THE PATRIATION AND AMENDMENT OF THE CONSTITUTION OF CANADA

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TABLE OF CONTENTS

INTRODUCTION 1

PART I -- THINKING ABOUT PATRIATION 25

CHAPTER 1 -- THE PATRIATION THEORY 28

CHAPTER 2 -- THE INDEPENDENCE THEORY 66

PART II -- EXPLAINING PATRIATION 116

CHAPTER 3 -- THE SOVEREIGNTY DILEMMA 116

CHAPTER 4 -- RESOLVING THE DILEMMA 147

PART III -- AMENDING THE CONSTITUTION 180

CHAPTER 5 -- THE AMENDING FORMULAE 180

CHAPTER 6 -- PROCEDURAL ISSUES 242

CHAPTER 7 -- LIMITATIONS ON AMENDMENT 275

CONCLUSION 292

BIBLIOGRAPHY 312

INTRODUCTION

Constitutional amendment in the period prior to 1982 has been examined in some considerable detail by Canadian and foreign political and constitutional scholars.[1] I do not propose to reconsider the process for amending the Constitution over that whole period. Instead, I propose to deal primarily with the problem of what came to be known as the "patriation" of the Constitution. A full understanding of the views of Canadian legal and political authorities on this crucial issue will help to explain what came to be seen as the acquisition of the final, irrevocable attribute of Canadian independence.

In the eyes of many Canadians, independence had been accomplished with the establishment of the new federation of 1867. Without entering into the debate over the meaning of independence, it will serve our purposes to consider for a moment in this Introduction Canada's progression from federation in 1867 to patriation in 1982 through the prism of the amending formula. Part I will then examine some background theoretical perspectives on the patriation process. Part II will attempt to explain the patriation process, and Part III will consider the new amending formula which was a key product of that process. The Conclusion will begin to treat some emerging issues affecting the Canadian constitutional amendment process.

The obvious starting point for any discussion of the Canadian procedure for constitutional amendment is the active period of constitution-making which occurred from the late 1850s until 1867. Why is it that what was then referred to as the British North America Act, 1867 made no express provision for a general amendment procedure? Clearly, the missing provision was not an oversight; the drafters saw fit to include in the 1867 Act Class 1 of section 92 which governed amendments to the Constitutions of the

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[1] See, e.g., P. Gérin-Lajoie, Constitutional Amendment in Canada (Toronto, 1951) and W.S. Livingston, Federalism and Constitutional Change (Oxford, 1956).

provinces. It is generally agreed that the Fathers of Confederation were content to allow the British Parliament to amend the Act which it had created, just as that Parliament had altered the constitutional statutes relating to the British North American colonies in the past.[2]

Of course, the 1867 Act was significant in that it had been put together at the initiative of the political representatives of the British North American colonies and had involved their collaboration throughout. Only the final sanction, accomplished by enactment at the Parliament in Westminster, excluded the Canadian actors. Presumably, the Canadians of 1867 would have wished to guard the product of their hard work from later interference by the Imperial Parliament.

In fact, reliance on the Imperial Parliament appears to have satisfied opposing, even contradictory, requirements: flexibility and stability, strong central government and distrust of the centre.

There are fairly reliable indications that the framers of the Canadian Constitution were influenced by events in the United States. As early as 1858, three Canadian politicians presented the Secretary of State for the Colonies with a memorandum on the idea of Confederation and referred to the possibility of amendment by the Imperial Parliament as preferable to the American model:[3]

> It will be observed that the basis of Confederation now proposed differs from that of the United States in several important particulars. It does not profess to be derived from the people but would be the Constitution provided by the imperial parliament, thus affording the means of remedying any defect, which is now practically impossible under the American Constitution.

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[2]See P.W. Hogg, Constitutional Law of Canada, 2nd ed. (Toronto, 1985), pp. 2-3, 52.

[3]See G.P. Browne, Documents on the Confederation of British North America (Toronto, 1969); Canada, Senate, Report, by W.F. O'Connor (Ottawa, 1939; reprinted 1961) (hereinafter cited as O'Connor);; P.B. Waite, The Life and Times of Confederation, (Toronto, 1962).

It should be noted that the American Constitution was not amended from 1804 until 1865 and was widely thought to be excessively rigid. By the time the Confederation debates were fully under way, the Americans had engaged in a bloody civil war and amended their constitution in a way which might well have alarmed their more conservative northern neighbours. Canadians had experienced its own periods of unrest as recently as 1837-8. As Dr Paul Gérin-Lajoie has observed, "[n]o doubt, this psychological situation ... evoked a desire for stronger authority among the British North American provinces and for more permanency in their political institutions".[4] It seemed that the Imperial Parliament could be at once a means of remedying any defect in the new Constitution and a force of stability and reason.

The decision to leave the power to amend the Constitution with the Imperial Parliament also appears to have been influenced by local political factors. John A. Macdonald, future Prime Minister and most active proponent of the union of the British North American colonies, spoke out initially in favour of a unitary form of government and continued to encourage strong central power, even after a federal model had been chosen. Gérin-Lajoie and others[5] have suggested that Macdonald deliberately avoided the question of an amending process in the knowledge that the power to initiate amendments might then be left to the federal Parliament.

In the course of the debates which took place at Quebec in 1864, Macdonald referred to the tensions in the United States' constitutional past and spoke in favour of a clear constitutional division of powers between the "General Legislature" and the "Local Legislatures".[6] That presumably would assure stability. But once the maximum central power that was then politically feasible had been set out clearly, Macdonald was apparently in favour of a flexible constitution ensured by the traditional method of amendment. And to

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[4]Gérin-Lajoie, supra, p. 37.

[5]Ibid., p. 38 and, e.g., N. McL. Rogers, "The Constitutional Impasse" (1934) 41 Queen's Q. 482.

[6]J. Pope, Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act (Toronto, 1895), p. 58.

achieve that he proposed that the British (and presumably the Imperial) model be maintained: "We should keep before us the principles of the British Constitution. It (our constitution) should be a mere skeleton and framework that would not bind us down. We have now all the elasticity which has kept England together."[7]

Not surprisingly, there is also evidence that other, more provincial elements in the emerging federation distrusted Macdonald's brand of centralist politics. But they too were satisfied to leave amendment beyond the control of a new Canadian Parliament, and therefore beyond the control of any centripetal Canadian interest.[8]

Leaving the process of constitutional amendment aside (and therefore with Westminster) allowed the framers of the Constitution to balance the conflicting political claims which were an inevitable part of their discussions. The Confederation debates contain few references to the possibility of future constitutional change, but the most famous reference captures the sense in which the Imperial Parliament represented not only a procedure for any constitutional change which might be required in the future but also a means of mediating various opposing Canadian interests should that ever be required. Thomas D'Arcy McGee, in the course of the debates, made the following statement which is frequently cited in support of the view that the framers of the Constitution intended to leave amendment with the Imperial Parliament:[9]

> We go to the Imperial Government, the common arbiter of us all, in our true Federal metropolis – we go there to ask for our fundamental Charter. We hope, by having that Charter that can only be amended by the authority that made it, that we will lay the basis of permanency for our future government.

But even McGee's bold statement reveals some ambiguity when examined more closely, perhaps an ambiguity which was intended by such an able orator. First, it was

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[7]Ibid,. p. 59.

[8]See Hon. P.J.T. O'Hearn, "Nova Scotia and Constitutional Amendment" (1966-7) 12 McGill L.J. 433, p. 434.

[9]Livingston, supra., p. 21. Quoted in Gérin-Lajoie, supra , p. 4.

not clear in what sense the Imperial Parliament was likely to remain the type of arbiter which it had been in the past in its earlier, paternalistic role as colonial power.[10] Even in the period immediately preceding 1867, opposing Canadian parties called on Westminster to mediate their interests. For example, the product of the framers discussions -- the Quebec Resolutions -- ostensibly represented an unalterable set of principles which would serve as a basis for the British North America Act. But clearly the drafting process which was to take place in London was likely to produce points of contention. One view of Imperial arbitration was expressed in a letter sent by the Lieutenant Governor of Nova Scotia to his counterpart in the United Canadas:[11]

> It appears to myself and the members of my Government that, to avoid the probable multified divergence of opinion in each Legislature, inseparable from discussing a variety of details in several independent Parliaments, despite of a general agreement in the main objects and principles of the general scheme, it is better for these Provinces to avail themselves of the friendly arbitrament of the Queen's Government and send Delegates to consult with the latter during the preparation of the proposed Imperial Bill.

Members of the Nova Scotia legislature hoped to take advantage of the "arbitrament of the Imperial Government"[12] in order to "improve" the Confederation package.[13] Some francophone politicians from the Canadas feared that such improvements might benefit only their Maritime partners.[14] The anglophone Canadian delegate at the London meetings, Alexander Galt, ensured that certain improvements were made on behalf of his interests before declaring himself bound by the Quebec Resolutions, except perhaps regarding certain outstanding Maritime claims.[15] Clearly, this first example of conflicting local interests revealed that if "arbitrament" by the Mother Parliament were to continue as part of

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[10]"Maternalistic" is probably a more apt description, and one which anticipates later discussions. If 1867 represented "the birth of a nation", in one historian's terms, then there remained the problem of determining when the new nation came of age, acquired full legal rights etc. Gérin-Lajoie, supra, writing in the middle of this century, uses the phrase "the Mother Parliament" when referring to Westminster.

[11]O'Connor, supra, Annex II, p. 29.

[12]See Waite, supra,, p. 276.

[13]Ibid.

[14]Ibid.

[15]O'Connor, supra, Annex 4, p. 44.

the political, if not the legal, process of constitutional amendment, then it would be a significant and highly difficult role for the United Kingdom authorities to play.

A second, related point could be made regarding McGee's famous pronouncement on how the new Canadian constitutional text would be amended. There was considerable ambiguity in the phrase "that Charter that can only be amended by the authority that made it [the constitution]". Clearly, in the legal sense, the Imperial Parliament was to "make" the Canadian constitution, and this was probably what McGee meant. But in a very real sense, the delegates from the British North American colonies had themselves made their constitution, and they would have a role in the process of amending it, although one which neither McGee nor Canadians in the century to come could define with any precision.

Before leaving this brief look at constitutional amendment from the point of view of Canadians in 1867, it is important to note that although the 1867 Act did not include a general procedure for amendment there were numerous references within the text which were intended to apply in the event of more specific amendments. These special procedures are further indication of the fact that the absence of a general amending procedure was not likely to have been an oversight. As was noted above, Class 1 of s. 92 provided for amendment of the Constitutions of the provinces.[16] A number of other provisions in the 1867 Act were qualified by phrases such as "Until the Parliament of Canada otherwise provides",[17] "Unless (or until) altered by the Parliament of Canada",[18] "Until the Legislature of Quebec otherwise provides"[19] "Until the Legislature of Ontario otherwise provides,"[20] "Until the Legislature of Ontario [and/or] of Quebec otherwise

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[16]Lord Carnarvon, introducing the Canadian proposal to the House of Lords in 1867, made the following comment regarding this provision: "Lastly, and in conformity with all recent colonial legislation, the Provincial Legislatures are empowered to amend their own Constitutions." See O'Connor, supra, Annex 4, p. 76.

[17]See, e.g., ss 35, 40, 41, 47, 130 and 131 of the Constitution Act, 1867.

[18]See, e.g., ss 105 (and 122).

[19]Section 78.

[20]Section 84 para. 2.

provide"[21] or "Until altered by the Lieutenant-Governor in Council".[22] However, the 1867 Act did not provide rules for amendment of the most important parts the Confederation arrangement, notably the division of federal and provincial powers set out in sections 91 and 92.

The Confederation of the British North American colonies which took place in 1867 created a new entity, the Dominion of Canada, but it is difficult to argue that this entity had at that moment achieved the status of an independent nation. Not only was a power to make treaties with other nations left in the hands of the mother country, but the 1867 Act itself contained clear indications of the limited way in which Canadian authorities could deal with legislation of a more local sort.[23] Section 129, for example, provided for the continuance of existing laws, courts and legal officers subject to repeal, abolition or alteration by the competent Canadian authority, but the same section excluded such laws "as are enacted by or exist under Acts of Parliament of Great Britain or of the Parliament of the United Kingdom and Ireland". This exclusion made clear that a range of legislative competence, including the power to modify the 1867 Act, remained in the hands of the Imperial Parliament.

In fact, s. 129 confirmed that the unquestionably significant events of 1867 did not alter the hierarchy of Imperial and colonial statutes that had been so recently confirmed and clarified by the Colonial Laws Validity Act, 1865.[24] That Act defined the extent to which Acts of the Parliament of the United Kingdom took precedence over colonial laws. It clarified but by no means eliminated the power of the Mother Parliament to legislate for Canada. According to the Act, an Imperial statute (defined as an "Act of Parliament extending to the colony") was deemed to extend to that colony only where that intention was clear according to "the express words or necessary intendment" of the statute itself.

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[21] Sections 83, 84 and 135.
[22] Section 136.
[23] See Hogg, supra, pp. 37-8.
[24] 28 & 29 Vict., c. 63 (U.K.).

Section 2 provided, however, that any colonial law which was in any respect repugnant to the provisions of an Imperial statute would remain "absolutely void and inoperative" to the extent of such repugnancy. The 1867 Act was therefore not only entrenched, by virtue of being legislation which only the Westminster Parliament could alter, but it was also supreme, in the manner set out in the Colonial Laws Validity Act, 1865.

Following 1867, Canada from time to time requested legislation by the United Kingdom Parliament in order to accomplish that which could not be done by Canadian legal processes. As Gérin-Lajoie has noted, legally speaking and in accordance with the Colonial Laws Validity Act, 1865, the Westminster Parliament could enact any legislation for Canada whether such legislation was of a constitutional nature or not, and on occasion it did so, dealing with matters as varied as copyrights and lighthouses.[25] Even constitutional amendments came in many forms: sometimes as alterations to the existing text of the 1867 Act and sometimes as additions to those constitutional provisions already in force.[26]

Of course, in reality, Canada was not as subordinate as the legal picture indicates. In constitutional affairs, a convention gradually developed whereby Westminster would only legislate at the request and with the consent of Canada, usually expressed in a Joint Resolution of the Senate and House of Commons.[27]

Nonetheless, by the early part of this century, and especially following the important role which Canada and other parts of the British Empire played in the First World War and its aftermath, many voices called for an end to the legal relationship of Empire and colony. The self-governing dominions sought to acquire the full attributes of nationhood. In order to deal with this issue and others, the Imperial Conference met in 1926 and 1930

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[25] As Gérin-Lajoie notes, supra, p. 49.

[26] Ibid., p. 48.

[27] Ibid., ch.4 and Re:Resolution to Amend the Constitution [1981] 1 S.C.R. 753 (hereinafter cited as Patriation Reference).

and agreed on what were to become known as the Balfour Declaration and the Statute of Westminster, 1931.

At the Imperial Conference of 1926 the participants approved the Balfour Declaration, the contents having been prepared by the Committee on "Inter-Imperial Relations" whose chairman was Lord Balfour. The final Report of the Imperial Conference of 1926 stated that, from a constitutional point of view, the position and relationship of the self-governing communities of the British Empire (Great Britain and the Dominions) had reached full development and could be readily defined.[28] That definition took form as a declaration which is now very familiar to all Commonwealth scholars:

> They [Great Britain and the Dominions] are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic and external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

And further along one could find the statement that "[e]quality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our Inter-Imperial Relations."[29]

Whatever the value of the Balfour Declaration in describing the political relationship between the self-governing Dominions and the mother country in 1926, some changes to the formal legal relationship were clearly required in order to eliminate what was at least an enduring appearance of subordination. At the Imperial Conference of 1930, the participants adopted recommendations which had been prepared in a document entitled Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929.[30] Paragraph 54 of the Report sought to place on record a statement

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[28]K.C. Wheare, The Statute of Westminster and Dominion Status, 5th ed. (Oxford, 1953), p. 28.

[29]Cmnd. 2768 in Sessional Papers (1926).

[30]Cmnd. 3479 in Sessional Papers (1929).

embodying the conventional practice between the Westminster Parliament and the Dominions:

> It would be in accord with the established constitutional position of all members of the Commonwealth in relation to one another that no law hereafter made by the Parliament of the United Kingdom shall extend to any Dominion otherwise than at the request and with the consent of that Dominion.

Very similar words eventually appeared in the preamble to the Statute of Westminster, 1931.

Although the Balfour Declaration and recognition of a convention regarding request and consent together provided a more accurate description of the relationship between the Dominions and Westminster, there was still a feeling that this more mature state of affairs should be given legal sanction. The Statute of Westminster, 1931 was enacted for that purpose.

If we return to Canadian concerns for a moment, it will be remembered that among the badges of colonial status were, first, the rules contained in the Colonial Laws Validity Act, 1865 regarding the invalidity of Canadian statutes for repugnancy to any Imperial statute and, secondly, the closely related inability of Canadians to amend the country's most important constitutional texts by means of a wholly domestic procedure.

Section 2 of the Statute of Westminster, 1931 sought to deal with the first concern. Subsection 2(1) provided that the Colonial Laws Validity Act, 1865 would not apply to any law made in future by the Parliament of a Dominion. This, of course, had the effect of abrogating section 129 of the 1867 Act in so far as that section prohibited Parliament and the provincial legislatures from dealing with legislation emanating from Westminster. Subsection 7(3) made clear that the powers acquired thereby would only be exercisable by Parliament and the legislatures within their respective areas of competence. Subsection 2(2) stated that no law made by the Parliament of a Dominion would be declared void or

inoperative on the basis of repugnancy to the law of England or any Act of the United Kingdom Parliament. This last provision was thought necessary in order to avoid the inference that simple repeal of the Colonial Laws Validity Act, 1865 might have the effect of restoring the old common law doctrine regarding the paramountcy of Imperial Acts. Subsection 7(2) made it clear that all of section 2 applied to provincial laws and legislatures.

Regarding the second Canadian concern, that is, the ability to modify Canadian constitutional statutes by means of a domestic amending procedure, it was not possible to resolve this within the framework of the Statute of Westminster, 1931. Federal and provincial representatives had met in Canada as early as 1927 in order to devise a mutually satisfactory procedure, but no agreement had been reached by 1930-31, and, of course, such agreement was to prove highly elusive. As a result, it was necessary to retain the possibility of recourse to the Parliament at Westminster in order to accomplish at any moment in the future amendments to the United Kingdom statutes which formed part of the Canadian Constitution. The Conference on the Conference of Dominion Legislation had originally recommended a provision which would have been equally applicable to Canada, Australia and New Zealand. Paragraph 66 had read, in part: [31]

> (1) Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution Acts of the Dominion of Canada, the Commonwealth of Australia, and the Dominion of New Zealand, otherwise than in accordance with the law and constitutional usage and practice heretofore existing.

There were some nervous reactions in the provinces to this type of provision, despite Prime Minister Bennett's insistence that "[o]ur purpose is to leave things as they are". [32] Premier Ferguson of Ontario and Premier Taschereau of Quebec were concerned that section 4 of the Statute[33] would have the effect of giving the federal government the sole right to

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[31] Cmnd 3479 in Sessional Papers (1929).

[32] Canada, Parliament, Report of the Dominion-Provincial Conference 1931, p. 18.

[33] 4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion

request amendments.[34] Accordingly, the earlier version of paragraph 66 was abandoned and subsection 7(1) referring to Canada alone was eventually approved:[35]

> 7. -- (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1830, or any order, rule or regulation made thereunder.

It would take over fifty years before Canadians could settle on a new procedure to amend the Constitution of Canada and repeal subsection 7(1).

Although a domestic procedure for amending the Constitution of Canada would be long in coming, the repeal of the Colonial Laws Validity Act, 1865 in other domains had near-immediate effects, most notably on the role played by another remnant of the Imperial system, that is, the Judicial Committee of the Privy Council.

The Judicial Committee was, of course, the final court of appeal from all the colonial courts, having been constituted by legislation of the Imperial Parliament in 1833 and 1844 to perform this role.[36] Its authority in Canada was preserved by section 129 of the 1867 Act and maintained even after the creation of the Supreme Court of Canada in 1875.[37] In 1888, the Canadian government passed a statute which purported to abolish appeals to the Privy Council in criminal cases. In 1926. in Nadan v. The Queen,[38] the Privy Council held that the 1888 statute was invalid, basing its decision primarily on the necessary effect of section 2 of the Colonial Laws Validity Act, 1865. Viscount Cave L.C.

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as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

[34]Canada, Parliament, Report of the Dominion-Provincial Conference 1931, p. 18.

[35]Gérin-Lajoie, supra, pp. 8-9, discusses the various problems with this formulation.

[36]See Judicial Committee Act, 1833, 3 & 4 Will. 4, c. 41 and Judicial Committee Act, 1844, 7 & 8 Vict., c. 69. See also S.A. de Smith, Constitutional and Administrative Law, 5th ed. by H. Street & R.Brazier (London, 1985), ch. 7.

[37]The creation of the Court was authorized by s. 101 of the 1867 Act which authorized the Parliament of Canada to "provide for the constitution, maintenance, and organization of a general court of appeal for Canada". See Supreme Court and Exchequer Courts Act, 1875, S.C. 1875, and Supreme Court Act, R.S.C. 1970, c. S-19.

[38][1926] A.C. 482.

stated the following: "In their Lordships' opinion [the impugned section] of the Canadian Criminal Code ... is repugnant to the Acts of 1833 and 1844 which have been cited, and is therefore void and inoperative by virtue of the Act of 1865."[39]

With the passage of the Statute of Westminster, 1931, and in particular subs. 2(1) of that statute, it became possible for the Parliament of Canada to repeal, amend or alter all imperial statutes (other than those listed in subs. 7(1)) in so far as these were part of Canadian law. Accordingly, Parliament re-enacted the statute of 1888 which had been invalidated in Nadan, and once again the legislation was challenged.

In British Coal Corporation v. The King[40], Viscount Sankey L.C. stated that the difficulties with the Canadian legislation, as described in Nadan "could only be overcome by an Imperial statute", and it was the Judicial Committee's task to determine whether the Statute of Westminster, 1931 accomplished this adequately.[41] It may be useful to set out a large portion of Viscount Sankey's response:[42]

> It is true that before the Statute [of Westminster], the Dominion Legislature was subject to the limitations imposed by the Colonial Laws Validity Act and by s. 129 of the [1867] Act, and also by the doctrine forbidding extra-territorial legislation, though that is a doctrine of somewhat obscure extent. But these limitations have now been abrogated by the Statute. There now remain only such limitations as flow from the Act itself, the operation of which as affecting the competence of Dominion legislation was saved by s. 7 of the Statute, a section which excluded from the competence of the Dominion and Provincial Parliaments any power of "repeal, amendment or alteration" of the Act. But it is well known that s. 7 was inserted at the request of Canada and for reasons which are familiar. It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute. But that is a theory and has no relation to realities. In truth Canada is in enjoyment of the full scope of self-government: its Legislature was invested with all the necessary powers for that purpose by the Act, and what the Statute did was to remove the two fetters which have already been discussed.
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[39] Ibid., pp. 492-3.

[40] [1935] A.C. 500 (P.C.).

[41] Ibid., p. 516.

[42] Ibid., pp. 520-22.

> Their Lordships can see no valid reason since the Statute why the power to regulate or prohibit this type of appeal should not be held to be vested in the Dominion Parliament ... .

Even if the judgment of the Privy Council in British Coal Corporation placed the legal sovereignty of Canada in doubt in theory,[43] it made clear that appeals from Canada to the Privy Council could be further limited or abolished altogether.

In 1939, the Parliament of Canada took steps to abolish all Privy Council Appeals. A bill was introduced in which it was provided that "[t]he Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court shall, in all cases, be final and conclusive".[44] The federal Parliament even proposed to eliminate per saltum appeals, that is, appeals to the Privy Council coming directly from provincial courts, pursuant to provincial legislation. Finally, provision was made for the repeal of the Judicial Committee Acts of 1833 and 1844.

The Bill was referred to the Supreme Court of Canada for a decision as to its validity. That Court ruled that the Parliament of Canada was competent to enact the Bill,[45] and the Privy Council, after some delay, affirmed that decision,[46] with the result that the legislation was enacted and came into force in 1949. Cases commencing after 1949 could no longer proceed to the Privy Council. It is important to note that, to the extent that the Constitution of Canada was and continues to be modified by decisions of the highest court,

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[43]Later, in Part II, we will examine how it is that this matter of abstract theory remains a live issue to some extent, especially if we imagine an attempt -- post-1982 -- to have recourse to the Westminster Parliament for Canadian purposes.

[44]Bill 9, An Act to Amend the Supreme Court Act, 4th Sess., 18th Parliament, 1939.

[45]Reference as to the Legislative Competence of the Parliament of Canada to Enact Bill No. 9 of the Eighteenth Parliament of Canada Entitled "An Act to Amend the Supreme Court Act" [1939] S.C.R. 49.

[46]A.G. Ontario v. A.G. Canada [1947] A.C. 127 (P.C.).

the termination of Privy Council appeals brought a further measure of constitutional control into Canadian hands.[47]

The search for a formal domestic procedure for amending the Canadian constitution continued throughout the period under discussion. Following the first failed attempt at the Dominion-Provincial Conference of 1927, various renewed efforts took place in 1931, 1935, 1950, 1960, 1964 and 1971, the last two of these coming tantalizingly close to agreement.[48] A final phase began in the late 1970s and had produced no consensus by 1980, prompting Prime Minister Trudeau to attempt to proceed unilaterally, that is by the sole initiative of the federal Parliament. This initiative was intended to achieve a three-fold objective: "patriation" of the Constitution, a comprehensive set of procedures for constitutional amendment and a new Charter of rights. Two provinces and one federal opposition party supported this bold move, but the Official Opposition and eight provinces objected. The provinces of Manitoba, Newfoundland and Quebec asked their respective Courts of Appeal to consider the constitutionality of the federal initiative. Only the Newfoundland Court of Appeal ruled in favour of the dissenting provinces' position, but the decisions of all three Courts of Appeal were appealed to the Supreme Court of Canada. The decision of that Court[49] proved to be one of the most important in Canadian history. It will be dealt with in some detail in later chapters, but for the moment a brief summary may suffice.

The Patriation Reference brought together many of the seemingly disparate elements of Canadian constitutional history which were highlighted above. The Supreme Court of

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[47]Again, we will see later, in Part II, how important it was for the Supreme Court of Canada to take over the ultimate responsibility for Canadian judicial law making. Whereas the Judicial Committee of the Privy Council was naturally inclined to decide matters in a manner which was likely to be equally applicable elsewhere in the Commonwealth, the Supreme Court of Canada was in no way bound to do so. In the Patriation Reference, the majority on the legal question acted much as the Privy Council might have done, as we will see, but we can now predict with come confidence that the current Supreme Court of Canada would be at pains to establish its post-patriation independence in judicial thinking.

[48]For a brief summary of these efforts, see Canada, Parliament, Federal-Provincial Relations Office, The Canadian Constitution and Constitutional Amendment (Ottawa, 1978).

[49]Patriation Reference, supra.

Canada, the highest Canadian court and since the termination of appeals to the Privy Council also the ultimate judicial authority regarding Canada's "Imperial" legal business, was called upon to determine the legal and conventional rules applicable to repeal, amendment or alteration of the Canadian Constitution, the very matters which had been omitted from the 1867 Act and excluded from the operation of the Statute of Westminster, 1931. In a very real sense, then, the Court was presented with a constitutional issue which had been sheltered from formal legal treatment since 1867, but which in practice had evolved and matured along with the Canadian nation.

The questions before the Court can be summarized as follows. First, would the federal proposal, if enacted, affect federal-provincial relationships or the powers, rights or privileges of the provinces? Secondly, was there a constitutional convention requiring the consent of the provinces before the Senate and House of Commons lay before the Parliament of the United Kingdom a measure to amend the Constitution of Canada affecting federal-provincial relationships? And thirdly, was there a legal requirement regarding such provincial consent?[50]

The Court dealt with legal and conventional questions separately. Questions one and three were treated together. The Attorney General of Canada had conceded that the federal provincial relationship would be affected by the federal proposal, and consequently the legal analysis focused on the third question. A majority[51] which included then Chief Justice Laskin concluded that there was no legal limit on the authority of the federal Parliament to request the amendment of the Constitution of Canada by the Parliament at Westminster. It rejected the argument that certain practices can crystallize into law and furthermore refused to enshrine by means of judicial legislation a legal principle of provincial consent. Many arguments were considered regarding the legal effects of the

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[50]A fourth question relating only to the Province of Newfoundland is not relevant to our discussion and will be ignored.

[51]The majority on the legal question will be referred to as the majority (law). It included Laskin C.J.C. and Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

Statute of Westminster, 1931. The majority (law) favoured the view that, regarding constitutional amendment, the 1931 Statute was designed to leave things as they had been before. There was nothing in that Statute which could be said to cast any doubt in law on the "undiminished authority of the Parliament of the United Kingdom over the British North America Act".[52]

The minority[53] turned the problem on its head. Rather than considering the unlimited powers of the Westminster Parliament and the absence of legal limits on the ability of the federal Parliament to pass resolutions, the minority (law) asked the question whether any affirmative legal rule could be identified which permitted the Senate and House of Commons to cause the Canadian Constitution to be amended in such a radical way without the consent of the provinces. Having no statutory basis for doing so, and having no power to implement measures contrary to the 1867 Act, it was equally beyond the power, or ultra vires, the two federal houses to accomplish such a modification of the Constitution of Canada through the agency of the Imperial Parliament.

As noted above, question two regarding conventions was treated separately. A new majority of the Court[54] determined that there was a convention that would have required "a substantial measure of provincial consent"[55] prior to passage of the resolution containing the federal proposal. The majority (convention) declined to express a view as to the precise number of provinces which would suffice.

The minority (convention)[56] denied even the existence of such a convention. These judges first made clear their aversion to considering a question which went beyond the scope of legal determination; however, they decided to deal with the matter of conventions

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[52]Patriation Reference, supra, p. 801.

[53]Martland and Ritchie JJ. (hereinafter the minority (law)).

[54]Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ. (hereafter the majority (convention)).

[55]Patriation Reference, supra, p. 905.

[56]Laskin C.J.C. and Estey and McIntyre JJ.

given the exceptional nature of the constitutional reference and given the extensive reasons of the majority. The minority limited its views to a convention requiring the consent of all provinces, judging that the majority's finding of a convention of "substantial ... provincial consent" went beyond the terms of the reference. In the end, the minority concluded that there was no convention of the first type.

The decision of the Supreme Court of Canada in the Patriation Reference presented the Trudeau government with a dilemma. It could embrace the judgment of the majority (law) and go ahead with the constitutional project relying on bare legality. Or it could return to the federal-provincial bargaining table and make renewed attempts at coming to the type of deal which would also satisfy the conventional requirement of substantial provincial consent.

It may be useful at this point to mention that, throughout the period of constitutional uncertainty which had existed since the declaration of a unilateral federal initiative in October 1980, discussions were also heating up in the Parliament at Westminster. On November 5, 1980 the Foreign Affairs Committee of the House of Commons, under the Chairmanship of Sir Anthony Kershaw, decided to "inquire into the role of the United Kingdom Parliament in relation to the British North America Acts, and to report".[57] The Committee heard evidence from British experts and received written memoranda from interested individuals and bodies, including the governments of five Canadian provinces. The dissenting Canadian provinces were at the same time active in lobbying British MPs on the matter of the impropriety of the unilateral action of the Canadian federal Parliament. The United Kingdom Parliament was being asked, in effect, to act as "arbiter" in much the same way as it had been perhaps expected to do by some of the framers in 1867. Canadian independence had intervened, however, and the British authorities were acutely aware of the delicacy of the situation.

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[57]U.K., H.C., First Report from the Foreign Affairs Committee: British North America Acts: The Role of Parliament (London, 21 January 1981), p. vi (hereinafter the First Kershaw Report).

The First Kershaw Report provided twelve conclusions. Among those conclusions was the assertion that the only way for the United Kingdom Parliament to reconcile its own exclusive powers to amend fundamental parts of the Canadian constitution with Canada's sovereign independence was to exercise those powers in accord with constitutional requirements, taking into account, therefore, the federal character of Canada's constitutional system.[58] Then came the startling conclusion that the United Kingdom Parliament would be "bound to exercise its best judgment in deciding whether the [Canadian Parliament's] request, in all circumstances, conveys the clearly expressed wishes of Canada as a federally structured whole".[59]

The United Kingdom government appeared to take a different view of the matter. In a reply to the First Kershaw Report, the government stated that the United Kingdom government would act in accordance with a request from the federal Parliament of Canada and would urge the United Kingdom Parliament to do likewise.[60]

Also in response to the First Kershaw Report, the Canadian government issued a background paper in March 1981[61] in which it made clear its opinion that the United Kingdom Parliament was bound to accede to any request relating to amendment made by the Parliament of Canada. The Kershaw Committee issued a lengthy reply in April of 1981 in which it repeated and further documented its own position.[62]

By September 1981, then, the Trudeau government was staring at two large obstacles to its unilateral federal initiative. The Supreme Court of Canada had declared the

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[58] Ibid., p. xii, Conclusions 3 and 4.

[59] Ibid., Conclusion 9.

[60] U.K., H.C. "Observations by the Secretary of State for Foreign and Commonwealth Affairs on the First Report from the Foreign Affairs Committee", Cmnd 8450 in Sessional Papers (1981), para. 13.

[61] Canada, Parliament, The Role of the United Kingdom Parliament in the Amendment of the Canadian Constitution (Ottawa, 1981).

[62] U.K., H.C, Second Report of the Foreign Affairs Committee, Supplementary Report on the British North America Acts: The Role of Parliament (London, 15 April 1981).

initiative legal but contrary to convention, and there was no guarantee that the British Parliament's acquiescence would be automatic. The Prime Minister decided to convene a Federal-Provincial meeting for early November in order to make another attempt at finding a proposal which could attract sufficient provincial support. The first ministers and their officials met on November 2, and by November 5 they had made the compromises necessary to assure the support of nine out of ten provinces. Unfortunately, the dissenting province was the predominantly french-speaking province of Quebec, and the government of that province decided to refer the matter of the new agreement to its Court of Appeal for a decision as to the constitutionality of a fundamental amendment to the Constitution in the absence of Quebec's consent.

Meanwhile the patriation project went ahead. In early December 1981, the resolution was approved by the Canadian Parliament and transmitted to the United Kingdom. In a third and final Report, dated 22 December 1981, the Kershaw Committee recommended that "it would be proper for the UK Parliament to enact the proposals, notwithstanding that they will directly affect the Canadian Provinces and are dissented from by one of those Provinces, Quebec".[63] The Prime Minister of Quebec, René Lévesque, wrote to the British Prime Minister, Margaret Thatcher, requesting that the Parliament of the United Kingdom delay enactment of the proposed legislation until the Canadian courts had had the opportunity to rule on the constitutionality of proceeding without Quebec's approval.[64] The British Prime Minister's reply, transmitted in early January 1982, stated that the United Kingdom Parliament would not delay the progress of the Canada Bill.[65]

The Parliament at Westminster finally completed its "Canadian business" on March 25, 1982, and four days later Queen Elizabeth II assented to the Canada Act 1982.[66]

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[63]U.K., H.C., Third Report on the British North America Acts: The Role of Parliament (London, 22 December 1981) p. v.

[64]A copy of the letter is reprinted in (1984-85) 30 McGill L.J. 708.

[65]See letter reprinted, ibid., p. 724.

[66]c. 11 (U.K.).

Schedule B of that Act set out the Constitution Act, 1982 and provided Canada with the most significant addition to its constitution since the British North America Act, 1867.[67] Section 2 of the Canada Act 1982 stated boldly that "[n]o Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law", and the marginal notes underlined this point succinctly: "Termination of power to legislate for Canada". If the Act was truly all that it purported to be, it would have been difficult to imagine a more crucial constitutional text, at least in Canadian terms.

On April 17, 1982, at a ceremony on Parliament Hill in Ottawa, Canada, Queen Elizabeth II proclaimed the Constitution Act, 1982 in force.[68] The opening words of the proclamation gave further indication of the importance of the event:

> **WHEREAS** in the past certain amendments to the Constitution of Canada have been made by the Parliament of the United Kingdom at the request and with the consent of Canada;
>
> **AND WHEREAS** it is in accord with the status of Canada as an independent state that Canadians be able to amend their Constitution in Canada in all respects;
>
> **AND WHEREAS** it is desirable to provide in the Constitution of Canada for the recognition of certain fundamental rights and freedoms and to make other amendments to the Constitution;
>
> **AND WHEREAS** the Parliament of the United Kingdom has therefore, at the request and with the consent of Canada, enacted the Canada Act, which provides for the patriation and amendment of the Constitution of Canada;
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> ...

Such official-sounding phrases begged to be given clearer meaning. In what sense had the Parliament of the United Kingdom acted "at the request and with the consent of Canada"?[69] What was the relationship between Canada's "independence" and her ability

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[67] 30-31 Vict., c. 3 (U.K.), renamed Constitution Act, 1867 pursuant to s. 53(1) of the Constitution Act, 1982.

[68] The Constitution Act, 1982, with the exception of paragraph 23(1)(a) in respect of Quebec, came into force on this date. See SI/82-97, reprinted in (1984-5) McGill L.J. 725.

