rejection of the accord. Ironically he was most critical of his fellow premiers in the so-called "gang of eight", despite the fact that he himself had been the first to break ranks. The Quebec delegation's objection rested on three main points: the removal of compensation for provinces opting out of future amendments, the mobility clause which was felt would still permit more outside workers coming into the province than vice versa; and finally, the acceptance of the language provisions re: education, which was viewed as an effort to blackmail Quebec into accepting the unacceptable. Premier Lévesque argued that the new agreements would leave Quebec in its traditional position of isolation and that the results of this for the Canadian federation would be "incalculable."(58)

In the Commons, Opposition Leader Clark welcomed the progress shown by the accord but indicated that Parliament should have sufficient time to study the new arrangements and hopefully modify them in order to include Quebec.(59) Ed Broadbent, on behalf of the New Democratic Party, congratulated the premiers and Prime Minister on their accomplishment. He regretted the position of Quebec and hoped that his party would be able to support the accord.(60) The Prime Minister indicated that he was willing to delay submitting the final package to Parliament in order to talk with representatives of the

Quebec government, in the hope of finding some language that would meet that government's objections, as well as attempting to win the other nine premiers' agreement to reintroduce the clauses on women's rights and native rights as originally stated. (61)

However, by November 18 Premier Lévesque had emphatically rejected a number of suggestions offered by Ottawa, and three western provinces — B.C., Alberta and Manitoba — were still holding out against reinstating the native and women's rights clauses. Ironically, after the redrafted resolution was introduced in the House on November 19, 1981, these three provinces agreed to accept the equality clause, in no small measure due to the intense lobbying of the groups concerned, but Saskatchewan and Nova Scotia then expressed reservations. Fearing that the entire accord might fall apart the federal government hesitated to push further, but after the election of an N.D.P. government led by Howard Pawley in Manitoba, on November 17, and his subsequent acceptance of both the equality and aboriginal rights clauses, an understanding began to take shape. An agreement was finally reached between federal and provincial negotiators to remove the non obstante from section 28 (equality rights) and this amendment was passed by the House on November 24. Section 34 on aboriginal rights was also reinstated after the word "existing" had been inserted at the insistence of Premier Lougheed. This amendment was approved by the House on November 26. Passage of the entire package came on December 2, 1981 in the House, December 8 in the Senate, whereupon it was immediately referred to Westminster.

Thus we have seen in this section how the provinces were constrained in their role during this process by the decision of the federal government to shift the action to the Parliamentary stage. Some provincial premiers chose to appear in person before the S.J.C.C., a significant departure from tradition in itself, while others chose to press their case in Great Britain. Much of the time they were excluded from the central focus of activity, whether it was taking place in the parliamentary or committee forum. As a result, by the time they arrived in Ottawa for the final November 1981 conference, the parameters of the discussion had already been defined. While they were not the ones originally planned by Mr. Trudeau, (since promotional interest groups and backbench parliamentarians had already had a significant impact on his proposed Resolution), neither were they the ones outlined by the provinces at the September 1980 Conference. Indeed, nine of the twelve items they had identified at that time were not even on the agenda.

Nevertheless, it is clear that the provinces were able to obtain some concessions from the federal forces at the last meeting, notably with respect to the amending formula. At the same time, however, they also made major concessions, the most noteworthy being their acceptance with only minor changes of a fully entrenched Charter of Rights, which many of them had bitterly opposed, and of minority language education rights, of which the same could be said. As these issues had all been discussed at previous conferences, and at least one province had always been able to veto any potential agreement, it is reasonable to conclude that the shift in forum was a key factor in their acceptance this time. Moreover, as the following section demonstrates, without the input of Great Britain they might not have achieved even these concessions.
C. Great Britain

"The United Kingdom Parliament should be careful not to permit itself to become the agent of the Dominion alone or of the provinces alone."

-- Sir Kenneth Wheare

Even before the constitutional drama officially "opened" with the September 1980 conference the federal forces were scouting other potential members of the cast. It appears from various sources that the role originally envisaged for Great Britain was definitely a "bit part", a walk-on with no lines. That this did not prove to be the case is an example of how the play frequently escaped the control of its director and his assistants.

By shifting the drama from the executive federalism stage to the parliamentary one, the federal forces had hoped to neutralize to a significant extent what they perceived to be the counterproductive influence of the provinces in the constitutional policy process. As the previous section has suggested, they were in large measure successful in this during the parliamentary and committee stages. However, when the scene shifted to Great Britain, as it must have inevitably regardless of the forum used for negotiation in Canada, the federal forces could not exercise much control over the provinces, who were able to make use of this alternative arena to promote their position, as this section demonstrates. It also reveals that their cause was assisted, not only by the presence in London of representatives of several dissatisfied native splinter groups, but also by the clumsy way
in which the federal hierarchy handled negotiations with the British actors.

An earlier section has already dealt with the various meetings between the Prime Minister, External Affairs Minister Mark MacGuigan, Environment Minister Roberts, the Queen and Mrs. Thatcher which occurred in June 1980 and then again in October after the tabling of the Proposed Resolution.(62) Mr. MacGuigan said in an interview on his return that the British government expected the debate in Westminster to take no more than four days. The first hint of British opposition to the Canadian plan came shortly thereafter, when on October 8 Bruce George, a Labour backbencher, announced that he and several other MPs would try to block passage at Westminster unless native rights were guaranteed.(63)

The media in both countries quickly became involved in this aspect of the process as well. On October 10 an editorial in London's influential Daily Telegraph argued that London should resist Pierre Trudeau's attempt to have his package approved, while the Toronto Star in an article on October 14 hinted at a secret plan which Westminster had devised to deal with any recalcitrant backbenchers by extending its sitting hours, possibly to all-night sessions.(64)

Opposition activity in Britain began in earnest on October 16, 1980, when Bruce George invited the three national native groups from Canada to visit London to lobby against the existing patriation package. The same day Canada's High Commissioner in London, Jean Casselman Wadds, publicly advised provincial and other delegations planning trips to London that they should not expect much reaction or

(63) Globe and Mail October 10, 1980.
(64) Daily Telegraph, October 10, 1980; Toronto Star, October 14, 1980.
support.(65) Nevertheless on October 21 the National Indian Brotherhood announced that it had set aside $200,000 in federal funds to establish a permanent office in London and send a "native ambassador" immediately to lobby British MPs. By November 3 the leaders of all three native organizations had accepted Mr. George's invitation.(66)

Meanwhile several Canadian newspapers quoted an unidentified spokesman of the British government as saying that the Charter of Rights would complicate and delay passage at Westminster, and by the end of October the Parliamentary Secretary to the President of the Privy Council, Mr. David Collenette, informed the House that the British government had in fact "inquired" on the evolution of the Canadian constitutional proposal in view of the "alarmist" reports in the British press.(67) The same day the London Times announced that the British House of Commons Select Committee on Foreign and Commonwealth Affairs would examine the Canadian reform proposals; its mandate would be to "examine the relevance of the B.N.A. Act to the House of Commons and to make a report."(68) Committee Chairman Sir Anthony Kershaw indicated that the Committee would limit its investigation to "evidence on legal and constitutional responsibilities of this parliament" and would inquire on "no other matter."(69)

Then in early November Prime Minister Thatcher designated Lord Carrington, the Foreign Secretary, to deal with the Canadian proposal, and a meeting was held between Lord Carrington and a Canadian contingent consisting of Mr. MacGuigan, Jean Wadds and Reeves Haggan (Assistant Secretary, FPRO). Mr. MacGuigan subsequently met with Conservative House Leader Norman St. John-Stevas concerning the British parliamentary timetable and was advised that January or February of 1981 would be the most appropriate times to steer the proposal through Parliament. Liberal leader David Steel also met with Mr. MacGuigan at this time to assure the Minister of his party's support.

At the first meeting of the British Select Committee on November 12, 1980, representatives of native groups and agents for the provinces of Nova Scotia, Quebec, Saskatchewan and Alberta were present. (It is perhaps somewhat ironic that the British committee managed to be operational long before the Canadian SJCC began proceedings) However, Sir Anthony's remarks at the time indicated that the issue of native rights would not be examined, and that the provincial governments might not be allowed to make oral representations to the Committee. (70)

Undaunted, the provinces began to play to their British audience in earnest. Premier Lougheed had already announced that his government would ignore the SJCC hearings in favour of putting its case before the British Committee. (71) Meanwhile Saskatchewan's Alan

Blakeney, when questioned about the possibility, termed any move to withdraw Canada from the Commonwealth in the event of British rejection of the proposal "utter nonsense". (72) Then Premier Peckford of Newfoundland arrived in London on November 25 and gave a speech to the Canada-United Kingdom Chamber of Commerce the following day at which he warned that Ottawa was attempting to effect "a subtle but real demolition of the federal system" under the guise of simple patriation. (73)

Yves Pratte, the lawyer retained by Quebec for its court challenge, also visited London at this time to retain a London firm of solicitors, Simons & Simons, for the provincial government. The Quebec government evidently took the British role in the process extremely seriously from the beginning, charging its agent Gilles Loiselle with an ambitious lobbying campaign that included the distribution of a sevenpage position paper to all 635 MPs, 300 members of the House of Lords and leading political reporters and editors. Earlier a motion had been passed in the Quebec Assembly which not only condemned the federal initiative but also called on the British Parliament to reject the Proposed Resolution. (74)

In retaliation Ottawa once again dispatched Reeves Haggan to London, this time to remain as constitutional adviser for the duration. Two days later, on November 29, the governments of Newfoundland, P.E.I., Quebec, Alberta and British Columbia sent a joint brief to the

(74) Quebec National Assembly. *Debates*. November 21, 1980, p. 328. (The motion passed by a vote of 63-21, with all Liberal MNAs opposed.)
Select Committee denouncing Ottawa's position, and on December 3 a British constitutional expert testifying before the Committee, Mr. Geoffrey Marshall, suggested that the Proposed Resolution should not be sent to Westminster before the provincial court challenges were resolved in Canada. (75)

The media in both countries continued to give mixed reviews. However, there was now little doubt that behind the rhetoric the federal forces were beginning to perceive Great Britain's role as a more substantial one. When several Canadian newspapers, including the Globe and Mail, wrote that the Resolution would not be passed in the current British parliamentary session if it did not reach London by the end of February, Mr. Trudeau felt obliged to call a press conference to deny these reports. (76)

In Britain the debate continued to heat up. Mrs. Thatcher partially supported the Prime Minister in a statement on December 9, in which she said that the British government would handle a Canadian request for patriation "as expeditiously as possible and in accordance with precedent", but Anthony Kershaw indicated in an interview the same day that she was wrong if she "imagined that this could get through Parliament without very extensive debate." (77) He did, however, suggest that if the Tories invoked a three-line whip (the strictest


possible measure to ensure party discipline), they could easily win the eventual vote.

Meanwhile the Canadian High Commissioner to the U.K. continued to make representations on behalf of the federal government despite some earlier questioning of her status by some observers in Canada. (78) Addressing a meeting of the Commonwealth Parliamentary Association (C.P.A.) in London she dismissed the extensive lobbying being carried on by provincial and native groups by reminding her audience that the federal House of Commons is made up of freely elected members from every part of Canada and that it is in that forum that "great matters of state in Canada are discussed and determined." (79)

The same day, December 11, the British Select Committee terminated hearings. An encouraging note was struck in the House a few days later when Conservative MP Maxwell Hyslop argued that the Canadian Parliament was the only body legally competent to deal with patriation; in his view the Canadian provinces had no legal existence outside of Canada. (80)

However in a formal meeting with British officials a few days later the federal forces received distressing news indeed. Francis Pym, British Secretary of State for Defence, accompanied by his Private Secretary Brian Morbury, and Second Legal Officer John Freeland of the


Foreign and Commonwealth Relations Office, met in Ottawa with External Affairs Minister Mark MacGuigan along with Executive Assistant Catherine Anderson and Messrs. Gibson, Legault and Anderson of the Justice Department and F.P.R.O. The British contingent offered stern warnings to Ottawa that its package was in "appalling difficulties" in London and might not be adopted. Furthermore the British were dismayed at the prospect of dealing with the Canadian request before a definitive ruling from the courts. Mr. Pym personally informed Mr. MacGuigan that the British government did not know about the proposed Charter of Rights until October, and warned that the request and possible refusal or long delay by Britain could endanger bilateral relations and the future of the Commonwealth.(81)

All the provinces continued to apply pressure in London but at this point the two premiers who supported the federal proposal, Messrs. Hatfield and Davis, took the initiative. New Brunswick's Richard Hatfield travelled to London in January 1981. Speaking to the Diplomatic and Commonwealth Writers' Association on the 13th, he threatened that Canada would declare independence unilaterally, severing ties with the monarchy and Commonwealth, if London did not pass a request from the Canadian Parliament. On his return he briefed the Prime Minister on the "distressing" situation which he had found in London but Mr. Trudeau, while acknowledging that opponents of his package had found a sympathetic hearing in London from some MPs, remained confident that Mrs. Thatcher would push the package through.

(81) Information about this meeting was obtained in discussions with one of the participants.
Westminster with her parliamentary majority, and stated that she had agreed to use the three-line whip to ensure support. At the same time he rejected the suggestion that he personally present his case in London, arguing that such a move could be viewed as a concession by the provinces, and as a "vestige of colonialism" by Canadians. (82)

However at the end of a 10-day sojourn in England during which he met the Lord Chancellor, Lord Hailsham, and Attorney-General Sir Michael Havers, Ontario Attorney-General Roy McMurtry indicated that his impressions differed from those of the Prime Minister. He warned that in his view swift approval by Westminster was no longer assured, and that referral of the package to the Supreme Court in Canada was necessary to expedite matters. (83) Although his remarks were subsequently downplayed by Premier Davis, who reiterated his firm commitment to the federal plan, it was becoming increasingly clear that storm clouds were on the British horizon. It was in this context that Manitoba Premier Sterling Lyon's statement in London on January 29 that Ottawa's proposal would lead to a presidential system of government received a more respectful hearing than one might otherwise imagine. (84)

Meanwhile Sir Anthony Kershaw, visiting Canada to attend a conference in Edmonton, revealed in an interview that his Committee would advise rejection of Mr. Trudeau's resolution unless more substantial support from the provinces could be demonstrated. The following

(83) Ibid., p. 220.
day the Kershaw Report was released in London. Following are the most pertinent recommendations:

3. The UK Parliament's powers in relation to the Canadian constitution can be reconciled with Canada's sovereign independence only if they are exercised in accord with constitutional requirements [para. 86].

4. It would be in accord with the established constitutional position for the UK Government and Parliament to take account of the federal character of Canada's constitutional system, when considering how to respond to a request for amendment or patriation of the Canadian constitution [paras. 83, 113].

6. It would not be in accord with the established constitutional position for the UK Government and Parliament to accept unconditionally the constitutional propriety of every request coming from the Canadian Parliament [paras. 74, 96].

9. Where a requested amendment or patriation would directly affect the federal structure of Canada, and the opposition of Provincial governments and legislatures is officially represented to the UK Government or Parliament, the UK Parliament is bound to exercise its best judgment in deciding whether the request, in all the circumstances, conveys the clearly expressed wishes of Canada as a federally structured whole [para. 114].

10. In those circumstances, it would be proper for the UK Parliament to decide that the request did not convey the clearly expressed wishes of Canada as a federally structured whole because it did not enjoy a sufficient level and distribution of Provincial concurrence. But Parliament would be justified in regarding as sufficient a level and distribution of Provincial concurrence commensurate with that required by the least demanding of the formulae for a post-patriation amendment (similarly affecting that federal structure): which have been put forward by the Canadian authorities: see para. 114-(85)

Needless to say this was perceived as a serious impediment to the federal government's plan, and the federal government did not waste

any time in replying to it. Early in March a major publication, The Role of the United Kingdom in the Amendment of the Canadian Constitution, was widely distributed under the auspices of Justice Minister Chrétien, who explained in the preface that as a result of the confusion and attention created by the Kershaw Report,

I have therefore had this background paper prepared for the information of members of the Senate and House of Commons of Canada, and for Canadians generally, that they may better appreciate the respective responsibilities in this important process of the Parliaments and Governments of these two sovereign Commonwealth countries. (86)

The document contained numerous references to the "inadequacy of evidence" which had been presented before the Kershaw Committee and the threat of "interference with Canadian independence" which it provided by its recommendations. In fact the Canadian response did not hesitate to attack the report on all its aspects and conclusions:

78. Unhappily, many of the Report's conclusions advise the Government and Parliament of the United Kingdom to respond to the proposed Canadian request for amendment of the Canadian Constitution in ways that would constitute intolerable interference with the internal affairs of "an independent and sovereign state". To appreciate the extent of intervention in Canadian affairs that would occur if the Committee's advice were heeded, one has only to consider a few of the responsibilities that the United Kingdom Parliament would be called upon to undertake:

Even if one accepted the Committee's view that a request of the type proposed must be shown to meet "the clearly expressed wishes of Canada as a whole, bearing in mind the federal character of the Canadian constitutional system", it is the Parliament of Canada, with a membership drawn from all parts of the country, and the constitutional responsibility for Canada's relations with the rest of the world, which is best suited to convey to the United Kingdom "the clearly expressed wishes of Canada as a whole".

(86) Ottawa, Department of Justice, The Role of the United Kingdom in the Amendment of the Canadian Constitution, p. i.
Even if the Kershaw Committee were correct in its mistaken belief that the Constitution of Canada requires a measure of provincial concurrence before the Parliament of Canada can properly approach the United Kingdom Parliament to request a constitutional amendment "significantly affecting the federal structure of Canada", the requirement would not apply to the proposal currently under discussion, because, as has been explained earlier, that proposal, when implemented, will not affect the "federal structure" of Canada in any way that would be detrimental to the provinces.

81. It was pointed out earlier that any flaw in the Kershaw Committee's chain of reasoning would invalidate its conclusions. It is submitted that many such flaws have been demonstrated by the preceding paragraphs. Indeed, every major component of the Committee's position can be shown to be mistaken. (87)

Meanwhile in the early months of 1981 a rather ludicrous series of exchanges between British and Canadian officials began. It originated with newspapers in London reporting upon release of the Kershaw Report that, according to "high British Government sources" and contrary to assertions by the Trudeau Government, the British Government had never formally undertaken to support a Canadian constitutional package that included a charter of rights and freedoms - or any package that lacked broad provincial and public support in Canada. (88)

Then on February 2 External Affairs Minister MacGuigan said in a television interview that he had written assurance from Prime Minister Margaret Thatcher that Canada's constitutional package would be presented to the British Parliament, even though her Government might be unhappy about it being larger than expected and opposed by most provinces. Sources close to Mrs. Thatcher then said that they had "no collective recollection of written assurance." (89)

(87) Ibid., p. 11.
(89) Ibid. February, 1981.
However in Britain Prime Minister Thatcher reiterated that "a request from Ottawa for patriation will be dealt with as expeditiously as possible in accordance with precedent and in accordance with the law."(90)

In another development on the British scene a series of accusations came to light in early February concerning the role which the U.K. was playing in Canada. On February 5, in an exchange in the House of Commons, NDP Leader Ed Broadbent accused the British High Commissioner to Canada, Sir John Ford, of "inappropriate activity" in lobbying two NDP Members of Parliament, warning them that the constitutional proposals might not get immediate approval. In reply External Affairs Minister MacGuigan quickly promised to investigate the allegations which, if true, "would be conduct completely unacceptable to the [Canadian] government."(91)

Two hours later, the High Commissioner called a press conference and warned publicly that the Canadian Government's constitutional proposals could run into serious trouble when sent to the British Parliament for final approval. He also defended his actions as being well within the bounds of normal diplomatic activity. However, this particular tempest in a teapot ended with a victory for the federal government when an announcement followed that the High Commissioner was being recalled to London on the pretext of an early retirement.(92)

In London the Times referred to Sir John as the "first casualty of the patriation crisis." It continued with pointed references to the importance of Canadian-British relations and concluded:

"Canadian political nerves are exposed just now by an approaching constitutional crisis, and it has to be presumed that an announcement of the high commissioner's withdrawal is the application of a little ointment.  
Mr. Trudeau is causing the British government anxious embarrassment by his insistence on presenting proposals that are so widely opposed in Canada and may come unstuck at Westminster."

...It would be tragic if this intensifying disagreement were to bring about a rupture in the normally cordial dealings between the two closely related nations and partners in the Commonwealth.(93)

Similarly the Daily Telegraph, while avoiding any direct reference to the Ford debacle, concluded in an editorial that:

...it will seem to many people in this country extraordinary that we should have drifted so silently towards what now threatens to become a major constitutional crisis. The wisest Canadians have always cherished the British connection and the link with the Crown.(94)

Meanwhile an all-party group of British MPs had formed an unofficial committee and offered to hear both natives and provincial intervenants. Native groups in particular took advantage of this opportunity to continue to press their case.

Little more of substance was heard from Britain on the matter over the summer as it had increasingly been classified by government officials as a Canadian affair; they then declined any further comment until a request was actually received from Ottawa. However Anthony Kershaw did have an opportunity to reply to the Canadian government's attack on his Committee's report in the July 1981 issue of The Parliamentarian. Referring to Ottawa's document as "highly unusual though perhaps not unique" he then indicated that his Committee had issued a supplementary report which stood by every word of the first report in rebutting criticisms made by the Canadian report. Perhaps his most important comment was found in the conclusion, when he clearly reflected the increasing sense of relief which the British actors felt after the Proposed Resolution was referred to the Canadian Supreme Court:

Whether or not the request for patriation of the Canadian constitution is received in the United Kingdom in the next few weeks (this article is written in mid-May) seems now to depend on the ruling of the Canadian Supreme Court. Although the decision of that Court would not be binding on the British Parliament from a constitutional point of view, from a political and practical point of view it seems highly unlikely that, if the Supreme Court ruled for Mr. Trudeau, the British Parliament would refuse his request. This seems a situation eminently desirable to the U.K. Parliament, which would then no longer be placed in the invidious position of deciding, in effect, between the widely different and apparently irreconcilable viewpoints of the Canadian federal Government and (now) eight of the ten provincial Governments. (95)

Thus it was clearly as much of a disappointment for the British government as for Canadians to learn of the complex and ambiguous decision handed down on September 28. A spokesman for the Foreign Office told reporters, "We take note of the decision, but we cannot say any more until a formal request is made. Until then it remains a purely internal Canadian matter." Prime Minister Trudeau in a press conference in Seoul, South Korea, told reporters he was going to consult Mrs. Thatcher at the Commonwealth Conference in Australia later in the week, but he also stated that he was sure that Westminster would pass his resolution because the Supreme Court decision "clearly indicates there is no legal barrier to London acting."

One British government official who was willing to speak to the press anonymously stated that:

The Canadian government wants to get it out of the way for perfectly good Canadian reasons. The U.K. government wants to get it over with as quickly as possible because it knows it will be difficult, but it knows it must do it. (96)


Then on October 1 four British MPs arrived in Canada on a fact-finding mission. Conservative backbencher Jonathan Aitken estimated Trudeau's chances in Westminster as six to four, stating that:

... this week's Supreme Court decision on the constitution "significantly reduces the chance of the Trudeau package getting through the Westminster Parliament. Since we in our Parliament have a very high regard for the importance of constitutional conventions, I think at the very least the changes of getting it through have been decreased and the chances of a great deal of pretty intense argument have substantially increased.

It is the most fervent hope of every MP in Westminster that this whole matter can be resolved in Canada and will not come to us in any but a purely agreed form.... We want to do what Canada wants.(97)

Thus despite a fairly strong assurance from Mrs. Thatcher in Australia that she would continue to push for passage of the package, what could only be termed the lukewarm audience awaiting his script in London was at least partly responsible for the decision of Mr. Trudeau and the federal forces to negotiate one last time with the provinces.

When an agreement was finally reached in November 1981 and approved by Parliament in early December the collective sigh of relief from Britain was almost audible in Ottawa. Lord Carrington gave his blessing immediately, while the Queen announced that she planned to visit Canada "early in 1982" to participate in patriation ceremonies.(98) This was something of a deviation from her traditional apolitical role, since it implied that she anticipated Westminster would quickly pass the legislation once introduced.

(97) Ibid., October 2, 1981.
Although the British Commons and House of Lords were indeed widely expected to endorse the package some pockets of resistance remained. Certain Labour MPs as well as a handful of members of the Lords continued to express concern over the issue of aboriginal rights, and to a lesser degree the refusal of Quebec to accept the accord. Meanwhile Anthony Kershaw announced at an informal briefing session that his committee would table a final report to Parliament "before the patriation legislation is debated."

Sir Anthony assured members of the Commonwealth Diplomatic Writers' Association that his committee had not reconsidered its opinion that Britain no longer had any responsibility regarding the native rights issue. Nevertheless representatives of those Canadian Indians still opposed to the package announced on December 18 that Conservative MP Sir Bernard Braine would introduce a petition on their behalf in the House on December 22 when the Canada Act was tabled.

At this point a British court ruling of December 9 had already denied the Indian Association of Alberta a judicial hearing on their claim that the British government was still bound by old treaties, but on the same day the Canadian package was tabled the British Court of Appeal announced that it had overturned the lower court decision and would hear the Indians' case February 1-2. In announcing the court's decision Master of the Rolls Lord Denning stated that "this isn't the sort of thing that we ought to rush through" and Mr. Justice Sir Sebag Shaw was quoted as saying that it would be "cavalier" to deny the natives a chance to state their case.

The Canada Bill was nevertheless introduced in the House of Commons as planned by the Lord Privy Seal, Humphrey Atkins, and

received automatic first reading before Members recessed for the Christmas break. Second reading had originally been anticipated to follow within a few days of Parliament reconvening on January 18, but a letter from René Lévesque to Prime Minister Margaret Thatcher requesting suspension of debate until the Quebec appeal on its veto right was heard by the Canadian courts put a crimp in these plans, as did a letter to Thatcher from Labour MP Bruce George requesting a delay in debate until the Court of Appeal could rule on the Indian claim.

As a result Mrs. Thatcher spoke with Prime Minister Trudeau by trans-Atlantic telephone in late December 1981, informing him that Westminster would be unlikely to approve the package before mid-April of the following year. (This further delay upset the federal government's plans for patriation celebrations in mid-February, just when the long-awaited Heritage Day holiday appeared to be an imminent reality.)

Both the British and Canadian governments were unhappy with this unexpected delay, and early in January lawyers representing both petitioned the Court of Appeal to advance its hearings. On January 12, 1982 the Court announced that it would begin hearings on Thursday January 14 for two days, with the following Monday set aside for an additional day of deliberations if necessary. Meanwhile Mrs. Thatcher replied to Mr. Lévesque's request for delay in a negative fashion, stating that as a result of the September Supreme Court decision:

I am satisfied that the existence of further legal proceedings of the kind to which you refer is entirely a Canadian matter. I therefore do not think that it would be appropriate to suspend action on the Canada Bill in the way that your letter requests.(101)

Then, on Monday January 18, the Select Committee tabled its third and final report in the Commons, giving the green light to Westminster's passage of the Canada Bill. It concluded that "It would be proper for the U.K. Parliament to enact the proposals, notwithstanding that they will affect the powers of the Canadian provinces and are dissent from by ... Quebec." It continued:

That dissent may have significance for the welfare of Canada. However, that is a matter of political judgment and not something which should concern the U.K. Government and Parliament. (102)

With regard to native rights it reiterated:

The fact is that Indian rights and affairs have been an exclusive responsibility of the Canadian Government and Parliament for generations... For at least 50 years the U.K. ... has lacked even residual constitutional authority to intervene in relation to those rights or affairs. (103)

On January 27th the Court of Appeal decisively quashed the native attempt to block passage of the Canada Bill, and debate resumed on the package on February 17 with Justice Minister Chrétien looking on from the gallery. Introduced by Humphrey Atkins, who referred to the situation as "an anachronism totally out of keeping with Canada's place in the world today", (104) the Government made known immediately its preference that no amendments be passed at any stage. In reply the chief Opposition spokesman, Denis Healey, indicated that he would support the Canada Bill in toto but that he wished to ensure a full


(103) Ibid., p. vii.

airing of views regarding certain aspects of it. Referring to the issue of native rights he stated that there appeared to be little agreement among natives themselves, but that nevertheless many members wished to express their concern.

Mr. Atkins is right - it should be passed as it stands. If it were to be amended, that could open a major constitutional crisis between the British and Canadian people. But it is right to ventilate many of those concerns in the hope that the authorities in Canada will take some account of the views. (105)

At the other extreme maverick Labour MP Bruce George stated that "Canada's treatment of native people makes ... South Africa seem almost liberal", and urged against passage. (106) But after a six-hour debate in which all four major parties officially supported the bill the House gave approval in principle by a vote of 334 to 44 and referred it to committee of the whole, where debate resumed February 22nd. Although 59 amendments were proposed by 13 MPs, the Conservative government reiterated its intention to block any attempts at altering the Canada Bill. However, the opposition managed to extend debate to the point that the Bill had to be set aside for another day of debate the following week.

Having heard the Canadian federal and provincial governments accused of "treachery" and "genocide" against Canadian natives, spectator Justice Minister Chrétien refused comment, stating that "I will not comment on British affairs because I don't like people commenting on Canadian affairs." (107) He then met with Francis Pym to learn

(106) Ibid.
the British time table for resuming debate, before flying back to Ottawa to report to the Prime Minister. The latter indicated his ire over British comments in a press conference by telling reporters that he had been "biting his lip very hard" and would "continue to bite it until it (the Canada Bill) is passed."(108)

Debate resumed in early March, with third reading beginning after the bill's return from committee. On March 8, after 19 hours of debate over a four-day period, the House gave final approval to the bill by a vote of 177 to 33. At one point during the debate Independent Labour MP George Cunningham, who supported the package, referred to the delay as a "boundless presumption, a characteristic which has marked the English throughout the centuries", while Sir Bernard Braine criticized the haste with which the package had been dealt, warning that Britain would be judged "at the bar of history" for its "blind act of expediency."(109)

In the Lords the number of peers wishing to speak to the Canada Bill surprised many observers, but all parties officially supported the package. Debate was opened March 18 by Lord Carrington himself; who urged his colleagues to "be realistic and not be overly concerned with the residual controversy surrounding this bill."(110)

Apart from an attempt by the Earl of Gosford to introduce the issue of native rights during debate on third reading the Lords paid attention to Lord Carrington's admonition and the Canada Bill received final

(109) Ibid.
parliamentary approval on Thursday, March 25. "This is an historic and happy moment", said Lord Trefgarne, mover of the third reading motion, but the final word was left to Lord Morris, who observed that the entire debate had at least been beneficial in educating the British parliamentarians about Canada. "Many now know not only where Saskatchewan is - they know how to spell it."(111)

On March 29 Lord Hailsham announced in the Lords that the Queen had given Royal Assent, thus ending Britain's last colonial link with her former colony. But in an ironic conclusion to this last act, the Queen personally proclaimed Canada's new Constitution in Ottawa on April 17, 1982; a three-day visit including several gala events was organized by the protocol personnel of the Secretary of State Department to complement the royal proclamation ceremony.

It was reported that originally plans had been made to have Governor-General Ed Schreyer formally proclaim Canada's new Constitution, a move more in keeping with both the concept of ultimate Canadian independence and Mr. Trudeau's personal preference to de-emphasize the monarchy. The decision to invite the Queen may have been partly the result of Mr. Schreyer's highly-publicized remarks on his role in the process,(112) but it also appears likely that monarchist forces, including certain of the provincial premiers, also played a role in this decision to include a British actor on stage for the final curtain call.

Thus it is clear that Great Britain, too, played a greater role in the constitutional process than the federal government had originally anticipated. The decision to shift the forum for constitutional negotiation from executive federalism to Parliament, while it did achieve to a large extent the primary objective of limiting the input of the provinces, also produced a number of unanticipated consequences and contributed to the alteration not only of the federal timetable but also of the ultimate nature of the Resolution. Essentially because of British resistance, combined with the urging of the federal Opposition, the provinces were given one last chance in November 1981 to have an effect on the final outcome.

Conclusion

This discussion of the role of promotional interest groups, provinces and Great Britain in the constitutional process of 1980-82 has concentrated on highlighting the inputs which each made and the relative effect and/or success of those interventions. Both the interest groups and Great Britain were new actors on the constitutional scene, and both have been shown to have had a significant effect on the final outcome, the former with respect to content and the latter with respect to the process. By contrast neither is traditionally considered to play an important role in the general Canadian policy process or the constitutional process as described in the literature.
Similarly, the provinces played an appreciably different role in this process than had come to be expected. Whether appearing before a parliamentary committee, lobbying in Britain, appealing to the judiciary or meeting with counterparts to devise alternate proposals, the provincial premiers were participating in the drama in a number of new modes which may or may not be repeated in future negotiations. Even when the executive federalism format was resurrected for the final scene, in November of 1981, it was conducted from a different perspective. With a lengthy parliamentary process and a judicial decision indicating legal if not moral justification for his proposal behind him, the Prime Minister was in a position to state that the conference was a "do or die" last-ditch attempt, and that he could and would proceed unilaterally -- either directly to Britain or with the referendum option -- if the meeting failed to achieve a consensus. In short, the rest of the process had provided him with unprecedented legitimacy and leverage at the federal-provincial bargaining table.

As a result the premiers were forced to negotiate from a position of relative weakness which, as the discussion above demonstrates, brought out all the inherent conflicts among the eight dissenting provinces and allowed a new accord to be forged with relatively minimal concessions on the part of the federal forces. The Charter, for example, remained basically intact and binding, unless a province risked using a politically charged non obstante clause. While the provinces achieved some measure of success with respect to the amending
formula, this must be weighed in contrast with their failures regarding natural resources, and the other nine items on their original twelvepoint shopping list, which were never even discussed during the entire process.

Finally, neither Quebec nor any of the western provinces were able to simply exercise a veto and bring the entire process to a standstill, as they had done in previous constitutional negotiations focussed on the executive federalism format. In the end, despite Quebec's absence from the accord, the constitutional package was approved and the Constitution Act, 1982 proclaimed. This alone is perhaps the most telling evidence of the way in which this policy process deviated from the traditional norms.
"There is nothing more difficult to arrange, more doubtful of success, and more dangerous to carry through, than initiating changes in a State's constitution." -- Machiavelli, The Prince.

The constitutional process of 1980-82 appears to exemplify a qualitatively different type of policy process from that which is traditionally described in the literature, thereby confirming the hypothesis outlined earlier in Chapter II. First and foremost, it was successful. Moreover, it was successful because, at the national level, the role played by Parliament and interest groups in the policy process was greatly expanded, while at the federal-provincial level the executive federalism format, traditional to the constitutional policy process in particular, was effectively excluded from most of the debate.

First, at the national level, each of the actors involved played a substantially altered role from the one which the literature has led us to expect. The Prime Minister, frequently an aloof executive producer concerned only with the determination of the broad policy priorities of his government, personally wrote and attempted to direct the play. (Although as we have seen he was frequently
frustrated in this endeavour.) Second, there is very little evidence of bureaucratic input in terms of direction; rather, senior mandarins appear to have lost out at almost every stage of policy formulation, with their participation limited to assisting in the implementation of the plan. Proponents of the languishing "topdown" theory should find some comfort in this example, which so eloquently belies the image of the increasingly influential bureaucracy described in the literature review in Chapter II.

Similarly, the role of the backbench parliamentarian in the constitutional process provides evidence to counterbalance the "decline of legislatures" theory of executive government. The analysis of the parliamentary phase in Chapter IV reveals the strategic successes which federal Opposition members achieved regarding changes to the timetable and process which had been proposed by the federal government. The establishment of the Special Joint Committee, televising of the hearings, extended debate and concessions on procedure and content, as well as referral to the Supreme Court, were all victories of the Opposition over an extremely reluctant government. That this was accomplished despite the large government majority is even more striking.