[69] (Emphasis added).

to amend her Constitution at home? To what extent were the newly recognised "fundamental rights and freedoms" themselves subject to the new rules on amendment? What was the "patriation" of the Constitution of Canada? Had not the Constitution always been in Canada? And had not amendment always been possible? In what way did the new provisions on amendment change the rules?

As mentioned above, the first formal attempt to question the "patriation" process had already been initiated by the government of the province of Quebec. On November 25, 1981, as the government of Canada prepared to submit a Resolution to Parliament requesting the introduction in the Parliament of the United Kingdom of a bill entitled the Canada Act, the government of Quebec had presented a reference case to the Quebec Court of Appeal in which it challenged the legitimacy of proceeding to patriation and amendment of the Constitution of Canada over the objection of the province of Quebec. On April 7, 1982, just days before the scheduled proclamation of the Constitution Act, 1982, the Quebec Court of Appeal rendered a unanimous opinion in which it rejected the arguments of the government.[70] The case moved on to the Supreme Court of Canada and thereby provided the country's highest Court with a first opportunity to comment on the constitutional transformation which had taken place.[71] A unanimous full Court agreed with the Court of Appeal and made the following declarations in the course of its reasons:[72]

> The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable. It contains a new procedure for amending the Constitution of Canada which entirely replaces the old one in its legal as well as in its conventional aspects. Even assuming therefore that there was a conventional requirement for the consent of Quebec under the old system, it would no longer have any object or force.

Once again, a further series of questions emerged, ones which could not even be hidden behind the straightforward, reassuring language of the Court. Even if the legality of

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[70]Re: Objection to a Resolution to Amend the Constitution, [1982] C.A. 33.

[71]Re: Objection to A Resolution to Amend the Constitution, [1982] 2 S.C.R. 793 [hereinafter the Quebec Reference].

[72]Quebec Reference, ibid., p. 806.

the 1982 Constitution was not challenged, could its legality be truly unassailable? Would even the highest Court of Canada decline to declare the "patriation" and amendment invalid if the legal process had been flawed?[73] Or did the stamp of the United Kingdom Parliament put the process beyond the Canadian courts' domain? And in what sense did the new procedure for amending the Constitution for Canada "entirely" and irrevocably replace the old one? Presumably the United Kingdom Parliament which accomplished the deed could undo it at a later time, especially when one considered the Patriation Reference's many statements regarding the untrammelled power of the Westminster Parliament.

In this thesis, I am interested in answering some of the difficult questions which I have set out above (Parts I and II). In addition, I propose to provide some indication of how the new process for constitutional amendment is designed to function (Part III).

In Part I, I concentrate on the differing attitudes regarding the so-called "patriation" of the Constitution. According to one view, which I have called the "Patriation theory", the process for amending the Constitution of Canada was left in the hands of the United Kingdom Parliament in 1867 and remained there until 1982. A second view, which I describe as the "Independence theory" suggests that the process became subject to increasing Canadian control, and that it should have been governed by long-standing principles of federalism and by emerging principles of Canadian independence.

Both of these theories underpinned the arguments presented by the parties which came before the Supreme Court of Canada in the Patriation Reference, and ultimately it can be said that the Patriation theory prevailed.

In Part II, I consider the transition from an amendment process where legality derived from the United Kingdom Parliament to a system where a Canadian grundnorm

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[73] As it was prepared to do regarding Manitoba statutes passed according to a flawed process. See Re: Manitoba Language Rights [1985] 1 S.C.R. 721.

prevailed. Problems of legal continuity are discussed here, and the Independence theory is revived in order to explain the certainty with which the irreversible transformation is viewed presently in Canada.

In Part III, I examine the amending formula as it presently exists, and in addition to working out the detail of its provisions, consider also such broad notions as the meaning of "the Constitution of Canada", the supposed amendability of all parts of the Constitution, judicial review of the amendment process and general issues of entrenchment and supremacy.

The thesis concludes with a consideration of emerging issues in Canadian constitutional amendment.

PART I -- THINKING ABOUT PATRIATION

The introductory chapter of this thesis has provided an overview of some of the more important events in the history of the Canadian constitution and constitutional amendment. It would be idle to attempt to rewrite this history. Clearly, Canada's constitutional history is intimately linked to that of the United Kingdom.

Looking more closely at that history from the point of view of constitutional theory, however, it seems that two very different accounts are available, each giving different legal significance to the same historical facts. I propose to examine these theories,[1] using all the while the prism of constitutional amendment.

The first theory, which I call a Patriation theory, emphasizes the continuity in the Empire-colony legal relationship until 1982. The second, which I refer to as an Independence theory, points to various events in Canada's constitutional and international development which justify Canadians, and principally their courts, in recognizing an evolution in the law of what is more aptly described as an Anglo-Canadian relationship, a relationship of equals.

Of course, both the names of these theories and the content which I will attribute to them are somewhat arbitrary. Many participants in the constitutional debate

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[1] "Theory" is used here to designate an understanding of the Constitution which though perhaps seldom (if at all) captured in legislation or case law has a profound influence on what is and is not considered "law" in any given legal system. Such theory or theories, especially concerning the constitution and constitutional amendment, have been developed to a large extent extra-judicially, through academic writing, legal education and professional discussion (by judges, lawyers, legislators and academics alike). It is contended that (directly or indirectly) such theoretical developments condition the type of options and arguments which are available when, exceptionally, the more obscure questions of constitutional law require resolution. This has been the case each time Canadians have considered possible ways of patriating the constitution, and it was also the case when lawyers appeared before the courts in 1981 to argue Re: Objection to a Resolution to Amend the Constitution, (1981) 117 D.L.R. (3d) 1 (Man. C.A.); (1981) 118 D.L.R. (3d) 1 (Nfld C.A.); (1981) 120 D.L.R. (3d) 385 (Que. C.A.); (1981),[1982] 2 S.C.R. 793; and, more recently, Re: Manitoba Language Rights [1985] 1 S.C.R. 721. For a discussion of constitutional theory in a New Zealand context. see P. Joseph & G.Walker, "A Theory of Constitutional Change" (1987) Ox. J. Leg. Stud. 155.

employed arguments drawn from both theories. The divisions are useful nonetheless. As we will see, the Patriation theory provides a good description of Canadian and British understandings of the constitutional arrangements that applied to Canada and (with formal differences appropriately accounted for) to other parts of the Commonwealth. This theory is most clearly articulated by the Supreme Court of Canada majority (law) in the Patriation Reference. While we must acknowledge the descriptive value of this theory for Canada pre-1982 as well as its past usefulness in Commonwealth relations (though perhaps mostly as viewed from the United Kingdom), it is also necessary to point out that it can be criticised, especially in former colonies such as Canada, for its failure to accommodate and explain the role of local factors such as federalism, independence and a desire for so-called autochthony.[2]

Many of the deficiencies which are perceived in the Patriation theory come together as part of the Independence theory. This account of Canadian constitutional history, which has its counterpart in the legal and political culture of other Commonwealth countries,[3] achieved its most coherent development and articulation immediately following, and to a large extent in reaction to, the Patriation Reference and the major constitutional events of 1982. It is perhaps a more satisfactory interpretation from a Canadian point of view in that it gives legal (as opposed to conventional) significance to the local factors mentioned above, but it can be criticized as being highly wishful (pre-1981-82) and dangerously revisionist (post-1981-82), and it suffers first and foremost for those reasons. That is not to say that it lacks coherence. It has been voiced at different times prior to 1982 by some of the country's most eminent

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[2]For a discussion of autochthony see K. Wheare, Constitutional Structure of the Commonwealth (Oxford, 1960), ch. 4 and G. Marshall, Constitutional Theory (Oxford, 1971), pp. 57-64.

[3]See, for example, K Robinson, "Autochthony and the Transfer of Power", in K. Robinson & A.F. Madden, eds, Essays in Imperial Government (Oxford, 1963); K.Wheare, ibid.; G.Marshall, Parliamentary Sovereignty and the Commonwealth, (Oxford, 1957); R.T.E. Latham, "The Law and the Commonwealth" (1949) reprinted from W.K. Hancock, ed., Survey of British Commonwealth Affairs, Vol I (London, 1937); and L. Zines, Constitutional Change in the Commonwealth (Cambridge,England, 1992).

constitutional experts, and it found partial voice in the minority reasons of the Patriation Reference. In general, however, the theory suffers from an inadequate explanation of how political facts such as models of federalism, forms of independence or commonly held beliefs engage or make an impact on the law (as opposed to the conventions) of the constitution.

In the end, however, it seems that a satisfactory account of the complex legal transformation which occurred in 1982 may require elements of both theories. This point will be developed in Chapter 4. First it will be useful to elaborate further on the content of each.

CHAPTER ONE

THE PATRIATION THEORY

The most basic characteristic of the Patriation theory is captured in the very idea of "patriation", by which is meant the process which allowed control over the Constitution to be brought home to Canada. Use of the word "patriation" gives the impression that the Constitution of Canada remained in the United Kingdom until all the means of controlling it, principally the process for its amendment, had been returned to Canadian soil. Until that time, the implicit understanding was that it should also be governed by British, or at best Commonwealth, constitutional theory, notably that part of the theory concerning sovereignty.

In a 1965 White Paper, the Minister of Justice, the Honourable Guy Favreau objected to the term "repatriation"[1] which was in common usage at the time as it misleadingly "implie[d] the return to Canada of something that was here originally". He noted that in fact "the full responsibility for our Constitution has never been vested in Canada".[2] He made reference to earlier attempts to "work out a way by which 'a Canadian Constitution' might be 'domiciled' in Canada".[3] In a speech entitled "Constitutional Amendment in a Canadian Canada" delivered one year earlier, Favreau's comments had been more emotive in reference to this notion of domicile. The past tense used in the

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[1]The French word, rapatriement, is still commonly used, while in English "patriation" became the standard. See, e.g., G. Rémillard, "L'historique du rapatriement" (1984) 23 C. de D. 1. The author later became the Minister of Justice of Quebec.

[2]Hon. Guy Favreau, The Amendment of the Constitution of Canada (Ottawa, 1965), p. 50.

[3]Ibid., p. 51.

speech reflected the Minister's misplaced optimism regarding the chances of success of the domestic amending formula which he was proposing at that time:[4]

> But the [proposed] formula ... marks the birth in Canada of a new climate of political discussion. That climate, for the first time, is unmistakably Canadian. As long as our country's fundamental law remained domiciled abroad, a cloud of doubt, humiliating doubt, obscured our homeland's sovereignty. However deep the affection we all feel for the great island beyond the seas that sent us one of our founding peoples, we could no longer, as a proud and independent nation, allow our Constitution to stand subject, even formally, to an absentee Parliament. The pilgrimage to London was an intolerable anachronism ... .

Favreau's notion of domicile is useful because it takes in a number of the other important attributes of the Patriation theory. According to some stronger versions, Canadian independence did not arrive until 1982 when the Constitution finally fulfilled the requirements of a Canadian domicile.[5] Furthermore, a Patriation theory made it difficult to speak of a Canadian amending formula. Despite the fact that in 1931 a Canada which was acknowledged to have autonomous status internationally chose to leave the mechanism for amendment of its Constitution with Westminster, in legal terms the nature of the relationship could still be seen as one of Empire and colony, and the key documents of the fundamental law of Canada could be seen merely as a collection of Imperial legislation, recorded in the statute books at Westminster. According to this view, the rules governing the modification of such legislation were naturally those rules applicable to all Westminster legislation. If the undeniable Canadian attributes of federalism, independence, self-government and international recognition could not be found in this legislation, then they could exist only at the level of convention or politics. In law, the courts (the Judicial Committee and later even the Supreme Court of Canada) were apparently obliged to respect the principles of the British (and Imperial) constitution, and those included the central

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[4]Hon. Guy Favreau, "Constitutional Amendment in a Canadian Canada" (1966-67) 12 McGill L.J. 384, pp. 392-3. The proposal, known as the Fulton-Favreau formula in recognition of the Ministers of Justice who had had a hand in its conception, was abandoned in 1965 when the Premier of Quebec, Jean Lesage, announced his province's decision to reject this "patriation" scheme. See the Lesage-Pearson letters in (1966-67)12 McGill L.J. 592-95.

[5]Although, the logic of this strong version made it difficult to see how, even after 1982, there was not at least a theoretical possibility of the "Mother Parliament" reasserting her authority.

notions of parliamentary sovereignty and the rule of law. Finally, if the Constitution was domiciled in the United Kingdom, then it was appropriate to interpret it not only according to its own terms but also consistently with British or at least Commonwealth constitutional theory and, by implication, with that body of law and theory which applied to all Commonwealth nations.[6] In effect, in so far as the theory was operative, it called upon the Supreme Court of Canada to act with regard to Imperial legislation not as a Canadian court responding to developments in Canadian legal and political culture, but as a stand-in for the Judicial Committee of the Privy Council, the highest court of the Empire which, as we have seen, the Supreme Court of Canada in fact replaced, at least for Canadian appeals.

If these observations are thought to be too strongly put, or expressed in caricature, it may be worthwhile to look immediately at the 1981 Patriation Reference for an excellent example of the influence of the Patriation theory.[7]

The members of the majority (law) made clear that the issue before them was "an unprecedented situation".[8] The federal government had never before attempted unilaterally to "patriate" the Constitution by means of the United Kingdom Parliament, and the Supreme Court of Canada had never before been asked to rule on the law governing such an initiative. The Court had said in the Upper House Reference[9] that any changes to the British North America Act had to be enacted by the British Parliament. However, that case had dealt with an attempt by the federal government to accomplish such changes by ordinary legislation of the federal Parliament.[10]

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[6]Important legislation included the Colonial Laws Validity Act, 1865 and the Statute of Westminster, 1931, but perhaps even more important was a very impressive body of Commonwealth constitutional theory. See, e.g., Latham, supra; Marshall, supra, and other references, supra, note 3.

[7]This name for the case is in common usage in Canada and is not merely used to support the thesis being advanced here.

[8]Patriation Reference, supra, p. 807.

[9]Re: Authority of Parliament in Relation to the Upper House [1980] 1 S.C.R. 54.

[10]There was potential justification for this in Class 1 of section 91 regarding amendments to the Constitution of Canada in so far as they affected only the federal government. The Supreme Court of Canada ruled that the provinces also had an interest in changes to the Upper House and that the federal legislation of the sort contemplated would be ultra vires. Ibid., p. 78.

The Patriation Reference provided the Court with an "unprecedented" opportunity to describe the rules which governed amendment of the Canadian constitution if not since 1867 then at least perhaps since 1931. As we will see, a majority of the Court viewed only the Canadian-based part of the process as a matter for its concern. Practices which could have been recognized even at that stage as part of the Canadian law of constitutional amendment were deemed instead to be conventions and hence not recognizable by a court of law. The legal rules governing the passage through the Westminster Parliament were seen less as part of that Canadian law of constitutional amendment (and hence subject to interpretation by Canadian courts in accordance with Canadian principles and theory), and more as matters of British constitutional law and practice, which effectively excluded them from judicial review. It is entirely possible that even if the Court had viewed the Westminster Parliament as a part of an essentially Canadian process it might have denied that that process was governed by rules regarding the need for and level of provincial consent, but for our purposes, it is significant to note that the issue was deemed to be a matter for the Westminster Parliament, there being no notion of ultra vires and judicial review in the British and Commonwealth theory of sovereignty of Parliament.

On the legal, as opposed to the conventional, branch of the Patriation Reference, the Court was asked two basic questions. These have been identified in the brief summary of the Reference which was set out in the introductory chapter. It was conceded that the first question, whether or not the proposed federal initiative would, if enacted, affect federal-provincial relationships, should be answered in the affirmative.[11] The second question on law was framed differently by Newfoundland and Manitoba on the one hand and by Quebec on the other hand. Newfoundland and Manitoba asked generally whether "the agreement of the provinces [is] constitutionally required for amendment of the Constitution of Canada".[12] Quebec focussed to a greater extent on the Canadian-based part of the

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[11]The Attorney General for Canada conceded this point at the outset. See Patriation Reference, supra, p. 767.

[12]Ibid., p. 762 (emphasis added).

process which initiated the amendment process: "Does the Canadian Constitution empower ... the Senate and the House of Commons of Canada to cause the Canadian Constitution to be amended without the consent of the provinces ... ".[13] It was perhaps in response to this second, more convenient, way of formulating the question that the majority chose to divide it into two separate issues:[14]

> (1) the authority of the two federal Houses to proceed by Resolution where provincial powers and federal-provincial relationships are thereby affected and (2) the role or authority of the Parliament of the United Kingdom to act on the Resolution. The first point concerns the need of legal power to initiate the process in Canada; the second concerns legal power of want of it in the Parliament of the United Kingdom to act on the Resolution when it does not carry the consent of the Provinces.

There was nothing inherently misleading in this manner of separating the issues. It simply divided initiation and ratification. As we will see, however, it permitted the Court to consider initiation as a matter for Canadian judicial consideration but to deny any such jurisdiction regarding the process of ratification. Once it could be established that the Westminster Parliament had been designated to enact and to modify the Canadian Constitution, the manner in which it did so could not be a matter for Canadian courts. The majority made two pertinent observations:[15]

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

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[13] Ibid, p. 763.

[14] Ibid. p. 773.

[15] Ibid., p. 774 (emphasis added).

Although it is obvious why a Canadian court would not want to pronounce on the authority, practices and conventions of a foreign Parliament, it is not clear why it should not do so where that foreign Parliament is, for amendment purposes, an integral part of the constitutional system. That which is valid law for the foreign country need not be similarly so in Canada unless the "anomaly" and "internal deficiency" of the absence of a domestic amending formula means that not only the process but also the law, interpretation and theory governing that process lie beyond the jurisdiction of Canadian courts until "patriation".[16] It is hard to see how such an approach is consistent with Canadian independence, an independence which, at least since 1949, presumably includes an independent Canadian judiciary. A more satisfactory approach from a Canadian point of view might have been to claim the ability to pronounce on the validity of the enactments of the British Parliament in terms of Canadian law, but to conclude perhaps that no rules regarding provincial consent had been provided and that it was not up to the Court to provide them. The result would have been the same but the analysis would have differed in important ways. The Court might for instance have wanted to say in a later case that Canadian law required that enactments of the Westminster Parliament amending the Canadian Constitution be preceded by Canadian request and consent.[17] This conclusion was excluded if the Court could not pronounce on the authority of the British Parliament.

From all the evidence, it appears that the majority (law) was not inclined to find a legal rule requiring provincial consent under any view of the matter. Provincial consent was at best a matter of convention and, as such, not enforceable by the courts. Of course, such an analysis begged the question. Once the matter had been deemed to be conventional it was by definition beyond the Court's purview.[18] However, the majority stated a strict and formal approach to such questions in stating that "[w]hat is desirable as a political

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[16]The majority refers to the proposed "patriation" of the Constitution, ibid., p. 766. Of course, given the currency of this word, nothing at all can be concluded as to the majority's theoretical outlook on that basis alone.

[17]Even this possibility is ruled out by the minority (convention). These reasons represent a very strong version of the Patriation theory. Ibid., pp. 855-6.

[18]This same point is made by W. Conklin, Images of a Constitution (Toronto, 1989), p. 71.

limitation does not translate into a legal limitation, without expression in imperative constitutional text or statute".[19]

In considering whether such "express or imperative constitutional text or statute" could be found, the majority turned to the bipartite division of the issues set out earlier. It considered, first, the authority or power of the two federal powers to initiate the amendment resolution affecting federal-provincial relationship and, second, the role or authority of the United Kingdom Parliament. As we will see, on the first part of the issue, the majority appeared to be highly influenced by a British interpretation of the 1867 Act of the British Parliament, and on the second, the majority seemed to view the authority of that same British Parliament as being beyond the competence of a Canadian court.

Turning to the first part of the issue, one notes that the majority stressed that the 1867 Act was silent as to the power of initiation of constitutional amendments, and that such silence could justify neither a positive nor a negative conclusion regarding the federal Parliament's ability. Examination of this question should not necessarily have involved any British considerations, but, oddly enough, the views of a former British Solicitor-General of 1940 were cited at some length. Presumably, British interpretations of the Act were still deemed to be relevant for Canadian purposes. In response to a question regarding provincial consent to the 1940 "unemployment insurance amendment", which directly affected provincial legislative power, Sir William Jowitt was quoted as saying[20] that he did not know whether the provinces had consented but that, even in 1940, the provinces appeared to have expressed a desire that the old system of a request by the Parliament of Canada and enactment at Westminster continue:

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[19]Patriation Reference, supra, p. 784. This is a very narrow definition of the Constitution. It appears to ignore the fact that at least one part of the Constitution, which Professor H.L.A. Hart would call the rule of recognition, is derived in part from political practice, although it may be defined by a court and thus made legal. The Patriation Reference was an opportunity for the Supreme Court of Canada to articulate the Canadian rule of recognition, but the majority (law) appeared unwilling to do so; or perhaps, even more distressingly, it viewed the British rule of recognition as binding. See H.L.A. Hart, The Concept of Law (Oxford, 1961), pp. 97-107. This point will be developed further in Part II. See also W. Lederman, "The Supreme Court of Canada and Basic Constitutional Amendment" in K. Banting and R. Simeon, And No One Cheered: Federalism, Democracy and the Constitution Act 176, p. 180 where he criticises the Supreme Court majority (law) as being positivist and historically static.

[20]Patriation Reference, supra, p. 787.

> [A]t the request of Canada this old machinery still survives until something better is thought of, but we square the legal with the constitutional position by passing these Acts only in the form that the Canadian Parliament require and at the request of the Canadian Parliament.
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> ...
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> In reply to the hon. Member ... , I do not know what the view of the Provincial Parliaments is. I know, however, that when the matter was before the Privy Council some of the Provincial Parliaments supported the Dominion Parliament. It is sufficient justification for the bill that we are morally bound to act on the ground that we have here the request of the Dominion Parliament and that we must operate the old machinery which has been left over at their request in accordance with their wishes.

Given the silence of the 1867 Act and the lack of justification for interpreting that silence one way or another, the majority then dealt with the question of whether the Supreme Court of Canada could, by its own initiative, "enshrine as a legal imperative a principle [of unanimous provincial consent] for constitutional amendment":[21]

> The stark legal question is whether this Court can enact by what would be judicial legislation a formula of unanimity to initiate the amending process which would be binding not only in Canada but also on the Parliament of the United Kingdom with which amending authority would still remain. It would be anomalous indeed, overshadowing the anomaly of a Constitution which contains no provision for its amendment, for the Court to say retroactively that in law we have had an amending formula all along, even if we have not hitherto known it; or, to say, that we have had in law one amending formula, say from 1867 to 1931, and a second amending formula that has emerged after 1931.

This formulation of the "stark legal question" is as close as the majority came to recognizing the possibility of a distinct Canadian legal interpretation of its fundamental constitutional statute. As the Court acknowledged elsewhere in the judgment, the question was "unprecedented". Presumably, the Court should have been entitled to declare the true state of the law, whether or not that corresponded to the practice which had obtained until that moment.[22] And presumably, if there were sufficiently compelling reasons in law to

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[21] Ibid., p. 787.

[22] The Court was to take such bold action four years later in Re Manitoba Language Rights [1985] 1 S.C.R. 721.

do so, the Court could have also concluded that there had a been one amending formula before 1931 and another after that moment. There were numerous elements, both formal and informal, in Canada's rapid and complex constitutional development which could have been highlighted in order to justify such conclusions. These conclusions, whatever their merit in law, could only be seen as anomalous if the unaltered position of the formal amending authority -- the United Kingdom Parliament -- was deemed to be determinative. That Parliament had, of course, gone through a certain evolution of its own since 1867. But there was nothing in its evolution which could be said to have limited its ability to modify its own legislative acts, unless a specific legislative text could be said to have done so, and from that perspective it would indeed have been anomalous to imply new legal limits. It would only cease to be so if it the Court felt that it were possible to look at the role and authority of the United Kingdom Parliament for Canadian purposes as being different from its role and authority for the United Kingdom purposes, and, more importantly, as being an appropriate subject of Canadian judicial interpretation.

It appeared, then, that the majority (law) was unwilling to deal with the first issue in a manner which would require it to describe the content of the rule regarding initiation of amendments, despite the fact that the matter had never been dealt with before. In the absence of a positive legal text covering the matter any Court-initiated determination would amount to judicial legislation. Of course, the minority (law) allowed itself to see in the absence of a legal text a corresponding absence of authority to do that which appeared to violate one of the principles of Canadian constitutional law, that is, federalism.

Having refused to describe the content of the "initiation" aspect of the amendment process, it was not likely that the Court would be any less restrained regarding the second issue: the role and authority of the United Kingdom Parliament. The highest Canadian court showed itself unwilling to define, even for Canadian purposes, the limits, if any, of Westminster Parliament power.

As we will see below, the provinces presented strong arguments in favour of a distinct Canadian legal interpretation of the role and authority of the United Kingdom Parliament. Some of these arguments were accepted in the Newfoundland Court of Appeal, and in the dissenting reasons of judges in the Manitoba and Quebec Courts of Appeal. Elements of these arguments will be considered in the discussion of the Independence theory. In its strongest version, the Independence theory dictated that federal considerations, and hence provincial consent, should be a legally relevant part of the amendment process. Briefly put, since the 1867 Act made no formal provision for amendment, neither the federal Parliament nor the provincial legislatures could be said to have been given the power to amend the most fundamental parts of the Constitution, principally those parts where the rights of both level of governments were guaranteed. Accordingly, the consent of both levels would be required before a Canadian court (or a court acting for Canada pre-1949, in the case of the Judicial Committee) could recognize such an amendment as Canadian law. To do otherwise would have been to violate that part of Canadian constitutional organization which had been confirmed by 1867, that is, its federal nature. Only later, sometime during the first half of the next century, would the addition of a requirement of proper Canadian consent be more easily argued, in recognition of Canadian equality and autonomy vis-à-vis the United Kingdom.

Not surprisingly, these and other similar arguments did not convince the majority (law). Some possible reasons have been discussed. The majority required a clear formal, legal indication, recognizable as such in relation to the Westminster Parliament, to justify such conclusions and these were not forthcoming. The Balfour Declaration reference to "autonomous communities" was judged to be a purely political statement from which the argument in favour of provincial consent could seek no nourishment.[23] If the Declaration had any impact it would have to be "regarded as retroactively having that effect by reason of the ultimate enactment of the Statute of Westminster".[24]

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[23] Patriation Reference, supra, p. 790.

[24] Ibid.

Upon this Statute, then, lay the burden of revealing that "an equality of status as between the Dominion and the Provinces vis-à-vis the United Kingdom Parliament" had come into existence and that "the theretofore untrammelled legislative authority of that Parliament in relation to Canada where provincial interests [were] concerned" had been attenuated.[25] We can at least be sure that the majority felt that the argument regarding the 1867 Act and the federal principle had no toehold even by 1931. The untrammelled authority of the Westminster Parliament was the rule.

With respect to the Statute of Westminster, 1931, the majority saw no justification for the view that a requirement of provincial consent had been imposed on the activity of the United Kingdom Parliament regarding the amendment of the 1867 Act. The preamble to the Statute pertained primarily to the Dominion as a whole, not the provinces. Section 2 repealed the Colonial Laws Validity Act, 1865 and empowered the Dominion, and pursuant to subsection 7(2), the provinces, to repeal or amend any British legislation that was or would be made applicable to them. As subsection 7(3) made clear, this only applied to enactment of laws in relation to matters within the competence of each. Amendment of greatest part of the Canadian constitution had never been within the competence of either. In the view of the majority,[26] subsection 7(1)

> appeared ... to maintain the status quo ante; that is, to leave any changes in the British North America Act ... to the prevailing situation, namely, with the legislative authority of the United Kingdom Parliament being left untouched. ... "[T]he old machinery" remained in place ... .

In the end, the majority was of the view that "as of 1930, there was certainly no rule of law with respect to constitutional amendment" and "[n]o change was effected in the legal position by the Statute of Westminster".[27]

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[25] Ibid.

[26] Ibid., pp. 794-5.

[27] Ibid., p. 797.

The idea that there was never "a rule of law with respect to constitutional amendment" is a constant in the reasons of the majority, and it is an important characteristic of the Patriation theory. The contrary point of view, as we will see, requires that the Canadian courts see the Canadian constitution as a whole, wherein the rules on amendment are assigned to the United Kingdom Parliament. Accordingly, those courts -- ultimately the highest court -- are entitled to determine the conditions according to which an amendment to that Canadian constitution will be deemed valid. As mentioned earlier, even a less reticent court might legitimately feel that such a decision went beyond the proper judicial function, but, equally, it might infer, for example, a requirement of provincial consent after 1867 and an absolute requirement of Canadian request and consent following 1931. But any of these definitions of the rules for validity of Canadian constitutional amendment required that the whole of the Constitution, including its amendment, be an appropriate subject of judicial enquiry. As we have seen, the majority in the Patriation Reference viewed that Constitution differently. In the majority's view, the Westminster Parliament was a process unto itself, and a foreign process at that, governed by its own rules. On its own, this was an unobjectionable point of view. What the majority failed, or was unwilling to consider, was that Westminster could be seen, and judged differently for Canadian purposes, that is, as part of a complete Canadian constitution (though one not entirely domestic in its machinery).

Instead, the majority viewed the Canadian constitution as incomplete:[28]

> At least with regard to the amending formula the process here concerns not the amendment of a complete constitution but rather the completion of an incomplete constitution.
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> We are involved here with a finishing operation, with fitting a piece into the constitutional edifice; it is idle to expect to find anything in the

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[28] Ibid., p. 799. As Conklin, supra, p. 73, observes, the idea that the Canadian constitution is incomplete is related to the majority (law)'s apparent understanding of the constitutional "law as enactment".

> British North America Act that regulates the process that has been initiated in this case.

Canadian independence, or the autonomy and equality which came to be recognized in the former colony's relationship with the United Kingdom, manifested itself not in the ability of Canadian courts to determine what amounted to the ultimate rule of the Canadian Constitution; instead, in the majority's view,[29] it justified only

> a procedure which takes into account the intergovernmental and international link between Canada and Great Britain. There is no comparable link that engages the Provinces with Great Britain. ... The legal competence of [the British] Parliament, for the reasons, already given, remains unimpaired, and it is for it alone to determine if and how it will act.

There was apparently nothing in the Statute of Westminster, 1931 which could be seen to remove that full and unimpaired competence:[30]

> Whatever the statute may import as to intra-Canadian conventional procedures, there is nothing in it or in the proceedings leading up to it that casts any doubt in law as to the undiminished authority of the Parliament of the United Kingdom over the British North America Act.

The majority insisted that by 1931 Canada had the rights of an independent nation in international law. This had been recognized in 1923, confirmed in Imperial Conferences and sanctified in the Statute of Westminster, 1931. In the majority's view, "[t]he remaining badge of subservience, the need to resort to the British Parliament to amend the British North America Act, although preserved by the Statute of Westminster, did not carry any diminution of Canada's legal right in international law".[31] That which remained unclear was why the need to resort to the British Parliament also required that the courts of an apparently independent country deny their ability to determine the rules regarding the validity for Canadian purposes of the enactments of that foreign legislature, especially

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[29] Ibid.

[30] Ibid., p. 801.

[31] Ibid., p. 802.

when those enactments were part of a Canadian constitutional amendment process. And yet that appeared to be the majority approach:[32]

> History cannot alter the fact that in law there is a British statute to construe and apply in relation to a matter, fundamental as it as, that is not provided for by the statute.
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> ...
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> There is here ... an unprecedented situation in which the one constant since the enactment of the British North America Act in 1867 has been the legal authority of the United Kingdom Parliament to amend it. The law knows nothing of any requirement of provincial consent, either to a resolution of the federal Houses or as a condition of the exercise of United Kingdom legislative power.

Presumably, if a situation is unprecedented, then it is up to the courts to declare or interpret the law even, or perhaps especially, where the fundamental law of the country is silent. It is one of the ironies of the Patriation Reference that that which was described as a conventional rule by a different majority of the Supreme Court of Canada -- that is, the requirement of a substantial provincial consent -- could have been declared as a condition of validity for Canadian purposes of an otherwise valid enactment of the Westminster Parliament.

In effect, that which the Court eventually described as a constitutional convention could have been used as the content of the ultimate rule of the Canadian constitution. As we will see later, in this exceptional context, it may well have been correct to speak of a convention for United Kingdom purposes (and courts) and a rule of law for Canadian purposes (and courts). The Patriation theory left no room for such an argument.

It has been acknowledged throughout that there may have been very good reasons for the Supreme Court of Canada to refuse to identify a legal rule regarding provincial consent, even in circumstances where it recognized its authority to declare the law in this

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[32] Ibid., pp. 803, 807.

fashion in the appropriate case. First, the rule of substantial provincial consent was vague and imprecise. Secondly, the courts may have seen themselves as lacking the legitimacy to define the law in the absence of formal indication. And thirdly, there may simply have been insufficient justification here under any view of the matter to have inferred some type of provincial consent requirement.

It is not so much the result which is important. Rather it is the approach that is so crucial. The majority (law) did not even seem to have acknowledged that it was in the process of defining the ultimate rule of the Canadian constitution. Ultimate control over that constitution had been left in the hands of the British Parliament (and courts). The rules regarding its amendment were the rules of that Parliament. Whatever the rule of recognition applicable to that Parliament in order to determine the validity of its legislative enactments, it was not deemed to be a matter for the Canadian courts. The Canadian courts which followed the Patriation theory's tenets showed an unwillingness to acknowledge that it was possible for an enactment of the United Kingdom Parliament regarding the amendment of the Canadian constitution to be valid according to British law but invalid according to Canadian law.

The importance of the Patriation theory approach can perhaps be best explained by examining the difficulties which it could be seen to have in providing satisfactory answers in three situations, two of which were mentioned in the Reference. The last was its most beguiling consequence.

The majority (law) stated that during the course of argument the Attorney General of Canada was asked whether the federal government could, in theory, "procure an amendment to the British North America Act that would turn Canada into a unitary state". The Attorney General answered in the affirmative. The logic of his argument required it. The majority stated simply that this was not what the present Resolution envisaged. Presumably, if there had been a means of discounting such a possibility in law, the

majority would have stated it. But the logic of the Patriation theory dictated that there could be no objection in law to an act of the United Kingdom Parliament which accomplished even such a radical alteration of the country's political structure. The conventions of the Canadian constitution and international comity made the prospect unlikely. One might also have wanted to say that in such an event the courts would find a way to declare it unconstitutional. But then that is the problem. There appeared to be no ready answer within the Patriation theory.

A second situation emerged in the strong Patriation theory line kept to by the minority (convention). In that judgment, the logic of the Patriation theory was taken to its logical extreme. The minority considered the theoretical possibility of a statute enacted for Canada by the United Kingdom Parliament without Canada's request or consent, in contravention of a well-established convention against such action. Professor Peter Hogg's response (set out below) was quoted with disapproval:[33]

> If a court did give a remedy for a breach of convention, for example, by declaring invalid a statute enacted for Canada by the United Kingdom Parliament without Canada's request or consent ... , then we would have to change our language and describe the rule which used to be thought of as a convention as a rule of the common law [of the Constitution]. In other words a judicial decision could have the effect of transforming a conventional rule into a legal one.

The minority rejected this view forcefully. Presumably, such a statute would have been valid, in the minority's view, in both British and Canadian law. There was no room within the theory for the view that that which might be a convention in the United Kingdom (the United Kingdom Parliament will not pass a law amending the constitutional statutes for Canada without Canadian request and consent) could be a legal requirement in Canada (the Canadian courts will not recognize the validity of a United Kingdom Parliament law amending the Canadian constitutional statutes without evidence of Canadian request and

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[33] Ibid., pp. 855-6. We will see later that Professor Hogg's view here is characteristic of the Independence theory.

consent). Without a Canadian court having pronounced on the issue, it is uncertain whether such a rule would have been considered a convention or part of the ultimate rule of the Canadian constitution. And, however unlikely the prospect of such legislation was, if one could have confidently predicted that Canadian courts would have declared such legislation invalid, it seems misleading to have insisted on referring to it in Canadian terms as a convention, despite the fact that that might have been the most accurate description in British terms. The Patriation theory made this distinction illegitimate, however.

The minority (convention) joined the majority (law) in viewing the Canadian constitution as an incomplete body of law:[34]

> In view of the fact that the ... argument has been raised .. it should be noted, in our view, that the federal constitutional proposals, which preserve a federal state without disturbing the distribution or balance of power, would create an amending formula which would enshrine provincial rights on the question of amendments on a secure, legal and constitutional footing, and would extinguish, as well, any presently existing power on the part of the federal Parliament to act unilaterally in constitutional matters. ... Its effect is to complete the formation of an incomplete constitution by supplying its present deficiency, i.e. and amending formula, which will enable the Constitution to be amended in Canada as befits a sovereign state.

This statement along with statements of its type which were highlighted in the majority (law) presented a third problem for the Patriation theory. If the Parliament of the United Kingdom was governed by British constitutional understandings, then in what sense could it effectively transfer the power to amend the Canadian constitutional statutes to Canada. Over a year later, the Quebec Reference appeared to indicate that the process which was successfully completed in 1982 was now irreversible. We can be quite certain that the Supreme Court of Canada would reject as invalid any attempt to undo the Canada Act, 1982 and to amend the Canadian constitution by means of a statute of the United Kingdom Parliament. However, the Patriation theory makes this very hard to explain because of its failure to separate and distinguish Canadian and British constitutional theory.