Obviously an argument could be made that the case was a uniquely compelling one, with the federal government desperately trying to achieve at least a facade of parliamentary consensus. Nevertheless both Opposition and Liberal backbenchers learned that their input could be effective, and that strategic ploys such as the use of the House as
a public forum for negotiation and procedural tools such as the filibuster could assist them. Certainly these tools could be used again, albeit sparingly. In fact, the "bells" affair of March 1982 over the government's energy package was just such an example.

At the same time the role of government backbenchers and the Opposition in the Committee phase is highly significant. The Committee managed to steal the spotlight from the director and his assistants for a considerable period of time. Liberals as well as Opposition members demonstrated a certain reluctance when it came to the federal timetable, and the lines of questioning of certain Liberal members demonstrated that not all of the actors were sticking to the script. In the end the package which left the SJCC was substantially altered; evidence of renewed parliamentary importance in the policy process, this time via the committee mechanism, and of the unanticipated consequences of the shift from the executive federalism forum.

The very fact that the judiciary became involved in the drama at all can also be viewed as a deviation from the traditional process, at least since World War II. Despite Mr. Trudeau's reluctance, the Supreme Court did in the end have a role to play, and in his own words the eventual decision was a "turning point" in the process, if not a dénouement. By returning the issue to the political stage, with the strict admonition to pay more attention to the conventional niceties, the judiciary not only affected the mindset of the final negotiations between Ottawa and the provinces but at the same time steeled Opposition and British resistance to the federal script. The court's
role may be particularly ironic in view of the fact that the constitutional proposal it examined provides for increased judicial input to the political system, by means of judicial review of the entrenched Charter.

Perhaps the most noteworthy divergence from the norm of the policy process at the national level can be found in the role which promotional interest groups played. Rarely if ever have so many interest groups involving so many Canadians been given the opportunity to express their views in the midst of the policy process; rarely if ever have their views been so demonstrably effective in altering proposed legislation. The original proposal which was referred to the SJCC was exposed to public criticism in a model forum of participatory democracy. Furthermore, the correlation between groups’ recommendations and actual changes is extremely high. The groups for the most part declared themselves to be more than satisfied with the final product; while the federal forces acknowledged the valuable, if unexpected, role which the groups had played in improving the overall quality and in communicating the concerns of their specific clientele.

All of these actors, therefore had a direct input into the process, which would normally have been reserved for the provinces through the executive federalism format. But even more important, at the federal-provincial level, there is also ample proof of a significant deviation from the executive federalism approach described in the literature on the policy process. The eight provincial premiers opposed to the original package effectively precluded the institution of
executive federalism from the policy process by their non-conciliatory actions in September 1980. Subsequently they demonstrated little concern for the possible repercussions of their refusal to compromise, and then as individual actors they played unfamiliar roles during the marathon one and a half years of negotiation. For much of this period they continued to insist on their particular interests despite the consequences, but in the end they were forced to make significant concessions or risk a settlement in which they had played only a minor role.

Having been effectively displaced as the focus of negotiation, they were forced to participate in the process on the federal government's terms. Taking into account the fact that, as a result, there was absolutely no discussion of 10 of the 12 issues raised by the provinces in September 1980, the achievement of patriation, an amending formula and a Charter as a result of the November accord appears in quite a different light. True the federal proposal did not emerge intact, but it was certainly not the provinces who were primarily responsible for this. Rather it was Parliament and interest groups who effected most of the changes in the original proposal.

To date, most of the literature on the 1980-82 period has concentrated on the final product rather than on the process. (1)

Furthermore, what little work has been done on this constitutional process has either not dealt with the role of executive federalism or has discussed it only peripherally. Sheppard and Valpy's *The National Deal*, for example, is a straightforward journalistic narrative of events which makes little attempt to analyse or assess. In their final chapter, which comes closest to providing an interpretation, they nevertheless conclude that the Prime Minister "succeeded in narrowing the final agenda to his preferred items and was able to winkle out a compromise he could live with," describing him and the premiers as "petulant, intransigent" negotiators whose confrontational style makes it "unlikely that any government will have the will to take up the rough issues again for years to come."(2)

Similarly, McWhinney's *Canada and the Constitution, 1979-82* is basically a chronological account of the events, placed in historical perspective and somewhat coloured by the author's stated dislike for the federal approach in general and unilateral action in particular. Nevertheless, and interestingly enough given the fact that he downplays the role of special interest groups in the committee stage,(3) he does concede the importance of the role of special interest groups in reversing some of the changes requested by the provinces at the November accord. He also refers to the dissenting provinces as having "quite disparate, often directly conflicting

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interests," entering too easily "into a common front" from which only a "Pyrrhic victory" would ever have been possible, and suggests that in future constitutional reform should be subject to even greater participatory democracy since the issues are too important to be left to the provinces.\(^{(4)}\)

On the other hand, Savoie's recent article on first ministers' conferences is based on the unstated premise that the executive federalism format was seriously undermined, if not delivered a death blow, by the constitutional process.\(^{(5)}\) In their recent book on the product and the process, Banting and Simeon's And No One Cheered, there are similar unstated premises throughout. Although this book also does not focus exclusively or even significantly on the future of executive federalism or its role in the process, it does provide some support for the hypotheses presented in this study. In particular, the concluding chapter stresses the confrontational mindset which dominated the executive federalism efforts and its possible effect on future change. "Public distaste for constitutional wrangling is deeply entrenched," they conclude, and the difficulties of amending under the new formula "undermine what little political incentive remains on any side to re-open debate." While they fail to predict the federal government's determination to proceed with "Phase II", including Senate reform, they do recognize that "the federal government emerged with its

\(^{(4)}\) Ibid., pp. 118-124.

own powers intact, and can be expected to test their limits -- both political and legally -- as it seeks to restore its power and authority in the federal system."(6)

Since the accord Alberta Premier Lougheed has attempted to sell the constitutional accord to his constituents by stressing that Alberta "won" over the feds by imposing the amending formula, the word "existing" in the aboriginal rights clause and the non obstante clause on the rest of the participants. Meanwhile Quebec's René Lévesque has flown flags at half-mast, draped everything in black and personally led a protest rally in Montreal on the day of the proclamation, while Premier Brian Peckford of Newfoundland called and won handily an election on the issue of his opposition to the federal position on off-shore resources, an item which Mr. Trudeau had refused to "barter" for a charter of rights during the constitutional negotiations.

Although the New York Times applauded the accord of November 1981 as proof that the democratic process works, few participants or knowledgeable observers would say they believed the outcome to be an improvement over the package which had been referred to the Supreme Court, primarily because of the amending formula. On the contrary, most talked of the new accord as the result of political pragmatism, a "realistic" document, the best that we could hope for and a "reasonable compromise" in the face of "substantial" disagreement on basic issues.

The hostility generated by the lengthy wrangling has already spilled over into the areas of energy policy and fiscal cost-sharing arrangements. There is little evidence of a cooperative mindset or a consociational approach to the resolution of continuing areas of federal-provincial concern, and in fact the Prime Minister subsequently announced that "cooperative federalism is dead."(7)

As a result it is not difficult to conclude that this policy process was in fact quite different from the way in which the traditional literature has described it, both at the national and the federal-provincial levels. However, it is less clear what this may mean for the way in which the federal government formulates policy in the future. Possibly this case will prove to be a sui generis one, having few, if any specific implications for the policy process in general. Alternatively, it might represent a milestone in an ongoing evolutionary process -- a logical extension of previously existing trends -- or, finally, it might prove to be a totally new departure which has far-reaching consequences. Obviously only time will tell which of these views is the most accurate. However, in general a greater degree of consultation at the federal level and confrontation at the federal-provincial level does seem inevitable.

Based on recent developments, one could further speculate on the implications of these two trends. First, within the federal level, there appears to be significant movement in the direction of expanded consultation, resulting in a greater role for some of the actors. Certainly the constitutional process alone is not responsible for this trend. This approach was being recommended by such insiders as Tom Shoyama and Ian Stewart on economic issues some time ago.(8)

but for all practical purposes it was abandoned after the A.I.B. experience. It took renewed debate on the constitution to bring about a broad participation of voluntary groups in the policy process, and to remind the federal government of their possibilities.

Since both sides increased their credibility during the process, it is possible there will be a greater willingness on the part of government to consult with groups and a greater willingness on the part of interest groups to participate, believing now that their input can have an effect. Moreover the successful experience of the women's and natives' groups in reinserting certain guarantees after their removal from the November accord, by exerting pressure on the provincial governments responsible, may mean that these groups will opt for increased participation at the provincial level as well. Certainly in the area of human rights one can expect much overall activity due to the heightened consciousness of various groups, their familiarity with the Charter and their new perception of the watchdog role they can play vis-à-vis its implementation. Similarly the perceived success of the particular interest groups involved in this process will undoubtedly encourage other groups in other sectors to participate in the policy process in areas relevant to their specific interests.

It is also very possible that the frequently called-for upgrading of parliamentary committees may occur as a result of the positive exposure which that mechanism received during the constitutional debate. Once again the idea is not new but certainly gained momentum as a result of this process. The subsequent attention and positive reaction which various other special committees, such as the Task Force on Federal-Provincial Fiscal Arrangements, have received in the
political arena tend to support this view. Herb Breau, chairman of the above committee, is an enthusiastic supporter of the committee mechanism, particularly if it is refined to provide greater member specialization and better support services. This too is not a new idea, but one which did not capture the imagination of the government before the great popularity of the SJCC. The current process of parliamentary reform being conducted by the House Committee on Rules and Procedure has already indicated its intention of dealing with the entire question of parliamentary committees in a future report.

Richard Simeon also foresees that the federal government may perceive a political utility in employing the committee mechanism more often, in an effort to circumvent the provinces. In fact, he predicts that the process in future will combine expanded roles for both interest groups and parliamentary committees, as has been argued above:

That may well be accompanied by political action to mobilize interest groups to focus on Ottawa as the centre of national decision making. The model here may be the Joint Senate-Commons Committee which examined the government's constitutional Resolution. The shift from the federal-provincial arena to the parliamentary one was dramatic. Not only were the participants different, but so were the issues and arguments they raised. In the former, the issues focussed almost entirely on questions of the implications for the power and influence on the various governments. In the latter, such questions were almost entirely ignored. The parliamentary committee became the focus for hundreds of interest groups, very few of which discussed the Resolution in terms of its

implications for the provinces and the federal system. Few challenged the legitimacy of the federal action. Instead, by coming to Parliament and by demanding, in most cases, that the Charter of Rights be strengthened and expanded, they legitimized the federal action even as they criticized its content. Moreover, the platform which the televised committee hearings provided demonstrated that there was a large constituency in the wider public which wished to participate in constitutional discussions. Ironically, the federal government had been reluctant to hold lengthy hearings or to permit televised committee proceedings, but the result may well be not only to change the politics of constitution making but also to encourage Ottawa to use the vehicle of Parliament and its committees and task forces to establish closer links with various groups and interests, and to undermine the provincial claim of regional representation.(10)

A shift in the balance of power in the policy process towards these actors may result in a concomitant decrease in the input of other participants, notably federal bureaucrats. As there is no consensus on the importance of this group of players in the past it is difficult to demonstrate a change, but since the achievement of the accord in November 1981, at which Mr. Trudeau "played his cards very close to his chest" and left most of his closest advisers in the dark, there have been a few visible signs of a diminished role. As Finance Minister, Allan MacEachen's November 1981 budget was publicly challenged by back-bench Liberals and even two cabinet ministers, despite the fact that it appeared to have been the culmination of years of planning and persuasion on the part of top Finance officials, mandarins who are normally perceived to be among the most powerful. The backtracking since then has been unprecedented, with the Deputy Minister finally

leaving the Department after publicly accepting responsibility for the faulty forecast. Meanwhile the departure of Michael Kirby to Fisheries and David Cameron to the educational support sector of Secretary of State, along with the wholesale dismantling of the F.P.R.O., not only lend additional credence to this speculation, but are also highly significant in terms of the new aggressive stance which the federal government has taken vis-à-vis the provinces overall and the current dismal status of federal-provincial relations.

For the moment, then, it appears that the stars of promotional interest groups, backbenchers and parliamentary committees are in the ascendancy. However, as was pointed out in the introduction, it is always possible for the bureaucracy to reassert itself, by co-opting the interest groups for example, and only time will tell if it will be successful in such an attempt. It is faced with a more difficult dilemma in this case than in the past, since it is the participation of the interest groups per se, and not just their opinions, that have become important to the process. As well, the steady decline of the party system which has necessitated these other means of participation may be arrested, particularly with changes in the leadership of the two major parties, and this would certainly benefit the bureaucrats. On the other hand the policy issues which are likely to arise in the near future are only partly in favour of the bureaucrats - native rights, economic issues and a restructuring of institutions such as the Senate and Supreme Court lend themselves to the participatory/consultative approach, while communications and fiscal arrangements policies are more likely to be dominated by public service expertise.
At the federal-provincial level there are also likely to be a number of changes in the way in which the two levels negotiate, primarily on issues involving shared jurisdiction. In terms of structure there seems to be a consensus developing that the executive federalism format, where it continues at all, will move away from major conferences of all first ministers towards a model of bilateral negotiation. One of the proponents of this approach and a major participant in the preparatory phase, Michael Kirby, has suggested that this mode will be more appropriate not only because it will allow a "cooling off" period for many of the constitutional participants but also because many of the issues currently at stake are more suited to one-on-one negotiation -- off-shore resources, energy agreements, fisheries and communications each concern different sub-groups of provinces, and none of them concern all ten.(11)

Both Peter Meekison and Gordon Robertson concur with Kirby that bilateral and/or multilateral negotiation will be the trend for at least the next few years. However they have also stressed that there remain several areas which are essentially non-legal and require the participation of all provinces, a notable example being fiscal transfer payments, and here they expect little movement. Mr. Chrétien's constitutional adviser, Edward Goldenberg, has even suggested that the active format of executive federalism may be replaced by a passive mode of "benign neglect", while Robertson envisages the federal government acting whenever possible, but without any consultation at all.(12)


(12) Ibid.
The structure of the federal-provincial policy process may also be influenced by several issues arising from the constitutional accord itself, the most obvious one being the amending formula. Mr. Goldenberg has indicated(13) that the next phase in constitutional reform will still be institutional change as far as the federal government is concerned; both Robertson and Meekison identified the issues of Senate and electoral reform as having potentially major implications for the process. Referring to the decline of party politics and the alienation of the West in general which has led to the emergence of provincial premiers as regional spokesmen to fill the void, Robertson suggested in a recent article that the executive federalism format could be successfully replaced only by a new and representative Senate:

One part of the problem of the West could be tackled if we could abolish our Senate as it now is and substitute an elected one. Every other federation has a second chamber where the voices of the provinces or regions are heard loud and clear. Those voices in our Senate are muffled because the Senators are all appointed by the government in Ottawa. They represent no one: they speak for no one but themselves.

Our House of Commons is not an adequate voice for regional differences because of our parliamentary system of government. MPs cannot fully and bluntly argue a regional view because they must fit in with the policy of their parties. Party unity and party discipline are paramount in our House of Commons. The result is a Parliament that does not bring out regional views and interests the way it should. The Premiers of the provinces step into the vacuum and become involved in national policy: not just the provincial areas that come under their governments....

If a reform along the lines it recommends could be brought about by an early use of our new amending procedure after patriation is achieved, it would give new strength to our Parliament as an institution to fully represent the provincial and regional differences of Canada....

(13) Ibid.
I have referred to the possibility of reform of the Senate for two reasons. One is that it is important. The word "Ottawa" now stinks in a lot of Canadian nostrils. That is bad for government and bad for this country. A truly representative Senate might change the odour of the national capital a good deal. The other reason is that reform of the Senate, under the new amending procedure, could be done with no opting out. It is one of the few significant changes where there might be a reasonable prospect of moving ahead, especially if it showed a sensitivity to the role of Quebec and the "French fact" in Canada.

Indeed a Special Joint Committee on Senate Reform has been created, and is currently drafting its report.

But the most dramatic changes in the federal-provincial policy process may not involve structure as much as mood or style. The confrontational mindset honed to a fine point by 18 months of constitutional wrangling left an indelible mark on all of the participants. Other members of the federal forces immediately took their cue from this stance. Marc Lalonde forged ahead on the N.E.P. and Allan MacEachen ignored provincial input before introducing and obtaining swift passage of Bill C-97 on fiscal arrangements in the summer of 1982. In his capacity as Deputy Minister of Intergovernmental Relations for the province of Alberta, Peter Meekison has predicted that debate on this issue would be "bitter and protracted", and "not remotely productive." (15) The recent history of developments in the field certainly bears out both his opinion and the general thrust of this argument regarding the importance of confrontation. At no time during the fiscal negotiations of 1981-82 did the two sides even appear to be talking about the same concerns.


Just weeks after the achievement of the November accord a meeting of Finance Ministers was held in Halifax, at which the provinces unanimously rejected Mr. MacEachen's plan as outlined in the budget of 12 November to cut back the established programs financing (EPF) by $5.7 billion over the next five years. Mr. MacEachen in turn flatly refused to consider a provincial counter-proposal to extend the current system from its deadline of March 1982 until April 1983 to allow for further negotiations. A subsequent meeting in Toronto on 14 December 1981 produced no real results and the provinces continued to protest the federal government's stated intention to impose a national standard on provincial medicare programs.

Then, in early January 1982, Employment Minister Lloyd Axworthy, responding in part to the recommendations of the Special House Committee on Employment Opportunities for the '80s, announced a sweeping set of changes in federal emphasis and assistance to manpower training programs. This was closely followed by a Cabinet reorganization in which the Departments of Industry, Trade and Commerce, Regional Economic Expansion, and External Affairs were substantially reorganized. The stated overall intent of the federal government was a decreased emphasis on regionalism and development, but many viewed the move as another attempt by the federal government to increase its control over areas of provincial jurisdiction.

A federal-provincial First Ministers' Conference on the Economy, held 2-4 February 1982, failed to arrive at any consensus. Provincial premiers called for a drop in interest rates while Finance Minister MacEachen and Bank of Canada Governor Gerald Bouey maintained
their tight money stance; at the same time Prime Minister Trudeau’s attempt to establish national wage controls for the public sector met with virtually no support from the provinces. Meanwhile Finance Ministers attempted unsuccessfully to iron out difficulties regarding fiscal transfer payments. Since then the federal government has proceeded, without provincial agreement, to pass Bill C-97, which amends the fiscal arrangements and EPR; while the issue of funding has thus been decided by the federal government alone it has indicated it is still planning to negotiate in the area of program changes. Both Health and Welfare Minister Monique Bégin and Secretary of State Serge Joyal announced plans to meet with their provincial counterparts but they also issued warnings that they would not delay program changes for long. Similarly, in June of 1982, the federal government without provincial support imposed a wage restraint program on federal public servants with the passage of Bill C-124.

The reactions of the premiers since the accord have been equally combative. Not only René Lévesque but all who remain of the original “gang of eight” appear to need considerable breathing space before they will be ready to think cooperatively, or to regain a semblance of consociational accommodation. Until the last possible moment the Quebec premier refused to indicate, for example, whether he would even attend the March 1983 conference on aboriginal rights scheduled in the Constitution Act, 1982; moreover the results of that conference were hardly significant, with the major accomplishment being an agreement to hold further meetings.
What will be the mid and long-term results of "unfriendly" federalism? It is difficult to see how any of the pressing economic problems can be resolved on such a basis, and few observers hold out much hope for any institutional changes which could alleviate the problem. Perhaps there will be a duplication of programs, as the American system has experienced. Perhaps the aggressive mindset will not be able to continue for long, as the two levels compete for the scarce funds (taxpayers' incomes) which the lack of a comprehensive economic and energy policy has already produced. Alan Cairns is less than optimistic about the potential for accommodation.

This article examines "the other crisis" of Canadian federalism, which is identified as a declining capacity for the effective use of government authority for the attainment of public goals. Central to this crisis is the negative impact of competitive big governments at both levels on the effective functioning of the federal system. In one sense the crisis is simply a particular version of the widespread crisis in government capacity characteristic of all big governments in the modern era. In another sense it is argued that contemporary Canadian federalism makes a distinct contribution to the growth of the governments whose competitive tendencies it cannot effectively restrain or channel. In sum, escape from the destructive spiral of interaction between collectivism and federalism is unlikely without an intellectual and political transformation of the frames of reference which motivate and control political behaviour.

This pessimistic appraisal is given extra weight by the developing integration of governments and societies in Canadian federalism. The competitive coexistence of provinces and central government has especially profound consequences in an era of expanded government bureaucracies, strong pressures for policy coherence by each government, and the massive extension of the tentacles of government regulation, control, and public ownership.
The economy and society of each province are confronted with competing and sometime opposing government directives emerging from separately conceived national and provincial plans for making sense of the same socioeconomic order. The national and provincial perspectives, although they frequently encompass the same interests, inevitably take into account a different set and range of considerations. (16)

It would seem, therefore, that institutional changes designed to restructure the federal-provincial aspect of the policy process will be a necessary corollary to the consultative process already begun at the federal level. Michael Pitfield's move to the Senate suggests that the federal government is indeed serious about its commitment to future institutional change, as is the creation of the Special Committee on Senate Reform. As McWhinney argues in his analysis of the constitutional process,

There is a clear trend ... to bring the people into any process for drafting and adoption of a new constitutional charter or for substantial renewal of an old one .... The limitations of Canada's old-style approach are too potent to need further demonstration. It rests upon a legal fiction that the historian knows to be untrue -- that the constitution is a contract between provincial princes. (17)

Thus regardless of the degree to which executive federalism is or is not deemphasized, a change of political actors at both levels would no doubt also contribute greatly to an improved atmosphere for productive policy-making. Mackenzie King may have been right, at least about Canada, when he said that "the really important people in the world are the conciliators."

(17) E. McWhinney. Canada and the Constitution 1979-1982, p. 120.
APPENDIX I

LIST OF INDIVIDUALS
(with whom the author had interviews, informal discussions, brief conversations, etc.)
APPENDIX I

LIST OF INDIVIDUALS
(with whom the author had interviews, informal discussions, briefing conversations, etc.)

Eddie Goldenberg (Justice)
Catherine Anderson (External)
Janice Thordason (External)
Alan Borovoy (C.C.L. Assoc.)
Rita Cadieux (C.H.R.C.)
David Husband (Director, Liberal Caucus Research)
Prof. Michael Jackson (Legal Counsel to B.C. Indians in London)
Harry Hays (Co-Chairman, S.J.C.C.)
Hon. David Smith, M.P.
Sen. Arthur Tremblay
Prof. Gil Rémillard (Witness, constitutional expert)
Carole Presseau (Justice)
Denis Dawson, M.P.
Eymard Corbin, M.P.
Sen. Lowell Murray
Laverne Lewycky, M.P.
Paul Bélisle (Clerk of S.J.C.C.)
Michael Kirby (F.P.R.O.)
Michael Valpy (Journalist)
Hon. John Reid, M.P.
Coline Campbell, M.P.
Sen. Duff Roblin
Barry Strayer (Justice)
Linda Geller-Schwartz (F.P.R.O.)
Charles Bouchard (Liberal Caucus Research)
H. Haggan
David Ablatt (P.C.O.)
Guy Faggiolo (Justice)
Allan Stillar (Ont.)
H. Leeson (Sask.)
Pete Meekison (Alta.)
Noel Kinsella (Witness, N.B.H.R.C.)
Sen. David Stewart
(Sen.) Eugene Forsey
Sen. Peter Bosa
Jim Derkson (Witness, C.O.P.O.H.)
Roberta Jamieson (Assembly of First Natives)
Cally Jordan (Law Clerk to Justice Dickson of the Supreme Court)
Prof. Richard Simeon
Herb Breau, M.P.
Walter Baker, M.P.
Sen. Michael Pittfield
Prof. Audrey Doerr
Prof. Sandra Burt
APPENDIX II

CHRONOLOGY
APPENDIX II

CHRONOLOGY

8-13 September 1980 - Prime Minister Trudeau and the provincial premiers met in Ottawa in an attempt to reach a consensus on constitutional reform. Although there were "partial agreements" on several issues, there was no overall agreement.

2 October 1980 - In a news conference Prime Minister Trudeau announced proposals for constitutional reform to be introduced in Parliament as a joint resolution to the Monarch asking the British Parliament to amend and then "patriate" the British North America Act which would then be known as the Constitution Act 1867-1980.

3 October 1980 - At the conclusion of a joint cabinet meeting in Edmonton the premiers of British Columbia and Alberta promised to "fight back any way we can devise" against the proposed federal action.

6 October 1980 - Parliament reconvened following its summer recess. The government proposed a resolution for a joint address to the Queen respecting the Constitution of Canada, Schedule B, containing the Constitution Act, 1980.

15 October 1980 - At a premiers' meeting in Toronto the premiers of British Columbia, Alberta, Manitoba, Quebec and Newfoundland agreed to meet to decide on a court challenge to Ottawa's constitutional proposals. The premiers of Prince Edward Island and Nova Scotia said they agreed substantially with the other five but needed the approval of their cabinets before endorsing such action. The premiers of Ontario, Saskatchewan and New Brunswick refused to join the group of seven.

21 October 1980 - In a letter to NDP leader Broadbent, Prime Minister Trudeau said that his party would support amendments to the resolution to give the provinces authority over the development, management, exploration, conservation as well as indirect taxation of their non-renewable natural resources, and forestry resources.

Mr. Broadbent indicated that his party, although it would still like other changes, would support the resolution in the House.

24 October 1980 - After vigorous debate and imposition of closure the House voted 156-83 to send the resolution to committee.
3 November 1980 - The Senate voted 45 to 29 to send the proposed joint resolution to the Special Joint Committee on the Constitution for detailed examination.

6 November 1980 - The Special Joint Committee on the Constitution of Canada held its first meetings.

2 December 1980 - The President of the Privy Council announced in the House of Commons that the three House Leaders had come to an agreement to extend the sitting of the Special Joint Committee on the Constitution from 9 December 1980 to 6 February 1981. The recommendation received unanimous consent.

30 January 1981 - The Foreign Affairs Committee of the British House of Commons reported saying that the British Parliament need not accede automatically to any Canadian request for an amendment to the British North America Act. The Committee also indicated that there was substantial precedent for the British Parliament to insist on greater provincial support for a constitutional amendment which would alter the federal structure of Canada.

3 February 1981 - In a three-two split decision the Manitoba Court of Appeal ruled that the Federal Parliament does not need provincial consent to "patriate" and amend the British North America Act.

13 February 1981 - The Special Joint Committee on the Constitution of Canada reported to both Houses of Parliament.


19 February 1981 - Premier Blakeney of Saskatchewan announced that his government had rejected the Federal Government's constitutional proposals.

26 February 1981 - The Intergovernmental Affairs Ministers of the six provinces taking the Federal Government to court over its constitutional proposals met in Montreal. They were joined by representatives of the Governments of Saskatchewan and Nova Scotia.

31 March 1981 - The Newfoundland Court of Appeal unanimously upheld the position of the provinces opposed to the federal constitutional resolution.

8 April 1981 - A motion passed unanimously in the House of Commons set the rules for the remaining stages of parliamentary consideration of the constitutional resolution.
15 April 1981 - The Quebec Court of Appeal in a 4 to 1 decision agreed that the Federal Government could proceed with its constitutional resolution.

15 April 1981 - The Premiers of the eight provinces opposed to the Federal Government's constitutional resolution held talks in Ottawa to finalize their accord on an amending formula as an alternative to the federal proposal.

16 April 1981 - The dissenting premiers announced their agreement to patriation of the constitution with a revised version of the Vancouver amending formula if the Federal Government would cease its unilateral program. There was no mention of a Charter of Rights.

21-24 April 1981 - The final amendments to the constitutional resolution were debated and voted upon in the House of Commons and the Senate.

28-29 April 1981 - The Western Premiers held their annual meeting in Thompson, Manitoba. At a news conference the premiers continued their attack on the Federal Government's constitutional resolution but insisted that the current fiscal arrangements agreement "has served Canada well, and no major changes are needed."

28 April-4 May 1981 - The Supreme Court heard arguments on the appeals from the Manitoba, Newfoundland, and Quebec Courts of Appeal regarding the Federal Government's proposed constitutional resolution.

10 June 1981 - Spurred by their opposition to the constitutional resolution and their declared desire to represent their regions 13 Senators have asked to sit together in their Chamber as an independent voting bloc.

15 August 1981 - The eight premiers opposed to the constitutional resolution met to continue their discussions on the strategy for the united front.

28 September 1981 - The Supreme Court brought down its decision on the government's constitutional resolution. In a 7-2 judgement the unilateral action of the government was declared to be legal. In a separate 6-3 judgement the court declared that the constitutional convention of provincial consent was being violated.

30 September 1980 - NDP Leader Broadbent said that his party would oppose the government's constitutional resolution unless Prime Minister Trudeau makes a "final attempt" to reach agreement with the provinces.
1 October 1981 - Premier Bennett of B.C. acting as Chairman of the Premiers' Conference began a series of meetings with each of the other premiers to test their opinions of the Supreme Court decision.

13 October 1981 - Prime Minister Trudeau and B.C. Premier Bennett held constitutional talks in Ottawa. The Prime Minister offered what he called "substantial changes" and Premier Bennett agreed to communicate them to the other premiers.

15 October 1981 - Prime Minister Trudeau met with his two provincial allies Premiers Davis of Ontario and Hatfield of New Brunswick.

19 October 1981 - The 10 provincial premiers met in Montreal to discuss their reactions to the Supreme Court decision and the Prime Minister's new proposals. They asked that a federal-provincial conference be convened in the first week of November.

20 October 1981 - The eight provincial premiers (minus Ontario and New Brunswick) continued their discussions in Montreal.

20 October 1981 - Prime Minister Trudeau invited the premiers to a federal-provincial conference on the constitution for 2 November.

2-4 November 1981 - Prime Minister Trudeau and nine premiers (Quebec excluded) signed a compromise constitutional accord containing a provincial opting-out clause and removing women and native rights guarantees.

1 December 1981 - After provincial acceptance, Parliament amended the accord and re-instated the guarantees which had been removed.

8 December 1981 - The new constitutional accord received parliamentary approval and was immediately referred to Westminster.

25 March 1982 - The British House of Lords gave final approval to the Canada Bill.

17 April 1982 - Queen Elizabeth II formally proclaimed the Constitution Act, 1982 in a ceremony on Parliament Hill.
APPENDIX III

VICTORIA CHARTER
PART I

POLITICAL RIGHTS

Art. 1. It is hereby recognized and declared that in Canada every person has the following fundamental freedoms:

freedom of thought, conscience and religion,
freedom of opinion and expression,
and
freedom of peaceful assembly and of association;

and all laws shall be construed and applied so as not to abrogate or abridge any such freedom.

Art. 2. No law of the Parliament of Canada, or the Legislatures of the Provinces shall abrogate or abridge any of the fundamental freedoms herein recognized and declared.

Art. 3. Nothing in this Part shall be construed as preventing such limitations on the exercise of the fundamental freedoms as are reasonably justifiable in a democratic society in the interests of public safety, order, health or morals, of national security, or of the rights and freedoms of others, whether imposed by the Parliament of Canada or the Legislature of a Province, within the limits of their respective legislative powers, or by the construction or application of any law.

Art. 4. The principles of universal suffrage and free democratic elections to the House of Commons and to the Legislative Assembly of each Province are hereby proclaimed to be fundamental principles of the Constitution.

Art. 5. No citizen shall, by reason of race, ethnic or national origin, colour, religion or sex, be denied the right to vote in an election of members to the House of Commons or the Legislative Assembly of a Province, or be disqualified from membership therein.

Art. 6. Every House of Commons shall continue for five years from the day of the return of the writs for choosing the House and no longer, subject to being sooner dissolved
by the Governor General, except that in time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by the Parliament of Canada if the continuation is not opposed by the votes of more than one third of the members of the House.

Art. 7. Every Provincial Legislative Assembly shall continue for five years from the day of the return of the writs for the choosing of the Legislative Assembly, and no longer, subject to being sooner dissolved by the Lieutenant-Governor, except that when the Government of Canada declares that a state of real or apprehended war, invasion or insurrection exists, a Provincial Legislative Assembly may be continued if the continuation is not opposed by the votes of more than one third of the members of the Legislative Assembly.

Art. 8. There shall be a session of the Parliament of Canada and of the Legislature of each Province at least once in every year, so that twelve months shall not intervene between the last sitting of the Parliament or Legislature in one session and its first sitting in the next session.

Art. 9. Nothing in this Part shall be deemed to confer any legislative power on the Parliament of Canada or the Legislature of any Province.
PART II

LANGUAGE RIGHTS

Art. 10. English and French are the official languages of Canada having the status and protection set forth in this Part.

Art. 11. A person has the right to use English and French in the debates of the Parliament of Canada and of the Legislatures of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island and Newfoundland.

Art. 12. The statutes and the records and journals of the Parliament of Canada shall be printed and published in English and French; and both versions of such statutes shall be authoritative.

Art. 13. The statutes of each Province shall be printed and published in English and French, and where the Government of a Province prints and publishes its statutes in one only of the official languages, the Government of Canada shall print and publish them in the other official language; the English and French versions of the statutes of the Provinces of Quebec, New Brunswick and Newfoundland shall be authoritative.

Art. 14. A person has the right to use English and French in giving evidence before, or in any pleading or process in the Supreme Court of Canada, any courts established by the Parliament of Canada or any court of the Provinces of Quebec, New Brunswick and Newfoundland, and to require that all documents and judgments issuing from such courts be in English or French, and when necessary a person is entitled to the services of an interpreter before the courts of the other Provinces.

Art. 15. An individual has the right to the use of the official language of his choice in communications between him and the head or central office of every department and agency of the Government of Canada and of the Governments of the Provinces of Ontario, Quebec, New Brunswick, Prince Edward Island and Newfoundland.

Art. 16. A Provincial Legislative Assembly may, by resolution, declare that any part of Articles 13, 14, and
15 that do not expressly apply to that Province shall apply to the Legislative Assembly, and to any of the provincial courts and offices of the provincial departments and agencies according to the terms of the resolution, and thereafter such parts shall apply to the Legislative Assembly, courts and offices specified according to the terms of the resolution; and any right conferred under this Article may be abrogated or diminished only in accordance with the procedure prescribed in Article 50.

Art. 17. A person has the right to the use of the official language of his choice in communications between him and every principal office of the departments and agencies of the Government of Canada that are located in an area where a substantial proportion of the population has the official language of his choice as its mother tongue, but the Parliament of Canada may define the limits of such areas and what constitutes a substantial proportion of the population for the purposes of this Article.

Art. 18. In addition to the rights provided by this Part, the Parliament of Canada and the Legislatures of the Provinces may, within their respective legislative jurisdictions, provide for more extensive use of English and French.

Art. 19. Nothing in this Part shall be construed as derogating from or diminishing any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Part with respect to any language that is not English or French.

PART III
PROVINCES AND TERRITORIES

Art. 20. Until modified under the authority of the Constitution of Canada, Canada consists of ten Provinces, named Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta and Newfoundland, two Territories, named the Northwest Territories and the Yukon Territory, and such other territory as may at any time form part of Canada.

Art. 21. There shall be a Legislature for each Province consisting of a Lieutenant-Governor and a Legislative Assembly.
PART IV

SUPREME COURT OF CANADA

Art. 22. There shall be a general court of appeal for
Canada to be known as the Supreme Court of Canada.

Art. 23. 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, subject to this Part,
be appointed by the Governor General in Council by letters
patent under the Great Seal of Canada.

Art. 24. Any person may be appointed a judge of the
Supreme Court of Canada who, after having been admitted to
the Bar of any Province, has, for a total period of at
least ten years, been a judge of any court in Canada or a
barrister or advocate at the Bar of any Province.