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[34] Ibid., p. 873

According to the classical rules of the British constitution, Parliament may not bind future Parliaments, and by repeatedly referring to the unqualified, untrammelled, absolute power of the United Kingdom Parliament, the Supreme Court of Canada appeared to align itself with that classical theory of the British constitution. This theory is explained in its most complete form in the writing of Professor A.V. Dicey.[35] In the works which commented on Dicey, one can find explanations of how Parliament can bind itself or, according to another view, abdicate its sovereignty.[36] But even these theories are not universally accepted in British theory. Following the 1982 Patriation, some British courts accepted the theoretical possibility of a reassertion of the power of the British Parliament to legislate for Canada.[37] If Canadian courts continued to respect British theory, then they too would have to respect such a reassertion of legislative authority. This was the logic of the Patriation Reference and Patriation theory, both of which appeared to place the United Kingdom Parliament beyond judicial review, even for Canadian purposes.

The standard modern analysis of this problem by British, Commonwealth and Canadian constitutional commentators is that "Imperial" legislation of such a (unlikely) sort, would simply be ignored by the Canadian courts.[38] This seems unchallengeable. However, the enduring effects of the Patriation theory would make it hard for these same courts to explain this convincingly, except by a resort to British constitutional theory. As we will see in discussing the Independence theory, the Supreme Court of Canada may have missed a chance in the 1981 Patriation Reference to pull together the threads of a Canadian theory of the constitution. It is also submitted that we may have to revert to at least part of that independent Canadian theory to explain in a convincing way the "irreversibility" of the 1982 "patriation" process.

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[35] A.V. Dicey, An Introduction to the Study of the Law of the Constitution, 10th ed. by E.C.S. Wade (London, 1959).

[36] The works of Sir Ivor Jennings and Dr Geoffrey Marshall, for example, will be discussed in Chapter 3.

[37] See Megarry V.C. in Manuel v.A.G. [1982] 3 All E.R. 822 discussed in Chapter 3.

[38] See, e.g., G. Marshall, Constitutional Theory (Oxford, 1971), p. 63; A.W. Bradley, "The Sovereignty of Parliament" in J. Jowell & D. Oliver, eds, The Changing Constitution, 2nd ed. (Oxford, 1989), p. 33; and P.W. Hogg, Constitutional Law of Canada, 2nd ed. (Toronto, 1985), p. 49.

In order better to understand the legal tradition which no doubt alimented the reasons of the judges in the majority (law) and minority (convention), it may be useful to return and consider earlier manifestations of the Patriation theory in Canadian sources. The claim is not that one group of judges, lawyers and academics adopted a Patriation theory and another an Independence theory. Rather, the purpose of this exploration is to identify certain assumptions about the first rules of the Canadian constitution which ultimately led to very different understandings of how that Constitution should be interpreted.

Clearly, there was much in the way of justification for the Patriation theory. As we saw in the introductory historical survey, the Fathers of Confederation appear intentionally to have left control over the 1867 Act with the Imperial Parliament. They also accepted implicitly the jurisdiction of the Judicial Committee of the Privy Council which acted as a final court of appeal on issues concerning the vires of federal or provincial legislation. Though no litigation regarding the amendment of the Constitution occurred at the highest level of appeal until the 1980s, there appears to have been an understanding by Canadians even as early as 1867 that no court, not even the Judicial Committee of the Privy Council, could rule on the vires of an Act of the Westminster Parliament.[39] The key political actors spoke of the "arbitrament" not of the Judicial Committee but of the government and Parliament of the mother country. If the Supreme Court of Canada were ever to view these matters differently, then arguably it would need a clear indication that the legal situation had changed before it could intervene. As we have seen, the Statute of Westminster, 1931 appears to be the only document which could have been said to have that legal effect, and it was apparently designed to leave the "old machinery" in place.

The true characteristic of the Patriation theory, then, is not alegal; in fact, it is positively legal. It ignores the potential implications of such factors as federalism,

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[39]This was also the view expressed by the English courts in the Manuel case, supra.

independence and legitimacy precisely because strictly speaking it is not required to do so. The constitution which was in the making was domiciled in the United Kingdom, not in Canada, and until agreement could be had to bring it home, Canadians, even Canadian courts, were powerless, so the theory went, to modify the situation which Favreau and others described as "anachronistic" and "humiliating". It was fundamentally a very conservative theory. However, its critics need more arguments than those traditionally put forward to say that this is a bad thing. Perhaps even the Supreme Court of Canada should be very wary of boldly reforming the constitutional rules at the highest level.[40] The Patriation theory may however be vulnerable to criticism if it cannot explain the change of constitutional domicile -- or "patriation" -- which was desired from a very early point in Canadian constitutional history but which did not occur completely until 1982.

If we take a brief look at the history of Canadian constitutional theory since 1867, it should not surprise us to see strong indications of the Patriation theory in early writings. It should also not surprise us to see that the early thinking on this subject was heavily influenced by ideas coming from the centre of the Empire, that is, the United Kingdom.

A.H.F. Lefroy reported that in the early days of Confederation, some Canadians considered the idea that when the 1867 Act gave (by sections 91 and 92) "exclusive" legislative powers to the federal Parliament and provincial legislatures respectively that the intention was to exclude the Imperial Parliament altogether, and not merely to exclude federal from provincial.[41] This assertion of Canadian legal sovereignty was even dealt with in a favourable light by Chief Justice Draper of Ontario.[42] When word of this interpretation reached the ears of the much-revered Professor A.V. Dicey, the reply was not very forgiving:[43]

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[40] This point will be dealt with more fully in Chapter 7.

[41] A.H.F. Lefroy, Canada's Federal System, (Toronto, 1913), pp. 51-2.

[42] Regina v. Taylor (1875) 36 U.C.R. 220.

[43] A.V. Dicey, Book Review, (1898) 14 L.Q.R. 199.

> The curious idea suggested by Draper C.J.. that the words "exclusive legislative authority", which occur in the British North America Act, s. 91, exclude the legislative power of the Imperial parliament, could never have obtained the currency which it certainly has acquired if even learned lawyers had not occasionally failed to realise that the parliament at Westminster is a Sovereign legislature. It ought to be added that this sovereignty, so far from being inconsistent with the practical independence of the Canadian legislatures on all matters of solely Canadian interest, in some respects facilitates the amendment, whenever it may be required, of the Canadian constitution, and explains the absence of provisions for carrying out of constitutional changes.

By the turn of the century, the misunderstanding had been cleared up. W.H.P. Clement could state in 1916 that "[i]n the study of the Canadian Constitution the first fact which challenges attention is that the Dominion of Canada is a British colony"[44] and that all powers which it possessed were held under a statute passed by the Imperial Parliament, "the only constituent assembly in the full sense within the Empire".[45]

All in all, one reads very little in this period about the modalities of patriation, in the sense in which that was later understood.[46] For the greatest number of a small group of Canadians who considered the issue, the matter seemed clear: legally, the Imperial Parliament was free to make or unmake any laws, including those British statutes which made up the Canadian constitution. The centrality of Westminster in this process put considerations such as federalism, independence and legitimacy well into the background, at least in so far as the law of the constitution was concerned. And furthermore, those who had read Dicey's Introduction to the Law of the Constitution would have noted that Westminster could not divest itself of authority, and could not therefore abandon its powers in and for the Empire.[47] Federalism, independence and legitimacy could not trump the

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[44]Hon. W.H.P. Clement, The Law of the Canadian Constitution, 3rd ed. (Toronto, 1916), p. 1

[45]Ibid., p. 3.

[46]The point was made earlier that the Patriation theory excludes certain important factors from consideration: federalism, independence, public attitudes (or legitimacy). Federalism would seem to dictate that the provinces participate in the amendment process where their interests are at all affected. Canada is not said to have achieved its independence until after the First World War. Clement's colonial characterization of Canadian constitutional law is not therefore surprising on that score. We may wonder what place could be made for notions such as public attitudes or legitimacy, but the point does not seem to have been considered.

[47]Dicey, supra, pp. 68-9n. See also R.C. Vipond, Liberty and Community: Canadian Federalism and the Failure of the Constitution (Albany, 1991), pp. 70, 133-4.

Imperial legislator where it remained possible for Westminster "tomorrow to impose a tax, say on New Zealand or on the Canadian Dominion".[48] "No lawyer," said Dicey "questions that Parliament could legally abolish any colonial constitution, or that Parliament can at any moment legislate for the colonies and repeal or override any colonial law whatever".[49]

It was only later that "improvements" on Dicey's theory would provide the Patriation theorists with a more flexible range of possibilities regarding the ending of the Imperial link. But in all circumstances, according to this view, any change in the process by which the Constitution of Canada was to be amended would require a clear legal text provided by the constituent power at Westminster.

To the extent that Canadian concerns were relevant regarding amendment of her fundamental statutes, it could only be at the level of convention, that notion having also been described by Dicey.[50] Federalism had not in any event had a large impact even at the conventional level. There had been little cause in the first half-century of the country's existence for the provinces to express opinions on the issue of the process for amending the Canadian constitution.[51] Independence was manifesting itself at a steady pace, and amendments generally took place upon the request and with the consent of the Canadian authorities. It was not unusual, however, for the Imperial legislators to make changes to proposed Canadian texts or even, on rarer occasions, to refuse to comply with Canadian wishes.[52] Canadian attitudes, or questions of legitimacy, were purely a question for the Canadian political process. In any event, none of these concerns could engage the law, according to the theory prevailing at the time, in the absence of a clear legal text, and even then the matter was not fully certain.

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[48]Dicey, ibid., p. 67.
[49]Ibid., p. 114.
[50]Ibid., p. 24.
[51]Gérin-Lajoie, supra, ch.5.
[52]Ibid., pp. 185-6.

In the early part of this century, senior Canadian officials began to consider the possibility of finding a domestic procedure for amending the Constitution.[53] By the mid-1920s it had become a matter of great importance. The strong hold of the Patriation theory is evident in most of these discussions. For example, it was assumed by many that even after Canada obtained a domestic procedure for amending the Constitution, it would remain possible for the Westminster Parliament to assert its continuing sovereignty. The problem in all its logical complexity had been explained as early as 1925 by the then Leader of the Opposition, the Right Honourable Arthur Meighen. a highly regarded thinker if somewhat ineffectual political leader. His terms seem to distinguish politics or convention ("constitutional right") from law:[54]

> [I]f all were unanimous that we abandon recourse to the British Parliament altogether, and through some system at home, vest in the various legislatures and the Parliament the right to amend the Constitution, would we really be farther ahead than we are now? The Prime Minister says, and I support him to the full, that we have to-day an absolute constitutional right to fix the terms of our Constitution. Speaking for the people of Canada, satisfying the British Parliament that we so speak -- and there is not difficulty doing this if the voice of objection is not heard -- we have the right as a Parliament to decide what goes into that Act and what stays out. Such is our position to-day. Hon. gentleman say "Yes, but that only rests on the foundation of constitutional right; by law we still have to go around the route to the British Parliament; and we do not want to rest on the insecure basis of mere constitutional right. We want our legal rights plainly defined before the world." Let us inquire into that contention. In my judgment our legal position would not be one whit stronger in that case than it is now. True, it is by virtue of constitutional right that we can now dictate virtually any amendments to the Act, provided we speak for all Canada and the voice of minorities raises no objection. But the sanction of constitutional right within this British Empire is just as firm, just as lasting, and just as dependable as the voice of law itself. But I go farther. When we have gone through all this and got our substituted system, when we have obtained the legal right to amend in our several Parliaments this British North America Act, the legal foundation is not one iota better than it was before. Why do I say that? Though the British North America Act may be amended, in such a way as to give the Parliament of Canada, after a long series of provincial approvals, the right to amend the Act, after that is all done the legal power would still remain in the British Parliament to change the Act at will. And nothing could restrain them save a regard for constitutional authority. In other words, we would still be protected by constitutional right and

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[53]See Gérin-Lajoie, ibid., pp. 221-2 and M. Ollivier, L'avenir constitutionnel du Canada (Montreal, 1935), p. 130.

[54]Canada, House of Commons, Debates (19 February 1925), pp. 336-7 (emphasis added).

> constitutional right alone; the legal power in the British Parliament would remain to amend the Act or to repeal it. So that. after all, the sanction we would have would be the very sanction we now enjoy.

The proposed enactment which was the subject of debate did not include a provision limiting the authority of the United Kingdom Parliament to legislate.[55] Following the Supreme Court of Canada's judgment in the Patriation Reference it is difficult to avoid the thrust of Meighen's argument, even after the Canada Act 1982 and the apparent termination of the British Parliament's power to legislate for Canada.

The most important opportunity to provide such a legal text limiting the apparently unlimited powers of the Parliament at Westminster came with the process which led up to the passage of the Statute of Westminster, 1931. As we have seen, Canadian politicians, meeting at successive Federal-Provincial conferences were unable to agree on a domestic procedure for amending the Constitution of Canada and chose therefore to preserve the status quo ante by means of section 7.[56] If there had been any doubt before regarding the ability of the United Kingdom Parliament to legislate for Canada, at least where it was amending that country's fundamental law, those doubts had been removed by the words of subsection 7(1).

The preamble to the Statute taken together with the Balfour Declaration of 1926 clearly recognized the autonomous status which Canada had acquired. Subsection 7(3) of the Statute and the notes of the preparatory conferences confirmed the importance of provincial approval of any constitutional change which might affect the federal nature of the country. But the words of subsection 7(1) stated that "[n]othing in this Act" could be deemed to apply to the amendment of the Imperial statutes which together made up Canada's constitution. According to the Patriation theory which was still dominant, changes of a political nature could not have any impact on the unaltered sovereignty of the

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[55] See Gérin-Lajoie, supra, p. 226n.

[56] Gérin-Lajoie, ibid., ch. 1, shows that s. 7 may not have even succeeded in doing what it set out to do because of the specific references to the British North America Acts, 1867-1930.

United Kingdom Parliament in this domain. And those who were influenced by the theory appear not to have considered that while the sovereignty of the United Kingdom Parliament might remain unaltered for British purposes, the legal system of the autonomous country of Canadian was capable of a separate evolution, even within the sphere of constitutional amendment. The Canadian polity had after all made a choice regarding that process in 1931, and the fact that Westminster remained the mechanism did not mean that Canadian definition of that process could not obtain. Absolute or untrammelled parliamentary sovereignty, if it existed at all, was a creation of British, not Canadian, constitutional theory. However, for the moment, Canadian understandings of its constitution were to a great extent determined by the Judicial Committee of the Privy Council. The Judicial Committee was not necessarily required to cling to British constitutional theory, and might even have seen fit to develop an independent constitutional theory for Canada, but it was not so inclined.[57]

That which was even more disturbing, at least at the theoretical level, was that the same British understanding of parliamentary sovereignty even rendered the legal limitations contained in the text of the Statute of Westminster formally precarious. As the Judicial Committee of the Privy Council stated in the British Coal Corporation case,[58] as a matter of abstract theory the Westminster Parliament could always reclaim its power to legislate in all respects for the former colonies. On the strongest version of the Patriation theory, the Westminster Parliament could legislate on any matter for Canada. This was judged to be

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[57]The Judicial Committee rather showed a natural tendency to set out rules which could apply equally to all colonies or provinces. It was only when the Supreme Court of Canada took over from the Judicial Committee that an independent Canadian constitutional theory might have been anticipated. 1982 showed that that theory had not yet been developed. In the 1930s the Judicial Committee was, of course, deciding cases for other parts of the Empire. When Ireland expressed a desire to establish its own independent constitutional theory, the Judicial Committee insisted on the standard British understanding of parliamentary sovereignty. See Moore v. A.G. for the Irish Free State [1935] AC 484 (PC). Of course, it would have been difficult for the Judicial Committee, far removed from the day-to-day life of the colonies, to determine in which direction developments in constitutional theory might best move, although it did so regularly in determining important cases regarding the federal division of powers.

[58][1935] A.C. 500, discussed in the Introduction.

the case, in law at least, by the Parliamentary Counsel of the Senate, writing in 1939, eight years after the passage of the Statute of Westminster, 1931:[59]

> It is not open to doubt that the Imperial Parliament may, so far as constitutional law is concerned, legislate for Canada, notwithstanding the British North America Act, and without Canada's consent or request, indeed against Canada's will, to as full an extent as it may see fit, Nor can there be any doubt that, notwithstanding the Statute of Westminster, the Imperial Parliament may so far as such law is concerned, as fully, freely and extensively so legislate. The British North America Act and the Statute of Westminster, alike, are in eye of the law, merely statutes of Parliament and -- at law -- no Parliament can bind either itself or a future Parliament.

There was also, of course, a strong convention which made it very unlikely that the Westminster Parliament would legislate to such a full extent in Canadian matters. In the Canadian case, such discussions were moot in another sense. Presumably, any direct interference in Canadian affairs which the United Kingdom Parliament might have wished to accomplish could have been accomplished indirectly through its power to amend Canadian constitutional texts, explicitly maintained in subsection 7(1).

Despite the fact that Canadians had been unable to agree upon a domestic procedure for constitutional amendment for inclusion in the Statute of Westminster, 1931, the attempts to find such a procedure did not abate. Numerous proposals emerged in the years immediately following passage of the Statute. While the greatest parts of these proposals were concerned with substance, it is possible to see nonetheless the various influences of the constitutional understandings which are characteristic of the Patriation theory. The most revealing aspect of these proposals, in terms of constitutional theory, was the manner by which the transfer of ultimate legislative authority might take place.

In 1935, for example, the Ontario government presented to the Federal-Provincial Conference a proposal for a Canadian amending procedure in which a suggestion appeared

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[59]Canada, Senate, Report on the British North America Act by W.F. O'Connor (Ottawa, 1939; reprinted 1961) Annex 5, p. 17 (O'Connor's emphasis).

regarding the United Kingdom Parliament. The suggestion was later reported in summary form and with commentary by Dr Paul Gérin-Lajoie:[60]

> (f) Recourse to the Parliament of the United Kingdom for the enactment of constitutional amendments should accordingly be abolished except as regards amendments to the amending process; the Ontario proposal also set forth that no alteration should be made in this process except by consent of the federal Parliament and of the legislatures of all the provinces. The Ontario proposal attached much importance to the retaining of the United Kingdom Parliament "as the arbitor [sic] in this matter of vital concern." This peculiar feature was considered necessary in order to ensure the continuance of the method of amendment proposed.

It appears that the Ontario government wished in so far as possible to remove the United Kingdom Parliament as the ultimate legislative authority of the Canadian constitution, but this account also indicates that the continued role of Westminster was deemed necessary in order to accomplish any future alteration of the amending process itself and perhaps even to ensure the ongoing status of such a process as part of Canadian fundamental law. One must be wary of reading too much into these proposals, but it seems that the Ontario government saw the British. Diceyan notion of what came later to be known as continuing sovereignty[61] as the only model available to Canada. And furthermore, it may have felt that if the United Kingdom disappeared from the Canadian constitutional structure, the Canadian constitution would lose its fundamental or supreme legislative status at the same time. The safer and. as has been noted, perhaps the more desirable option on this view, was to maintain the Imperial link.

The prevalence of the British notion of parliamentary sovereignty in two generations of Canadian constitutional scholars can be seen in Dr Gérin-Lajoie's account in 1950 of Dr Maurice Ollivier's 1935 proposals. Dr Ollivier had suggested that Canadians should draft a new constitution based on the 1867 Act. As Dr Gérin-Lajoie reported, the main object of this proposal was "to bring about the repeal of the British North America

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[60] Gérin-Lajoie, supra, p. 246.

[61] Discussed infra, Chapter 4.

Acts and to have the Canadian Constitution embodied exclusively in a Canadian act in order that it might not be any more subject, in law, to amendment by the Parliament of the United Kingdom".[62] Gérin-Lajoie noted the problem with this proposal "in strict law". His comments indicated that that law was based on British principles which were equally applicable to Canada:[63]

> Dr. Ollivier seems to have forgotten that, as a matter of abstract law, Westminster could amend or repeal any Canadian acts as well as any British acts relating to Canada. (See in this respect the illuminating pages of Jennings, The Law and the Constitution, pp. 148-51.) By constitutional convention, however, the supremacy of Westminster -- which is a legal fiction -- is limited to the extent of precluding Parliament from amending or repealing without the request or Canada, the British North America Acts as well as any Canadian statute (either embodying the Constitution or not). The enactment in Canada of a Canadian Constitution (for instance, by concurrent statutes of the federal Parliament and the provinces) and the repeal of the present British acts on the subject would therefore operate only a change of form. This change is, no doubt, highly desirable in many respects. But it would not affect at all, from a strictly legal and abstract point of view, the supremacy of the Parliament of the United Kingdom over the Canadian Constitution.

Once again, the predominance of British constitutional theory over even Canadian matters can be seen, even to the point of making it apparently impossible to cut the Imperial link.[64] The Honourable Arthur Meighen in the twenties, the Parliamentary Counsel for the Senate in the thirties and Dr Gérin-Lajoie's writing in the forties are all excellent examples of a Patriation theory view.

Dr Gérin-Lajoie had a proposal of his own which was inspired in part by the report of a sub-committee to the Federal-Provincial conferences of 1935-6. The sub-committee had proposed that the Statute of Westminster, 1931 be amended to remove subsection 7(1) and to empower the Parliament of Canada to enact a consolidated Constitution (a proposed

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[62] Ibid., pp. 240-1.

[63] Ibid., p. 241n.

[64] This, of course, may account for the form of s. 4 of the Statute of Westminster, 1931 which made no reference to termination of Imperial power, leaving that to be taken care of by the the "request and consent" provisions. See G. Marshall, Parliamentary Sovereignty and the Commonwealth (Oxford, 1957), p. 146n and K.C. Wheare, The Statute of Westminster and Dominion Status, 5th ed. (Oxford, 1953).

amending clause having already been enacted as s. 148 of the 1867 Act) which would not operate as new law but would be construed as declaratory of the law as existing at the time of such enactment.[65] Gérin-Lajoie specified that the consolidated Constitution should only be a rearrangement of the 1867 Act not a restatement or reform, and that it be brought into force by and act of the federal Parliament concurred in by the legislatures of all the provinces of Canada. He did not mention the removal of subsection 7(1) of the 1931 Statute. Instead, he concluded with a reference to the comments set out immediately above that this scheme "would not remove, in strict law, the supremacy of the Parliament of the United Kingdom over the Constitution of Canada".[66]

Also writing in 1950, Professor F.R.Scott agreed that schemes of this type could not easily escape the supremacy of the Westminster Parliament:[67]

> In my view, this kind of procedure still suffers from its relationship to the Statute of Westminster, which is an exclusively United Kingdom statute. The Canadian constitution thus created would seem to depend upon the sovereign Parliament as of old. While the Statute of Westminster was intended to free the former colonies from certain legal fetters, it nevertheless preserved the law-making power of the United Kingdom Parliament over the very nation it was attempting to free.

Scott also described (perhaps for the first time in Canada) the hold which British constitutional theory had on Canadian constitutional thinking at that time:[68]

> What was this basic principle, this fundamental rule, which showed such remarkable tenacity? Dicey first made it a widely understood idea. The opening sentence of chapter I of his Law of the Constitution declares simply that "The sovereignty of Parliament is (from the legal point of view) the dominant characteristic of our political institutions." This principle means, he continues, that Parliament (i.e the United Kingdom Parliament) had the right to make or unmake any law whatever, and further that no person or body is recognized by the law of England as having a right to

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[65] Ibid., pp. 247-8.

[66] Ibid., pp. 277-8.

[67] F.R. Scott, "The Redistribution of Imperial Sovereignty" in Transactions of the Royal Society of Canada, June 1950, reprinted in F.R. Scott, Essays on the Constitution (Toronto, 1977) 244, p. 250. Dr Gérin-Lajoie changed his views in reaction to Professor Scott's article. See (1951) 29 C.B.R. 1136, p. 1178.

[68] Ibid., p. 245.

> override or set aside the legislation of Parliament. Hence it follows that the constitutions of the various Dominions and colonies, created by laws enacted in this Parliament, are binding upon the courts and people of the territory covered by them, and can only be "made or unmade" by this same authority which first gave them the force of law.

He observed that the legal rules were tempered to a great extent by convention, and that the system had worked well enough to that point. However, he insisted that[69]

> [t]his system ... obviously leaves in existence the ancient doctrine of Imperial sovereignty. The inequality of the relationship has become more and more apparent as the international status of the Dominion has risen. While the active interference of British governments in Canadian affairs has withered away, the hard core of legal dependence has been unconscionably slow in dying, and is not yet dead.

Professor Scott was unique among constitutional lawyers of the period in recognizing that Canadian legal independence would require the development of a distinct Canadian legal theory, including its own grundnorm, to use Kelsen's formulation which was at that time gaining currency. That understanding was also crucial to what will later emerge as the Independence theory, and it will be useful to return to Scott's argument that point. It is sufficient for the moment to point out that, according to Scott's view of the matter, Canada would only be entitled to its own grundnorm after the enactment of a Canadian independence act, a final United Kingdom statute at Canada's request which would declare that all jurisdiction over Canada vested in the United Kingdom Parliament would cease, and thereby establish "once and for all the solid fact of Canada's legal sovereignty vis-à-vis Great Britain."[70] He was less clear as to how this change in grundnorm would take place or, perhaps more importantly, how a Canadian court would account for the change in legal terms. Likening the grundnorm to the turtle upon which, according to eastern myth, the elephant (constitution) sits, he stated that Canadians must simply "pull out the old turtle and slip a new one in its place, so that not even a tremor need be felt in the superstructure".[71]

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[69] Ibid., p. 246.
[70] Ibid., p. 250.
[71] Ibid., p. 249.

It was not clear how this sleight of hand was actually to take place nor was it evident who were the "Canadians" who would do it. One might have looked to the Supreme Court of Canada, by then the highest Canadian court with no appeal beyond it to the Judicial Committee. But as we have seen, a majority of the Court was not prepared, even in 1981, to manhandle the old turtle, at least not overtly. Also, even though Professor Scott's views presented the possibility of an eventual break from the Imperial connection (a possibility denied until then in versions of the Patriation theory which we have examined thus far), his writing did not overtly acknowledge the logical extension of his theory, that is, the possibility that a new Canadian grundnorm had already been in existence, unrecognized, since 1931, if not since 1867. Such a radical perspective anticipates the Independence theory. It was buried in Scott's thinking and not at all current in the 1950s, as we will see. The Patriation theory still dominated constitutional thinking.

The Constitutional Conferences of 1950 authorized a Continuing Committee of Attorneys General "to study the methods and techniques whereby a Canadian Constitution can be domiciled in Canada as a purely Canadian instrument."[72] The Continuing Committee did not succeed. For the next thirty years, numerous Canadian committees would grapple with the problem. The results and the rhetoric usually confirmed the traditional view that it would not be possible to think of "a truly Canadian Constitution, domiciled in Canada as a purely Canadian instrument" until the anachronistic and humiliating role of the United Kingdom Parliament could be terminated. Far less attention was paid to the problem of the position of the United Kingdom Parliament vis-à-vis Canada after patriation -- Scott and others had allayed if not eliminated those concerns -- but the dominance of Westminster and British constitutional understandings were scarcely challenged in the meantime.

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[72]Quoted in Favreau, The Amendment of the Constitution of Canada, supra, p. 51.

The Conference of Attorneys General meeting in 1960[73] continued to wrestle with the problem of patriating the Constitution and divesting the United Kingdom Parliament of its legislative powers regarding Canada. Draft "transfer", "savings" and "renunciation" clauses were prepared in order to transfer power from the United Kingdom Parliament. preserve the power of the Parliament of Canada and of the legislatures, and end the right of the United Kingdom Parliament to make laws for Canada or have them extend to Canada. In the end, what became know as the Fulton formula of 1961 only contained savings and renunciation clauses.[74]

After a change of government at the federal level, the Fulton formula was transformed into what became known as the Fulton-Favreau formula. The communiqué of the Federal-Provincial Conference of 1964 announced[75] unanimous agreement on

> a formula to repatriate the Constitution of Canada. This formula, when it has become law, will mean that any future amendment of the Constitution will be made in Canada instead of by the Parliament of the United Kingdom. As a result, our Constitution will have become, for the first time in the history of Canada, truly and wholly Canadian.

The savings and renunciation clauses were virtually unaltered. A new preamble declared that Canada had requested and consented to the proposed enactment. The explanatory notes stated that "[s]ection 7 of the Statute of Westminster exempts the British North America Acts from this requirement [i.e. request and consent], but since the amending formula contains a renunciation clause applicable to the United Kingdom Parliament, it is considered appropriate to include the recital".[76] This indicates that in the

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[73]See Letter from E.D. Fulton to Attorneys General of all the provinces, 25 October 1960, reprinted with drafts of transfer clause, saving clause, renunciation clause, limitation clause, and delegation clause in A.F. Bayefsky, ed., Canada's Constitution Act, 1982 and Amendments: A Documentary History, vol. I (Toronto, 1989), pp. 1-3.

[74]Letter from E.D. Fulton to Attorneys General of all the provinces, 30 November 1961, reprinted with attachment: An Act to Provide for the Amendment of the Constitution of Canada in Bayefsky, ibid., pp. 13-5.

[75]Communiqué of the Federal-Provincial conference, 14 October 1964, reprinted with attachment: An Act to Provide for the Amendment in Canada of the Constitution of Canada, in Bayefsky, ibid., pp. 16.

[76]Favreau, White Paper, supra, p. 34.

view of the Minister of Justice for Canada, and in accordance with the Patriation theory. Canadian request and consent had not been a legal requirement, in Canadian legal terms, of constitutional amendments to that point.

The Fulton-Favreau formula was not adopted. In 1967, a Canadian constitutional commentator could still write that "[o]ne would think it clear ... that the U.K. Parliament, which now retains by virtue of section 7(1) of the Statute of Westminster, 1931, unrestricted power to dispose of legislative power in Canada, ipso facto retains an unrestricted right to exercise that power."[77]

At about the same time, an advisor to the Quebec government and future judge of the Supreme Court of Canada, Professor Louis-Philippe Pigeon, expressed the view that the renunciation clause in the Fulton-Favreau formula would not even have been entirely effective. After citing the usual authority for the proposition that a Parliament cannot bind itself, he stated that only the enactment of a Constitution by Canadian legislation would definitively end the legislative power of the United Kingdom Parliament in the Canadian legal system. He presumed that Canadian courts would then be legally obliged to ignore legislation passed by Westminster, although he did not explain how that would be so. One might have presumed that the theory of parliamentary sovereignty to which the author subscribed (citing British authority) would have required the Canadian courts to take notice.[78]

In 1971, a new attempt to "patriate" the Constitution failed to achieve adequate support. The federal government responded immediately to this setback by establishing a Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada. The Committee's final report, tabled in March of 1972, revealed strong

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[77]S.A. Scott, "Constituent Authority and the Canadian Provinces" (1966-67) 12 McGill L.J. 528, p. 572.

[78]L.-P. Pigeon, "Le sens de la formule Fulton-Favreau" (1966-67) 12 McGill L.J. 403, pp. 411-2.

indications of the ongoing influence of the Patriation theory.[79] The Committee reported that even though the 1867 Act had served the country well, it was "the constitution of a colony".[80] In order to remove the anachronistic role of the United Kingdom Parliament, the Committee recommended a novel procedure which had apparently been agreed to at the meetings prior to the failed 1971 initiative.[81] It is perhaps worth quoting at length from the Committee's description and explanation of that procedure in order to reveal the extent to which the Patriation theory dominated the Committee's thinking:[82]

> [F]ollowing agreement among the governments of Canada as to an amending formula and as to any substantive changes, the Parliament of Canada and all the Provincial Legislatures would pass resolutions authorizing the Governor General to issue a proclamation containing a formula and any substantive changes agreed to; before the issuance of the proclamation the British Parliament would be asked to take all necessary steps to ensure the legal validity of the procedures including nullification of any British statutes, present or future, which purport to affect the Canadian Constitution; finally, the Governor General's proclamation would be timed to coincide with the effective date of the British renunciation of jurisdiction.
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> The complexity of these procedures results from the desire, on the one hand, to avoid having a new Canadian Constitution brought into being solely by an act of the British Parliament, and the fear, on the other hand, that, if it was not so grounded, there might be a legal gap which might conceivably lead to a court's invalidating the whole new Constitution. The effect of the agreed procedures is to have the negative action which removes Canada from the jurisdiction of the British Parliament and the positive action by which we proclaim our new Constitution occur simultaneously so that both legal continuity and national autonomy are safeguarded.
>
> There are no precedents in such an area, and one can only speculate about possible judicial reaction to the procedures. Nevertheless, since there is no apparent deficiency in them, it is hard to believe that any Canadian judge would strain language or law to invalidate them, since they would represent the solemnly expressed will of all the legislative bodies in Canada. We are therefore prepared to accept the suggested procedures for patriation of the Constitution without any fears that they would not be held legally viable.

The Special Joint Committee's observations and these complex procedures resembled somewhat the proposals of the 1936 Federal-Provincial Conference and the suggestions of

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[79] Bayefsky, ibid., pp. 224-308.

[80] Ibid., p. 230.

[81] See Statement of Conclusions, Constitutional Conference, Working Session No. 3, 8-9 February 1971, reprinted in Bayefsky, ibid., pp. 210-3.

[82] Ibid., pp. 231-2.

Dr Gérin-Lajoie in 1950, and they also revealed the full extent to which the Patriation theory and its accompanying rhetoric were still deeply ingrained in Canadian attitudes toward "patriation". If the Canadian Constitution was truly colonial, then the Committee was justified in taking care to safeguard national autonomy. But unless the colonial theory could be discarded along with it, then it was hard to see how even these ingenious procedures could accomplish the task. In the end, the Committee placed its faith in the Canadian courts. While the procedures might indeed have been valid, it was not clear by what theory the courts could be expected to avoid the theoretical possibility of unwanted reassertion of the Imperial power.

As the federal government became more frustrated with the ongoing failure of the provinces to agree upon a domestic amending formula, the Patriation theory rhetoric became more colonial and hence borrowed heavily from the language which we have associated with the Patriation theory. It was as if the federal authorities wished to shame the country into action. Prime Minister Trudeau referred to the existing process as "demeaning for an independent country, but a legal necessity since we have never remedied the omission in the legislation of 1867".[83]

Perhaps the strongest expression of the Patriation theory can be found in the testimony of the federal Minister of Justice, the Honourable Jean Chrétien, in his testimony before the 1980 Special Joint Committee of the Senate and House of Commons on the Constitution of Canada. The Minister was defending the government's unilateral effort to "patriate" the Constitution and to add a new amending formula and Charter of rights and freedoms. It was of course in the federal government's interest to emphasize the unlimited power of the British Parliament and the absence of any legal requirement of Canadian

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[83]See, e.g., Hon. Pierre Elliott Trudeau, A Time for Action: Toward the Renewal of the Canadian Federation, reprinted in Bayefsky, ibid., p. 457.

participation. In response to questions regarding the role of the British Parliament, the Minister made the following statement:[84]

> Mr. Chrétien: ... I have said that from a legal point of view, the British Parliament could theoretically decide to completely revert the Canadian Constitution from A to Z. It could decide tomorrow to accept the theory of your leader to the effect that Canada is a community of communities and can do away with the Federal Government.

Further along in his testimony, the Minister acknowledged that the situation was unprecedented and that there was no binding legal authority on the matter:[85]

> Mr Chrétien: You are talking about precedents. I do not know where you found your precedents because we have never repatriated the constitution, so there are no precedents.
>
> ...
>
> There is no jurisprudence; we are in the process of making it.
>
> From the strictly legal point of view, the Canadian constitution is a British law and we maintain that the power to decide the future of the Canadian constitution rests with the British Parliament ... .

Other advisors to the federal government had expressed the view that even the Supreme Court of Canada might feel itself powerless to question the validity of United Kingdom legislation for Canada, even where such legislation was requested in accordance with what could be seen as the existing Canadian procedure for amending the Constitution. In what became known as the Kirby Memorandum, Michael Kirby, advisor to Prime Minister Trudeau and Secretary to the Cabinet for Federal-Provincial relations, expressed the following views in a document dated August 30, 1980, only a few months before the federal governments unilateral "patriation" initiative:[86]

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[84]Canada, Parliament, Minutes and Proceedings of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (Chairs: Senator Harry Hays and Serge Joyal, M.P.) (1980-81), p. 4:27 (hereinafter 1980-81 Special Joint Committee).

[85]Ibid., pp. 4:93-4.

[86]Report to Cabinet, document produced under the direction of M. Kirby for minister's' eyes only, reprinted in L. Cohen, P. Smith, P. Warwick, eds, The Vision and the Game: Making the Canadian Constitution (Calgary, 1987) 113, p. 121.

> As to the question of validity, it is the view of the Department of Justice that a law passed by the U.K. Parliament to patriate the Constitution, with an amendment formula and other changes, could not be successfully attacked in the courts. It seems abundantly clear that the legal power remains for the U. K. Parliament to enact such a law for Canada ... .

The author of the memorandum saw strategic advantage in having the federal resolution passed and United Kingdom enacted "before a Canadian court had occasion to pronounce on the validity of the measure".[87]

The Supreme Court of Canada would of course rule on the legal validity of the federal initiative before the United Kingdom Parliament had had the opportunity to act, but the majority (law) reasons gave every indication that any action by the United Kingdom Parliament amending the Canadian constitution would have been held legally valid.