Art. 25. At least three of the judges of the Supreme
Court of Canada shall be appointed from among persons who,
after having been admitted to the Bar of the Province of
Quebec, have, for a total period of at least ten years,
been judges of any court of that Province or of a court
established by the Parliament of Canada or barristers or
advocates at that Bar.

Art. 26. Where a vacancy arises in the Supreme Court of
Canada and the Attorney General of Canada is considering
a person for appointment to fill the vacancy, he shall
inform the Attorney General of the appropriate Province.

Art. 27. When an appointment is one falling within
Article 25 or the Attorney General of Canada has
determined that the appointment shall be made from among
persons who have been admitted to the Bar of a specific
Province, he shall make all reasonable efforts to reach
agreement with the Attorney General of the appropriate
Province, before a person is appointed to the Court.

Art. 28. No person shall be appointed to the Supreme
Court of Canada unless the Attorney General of Canada and
the Attorney General of the appropriate Province agree to
the appointment, or such person has been recommended for
appointment to the Court by a nominating council described
in Article 30, or has been selected by the Attorney
General of Canada under Article 30.
Art. 29. Where after the lapse of ninety days from the
day a vacancy arises in the Supreme Court of Canada, the
Attorney General of Canada and the Attorney General of a
Province have not reached agreement on a person to be
appointed to fill the vacancy, the Attorney General of
Canada may inform the Attorney General of the appropriate
Province in writing that he proposes to convene a
nominating council to recommend an appointment.

Art. 30. Within thirty days of the day when the Attorney
General of Canada has written the Attorney General of the
Province that he proposes to convene a nominating council,
the Attorney General of the Province may inform the
Attorney General of Canada in writing that he selects
either of the following types of nominating councils:

(1) a nominating council consisting of the
    following members: the Attorney General of
    Canada or his nominee and the Attorneys General
    of the Provinces or their nominees;

(2) a nominating council consisting of the
    following members: the Attorney General of
    Canada or his nominee, the Attorney General of
    the appropriate Province or his nominee and a
    Chairman to be selected by the two Attorneys
    General, and if within six months from the
    expiration of the thirty days they cannot agree
    on a Chairman, then the Chief Justice of the
    appropriate Province or if he is unable to act,
    the next senior judge of his court, shall name
    a Chairman;

and if the Attorney General of the Province fails to make
a selection within the thirty days above referred to, the
Attorney General of Canada may select the person to be
appointed.

Art. 31. When a nominating council has been created, the
Attorney General of Canada shall submit the names of not
less than three qualified persons to it about whom he has
sought the agreement of the Attorney General of the
appropriate Province to the appointment, and the
nominating council shall recommend therefrom a person for
appointment to the Supreme Court of Canada; a majority of
the members of a council constitutes a quorum, and a
recommendation of a majority of the members at a meeting
constitutes a recommendation of the council.
Art. 32. For the purpose of Articles 26 to 31 "appropriate Province" means, in the case of a person being considered for appointment to the Supreme Court of Canada in compliance with Article 25, the Province of Quebec, and in the case of any other person being so considered, the Province to the Bar of which such person was admitted, and if a person was admitted to the Bar of more than one Province, the Province with the Bar of which the person has, in the opinion of the Attorney General of Canada, the closest connection.

Art. 33. Articles 26 to 32 do not apply to the appointment of the Chief Justice of Canada when such appointment is made from among the judges of the Supreme Court of Canada.

Art. 34. The judges of the Supreme Court of Canada hold office during good behaviour until attaining the age of seventy years, but are removable by the Governor General on address of the Senate and House of Commons.

Art. 35. The Supreme Court of Canada has jurisdiction to hear and determine appeals on any constitutional question from any judgment of any court in Canada and from any decision on any constitutional question by any such court in determining any question referred to it, but except as regards appeals from the highest court of final resort in a Province, the Supreme Court of Canada may prescribe such exceptions and conditions to the exercise of such jurisdiction as may be authorized by the Parliament of Canada.

Art. 36. Subject to this Part, the Supreme Court of Canada shall have such further appellate jurisdiction as the Parliament of Canada may prescribe.

Art. 37. The Parliament of Canada may make laws conferring original jurisdiction on the Supreme Court of Canada in respect of such matters in relation of the laws of Canada as may be prescribed by the Parliament of Canada, and authorizing the reference of questions of law or fact to the Court and requiring the Court to hear and determine the questions.

Art. 38. Subject to this Part, the judgment of the Supreme Court of Canada in all cases is final and conclusive.
Art. 39. Where a case before the Supreme Court of Canada involves questions of law relating to the civil law of the Province of Quebec, and involves no other question of law, it shall be heard by a panel of five judges, or with the consent of the parties, four judges, at least three of whom have the qualifications described in Article 25, and if for any reason three judges of the Court who have such qualifications are not available, the Court may name such ad hoc judges as may be necessary to hear the case from among the judges who have such qualifications serving on a superior court of record established by the law of Canada or of a superior court of appeal of the Province of Quebec.

Art. 40. Nothing in this Part shall be construed as restricting the power existing at the commencement of this Charter of a Provincial Legislature to provide for or limit appeals pursuant to its power to legislate in relation to the administration of justice in the Province.

Art. 41. The salaries, allowances and pensions of the judges of the Supreme Court of Canada shall be fixed and provided by the Parliament of Canada.

Art. 42. Subject to this Part, the Parliament of Canada may make laws to provide for the organization and maintenance of the Supreme Court of Canada, including the establishment of a quorum for particular purposes.

PART V
COURTS OF CANADA

Art. 43. The Parliament of Canada may, notwithstanding anything in the Constitution of Canada, from time to time provide for the constitution, maintenance, and organization of courts for the better administration of the laws of Canada, but no court established pursuant to this Article shall derogate from the jurisdiction of the Supreme Court of Canada as a general court of appeal for Canada.
PART VI

REVISED SECTION 94A

Art. 44. The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits including survivors' and disability benefits irrespective of age, and in relation to family, youth, and occupational training allowances, but no such law shall affect the operation of any law present or future of a Provincial Legislature in relation to any such matter.

Art. 45. The Government of Canada shall not introduce a bill in the House of Commons in relation to a matter described in Article 44 unless it has, at least ninety days before such introduction, advised the Government of each Province of the substance of the proposed legislation and requested its views thereon.

PART VII

REGIONAL DISPARITIES

Art. 46. The Parliament and Government of Canada and the Legislatures and Governments of the Provinces are committed to:

(1) the promotion of equality of opportunity and well being for all individuals in Canada;

(2) the assurance, as nearly as possible, that essential public services of reasonable quality are available to all individuals in Canada; and

(3) the promotion of economic development to reduce disparities in the social and economic opportunities for all individuals in Canada wherever they may live.

Art. 47. The provisions of this Part shall not have the effect of altering the distribution of powers and shall not compel the Parliament of Canada or Legislatures of the Provinces to exercise their legislative powers.

PART VIII

FEDERAL-PROVINCIAL CONSULTATION

Art. 48. A Conference composed of the Prime Minister of Canada and the First Ministers of the Provinces shall be called by the Prime Minister of Canada at least once a year unless, in any year, a majority of those composing the Conference decide that it shall not be held.
PART IX

AMENDMENTS TO THE CONSTITUTION

Art. 49. Amendments to the Constitution of Canada may from time to time be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assemblies of at least a majority of the Provinces that includes

1. every Province that at any time before the issue of such proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada;

2. at least two of the Atlantic Provinces;

3. at least two of the Western Provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Western Provinces.

Art. 50. Amendments to the Constitution of Canada in relation to any provision that applies to one or more, but not all, of the Provinces may from time to time be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assembly of each Province to which an amendment applies.

Art. 51. An amendment may be made by proclamation under Article 49 or 50 without a resolution of the Senate authorizing the issue of the proclamation if within ninety days of the passage of a resolution by the House of Commons authorizing its issue the Senate has not passed such a resolution and at any time after the expiration of the ninety days the House of Commons again passes the resolution, but any period when Parliament is prorogued or dissolved shall not be counted in computing the ninety days.
Art. 52. The following rules apply to the procedures for amendment described in Articles 49 and 50:

(1) either of these procedures may be initiated by the Senate or the House of Commons or the Legislative Assembly of a Province;

(2) a resolution made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Art. 53. The Parliament of Canada may exclusively make laws from time to time amending the Constitution of Canada, in relation to the executive Government of Canada and the Senate and House of Commons.

Art. 54. In each Province the Legislature may exclusively make laws in relation to the amendment from time to time of the Constitution of the Province.

Art. 55. Notwithstanding Articles 53 and 54, the following matters may be amended only in accordance with the procedure in Article 49:

(1) the office of the Queen, of the Governor General and of the Lieutenant-Governor;

(2) the requirements of the Constitution of Canada respecting yearly sessions of the Parliament of Canada and the Legislatures;

(3) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons and the Legislative Assemblies;

(4) the powers of the Senate;

(5) the number of members by which a Province is entitled to be represented in the Senate, and the residence qualifications of Senators;

(6) the right of a Province to a number of members in the House of Commons not less than the number of Senators representing the Province;
(7) the principles of proportionate representation of the Provinces in the House of Commons prescribed by the Constitution of Canada; and

(8) except as provided in Article 16, the requirements of this Charter respecting the use of the English or French language.

Art. 56. The procedure prescribed in Article 49 may not be used to make an amendment when there is another provision for making such amendment in the Constitution of Canada, but that procedure may nonetheless be used to amend any provision for amending the Constitution, including this Article, or in making a general consolidation and revision of the Constitution.

Art. 57. In this Part, "Atlantic Provinces" means the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, and "Western Provinces" means the Provinces of Manitoba, British Columbia, Saskatchewan and Alberta.

PART X

MODERNIZATION OF THE CONSTITUTION

Art. 58. The provisions of this Charter have the force of law in Canada notwithstanding any law in force on the day of its coming into force.

Art. 59. The enactments set out in the first column of the Schedule, hereby repealed to the extent indicated in the second column thereof, shall continue as law in Canada under the names set forth in the third column thereof and as such shall, together with this Charter, collectively be known as the Constitution of Canada, and amendments thereto shall henceforth be made only according to the authority contained therein.

Art. 60. Every enactment that refers to an enactment set out in the Schedule by the name in the first column thereof is hereby amended by substituting for that name the name in the third column thereof.

Art. 61. The Court existing on the day of the coming into force of this Charter under the name of the Supreme Court of Canada shall continue as the Supreme Court of Canada, and the judges thereof shall continue in office as though appointed under Part IV except that they shall hold office during good behaviour until attaining the age of seventy-five years, and until otherwise provided pursuant to the provisions of that Part, all laws pertaining to the Court in force on that day shall continue, subject to the provisions of this Charter.
APPENDIX IV

PROPOSED RESOLUTION
(as tabled October 1980)
SCHEDULE B
CONSTITUTION ACT, 1980

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:
   (a) freedom of conscience and religion;
   (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of information; and
   (c) freedom of peaceful assembly and of association.

Democratic Rights

3. Everyone has, without unreasonable distinction or limitation, the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

   (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
   (a) to move to and take up residence in any province; and
   (b) to pursue the gaining of a livelihood in any province.

   (3) The rights specified in subsection (2) are subject to
   (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
   (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right not to be subjected to search or seizure except on grounds, and in accordance with procedures, established by law.

9. Everyone has the right not to be detained or imprisoned except on grounds, and in accordance with procedures, established by law.

10. Everyone has the right on arrest or detention
   (a) to be informed promptly of the reasons therefore;
(b) to retain and instruct counsel without delay; and

(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Anyone charged with an offence has the right:

(a) to be informed promptly of the specific offence;

(b) to be tried within a reasonable time;

(c) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(d) not to be denied reasonable bail except on grounds, and in accordance with procedures, established by law;

(e) not to be found guilty on account of any act or omission that at the time of the act or omission did not constitute an offence;

(f) not to be tried or punished more than once for an offence of which he or she has been finally convicted or acquitted; and

(g) to the benefit of the lesser punishment where the punishment for an offence of which he or she has been convicted has been varied between the time of commission and the time of sentencing.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. A witness has the right when compelled to testify not to have any inculpatory evidence so given used to incriminate him or her in any other proceedings, except a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted has the right to the assistance of an interpreter.

15. (1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.

(2) This section does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups.

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) Nothing in this Charter limits the extension of authority of Parliament or a legislature to extend the status or use of English and French or either of those languages.

17. Everyone has the right to use English or French in any debates and other proceedings of Parliament.

18. The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

19. Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

20. Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, as he or she may choose, and has the right with respect to any other office of any such institution where that office is located within an area of Canada in which it is determined, in such manner as may be prescribed or authorized by Parliament, that communications by public or federal institutions.
a substantial number of persons within the population use that language.

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

**Minority Language Educational Rights**

23. (1) Citizens of Canada whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside have the right to have their children receive their primary and secondary school instruction in that minority language if they reside in an area of the province in which the number of children of such citizens is sufficient to warrant the provision out of public funds of minority language educational facilities in that area.

(2) Where a citizen of Canada changes residence from one province to another and, prior to the change, any child of that citizen has been receiving his or her primary or 30 secondary school instruction in either English or French, that citizen has the right to have any or all of his or her children receive their primary and secondary school instruction in that same language if the number of children of citizens resident in the area of the province to which the citizen has moved, who have a right recognized by this section, is sufficient to warrant the provision out of public funds of minority language educational facilities in that area.

**Undeclared Rights and Freedoms**

24. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, including any rights or freedoms that pertain to the native peoples of Canada.

**General**

25. Any law that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.

26. No provision of this Charter, other than section 13, affects the laws respecting the admissibility of evidence in any proceedings or the authority of Parliament or a legislature to make laws in relation thereto.

27. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

28. Nothing in this Charter extends the legislative powers of any body or authority.

**Application of Charter**

29. (1) This Charter applies to the Parliament and government of Canada and to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province and to all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have application until three years after this Act, except Part V, comes into force.
census, combined populations of at least eighty per cent of the population of all the provinces may make a single proposal to substitute for paragraph 41(1)(b) such alternative as they consider appropriate.

(2) One copy of an alternative proposed under subsection (1) may be deposited with the Chief Electoral Officer of Canada by each proposing province within two years after this Act, except Part V, comes into force but, prior to the expiration of that period, any province that has deposited a copy may withdraw that copy.

(3) Where copies of an alternative have been filed as provided by subsection (2) and, 15 on the day that is two years after this Act, except Part V, comes into force, at least eight copies remain filed by provinces that have, according to the then latest general census, combined populations of at least twenty per cent of the population of all the provinces, the government of Canada shall cause a referendum to be held within two years after that day to determine whether

(a) paragraph 41(1)(b) or any alternative thereto proposed by the government of Canada by depositing a copy thereof with the Chief Electoral Officer at least ninety days prior to the day on which the referendum is held, or

(b) the alternative proposed by the provinces,

shall be adopted.

39. Where a referendum is held under subsection 38(3), a proclamation under the Great Seal of Canada shall be issued within six months after the date of the referendum bringing Part V into force with such modifications, if any, as are necessary to incorporate the proposal approved by a majority of forty persons voting at the referendum and with such other changes as are reasonably consequential on the incorporation of that proposal.

40. (1) Subject to subsection (2), Parliament may make laws respecting the rules applicable to the holding of a referendum under subsection 38(3).

(2) Every citizen of Canada has, without unreasonable distinction or limitation, the right to vote in a referendum held under subsection 38(3).

PART V

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

41. (1) 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

(a) resolutions of the Senate and House of Commons; and

(b) resolutions of the legislative assemblies of at least a majority of the provinces that includes

(i) every province that at any time before the issue of the proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada,

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

(iii) at least two of the Western provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Western provinces.

(2) In this section, “Atlantic provinces” means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland; “Western provinces” means the provinces of Manitoba, British Columbia, Saskatchewan and Alberta.

42. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the
31. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
(a) promoting equal opportunities for the well-being of Canadians;
(b) furthering economic development to reduce disparity in opportunities; and
(c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to taking such measures as are appropriate to ensure that provinces are able to provide the essential public services referred to in paragraph (1)(c) without imposing an undue burden of provincial taxation.

PART III
CONSTITUTIONAL CONFERENCES

32. Until Part V comes into force, 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 in every year unless, in any year, a majority of those composing the conference decide that it shall not be held.

PART IV
INTERIM AMENDING PROCEDURE AND RULES FOR ITS REPLACEMENT

33. Until Part V comes into force, 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 House of Commons and by the legislative assembly or government of each province.

34. Until Part V comes into force, an amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces 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 House of Commons and by the legislative assembly or government of each province to which the amendment applies.

35. (1) The procedures for amendment described in sections 33 and 34 may be initiated either by the Senate or House of Commons or by the legislative assembly or government of a province.

(2) A resolution made or other authorization given for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

36. Sections 33 and 34 do not apply to an amendment to the Constitution of Canada where there is another provision in the Constitution for making the amendment, but the procedure prescribed by section 33 shall be used to amend the Canadian Charter of Rights and Freedoms and any provision for amending the Constitution, including this section, and may be used in making a general consolidation and revision of the Constitution.

37. Part V shall come into force
(a) with or without amendment, on such day as may be fixed by proclamation issued pursuant to the procedure prescribed by section 33, or
(b) on the day that is two years after the day this Act, except Part V, comes into force,

whichever is the earlier day but, if a referendum is required to be held under subsection 38(3), Part V shall come into force as provided in section 39.

38. (1) The governments or legislative assemblies of eight or more provinces that have, according to the then current general..
Great Seal of Canada where so authorized by a referendum held throughout Canada under subsection (2) at which
(a) a majority of persons voting thereat, and
(b) a majority of persons voting thereat in each of the provinces, resolutions of the legislative assemblies of which would be sufficient, together with resolutions of the Senate and House of Commons, to authorize the issue of a proclamation under subsection 41(1), have approved the making of the amendment.

(2) A referendum referred to in subsection 15(1) shall be held where directed by proclamation issued by the Governor General under the Great Seal of Canada authorized by resolutions of the Senate and House of Commons.

43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces 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 House of Commons and of the legislative assembly of each province to which the amendment applies.

44. An amendment to the Constitution of Canada may be made by proclamation under subsection 41(1) or section 43 without a resolution of the Senate authorizing the issue of the proclamation if, within ninety days after the passage by the House of Commons of a resolution authorizing its issue, the Senate has not passed such a resolution and if, at any time after the expiration of those ninety days, the House of Commons again passes the resolution, but any period when 40 Parliament is prorogued or dissolved shall not be counted in computing those ninety days.

45. (1) The procedures for amendment described in subsection 41(1) and section 43 may be initiated either by the Senate or House of Commons or by the legislative assembly of a province.

(2) A resolution made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

46. (1) Subject to subsection (2), Parliament may make laws respecting the rules applicable to the holding of a referendum under section 42.

(2) Every citizen of Canada has, without unreasonable distinction or limitation, the right to vote in a referendum held under section 42.

47. The procedures prescribed by section 41, 42 or 43 do not apply to an amendment to the Constitution of Canada where there is another provision in the Constitution for making the amendment, but the procedures prescribed by section 41 or 42 shall nevertheless be used to amend any provision for amending the Constitution, including this section, and section 41 may be used in making a general consolidation or revision of the Constitution.

48. Subject to section 50, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate or House of Commons.

49. Subject to section 50, the legislature of each province may exclusively make laws amending the constitution of the province.

50. An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with a procedure prescribed by section 41 or 42:
(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
(b) the Canadian Charter of Rights and Freedoms;
(c) the commitments relating to equalization and regional disparities set out in section 31;
(d) the powers of the Senate;
(e) the number of members by which a province is entitled to be represented in the
Senate and the residence qualifications of Senators;
(f) the right of a province to a number of members in the House of Commons not less than the number of Senators representing the province; and
(g) the principles of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada.

51. Class I of section 91 and class I of section 92 of the Constitution Act, 1867 (formerly named the British North America Act, 1867), the British North America (No. 2) Act, 1949, referred to in item 21 of 15 Schedule I to this Act and Parts III and IV of this Act are repealed.

PART VI

GENERAL

52. (1) The Constitution of Canada includes
(a) the Canada Act;
(b) the Acts and orders referred to in Schedule I; and
(c) any amendment to any Act or order referred to in paragraph (a) or (b).

(2) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

53. (1) The enactments referred to in Column I of Schedule I are hereby repealed, or amended to the extent indicated in Column II thereof, and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

(2) Every enactment, except the Canada Act, that refers to an enactment referred to in Schedule I by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in Schedule I may be cited as the Constitution Act following

issued by the year and number, if any, of its enactment.

54. A French version of the portions of the Constitution of Canada referred to in Schedule I shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

55. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 51, the English and French versions of that portion of the Constitution are equally authoritative.

56. The English and French versions of this Act are equally authoritative.

57. Subject to section 58, this Act shall come into force on a day to be fixed by proclamation issued by the Governor General under the Great Seal of Canada.

58. Part V shall come into force as provided in Part IV.

59. This Schedule may be cited as the Constitution Act, 1980 and the Constitution Acts, 1867 to 1975 (No. 2) and this Act may be cited together as the Constitution Acts, 1867 to 1980.
APPENDIX V

PROPOSED RESOLUTION
(as amended January 12, 1981)
SCHEDULE II
CONSTITUTION ACT, 1981

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:
   
   (a) freedom of conscience and religion;
   (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
   (c) freedom of peaceful assembly; and
   (d) freedom of association.

Democratic Rights

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.
   
   (2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

1981

Annual sitting of legislative bodies

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right:
   
   (a) to move to and take up residence in any province; and
   (b) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to:
   
   (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
   (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Legal Rights

7. Everyone has the right to life, liberty and security of person.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention:
   
   (a) to be informed promptly of the reasons therefor;
   (b) to retain and instruct counsel without delay and to be informed of that right; and
   (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.
11. Any person charged with an offence has the right:
   (a) to be informed without unreasonable delay of the specific offence;
   (b) to be tried within a reasonable time;
   (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
   (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
   (e) not to be denied reasonable bail without just cause;
   (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
   (g) not to be found guilty on account of an act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
   (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
   (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

**Equality Rights**

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

**Official Languages of Canada**

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

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

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

17. (1) Everyone has the right to use English or French in any debate and other proceedings of Parliament.
21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

23. (1) Citizens of Canada
(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the right with respect to any other office of any such institution where
(a) there is a significant demand for communications with and services from that office in such language; or
(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

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

28. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada, in respect of denominational, separate or dissentent schools.

29. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

30. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

31. (1) This Charter applies

(a) to the Parliament and government of Canada and to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province and to all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this Act, except Part VI, comes into force.

Citation

32. This Part may be cited as the Canadian Charter of Rights and Freedoms.

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

33. (1) The aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

PART III

EQUALIZATION AND REGIONAL DISPARITIES

34. (1) Without affecting the legislative authority of Parliament or of the provincial
legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to (a) promoting equal opportunities for the well-being of Canadians; (b) furthering economic development to reduce disparity in opportunities; and (c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

PART IV

CONSTITUTIONAL CONFERENCES

35. (1) Until Part VI comes into force, 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 in every year.

(2) A conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

PART V

INTERIM AMENDMENT PROCEDURE AND RULES FOR ITS REPLACEMENT

36. Until Part VI comes into force, 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 House of Commons and by the legislative assembly or government of each province.

37. Until Part VI comes into force, an amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces 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 House of Commons and by the legislative assembly or government of each province to which the amendment applies.

38. (1) Notwithstanding section 40, 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 House of Commons and the legislative assembly of the province to which the amendment applies.

(2) The procedure for amendment prescribed by subsection (1) may be initiated only by the legislative assembly of the province to which the amendment applies.

39. (1) The procedures for amendment prescribed by sections 36 and 37 may be initiated either by the Senate or House of Commons or by the legislative assembly or government of a province.
(2) A resolution made or other authorization given for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

40. Sections 36 and 37 do not apply to an amendment to the Constitution of Canada where there is another provision in the Constitution for making the amendment, but the procedure prescribed by section 36 shall be used to amend the Canadian Charter of Rights and Freedoms and any provision for amending the Constitution, including this section.

41. Part VI shall come into force

(a) with or without amendment, on such day as may be fixed by proclamation issued pursuant to the procedure prescribed by section 36, or

(b) on the day that is two years after the day this Act, except Part VI, comes into force,

whichever is the earlier day but, if a referendum is required to be held under subsection 42(3), Part VI shall come into force as provided in section 43.

42. (1) The legislative assemblies of seven or more provinces that have, according to the then latest general census, combined populations of at least eighty per cent of the population of all the provinces may make a single proposal to substitute for paragraph 45(1)(b) such alternative as they consider appropriate.

(2) One copy of an alternative proposed under subsection (1) may be deposited with the Chief Electoral Officer of Canada by each proposing province within two years after this Act, except Part VI, comes into force but, prior to the expiration of that period, any province that has deposited a copy may withdraw that copy.

(3) Where copies of an alternative have been deposited as provided by subsection (2) and, on the day that is two years after this Act, except Part VI, comes into force, at least seven copies remain deposited by provinces that have, according to the then latest general census, combined populations of at least eighty per cent of the population of all the provinces, the government of Canada shall cause a referendum to be held within two years after that day to determine whether

(a) paragraph 45(1)(b) or any alternative thereto approved by resolutions of the Senate and House of Commons and deposited with the Chief Electoral Officer at least ninety days prior to the day on which the referendum is held, or

(b) the alternative proposed by the provinces,

shall be adopted.

43. Where a referendum is held under subsection 42(3), a proclamation under the Great Seal of Canada shall be issued within six months after the date of the referendum bringing Part VI into force with such modifications, if any, as are necessary to incorporate the proposal approved by a majority of the persons voting at the referendum and with such other changes as are reasonably consequential on the incorporation of that proposal.

44. (1) Every citizen of Canada has, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, the right to vote in a referendum held under subsection 42(3).

(2) If a referendum is required to be held under subsection 42(3), a Referendum Rules Commission shall forthwith be established by commission issued under the Great Seal of Canada consisting of

(a) the Chief Electoral Officer of Canada, who shall be chairman of the Commission;

(b) a person appointed by the Governor General in Council; and

(c) a person appointed by the Governor General in Council

(i) on the recommendation of the governments of a majority of the provinces, or
PART VI
PROCEDURE FOR AMENDING
CONSTITUTION OF CANADA

45. (1) 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
(a) resolutions of the Senate and House of Commons; and
(b) resolutions of the legislative assemblies of at least a majority of the provinces that includes
(i) every province that at any time before the issue of the proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada,
(ii) two or more of the Atlantic provinces, and
(iii) two or more of the Western provinces that have in the aggregate, according to the then latest general census, a population of at least fifty per cent of the population of all of the Western provinces.

(2) In this section,
"Atlantic provinces" means the provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland;
"Western provinces" means the provinces of Manitoba, British Columbia, Saskatchewan and Alberta.

46. (1) 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 a referendum held throughout Canada under subsection (2) at which
(a) a majority of persons voting thereto, and
(b) a majority of persons voting thereto in each of the provinces, resolutions of the legislative assemblies of which would be:
(ii) if the governments of a majority of the provinces do not recommend a candidate within thirty days after the Chief Electoral Officer of Canada requests such a recommendation, on the recommendation of the Chief Justice of Canada from among persons recommended by the governments of the provinces within thirty days after the expiration of the first mentioned thirty day period or, if none are so recommended, from among such persons as the Chief Justice considers qualified.

(3) A Referendum Rules Commission shall cause rules for the holding of a referendum under subsection 42(3) approved by a majority of the Commission to be laid before Parliament within sixty days after the Commission is established or, if Parliament is not then sitting, on any of the first ten days next thereafter that Parliament is sitting.

(4) Subject to subsection (1) and taking into consideration any rules approved by a Referendum Rules Commission in accordance with subsection (3), Parliament may enact laws respecting the rules applicable to the holding of a referendum under subsection 42(3).

(5) If Parliament does not enact laws under subsection (4) respecting the rules applicable to the holding of a referendum within sixty days after receipt of a recommendation from a Referendum Rules Commission, the rules recommended by the Commission shall forthwith be brought into force by proclamation issued by the Governor General under the Great Seal of Canada.

(6) Any period when Parliament is prorogued or dissolved shall not be counted in computing the sixty day period referred to in subsection (5).

(7) Subject to subsection (1), rules made under this section have the force of law and prevail over other laws made under the Constitution of Canada to the extent of any inconsistency.
sufficient, together with resolutions of the Senate and House of Commons, to authorize the issue of a proclamation under subsection 45(1), have approved the making of the amendment.

(2) A referendum referred to in subsection (1) shall be held where directed by proclamation issued by the Governor General under the Great Seal of Canada, which proclamation may be issued where

(a) an amendment to the Constitution of Canada has been authorized under paragraph 45(1)(a) by resolutions of the Senate and House of Commons;

(b) the requirements of paragraph 45(1)(b) in respect of the proposed amendment have not been satisfied within twelve months after the passage of the resolutions of the Senate and House of Commons; and

(c) the issue of the proclamation has been authorized by the Governor General in Council.

(3) A proclamation issued under subsection (2) in respect of a referendum shall provide for the referendum to be held within two years after the expiration of the twelve month period referred to in paragraph (b) of that subsection.

47. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces 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 House of Commons and of the legislative assembly of each province to which the amendment applies.

48. (1) Notwithstanding section 54, 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 House of Commons and the legislative assembly of the province to which the amendment applies.

(2) The procedure for amendment prescribed by subsection (1) may be initiated only by the legislative assembly of the province to which the amendment applies.

49. (1) The procedures for amendment prescribed by subsection 45(1) and section 47 may be initiated either by the Senate or House of Commons or by the legislative assembly of a province.

(2) A resolution made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

50. (1) Every citizen of Canada has, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, the right to vote in a referendum held under section 46.

(2) Where a referendum is to be held under section 46, a Referendum Rules Commission shall forthwith be established by commission issued under the Great Seal of Canada consisting of

(a) the Chief Electoral Officer of Canada, who shall be chairman of the Commission;

(b) a person appointed by the Governor General in Council; and

(c) a person appointed by the Governor General in Council,

(i) on the recommendation of the governments of a majority of the provinces, or

(ii) if the governments of a majority of the provinces do not recommend a candidate within thirty days after the Chief Electoral Officer of Canada requests such a recommendation, on the recommendation of the Chief Justice of Canada from among persons recommended by the governments of the prov-
inues within thirty days after the expiration of the first mentioned thirty day period or, if none are so recommended, from among such persons as the Chief Justice considers qualified.

(3) A Referendum Rules Commission shall cause rules for the holding of a referendum under section 46 approved by a majority of the Commission to be laid before Parliament within sixty days after the Commission is established or, if Parliament is not then sitting, on any of the first ten days next thereafter that Parliament is sitting.

(4) Subject to subsection (1) and taking into consideration any rules approved by a Referendum Rules Commission in accordance with subsection (3), Parliament may enact laws respecting the rules applicable to the holding of a referendum under section 46.

(5) If Parliament does not enact laws under subsection (4) respecting the rules applicable to the holding of a referendum within sixty days after receipt of a recommendation from a Referendum Rules Commission, the rules recommended by the Commission shall forthwith be brought into force by proclamation issued by the Governor General under the Great Seal of Canada.

(6) Any period when Parliament is pro-ogued or dissolved shall not be counted in computing the sixty day period referred to in subsection (5).

(7) Subject to subsection (1), rules made under this section have the force of law and prevail over other laws made under the Constitution of Canada to the extent of any inconsistency.

51. (1) The procedures prescribed by sections 45, 46 or 47 do not apply to an amendment to the Constitution of Canada where there is another provision in the Constitution for making the amendment, but the procedures prescribed by section 45 or 46 shall, nevertheless, be used to amend any provision for amending the Constitution, including this section.

(2) The procedures prescribed by section 45 or 46 do not apply in respect of an amendment referred to in section 47.

52. Subject to section 54, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate or House of Commons.

53. Subject to section 54, the legislature of each province may exclusively make laws amending the constitution of the province.

54. An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with a procedure prescribed by section 45 or 46:

(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
(b) the Canadian Charter of Rights and Freedoms;
(c) the commitments relating to equalization and regional disparities set out in section 34;
(d) the powers of the Senate;
(e) the number of members by which a province is entitled to be represented in the Senate;
(f) the method of selecting Senators and the residence qualifications of Senators;
(g) the right of a province to a number of members in the House of Commons not less than the number of Senators representing the province; and
(h) the principles of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada.

55. (1) Class 1 of section 91 and class 1 of section 92 of the Constitution Act, 1867 (formerly named the British North America Act, 1867), the British North America (No. 2) Act, 1949, referred to in item 22 of Schedule 1 to this Act and Parts IV and V of this Act are repealed.
(2) When Parts IV and V of this Act are repealed, this section may be repealed and this Act may be renumbered, consequential upon the repeal of those Parts and this section, by proclamation issued by the Governor General under the Great Seal of Canada.

PART VII

AMENDMENT TO THE CONSTITUTION ACT, 1867

56. (1) The Constitution Act, 1867 (formerly named the British North America Act, 1867) is amended by adding thereto, immediately after section 92 thereof, the following heading and section:

"Non-Renewable Natural Resources, Forestry Resources and Electrical Energy"

92A. (1) In each province, the legislature may exclusively make laws in relation to:

(a) exploration for non-renewable natural resources in the province;
(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
(b) sites and facilities in the province for the generation of electrical energy and the production therefrom, whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

57. The said Act is further amended by adding thereto the following Schedule:

"THE SIXTH SCHEDULE

Primary Production from Non-Renewable Natural Resources and Forestry Resources"

1. For the purposes of section 92A of this Act,
(a) production from a non-renewable natural resource is primary production therefrom if...
(i) it is in the form in which it exists
upon its recovery or severance from its
natural state, or
(ii) it is a product resulting from proc-
cessing or refining the resource, and is
not a manufactured product or a prod-
uct resulting from refining crude oil,
refining upgraded heavy crude oil, re-
ing gases or liquids derived from coal or
refining a synthetic equivalent of crude
oil; and
(b) production from a forestry resource is
primary production therefrom if it consists
of sawlogs, poles, lumber, wood chips, saw-
dust or any other primary wood product,
or wood pulp, and is not a product manu-
factured from wood.”

58. (1) The Constitution of Canada is the
supreme law of Canada, and any law that is
inconsistent with the provisions of the Con-
stitution is, to the extent of the inconsisten-
cy, of no force or effect.

(2) The Constitution of Canada includes
(a) the Canada Act;
(b) the Acts and orders referred to in
Schedule I; and
(c) any amendment to any Act or order
referred to in paragraph (a) or (b).

3. Amendments to the Constitution of
Canada shall be made only in accordance
with the authority contained in the Consta-
tution of Canada.

59. (1) The enactments referred to in
Column 1 of Schedule I are hereby repealed
or amended to the extent indicated in
Column II thereof and, unless repealed, shall
continue as law in Canada under the names
set out in Column III thereof.

(2) Every enactment, except the Canada
Act, that refers to an enactment referred to
in Schedule I by the name in Column I
thereof is hereby amended by substituting

60. A French version of the portions of
the Constitution of Canada referred to in
Schedule I shall be prepared by the Minister
of Justice of Canada as expeditiously as pos-
sible and, when any portion thereof sufficient
to warrant action being taken has been so
prepared, it shall be put forward for enact-
ment by proclamation issued by the Gover-
nor General under the Great Seal of Canada
pursuant to the procedure then applicable
to an amendment of the same provisions of the
Constitution of Canada.

61. Where any portion of the Constitution
of Canada has been or is enacted in English
and French or where a French version of any
portion of the Constitution is enacted pursu-
ant to section 60, the English and French
versions of that portion of the Constitution
are equally authoritative.

62. The English and French versions of
this Act are equally authoritative.

63. Subject to section 64, this Act shall
come into force on a day to be fixed by
proclamation issued by the Governor Gener-
al under the Great Seal of Canada.