In order to appreciate fully the problems with such an understanding of the Constitution it will be useful to turn now to the Independence theory.

We have seen in this chapter on the Patriation theory that certain attitudes prevailed in Canadian constitutional thinking for over a century and that eventually these surfaced in the crucial ruling of the Supreme Court of Canada in the Patriation Reference.

Following Dicey, we have seen how lawyers, academics and politicians -- Clement, Meighen, O'Connor, the Ontario government advisors of the thirties, Dr Gérin-Lajoie -- felt that in abstract legal terms the Imperial link could never be broken. The British notion of the continuing legal sovereignty of the Westminster Parliament was apparently the rule, and the constraints of the Patriation theory prevented an independent Canadian view on that matter from developing.

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[87]Quoted by Mr. Beatty in a question to the Minister of Justice, 1980-81 Special Joint Committee, supra, p. 4:49.

Even when eventually Professor Scott raised the possibility that the Imperial legal link could be severed, it was assumed that in the meantime, even for Canadian amendment purposes, the Westminster Parliament remained governed by British constitutional understandings. If Canadian request and consent or provincial participation could only be conventions in British constitutional theory then they could not be elevated to legal principles in Canadian theory. The Patriation theory acknowledged no possibility of a separate Canadian theory so long as the Constitution remained domiciled, by virtue of its anachronistic amending procedure, in the United Kingdom. As we have seen, this view dominated the perspective of the federal authorities in the 1970s and early 1980s and of course found its strongest expression in the majority (law) and minority (convention) in the Patriation Reference.

It was noteworthy that throughout the long discussions regarding the Westminster Parliament's continuing sovereignty and the absence of a Canadian-based amendment procedure, there was very little mention of an alternative source of sovereignty. According to British constitutional theory, sovereignty lies with Parliament and those who subscribed to the Patriation theory had to make do with that. But it was by no means far-fetched to suggest, for example, that sovereignty rested with the people and that Canada could come by a new, domestic amendment procedure by means of a constituent assembly and/or referendum, that is, by recourse to the people. The possibility was certainly discussed, as we will see in the next chapter, but the perceived weakness of this approach may well have had something to do with the pervasiveness of the Patriation theory and its accompanying British constitutional notions.

CHAPTER TWO

THE INDEPENDENCE THEORY

The "independence" in this theory refers both to the political independence of Canada which is deemed by some proponents of the theory to have produced certain legal consequences, and to the more general idea that an independent Canadian understanding of the constitutional texts was available and potentially applicable through the courts in cases such as the Patriation Reference. Of course, if political and legal independence had been acquired in its totality in the 1920s or any time thereafter, the issue of an independent Canadian constitutional theory would probably not have presented any difficulty. As we have seen in the discussion of the Patriation theory, however, Canadians showed a marked reluctance to develop such a theory until 1982 when the last vestiges of an omnipotent Parliament at Westminster had been (apparently) removed.

In one sense, it can be said that Canada has always had its own constitutional theory. The constitutional writing and thinking regarding the 1867 Act could fall into that category. Both the Supreme Court of Canada and the Judicial Committee of the Privy Council interpreted Canadian constitutional texts on the basis of certain background assumptions regarding, for example, the requirements of federalism and the protection of minorities. But the development of a distinct and independent Canadian constitutional theory, in the sense in which it is understood here, required more. The argument here advanced is that Canadian constitutional theory only went so far; in fact, the mainstream of Canadian legal thinking stopped short of considering the amendment process. As long as the process was routed through Westminster then British constitutional theory would apparently govern. This proposition was seldom overtly stated, as we have seen, but its effect in stunting the development of Canadian thought regarding amendment was a

constant, manifesting itself most clearly in the Patriation Reference, as we have seen. More "independent" thinking might have taken into account considerations such as the legitimacy of the fundamental body of law in the eyes of all Canadians (English, French, aboriginals etc.), interpretation of that law with a mind to the facts of an evolving Canadian society, and generally acceptance of the possibility of separate British and Canadian understandings of the same constitutional instruments.

As we have seen in the discussion of the Patriation theory, as viewed through the prism of Canadian constitutional amendment, Canadian understandings of the law were heavily constrained by a view of the Constitution as a British statute, governed by the law and theory generally applying to British statutes. It is quite conceivable that even a fully independent Canadian theory could have viewed the constitutional amendment process as lacking any sufficiently clear legal signposts to justify any other conclusion than that Westminster had been retained as the constituent assembly for Canada at least until 1982. But as we have seen, in many cases, the dominance of the Patriation theory made the very idea of a separate Canadian legal understanding of the role of Westminster seem impossible.

Now that the Supreme Court of Canada has expressed its views on the matter, it may appear that the Patriation theory has prevailed. We will have an opportunity to consider that question at a later point. It does seem clear, however, that the Independence theory has been most forcefully articulated in the years immediately following the Patriation Reference ruling and the patriation process itself. There is a certain amount of revisionism in this, however valid the Independence theory perspective might have been prior to what amounted to judicial rejection of it in 1981. It may be useful nonetheless to note some of the signs of potential growth of an Independence theory which were evident in Canadian constitutional history prior to 1981-2.

The central theme in this aspect of Canadian constitutional history was that the Constitution was a Canadian document, despite the fact that it had been formally brought into law by the Imperial Parliament and would for a time be interpreted in most important ways by the highest Imperial court, the Judicial Committee of the Privy Council. The undeniable and ongoing link to the United Kingdom did not stop some Canadians from considering the Constitution in its Canadian context. Some early commentators worried about its legitimacy. Some proponents of a domestic amending formula felt that any modification should be ratified by the people. Others felt that no matter what formula was chosen it would have to be agreed upon and reflect the federal fact in Canada. These sentiments did not engage the law, but they did reveal an understanding of a Constitution with strong roots in Canadian soil.

With time, even legal theories were to emerge, based to a large extent on the important events of 1926-31 which have been referred to above. Some Canadian constitutional observers tentatively suggested that even the Judicial Committee of the Privy Council could interpret Canada's fundamental law in a manner which took into account a changing Canadian reality. A distinctive Canadian interpretation foreshadowed the boldest step toward the possibility of uniquely Canadian rules regarding validity. Constitutional thinkers such as Professor F.R. Scott provided a framework for this approach, and former Supreme Court justice Ivan Rand and Professor W.R. Lederman developed it into an independent Canadian understanding of validity which went well beyond the text of the 1867 Act and even the 1931 Statute. While Lederman's views in particular, representing a strong version of the Independence theory, were not accepted in the mainstream of Canadian constitutional thinking, and were ultimately rejected in the Patriation Reference, they did have some impact, perhaps in forcing the more probing thinkers to take a stand on the issue of an independent Canadian constitutional theory on amendment. Weaker versions of the Independence theory appeared in the writings of Professor Peter Hogg.

Perhaps as a result of this refreshing and liberating development in constitutional thinking, federal and provincial politicians seemed to have worried far less about the feasibility of an eventual final break with the United Kingdom Parliament, and the proposed texts reflected this new confidence. The "liberation" came to be questioned, however, partially as a result of a slightly cynical tack taken by the Trudeau government in response to its natural frustration with failed negotiations regarding "patriation", the new amending formula and the various substantive amendments which were being proposed (principally a Charter of rights). With the election of an avowedly separatist government in Quebec the prospects for success seemed even more dim. The federal government began to resuscitate the idea that the United Kingdom Parliament was ultimately the constituent assembly for Canada and that it could bring any proposal, even a unilateral federal proposal, into law. We have already seen the strong Patriation theory language used by the Minister of Justice in the parliamentary hearings on the unilateral proposal which the federal government eventually put forward.

Of course, the federal government was not wholly successful. We will see how the Supreme Court of Canada articulated much of the content of the Independence theory in the form of constitutional conventions. These conventions were supposedly unenforceable by courts, but the Supreme Court of Canada's authority was such that the federal government had no alternative but to return to the negotiating table and come to an agreement which satisfied the requirements of Canadian federalism. While the Patriation Reference, and particularly the majority (convention) judgment perhaps rescued the legitimacy of the "patriation" project, it also left the Independence theory in its legal incarnation in shreds, and, as we have seen, the majority (law) was responsible for the damage. Many questions were asked after the April 1982 process about how, in law, "patriation" and "independence" had come about. Constitutional lawyers were hard pressed to find answers. Professors Eric Colvin and Brian Slattery made very useful contributions but still had difficulty in coming to terms with the Patriation Reference. In order to understand the

various tensions in this debate, it may be useful to review some elements of the Independence theory as they gradually emerged after 1867.

As mentioned earlier, the Independence theory was only rarely articulated early on. Perhaps its most obvious precursor was the sentiment, even at the time of Confederation, that called for Canadian acceptance of the 1867 Act as opposed to simple, proper legal process through the Imperial Parliament. This sentiment at least revealed an understanding of legitimacy and the existence of a Canadian attachment to the Constitution which was separate from an understanding of it as a British legal text, and, more importantly, separate from the standard Westminster-centred thinking on constitutional amendment procedure. Even during the discussions prior to Confederation, there were some who felt that the scheme should not be enacted by the Imperial Parliament before the electorate of the colonies concerned had been consulted. Joseph Howe of Nova Scotia expressed this view in a letter to Lord Russell:[1]

> In England no important change in the machinery of government is made without an appeal to the country. In the United States no amendment can be made to the constitution which is not sanctioned by two-thirds of the members of both Houses, and ratified by a majority of the electors.
>
> Your Lordship will readily understand how our people would feel if their institutions, enjoyed for a century, were swept away by a surprise, without the constituencies, who have worked them peacefully and successfully, being consulted.

Howe's argument, while not expressed in legal terms, served as a counterpoint to Galt's and McGee's emphasis on the Imperial Parliament as effectively the creator and protector of the 1867 Act.[2]

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[1]Quoted in Hon. P.J.T. O'Hearn, "Nova Scotia and Constitutional Amendment" (1966-67)12 McGill L.J. 433, p. 435. Howe's examples from comparative constitutional law were not wholly accurate; however, the idea of a constitution being connected to a particular polity and therefore to a group of electors was a potentially powerful one.

[2]See statement by McGee discussed in the Introduction and set out in P. Gérin-Lajoie, Constitutional Amendment in Canada (Toronto, 1951), p. 4.

As we have seen, the absence of a domestic procedure in the 1867 Act was not seen as an important national issue until well into the next century. But, as Dr Gérin-Lajoie indicated, lack of interest did not mean that the issue had disappeared entirely.[3] In 1883, an article in The Bystander, a Toronto periodical, stated that the power of constitutional amendment ought to be vested in Canada and be entrusted to the sovereign people.[4] At the turn of the century, J.S. Ewart called for Canada to acquire the fullest possible autonomy in the Commonwealth, including a domestic procedure for amendment of the Constitution.[5] According to Gérin-Lajoie, "[t]hese were isolated cases and were considered as the claims of extremists if not real anti-imperialists".

It was only with First World War and its aftermath that the search for a domestic amending formula became a pressing national concern. Sir Clifford Sifton (a former Minister in the Laurier government) suggested two possible methods of overcoming what he referred to as "an anachronism and an absurdity".[6] As a first possibility, he proposed a Conference of elected representatives from all parts of the country which would draft a new constitution and submit it to the people for approval. A second possibility involved a Committee of federal and provincial delegates which would hear submissions from a wide range of constitutional lawyers before drafting a new constitution and submitting it to the people.[7] The idea of popular ratification of constitutional amendments or new constitutions resurfaced from time to time prior to 1982 but was doomed to be ignored in the face of the apparently overwhelming and exclusive legal requirement of passage through Westminster.

As we have already seen, both the Balfour Declaration and the Statute of Westminster, 1931 made surprisingly little impact on the prevailing thought regarding

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[3]See Gérin-Lajoie, ibid., pp. 221 et seq.

[4]Ibid., p. 221. The Bystander, N.S., No. 4 (1883), pp. 261-2.

[5]Gérin-Lajoie, ibid. See J.S. Ewart, The Kingdom of Canada, Imperial Federation, The Colonial Conferences, the Alaska Boundary and other Essays (Toronto: 1908). See also M. Ollivier, L'avenir constitutionnel du Canada (Montreal, 1935) p. 130.

[6]Quoted in Gérin-Lajoie, ibid., p. 222.

[7]See Sir Clifford Sifton, "Some Canadian Constitutional Problems" (1922) 3 Can. Hist. Rev. 3. See also Ollivier, supra, p. 130 and Gérin-Lajoie, ibid., p. 222.

constitutional amendment. The accepted view was that Canada had indeed achieved a high degree of autonomy through these political and legal events but that regarding constitutional amendment, the status quo ante applied. The Westminster Parliament remained alone capable of amending most parts of the Canadian Constitution.

The debates of the time had however provoked national self-examination in the discussions by Canadian constitutional thinkers on the question of what the status quo ante in fact was. It was accepted that the Westminster Parliament would have to ratify any amendment, but was there any law with respect to the requisite source and sanction of Canadian amendment initiatives? In the early 1930s, a theory which was known as the "compact" theory of Confederation reached its zenith, having peaked once before in the 1880s. The theory had its earliest expression in the provincial rights movement which had considerable political impact in the years after Confederation.[8] The theory taught that the 1867 Act had been a compact or contract between the uniting colonies, now provinces, and that any modification of that contract would require the consent of all the provinces. There was, of course, a problem in the fact that all nine provinces (making up Confederation in the 1930s) had not been present the negotiating table in 1867, but this was not seen by its proponents to take away from the essential thrust of the theory: the legitimacy of the Canadian constitution lay in the country's constituent parts -- the provinces.

The compact theory had been presented in its most prominent and articulate form by Premier Howard Ferguson of Ontario. In a letter and memorandum to Prime Minister R.B. Bennett, he asserted that the Canadian Constitution was really "the crystallization into law by an Imperial statute of an agreement made by the provinces" and that "this agreement should not be altered without the consent of the parties to it".[9] The memorandum went on

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[8]See R.C. Vipond, Liberty and Community: Canadian Federalism and the Failure of the Constitution (Albany, 1991). For a discussion of the "compact theory" and its meaning in Canadian political writing, see E.R. Black, Divided Loyalties (Montreal, 1975).

[9]"Letter and memorandum of Hon. Howard Ferguson, Premier of Ontario, to the Prime Minister of Canada" set out in Canada, Senate, Report Relating to the British North America Act, 1867, by W.F. O'Connor (Ottawa 1939; reprinted 1961), Annex 4, pp. 134-139 (hereinafter O'Connor).

to refer to the "unwritten Constitution" and cited both history and judicial precedent in support of the vital role of the provinces with respect to amendment of the written constitutional text wherein provincial powers are delineated. The memorandum did not indicate whether the rule of unanimous provincial consent which flowed from the compact theory was legal or conventional, but clearly the makings of a legal argument were present.

This theory had the potential to add a new, and essentially Canadian, layer to the interpretation of the United Kingdom legislation making up the Canadian Constitution. And clearly if it had done so, it would have amounted to an important first step along the way to a Canadian understanding of constitutional amendment which went beyond the narrower confines of the British constitutional theories based on Westminster sovereignty.

However, the compact theory idea was immediately discredited by a number of Canadian critics. The most devastating and oft-quoted attack was an article by Queen's University Professor Norman Rogers.[10] Rogers was concerned as were many others that the theory would act as a roll of "barbed-wire" in the way of Canadian constitutional development.[11] However, in criticising the compact theory he also gave his support to the Patriation theory by stating that, legally, only the Imperial Parliament was behind the 1867 Act and that nothing in history, practice or judicial precedent had changed that. The Rogers view of the matter was later endorsed by such commentators as the Parliamentary Counsel to the Senate, W.F. O'Connor[12] and the Law Clerk of the House of Commons, Dr. M. Ollivier. Ollivier bemoaned the rigidity inherent in the compact theory and added a chapter

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[10]Norman McL. Rogers, "The Compact Theory of Confederation" (1931) 9 Can. Bar Rev. 400.

[11]Ibid., p. 417.

[12]O'Connor, supra, Annex 4, p. 151:

> [W]hen the [1867] Bill was introduced and promoted, whereupon that sole outstanding compact stood fully and faithfully performed, so that then the Bill was enacted there was no outstanding compact or treaty, explicit or implicit of any kind whatever, but only and Imperial statute, into which all previous communings had merged and become as if they had never been.
>
> ...
>
> Now, as in the beginning deliberately intended, the Imperial Parliament is, in my opinion, the arbiter and executor as between this Dominion and its provinces as to when and how and to what extent, if at all, the British North America Act shall be amended.

to one of his books in which he set out the various arguments against it.[13] This would not be the last time that a Canadian theory intended to provide Canadian parameters for the Westminster amendment process would be discredited in order to reduce the obstacles in the way of "patriation".[14]

As we have seen in earlier discussions of this period under the Patriation theory. Canadian writings on constitutional amendment continued to be influenced to a very large extent by the idea of the ultimate, untrammelled and continuing sovereignty of the United Kingdom Parliament. The first author of a book-length discussion of Canadian constitutional amendment, Dr Paul Gérin-Lajoie confirmed the essential elements of a Patriation theory. The Canadian constitution was a British statute and, legally, it would continue to be dealt with according to the British legislative rules, including the related rule of Parliamentary sovereignty which was enforced by British and (so it was presumed) by Canadian courts as well.[15]

Perhaps the most important opening for a possible independent Canadian theory of the Constitution was the idea presented by Professor F.R. Scott in his 1950 article, "The Redistribution of Imperial Sovereignty" which was referred to earlier. Scott's idea of a new Canadian grundnorm reduced the anxiety which had earlier prevailed regarding Canada ever being able to shake off the Imperial link (and that was perhaps its main

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[13]Ollivier, supra, p. 18. See Ch. V: "Notre Constitution n'est pas un contrat".

[14]This phenomenon was seen earlier, in Chapter 1, in the comments of the federal authorities prior to the 1980 unilateral federal effort.

[15]Dr Gérin-Lajoie, supra, p. 135 stressed in his study that Canadian request and consent and even provincial consent in certain circumstances were constitutionally required for amendment but he was careful to point out that such requirements were of a conventional sort. The only requirement of law was enactment by the Parliament at Westminster:

> The necessity of ... enactment at Westminster is the one feature of the amending process which is determined entirely by law proper and does not result in any way from convention. Any attempt to alter the Constitution or to override it by other means would be repudiated and declared null and void by the courts.

Dr Gérin-Lajoie was prepared to develop Canadian constitutional thinking regarding amendment to take into account such considerations as independence, federalism and legitimacy, but only at the level of convention. The ultimate legal process and the legal thinking governing it were matters for the Westminster Parliament and the ample literature regarding the latter's proper role. It is not surprising that Dr Gérin-Lajoie highly influential study on amendment fits so well with the majority approaches in the Patriation Reference.

importance), but it also presented possibilities for the development of a uniquely Canadian theory of the constitution even prior to the "decolonialising" event.

Scott pointed out that Dicey's idea of sovereignty of Parliament had shown "remarkable tenacity".[16] He noted that even where a Dominion or colonial constitution contained a permission to the local legislature to amend its Constitution (as with the then-recent amendments of 1949 which gave the federal Parliament in Canada the power to amend large parts of the Canadian Constitution), there was always the possibility that the permission might be withdrawn. This was the logic of "the binding force of the doctrine of Imperial sovereignty".[17] As we have seen, Scott did not deny "the unlimited law-making power of the United Kingdom".[18] In his view, it could only be tempered by the conventions by which the legislators of the Westminster Parliament might feel constrained. Even the Statute of Westminster, or the events which preceded it did not make law out of convention, and in Scott's view, the new system "obviously [left] in existence the ancient doctrine of Imperial sovereignty". It will be obvious from earlier discussions that this was strong Patriation theory.

That which was potentially liberating in Scott was his elaboration of the idea of a new Canadian grundnorm, or basic norm. The idea, which was first developed by the Austrian legal thinker Hans Kelsen, is well-known now, but until that moment, it had not apparently made an entry into Canadian constitutional thinking. Scott expressed his indebtedness to R.T.E. Latham whose "brilliant essay", "The Law and the Commonwealth",[19] had applied Kelsen's approach in order to find a grundnorm for the

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[16]"The Redistribution of Imperial Sovereignty" in Transactions of the Royal Society of Canada, June 1950, reprinted in F.R.Scott, Essays on the Constitution (Toronto, 1977) 244, p.245.

[17]Ibid.

[18]Ibid.

[19]Reprinted in W.K. Hancock, ed., A Survey of British Commonwealth Affairs, vol. I (London, 1937).

Commonwealth. Scott acknowledged the existing Commonwealth grundnorm but also saw the possibility of a new version for Canada in due time:[20]

> The process can be described ... by saying that whereas till now we have had but one Grundnorm, one fundamental law for the Commonwealth, namely the ultimate proposition that all laws emanating from the United Kingdom Parliament must be obeyed in all the courts of the Commonwealth, in future we shall have many totally distinct systems of law each with its own Grundnorm, which may well vary from country to country. To borrow another analogy from the well-known eastern myth, we may say that until now all legal rules in Canada ... have derived their validity from the elephant of the B.N.A. Act, which stood firmly upon the turtle of the sovereignty of the United Kingdom Parliament. Beneath the turtle nothing further has existed to support a stable universe. Now the various Dominions are getting their own turtles, and we are looking for a Canadian turtle.

Scott did not explain how a Canadian court would explain or sanction this swapping of turtles, and, more importantly for our immediate purposes, he did not explain why it was that a Canadian grundnorm had not already developed if not by 1867 then at least since 1926-31.[21]

Although Scott had not approved of the immediate development of a Canadian grundnorm, he apparently calmed those who had been concerned that it would never be possible to sever the so-called Commonwealth or Imperial grundnorm. In an article published soon after that of Scott, Dr. Gérin-Lajoie adopted Scott's approach. He stated that once Canada had acquired the means to amend its own constitution, Canadians would be masters, even in legal terms, of their development and not even the Westminster Parliament would be able to affect that independence.[22] This too needed further explaining, as we will see in Chapter 4.

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[20]Scott, supra, p. 246.

[21]Scott does not go into any detail in describing Kelsen's theory, but one can presume that Scott understood the grundnorm as a logical premise, and not therefore one which could adapt or evolve in response to various extrinsic developments. Latham appears to subscribe to an evolutionary view of the grundnorm. It may be that Scott did not see any clear legal markers even to justify an evolution in the grundnorm.

[22]See P. Gérin-Lajoie, "Du pouvoir d'amendement constitutionnel au Canada" (1951) 29 Can. Bar Rev. 1136, p. 1178n.

Perhaps for the reasons set out by constitutional commentators such as Scott and Gérin-Lajoie, the government draftsmen appeared to be less concerned with the question of terminating the effects of even the remarkably tenacious doctrine of Imperial sovereignty.[23] While the accompanying governmental literature continued to bemoan the humiliating anachronism of an unpatriated Constitution, the proposed legislation of the early 1960s dealt with the matter in a more straightforward manner than, say, many of the schemes which had been devised in the 1930s.[24] As we have seen, however, the common understanding in all these proposals was that the Constitution and even its grundnorm, to use the then-popular term, were domiciled in the United Kingdom until the new domestic amending formula had been found. But even the hope-turned-belief that a complete and irreversible transfer of sovereignty could take place should perhaps be identified as the first real step in an Independence theory that would only gradually emerge later.

The fuller articulation of an Independence theory, at least as an immediate possibility, waited on two important Canadian constitutional thinkers for its most forceful exposition: former justice of the Supreme Court of Canada and Dean of the Faculty of Law of the University of Western Ontario, the Honourable Ivan Rand, and Queen's University law professor, W.R. Lederman.

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[23]G. Marshall, Constitutional Conventions (Oxford, 1984), p. 205 explains that by 1960, British constitutional draftsmen had come to assume that British parliamentary sovereignty with respect to a former colony could be terminated by means of a final Independence Act (e.g. the Nigeria Independence Act of 1960).

[24]See, e.g., Ollivier proposal described in Gérin-Lajoie, supra, pp. 240-1. For uncomplicated newer proposals see the 1961 Fulton Formula, s. 7 and the 1964 Fulton-Favreau Formula, s. 10 in A.F.. Bayefsky, ed., Canada's Constitution Act, 1982: A Documentary History, vol. I, (Toronto, 1989), p. 14 and p. 17. The 1965 White Paper explained the transitional process in uncomplicated fashion:

> The purpose of the proposed amending formula ... is to transfer to legislative authorities in Canada -- acting whether singly or in combination -- complete and exclusive power of amendment over the whole of the Constitution of Canada. The formula would thus terminate all authority now vested in the Parliament of the United Kingdom to enact statutes forming part of Canadian law.

Hon. G. Favreau, The Amendment of the Constitution of Canada (Ottawa, 1965), p. 10. See, however, the complex federal solution to this problem recommended by the Special Joint Committee in 1972 in Bayefsky, ibid., pp. 231-2.

In the Oliver Wendell Holmes Lecture delivered in 1960 at the Harvard Law School and later published in the Canadian Bar Review, Dean Rand set out a theory of the Constitution which was based on the legal significance of the events of 1926-31. Rand saw the Statute of Westminster not so much as a law-creating text, but rather "the formal confirmation of the substance of the existing state of things",[25] specifically the fact that Canada "had come formally of age".[26] The question which might come more naturally to the minds of a Canadian audience was whether such confirmation could have any legal force given the continuing sovereignty of the Westminster Parliament and the preservation of that Parliament's power to amend the Canadian Constitution after 1931. Rand's answer was that Canada's coming of age had legal effects, and that unwanted interference by the United Kingdom Parliament, even regarding amendment of the Constitution, would be ignored by a Canadian court:[27]

> The question may be raised of the political and legal force of resolutions passed by Imperial Conferences [of 1926 and 1930] and confirmed by legislation. It cannot, in my view, be less than this: that they are to be treated as creating constitutional commitments of a permanent nature, which once approved and entered upon become irrevocable as self-executing conventions, placed, by that fact, beyond repudiation. They have not become the subject of juridical examination but that might happen. Should, for example, the British Parliament, of its own initiative, purport to repeal the Act of 1931 what would be the position of Canadian legislation and of Canadian courts? The answer must be that the purported repeal would not be recognized. ... The acceptance of the convention concludes resort to conflicting statutory power; if that were not so, the bonds of colonial relation embodied in statutes could never constitutionally be dissolved, there could be no termination by statutory enactment, a link of that nature would be perpetual; even express renunciation could be revoked. Actual or constructive revolution would then be the only means of establishing a status of independence. But treaties can effect finalities in the transfer of titles or the recognition of sovereignty; and there is nothing in the nature of such a convention that prevents a similar result in the creation of a constitutional title to independence by which a status is created the modification of which is withdrawn from future parliamentary competence. The relation between kingdom and colony is founded on the idea of ultimate evolution to independence; and the statutory removal of legislative subordination becomes a formal renunciation of suzerainty; the disappearance of paramountcy becomes the recognition and investment of sovereign power.

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[25]Hon. Ivan C. Rand, "Some Aspects of Canadian Constitutionalism" (1960) 38 Can. Bar Rev. 135, p. 139.

[26]Ibid., p. 138

[27]Ibid., pp. 148-9.

Was this not the espousal of a Canadian grundnorm that was already operative in 1960, at the time of Rand's lecture (and apparently since 1931)? The conventions that Rand refers do not appear to be constitutional conventions; rather they are conventions in the nature of treaties. And even if understood as constitutional conventions in the Diceyan sense, they were clearly conventions with a difference, in that they could be seen, in Rand's eyes, to determine the very rules of validity used by Canadian courts. That which might be a convention in British terms (no legislation for Canada to be enacted by the Westminster Parliament without Canadian request and consent) could at the same time be a basic rule of constitutional law in Canadian terms. That was a powerful and potentially liberating idea.[28]

In order to explain the peculiarity of an independent Canada having left the power to amend the Constitution of Canada with the United Kingdom Parliament, Rand provided a powerful analogy. He no longer saw Westminster as an omnipotent legislator, but rather as "a bare legislative trustee".[29] The United Kingdom Parliament could be seen to have been given a power to deal with the Constitution of Canada but only in a manner which was consistent with the wishes of an otherwise sovereign and independent Canada, which in turn was absolutely entitled to call for personal control over the constitutional trust property whenever it might wish.[30]

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[28]It is significant that this view should come from a former Supreme Court of Canada justice who had served through the transformation from Judicial Committee to Supreme Court of Canada as the highest court of Canadian appeal. The Judicial Committee of course had a natural desire to interpret different constitutions according to one Imperial constitutional theory. The Supreme Court of Canada taking over as highest constitutional court would have less interest in maintaining theoretical coherence, constitutionally speaking, Commonwealth wide. It could be more interested in Canadian concerns and could develop a uniquely (or independent) Canadian constitutional theory. That which the more activist Rand might have been willing to do in the late 1950s was ultimately not to appeal to a more conservative Supreme Court in the early 1980s.

[29]Rand, supra, p. 145.

[30]H.G. Hanbury & R.H. Maudsley, Modern Equity, 13th ed. by Jill Martin (London, 1989), p. 71:

> According to current practice, there is said to be a simple, bare or naked trust when the trustee holds trust property in trust for a single beneficiary absolutely. In such a situation the beneficiary may call for a conveyance of the legal estate at any time, and

If the United Kingdom Parliament acted as a bare legislative trustee, then there was still some question as to who might be the beneficiary. Was it Canada as a whole, speaking through the voice of its federal Parliament, or was it federal Canada, as represented by both the federal and provincial levels of government? The demise of the compact theory of Confederation had made it difficult to argue that unanimous provincial consent was required, by law or convention, but clearly an argument was available to the effect that at least some provincial consent was required. Had not subsection 7(3) of the Statute of Westminster been designed to protect the federal division of powers? These and other arguments were eventually developed by Professor Lederman in the 1970s and resurfaced as part of the dissenting provinces' argument in the Patriation Reference.

In the 1960s, however, Lederman had not yet come to the more independent perspective he would subsequently espouse. In a 1967 article, he set out some of the principles which would later enable him to develop an understanding of the law regarding constitutional amendment that related more specifically to the Canadian reality.[31] In other respects, however, he appeared to accept some of the precepts of the Patriation theory.

It is significant that Lederman began his argument with a reminder that the legal system is based on what Kelsen referred to as the grundnorm or basic norm.[32] This placed his thinking on the same line originally developed in Canadian constitutional thinking by Professor F.R. Scott. Lederman subscribed to the view that the Constitution must be found not only in the (British) statute book, but also in general principles and the common law.[33] In commenting on the Favreau White Paper, which as we have seen was

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the trustee must comply. In the meantime the trustee will deal with the trust property in accordance with the instructions of the beneficiary.

[31] "The Process of Constitutional Amendment for Canada" (1966-67) 12 McGill L.J. 371, reprinted in W.R. Lederman, Continuing Constitutional Dilemmas (Toronto, 1981), p. 81 (hereinafter cited to 1981 reprint).

[32] Ibid., p. 82

[33] Scott, supra, p. 82.

laden with Patriation theory language. Lederman admitted that there was "a respect in which the Canadian Constitution is not now and never has been at home," specifically in the sense that in certain cases amendment of the Constitution required that steps be taken in the United Kingdom. But his analysis made plain that the legal rules regarding amendment were governed by an independent Canadian understanding:[34]

> [W]e see that our basic law of amendment has been made by longstanding official precedent, custom and practice modifying the constitutional law of the old British Empire ... . Anyone who doubts the validity and force of such custom, convention and practice should read again the preamble to the Statute of Westminster, 1931, which makes it clear that even that statute purports to be declaratory of a basic "constitutional position" already "established" by other means than statute ... .

The Fulton-Favreau process had not questioned the idea of a legal requirement of Canadian request and consent in addition to the provincial agreement which might be said to make up that request and consent. Accordingly, in 1967, Lederman did not have to develop his ideas on those issues. One decade later, however, there was increasing talk of the supposed legality of a unilateral federal initiative to "patriate" the Constitution, and this provoked Lederman's most forceful interventions. Some background information may be necessary.

It should be pointed out first that while the discrediting of the compact theory had quieted the claim that unanimous provincial consent was required in law, there were still those who believed that there was a strong convention, or at least a frequent practice, to that effect. A most important, if qualified, statement of this convention or practice could be found in the Favreau White Paper of 1965:[35]

> The fourth general principle is that the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. ... The nature and degree of provincial participation in the amending process, however, have not lent themselves to easy definition.

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[34] Ibid., p. 84.

[35] Favreau, supra, p. 15.

Unanimous consent from the provinces had been one of the hallmarks of the Fulton-Favreau formula and ultimately the refusal of only two provinces had sunk the project. There were many who felt that even such a conventional rule would prevent Canada from agreeing on "patriation" and a domestic amending formula. The next major proposal, the Victoria formula of 1971, contained a more flexible amending formula proposal, but it too was thwarted by a lack of unanimous provincial consent. As we have seen, throughout the 1970s many federal officials were intent on reminding Canadians of the humiliating and anachronistic fact of the continued link to the United Kingdom Parliament for amendment of key parts of the Constitution. It also became common for federal documents to point out that whatever past practice had been, the federal Parliament was still constitutionally entitled to proceed unilaterally to Westminster. The Special Joint Committee of the Senate and the House of Commons on the Constitution tabled a report in March of 1972 in which it made the following statement:[36]

> The present amending procedure is humiliating to an independent state, but it is nevertheless effective. Amendment formally takes place by act of the British Parliament, which follows the constitutional convention that the United Kingdom Parliament will make any amendment to the British North America Act which it requested by the Government of Canada. Such a request is traditionally preceded by a joint address of both Houses of the Parliament of Canada. Some argue that there is a secondary convention that the Canadian Parliament will request amendments only with unanimous consent of all the provinces, or of the provinces affected where not all provinces are involved. However, the British Parliament has shown, by its refusal to entertain objections from Provincial Governments in disputed cases, that it will follow the request of the Canadian Parliament without reference to the views of the Provinces. It seems therefore safe to assert that, as a matter of mixed law and convention, the Parliament of Canada possesses the unilateral power to change the Constitution. Nevertheless Parliament has.chosen not to exercise that power ... .

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[36]Canada, Parliament, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, Final Report, 16 March 1972 (Chairmen: Senator G.L. Molgat, Mr Mark MacGuigan, M.P.), reprinted in Bayefsky, supra, p. 231.

In a letter to the Premiers, dated 31 March 1976, Prime Minister Trudeau repeated this view,[37] and by 1978 it had been incorporated in the "observations" of the Federal-Provincial Relations Office, a branch of the federal government. The "observations" were borrowed to a large extent from the earlier "principles" of the Favreau White Paper, but significant additions appeared in the later formulation:[38]

> The fourth observation is that, although not constitutionally obliged to do so, the Government of Canada, before asking Parliament to adopt a Joint Address, sought and obtained the consent of all provinces on the three amendments ... that involved the distribution of powers.

The statement regarding absence of constitutional obligation indicated that if ever the federal government decided to abandon its practice of obtaining provincial consent it would meet no legal impediment, and even changes altering the distribution of powers could be validly enacted if passed by the United Kingdom Parliament. If there was any scope for development of an Independence theory, the federal government appeared to be wilfully blind to it.

In an article published in 1978, Lederman provided a contrary opinion, and in so doing expanded on the ideas which had been put forward in the 1960s by Rand and himself.[39] He began his 1978 piece by stating that constitutional law (and therefore constitutional theory) is intimately related to the people whose affairs it governs: "For me, constitutional law arises out of our whole history and tradition as a people, and one must constantly relate these rules and principles of law and government to the organic life of our national community, from which they derive their validity".[40] Regarding the law of

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[37]Reprinted in Bayefsky, ibid., p. 314: "[W]e are satisfied that .. action by the Parliament of Canada does not require the consent of the provinces ... ."; "at present it is the federal Parliament alone which goes to Westminster, and the degree of consultation of or consent by the provinces is only a matter of convention about which there can be differences of view".

[38]Canada, Federal-Provincial Relations Office, The Canadian Constitution and Constitutional Amendment (1978), reprinted in Bayefsky, ibid., 459, p. 468 (emphasis added).

[39]W.R. Lederman, "Constitutional Amendment and Canadian Unity" in Special Lectures of the Law Society of Upper Canada 1978: the Constitution and the Future of Canada (Toronto, 1978), reprinted in Lederman, Continuing Canadian Constitutional Dilemmas, supra, 91 (hereinafter Lederman (1978).

[40]Ibid., p. 92.

constitutional amendment, he insisted that far from lacking an amending formula, Canada actually had "in Canadian constitutional law a full-fledged amending process".[41] According to Lederman's account, this process had evolved over the nation's history. In 1867, "[t]he original power of the British Parliament to change the B.N.A. Act, one of its own statutes, was plenary and unlimited." Over time, however, the rules on amendment had evolved to the point where "this plenary power [was] now exercised by the British Parliament only in response to and in accordance with a proper request from Canada, and not on its own initiative".[42] The rules regarding the "proper request" had also evolved to the point where it could be said that the constitution at least required substantial provincial compliance in cases involving changes to the federal-provincial relationship. In support of this evolution, Lederman emphasized that the Statute of Westminster, 1931 purported to declare constitutional principles already established, and he noted that there were weighty judicial precedents[43] in which the process of "crystallization of constitutional usage into a rule of constitutional law"[44] had been recognized and described. Lederman stressed that such rules of constitutional law would have the greatest impact in governing political practice, but he denied that such was their only purpose:[45]

> There may be some doubts about the status of these rules. Are they full-fledged constitutional laws or are they something less? Are they merely political conventions of the constitution that do not have the force of law and which can, to some extent at least, be varied or disregarded? In my view these rules are basic constitutional laws in every sense and should be recognized as such by the governments and parliaments concerned, including the British.

In the end, however, Lederman acknowledged, of course, that only the Supreme Court of Canada would be able to determine the matter.[46] However basic these rules

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[41] Ibid., p. 97.

[42] Ibid.

[43] Reference re Weekly Rest in Industrial Undertakings Act, [1936] 3 D.L.R. 673, pp. 678-9 (per Sir Lyman P. Duff, C.J.C.). and Attorney General for Ontario v. Attorney General for Canada [1947] A.C> 127, pp. 153-4 (per Lord Jowitt).

[44] Reference re Weekly Rest in Industrial Undertakings Act, ibid.

[45] Lederman (1978), supra, p. 95 (emphasis added).

[46] Ibid., p. 103.

were, they were clearly not recorded in an unambiguous clear text. In some cases, it was clearly possible to say that they had already achieved the level of convention. But in the case of the most important, most vital rules of the constitution it was crucial, in Lederman's view, to call them law and respect them as law, even in advance of their formal recognition by the courts or by eventual formulation in a legal text.

Perhaps Lederman did not expand on these ideas enough. But his argument was fundamental, especially to the development of what has been described as an Independence theory. It allowed that Canadian conventions regarding Canadian request and consent or substantial provincial agreement could evolve into basic rules of the Constitution. It also permitted a separate analysis of British and Canadian constitutional law, which was something that the Patriation theory inhibited. The practice of amending the 1867 Act only with Canadian request and consent could develop into and remain a convention in British constitutional law and for British courts while at the same time it could evolve from convention into law in so far as the Canadian Constitution and Canadian courts were concerned. As long as one accepted the possibility of independent British and Canadian constitutional theory, the difference was valid. There might be objections as to the soundness of constitutional analysis in the different cases, but the possibility could not be denied. And ultimately it would be up to the courts of Canada to decide.

As we will see later, part of the problem which many constitutional lawyers might have had with this analysis is that once a practice has been identified as a convention it may not then simply become law by further practice; it must be formally enacted in order for the courts to recognize it as law proper. This is an accurate analysis for the most part, especially where one is examining a single legal system. However, in the case of new legal systems which have emerged from older legal systems, it may be that that which is a convention in the older system (Britain) may at the same time be a fundamental rule of the new legal system (Canada), that is, a prerequisite of its independence, as seen from the younger system's point of view. Such fundamental rules may never be recorded in statute

or determined by courts but, according to one view of the matter, it is nonetheless appropriate for commentators to describe them as law if they are very confident that a court would, for example, immediately recognize the rule if ever asked to do so.[47] The rule regarding request and consent from Canada for constitutional amendment by the Westminster Parliament is a good example.

Some of the distinctions made above were recognized by Professor P.W. Hogg who, as Lederman noted in the footnotes to his 1978 article,[48] disagreed with Lederman's assertion regarding the full-fledged constitutional status of some basic practices but at least acknowledged that apparent conventions could be transformed into law by judicial recognition. In the first edition of his highly influential Canadian constitutional law text published in 1977, Professor Hogg first stated his own opinion regarding the convention requiring Canadian request and consent: "If the Parliament at Westminster enacted a statute purporting to alter the law of Canada without the request and consent of Canada, the courts would not deny validity to that statute."[49] That statement amounted to a prediction of the behaviour of Canadian courts. With characteristic sensitivity to the range of applicability of an argument, Professor Hogg also considered the alternative scenario:[50]

> If a court did give a remedy for a breach of convention, for example, by declaring invalid a statute enacted for Canada by the United Kingdom Parliament without Canada's request or consent, ... then we would have to change our language and describe the rule which used to be thought of as a convention as a rule of the common law.

Hogg could have added that a British court might refuse to recognize the same convention.

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[47]Some commentators recognize the problem of deciding whether or not to recognize rules which however important have not been recognized by courts or legislatures. See R.T.E. Latham, The Law and the Commonwealth (Oxford, 1959), p. 521. For Hart's and Raz's views on this same point see infra, chapter 4.

[48]Lederman(1978), supra, p. 95.

[49]P. W. Hogg, Constitutional Law of Canada (Toronto, 1977), p. 7.

[50]Ibid., p. 8 See also, ibid., p. 17n: "There is little doubt the imperial Parliament could disregard the convention, although it is possible that Canadian courts might refuse to recognize as Canadian law a statute enacted in breach of the convention."

In general, however, Hogg's opinions were those which have been aligned under the Patriation theory. He stated, for instance, in no uncertain terms that "[t]he provinces have no legal role in the amending process, and their interests can be affected by the unilateral action of the federal Parliament".[51] He acknowledged that "[t]his is intolerable to the provinces, and ... is inconsistent with orthodox conceptions of federalism",[52] but he considered only the possibility that "the practice of securing provincial consent to amendments altering the distribution of powers [had] hardened into a binding convention".[53] In no sense could it be seen to engage the law.

It would be inappropriate to assign the entirety of Professor Hogg's writing to either the Patriation or Independence theory. His legal instincts as expressed in the first edition of his text were conservative in the sense that he did not predict that the Canadian courts would invalidate unwanted United Kingdom legislation, and this conclusion along with others appeared to set him with the Patriation theorists. It would be unfair in this case to classify his thinking on the basis of that one point of view. Hogg clearly recognised the possibility of an independent Canadian constitutional understanding of constitutional problems based on the principles flowing from such factors as federalism, independence and legitimacy. He did not feel, however, that there was sufficient justification for recognition of such factors in the law relating to Canadian constitutional amendment, whatever their value in considering conventions, custom etc. Hogg considered in some detail the legal and theoretical problems associated with "patriation", and we will have occasion to consider his analysis at a later point.

Before moving on to consider the traces of an Independence theory in the Patriation Reference, it may be appropriate to consider one final pre-patriation manifestation of the Independence theory: the idea of direct recourse to the Canadian people. We have seen the

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[51] Ibid., p. 19.
[52] Ibid.
[53] Ibid., p. 20.

referendum proposal earlier in the ideas of Sir Clifford Sifton. In 1949, Dr Gérin-Lajoie also mentioned the idea of a referendum as part of a proposed constitutional amendment ratification process, though in the end he did not endorse it.[54] The possibility of recourse to referenda in search of legitimacy for a constitution reflected a sensitivity to the Canadian basis for the Constitution, regardless of the traditional legal requirement of enactment of amendments by Westminster. In that sense, the idea was connected to the Independence theory. But if proponents of referenda still insisted that legally amendment had to go through the Westminster Parliament, then clearly the British idea of Parliamentary sovereignty held sway over the Canadian legitimizing process. Thus even the federal government in 1980-81, wedded as it was to a Patriation theory view, proposed various referenda methods of choosing a new amending formula and amending the Constitution, but it did so only as a part of a process which drew its legal validity, in the federal legal advisors' eyes, from Westminster.[55]

A strong Independence theory was however evident in the writings of those who suggested that British parliamentary sovereignty was not the operative ultimate rule of the Canadian legal system. They suggested that a new Constitution could derive its legal validity solely from the sovereign people in a referendum. Clearly this view had little to do with classical British constitutional theory and much more to do with American thinking.

An example of this view could be found in the writing of Professor Edward McWhinney. In his Canada and the Constitution, 1979-82,[56] McWhinney stated confidently that recourse to the people of Canada in order to "patriate" the constitution

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[54]Gérin-Lajoie, supra, pp. 267-77.

[55]See October 1980 proposed resolution, subs. 38(3) and s. 42; February 1981 proposed resolution, subs. 42(3) and s. 46; and April 1981 proposed resolution, subs. 43(3) and s. 47, reprinted in (1984-85) 30 McGill LJ. 753 et seq.

[56]E. McWhinney, Canada and the Constitution, 1979-82 (Toronto, 1982). See also E. McWhinney, "The How, When and Why of Constitution-Making: The Machinery for Developing a New Constitution" in G.-A. Beaudoin et al, eds, Mécanismes pour une nouvelle constitution (Ottawa, 1981), pp. 65-88.

would have been not only more legitimate but legal as well, even without the final sanction of Westminster:[57]

> In an era of constitutional democracy, constituent power comes from the people, and there is little reason to believe that had Prime Minister Trudeau proceeded boldly by going directly to the people with a new constitutional project, the courts or any other authority would have stood in the way of any resounding endorsement. A legally unimpeachable, popular source of sovereignty would thus have been established (in place of or as a supplement to the older imperial basis, now presumably fallen into disuse), just as it had been in the United States and in France.

Had Canada followed this route it would have joined what McWhinney referred to as "a clear trend, observable throughout the world and almost without exception to 'bring the people in' to any process for drafting and adoption of a new constitutional charter, or even for substantial renewal of an old one".[58] It should be noted that McWhinney's ideas had their echo in French Canada in the writings of Gil Rémillard, later Minister of Justice for the Province of Quebec.[59]

As has been noted elsewhere, the importance of the referendum alternative is not that it would certainly have been accepted as legal by the Canadian courts, but rather that it represented an attempt to think about the Canadian constitution in terms other than those of Westminster-based sovereignty. As we know, the federal government eventually stuck by its strict interpretation of constitutional validity and proceeded via Westminster. That approach was eventually vindicated, but other possibilities for an independent Canadian constitutional theory were encountered along the way.

It should not be surprising that many of the arguments which formed part of an Independence theory were developed in greater detail in the arguments made by the provinces at the time of the Patriation Reference. Some of these arguments were accepted

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[57] McWhinney, Canada and the Constitution, 1979-82, ibid. p. 46.

[58] Ibid., p. 121.

[59] See Le Devoir [de Montréal], 26 juin 1980, p. 13.

in the judgments of the three Courts of Appeal which dealt with the constitutional reference, and it may be useful to look briefly at these. In many ways, the provincial argument, as reflected in the judgments of O'Sullivan and Huband JJ.A. of the Manitoba Court of Appeal, Bisson J.A. of the Quebec Court of Appeal and the whole Newfoundland Court of Appeal, represents the fullest exposition of the Independence theory. The other opinions will only be commented on briefly, although they provide ample evidence of a healthy Patriation theory in the provincial appellate judiciary.

A majority of the Manitoba Court of Appeal[60] found that there was no law or convention indicating that the federal Parliament could not proceed unilaterally to the United Kingdom Parliament even where federal-provincial relationships were effected.

Freedman C.J.C. was of the view that Canada was independent in all respects other than regarding amendment of the Constitution: "Canada is a sovereign nation. It is so recognized throughout the world. But one vestige of colonialism still adheres to her national status, namely, that she is unable to amend her constitution."[61] He concluded that there was not even a convention requiring provincial consent and that, a fortiori, there could be no such law. Hall J.A. felt that it was inappropriate for the judiciary to consider matters of custom or convention; only the law of the Constitution, consisting in statute and common law, was enforceable by the courts. Matas J.A. stated that the alleged convention was at best indeterminate and that the Court would be entering the political arena if it attempted to define the limits of a convention and declare its existence.[62] In the absence of a convention, the Court could certainly not proceed further to consider whether a legal rule existed.

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[60] Reference Re Amendment of the Constitution (1981), 117 D.L.R. (3d) 1 (Man. C.A.).

[61] Ibid., pp. 7-8.

[62] Ibid., p. 39.

O'Sullivan J.A., dissenting, began his analysis with a threshold question: "whether the Canadian Confederation is a country which is truly sovereign and independent of all other external powers, or whether it is only partially so".[63] In answering this question he set out a bold expression of an Independence theory. He stated that he could not accept the view that Canadian status was "that of an abject colony dependent entirely on the goodness of the Parliament of the United Kingdom over which we have no control".[64] And while the British Courts might feel obliged to recognize any enactment of the United Kingdom Parliament, he found it "difficult to understand how the Attorney-General of Canada can assert that the Imperial Parliament remains supreme and sovereign over Canada, bound only by a "convention" which has no force of law and which it can legally disregard as it pleases".[65] O'Sullivan appeared to recognize that some so-called "conventions" were of such importance that the judiciary would be remiss in not recognizing them as law:[66]

> I agree there are many constitutional conventions that do not have the force of law, or at least not of law cognizable by law Courts; on the other hand, I think that it is going much too far to suggest that there are no conventions which can be recognized by the Courts. The Constitution of the Canadian Confederation is not entirely written; it consists of a written part and an unwritten part, and the unwritten part is very important. The unwritten part of the law consists of the customs, usages, principles, practices and conventions which have been recognized or are now recognized by the Courts as having force of law. Such laws apply to the exercise of the Royal Prerogative and the supremacy of Parliament itself.
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> ...
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> In my opinion, it is the duty of the Courts to recognize and to declare such constitutional principles and practices as are necessary to maintain the integrity of our Constitution. This is especially needful in a federal society; the Courts have consistently in our country recognized constitutional practice in deciding cases affecting the balance between the federal power and the provincial power.

O'Sullivan emphasised throughout that the duty of the Canadian courts to give effect to constitutional principles and practice was a concomitant of independence. He also

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[63] Ibid., p. 45.

[64] Ibid., p. 47.

[65] Ibid., p. 48.

[66] Ibid., p. 48 and p. 49.

observed that although independence was not derived from the Statute of Westminster, 1931, it had been observed in 1926 and had certainly been acquired by 1981. Independence dictated that the practice that the United Kingdom Parliament amend the Constitution only upon the request of the Canadian constituents be recognized and affirmed by Canadian courts:[67]

> In my opinion, under the Constitution of the Commonwealth, Canada is a free and sovereign and completely independent country. It is so by international law; it is so by Canadian law. To hold that the United Kingdom Parliament has still the legal power to alter the fundamental structure of our Confederation without the consent of its constituents would be to decline to give effect to constitutional principles and practices that are by now well settled.

O'Sullivan anchored his observations in the idea of responsible government. He pointed out that "[i]f the Queen can act for Canada on the advice of her British ministers, then we have no fully responsible government".[68] He did not purport to be able to rule on the actions of the Queen, but he did claim a judicial ability to control the activities of ministers. In a clear indication that he viewed the amendment process as truly a Canadian process, he observed that when the Queen acted she did so as Queen in right of Canada, only later assenting to the enactment as Queen in right of the United Kingdom. And given the divided sovereignty which characterised the Canadian federation, he considered it to be well-established in constitutional law and practice that in all matters pertaining to provincial power the Queen (in right of the province) had to act on the advice of her provincial ministers. Furthermore, while it might be said that the Parliament of the United Kingdom was "supreme and omnipotent" "under its own municipal law",[69] "[i]n respect of matters appertaining to the sphere of provincial concern, the United Kingdom ha[d] a power to enact legislation but constitutionally and legally it [was] incompetent for it to do so except at the request of the Province concerned".[70] Canadian independence and federal factors had

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[67] Ibid., pp. 49-50.
[68] Ibid., p. 51.
[69] Ibid., p. 57.
[70] Ibid., p. 58.

to been taken into account in Canadian law not merely because a certain number of precedents might have determined that a convention had crystallized into law but more because such facts were appropriately recognized as fundamental principles of the Canadian constitution.[71] Alteration to such fundamental principles would require unanimous provincial consent. O'Sullivan J.A. accepted the force of the compact theory at least in so far as such fundamental principles were concerned.

Huband J.A. picked up on Dean Ivan Rand's arguments of twenty years earlier and agreed with O'Sullivan J.A. that in facilitating a request of the federal Canadian House of Commons and Senate the Queen was action not as Queen of the United Kingdom but as Queen of Canada and the provinces. This had been true at least since 1931. In his view, the Parliament of the United Kingdom could have no interest in the internal jurisdictional disputes in Canada; it acted only as a bare trustee for both the federal and provincial levels of Canadian government.[72]

The Newfoundland Court of Appeal spoke with one voice and sided with the dissenting provinces in terms similar to those of Huband J.A. The Court reviewed in considerable detail the events of 1926-31 and concluded that upon the passing of the Statute of Westminster, 1931 Canada "attained sovereign independence, qualified by Great Britain's role, retained at the request of the Canadian community, to enact amendments to Canada's Constitution".[73] The Court noted that there was great concern expressed at that time that the Statute not grant to the federal Parliament the power to request and consent to amendments of the Constitution that would infringe on the rights of the provinces. In the end, the provinces were content to maintain the status quo, relying on the Parliament of

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[71] Both Geoffrey Marshall, Constitutional Conventions (Oxford, 1984), p. 9 and Andrew Heard, Canadian Constitutional Conventions (Toronto, 1991), p. 14 acknowledge that there may be "conventions" of this type (i.e. not based on precedent but on principle). But if we predict that a court would recognize such principles if asked, then perhaps they are conventions of a very special type.

[72] Ibid., p. 68.

[73] Reference Re Amendment of the Constitution of Canada (no. 2) (1981) 118 D.L.R. (3d) 1, p. 16 (Nfld C.A.).

Great Britain to protect their right until an alternative method of amendment could be agreed upon.[74] This, of course, was accomplished by subsection 7(1), and the Court noted possible interpretations of it:[75]

> Under a strict interpretation of that [sub]section, one might conclude that it is within the power of the British Parliament to amend the British North America Acts in any manner it thought fit, regardless of the wishes of either the federal Parliament or the provincial Legislatures. However, such an interpretation would be contrary to the established constitutional position declared by the Imperial Conference and would defeat the declared intention of the statute as set forth in its subtitle "An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930".
>
> In our opinion, the intent, and the effective result, of that enactment was to place the Parliament of Great Britain in the role of "a bare legislative trustee", as enunciated by the Honourable Ivan C. Rand ... .

The Court adopted Rand's analogy fully "with the important addition that the Parliament of Great Britain is a "bare legislative trustee" for both the federal Parliament and the provincial Legislatures in relation to the matters within their respective legislative competence".[76] Accordingly, the Parliament of the United Kingdom was "precluded ... from enacting an amendment restricting the powers, rights and privileges granted the Provinces by the British North America Act, 1867, and enlarged by the Statute of Westminster, 1931 over the objections of the Provinces".[77] And furthermore, the Court[78] felt that 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, disregarding the views of [the provinces] affected by these amendments. The very nature of the federation requires that the rights and powers of its constituent units be protected.

For the federal authorities to ignore the federal character of Canada by proceeding unilaterally to the United Kingdom Parliament would be to assert "a jurisdiction that would

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[74] Ibid., p. 13.
[75] Ibid., p. 16.
[76] Ibid., p. 17.
[77] Ibid., p. 18.
[78] Ibid., p. 24.

enable them to obtain indirectly what they cannot legally attain directly".[79] In the Court's view, such a result would appear to undermine the constitutional safeguards of provincial constitutional autonomy.[80] The proper course would be first to obtain provincial consent.

The Quebec Court of Appeal was nearly unanimous in adopting the attitude which we have seen in considering the Patriation theory. All five judges expressly stated that the sovereignty of the United Kingdom Parliament over the Canadian Constitution remained unimpaired, and none seemed to view this conclusion as controversial.[81] Crête C.J.Q. recommended an analysis of "a strictly juridical nature".[82] He summarized the legal situation in a concise fashion:[83]

> The British North America Act, 1867 acquired the force of law as an Imperial statute and it must be recognized that a statute can only be amended or repealed by another statute enacted by the legislative authority which adopted the original Act.
>
> Moreover, as the power to amend the Constitution was not provided for in the British North America Act, 1867 it is necessary to go back to the Parliament of the United Kingdom in order to change the Constitution.
>
> The Statute of Westminster, 1931 ... did not in any way change this legal situation.

The Parliament of the United Kingdom could not be a trustee of the Canadian Constitution for to acknowledge that to be so would amount to "a denial of the legislative sovereignty of the said Parliament".[84] He could find no convention requiring provincial consent to amendment proposals and he viewed the claim that conventions can have force of law as "highly doubtful".[85]

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[79] Ibid., p. 24.

[80] Ibid., p. 25 where the Court quotes with approval Lord Atkin in Reference re Weekly Rest in Industrial Undertakings Act [1937] A.C. 326, p. 352.

[81] Reference Re Amendment of the Constitution of Canada (no. 3) (1981) 120 D.L.R. (3d) 385 (Que. C.A.). See Crête C.J.Q., p. 406; Owen J.A., p. 414; Turgeon J.A., p. 421; Bélanger J.A., p. 443; and Bisson J.A., p. 456.

[82] Ibid., p. 395.

[83] Ibid., p. 405.

[84] Ibid., p. 406.

[85] Ibid., p. 407.

The judgments of Owen, Turgeon and Bélanger JJ.A. were similarly dismissive of the provincial claim. Turgeon J.A. adopted a strong Patriation theory position by insisting that even the practice of Canadian consent was not a legal requirement "since one cannot impose a condition on the exercise of the legislative authority of this [the United Kingdom] Parliament".[86]

Bisson J.A., dissenting, did not deny that the United Kingdom Parliament had the authority to amend the Canadian Constitution. He concentrated only on the question whether the Parliament of Canada could unilaterally request amendments affecting provincial jurisdiction. He reviewed the Quebec Resolutions of 1864, the London resolutions of 1866 and the judicial recognition of the legislative sovereignty of the provinces and concluded that[87]

> from a legal point of view, ... neither the Parliament of Canada nor a provincial Legislature, can act in such a way as to modify or remove any element of the legislative authority of the other without the consent of that part.

Having come to this conclusion regarding the legal state of affairs in 1867 and the years immediately following, he could then make the familiar argument that the Statute of Westminster, 1931 did not alter the legal state of affairs regarding constitutional amendment and that provincial consent in the situation already described was still required.

The varied and sometimes forceful exposition of the Independence theory in the provincial courts of appeal did not appear to have had a great influence on the Supreme Court of Canada. As we have already seen, both the majority (law) and minority (convention) adopted fairly strong versions of a Patriation theory. It will be useful to look

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[86] Ibid., p. 421.
[87] Ibid., p. 464.

briefly at the minority (law) and majority (convention). In general these judgments gave some credence to the provincial claims but did so in only the weakest form.

The minority (law) dealt solely with the question of the Ottawa Parliament's legal empowerment to proceed unilaterally by means of a resolution requesting legislative action by the United Kingdom Parliament. Arguments regarding the allegedly full legal authority of the United Kingdom Parliament to amend the Canadian Constitution were noted but not discussed in any detail. If we are to presume any conclusion, it would probably be one in favour of such a full legal authority. But the minority (law) was not obliged to deal with such questions because it chose to resolve the question on a purely internal, Canadian basis. The 1867 Act provided no answer to the question whether the federal Parliament was empowered to cause the Constitution of Canada to be amended without the consent of the provinces. The issue was "unique".[88] However. the preamble to the 1867 Act, the division of powers set out in the Act and the jurisprudential treatment of the Constitution together indicated that "the dominant principle of Canadian constitutional law is federalism".[89] Furthermore, it was up to the courts to preserve the integrity of the Constitution, including its federal structure.

The minority then turned its attention to the federal authorities' power to pass resolutions and noted that the power had never before been exercised for the purpose of curtailing provincial legislative authority without provincial consent. The legal issue could be rephrased[90] as

> whether the established incompetence of the federal government to encroach on provincial powers can be avoided through the use of the resolution procedure to effect a constitutional amendment passed at the behest of the federal government by the Parliament of the United Kingdom.

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[88] Reference Re Amendment of the Constitution of Canada [1981] 1 S.C.R. 753, p. 815.

[89] Ibid., p. 821.

[90] Ibid., p. 824.

It was noted that at no time in the past had amendments directly affecting the federal-provincial relationship been enacted without federal consultation with, and the consent of, all the provinces.[91] It was possible to conclude therefore that "normal constitutional principles recognizing the inviolability of separate and exclusive legislative powers were carried into and considered an integral part of the operation of the resolution procedure".[92] The Balfour Declaration and the Statute of Westminster, 1931 were discussed only to point out that Canada's independent sovereign status did not alter the fact that the nation remained federal in nature. The Declaration and Statute certainly did not mean that the federal Parliament acquired sole control over the exercise of that sovereignty.[93] And regarding amendment of the Constitution of Canada,[94]

> [t]he effect of s. 7(1) was to preserve the Imperial Parliament as the legal instrument for enacting amendments to the B.N.A. Acts, 1867-1930. This clearly had no effect on the existing procedure which had been used to obtain the amendment of the B.N.A. Act.

The minority (law) then considered the federal power to pass resolutions in its modern context. It was first noted that the British authorities which stated that internal parliamentary procedures were not the proper subject of judicial enquiry were of no help in determining the proper Canadian judicial attitude. Resolutions of the type under consideration were not matters of internal procedure but rather the means by which one level of government in a federal system could attempt to abridge the powers of the other level. The minority pointed out that the constitutional power which allowed Parliament to determine the rule of procedure applicable to the House of Commons and Senate was limited by the federal division of power: "because ... Parliament's power to legislate was limited in extent, it could not grant to the Senate and the House of Commons powers which it did not itself possess".[95] Parliament could only confer powers in so far as they were

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[91] Ibid., p. 830.
[92] Ibid., p. 831.
[93] Ibid., p. 835.
[94] Ibid.
[95] Ibid., p. 838.

"consistent with and not repugnant to" the Act of 1867.[96] The conclusion demanded by this analysis was that the Senate and House of Commons were purporting to exercise a power which they did not in fact possess. The two Houses of Parliament could not be permitted to "accomplish indirectly, through the intervention of the United Kingdom Parliament, that which the Parliament of Canada itself [was] unable to do,"[97] and it was "the duty of [the] Court to consider this assertion of rights with a view to the preservation of the Constitution".

After a review of other cases in which the Supreme Court of Canada had put forward "judicially developed principles and doctrines",[98] the minority ruled that it was the proper function of the Court in its role of protecting and preserving the Canadian Constitution to declare that the two Houses of the Canadian Parliament could not claim the power unilaterally to effect an amendment to the 1867 Act. The resolution at issue in the Patriation Reference could only be an effective expression of Canadian sovereignty if it had the support of both levels of the federal structure.

The majority (convention) framed its reasons in a tightly written judgment. It employed Dicey's distinction between law and convention and noted that the latter are not enforced by the courts.[99] The requirements for establishing a convention were taken from Sir Ivor Jennings: precedents, actors treating the rule as binding and a reason for the rule.[100] As for precedents, the majority (convention) recognized a strong indication of a requirement of unanimity.[101] The actors, however, could only be said to have accepted a

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[96] Ibid., p. 839.
[97] Ibid., p. 840.
[98] Ibid., p. 844.
[99] Ibid., p. 880.
[100] Ibid., p. 888.
[101] Ibid., p. 894.

binding rule of substantial provincial consent.[102] The reason for the rule was, of course, the federal principle.[103]

In a statement which, according to another direction of analysis, might have led to the stating of a legal rule, the majority (convention) stated that "[t]he federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities".[104] However, the so-called convention requiring substantial provincial consent could not be considered as law as long as the judges accepted the determination made by the majority (law) regarding that which could be recognized by the courts. As we have seen, the majority (law) required "an imperative constitutional text or statute" before it would have been able to recognize as law the limitation contained in a convention of substantial provincial consent.[105] The majority (law) rejected the notion that "[t]he leap from convention to law" could be explained "almost as if there was a common law of constitutional law, but originating in political practice".[106]

It is interesting to note in this respect that the majority (convention) adopted a definition of a convention according to which Professor Hogg was quoted as saying that "a convention is a rule which is regarded as obligatory by the officials to whom it applies".[107] There is a sense in which the common law is a set of rules which are regarded as obligatory by judicial officials, and therefore these rules may require special consideration. In the United Kingdom, of course, the rule that the courts will heed enactments of the Queen in Parliament is itself a part of the common law. It is regularly regarded as obligatory by English judges. As we know, Canadian judges have in the past ruled that they feel bound to uphold the principles of federalism, and some of these

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[102] Ibid., p. 905.
[103] Ibid.
[104] Ibid., p. 906.
[105] Ibid., p. 784.
[106] Ibid.
[107] Ibid., p. 883.

decisions were set out in the minority (law) reasons. This happens most often precisely where there is no "imperative constitutional text or statute" but where the law calls out for an answer. Something which was initially part of the realm of political practice (say in the early years after 1867 before the first decisions of the Supreme Court of Canada and the Judicial Committee of the Privy Council) became a part of the law of the constitution through the common law, that is because the judges of those courts saw it as a binding rule or principle. It is perhaps misleading, then, to speak of a hard and fast division between law and convention, especially in Canada where judicial review is more extensive than in the United Kingdom, precisely because of the federal nature of the former.

It is important to make a qualification here. We generally think of the common law as that which can be modified by statute. Where the common law concerns the Constitution, however, it can only be altered by the authority which is competent to amend the Constitution. In the United Kingdom, the authority is still with the Westminster Parliament, but in Canada it is controlled by the special rules on amendment. And in both the United Kingdom and Canada, the common law concerning the rules on amendment are amendable by no authority at all save the courts themselves. At this level, it is perhaps inappropriate to speak of the common law. Constitutional lawyers prefer to speak of the grundnorm or the rule of recognition. Had the majority (law) acknowledged that it was considering the most fundamental rules of the Canadian constitution, the conclusion regarding substantial provincial consent which was reached by the majority (convention) might well have served as a new rule of the "common law" of Canadian constitutional amendment. To this rule, the majorities (law and convention) might have wanted to add, by way of obiter dicta, the rule that no amendment to the Canadian Constitution accomplished by means of the United Kingdom Parliament could be valid unless requested by and consented to by the proper Canadian authorities. The strength of the prevailing Patriation theory may have prevented them from doing so. As we will see in Part III, there are strong reasons, mostly relating to legitimacy, which make the judiciary reluctant to make rules at the most fundamental levels of the Constitution, but likewise there are

circumstances when it may be obliged to do so in order to preserve the principles upon which the Constitution is based, most importantly, the rule of law.

Immediately following the Patriation Reference and the "patriation" itself which came soon after, a number of constitutional commentators produced articles which now serve as some of the strongest examples of an Independence theory. The events of 1981-82 seemed to have provoked a desire in some writers either to reexamine and reassert the constitutional independence of Canada or to go further and to relate the nation's constitutional history as if that independence had existed for a long time, that is well before the "patriation" itself. While these writings are a very good example of what might have been an appropriate Canadian attitude pre-1981-82, they also reveal, and in some cases volunteer, possible weaknesses in the Independence theory, some of which will be explored below.

Professors Bryan Schwartz and John Whyte were among the first to place the Patriation Reference (and by inference the "patriation") in a new, transcendent light:[108]

> The importance of legal debate during 1980-81 can be underscored by noting that the definition of the rules for constitutional amendment for a nation is a debate over the proper definition of the nation's sovereignty. The rules which govern reformation of the constitution are the most basic expression of the legal nature of the country. That Canada's rules were so unclear was historically anomalous in light of the country's self-perception of independence and adherence to the rule of law. The legal debate revealed that independence may have been illusory and that the roots of our legal existence were virtually untraceable. These difficulties were resolved in part with the proclamation of the Constitution Act, 1982 on April 17, 1982.

Schwartz and Whyte set out four different theories which were advanced by the provinces as part of the legal argument in the Patriation Reference. The theories were described as "the theory of Canadian independence, the compact theory of the Canadian

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[108]B. Schwartz & J.D. Whyte, "The Patriation Reference and the Idea of Canada" (1982-83) 8 Queen's L.J. 158, p. 163.

federation, the theory of provincial sovereignty, and the federalism theory".[109] Each one of these come within the general category of the Independence theory as they all would have required of the Supreme Court of Canada that it look upon constitutional amendment as a Canadian process, governed by Canadian rules of validity.[110] As Schwartz and Whyte noted, whatever the object of the legal aspect of the provincial challenge, "the question whether Canadian sovereignty was discounted by British legal sovereignty was relevant".[111] And such considerations might also have been relevant to the more limited claim against the right of the federal Parliament to pass a resolution and to send it to the United Kingdom. If, on the one hand, the United Kingdom Parliament was truly in full legal command, then there might have been some plausibility to the federal claim that the Canadian courts should no more have questioned or reviewed a joint resolution of the House of Commons and Senate seeking "patriation" any more than they should have questioned or reviewed "a motion extending birthday greetings to the Queen". If, on the other hand, the validity of Canadian constitutional amendments passed by Westminster was in part dependent on an expression of consent from the proper Canadian authorities, then it would have been entirely justified for the Canadian courts to have questioned and reviewed the federal resolution.

The theory of Canadian independence, as described by Schwartz and Whyte, had provided the dissenting provinces with a means of overcoming the federal lawyers' arguments regarding the unlimited legal sovereignty of the Westminster Parliament. The provinces were able to acknowledge that no text, including the Statute of Westminster, 1931, had altered the legal authority of the United Kingdom Parliament with respect to amendment of the Canadian Constitution. The provinces were also able to argue, however,

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[109] Ibid.

[110] Schwartz and Whyte note that the provinces which opposed the unilateral federal action to "patriate" the constitution probably feared the possibility of enactment by the United Kingdom Parliament prior to a decision by the Supreme Court of Canada. The authors point out that the question of the ultimate legal validity of the proposed amendments was therefore highly relevant. Any argument which challenged the validity of an enactment of the United Kingdom Parliament would have to rely to some extent on the premises of an Independence theory.

[111] Ibid., p. 164.

that in reality Canada had been fully independent since well before 1981 and that at the highest level of constitutional analysis "the reality is the law".[112] The argument was made most persuasively by the Attorney General of Manitoba who had relied on the arguments of H.W.R. Wade which had been set out in a well-known article originally published in 1955.[113] Schwartz and Whyte elaborated on the argument in a way which pointed to an important difference between the Patriation and Independence theories, Wade's insight belonging most particularly to the latter:[114]

> Counsel for Manitoba cited an article by H.W.R. Wade which contended that there is no strictly legal way for a British colony to become fully independent. If one starts with the [Patriation theory] assumption that British Parliaments are supreme, with the one exception that they cannot bind their successors, it logically follows that no declaration by Great Britain declaring the independence of a former colony can ever legally prevent a subsequent Parliament from reasserting legislative control. Former colonies become legally independent in the eyes of their own courts because those courts [following an independence theory] accept the fact that there has been a change in the fundamental legal order.

According to the latter approach, it was possible to acknowledge the continuing resort to the Westminster Parliament for the purpose of amending the Canadian Constitution (consistent with subsection 7(1) of the Statute of Westminster, 1931), but, given the fact or reality of Canadian political independence, to look at the ongoing role of that Parliament as a strictly formal part of a Canadian process: "just formal machinery to be used by Canadians to amend their own Constitution".[115]

In the end, however, it had been up to the Supreme Court of Canada, as "the ultimate arbiter of legal legitimacy",[116] to determine the nature of the United Kingdom

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[112] Ibid., p. 165

[113] H.W.R. Wade, "The Basis of Legal Sovereignty" [1955] Camb. L.J. 172. This will be discussed, infra, Part II.

[114] Schwartz and Whyte, supra, p. 165.

[115] Ibid., p. 166 (emphasis added). "Just formal", of course, has more than one meaning, one of which -- i.e. "legal" -- was adopted by the majority (law and convention). Here, "formal" is intended to mean "automatic".

[116] Ibid., p. 169.

Parliament's role in the Canadian amendment process. Schwartz and Whyte noted that this had not been an easy task where no clear answer could have been said to present itself:[117]

> But it must be conceded, neither history nor the texts dictate a single answer. Ultimately, a judicial opinion in the matter of whether Britain retained its plenary legal sovereignty had to turn on the political philosophy of the judge's deciding the whole complex of issues at stake.

A majority of the Supreme Court of Canada had been very reluctant to go beyond the legal texts in the Patriation Reference, perhaps because the judges felt that even the highest Court in the land required a clear signal by the appropriate legal means, of a desire by Canadians to change the rules of constitutional amendment. It was easy to understand such a political or judicial philosophy; however, as Schwartz and Whyte indicate, it was harder to deal with its apparent implications:[118]

> [U]ltimately the court did not accept the validity of the legal claim of Canada's independence. ... Although we hesitate to name it, the idea of Canada that this judgment comes perilously close to is Canada as colony. In light of this bleak characterization of our fundamental legal position we should be grateful that this same judgment induced the frenzy of political activity which led ultimately to the Constitution Act, 1982 and to legal sovereignty.

Schwartz and White, like others, did not explain in what sense or how legal sovereignty was acquired in 1982.

The same critical and slightly exasperated attitude toward the Supreme Court of Canada judgment in the Patriation Reference was evident in a 1982 article by Professor Eric Colvin, entitled "Constitutional Jurisprudence in the Supreme Court of Canada". Colvin criticized the Court for its "failure ... to recognize the jurisprudential character of the issues at stake and to utilize the insights of contemporary legal theory in their resolution".[119] For

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[117] Ibid.

[118] Ibid., p. 187.

[119] E.Colvin, "Constitutional Jurisprudence in the Supreme Court of Canada" (1982) 4 Sup. Ct L. Rev. 3, p. 3.

our purposes, the most significant missed "insight" was "that rules of constitutional law may have their source in constitutional practice",[120] by which he certainly meant a Canadian constitutional practice. Hence, this view fell squarely within the Independence theory.