64. Part VI shall come into force as pro-
vided in Part V.

65. This Schedule may be cited as the
Constitution Act, 1981, and the Constitution
Acts 1867 to 1975 (No. 2) and this Act may
be cited together as the Constitution Acts,
1867 to 1981.
APPENDIX VI

CONSTITUTION ACT, 1982
(as passed December 1981)
An Act to give effect to a request by the Senate and House of Commons of Canada

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

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

1. The Constitution Act, 1981 set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2. No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1981 comes into force shall extend to Canada as part of its law.

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4. This Act may be cited as the Canada Act.

CONSTITUTION ACT, 1981

PART I

SCHEDULE B

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:
   (a) freedom of conscience and religion;
   (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
   (c) freedom of peaceful assembly; and
   (d) freedom of association.

Democratic Rights

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.
(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right:
(a) to move to and take up residence in any province; and
(b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to
(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention
(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Any person charged with an offence has the right
(a) to be informed without unreasonable delay of the specific offence;
(b) to be tried within a reasonable time;
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
(e) not to be denied reasonable bail without just cause;
(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished
for the offence, not to be tried or punished for it again; and
(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

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

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where
(a) there is a significant demand for communications with and services from that office in such language; or
(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

23. (1) Citizens of Canada
(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province
(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.
26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

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

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

34. This Part may be cited as the Canadian Charter of Rights and Freedoms.

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
PART III

EQUALIZATION AND REGIONAL DISPARITIES

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to:

(a) promoting equal opportunities for the well-being of Canadians;
(b) furthering economic development to reduce disparity in opportunities; and
(c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

PART IV

CONSTITUTIONAL CONFERENCE

37. (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 within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

PART V

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

38. (1) 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:

(a) resolutions of the Senate and House of Commons; and
(b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment
relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

39. (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

40. Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters 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 by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

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

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

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

Exception

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

43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

(a) any alteration to boundaries between provinces, and
(b) any amendment to any provision that relates to the use of the English or the French language within a province,
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 each province to which the amendment applies.

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

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

AMENDMENT TO THE
CONSTITUTION ACT, 1867

46. (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its 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.

50. The Constitution Act, 1867 (formerly named the British North America Act, 1867) is amended by adding thereto, immediately after section 92 thereof, the following heading and section:

"Non-Renewable Natural Resources, Forestry Resources and Electrical Energy"

92A. (1) In each province, the legislature may exclusively make laws in relation to
(a) exploration for non-renewable natural resources in the province;
(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.
(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
(b) sites and facilities in the province for the generation of electrical energy and the production therefrom, whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

51. The said Act is further amended by adding thereto the following Schedule:

"THE SIXTH SCHEDULE"

Primary Production from Non-Renewable Natural Resources and Forestry Resources

I. For the purposes of section 92A of this Act,
(a) production from a non-renewable natural resource is primary production therefrom if
(i) it is in the form in which it exists upon its recovery or severance from its natural state, or
(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and
(b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

PART VII

GENERAL

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

(2) The Constitution of Canada includes
(a) the Canada Act, including this Act;
(b) the Acts and orders referred to in Schedule I; and
(c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

53. (1) The enactments referred to in Column I of Schedule I are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

(2) Every enactment, except the Canada Act, that refers to an enactment referred to in Schedule I by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in Schedule I may be cited as the Constitution Act followed by the year and number, if any, of its enactment.
54. Part IV is repealed on the day that is one year after this Part comes into force and this section may be repealed and this Act renumbered, consequential upon the repeal of Part IV and this section, by proclamation issued by the Governor General under the Great Seal of Canada.

55. A French version of the portions of the Constitution of Canada referred to in Schedule I shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

56. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

57. The English and French versions of this Act are equally authoritative.

58. Subject to section 59, this Act shall come into force on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

59. (1) Paragraph 23(1)(a) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

   (2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec.

   (3) This section may be repealed on the day paragraph 23(1)(a) comes into force in respect of Quebec and this Act amended and renumbered, consequential upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

60. This Act may be cited as the Constitution Act, 1981, and the Constitution Acts, 1867 to 1975 (No. 2) and this Act may be cited together as the Constitution Acts, 1867 to 1981.
November 5, 1981,

In an effort to reach an acceptable consensus on the constitutional issue which meets the concerns of the federal government and a substantial number of provincial governments, the undersigned governments have agreed to the following:

1. **Patriation**

2. **Amending Formula:**
   - Acceptance of the April Accord Amending Formula with the deletion of Section 3 which provides for fiscal compensation to a province which opts out of a constitutional amendment.
   - The Delegation of Legislative Authority from the April Accord is deleted.

3. **Charter of Rights and Freedoms:**
   - The entrenchment of the full Charter of Rights and Freedoms now before Parliament with the following changes:
     (a) With respect to Mobility Rights the inclusion of the right of a province to undertake affirmative action programs for socially and economically disadvantaged individuals as long as a province's employment rate was below the national average.

4. **Notwithstanding clause** covering sections dealing with Fundamental Freedoms, Legal Rights and Equality Rights. Each "notwithstanding" provision would require reenactment not less frequently than once every five years.

5. We have agreed that the provisions of Section 23 in respect of Minority Language Education Rights will apply to our provinces.

4. **Provisions of the Act now before Parliament relating to Equalization and Regional Disparities, and Non Renewable Natural Resources, Forestry Resources and Electrical Energy would be included.**

5. **A constitutional conference as provided for in clause 36 of the Resolution, including in its agenda an item respecting constitutional matters that directly affect the Aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, shall be provided for in the Resolution. The Prime Minister of Canada shall invite representatives of the Aboriginal peoples of Canada to participate in the discussion of that item.**
Dated at Ottawa this 5th day of November, 1981.

CANADA/POUR LE CANADA

Pierre Elliott Trudeau
Prime Minister of Canada/
Premier ministre du Canada

ONTARIO/POUR L'ONTARIO

William G. Davis, Premier/
Premier ministre

NOVA SCOTIA/POUR LA NOUVELLE-ECOSSE

John M. Buchanan, Premier/
Premier ministre

NEW BRUNSWICK/POUR LE NOUVEAU-BRUNSWICK

Richard B. Hatfield, Premier/
Premier ministre

MANITOBA/POUR LE MANITOBA

Sterling R. Lyon, Premier/
Premier ministre

BRITISH COLUMBIA/POUR LA COLOMBIE-BRITANNIQUE

William R. Bennett, Premier/
Premier ministre

PRINCE EDWARD ISLAND/POUR L'ILE-DU-PRINCE-EDOUARD

J. Angus MacLean, Premier/
Premier ministre
SASKATCHEWAN/POUR LA SASKATCHEWAN

[Signature]
Allan E. Blakeney, Premier/
Premier ministre

ALBERTA/POUR L'ALBERTA

[Signature]
Peter Lougheed, Premier/
Premier ministre

NEWFOUNDLAND/POUR TERRE-NEUVE

[Signature]
Brian A. Peckford, Premier/
Premier ministre
FACT SHEET

The notwithstanding or override clause
as applied to the Charter of Rights & Freedoms

A notwithstanding clause is one which enables a legislative body (federal and provincial) to enact expressly that a particular provision of an Act will be valid, notwithstanding the fact that it conflicts with a specific provision of the Charter of Rights and Freedoms. The notwithstanding principle has been recognized and is contained in a number of bills of rights, including the Canadian Bill of Rights (1960), the Alberta Bill of Rights (1972), The Quebec Charter of Rights and Freedoms (1975), the Saskatchewan Human Rights Code (1979), and Ontario's Bill 7 to Amend its Human Rights Code (1981).

How it would be applied

Any enactment overriding any specific provisions of the Charter would contain a clause expressly declaring that a specific provision of the proposed enactment shall operate, notwithstanding a specific provision of the Charter of Rights and Freedoms.

Any notwithstanding enactment would have to be reviewed and renewed every five years by the enacting legislature if it were to remain in force.
APPENDIX VII

TABLE IV

DETAILED ANALYSIS OF AMENDMENTS
<table>
<thead>
<tr>
<th>CONSTITUTION ACT 1980</th>
<th>CONSTITUTION ACT 1981</th>
<th>PURPOSE OF AMENDMENT</th>
<th>GROUPS</th>
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</thead>
</table>
| Guarantee of Rights and Freedoms | 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. | This amendment would narrow the limits that could be placed on the rights and freedoms guaranteed in the Charter. | Canadian Jewish Congress
|                      |                       |                      | Canadian Civil Liberties Ass'n. |
|                      |                       |                      | Société franco-manitobaine   |
|                      |                       |                      | B.C. Civil Liberties Ass'n.  |
|                      |                       |                      | Can. Fed. of Civil Liberties and Human Rights Associations |
|                      |                       |                      | Canadian Human Rights Commission |
|                      |                       |                      | Canadian Advisory Council on the Status of Women |
|                      |                       |                      | Nat. Ass'n. of Japanese Canadians |
|                      |                       |                      | Ukrainian Canadian Committee |
|                      |                       |                      | Nat. Ass'n. of Women and the Law |
|                      |                       |                      | Council of Nat'l. Ethnocultural Organizations of Canada |
|                      |                       |                      | Coalition for the Protection of Human Life |
|                      |                       |                      | N.B. Human Rights Commission |
|                      |                       |                      | Can. Nat'l. Inst. for the Blind Native Council of Canada |
|                      |                       |                      | United Church of Canada |
|                      |                       |                      | Can. Consultative Council on Multiculturalism |
|                      |                       |                      | Can. Ass'n. of Social Workers German-Canadian Comm. on the Constitution |

TABLE IV
DETAILED ANALYSIS OF AMENDMENTS

CONSTITUTION ACT 1980

Fundamental Freedoms
2. Everyone has the following fundamental freedoms:
   (a) freedom of conscience and religion;
   (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of information; and
   (c) freedom of peaceful assembly and of association.

Legal Rights
8. Everyone has the right not to be subjected to search or seizure except on grounds, and in accordance with procedures, established by law.

CONSTITUTION ACT 1981

2. Everyone has the following fundamental freedoms:
   (a) freedom of conscience and religion;
   (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of information;
   (c) freedom of peaceful assembly; and
   (d) freedom of association.

PURPOSE OF AMENDMENT
Paragraph (c) would be divided into two paragraphs to make it clear that the freedoms contained therein are separate freedoms. These freedoms are expressed separately in the International Covenant on Civil and Political Rights.

GROUPS
Canadian Bar Association
Canadian Council on Social Development

The right to be secure against search and seizure would be subject to the test of whether the search or seizure is reasonable as opposed to whether it is provided for by law.

Government of New Brunswick
Vancouver People's Law School Society
Canadian Jewish Congress
B.C. Civil Liberties Assns.
Can. Civil Liberties Assn.
United Church of Canada
Canadian Bar Association
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<tr>
<th>CONSTITUTION ACT 1980</th>
<th>CONSTITUTION ACT 1981</th>
<th>PURPOSE OF AMENDMENT</th>
<th>GROUPS</th>
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<tr>
<td><strong>Legal Rights</strong></td>
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<td>9. Everyone has the right not to be detained or imprisoned except on grounds, and in accordance with procedures, established by law.</td>
<td>9. Everyone has the right not to be arbitrarily detained or imprisoned.</td>
<td>The right not to be detained or imprisoned would be subject to the test of whether the detention or imprisonment is arbitrary rather than whether it is provided for by law.</td>
<td>Vancouver People's Law School Society</td>
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<td>Can. Civil Liberties Assn.</td>
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<td>B.C. Civil Liberties Assn.</td>
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<td>Native Women's Assn. of Canada</td>
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<td>Canadian Bar Association</td>
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<td>Government of New Brunswick</td>
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<td>10. Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefor; (b) to retain and instruct counsel without delay; and (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.</td>
<td>10. Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefor; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.</td>
<td>Paragraph 10(b) would be amended to include, with the right to retain counsel, an additional right to be informed of that right.</td>
<td>Canadian Jewish Congress</td>
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<td>Can. Civil Liberties Assn.</td>
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<td>Canadian Bar Association</td>
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## Table IV (cont'd.)

### Constitutions Act 1980

**Legal Rights**

11. Anyone charged with an offence has the right
(a) to be informed promptly of the specific offence;
(b) to be tried within a reasonable time;
(c) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
(d) not to be denied reasonable bail except on grounds, and in accordance with procedures, established by law;
(e) not to be found guilty on account of any act or omission that at the time of the act or omission did not constitute an offence;
(f) not to be tried or punished more than once for an offence of which he or she has been finally convicted or acquitted; and

### Constitutions Act 1981

11. Any person charged with an offence has the right
(a) to be informed promptly of the specific offence;
(b) to be tried within a reasonable time;
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
(e) not to be denied reasonable bail without just cause;
(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

### Purpose of Amendment

(c) This new paragraph would state the right of an accused not to be called as a witness in proceedings against the accused, a right at present reflected in the Canadian Bill of Rights.

(e) The present paragraph (d) would be amended so that the right to reasonable bail would be subject to the test of whether any denial of bail is for just cause rather than whether it is provided for by law.

(f) This new paragraph would provide a constitutional right to trial by jury in respect of serious offences, other than those under military law that are tried before a military tribunal. (Murder, rape and manslaughter cannot be tried in Canada before a military tribunal.)

(g) and (h) The present paragraphs (e) and (f) would be amended to make it clear that the rights set out in those paragraphs would not be interpreted to preclude the prosecution in Canada

### Groups

Section 11(d)
- Vancouver People's Law School Society
- B.C. Civil Liberties Assn.
- Canadian Jewish Congress
- Canadian Bar Association
- Government of New Brunswick

Section 11 (New Paragraph (f))
- Canadian Bar Association
- B.C. Civil Liberties Assn.

Section 11(e) and (f)
- Canadian Jewish Congress
<table>
<thead>
<tr>
<th>CONSTITUTION ACT 1980</th>
<th>CONSTITUTION ACT 1981</th>
<th>PURPOSE OF AMENDMENT</th>
<th>GROUPS</th>
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<tr>
<td><strong>Legal Rights</strong></td>
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<td>of a person for crimes recognized by international law at the time of their commission.</td>
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<td>(h) and (i) A technical amendment to paragraphs (h) and (i), the present paragraphs (f) and (g), would permit the deletion of the words &quot;he or she&quot; and clarify those paragraphs.</td>
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</table>

13. A witness has the right when compelled to testify not to have any incriminating evidence so given used to incriminate him or her in any other proceedings, except a prosecution for perjury or for the giving of contradictory evidence.

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

13. This amendment would make it clear that the protection against self-incrimination applies to a voluntary witness as well as to one who is compelled to testify. It would also replace "he or she" by the generic word "witness".

Canadian Bar Association
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<tr>
<td><strong>Non-Discrimination Rights</strong></td>
<td><strong>Equality Rights</strong></td>
<td><strong>Title:</strong> The change in title would place emphasis on the main object of section 15 which is to guarantee equality.</td>
<td>Can. Human Rights Commission</td>
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<td>15.(1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.</td>
<td>15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.</td>
<td><strong>15.(1) The word “everyone” would be replaced by the words “every individual” to make it clear that this right would apply to natural persons only. The addition of the words “and under” the law after “before” would ensure that the right to equality would apply in respect of the substance as well as the administration of the law. The addition of the words “and equal benefit” of the law after “protection” would extend the right to ensure that people enjoy equality of benefits as well as the protection of the law. Certain proscribed grounds of discrimination would be listed in the section. However, those grounds would not be exhaustive.</strong></td>
<td>B.C. Civil Liberties Assn.</td>
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<td>Canadian Bar Association</td>
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<td>National Assn. of Women and the Law</td>
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<td>Can. Advisory Council on the Status of Women</td>
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<td>National Action Committee on the Status of Women</td>
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<td>Coalition for the Protection of Human Life</td>
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<tr>
<td>TABLE IV</td>
<td>(cont'd.)</td>
<td>DETAILED ANALYSIS OF AMENDMENTS</td>
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<td>CONSTITUTION ACT 1980</td>
<td>CONSTITUTION ACT 1981</td>
<td>PURPOSE OF AMENDMENT</td>
<td>GROUPS</td>
</tr>
</tbody>
</table>
| 15.(2) This section does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged persons or groups. | 15.(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex or age. | 15.(2). This subsection would make it clear that affirmative action programs would be permitted in respect of individuals or groups that are disadvantaged on any grounds including those listed therein. | Canadian Committee on Learning Opportunities for Women
Nat. Assn. of Women and the Law
Can. Assn. of Social Workers |

<table>
<thead>
<tr>
<th>Undeclared Rights and Freedoms</th>
<th>Enforcement</th>
<th>24. Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.</th>
<th>24. New. The proposed section 24 would introduce into the Charter a general provision for the enforcement of rights guaranteed by the Charter.</th>
</tr>
</thead>
</table>
| 24. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, including any rights or freedoms that pertain to the native peoples of Canada. | | | B.C. Civil Liberties Assn.
Can. Civil Liberties Assn.
Canadian Jewish Congress
Société franco-manitobaine
N.B. Human Rights Commission
Canadian Bar Association
Can. Council on Children & Youth
Denominational Educational Committees of Newfoundland |
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<th>PURPOSE OF AMENDMENT</th>
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<tr>
<td>General</td>
<td>General</td>
<td>General</td>
<td>New Democratic Party of Alberta Nat'l. Italian Canadians Congress (Quebec Region)</td>
</tr>
<tr>
<td>25. Any law that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect.</td>
<td>25. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of: (a) any aboriginal, treaty or other rights or freedoms that may pertain to the aboriginal peoples of Canada including any right or freedom that may have been recognized by the Royal Proclamation of October 7, 1763; or (b) any other rights or freedoms that may exist in Canada.</td>
<td>25. This section is the present section 24 amended to state in greater detail the kinds of rights and freedoms pertaining to native people that are not affected by the Charter and would set them apart from other rights and freedoms not affected by the Charter.</td>
<td>Native Council of Canada Inuit Cttee. on National Issues Canadian Jewish Congress Ass'n. of Métis and Non-Status Indians of Saskatchewan National Indian Brotherhood Nuu-Chah-Nulth Tribal Council Conseil Attikamek-Montagnais United Church of Canada Public Interest Advocacy Centre Nat'l. Anti-Poverty Organization Indian Ass'n. of Alberta Fed. of Saskatchewan Indians Can. Consultative Council on Multiculturalism The Most Rev. Edward W. Scott Union of Ontario Indians Government of Saskatchewan Vancouver People's Law School Society Union of New Brunswick Indians Maxwell Cohen Ontario Conference of Catholic Bishops Union of Nova Scotia Indians</td>
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<td>Table IV (cont'd.)</td>
<td>Detailed Analysis of Amendments</td>
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<tr>
<td><strong>Constitution Act 1980</strong></td>
<td><strong>Constitution Act 1981</strong></td>
<td><strong>Purpose of Amendment</strong></td>
<td><strong>Groups</strong></td>
</tr>
<tr>
<td>26. No provision of this Charter, other than section 13, affects the laws respecting the admissibility of evidence in any proceedings or the authority of Parliament or a legislature to make laws in relation thereto.</td>
<td>26. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.</td>
<td>26. New. The present section 26, which states the relationship between the Charter the laws governing the admissibility of evidence, would be deleted. The proposed new section 26 is an interpretation section. It would require an interpretation of the Charter consistent with the preservation of the multicultural heritage of Canadians.</td>
<td>Deletation of Original § 26</td>
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<td>Can. Advisory Council on the Status of Women</td>
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<td>Can. Human Rights Commission</td>
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APPENDIX VIII

TABLE 5

POSITIONS OF THE PROVINCES AND FEDERAL GOVERNMENT BY ISSUE
TABLE V

POSITIONS OF THE PROVINCES AND FEDERAL GOVERNMENT BY ISSUE*

1. Patriation and Amending Formula

**Ottawa** - Top priority. Supported unilateral action if necessary. Amending formula similar to Victoria preferred, but relatively flexible.