After chronicling Canada's acquisition of de facto independence, Colvin observed that the majority view in the Supreme Court of Canada was inconsistent with such independence. He then went on to criticize the dissonance which the Court's narrow, legalistic view created when put together with the most basic Canadian and British understandings of political reality:[121]

> [T]he approach taken by the majority necessitated the conclusion that Canadian law empowered the U.K. Parliament, of its own volition, to destroy Canadian federalism and even to destroy Canadian independence.
>
> We are entitled to be suspicious of a line of reasoning which produced conclusions at odds with the common understanding, on both sides of the Atlantic, of political realities. The proper characterization of the foundations of a legal system has long been a controversial issue in constitutional theory and jurisprudence. Nevertheless, it is now widely accepted that these foundations must be sought in patterns of social practice giving rise to rules of law which exist only in the sense that they are observed in fact. Demonstrations of this proposition typically proceed along a "chain of validity", through which the existence of a legal rule is assessed by reference to the authority for its making which is conferred by a higher legal rule, which in turn also exists because there is authority for its making. To say that a legal rule is "valid" means that the legal system authorizes its existence. Yet no chain of validity is infinite. Eventually a point is reached where there is no higher rule and analysis must turn from questions of validity to questions of observance.

Colvin's analysis pointed to an aspect of the legal problem in the Patriation Reference which the Court did not overtly address: that is, what was the ultimate Canadian rule of the Canadian legal system? Colvin noted that the Court seemed to be asserting that "the problem could be resolved without reference to constitutional practice", and this approach was in his view untenable. As we have seen in examining the Patriation theory,

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[120] Ibid., p. 7.

[121] Ibid., pp. 8-9.

however, it appears that the majority (law) saw the amendment process, at least in its legal aspect, as Westminster-based and governed by the British rules of Parliamentary supremacy. It would not have been appropriate, according to this view, for a Canadian court to inquire into the ultimate rule of the British legal system as determined, so the analysis went, by British constitutional practice. Colvin acknowledged this possibility, in part, in stating that "[a]t best the majority could only be interpreted as subscribing to the view that the colonial rule of recognition had not changed with the development of de facto Canadian independence".[122] Colvin added that in its strongest version this view of things left the United Kingdom Parliament free to enact any legislation whatsoever for Canada, even by disregarding for the request and consent recitals provided for in section 4 of the Statute of Westminster, 1931. And, of course, even the weaker version of this view, according to which only constitutional amendments could be enacted by Westminster without Canadian request and consent, left the Canadian legal system vulnerable to radical and unwanted change.[123]

Colvin then turned to the problem of how the seemingly immutable British rule of recognition could disappear and be replaced by a new Canadian rule. He observed that Canadians who believed in the "patriation" process necessarily assumed that such a transition was possible, even by non-revolutionary means:[124]

> [T]he assumption that new criteria can be peacefully agreed to seems to have underlain the process of patriation which eventually culminated in the renunciation of British legislative power in section 2 of the Canada Act. Were this assumption not made, section 2 could be repealed as part of Canadian law by the body which enacted it. The federal Parliament could by-pass the amending formula which is set out in the Constitution Act, 1982, and once again seek constitutional change through action by the U.K. Parliament. Moreover, the U.K. Parliament itself could still, of its own volition, intervene to destroy Canadian independence.

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[122] Ibid., pp. 9-10.

[123] Ibid., p. 10n.

[124] Ibid., p. 10.

Colvin was right, it seems, to observe that Canadians assumed that the link with the United Kingdom had been broken. Looked at in this way, the transition was no more complicated than a mere substitution of turtles, to use Professor F.R.Scott's analogy.

The process was in fact more complicated than the turtle analogy indicated, and Colvin appeared to recognize this. He noted that such transitions placed the courts in a difficult position, and that this was especially so where the transition was said to have taken place over an extended period of time:[125]

> More difficult issues are raised by the idea of evolutionary change in the rules of recognition, which was in essence what the dissenting provinces had asserted. Judges should be cautious in deciding that developments in political practice have outdated traditional legal formulations.

Colvin went on to observe, however, that over the course of English constitutional history, such an evolution had taken place in response to various changes in the political context.[126]

In the end, Colvin concluded that the Supreme Court of Canada would have been fully justified in recognizing an ultimate rule of the Canadian legal system based in Canadian social, political (and even theoretical) reality:[127]

> The Court would not have been departing form the traditions of the common law if it had insisted that the rules of recognition of the Canadian legal system, although hitherto unarticulated in some key respects, must be consistent with the existence of Canada as an independent federal state. It would have been no more dramatic an entry into the political arena than was countenanced by English constitutional history. And if the Court had proceeded in this way, it would have laid the foundation for understanding the significance of the subsequent Canada Act as a declaration of proper constitutional practice and it would also have provided guidance for the handling of such crises of government as may face future generations of judges.

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[125] Ibid.

[126] Ibid., pp. 10-12.

[127] Ibid., pp. 12-3.

Colvin was quick to point out that this approach would not necessarily have produced a different result in the Patriation Reference. Clearly, however, it would have opened up a whole range of questions for legitimate consideration, including whether or not a constitutional amendment enacted by the United Kingdom Parliament without the request and consent of the proper Canadian authorities (however defined) could have been considered valid by a Canadian court applying the ultimate rule of an independent Canadian legal system.

Professor Brian Slattery provided another contribution to the Independence theory in a 1983 article entitled, appropriately enough, "The Independence of Canada". Before discussing the question of independence, he reviewed the process of colonization, the nature, sources and application of colonial law and the supremacy of Westminster in the context of the British Empire. He stated that "[t]he application of colonial law depended upon the factual subordination of Canada to British rule as recognized by Canadian courts". However, he appeared to view "facts" as having a legal importance independent of their recognition by the courts as he continued by stating that "[o]nce that state of subordination came to an end, colonial law as such ceased to apply to Canada".[128] At a later point, he explained that whatever the attitude of Canadian courts, once independence had occurred, their decisions could be based on "a different and more complex set of criteria than that used in British courts".[129] The possibility of differing Canadian and British constitutional understandings was, of course, a key to the Independence theory. In fact, this article provided a very coherent picture of how Canadian courts and other legal officials could have viewed the Constitution and the rules regarding its amendment. But it did not claim Canadian courts had actually adopted a different set of criteria prior to 1982. Slattery interpreted the Patriation Reference as an endorsement of an independence-based legal theory, but as we have seen in Chapter 1, there are good reasons to question this

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[128] B. Slattery, "The Independence of Canada" (1983) 5 Sup. Ct Law Rev. 369, p. 384.

[129] Ibid., p. 387.

interpretation of the Patriation Reference.[130] In the end, the analysis appeared to be based on the apparently inevitable consequences of the fact of political independence, and the question of judicial acceptance was either ignored or presumed.[131] It is nonetheless useful to look briefly at Slattery's account as an example of a well-developed Independence theory.

According to this account, Canadian independence probably came between 1919 and 1931. In Slattery's view, the Statute of Westminster, 1931 could not by itself have been responsible for this coming of age as it expressly excluded most of the Canadian Constitution from its scope. Instead, Canada "gained autonomy as the result of a largely factual process, though one carrying important legal consequences. Independence was not conferred; it was achieved."[132] This process was explained in greater detail elsewhere, as follows:[133]

> When a colony attains independence, it is released automatically from the application of colonial law for the future, in somewhat the same way that the attainment of maturity frees an individual from the legal regime governing juveniles. From the standpoint of the former colony, the principles of colonial law conferring autonomous powers on the British Crown and Parliament have no more force. They cannot validate acts performed subsequently by those institutions. The ultimate rules of validity have changed.

In Canada's case, therefore, sometime between 1919 and 1931, "there was a basic shift in the basic norms supporting our legal system"[134] as colonial law was replaced by "a body

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[130] See Slattery's own comments regarding this interpretation of the Patriation Reference, ibid., p. 397n.

[131] Slattery noted, ibid., p. 390n, that the Supreme Court of Canada's statement that "Canada has become a sovereign state" in Reference re Offshore Mineral Rights of British Columbia [1967] S.C.R. 792, p. 816, but this says nothing regarding the acquisition of full legal sovereignty in all matters including constitutional amendment.

[132] Slattery, ibid., p. 391.

[133] Ibid., p. 390.

[134] Ibid., pp. 391-2.

of fundamental Canadian common law drawing inspiration and strength from the new-found autonomy of our legal system".[135]

According to Slattery, the transition from colony to independent state was regulated by a basic rule or "principle of continuity" which he articulated as follows: "all laws, legal principles and legal institutions existing under the colonial regime remained valid after independence, with the exception of those inconsistent with the status of an independent state".[136] Furthermore, according to this account, once Canada became an independent state, "the rule recognizing Westminster as the supreme legislative body for the British colonies no longer applied" and, from a Canadian point of view, "a post-independence Act of the British Parliament purporting to extend here would not, ipso facto, be recognized as binding".[137] Once again, the factor of judicial acceptance appeared to be less important than the fact of independence and all that apparently flowed from it: "[o]nce Canada attained independence, Westminster necessarily lost its authority to pass laws for Canada without our agreement, at least as a matter of Canadian law".[138]

The exception to the supposed general rule was that the old rules regarding amendment of the Constitution would still apply, but now, due to the fact of independence, those rules were "subject to any modifications necessarily consequential to the change in sovereignty",[139] and in Slattery's view that meant that any amendments passed by Westminster had to be requested and consented to by Canada. "Any other position would have been incompatible with Canadian sovereignty."[140] One would have thought that a politically independent country could have chosen any sort of relationship with another country and that it would have been up to the courts to determine the full nature of that

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[135] Ibid., p. 392.
[136] Ibid., p. 393.
[137] Ibid., p. 396.
[138] Ibid., p. 397 (emphasis added).
[139] Ibid.
[140] Ibid.

relationship in the case of any doubt. It is not always clear why so much follows necessarily from the fact of independence. The closest thing to an answer was Slattery's assertion that when the British Parliament amended the Canadian Constitution it did so as "a Canadian legislature",[141] but this is not discussed in any detail.

Slattery did not feel that independence necessarily imported a requirement of provincial consent, and here he joined the majority (law) of the Patriation Reference in viewing the post-independence process of amendment as a relationship between sovereign nations. As the Canadian government spoke for Canada in international affairs it too could request and consent to constitutional amendments enacted at Westminster.[142]

Having posited a shift in the Canadian basic norm which took place between 1919 and 1931, Slattery was then able to explain the 1982 "patriation" with relative ease. Once Canada obtained full domestic power to amend its Constitution, Westminster's role automatically expired. "What can be done in Canada cannot be done elsewhere if Canada is fully sovereign."[143] The abdication clause of the Canada Act 1982 (section 2) was, according to this view, "as redundant in Canadian law as it is ineffectual in British law".[144]

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[141] Ibid., p. 399.

[142] Slattery discussed the arguments in favour of provincial consent, ibid., pp. 400-1.

[143] Ibid., p. 403.

[144] Ibid.

In the preceding chapters, two theories have been described and documented. The purpose in doing this was to understand better the constitutional transition of 1982. It is to that event that we now turn in an attempt to explain "patriation". Before doing so, it may be useful to provide a summary of the Patriation and Independence theories as we have encountered them so far.

The Patriation theory views the Canadian law of the constitution in its textual or enacted form. Prior to 1982, as a result of the failure in 1867 and 1931 to enact a written, Canadian-based amending formula, amendment of the Constitution of Canada could in certain vital respects only take place by using "the old machinery" of the Westminster Parliament. As long as this anachronistic and, to some, humiliating situation persisted, it would be correct to say, according to the Patriation theory understanding, that the Canadian constitution remained domiciled in the United Kingdom. We have seen that, consistent with this idea of British domicile, constitutional considerations, especially those regarding amendment, were highly influenced by the main tenets of British constitutional theory, notably the doctrine of absolute, untrammelled and continuing Parliamentary sovereignty. In the Patriation Reference, a majority of the Supreme Court of Canada appeared to affirm this notion of Westminster Parliamentary sovereignty and, in doing so, adopted the attitude of a British court toward that Parliament. It seemed to make clear that it would not review or declare invalid any legislation emanating from Westminster so long as that Parliament retained its untrammelled powers vis-à-vis Canada. Considerations of Canadian independence, federalism and legitimacy, for example, could not engage the law, although they might be relevant in the development and recognition of constitutional conventions. Any rule regarding the requirement and nature of Canadian request and consent for constitutional amendments was apparently only a convention. The Patriation theory did not take on board the idea that a rule could be, at one and the same time, a convention of the British constitution but an enforceable law of the Canadian constitution. It would have been up to the Supreme Court of Canada to declare it so, but that Court was not willing to do so. As we will see below, there may have been good reasons for its reticence, given the

highly political nature of such a decision and the Court's non-elected status. More disturbing than its cautious decision was the narrowness of its theoretical framework. As long as the Canadian constitution remained domiciled in Britain, Canadian constitutional theory was subsumed, at the highest level, by British (or Commonwealth) political theory. Furthermore, neither the Patriation theory nor the judges in the Patriation Reference who appeared to subscribe to it provided an explanation of how the untrammelled powers of the Westminster Parliament could be terminated. Earlier this century it was assumed by some not to be possible. Later some legislators and their advisors devised intricate schemes in order to cut the knot. Since 1982 and the Quebec Reference the Supreme Court of Canada and most Canadians assumed that the Canada Act 1982 had successfully terminated the United Kingdom Parliament's power to legislate for Canada. This conclusion was hard to align with the idea of the untrammelled powers of that Parliament that had been acknowledged by the Supreme Court of Canada in the earlier Reference. Consistent with its earlier posture, the Supreme Court presumably planned to rely on British (or at least Commonwealth) explanations for the 1982 process. We will examine some of those explanations in Part II.

The Independence theory begins with the assumption that, regardless of the fact that the Canadian constitution is amended via Westminster, it is a Canadian body of rules. It is primarily contained in constitutional texts which were agreed upon by Canadians, but in important respects it is unwritten or yet to be determined. In so far as it is unwritten and yet to be determined it may even be evolving in accordance with Canadian developments such as independence, federalism and public attitudes. Accordingly, the Constitution is domiciled in Canada and governed by a distinct Canadian constitutional understanding. The same is true of the rules regarding constitutional amendment, regardless of the fact that a vital part of the legal amendment mechanism is Wesminster-centered. Canadians retained that mechanism perhaps by default in 1867, but they clearly chose it in 1931, and accordingly it should be governed by Canadian interpretations of it, just as is the case with all other parts of the constitutional structure. Questions such as whether as a matter of law

Canada had to request and consent legislation from Westminster, whether that consent had to come from the provinces as well or whether Westminster could have been avoided altogether by recourse to the Canadian people were not rigidly cast as law or convention, usually consistently with British understandings, but were (at least since 1949) matters for the Supreme Court of Canada to decide. The so-called convention of substantial provincial consent could have been a rule of law had the Supreme Court of Canada chosen to recognize it as such. The Independence theory admitted this possibility whatever its plausibility in fact, whereas the Patriation theory did not -- the powers of the Westminster Parliament were untrammelled, and legislation for Canada emanating from it could not apparently be declared invalid. The Independence theory would have justified the Supreme Court in declaring invalid that which a British court would have been obliged to recognize. The Independence theory experienced a stunted growth prior to 1982 because of the dominance of the idea of a British-domiciled Canadian constitution governed to a great extent by British constitutional notions, but since 1982 it has come into its own. It may still be useful to us in order to explain what happened in 1982. If the Westminster-based mechanism prior to 1982 was simply a type of amending formula chosen by Canadians, at least since 1931, then like most amending procedures in modern constitutions, perhaps it could provide for its own replacement. We will consider that issue in Part II.

PART II -- EXPLAINING PATRIATION

CHAPTER THREE

THE SOVEREIGNTY DILEMMA

As we have seen, it was the Patriation theory which gained the approval of the Supreme Court of Canada in the 1981 Patriation Reference. As the majority was quick to point out, the Court was not asked to consider an attempt by one level of government to change the Canadian political system along unitary lines, and it was not asked to rule on whether United Kingdom legislation for Canada passed without Canadian request and consent could be considered valid. However, as noted earlier, the Patriation model employed by the majority (law) made it difficult to see how the Court could have declared invalid either of those admittedly unlikely possibilities. The untrammelled authority of the United Kingdom Parliament could be used in either situation in order to bring them into Canadian law, and the Canadian courts (just as their British counterparts) apparently could not review such action. This prompted one Canadian constitutional observer to say that the successful 1982 patriation may have "rescued the historical reputation of the Court",[1] for without it the Canadian Constitution would have remained vulnerable to unilateral federal or foreign tampering.

While it it is undoubtedly true that the present Canadian consensus is that the Canadian courts will not recognize United Kingdom Parliament legislation for Canada,[2] it

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[1]E. Colvin, " Constitutional Jurisprudence in the Supreme Court of Canada" (1982) 4 Sup. Ct L. Rev. 3, p. 22.

[2]See, e.g., A.C. Cairns, Charter Versus Federalism: The Dilemmas of Constitutional Reform (Montreal, 1992), p. 63; P.W. Hogg, Constitutional Law of Canada, 2nd ed. (Toronto, 1985), p. 47. M. Banks, Understanding Canada's Constitution (London, Ontario, 1991), p. 13.

is not altogether clear how that happened, especially considering the fact that the Patriation theory was the operating model upon which Canadian constitutional law was understood prior to 1982. If the powers of the Westminster Parliament were truly untrammelled then perhaps they could be reasserted, either by British authorities on their own initiative or by Canadian authorities frustrated perhaps by the rigidity of the new domestic amending process. The first possibility was highly unlikely in practice, whatever its legal significance, given the long-established convention which required Canadian request and consent in advance of British legislation for Canada. But assuming that such request and consent came after 1982, in response to constitutional paralysis in Canada as hypothesised above, what would be the proper legal response? And would the response be the same in Britain as in Canada?

These last questions get us ahead of ourselves because, for the moment, we are assuming that the Patriation theory is still operative. If that has ceased to be the case, then some new explanation will be required. First, however, it may be useful to reconsider why it is that the Patriation theory can be said to have such a tenacious grip on a legal system. It will be important to distinguish between two aspects of legislative sovereignty: first, the apparently unlimited sphere of Parliament's ability to legislate and secondly the related idea that no Parliament can bind its successors.[3] Accordingly, it may be useful to return to the highly influential writings of Professor A.V. Dicey.

As was noted earlier in this Part, the Patriation theory was heavily influenced by the writings of Professor Dicey. The majority (law and convention) followed Dicey's distinction between the conventions of the constitution and the law of the constitution

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[3]It might be useful at this point to note that these two aspects of sovereignty are analysed very differently. A dominant school, inspired by Dicey, would say that Parliament can legislate on all matters whatever and that it cannot bind its successors. A newer view, spawned by Professor Sir Ivor Jennings, suggests that while Parliament might be unlimited in its legislative sphere, it may bind its successors as to the manner and form of legislation. An even more recent line of opinion, represented for example in some recent decisions of President Cooke of New Zealand (see, e.g. Taylor v. New Zealand Poultry Board [1984] 1 N.Z.L.R. 394, p. 398), suggests that Parliament may be limited both as to the sphere of its legislation and as to manner and form of that legislation.

extremely closely.[4] Dicey is perhaps best known for his identification and elaboration of the principle of Parliamentary sovereignty, by which he meant that[5]

> Parliament thus defined [the Queen, the House of Lords and the House of Commons] has, under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

This, of course, meant that "[a]ny Act of Parliament ... will be obeyed by the courts".[6] This notion is reflected in the Patriation Reference by the use of such adjectives as "untrammelled", "unlimited", "undiminished" or "unimpaired" powers of the Imperial Parliament.

The Supreme Court of Canada in the Patriation Reference did not deal with an important related notion in Dicey: Parliament's inability to bind its successors. As we have seen, this notion was what made some observers in the first half of this century feel that the United Kingdom Parliament would never be able to divest itself irrevocably of its power to legislate for Canada. The consensus on this matter shifted as many former colonies acquired their independence, but it may be useful to consider it briefly, given the Supreme Court of Canada majority's adherence to a strict and apparently unqualified view of Imperial parliamentary sovereignty.

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[4]Although Dicey is not referred to specifically, the debt to his approach to the law of the constitution is clear. A.V. Dicey, An Introduction to the Law and the Constitution, 10th ed. by E.C.S. Wade (London, 1959), p. 24 stated the following:

> "[C]onstitutional law," as the expression is used in England, both by the public and by authoritative writers, consists of two elements. The one element, here called the "law of the constitution," is a body of undoubted law; the other element, here called the "conventions of the constitution," consists of maxims or practices which, though they regulate the ordinary conduct of the Crown, of Ministers, and of other persons under the constitution, are not in strictness laws at all.

The majority (convention) in Re:Resolution to Amend the Constitution [1981] 1 S.C.R. 753, p. 883 (hereinafter cited as the Patriation Reference) put the matter in the following, similar terms: "The foregoing may be summarized in an equation: constitutional conventions plus constitutional law equal the total Constitution of the country."

[5]Dicey, supra, p. 39.

[6]Ibid.

According to Dicey's view of the matter, full sovereignty meant that the holder of that sovereignty, in this case the Queen-in-Parliament.[7] not only had the full legal power to pass any legislation whatever (subject to very real political limits) but also had no power to limit the full legal power of future Parliaments. As we will see, the second need not necessarily flow from the first, and we will be interested to know how much of the English doctrine according to Dicey was imported as part of the Patriation theory. The Supreme Court of Canada did not qualify the idea of full, unlimited, untrammelled Parliamentary sovereignty, but it may in the end be appropriate to assume that the Court would have favoured a less absolutist view of sovereignty had it been asked. The Patriation Reference left us wondering.

Dicey put forward the notion of Parliament's inability to bind its successors by quoting with approval from Todd, Parliamentary Government in the British Colonies (1st ed. 1880):[8]

> As stated in short by a very judicious writer -- "It equally is certain that a Parliament cannot so bind its successors by the terms of any statute, as to limit the discretion of a future Parliament, and thereby disable the Legislature from entire freedom of action in any future time when it might be needful to invoke the interposition of Parliament to legislate for the public welfare."

In the footnote following this passage, Dicey explained the logic of this statement. If one has in mind the Canada Act 1982 in reading this passage, the problem of "patriation" and independence becomes apparent:[9]

> The logical reason why Parliament has failed in its endeavours to enact unchangeable enactments is that a sovereign power cannot, while retaining it sovereign character, restrict its own powers by any particular enactment. An Act, whatever its terms, passed by Parliament might be repealed in a subsequent, or indeed in the same session, and there would be nothing to

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[7]Hereinafter referred to as Parliament, the Queen's consent being presumed.

[8]Dicey, supra, pp. 67-8.

[9]Ibid., p. 68. Professor Sir Ivor Jennings, The Law and the Constitution, 5th ed. (London, 1959), p. 152n, notes that the passage here-quoted did not appear in the early editions: compare A.V.Dicey, An Introduction to the Study of the Law of the Constitution, 2nd ed., p. 63; but see 4th ed., p. 65.

> make the authority of the repealing Parliament less than the authority of the Parliament by which the statute, intended to be insurmountable, was enacted.

Dicey was quick to add that "the impossibility of placing a limit on the exercise of sovereignty" did not in any way prohibit, either logically or in fact, the "abdication of sovereignty". But in his view, the sovereign legal power could only divest itself of authority or abdicate in two ways: "It may simply put an end to its own existence" or "A sovereign may transfer sovereign authority to another person or body of persons".[10] Both of these possibilities seem to require that the whole of the sovereign power be disposed of.[11] Clearly, the United Kingdom Parliament could not be said to have taken either of these courses of action in 1982.

If Dicey's understanding of parliamentary sovereignty formed a part of the Patriation theory, then the Canadian constitution could not easily be removed from the continuing and untrammelled sovereignty of the United Kingdom Parliament. As we have seen, the Supreme Court of Canada viewed the powers and authority of the United Kingdom Parliament as something which was beyond its ability to consider.[12] Apparently, the Supreme Court of Canada was obliged to accept that enactments by the Westminster Parliament were legally valid. As we will see, there was at least one British understanding of the matter which saw the matter of Parliamentary sovereignty (untrammelled or limited, continuing or self-embracing) as a proper area of consideration for the courts. According to the Supreme Court of Canada, it may have been proper for British courts to reconsider the nature of the Westminster Parliament's sovereignty, but it was apparently not for a "colonial" court to do so. This would in fact be in keeping with

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[10]Dicey, supra, p. 68n.

[11]This is also the view of G. Marshall, Parliamentary Sovereignty and the Commonwealth (Oxford, 1957), p. 67.

[12]In fact this attitude could be easily explained by another notion put forward by Dicey, specifically that of subordinate or non-sovereign law-making bodies. Dicey used the foreign terminology to describe these as "assemblies which ... are 'legislative' without being 'constituent'". Dicey, supra, p. 94. Among these assemblies, Dicey included municipal bodies (railway companies, school-boards, town councils, etc.) and legislative bodies (e.g., British colonies, Belgium, France) which are not sovereign bodies in the full sense described by Dicey elsewhere.

the rules of the Imperial system, according to which it would have been up to the House of Lords or the Judicial Committee of the Privy Council to confirm that a change had taken place in the understanding which courts should have of Parliamentary sovereignty. If the Supreme Court of Canada had taken over the Judicial Committee's role as the highest Court for Canadian appeals, it apparently did not feel that it had taken over the role as interpreter of the idea of Parliamentary sovereignty. As the Patriation theory favoured a unified "Imperial" constitutional theory of constitutional amendment at least until the Constitution had been brought home, a separate Canadian understanding of Parliamentary sovereignty was not contemplated, and there appears to be no evidence of it in the Patriation Reference.[13]

The majority (law) stated rather that it was obliged to recognize as valid law that which was enacted by the Westminster Parliament. But this, as we have seen, was only one part of the Dicey doctrine. That doctrine also stated that the United Kingdom Parliament could at any time repeal any of its previous enactments. This was the the logical result of the idea that Parliament could not bind its successors. According to the British constitutional theory of the early part of this century, it would be difficult to conceive of the United Kingdom Parliament ever losing its legal authority to repeal or modify the Canadian constitution. Indeed, it was in part due to the enduring credibility of Dicey's constitutional analysis that the Statute of Westminster, 1931 purported not to terminate the powers of the United Kingdom Parliament but to ensure that those powers were exercised only with the request and consent of the Dominion concerned.[14] Of course in Canada's case, subsection 7(1) arguably made even this weak requirement inapplicable.

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[13]In fairness to the Court, the articulation of a new Canadian constitutional theory was not required by the 1981 Patriation Reference. We have seen, however, that the Court's reticence left disturbing questions as to the nature of legal sovereignty in Canada, not all of which were conclusively resolved by the 1982 "patriation" process.

[14]K.C. Wheare, The Constitutional Structure of the Commonwealth (Oxford, 1960), p. 25.

If we remain for the moment within the constraints of British (and hence Patriation) theory, it should be pointed out that since Dicey, British understandings of Parliamentary sovereignty and the rule that Parliament cannot bind its successors have evolved, although it appears fair to say that no consensus has been reached.

The most thorough revision and rethinking of Dicey was undertaken by Professor Sir Ivor Jennings. In his The Law and the Constitution,[15] first published in 1933, Jennings commented at some length on Dicey's notion of the "sovereignty of Parliament". He noted, first, that the very word "sovereignty" could be misleading in that it suggested that Parliament is completely unrestrained in that which it can do. In fact, as even Dicey was prepared to admit, there were very real political limitations on Parliament.[16] Jennings was prepared to go even further. He distinguished between Parliament's ability to make any law whatsoever and the courts' refusal to declare any enactment of that Parliament ultra vires and invalid as a result.[17] But he noted that in fact the courts would only "recognise as law the rules which Parliament makes by legislation; that is, rules made in the customary manner and expressed in the customary form."[18] From this observation, he concluded, inter alia, that Dicey was wrong in asserting that because of its sovereignty Parliament could not bind its future action.[19] As we will see, Jennings argued that Parliament could bind a future Parliament as to the manner and form of future legislation.

Jennings also objected to Dicey's distinction between sovereign and non-sovereign legislatures. According to Jennings' view of the matter, the British Parliament was in fact no different from any legislative body in the sense that they all derived their powers from law (in the British case, the common law).[20] He also felt that Dicey had no business

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[15]Jennings, supra.
[16]Ibid., p. 148.
[17]Ibid., p. 144
[18]Ibid., p. 149.
[19]Ibid., p. 150.
[20]Ibid.

lumping municipal governments and corporations together with colonial governments and their national governments.

Jennings pointed out that if Parliament truly had sovereign or supreme power, it would be quite proper to say that it could not bind itself. To use Jennings' example, "[i]f a prince has supreme power, and continues to have supreme power, he can do anything, even to the extent of undoing things which he had previously done".[21] But according to Jennings' analysis, Parliament did not have supreme power; the courts simply accepted as law that which was made in the proper legal form. This was the same state of affairs as would obtain if a prince without supreme power enacted that "henceforth no rule shall be law unless it is enacted by him with the consent of the legislature[. T]hen the law has been altered, and the courts will not admit as law any rule which is not made in that form".[22] This point was certainly debatable,[23] as we will see, but Jennings had provided a useful insight. He showed that it was useful to distinguish between sovereignty in the continuing sense imagined by Dicey and "legal sovereignty", that is the power of a legislature to make laws of any kind "in the manner required by the law".[24] According to the latter view, the courts would recognise legal rules enacted by Parliament, "including a rule which alters this law itself"[25] by which Jennings meant the law which required that law be made in a certain manner and form. Put more succinctly, "the 'legal sovereign' may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself".[26]

Jennings then offered illustrations of "manner and form" limitations on the power of a legislature, drawing these from the Commonwealth experience (admittedly at the level

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[21] Ibid..

[22] Ibid., p. 152.

[23] The more difficult, debatable question is whether the courts would recognize the prince's authority acting alone if he repealed, impliedly or directly, the rule requiring the consent of the legislature.

[24] Jennings, supra, p. 153.

[25] Ibid., p. 153 (Jennings' emphasis)

[26] Ibid.

of the Judicial Committee of the Privy Council).[27] He did not claim that these Commonwealth precedents in any way determined the law for the United Kingdom. For Jennings, these decisions did however "illustrate the point that the power of a legislature derives from the law by which it is established",[28] and in the United Kingdom where there was no written Constitution that meant the common law. After some historical review, he noted that "it is virtually impossible to prove that there are no principles of the common law which Parliament cannot repeal", but he concluded that "the modern trend is towards admitting the supremacy of Parliament over the common law".[29] He noted, however, that because of the enduring influence of Dicey, British courts would require a very clear indication that Parliament had bound itself not to repeal, except in the specified manner and form, the original enactment.[30] This was, of course, especially relevant given the operating rule of implied repeal.

Jennings looked to the post-Statute of Westminster, 1931 Commonwealth for examples of how Parliament had bound itself to legislate for Dominions only in the manner and form set out in section 4 of the 1931 Statute (that is, by an express declaration in the legislation "that that Dominion has requested, and consented to, the enactment thereof" (section 4). He noted the opinion of Viscount Sankey who in the British Coal Corporation case stated that "the Imperial Parliament could, as a matter of abstract law, repeal or disregard of section 4 of the Statute" and appeared to express disagreement.[31] Jennings used other Commonwealth examples to show that the United Kingdom Parliament clearly could by its own act deprive itself of its sovereignty.

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[27]See Jennings, ibid., where he discusses various Commonwealth authorities for this proposition: Attorney General for New South Wales v. Trethowan [1932] A.C. 526 (P.C.); Ndlwana v. Hofmeyer, N.O. [1937] A.D. 229; Harris v. The Minister of the Interior (1952) (2) S.A. 428.

[28]Jennings, ibid., p. 156.

[29]Ibid., p. 160.

[30]Jennings noted that in recent cases the courts had shown their habitual unwillingness to read limitations into the power of Parliament: British Coal Corporation v. The King [1935] A.C. 500 (P.C.) per Viscount Sankey (the passage discussed in the Introduction) and Ellen Street Estates Ltd. v. Minister of Health [1934] 1 K.B. 590 (C.A.).

[31]Jennings, supra, p. 164.

A number of points are unclear in Jennings, and these were to be picked up on by later commentators. It may be useful to focus on a few of these now. First, if we pursue the last points made regarding the Commonwealth, it is not clear how the fact that the courts of South Africa, India, Pakistan, etc. now consider only their domestic law as binding means that the United Kingdom Parliament has limited its sovereignty and bound its successors. Was it not possible for the law to be different in those countries from that in the United Kingdom? Jennings himself states that "Parliament can legislate for all persons and all places".[32] That did not mean, of course, that Parliament's enactments would be heeded in all places, but in those parts of the Commonwealth, say, where the laws of the Westminster Parliament were recognized those enactments would be the law. If that ceased to be the case, the most convincing explanation, it seems, was not that the British Parliament had successfully bound itself according to the manner and form of its legislation or even abdicated part of its sovereignty, but that the legal system of the former colony, and especially its courts, had ceased to recognize British laws. According to this view, the Westminster Parliament could still be free to ignore section 4 and legislate for the former colony without any request or consent from the former colony, but the courts of that country might simply ignore such legislation. We will want to consider later the reasons why the courts of that country might do so. It is only if the British courts refuse to recognise British legislation that is not in the proper manner and form that Jennings can truly say that his theory has been accepted. In fact, the British courts seem inclined to favour the idea of the continuing sovereignty of Parliament.

A second point is that Jennings seems to be saying that Parliament should logically be permitted to limit itself according to the manner and form of its legislation, and for this reason he rejects Dicey's assertion that Parliament cannot bind its successors. Jennings wishes to argue that even if Parliament is sovereign in that it can pass any law on any subject, it must determine how such law is made, and that this second consideration opens

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[32] Ibid., p. 170.

the door for Parliament to enact manner and form restrictions. In fact, the true answer may be that no approach -- continuing, continuing with a manner and form exception or fully self-embracing -- is logically required. Rather, in each legal system it may be a matter of interpretation as to whether the supreme legislative authority has continuing supremacy, in the Diceyan sense, or self-embracing sovereignty in the Jennings sense.[33] As Jennings notes, the legislative powers in most countries are laid out in a constitution, whereas in Britain they are determined according to the common law. As we will see, even in constitutional regimes, it may not always be clear whether or not the supreme legislative authority, usually the procedures for amending the constitution, are continuing or self-embracing. In England, the Queen-in-Parliament acts both as a legislative body and as a body which can amend the constitution. The question in British constitutional law can be recast in the same terms as the question for all constitutional systems. Is the rule for amendment of the constitution continuing or self-embracing? Or more specifically, can the British constitutional amending formula (the Queen-in-Parliament[34]) amend itself? In most countries that is a matter for the courts. Jennings seems to wish to avoid the question and place the ability of Parliament to limit itself in a partially self-embracing sense. That, it seems, begs the question whether the British constitution should be interpreted in a continuing or self-embracing sense. According to other British authorities, continuing sovereignty has been the rule. Jennings and others might then want to ask how that rule changed or could change in the future. This is considered in an important article by Professor Sir H.W.R. Wade.

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[33]The terms "continuing" and "self-embracing" are used notably by Professor H.L.A. Hart in his Concept of Law (Oxford, 1961), p. 146. They are not used by Dicey and Jennings. They are used here as a convenient shorthand and are discussed in greater detail in Chapter 4.

[34]Speaking of the Queen-in-Parliament of course begs the question how that body is constituted and by what procedure it votes. It is assumed in this discussion that the British amending formula, if one can put it that way, is the Queen-in-Parliament with the Commons and House of Lords voting by the traditional majority rules. It is also assumed that the British courts cannot be said to have adopted a position other than that the Queen-in-Parliament is governed by the idea of continuing sovereignty (although the issue has never been squarely presented).

In a 1955 article entitled "The Basis of Legal Sovereignty",[35] H.W.R. Wade addressed the arguments put forward by Jennings head on. In Wade's view, if any rule had been approved by the British courts and a majority of commentators, it was the rule that Parliament could not bind its successors and, accordingly, that it could not in any way detract from its "continuing sovereignty".[36] With regard to section 4 of the Statute of Westminster, 1931, and the ("unthinkable") possibility of an Act of the United Kingdom Parliament purporting "to extend to a Dominion without making the proper recitation of the Dominion's request and consent, Wade stated the following:[37]

> All English precedent would lead one to predict that an English court would regard itself as bound to give effect to the later statute, and would hold that to the extent of any inconsistency with the Statute of Westminster the Statute of Westminster was repealed.

In his view, these amounted to "statements of the obvious", but he noted that others, notably Jennings, disagreed.[38]

On Wade's view of the matter, most of the authorities quoted by Jennings appeared "to realise that somewhere in the background is a rule of English law that Parliament cannot bind its successors".[39] Trethowan's case was, in Wade's view a simple application of the principle of ultra vires, a notion familiar to all subordinate legislatures (as defined by Dicey). In the end, Jennings' attempt to cast "darkness and doubt" on the traditional theory of Parliamentary sovereignty had to fail.[40]

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[35][1955] C.L.J. 172.

[36]Ibid., p. 174. Wade supported this by listing Coke, Blackstone and Dicey, the cases of Vauxhall Estates Ltd. v. Liverpool Corporation [1932] 1 K.B. 733; Ellen Street Estates, Ltd v. Minister of Health [1934] 1 K.B. 590; and British Coal Corporation, supra.