**B.C.** - Supported patriation if not done unilaterally. Flexible on amending formula as long as it recognized B.C.'s position as the third most populous province.

**Alta.** - Strongly against unilateral patriation. Proposed own amending formula.

**Sask.** - Opposed to patriation of any kind unless substantial agreement reached on division of powers.

**Man.** - Supported patriation if provincial agreement. Favoured Alberta formula for amendment.

**Ont.** - Strongly supported patriation even if unilateral. Flexible on amending formula; no doubt assuming that any formula would give it a veto.

**Que.** - Opposed to any attempt at patriation without major changes in the structure of the federal system and a new amending formula.

**N.B.** - Generally against unilateral patriation, but if that came about would favour Victoria type formula or status quo.

**P.E.I.** - No patriation without amending formula. Favoured Alberta model with some reservations.

**N.S.** - Against unilateral patriation. Favoured Alberta model.

**Nfld.** - Supported patriation if an amending formula agreed to. Favoured its own version of Alberta model.

*Information for this table was taken from provincial position papers and from summaries published in the *Globe and Mail*, Sept. 16, 1980.
2. Statement of Principles (Preamble)

Ottawa - Softened position somewhat to accommodate Quebec. Referred to federal structure as freely associating states. Argued for a clear preamble that recognized Canadian people - rather than the various governments - as basis of nation.

B.C. - Flexible although concerned that the preamble not give Ottawa justificatory words for federal encroachment on provincial powers later on.

Alta. - Flexible.

Sask. - Flexible and an important player in seeking compromise.

Man. - Flexible, as long as the preamble acknowledged the monarchy.

Ont. - Flexible on wording, but disagreed with Quebec's interpretation that Canadians "freely united" means the right of self-determination for a province.

Que. - The most vociferous opponent of the federal preamble. Wanted a statement that acknowledged its distinctive character and right to self-determination. A compromise reached with a wording change to "free association" of provinces.

N.B. - In favour, it would also have liked to see francophone existence outside Quebec recognized explicitly.

P.E.I. - Might not be necessary and might open up some areas to judicial review, but would go along if brief and concise.

N.S. - No objection to statement of principles.

Nfld. - Favoured a general statement on the federal nature of Canada.

3. Charter of Rights

Ottawa - Wanted a comprehensive charter that would entrench basic democratic, fundamental and legal rights as well as the more controversial language rights and freedom of mobility. Some aspects of mobility rights negotiable, but rest was unassailable.

B.C. - Opposed to entrenchment. As a compromise, might accept a charter of democratic and fundamental rights.
Alta. - Like Saskatchewan, did not like entrenching a charter of rights, but would compromise if Ottawa softened its position on resources. At the last conference, Premier Peter Lougheed said Alberta could accept a charter as part of a package deal.

Sask. - Did not like entrenching rights, believing legislatures better protectors of those rights than courts, but at the last conference the province showed a willingness to compromise.

Man. - Firmly opposed to any kind of charter, feeling that rights of whatever kind best protected by the elected bodies, not by the courts.

Ont. - Fully and strongly supported federal charter of rights.

Que. - Prepared to accept limited charter of human, democratic and legal rights but adamantly opposed to including freedom of movement. Regarded entrenchment of language rights as a basic affront to its historic position.

M.B. - Next to Ottawa, the main proponent of entrenched rights. Flexible only on mobility rights.

P.E.I. - Not supportive because too much power given to courts. Prepared to go along with the entrenchment of fundamental and democratic rights, and language rights at federal level only.

N.S. - Against entrenching more than basic freedoms and democratic rights in constitution. Language, mobility and legal rights should not be decided by courts.

Nfld. - Supported entrenchment of democratic and legal rights and fundamental freedoms. Against entrenching freedom of mobility, but would go along with entrenching language rights if that was the consensus.

4. Powers Affecting the Economy

Ottawa - Wanted to promote economic union, and extend to the courts the right to limit provinces from setting up barriers restricting the flow of people, capital and services.

8.C. - Supported Saskatchewan's general statement of principles.

Alta. - Suspicious of any federal attempts to gain greater control of the economy by whatever means.
Sask. - Proposed a general statement supporting a Canadian economic union without enforcement provisions.

Man. - Supported a general statement of good intentions without any enforcement provisions.

Ont. - Ottawa's strongest ally in reaffirming federal power to strengthen the economic union, especially in eliminating interprovincial barriers.

Que. - Opposed expanding federal powers or extending control to the courts. Freedom of movement would cut or curtail application of language laws by limiting ability to licence professional groups.

N.B. - Concerned that restricting provincial powers in this field would leave N.B. unable to defend itself against dumping or underbidding by firms from economically stronger provinces.

P.E.I. - Supported the principle of an economic union, but felt an unrestricted economic union had built-in discrimination in favor of economically powerful.

N.S. - Agreed in principle to economic union concept but wanted constitutional authority to make limited exceptions in the case of have-not provinces wanting to discriminate in favor of their own jobless.

Nfld. - Accepted principle of economic union enunciated in constitution, but wouldn't change status quo on economic powers and did not want to see courts given additional powers in this area. Wanted statement in constitution that governments should work in consultation and co-operation.

5: Dedication to Sharing (Equalization)

Ottawa - Favored entrenching principle of equalization payments and reduction of regional disparities. Only one province, B.C., was against this in principle. Others, however, wanted to specifically limit undue federal intervention under this guise.

B.C. - Favored general statements supporting the elimination of regional disparities, but did not want to lock in equalization.

Alta. - Despite having the highest per capita income, Alberta was still strongly in favor of equalization in the constitution.
Sask. - As a long-time recipient, until recently, of equalization payments, the province fully supported the principle of putting the elimination of regional disparity and equalization payments in the constitution.

Man. - As a province becoming poorer by the day in relation to its neighbors in Western Canada, Manitoba was all for equalization.

Ont. - All for equalization.

Que. - Agreeable in principle, but worried that the mechanism could open the door to more federal intervention in provincial affairs.

N.B. - In favor.

P.E.I. - Supported principle.

N.S. - In favor. One of primary sponsors of draft statement on this principle.

Nfld. - Committed to equalization principle.

6. Offshore Resources

Ottawa - Diametrically opposed to concerted provincial demands that offshore resources be treated the same as those onshore, which are under provincial control. Wanted to control rate of development of offshore mineral resources and didn't want to give up existing jurisdiction or transfer ownership. At same time, pledged to return equivalent revenues or "very close" to coastal provinces and establish some kind of joint federal-provincial board for management of resources. Would still be able to overrule board decisions on questions of major national interest.

B.C. - Provincial control of offshore resources.

Alta. - Supported the coastal provinces wanting offshore resources treated in the same way as land-based resources.

Sask. - Supported provincial control.

Man. - Supported provincial control.

Ont. - Supported provincial claims to offshore resources, with the important proviso that all Canadians share (through the powers of the federal Government) in the wealth generated by the resources.
Que. - Room for joint federal-provincial jurisdiction in area between extended provincial boundaries and 200-mile limit.

N.B. - Preferred to see offshore resources settled by a sharing agreement between the two levels, but did not go along with the federal proposal along these lines. If forced to choose, would support the dominant provincial view that offshore should be treated the same as onshore.

P.E.I. - Considered offshore resources the same as onshore resources.

N.S. - Claimed ownership of offshore mineral resources but willing to reconsider as long as there was some constitutional guarantee that the same benefits from onshore exploitation would accrue to the province.

Nfld. - Complete provincial ownership of offshore mineral resources similar to what Alberta and Saskatchewan enjoy with onshore resources. Willing to see federal jurisdiction remain in related areas of navigation and fish stocks. Also recognized that federal Government would have right to intervene in offshore resources in an emergency situation.

7. Fisheries

Ottawa - Willing to transfer control of inland fisheries to provinces, but not ocean stocks. Would not give up control over quotas or licensing as most coastal provinces wanted, but willing to enshrine the right of consultation over decisions of this sort in the constitution.

B.C. - Provincial control of inland fisheries and joint federal-provincial control of the rest.

Alta. - Supported more provincial power.

Sask. - Flexible.

Man. - Supported more provincial control of fisheries.

Ont. - Flexible.

Que. - Provincial control over inland fisheries and certain ocean species. Prepared to accept federal quotas overall on migratory fish and federal rights in the field of conservation, but wanted shared powers in determining provincial quotas.
N.B. - In agreement with having more shared authority in this field, but, unlike the majority of other coastal provinces, some concerns about whether provinces should licence fishermen, the most contentious issue.

P.E.I. - Like most other coastal provinces wanted to see a form of concurrent jurisdiction with provincial paramountcy in areas like licencing fishermen and allocating quotas among the provinces.

N.S. - Alone among coastal provinces: federal Government should maintain total jurisdiction over offshore fish -- practical difficulties and expense of administering control too great otherwise.

Nfld. - New, shared jurisdiction in what is now totally a federal field. Federal laws would be paramount in determining total allowable catch, conservation, dealings with foreign powers, and quality control. Provinces would licence fishermen and decide on internal allocation of over-all quotas.

8. Ownership of Resources

Ottawa - A trade-off issue in which federal concessions limited. Affirmed provincial powers over management of natural resources and right of provinces to levy indirect taxes on those resources (a new power). But against sharing control over international trade while retaining proposals for concurrent jurisdiction over interprovincial trade with federal paramountcy where disputes arise.

B.C. - At one with Alberta and Saskatchewan on resources.

Alta. - Adamant on provincial control of resources and opposed to any strengthening of federal power to tax those resources or further regulate their use or sale. Offered very limited exceptions in times of national emergency.

Sask. - Clarification of provincial control of natural resources essential. Also a provincial role in sale of provinces' natural resources abroad.

Man. - In agreement with the other Western provinces in demanding reaffirmation of provincial control, a limiting of Ottawa's interprovincial commerce powers and Ottawa's ability to interfere with provincial control in times of crisis.

Ont. - Supported the federal power to regulate interprovincial and international trade.

Que. - Supported full provincial ownership and more say on trade side.
N.B. Supported provincial jurisdiction over natural resources and some shared jurisdiction over international and interprovincial trade.

P.E.I. - Content with status quo.

N.S. - Flexible.

Nfld. - Complete provincial ownership of resources and a minimum of federal intervention.


Ottawa - Federal control of telecommunications systems, licencing and programming in both broadcasting and cable. Also control or solid mechanism to return cable company revenues to programming side.

B.C. - Cable and regulatory control of B.C. Tel.

Alta. - Flexible.

Sask. - The leader, with Quebec, in demanding more provincial control. Paramount provincial control over cable and even a role in licencing broadcasting outlets.

Man. - Supported provincial consensus on cable regulation.

Ont. - Very strongly committed to provincial control of regulating cable television, regulation of communications carriers such as Bell Canada, but with provincial consensus.

Que. - Rejected federal control over programming and cable television.

N.B. - Control over frequencies should be federal and Ottawa should regulate national broadcasting. Other fields, including cable licencing and programming and telecommunications carriers (phone companies and CNCP telecommunications) should come under provincial control.

P.E.I. - Part of provincial consensus on this issue.

N.S. - Like most of the other provinces, wanted provincial authority to licence cable and telephone companies. All right for feds to licence broadcasters and private telecommunication companies (like CNCP). Felt cable content could be shared jurisdiction with provincial paramountcy in the case of in-province systems.

Nfld. - In agreement with provincial common front.
10. Family Law

Ottawa - Prepared to devolve right to enact divorce laws to those provinces who wanted it while maintaining general standards so that divorce havens not created. Provinces to work out agreement for upholding interprovincial custody orders.

B.C. - For provincial control of family law.

Alta. - A follower of those provinces wanting full provincial control.

Sask. - For provincial control of family law.

Man. - Did not want the extra cost of administering all aspects of family law, but would go along with the consensus.

Ont. - Supported provincial control of family law.

Que. - Wanted right to enact divorce law and appoint family court judges; agreeable to some vestige of federal jurisdiction to avoid divorce havens.

N.B. - Supported decision to devolve responsibility to province but unlikely N.B. would enact its own divorce laws.

P.E.I. - Along with Manitoba, the main opponent of transferring divorce law to the provinces.

N.S. - Issue resolved. No plans to enact own divorce law.

Nfld. - Did not intend to enact its own divorce laws, but supported other provinces' desire for control.

11. Supreme Court

Ottawa - Wanted to entrench Supreme Court in constitution and give provinces right to make direct constitutional references to that body. Had originally proposed expanding nine-member high court to 11 with five from Quebec to deal with that province's distinct civil law issues. Not rigidly wedded to that, however, and number may remain the same as long as acceptance of two systems of law is recognized. Not in favor of having the provinces appoint some judges or in allowing them a veto power. Appointments still to be made by the federal justice minister but with provincial agreement, and some kind of tie-breaking mechanism, like a third-party governmental committee, should there be disputes.

B.C. - Flexible but would have liked something about members from all regions of Canada, with B.C. considered as a region.
Alta. - Deeply suspicious of the present Supreme Court. At a minimum, wanted provincial consent to judicial appointments, but preferred a completely revamped court with panels of judges; its past proposals had been rejected by everyone except Quebec.

Sask. - A nine-member court whose existence would be enshrined in the constitution, and whose membership would reflect provincial approval.

Man. - Flexible, would go along with consensus, although might object if French-speaking justices too numerous.

Ont. - Favored an 11-member court with five judges from Quebec and the chief justice alternating between English- and French-speaking Canadians with a seven-year term for all justices. Sought provincial consultation in appointments and the entrenchment of the court in the constitution.

Que. - Originally wanted Quebec civil law cases to end at Quebec Court of Appeal rather than Supreme Court of Canada, but willing to go along with proposals to expand Supreme Court so as to better reflect two legal systems. Also wanted power to name Quebec superior, district and county court judges.

N.B. - In general agreement with proposals. Preferred to see judges appointed by Ottawa with provincial consultation, but could support Quebec having a veto over appointments from that province.

P.E.I. - Prepared to accept federal proposal for 11 judges. No provincial veto over appointments, but serious consultation.

N.S. - Disagreed with expanding the Quebec civil law contingent to five in an 11-member court on the grounds that there are not enough cases to justify that. No need for veto over federal appointments but would like more consultation.

Nfld. - Favored federal proposals. Wanted only provincial input, not veto, in court appointments.

12. New Upper House

Ottawa - Angered provinces by not offering any position on Senate reform in recent talks. In the past, had wanted a Senate appointed by provincial legislatures based generally on the percentage of popular vote accorded provincial parties. More recently, had come around to accepting view that provincial Governments appoint senators.
B.C. - Supported a provincially appointed upper house with enormous persistence and won over many originally skeptical provinces and the federal Government. As a first step, wanted a new body with equal membership from every province to ratify federal appointments and federal legislative moves in areas of provincial jurisdiction. Later, the whole Senate would be phased out. Any package deal that would include B.C. would need something about a reformed upper house.

Alta. - Appeared to have softened its previous opposition to a provincially-appointed upper house. Still lukewarm to the idea, but no longer an obstacle.

Sask. - Flexible but supporting a provincially appointed upper house with restricted powers that could not be unduly used to frustrate the House of Commons.

Man. - For a provincially appointed upper house.

Ont. - Not very strongly committed to Senate reform, although preferred an upper house appointed by the provinces.

Que. - Preferred Senate reform await settlement of division of powers question. Wanted French-English duality reflected in Senate.

N.B. - No objection to status quo but critical of the kinds and lengths of appointments.

P.E.I. - Proposed equal representation for provinces in provincially appointed Senate, and wanted to divide Parliament's legislation into two categories: ordinary legislation, which could be held up (suspensive veto), but not done away with by a new Senate, and legislation dealing directly with provincial concerns, which could be vetoed by a two-thirds vote.

N.S. - Favored compromise proposal that would see Senate retained and a second upper house (council of the provinces) established. New council would be provincially appointed and would deal only with federal intervention in provincial areas such as use of declaratory powers, trade and commerce legislation and the powers over the economy sphere.

Nfld. - For provincially appointed Senate with equal representation for each province. Senate would have much the same duties, but would have a suspensive veto over legislation -- it could delay legislation it didn't like and send it back to Parliament for a second look.
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