[37]Wade, ibid., p. 177.

[38]Ibid., p. 177.

[39]Ibid., p. 182.

[40]Ibid., p. 184.

Wade was quite prepared to admit, however, that the version of self-embracing sovereignty set out by Jennings would be "a perfectly possible state of affairs",[41] but if it was "to stand against the weight both of judicial decisions and of centuries of general agreement, something more [would be] needed than an absence of absurdity".[42] Wade attempted to isolate the "logical strength" of Jennings argument and summarized it as follows, according to its three branches:[43]

> (a) The authority of Acts of Parliament depends on the common law;
>
> (b) Parliament can change the common law in any way whatever;
>
> (c) Therefore Parliament can change the rules on which the authority of Acts of Parliament rests.

Wade then questioned Jennings' central assumption:[44]

> At the heart of the matter lies the question whether the rule of the common law which says that the courts will enforce statutes can itself be altered by a statute. Adherents of the traditional theory, who hold that future Parliaments cannot be bound, are here compelled to answer "no." For if they answer "yes," they must yield to Jennings reasoning. But to deny the Parliament can alter this particular rule of law is not so daring as it may seem at first sight; for the sacrosanctity of the rule is an inexorable corollary of Parliament's continuing sovereignty. If the one proposition is asserted, the other must be conceded. Nevertheless some further justification is called for, since there must be something peculiar about a rule of the common law which can stand against a statute.
>
> The peculiarity lies in this, that the rule enjoining judicial obedience to statutes is one of the fundamental rules upon which the legal system depends.

Wade borrowed from Salmond the idea of an "ultimate legal principle" the source of which is historical or political, not legal. The rule that the Acts of Parliament have the force of law was to be understood as such an ultimate legal rule, and if statute had not conferred it on Parliament, then statute could not alter it:[45]

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[41] Ibid., p. 185.
[42] Ibid., p. 186.
[43] Ibid.
[44] Ibid., pp. 186-7.
[45] Ibid., pp. 187-8.

> Once this truth is grasped, the dilemma is solved. For if no statute can establish the rule that the courts obey Acts of Parliament, similarly no statute can alter or abolish that rule. The rule is above and beyond the reach of statute, as Salmond so well explains, because it is itself the source of the authority of statute. This puts it into a class by itself among rules of common law, and the apparent paradox that it is unalterable by Parliament turns out to be a truism. The rule of judicial obedience is in one sense a rule of common law, but in another sense -- which applies to no other rule of the common law -- it is the ultimate political fact upon which the whole system of legislation hangs. Legislation owes its authority to the rule: the rule does not owe its authority to legislation. To say that Parliament can change the rule, merely because it can change any other rule, is to put the cart before the horse.

One was entitled to ask, then, how the ultimate legal principle could change or evolve. According to Wade, it could be changed only by revolution, not by legislation. And on this account, it was up to the courts to determine when and whether such a revolution had taken place. Wade concluded on this point as follows:[46]

> If this is accepted, there is a fallacy in Jennings' argument that the law requires the courts to obey any rule enacted by the legislature, including a rule which alters this law itself. For this law itself is ultimate and unalterable by any legal authority.

One can presume that the courts would require strong political imperatives, amounting to more than the will of the Queen-in-Parliament, before they would acknowledge that the ultimate legal principle had changed.[47] In the meantime, the courts were obliged (unless they gave effect to a revolution) to respect the idea of continuing Parliamentary sovereignty and not to grant to one session of Parliament the power to limit the substance, manner or form of future legislation which another Parliament might wish to enact in the same or a future session:[48]

> All arguments seem to combine in support of the view that the United Kingdom Parliament is, in the eyes of the English courts, a continuously

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[46]Ibid., p. 189 (Wade's emphasis).

[47]T.R.S. Allan, "The Limits of Parliamentary Sovereignty" [1985] P.L. 614 has suggested that courts should take political factors into account and alter the rules of Parliamentary sovereignty accordingly, but this seems to raise problems regarding the courts' legitimacy.

[48]Wade, supra, p. 190.

> sovereign legislature, which cannot bind its successors as to "manner and form" or anything else; and that if a "skilful draftsmen" attempted to entrench an Act of the United Kingdom Parliament by forbidding repeal except after a referendum, that Act like any other could be repealed by an ordinary Act of Crown, Lords and Commons without a referendum. To suggest the contrary is to assume a revolution, in which the courts must be taken to have abandoned their loyalty to the legislature as now constituted; but since this is something which no legislation can bring about, it is a purely political forecast.

One would have wanted to ask Wade why it was that Parliament could modify the common law when acting in its legislative role but could not modify the common law when acting in its constituent or constitutional amending role. Perhaps the inability had more to do with the nature of continuing sovereignty and less to do with the fact that it was a so-called "ultimate legal principle". Is not all of the common law explained in some sense by historical or political factors rendered legal by their recognition in courts of law? But these comments anticipate later discussions in which we will want to ask how and under what circumstances the courts might wish to recognize or confirm a change in the most fundamental constitutional rules. Presumably, as Jennings stated, it would take very clear language from Parliament, especially where it is acting in its constituent capacity. It may even be that the English courts have ruled out the possibility of anything other than continuing sovereignty because the majority voting rules which are part of the idea of the Queen-in-Parliament as it is presently understood represent a very flexible means of amending the amending formula so much so that it must be presumed that this was not intended.

The alternative is to accept Jennings' manner and form exception. A Bill of Rights, say, could be entrenched by means of legislation which would require that any legislation attempting either to repeal any of the rights in the Bill of Rights or the means of their entrenchment would require a referendum vote in addition to the Queen acting with Parliament. But then the problem would still be present. Either the original "amending formula" would have been changed by self-embracing means (with respect to manner and form or substance as well is unimportant because in the end it binds) or this would not be a

fully self-embracing sovereignty and that would mean that the entrenchment would be vulnerable to the Queen in Parliament acting alone expressly repealing the entrenchment act. This would still be an improvement on a system without any disincentive for Parliament, but it would still be vulnerable to repeal if a majority acting through Parliament was willing to take on the Bill of Rights by direct means.

It should be noted that Wade placed the idea of an ultimate legal principle in the context of Dicey's distinction between sovereign and subordinate legislation. His comments were particularly apt when read with the Canadian Constitution, the Supreme Court of Canada and the Patriation Reference in mind:[49]

> Subordinate legislation is one which owes its immediate legal authority not to an "ultimate legal principle" but to a superior legislature. In other words, the relations between a subordinate legislature and the courts which interpret its legislation are governed not merely by political reality but by a superior legal authority to which those courts render a more devoted obedience. The courts cannot serve two masters; if there are two or more legislatures within the same legal system, there must be one to which the courts will allow the last word in any particular matter. That is the "ultimate legal principle". The distinction between sovereign and subordinate legislation is therefore this: sovereign legislation depends for its authority on an "ultimate legal principle", i.e., a political fact for which no purely legal explanation can be given; subordinate legislation depends for its authority on some ulterior legal power for which a legal explanation can be given.

The majority (law) in the Patriation Reference treated the Canadian Constitution as a piece of subordinate legislation, and there was good reason to do so perhaps when one considered subsection 7(1) of the Statute of Westminster, 1931. But that which was less reasonable, on one view of the matter, was the Court's refusal to examine the "ultimate legal principle" of apparently untrammelled and (perhaps) continuing British Parliamentary sovereignty. On Wade's account, even if the Supreme Court had deemed itself capable of considering the matter, it would not have been able to alter the prevailing view of sovereignty without accomplishing a revolution. Again, one might want to ask whether the Canadian view of Westminster parliamentary sovereignty had necessarily to square with the

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[49] Ibid., p. 189 (Wade's emphasis).

British view, but that will be considered later. In fact, the Supreme Court of Canada accepted the idea of the untrammelled sovereignty of the British Parliament but said nothing as to whether it saw that sovereignty as continuing or self-embracing. The fact that the Court did not appear to see such considerations within the realm of its judicial purview leaves a suspicion that the Court adopted the British position by default. If that was so, then we may wish to follow Wade's analysis of how and under what circumstances a Court -- Canadian, British or other -- might assume that a "revolution" has taken place regarding the "ultimate legal principle".

Wade took the example of South African independence as his example. He rejected the argument that either the Statute of Westminster, 1931 or the South African Status of the Union Act, 1934[50] could have shifted "the seat of sovereign legal power ... from Westminster to Pretoria". Earlier in the article he had noted that the rule that Parliament cannot bind its successors made it "tempting to add that Parliament's power is therefore inalienable, but that is to anticipate a question which must be investigated later on".[51] However, Wade stated that "a purely legal answer" could easily be shown to be inadequate,[52]

> for it does not explain what would happen if, to take Lord Sankey's example, the United Kingdom Parliament were to attempt to amend or repeal the Statute of Westminster. Most people would predict, if they were willing to consider so unlikely an event, that English judges would be bound to uphold the United Kingdom Parliament's power to repeal or amend the Statute, but that South African judge's would not.

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[50]Section 2 of the Act declared:

> 2. The Parliament of the Union shall be the sovereign legislative power in and over the Union, and notwithstanding anything in any other law contained, no Act of the Parliament of the United Kingdom and Northern Ireland passed after the eleventh day of December, 1931, shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union.

[51]Wade, supra, p. 174.

[52]Ibid., p. 191.

In doing so, the South African judges would have "followed the movement of political events",[53] most importantly the recognition, found in the Balfour Declaration, that the Dominions were "in no way subordinate one to another in any aspect of their domestic or external affairs". According to this view, section 2 of the Status of the Union Act could best be understood as stating "a political fact which the courts could also recognise".[54]

What then were the "ultimate legal principles" for South Africa? On Wade's account,[55] it was up to the South African courts to

> invent them, for they have to fill a vacuum. They have to decide for themselves -- for no legislation can direct them -- what they will recognise as the proper expression of the new sovereign legal power. In this they have a perfectly free choice, for legally the question is ultimate.

Later, in Chapter 4, we will have occasion to reconsider the extent to which the Canadian courts also have a "perfectly free choice" after 1982, despite having denied to themselves such a choice in the Patriation Reference. If the choice were truly "free", as Wade suggested, then it was apt to speak of "the naked fact of revolution ... beneath its elaborate legal dress".[56]

The object in reviewing the main currents of British constitutional theory, it will be remembered, is to determine if that theory can explain the irreversible nature of the 1982 "patriation". Or, keeping the discussion in amendment terms, it is to discover whether the United Kingdom Parliament could at some time in the future play a role in the Canadian constitutional amendment process. Of course, the Canadian assumption is that it could not. If British theory can provide a reliable explanation for that assumption, then the fact that the Supreme Court of Canada adopted a Patriation theory framed in turn by British theory will not have caused any conceptual difficulties in understanding Canada's complete and

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[53] Ibid.
[54] Ibid.
[55] Ibid., p. 192.
[56] Ibid., p. 191.

permanent legal independence since 1982. It might strike some as odd that Canada should depend on British constitutional theory (in addition to British statutes) for its legal independence, but if the theory is reliable then perhaps Canadians should not be so churlish as to ignore it.

It may be useful at this point, then, to review what I have referred to as the main currents of British constitutional theory. We are particularly concerned about the Diceyan notion of Parliament's inability to bind its successors as this would seem to authorize the United Kingdom Parliament to legislate for Canada at any time, either by direct legislation (and consequent implied repeal) or by repealing the Canada Act 1982 and following with legislation. It may also be important to determine the different roles of the United Kingdom Parliament and the courts which consider themselves to be bound by the laws of that Parliament. According to the theory set out by the majority in the Patriation Reference, the Supreme Court of Canada could still be such a "subordinate" court. The Court would certainly not deny that the new constitutional amending formula in Part V of the Constitution is valid until repealed, but it would have to acknowledge that the continuing sovereignty of the United Kingdom Parliament would dictate that if ever that Parliament legislated for Canada those enactments would take precedence. Looked at in amending formula terms, if the United Kingdom Parliament's powers acting in its constituent capacity are interpreted, according to the constitutional theory accepted by the courts, to be continuing rather than self-embracing, then the Canadian Part V amendment process could only be seen as subordinate legislation, amendable at any time according to the permanent amendment process at Westminster. Strong conventions might militate against this possibility so much so that Part V could be considered for all intents and purposes supreme, but the possibility of recourse to Westminster would always be present in law, and the Supreme Court of Canada might feel obliged to acknowledge this if ever it were required to treat the question. Another way of looking at the problem might be to ask how, if at all, the British amendment process could change, whether by legislation or by change in theoretical understandings of the British constitution confirmed by the courts.

The approach adopted by Professor Wade assumed that the ultimate British legal principle is already established and can be treated almost as if it governs a constitutional provision on amendment (not in the sense that it is entrenched but in the sense that it is supreme). The constituent (or constitutional amendment) process happens in this case to be identical to the legislative process. The content of this "constitutional provision" on amendment in its detailed form would be that the British constitution can be added to or amended by the Queen-in-Parliament, the parliamentary bodies (the House of Lords and Commons) voting according to majority rules. Furthermore, the ultimate legal principle appeared to recognize the rules of implied repeal, suggesting that the sovereignty was of the continuing type. Wade perhaps assumed that even though this formula was not spelled out in a decision of the courts it could be inferred from the practice of those courts and political institutions over time. In effect, then, historical and political facts (as represented in the ultimate legal principle) had established an amending formula of the type described above which had to be interpreted according to the notion of continuing sovereignty. And, as we have seen, Wade believed that no ordinary legislation could alter the fact of that continuing sovereignty. Presumably, the judges who applied the rule could also change the interpretation of it, but on Wade's account, they could only do so by "revolution" in response to political facts. Perhaps the typically peaceful progress of the English constitution would also condemn it to perpetual adherence to the idea of continuing sovereignty.

The Jennings approach was far less theoretical. Jennings accepted that the Queen-in-Parliament had the power to make laws, but stated that this was a rule of the common law, which, like other rules of the common law, could be altered by statute. If he had had the benefit of reading Wade's criticisms he might have wished to state instead that the common law had simply not dealt conclusively with the idea of the true nature of legal

sovereignty and that, until it did so, new approaches could be suggested, enacted by Parliament and eventually considered by courts.[57]

If Parliament legislated with respect to the manner and form (say, a two-thirds majority requirement) of British legislation of a certain type (say, regarding human rights), then the courts would have to determine whether proposed subsequent legislation relating to human rights passed by simple majority voting rules could in fact be recognised as an enactment by the Queen-in-Parliament. If the courts refused to do so, then it might well have opened the door for a whole new range of possibilities for British legislative draftsmen, effectively touching off a revolution;[58] but in doing so the courts would be acting no differently from the way they do in formulating rules in other difficult areas of the common law, that is, by providing legal answers to previously unexplored questions. The question then is whether constitutional, or fundamental rules, should be deemed to have been presumed whereas as other rules, say those respecting private law, can be dealt with and elaborated on a case by case basis, or whether all rules should be dealt with similarly, that is by the method of gradual elaboration favoured by the common law. Wade clearly favoured the former attitude, whereas Jennings and his followers seemed to require that the latter route be taken.

Our purpose here is not to resolve an ongoing debate in English constitutional law. It is more important to determine how the course of this debate may have affected the strength of the Patriation theory, in as much as it appeared to rely on British explanations of Canadian constitutional development.

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[57]Marshall seem to adopt this more realistic improvement on Jennings in G. Marshall, Constitutional Theory (Oxford, 1971), p. 53.

[58]The court would have accepted the possibility of a self-embracing conception of amendment, whereby the existing amending formula (vaguely understood as the Queen-in-Parliament voting by majority) could be used to create new amending formulae, and eventually even to replace itself entirely. This process would amount to building up a Constitution over time (that is, by gradually entrenching important rules), as opposed to the usual mode of working "down" from the Constitution to the subordinate legislation created according to the terms of that Constitution.

Writing in 1971, Dr Geoffrey Marshall expressed his approval for what he referred to as the "new view", by which he meant the approach taken by Jennings in The Law and the Constitution and by Marshall himself in his Parliamentary Sovereignty and the Commonwealth.[59] He summarized the "new view" and referred to its level of acceptance at that moment:[60]

> On this view a sovereign legislature may validly reformulate what shall count as legislation for particular purposes. Unfortunately for the science of politics the "new view" is far from being a unanimous view. There is no case decided in an English court which can be cited as clearly supporting it. There are cases which, though they may be explained away as irrelevant, appear to tell against it, as do the uncompromising but ambiguous statements of Coke, Blackstone, and Dicey that Parliament cannot "bind" its successors.

After reviewing and improving on the "new view", Marshall admitted that only the British courts could decide the matter ultimately, in response to attempted manner and form limitations in legislation by Parliament, and that there were no precedents. In his view, however, the "new view" was to be preferred:[61]

> Which propositions, if any, the British courts would accept remains a matter for the future. It has, in fact, never been necessary for a court in this country to decide the points in issue between the older and newer doctrines of Parliamentary supremacy, since Parliament has never attempted to use its authority to regulate the future by an explicit reformulation of legislative procedure accompanied by entrenchment. But the balance of argument seems to favour one form or another of the newer theory. If valid distinctions can be made between substantive limitations on policy on the one hand and reconstitution and structure, and reformulation of procedure on the other, the traditional theses about Parliament's sovereign inability to bind successor Parliaments and about the enforcement of later statutes, at the expense of earlier ones, simply evade the fundamental issues as to the way in which rules defining "successors", "Parliament", and "statute" may be made and altered.

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[59](Oxford, 1957) chaps 2-4. See also E.C.S. Wade in Dicey, supra, pp. xxxiv-xcvi.

[60]Marshall, Constitutional Theory, supra, p. 43.

[61]Ibid., p. 53.

How then does the fate of the "new view" affect the prospects for a Patriation theory explanation of the supposedly irreversible legislation of the United Kingdom Parliament in 1982?

Writing in 1984, Dr Marshall summarised the ways in which new developments in British constitutional theory might accommodate the idea of a termination of the United Kingdom Parliament authority to legislate for a particular territory. After setting out the difficulties presented by the traditional theory of parliamentary sovereignty as described by Dicey, Marshall then set out that which was in his view the proper approach, in his discussion of the question whether the post-1982 Canadian constitution could be said to have a native root (or autochthony):[62]

> The answer ought to be that constitutionally -- as distinct from emotionally -- speaking it does not matter at all, since preservation of the British historical legal root is compatible with its being the case that the Westminster Parliament is no longer able to legislate for Canada or to reverse the process by which its former authority was terminated.
>
> At this point, therefore, it is necessary to enquire wither the termination of United Kingdom authority by s. 2 of the Canada Act <u>is</u> irreversible.

In so far as Marshall could explain this termination of United Kingdom authority according to the rules of British constitutional law, his findings would be particularly useful to the Patriation theorists.

Marshall put forward two new approaches, acknowledging all the while that "we are operating here at the untested limits of the traditional doctrine":[63]

> Developments since Dicey suggest that there are ways of accommodating within the doctrine, the notion of an extinction of Westminster authority over a particular area. One way is to suppose that for British courts independence legislation is an extreme case of a manner and form provision that changes the way in which legislative authority can be exercised for

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[62] G. Marshall, <u>Constitutional Conventions</u> (Oxford, 1984), p. 207.

[63] <u>Ibid</u>., p. 209.

> particular purposes. A simpler expedient, though it would modify the traditional theory, is to extend Dicey's cases of abdication so that "freedom once conferred cannot be revoked".

Whatever, the theoretical merit of such approaches. there is no consensus in British constitutional theory as to their validity. Very recently, in the Manuel case,[64] some doubt was expressed regarding similar approaches. As to the first approach, Megarry V.-C. gave no precise opinion, but referred instead to the article on sovereignty by Professor H.W.R. Wade[65] discussed earlier in which it was argued that "there is one, and only one, limit to Parliament's legal power: it cannot detract form its own continuing sovereignty". As we have seen, Wade had strongly rejected the idea, put forward most coherently by Sir Ivor Jennings,[66] that there could be a "manner and form exception" to the traditional doctrine of parliamentary sovereignty.[67] As to the second approach, Megarry V.-C. was inclined to

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[64]Manuel v. A.G. [1983] Ch. 77 (High Ct) 95 (C.A.).

[65]Wade, "The Basis of Legal Sovereignty", supra.

[66]Jennings, The Law and the Constitution, supra, p. 142.

[67]In Manuel, supra, p. 87, Megarry V.-C. took the traditional approach. After reciting the words of enactment in which it was indicated that the Queen-in-Parliament had approved of the Canada Act, he stated:

> There has been no suggestion that the copy before me is not a true copy of the Act itself, or that it was not passed by the House of Commons and the House of Lords, or did not receive the Royal Assent. The Act is therefore and Act of Parliament and the court cannot hold it to be invalid.

And further along, ibid., p. 87, he stated a view which was equally compatible with the traditional view:

> I do not think that, as a matter of law, it makes any difference if the Act in question purports to apply outside the United Kingdom. I speak ... also of statutes purporting to apply to other countries. If that other country is a colony, the English courts will apply the Act even if the colony is in a state of revolt against the Crown and direct enforcement of the decision may be impossible: see Madzimbamuto v. Lardner-Burke [1969] 1 A.C. 645. ... Similarly if the other country is a foreign state which has never been British, I do not think that any English court would or could declare the Act ultra vires and void. No doubt the Act would normally be ignored by the foreign state and would not be enforced by it, but that would not invalidate the Act in this country. ... Legal validity is one thing, enforceability is another. ...
>
> I do not think that countries which were once colonies but have since been granted independence are in any different position. Plainly once statute has granted independence to a country, the repeal of the statute will not make the country dependent once more; what is done is done, and is not undone by revoking the authority to do it. ...
>
> But if Parliament then passes and Act applying to such a country, I cannot see why that Act should not be in the same position as an Act applying to what has always been a foreign country, namely an Act which the English courts will recognise and apply but one which the other country will in all probability ignore.

interpret the view of Lord Denning M.R. expressed in Blackburn v. Attorney General[68] that no one could imagine "that Parliament could or would reverse the Statute [of Westminster]"[69] as meaning that no one could imagine it doing so "effectively", for the Courts of the Dominions would of course ignore such action. As a matter of law, however, as far as English courts were concerned, Lord Denning's statement had to be read in light of the position laid out by Viscount Sankey L.C. in British Coal Corporation v. The King that Parliament could as a matter of abstract law go ahead and reverse the Statute. Megarry V.-C. put his views in the following terms and, in so doing, pointed to a solution based on an Independence theory:[70]

> I have grave doubts about the theory of the transfer of sovereignty as affecting the competence of Parliament. In my view, it is a fundamental of the English constitution that Parliament is supreme. As a matter of law the courts of England recognise Parliament as being omnipotent in all save the power to destroy its own omnipotence. Under the authority of Parliament the courts of a territory may be released from their legal duty to obey Parliament, but that does not trench on the acceptance by the English courts of all that Parliament does. Nor must validity in law be confused with practical enforceability.

This view seemed to suggest that as long as British constitutional theory could be said to apply to the Canadian constitution, the doctrine of Parliamentary sovereignty with all that it implied would also apply. And if local courts continued to accept British constitutional theory, then presumably they would have a duty to obey Parliament as soon as Parliament repealed the liberating legislation. Megarry V.-C. appeared to agree with the statement that "freedom once given could not be taken away" in the political sense, but he could not agree with it as a matter of abstract law. As a matter of law, he agreed with Viscount Sankey L.C. in the British Coal Corporation case, referred to earlier, that Parliament could at any time repeal or disregard any statute, including one purporting to grant independence. The

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[68][1971] 1 W.L.R. 1037, p. 1040 (C.A.).

[69]Manuel, supra, p. 89.

[70]Ibid., p. 68. See also the quotation from the judgment of Megarry V.-C. set out in the note 67, supra.

only escape, it seemed, lay not in British theory but in an independent legal theory developed by the Canadian legal community and enforced by Canadian courts.

Slade L.J. in the Court of Appeal[71] noted that there was a clear division of opinion as to whether the United Kingdom Parliament could effectively tie the hands of its successors, but he did not find it necessary to deal with the issue. The House of Lords refused a petition for leave to appeal.[72]

More recently, the issue of Westminster parliamentary sovereignty has been considered in the context of the United Kingdom's legal position regarding the European Community. In the Factortame series of cases, the House of Lords[73] (in conjunction with the European Court of Justice) made it clear that the old rule of implied repeal had been severely watered down with the accession of Britain to the Community and, more importantly, the passage of the European Communities Act 1972.[74] From 1972, it had now become clear, European Community law prevailed over British common law and statute alike. Professor H.W.R. Wade commented that "a constitutional revolution"[75] had indeed occurred as he had considered in his earlier writings. Clearly Parliament's sovereignty was no longer unqualified, absolute or untrammelled for all intents and purposes.

But did the European developments and Factortame-prompted reevaluation of sovereignty affect the sovereignty-related issues that interested Canada? In order to answer that question we would have to know whether the ultimate law-maker remained the Queen-in-Parliament. Wade himself acknowledged that "[t]he only remnant of the old unqualified sovereignty is Parliament's ability to legislate in deliberate breach of the Treaty",[76] and

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[71]Ibid., pp. 99-110 (speaking on behalf of Cumming-Bruce and Eveleigh LJJ.

[72]Ibid., p. 110.

[73]R. v. Secretary of State for Transport, ex parte Factortame [1990] A.C. 85.

[74]Ch. 68 (U.K.)

[75](1991) 107 LQR 1 at p. 4.

[76]Ibid., p. 3.

others have acknowledged that if the United Kingdom decided to repeal the 1972 Act, it could do so and the courts would probably comply.[77] If that is true then, in the ultimate sense which interests us, the idea of continuing sovereignty has not been discarded and the state of British opinion on the matter remains at best unsettled and judicially untested.

The "untested" British solutions to the problem of continuing Parliamentary sovereignty present at best a precarious justification for the removal of the Canadian legal system post-1982 from the sovereignty of the United Kingdom Parliament. Many British (and of course Canadian)[78] commentators were quite prepared to admit that Canadian courts would simply ignore any attempt by that Parliament to legislate as if its continuing sovereignty justified its doing so, but such remarks seemed to call on an explanation which was based in Canadian constitutional theory, or least, on an independent Canadian understanding of British theory, which in the end amounted to the same.

Remaining for the moment within the confines of British theory, it seems clear that if anyone were to feel certain that the Imperial link had been definitively severed, some of the theories modifying the traditional theory of Parliamentary sovereignty (as discussed by Jennings, Marshall and others) would have to be accepted by the British courts, and for that to happen there would apparently have to be some evolution in their thinking, at least beyond British Coal Corporation and the other cases mentioned by Wade. Whether one would wish to speak of this extra-legally as a revolution or legally as a radical and

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[77]See, e.g., A.W. Bradley, "The Sovereignty of Parliament" in J. Jowell and D. Oliver, eds, The Changing Constitution, 2nd ed. (Oxford, 1989), p. 38:

> When [the 1972 Act] provisions were debated in Parliament, it was widely agreed that they did not exclude the possibility that the United Kingdom Parliament might one day wish to repeal the Act and thus effectively prevent the continued operation of Community law within the United Kingdom. In this sense, the ultimate sovereignty of Westminster was not affected, as ministers admitted, even though they refused to allow a statement to this effect to be included in the Act.

Bradley, ibid., pp. 34-5. also expressed the view that despite significant academic questioning, continuing sovereignty continues to be the rule in British constitutional law, overwhelming even manner and form schemes for entrenchment of, say, a British bill of rights.

[78]See, e.g., G. Marshall, Constitutional Theory p. 63; Bradley, ibid., p. 33; and Hogg, supra, p. 49. See also the extracts form Megarry V.-C.'s judgment set out, supra.

important development in the common law, it would require that the British courts travel some distance.

But if it were possible for British constitutional theory to evolve and to be reflected in changed form by the courts, then would it not be possible for Canadian theory to evolve and be reflected eventually by Canadian courts, and this in a way which was possibly but certainly not necessarily in the same direction as the British theory and courts. Canadian courts could, of course, continue to develop a Canadian theory on the basis of British constraints, but to do so would seem unnecessarily rigid. If a Canadian theory were to evolve would it not be most appropriate if it did so on the basis of factors which were relevant to the Canadian legal system? If so, then Canada could develop an independent Canadian constitutional theory of the type discussed earlier in the context of the Independence theory. Initially such a theory might be developed within the Canadian legal community, but eventually it could be accepted by the courts. If this were ever to happen a clear legal understanding of this process would have to be available. That legal understanding could no doubt be aided by comparative constitutional law, including British constitutional law and theory, but ultimately it would be up to the Supreme Court of Canada to decide. Its decision would be that much more convincing if based in Canadian realities.

Looking at the question of amendment from a Canadian perspective, then, we return to the troublesome precedent of the Patriation Reference and the Patriation theory which was adopted there by the majority. Even if one accepted that the Supreme Court of Canada was free to develop a Canadian constitutional theory once the Constitution had arrived in its new Canadian "domicile", how would that new theory be elaborated, assuming that the Court would want to explain it in terms which were consistent with the Patriation Reference precedent, in so far as that would be possible. Canada had after all gone to great, even excessive on one view, pains to follow the rule of law in "patriating" its Constitution. It might expect a legal explanation for that process. And if, as was to be

hoped, it could explain the absolute termination of the power of the British Parliament to legislate valid law for Canada. then that would not prove anything in British law (or theory), however tempting it might be for partisans of the "new" school to say so. The reason for this is that a Canadian understanding of that process would be understandable in Canadian terms and could not in any way affect the powers of the United Kingdom Parliament to legislate for Canada as understood in British terms.

It is very common in both Canadian and British constitutional theory to assert that Canadian (or other former colonial) courts would simply ignore an attempt by the Westminster Parliament to reassert its legislative power. This point seems unquestionable as a matter of political fact, but it raises theoretical problems, in Canada at least, as a matter of law.

How could Canadian courts explain the termination of the Westminster Parliament's power? The Supreme Court of Canada and many constitutional commentators who were partial to the Patriation theory embraced the idea of the untrammelled authority of the Westminster Parliament. As we have seen, the dominance of the Patriation theory led to the unsavoury (at least to the Canadian palate) idea that the Supreme Court of Canada would have deemed itself powerless, prior to 1982, to declare invalid a United Kingdom Parliament enactment affecting the federal nature of Canada, even without any provincial consent, or perhaps even without any Canadian consent at all. Of course, the Court might have found a way to deal with such eventualities had they arisen, but regarding the first scenario, the Patriation Reference appeared to leave the way wide open for unilateral federal action of <u>any</u> sort, and in the second scenario, the minority (law) was even willing to accept the possibility of unrequested British legislative interference without the question having even been asked. The majority (law) conspicuously ignored this possibility, although the repeated references to the United Kingdom Parliaments untrammelled powers begged for qualification. We have already seen that the Canadian Minister of Justice, for obvious political reasons, was willing to accept the idea of a complete and unobstructed legal power

in the Westminster Parliament to remodel Confederation without any Canadian request or consent. In the event that the Supreme Court of Canada had felt itself obliged to rule such legislation invalid, it seems likely that it would not have done so by means of the weak tenets of the Patriation theory.

How would the Supreme Court of Canada which had espoused a Patriation theory in 1981 rule that any enactments for Canada by the legally untrammelled Westminster Parliament after 1982 were invalid? Perhaps it would say that the turtle of the United Kingdom Parliament had been switched for a Canadian turtle, to use F.R. Scott's analogy. But if that is what it would do, then how would it explain this seemingly magical process? To put the question back into its legal context, the Supreme Court of Canada would have to explain how respect for the existing rule of law in 1982, that is amendment by means of the United Kingdom Parliament, had successfully broken the legal link with that same Parliament.

As we have seen, the Supreme Court of Canada could, consistently with its judgment in the Patriation Reference, adopt some version of the British "new view" in order to conclude that the once-untrammelled power of the United Kingdom Parliament had been at the least harnessed if not terminated. This might satisfy one sort of legal logic, but it would suffer from the oddity of explaining the identity of the Canadian legal system in British terms. That which seemed unnecessarily colonial following the acquisition of political independence earlier in the century had at least some explanation in the remaining link to the United Kingdom Parliament for constitutional amendment. But once that link for amendment purposes had been purportedly ended, it was odd to explain the new situation in terms of the powers of that same United Kingdom Parliament. Why, it might be argued, should the United Kingdom Parliament not be permitted to legislate for Canada in any way it wanted? The important change was that such legislation would be ignored in Canada. If the "new view" required support, it could find it in the British context on matters which could be determined by the British courts. The Canadian response required

a Canadian solution. Some elements of that Canadian solution will be discussed in Chapter 4.

CHAPTER FOUR

RESOLVING THE DILEMMA

It was stated at the outset of this Part that it would be idle to deny the historical and legal link of the United Kingdom Parliament to the Canadian Constitution. Clearly that is what originally gave the written constitution its legal validity. But that is not the question which we have to consider. The question takes for granted that historical legal link and asks whether the new amending formula (Part V of the 1982 Act) replaced the old one (the Queen in the United Kingdom Parliament), or whether the new remained subject to the old. The assumption in this analysis is that a credible legal answer to this question was influenced by law (written texts and the common law), logic and history, but was ultimately best determined at the level of political and constitutional theory.

We have already extrapolated and described a post-1982 Patriation (and sovereignty) theory and found possible answers within that theory. If the Patriation theory is still understood to be limited by British understandings of Parliamentary sovereignty then the matter is at best undetermined, and full Canadian legal independence is dependent on further developments in the theory regarding the United Kingdom Parliament's power to bind its successors. If the Patriation theory is now understood to be freed of British understandings of Parliamentary sovereignty post-1982 then the "new view" can be adopted at any time.

A different view will be proposed here, however. It will be argued that the Independence theory approach to the Canadian constitution was not to be totally disregarded. In fact it complemented or completed the Patriation theory. Political independence and the recognition of autonomous, equal status in the Commonwealth had

been recognised in 1926. It was not necessarily incompatible with political independence for a nation to decide, according to the appropriate internal means for its decision making, to rely on the Parliament of another nation for amendments to its Constitution. This could indeed be viewed as anachronistic or even humiliating, but there was nothing flowing from the fact of political independence which prevented such an arrangement. Professor Brian Slattery's argument is weakened by reliance on this assumption, as we have seen in Chapter 2.[1]

If Canada's coming of age in the earlier part of this century did not lead to any necessary or inevitable legal conclusions, it might at least have been seen to justify or encourage the development of a distinctly Canadian constitutional theory. This should have been especially so when the Supreme Court of Canada took over from the pan-Commonwealth-orientated Judicial Committee of the Privy Council.[2] Thus, as far as constitutional amendment was concerned, and as part of a distinct Canadian theory, it would be fair, and (as we will see) consistent with the Patriation Reference, to look back at the Statute of Westminster, 1931 and interpret it as representing a choice by Canada to retain the United Kingdom Parliament for amendments to the Canadian Constitution, but to do so only until a domestic amending formula could be found. The Federal-Provincial Conferences of 1927 and 1930-1 were evidence of this intention, if evidence were required. When looked at as a "chosen" amending formula, then, it could properly be understood and interpreted as "the Constitution of Canada may be amended by the United Kingdom Parliament until such time as that process could be used to replace itself". Though not contemplated in the arcane terms of constitutional theory, the Canadian understanding, or at least what came to be the Canadian understanding,[3] of that amending

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[1]See B. Slattery, The Independence of Canada (1983) 5 Sup. Ct L. Rev. 369.

[2]See Alan C. Cairns, Charter versus Federalism: The Dilemmas of Constitutional Reform (Montreal, 1992), p. 19 on the importance of the transition from Judicial Committee to Supreme Court as highest court of appeal for Canada.

[3]This approach accepts that in logic some answer to the continuing/self-embracing question must eventually be decided, but given that the distinction was not as well understood in 1931 (if at all) as it was in 1982, say, a Court which attributes a self-embracing understanding to the Canadian position in 1931 is being possibly ahistorical. However, it is part of the nature of law, and especially court-developed law, that

formula was that it could provide for its own replacement. That amounted to saying, in British terms, that the United Kingdom Parliament was not sovereign on a continuing basis but rather on a self-embracing basis. However, there was no need to enter into that British debate. All that was required was that the idea of self-embracing sovereignty be coherent for Canadian purposes, and, as we will see, it was.

On this view, then, the Patriation Reference was authority only for the fact that the United Kingdom Parliament retained the full legal power to amend the Canadian Constitution post-1931 and pre-1982. And though the majority could have found limits on this power consistent with Canadian federalism and political independence, its refusal to do so could be understood as a type of judicial restraint which was justifiable in the context of a decision on the corrective device of last resort for the political process to overturn decisions by the judicial branch.[4] For all its references to the untrammelled power, or full scope, of the United Kingdom Parliament, the majority in the Patriation Reference said nothing about the ability of Parliament to bind its successors. It was not required to pronounce on that matter. The statements to the effect that the Canadian court could not pronounce on the powers of the United Kingdom Parliament were unnecessarily timid, especially if understood as referring to the powers of that Parliament with respect to Canada and Canadian law, but this could be explained as part of the same judicial restraint referred to above.

As we have seen, the "Canadian" amending process chosen in 1931 (i.e., proceeding via the United Kingdom Parliament) was used on numerous occasions, notably in 1949 to provide for a new amending formula for the federal Parliament acting alone to alter certain parts of the federal part of the Constitution.[5] This still left an important, and notionally superior, power with the United Kingdom Parliament. That power was used in

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patterns which may not have been visible at one time become exposed in response to a case which puts the appropriate question to the courts.

[4]This point will be discussed in greater detail in Chapter 7.

[5]See British North America (No. 2) Act, 1949, 13 Geo. VI, c. 81 (U.K.) now repealed.

1982. The language which was used in both the Canada Act 1982 and the Constitution Act, 1982 should have been sufficient for any Canadian court to conclude that the previous amending process (the United Kingdom Parliament) had been used finally to replace itself completely. And given the Canadian understanding of self-embracing sovereignty of the previous amending formula, this had to be interpreted as an irreversible act. The United Kingdom Parliament amending formula was not being used to create a subordinate piece of legislation; it was being used to replace itself. And, as we know, and as the Quebec Reference appeared to acknowledge, the Part V replacement was now supreme, along with the rest of the Constitution. Part V left no doubt as to the question of self-embracing versus continuing sovereignty. Section 41 indicated that the amending formula could be replaced by all the provinces and the federal Parliament acting together.[6] Only that constituent body could restore the United Kingdom Parliament's earlier role, and that it was never likely to do.

If this explanation is satisfactory, borrowing as it does from both the Patriation theory and the Independence theory, it does not explain the whole process. We are still left to wonder how it was that the ultimate rule or basic norm of the Canadian legal system changed or evolved from continuing to self-embracing sovereignty, and how it might be that the Supreme Court of Canada could explain that change or evolution if ever it were asked to consider the question.

According to one view of the matter (also that which was adopted by Professor F.R. Scott in the article referred to above), the Canadian courts could claim to recognize a new grundnorm. The idea of the grundnorm came from the writings of Hans Kelsen.

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[6]Section 41(e) of the Constitution Act, 1982 reads as follows:

> **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:
>
> ...
>
> (e) an amendment to this Part.

However, the logic of Kelsen's argument did not provide a clear answer to the problem of independence. In fact, it appeared to impose an unbreakable hold, just as the doctrine of continuing Parliamentary sovereignty had done, as we have just seen.

In Kelsen's eyes the grundnorm, or basic norm, was logically connected to the legal system: "All the norms whose validity may be traced back to one and the same basic norm form a system of norms, or an order". [7] He suggested that all the laws in a legal system can be traced back to "some constitution that is first historically"[8], and that the validity of this first constitution was the "final postulate" upon which the validity of all the norms of the legal system depended: "All these legal norms belong to one and the same legal order because their validity can be traced back -- directly to the first constitution."[9] And, of course, the validity of the first constitution was dependent on the grundnorm: "That the first constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of this legal order."[10]

As described by Professor Scott, the grundnorm had a liberating potential. Once Canada could acquire its own grundnorm, it would be free of the authority of the Imperial sovereign. However, if all the norms which could be traced back to the basic norm formed part of the same legal system, then it was difficult to see how the Canadian penchant for following the rule of law as scrupulously as possible could ever separate Canada from the United Kingdom legal system. According to Kelsen, "the State and its legal order remain the same only as long as the constitution is intact or changed according to its own provisions", or viewed in another way, "[a] State remains the same as long as the continuity of the legal order is maintained ...".[11]

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[7] H. Kelsen, General Theory of Law and State (Cambridge, Mass., 1949), p. 111.
[8] Ibid., p. 115.
[9] Ibid.
[10] Ibid.
[11] Ibid., p. 219.

Kelsen's theory of the identity of a legal system was found to be quite useful in justifying the fact that a revolution or coup d'état had successfully imposed a new legal order by virtue of having violated the provisions of the previous constitutional régime. It was difficult, however, to conceive of the Canadian experience in such terms.

Instead, Canadian history indicated that the historically first constitution was the unwritten British constitution, and that it had been followed. The basic norm of the British constitution was presumably something similar to that which Wade[12] had identified as the "ultimate legal principle", although the latter was conceived of as a matter of fact, whereas the former was deemed to be a logical requirement. Staying with Kelsen's analysis in the Canadian context, it appeared that the British constitution had been respected. How then could it be said that the Canadian legal system was separate and distinct from the British legal system? Kelsen's model appeared to make the fact of a historical legal link determinative.

Rather than try to untangle the analysis according to Kelsen and his (in)famous grundnorm, it may be more useful to move on to those following Kelsen who adapted his ideas into what proved to be a more manageable model.

Professor H.L.A. Hart rejected Kelsen's idea that the validity of a basic norm had to be assumed or postulated. For Hart, validity was a question of fact, specifically "the actual practice of the courts and officials of the system when identifying the law which they are to apply".[13] Hart underlined the importance of habitual and factual use by calling his substitute for the grundnorm the "rule of recognition". The most basic of the rules of recognition he referred to as the "ultimate rule of recognition".[14]

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[12]H.W.R. Wade, "The Basis of Legal Sovereignty" [1955] C.L.J. 172.
[13]H.L.A. Hart, The Concept of Law (Oxford, 1961), p. 245n.
[14]Ibid., ch. 6.

Whereas Kelsen's grundnorm was unchangeable, given its position at the pinnacle and, especially, at the source of the legal system, the rule of recognition could change over time, in accordance with the courts' and officials' changing attitudes towards that which should be recognized as valid law in the legal system.[15] Kelsen placed considerable emphasis on the horizontal or temporal axis of the legal system, that is, the tracing of validity through time. Hart was far more concerned with what Kelsen had referred to as the vertical "hierarchy of norms" and the question of what was considered valid at any given moment in the life of the legal system. It is easy to see how the concept of a legal system was quite vital to Kelsen's approach though far less so for Hart. Kelsen's criteria for the existence of a legal system was, as we have seen, a juristic one. It was determined according to an unblemished legal attachment to the historically first constitution. Hart's analysis did not require a historically first constitution; validity could be determined by reference to the facts of the present. And Hart gave little indication as to what, in his view, constituted a discrete legal system. In so far as he indicated any view, he appeared to subscribe generally to Kelsen's assertion that the concept of a legal system was a legal question when viewed by those who were part of the system.[16] Only those who were outside the system might wish to refer to the rule of recognition as a question of politics upon which recognition of the validity of the rest of the legal rules depended. Beyond this entry into the world of the "political", Hart was no more inclined than Kelsen to look to other non-legal factors as relevant to the concept and existence of discrete legal systems.[17]

The closest Hart came to describing and distinguishing legal systems was in examining what he referred to as "the pathology of the legal system".[18] His discussion of

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[15] Ibid., p. 246n.

[16] Ibid., p. 108.

[17] Both Kelsen and Hart discussed the necessity of the effectiveness of the legal system or obedience to its rules, but these considerations certainly do not appear to affect the content of the grundnorm or the rule of recognition. In other words, neither (certainly not Kelsen) appeared to be interested in how the most basic rule of the legal system developed and whether or not it could be said usually to mirror social or political developments. The grundnorm was unchanging while the rule of recognition was a question of fact, leaving the question of how and on what basis it was formulated to the wind.

[18] Hart, supra, p. 114.

Commonwealth developments provided useful material for our analysis of the Canadian situation. As difficult as it was according to Kelsen's criteria to get out from under the legal authority of the United Kingdom Parliament, on Hart's account the process was a simple as a change in the ultimate rule of recognition:[19]

> At the end of the period of development [from colony to independent nation] we find that the ultimate rule of recognition has shifted, for the legal competence of the Westminster Parliament to legislate for the colony is no longer recognized in its courts. It is still true that much of the constitutional structure of the former colony is to be found in the original statute of the Westminster Parliament: but this is now only an historical fact, for it no longer owes its contemporary legal status in the territory to the authority of the Westminster Parliament. The legal system in the former colony has now a "local root" in that the rule of recognition specifying the ultimate criteria of legal validity no longer refers to enactments of a legislature of another territory. The new rule rests simply on the fact that it is accepted and used as such a rule in the judicial and other official operations of a local system whose rules are generally obeyed.

According to this theory, then, the transition from the Imperial legal system to a Canadian legal system is clearly possible. That which is not clear is how the courts of the Canadian legal system could explain what has come about. If the process had been one of true revolution, as Professor Wade described it, one would not necessarily expect such a legal explanation, but the Canadian process (as well as other Commonwealth "decolonization" processes) purported to be legal and could presumably be explained in legal terms.

In one sense, the rule of recognition could always be understood in what Hart saw as a legal context, that is , from the internal perspective. But it is one thing to say that the ultimate rule of recognition is legal when viewed internally and quite another to explain how, in legal terms, the ultimate rule of recognition of one momentary system was transformed by legal means into the ultimate rule of recognition of another legal system. All that we know is that -- and this is by now familiar -- the courts of the former colony would not "recognize" as valid law for the new legal system any enactment by the

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[19] Ibid., p. 117.

Westminster Parliament. Hart noted that the idea of termination of power to legislate would not necessarily be accepted by the British courts, confirming thereby the opinion expressed in the last chapter:[20]

> The parent legislature may ... finally retire from the scene by renouncing legislative power over the former colony. Here it is to be noted that there are theoretical doubts as to whether the courts in the United Kingdom would recognize the legal competence of the Westminster Parliament thus irrevocably to cut down its powers.

Hart stated very clearly the idea that it would be entirely acceptable for there to be different, even incompatible British and Canadian understandings, and, as we have seen in discussing the Independence theory, there would be no reason to assume that such could not have been the case even before 1982:[21]

> [I]t is possible that though in fact the legal system of the colony is now independent of its parent, the parent system may not recognize this fact. It may still be part of English law [as determined by the English rule of recognition] that the Westminster Parliament has retained, or can legally regain, power to legislate for the colony; and the domestic English courts may, if any cases involving a conflict between a Westminster statute and one of the local legislature comes before them, give effect to this view of the matter. In this case propositions of English law seem to conflict with fact. The law of the colony is <u>not</u> recognized in English courts as being what it is in fact: an independent legal system with its own local, ultimate rule of recognition. As a matter of fact there will be two legal systems, where English law will insist that there is only one. But, just because one assertion is a statement of fact and the other a proposition of (English) law, the two do not logically conflict. To make the position clear we can, if we like, say that the statement of fact is true and the proposition of English law is "correct in English law".

This view of the matter seems to clarify some of the divisions in Canadian constitutional theory that were discussed in earlier chapters. Depending on what the Canadian courts were willing to recognize as the highest source of legal validity prior to 1982, the Canadian legal system could at any time have had as its ultimate rule of recognition the British or Imperial rule of recognition (the Queen in the Imperial Parliament)

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[20] <u>Ibid</u>.

[21] <u>Ibid</u>., p. 118. To repeat, the more difficult question is to understand how the local courts justify the adoption of a new ultimate rule of recognition.

or any Canadian variation on that rule.[22] The first interpretation of that rule was the Patriation theory, but once the possibility of an independent Canadian understanding of the ultimate rule of recognition was raised, the variations were limited only by their plausibility.

As noted above, Hart does not explain how or why the ultimate rule of recognition changes. In our case, we want to know how the ultimate rule of recognition for Canada pre-1982 (say, the Queen in the United Kingdom Parliament acting on Canadian request and consent) became the post-1982 ultimate rule (validity ultimately and exclusively determined according to the amendment rules as set out in Part V of the Constitution). It will perhaps be necessary to look more closely at the content of the pre-1982 rule, and Hart's analysis may still be useful in that respect.

Hart observed that the ultimate rule of recognition is like other rules in that it may disclose clear answers to "clear central cases" without providing any obvious directions to cases falling within "the penumbra of doubt". Here we could open up a discussion of whether in the penumbra the courts are not bound by legal constraints or whether they must try to draw on the deeper principles of the legal system. However, when discussing the ultimate rule of recognition, the problem is even more severe. It is very rare that the courts or even legislatures provide any indication of the character of this fundamental rule, and we are left to presume and predict.

Hart dealt with the subject of uncertainty in the ultimate rule of recognition elsewhere in The Concept of Law.[23] Regarding the British rule, he stressed that the formulation "Whatever the Queen in Parliament enacts is law" was satisfactory in most

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[22]For instance, any of the following possibilities: the Queen in the Westminster Parliament acting (1) only with respect to constitutional amendment; (2) constitutional amendments with Canadian request and consent stated in the enactment; (3) request and consent actually obtained; (4) consent of federal, provincial and aboriginal authorities.

[23]Hart, ibid., p. 144.

cases.[24] He suggested that some aspects of the doctrine of the sovereignty of Parliament had once been part of the periphery, or the penumbra of doubt of the British rule. In his view, it had not been inevitable that the law had to be seen as "essentially the product of a legally untrammelled will" although [25]

> older constitutional theorists wrote as if it was a logical necessity that there should be a legislature which was sovereign, in the sense that it is free, at every moment of its existence as a continuing body, not only from legal limitations imposed ab extra, but also from its own prior legislation.

But despite the fact that this approach was not logically required, Hart felt that it had been settled as the English rule, moving it from the penumbra into the core presumably:[26]

> That Parliament is sovereign in this [continuing] sense may now be regarded as established, and the principle that no earlier Parliament can preclude its "successors" from repealing its legislation constitutes part of the ultimate rule of recognition used by the courts in identifying valid rules of law.

Hart was at pains, however, to emphasize that other possibilities had been available, including the principle that "Parliament should not be incapable of limiting irrevocably the legislative competence of its successors but, on the contrary, should have this wider self-limiting power".[27] As we have seen, this principle was commonly referred to as "self-embracing" sovereignty, and Hart applied that name.

Even if the British Parliament could not limit the substance of its legislation, it was still an open question, in Hart's view, whether that Parliament could alter the manner and form of legislation.[28] The matter would only move to the core of the rule of recognition upon determination by a court.

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[24] Ibid., p. 145.
[25] Ibid.
[26] Ibid..
[27] Ibid., p. 145.
[28] Ibid., p. 146.

In the end, Hart was of the view that it was a "form of 'formalist' error" to assume that every situation is covered in advance by a rule which is simply waiting for judicial sanction, and that this should be true of the ultimate rule of recognition as well. "The truth", according to Hart, "may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they get their authority to decide them accepted after the questions have arisen and the decision been given".[29] This comment was particularly apt regarding the Patriation Reference and would be equally so were the Supreme Court ever asked to reconsider the ultimate Canadian rule of recognition. But this seems to leave open a vital question. Does the Court act without guidelines at the periphery or can we say that it is bound by certain deeper principles? Those who argued the Independence theory used the latter perspective. But given that the Patriation theory was eventually accepted, it appeared that those principles (e.g., federalism, independence, legitimacy) had been ignored. Or was it possible that some of these principles were still available to deal with other questions on the penumbra of the ultimate rule of recognition which had not been asked in the Patriation Reference, such as whether the United Kingdom Parliament in acting as the ultimate Canadian rule of constitutional amendment should have been interpreted as continuing or self-embracing.

Hart discussed the ultimate rule of recognition and its uncertainty as separate matters. We have seen that part of that uncertainty was with respect to the nature (continuing or self-embracing) of the notion of Parliamentary sovereignty. In other words, how was one to interpret the idea that the courts will recognize enactments of the Queen-in-Parliament as law? This question was not just part of the penumbra of the rule of recognition, it was also that which determined the dynamic character of that rule, that is, how it changed other rules and, most importantly for us, how it transformed itself. For Kelsen, as we have seen, the grundnorm was "the starting point of a norm-creating process

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[29] Ibid., p. 149.

and, thus, has an entirely dynamic character",[30] but he did not consider that the basic norm could provide for its own change or transformation.

Kelsen's concern with the idea of a historically first constitution and legal change accomplished in accordance with it required that Kelsen be not only concerned with the validity of law at a particular point in time but also with the continuity of legal systems over time. Hart's main preoccupation was with the concept of law and legal validity as determined at any particular moment in a predetermined legal system. Having freed the basic norm (recast as a rule of recognition) from its logical connection to the historically first constitution, Hart opened up for systematic theoretical consideration the question of how the rule of recognition itself changed over time. From the internal point of view the rule of recognition was law, but was its alteration over time governed by law or legal principles in any way? Clearly the very fact that the rule of recognition was ultimately determined by the courts and officials meant that any change was legal in that sense. But by legal change one normally means more than that; one wishes to know how courts and officials, especially the former, explain what has occurred on the very rare occasions when they cannot avoid having to provide an explanation.

As noted above, Kelsen did not dwell on the question whether the basic norm could govern its own replacement with another basic norm, and this is effectively the question which most interests us. In Canadian terms, the question could be formulated as follows: could a pre-1982 basic norm relating to the Queen-in-Parliament permanently replace itself with a new norm represented by Part V of the 1982 Constitution on amendment? Hart and others seemed to think that the true answer was a question of fact, depending on how those internal to the (Canadian) system viewed the matter, and particularly on what view was taken by the courts. As we have seen, the true content of the basic norm or ultimate rule of recognition is not a matter which is often, if ever, considered by the courts. In any event,

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[30]Kelsen, supra, p. 114.

Hart had warned of the error of assuming that every rule in the legal system has a pre-determined content. However, on another view of this question, it was claimed that a basic norm could never provide for its own replacement. This assertion, made by the Danish jurist Professor Alf Ross, drew Hart into a complex theoretical debate which turned on the logical problem of self reference.

In his book On Law and Justice, Ross had looked more closely at Kelsen's basic norm and discovered a problem. The basic norm was, in Ross's first opinion on the matter, the norm which provided for the amendment of the constitution, there being no other higher legal norm which provided for the constitution's validity. Ross then argued that the basic norm could not provide for its own amendment without running into problems of self-reference. That is, if the rule on amendment were itself amended and replaced using the original rule then the new rule could not at the same time and without logical transgression both be based on the original rule and be the rule for which there is no higher justification. This complex logical argument produced the disturbing conclusion that so-called self-embracing legal rules such as the constitutional amendment procedures of most countries (which were assumed to govern not only amendment of other constitutional provisions but also the amendment procedures themselves) were in fact logically impossible or contradictory. To the extent that it was commonly believed that the rule on constitutional amendment could be used to amend itself, Ross stated that this was not in fact "constitutional change" or change which could be related back to the basic norm, but rather a disguised legal revolution or "magical act".[31]

In order to understand Ross better we have to remember that he, together with Kelsen, was interested in examining the legal system in the abstract. And as a deductive system based ultimately on the basic norm, the legal system had to change logically and in accordance with the basic norm. In that way the basic norm could explain the validity of

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[31] A. Ross, On Law and Justice (London, 1958), p. 81.

legal rules within the system and, at the same time, explain the coherence of that system over time.

In 1964, Professor Hart replied to Ross. With great care, he pointed out that self-embracing interpretations of the basic norm or ultimate rule of recognition were indeed possible and logically coherent. Hart observed that Ross had ignored the temporal element which was relevant in legal as opposed to abstract logical problems. When, for example, a rule for constitutional amendment was used to provide for its own replacement, it was correct to view that as a legal change rather than a magical act. The original rule on amendment was valid and effective until it was itself used to provide for a new rule on amendment which only at that moment became valid and effective and so replaced the old.[32] Accordingly, Hart argued as he had before that continuing and self-embracing amendment procedures were "both intelligible as constitutional arrangements".[33]

If we remember Hart's comments regarding the indeterminate nature of the ultimate rule of recognition and the formalist error of assuming that every situation is covered in advance by a rule, his conclusions regarding the so-called problem of self-reference fall neatly into place. Hart was more concerned with the validity in legal systems as a question of fact or observance. He was more interested in momentary systems and validity than in dynamic systems and continuity.[34] Accordingly, Hart observed that the validity of legal rules in a system could be satisfactorily explained without necessarily determining in advance whether the ultimate rule of recognition (say, the procedure for constitutional amendment) was continuing or self-embracing in nature. That question would only arise if a legal answer became necessary. In the meantime, legal observers might make

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[32]H.L.A. Hart, "Self-Referring Laws" in H.L.A. Hart, Essays in Jurisprudence and Philosophy (Oxford, 1983) 170, p. 177.

[33]Ibid.

[34]See J. Finnis, "Revolutions and Continuity of Law" in A.W.B. Simpson, ed., Oxford Essays in Jurisprudence, 2nd ser. (Oxford, 1973), p. 55, for an excellent discussion of these concepts.

suggestions and predictions, but the validity of rules in the legal system could not be said to depend on it.

Ross replied to Hart and other critics in 1969. He acknowledged that Hart's "temporal" refutation of the problem of self-reference was accurate in terms of legal considerations. Ross nonetheless insisted that, as a matter of logic, an original basic norm (amendment procedure) would naturally contradict a subsequent basic norm (amendment procedure) which purported to replace it. While Hart was prepared to say that both continuing and self-embracing interpretations were potentially available for the ultimate rule, Ross's logical, deductive system required that "the basic norm of the legal system must be unchangeable".[35] Ross therefore recanted his earlier views identifying the amendment procedure as the basic norm and instead designated a norm requiring adherence to the amendment procedure until that procedure pointed to its successor and then adherence to that procedure until it pointed to its successor, etc. This basic norm allowed Ross to admit the possibility in law of a self-embracing amendment procedure if not the possibility of a self-embracing basic norm.[36]

In the end, then, both Hart and Ross acknowledged the possibility of self-embracing interpretations of the rule on constitutional amendment. For Hart it was just that -- a possible interpretation of the peripheral content of the ultimate rule of recognition. Unless a question of validity arose involving the rule governing amendment, the core of the rule might be quite clear but the periphery (i.e., continuing or self-embracing?) still uncertain. Ross's revised arguments admitted the possibility of a self-embracing amendment procedure, and we can presume that he could also have conceived of its "continuing" alternative.[37] If the Hart-Ross debate was helpful at all, despite its

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[35] A. Ross, "On Self-Reference and a Puzzle in Constitutional Law" (1969) 78 Mind 1 at p. 21.

[36] Ross did not apply this analysis to the less common (British) case where continuing sovereignty is assumed to be the rule. To be logically consistent, Ross would have to assume that grundnorms come in two varieties, self-embracing and continuing.

[37] According to the "continuing" alternative all amendments to the amendment procedure would be viewed only as "statutes" and therefore amendable at all times using the original procedure. This

exasperating complexity, it did serve to highlight the fact that neither continuing nor self-embracing versions of sovereignty could be logically preferred but that one or the other version would have to be identified in any legal system if ever a question arose involving the very nature of that sovereignty. Until that moment, at least on Hart's view of the matter, the question could remain safely unresolved; only the legal scientist needed to follow Ross and make predictions from the outset as to which version best fit the legal system in question.

If we return to the question that was being considered before discussing the Hart-Ross debate, it can now be stated with more sophistication. Depending on whether we take the Hart approach or the Kelsen-Ross approach, we will want to know how it is that courts (or legal commentators before them) can determine: 1) what is the ultimate rule of recognition and how, if at all, can it change or evolve?; or 2) what is the basic norm? Before attempting to answer those questions, it may be useful to consider the work of Professors Raz and Finnis, in which the Kelsen-Ross approach is discredited and the Hart approach improved upon.

The challenge of understanding the changes in the rule of recognition was picked up by Professor Joseph Raz and Professor John Finnis, amongst others, who not only took into account the concept of a legal system and its relationship to the concept of law (Raz) but also looked at the movement of law and the legal system over time, that is, as more than mere momentary systems (Finnis).[38]

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corresponds the the system in the United Kingdom according to the prevailing view if one considers the Queen-in-Parliament as an amendment procedure. See also M.J. Detmold, The Australian Commonwealth: A Fundamental Analysis of its Constitution (Sydney, 1985), pp. 201-210.

[38]See also J. Eekelaar, "Principles of Revolutionary Legality" in Simpson, ed., supra and A.M. Honoré, "Reflections on Revolutions" (1967) 2 The Irish Jurist 268.

Raz first gathered together his ideas on this subject in The Concept of a Legal System. He rejected Kelsen's criterion of constitutional continuity as the proper criterion for the identity of a legal system:[39]

> The continuity of legal systems is not necessarily disrupted by the creation of new original laws. Nor is the fact that the creation of law is authorized by a law belonging to a certain legal system a sufficient proof that the authorized law belongs to that system. A country may be granted independence by a law of another country authorizing its laws; nevertheless, its laws form a separate legal system.

According to Raz's view of the matter, constitutional continuity of the laws was only one, and not even the most important, factor in determining the identity of a legal system. The content of the law in question was also important. The unauthorized creation of a municipality could not sever that town from the legal system, but unauthorized proclamation of an new constitutional law could be a factor in creating a new legal system. And presumably proper enactment of a copyright law by an imperial power for a colony would not affect the integrity of the imperial legal system, whereas enactment of full and final constitutional power to control its own legal and political future might well do so.

In order to understand the identity of legal systems, Raz felt obliged to go beyond the continuity and content of laws:[40]

> But neither the "constitutional continuity" of the laws nor their content are necessary or sufficient conditions for establishing the continuity or lack of continuity of legal systems. Legal systems are always legal systems of complex forms of social life, such as religions, states, regimes, tribes, etc. Legal systems serve as one, but only one, of the defining features of these. ...
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> ... The identity of legal systems depends on the identity of the social forms to which they belong. The criterion of identity of legal systems is therefore determined not only by jurisprudential or legal considerations but by other considerations as well, considerations belonging to other social sciences.

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[39] J.Raz, The Concept of a Legal System, 2nd ed. (Oxford, 1980), p. 188.

[40] Ibid., p. 189.

It should be noted that regarding the identity of momentary (as opposed to non-momentary or dynamic) systems, Raz approved of the idea, based loosely on Salmond, that "a momentary legal system contains all, and only all, the laws recognized by a primary law-applying organ which it institutes".[41] Raz, along with Hart, acknowledged that many "laws" of the legal system might never be considered by the primary law-applying organ:[42]

> Saying of a primary organ that it recognizes a law means that, had the question been raised before it, in the proper exercise of its powers it would have acted on that law. It is a counter-factual statement which raises many philosophical questions that need not concern us here. The evidence for such statements is the past behaviour of the primary organ, the attitudes and opinions of the population and of the legal profession, etc.

And, less modestly, Raz might have included academic opinion.

Raz's criterion resembled Hart's rule of recognition, but Raz clearly felt that his analysis went deeper. His was not merely a rule directed at courts and officials; it was an attempt to provide a "jurisprudential criterion" which described "a general truth about law".[43] Hart's rule might describe a form of law, but it did not purport to go beyond.

In the Postscript to the second edition of the Concept of a Legal System, Raz made clear that he had departed from both Kelsen and, to a lesser extent, Hart:[44]

> ... I criticised legal theorists such as ... Kelsen and Hart, who sought to provide autonomous legal criteria for the definition of the continuity of law. Autonomous legal criteria are those derived from the enactment of laws, their interrelations, and their efficacy. Reliance on them presupposes that not only the internal working but also the precise boundaries of the law can be fixed on the basis of specifically legal considerations alone. But the law is an aspect of the political system, be it a state, a church, a nomadic tribe, or any other. Both its existence and its identity are bound up with the existence and identity of the political system of which it is a part. If the book is at fault it is in not emphasizing this point enough. It argues that the identity of a legal system over time depends on the continuity of the political system of which the law is a part but it attempts an autonomous definition of

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[41] Ibid., p. 192.

[42] Ibid., p. 196.

[43] Ibid., p. 200.

[44] Ibid., p. 210 (emphasis added).

the boundaries of a momentary legal system. Though it is true that autonomous criteria take one a long way towards the identification of the bounds of a momentary legal system they ultimately leave certain margins of doubt. A momentary legal system consists only of rules which a certain system of courts is bound to apply in accordance with their own customs and practices. This leaves the notion of a system of courts unexplained. Courts can be viewed as belonging to the same system if it is their practice to recognize rules on the basis of the same criteria of validity (i.e. if they practice the same rules of recognition). This test leaves wide-open borders. It is possible to say that there is nothing wrong with that and that the notion of "a legal system" is just as vague and imprecise along this border. On the other hand it may make good sense to resort here again to the character of the political system of which that legal system is a part and to distinguish between the courts which are organs of that political system and those which are not. This will generate a more precise definition of momentary legal systems, but its main advantage is in highlighting the fact that law is an element in the political organization of a society. It can and should be treated as an autonomous system for many purposes but ultimately its boundaries are dependent upon the nature and boundaries of the larger political system of which it is a part.

Having emphasized the insufficiency of autonomous legal considerations in providing a doctrine of identity of legal systems, one should be wary of the reverse mistake.

A number of the recurring themes in this Part of the thesis are touched on in this passage. If neither the basic norm nor the rule of recognition are sufficient to define a legal system, then we must look to social and political factors, acknowledging that the "identity of a legal system over time depends on the continuity of the political system". Furthermore, as we have stated with reference to the Judicial Committee of the Privy Council and the Supreme Court of Canada, it may be crucial to the resolution of such questions whether the "primary law-applying organ", the court, belongs to one (pan-Commonwealth, as in the case of the Judicial Committee) legal system or another (Canadian, as in the case of the Supreme Court of Canada) system.

In his subsequent full length work, The Authority of Law, Raz restated the nature of his divergence from Kelsen and Hart:[45]

> [Kelsen and Hart] were not concerned with the material unity of legal systems. They did not think that the unity of the system depends on the content or the spirit of its laws, or on the traditions and practices of its most

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[45] J. Raz, The Authority of Law (Oxford, 1979), pp. 79-80

> important legal institutions. Instead, they hoped to formulate a test that would enable them to determine whether any two laws belong to the same legal system or not.

In formulating his own theory, Raz set out some of the criteria which he had identified in his earlier work. For instance, he repeated that "recognition by law-applying institutions [is] a necessary condition of the existence of laws" and that this fact in turn made "the institutionalized nature of law an indispensable part of the criteria of identity: a law is part of the system if it is recognized by legal institutions".[46] He also provided a reminder that law applying institutions would not provide answers regarding the membership of all laws in the system:[47]

> The condition of law's membership in a legal system is, however, a counterfactual: if presented with the appropriate case the courts would act on the law. This may be true even though they are never -- or seldom -- presented with the appropriate case.

Raz noted that Hart and others were united in insisting on the importance of law-applying institutions in identifying a law as being part of a particular legal system. Raz then returned to the inadequacy of the rule of recognition in providing the answer to the problem of the scope of a legal system, notably, for our purposes, a non-momentary or dynamic legal system:[48]

> Nor does the rule of recognition solve the problem of the continuity of legal systems. That one legal system comes to an end and another takes its place manifests itself in a change of rule of recognition, for each legal system has a different rule of recognition. The rule of recognition, however, is a customary rule; hence it is constantly in a process of change. What changes are consistent with the continued existence of the same rule, and what changes compel the admission that a new rule has replaced the old one? ... Hart's theory provides no clue as to how to draw the conceptual distinction. ... If his theory fails to provide a complete solution to the problem of identity it is because he overlooked not only part of the answer but also a whole question: that of the relation of law and state.

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[46] Ibid., p. 87.

[47] Ibid., p. 88.

[48] Ibid., p. 98.

For Raz, then, it is unsurprising that a Canadian ultimate rule of recognition should emerge, suddenly or gradually, according to the development of the Canadian federal "state".

Raz then set out to provide the rudimentary elements of a theory of the relation between law and state, noting that this was crucial to an understanding of both the scope and continuity of legal systems. He expanded on what he viewed as Kelsen's mistaken approach:[49]

> Kelsen claimed that the concept of the state can be explained only in legal terms. That is, the concept of a legal system must be explained first; from it naturally flows the explanation of the concept of a state, for a state is but a (municipal) legal system. No social facts, no social norms that are relevant to the explanation of law have any relevance to [Kelsen's] theory of state.

According to another view of the matter which Raz favoured, the law could only be explained after some theory of the state had been established. "First one must define the meaning of 'an independent political society' -- 'a state'." It is Kelsen's failure to do so that disables his theory from accounting for the identity of legal systems or from explaining situations such as the Canadian "patriation":[50]

> Because Kelsen lacks the concept of the state as a political system, he fails to account for the identity of a legal system. He is driven to rely on constitutional continuity as a sole mark of identity, disregarding the fact that new states can be created and new legal systems established without any break in the constitutional continuity taking place.

After reasserting the fundamental interrelationship of a theory of state and a theory of law, Raz set out his own ideas on the problem of the identity of a legal system:[51]

> It follows that since the continuity of a legal system is tied to the continuity of the political system, the former is affected by the fate of the non-legal norms that happen to form part of the political system concerned.

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[49] Ibid., p. 99.

[50] Ibid.

[51] Ibid., p. 100.

> However, emphasizing the importance of the fate of the non-legal norms to the continuity of the legal system does not mean that these are the only factors affecting continuity. The substance of my contention is that whatever form one's ultimate account of continuity takes, it must in view of the relation between law and state, be based on the interaction of legal and non-legal norms, and the extent and manner of their change; and secondly, that among the legal norms concerned some are more relevant than others. Since the continuity of the legal system is fundamentally a function of the continuity of the political system, political laws are more relevant than others. Constitutional and administrative laws are, therefore, more relevant than, for example, the law of contract or torts.

It seems fair to conclude from Raz that a principle similar to the rule of recognition is useful but must be supplemented by considerations of the underlying and interrelated presence of the social and the political before an explanation can be had for why the rule of recognition changes in such a way that it can be said that a new legal system exists independent of an older one.

To Professor Raz's view we can add the opinion of Professor John Finnis. In a tightly reasoned article published in 1973,[52] Finnis stated that "the continuity and identity of a legal system is a function of the continuity and identity of the society in whose ordered existence in time the legal system participates".[53] Finnis made these comments with the Commonwealth experience of peaceful and not-so-peaceful acquisition of legal independence from Britain and the Westminster Parliament in mind.

Finnis's thoughts on this question were also useful to help explain the type of transition which took place in Canada in 1982. How was it that the Canada Act 1982 could be said to sever the British legal link without disturbing the validity of existing Canadian laws, constitutional or other, some of these having been brought into force by the Westminster Parliament? He agreed that Ross's problem of self-reference was not an insurmountable obstacle, but Finnis admitted that Ross had identified an important question regarding the validity of legal rules which derive from but subsequently replace or eliminate

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[52]Finnis, supra, pp. 44-76.

[53]Ibid., p. 69.

those validating rules.[54] He proposed that the rule of recognition must include a general principle or rule of identification which could be expressed as follows:[55]

> A law once validly brought into being, in accordance with criteria of validity then in force, remains valid until either it expires according to its own terms or terms implied at its creation, or it is repealed in accordance with conditions of repeal in force at the time of repeal.

This principle seems to "make sense of the history and practice of legal systems and lawyers" and it provides "a present guide to actions which take place and have effect in the future".[56] Accordingly, it seems appropriate to adopt it.

In the Canadian context, Finnis's analysis not only confirms the validity of pre-1982 constitutional and ordinary laws passed at Westminster, but it also explains how the Canada Act 1982 could at one and the same time establish the validity of, inter alia, Part V of the Constitution on amendment and terminate the power of Westminster to legislate for Canada, thereby leaving matters to be deal with solely on Canadian terms. Effectively, this was Hart's point, examined above, in defence of self-embracing sovereignty, but Finnis's analysis also made clear that this was a point which applied beyond the self-reflexive provisions of a constitutional amendment procedure.

With Finnis, then, we can see how the "patriation" process required different analysis at the level of history, logic and law. There was clearly no need to deny either the historical link to the Westminster Parliament or the conferral of legal validity which that link provided, and no need to fear that a rule of logic had been violated so as to have rendered the process secretly illegal. In law there was a coherent means of explaining to a Canadian court that any post-1982 enactment by the Westminster Parliament, even one preceded by the repeal of the Canada Act 1982 could be safely ignored. There was nothing inevitable, of course, in this legal conclusion, but it would have been surprising had there been no

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[54] Ibid., p. 54.

[55] Ibid., p. 63 (Finnis's emphasis).

[56] Ibid.

legal explanation for the prevailing Canadian understanding of the strictly legal 1982 "patriation" experience.

Before moving on, in Part III, to consider the procedure for constitutional amendment under the Constitution Act, 1982, it may be useful to summarize the various explanation of the "patriation" process which might be argued before a Canadian court of law if, for example, the federal government attempted to amend the Constitution by means of a resolution requesting the United Kingdom Parliament to repeal the Canada Act, 1982 and to substitute a text representing a new federal agenda. The arguments for and against such a federal initiative would borrow to a greater or lesser extent from the Patriation and Independence theories and from the arguments from constitutional theories set out in this Part.

The analysis in Parts I and II has provided some of the materials -- historical, logical, legal and theoretical -- upon which an explanation of "patriation" could be based, but, as noted above, there are a number of coherent explanations which a Canadian court might choose. In the end, it is submitted, the Court would presumably favour the explanation which fit best with Canadian legal understandings of the process and with Canada's status as an independent nation, federally organized, democratically and responsibly[57] governed and judicially emancipated. It may be useful. however, first to examine some of the possible explanations of patriation.

If a Canadian court continued to be influenced by some of the more traditional aspects of the Patriation theory, then it might subscribe to the classical version of Westminster parliamentary sovereignty which dictates that the United Kingdom Parliament of 1982 could not bind any future Parliament and that therefore post-1982 legislation for Canada would have to be heeded. The Canadian court could not declare such legislation

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[57]In the sense of "responsible government".

ultra vires any more than a British court could do so. The conventions of the British or Commonwealth constitution would certainly discourage such legislation without Canadian request and consent, but as a matter of strict law, as the minority (convention) seemed to indicate in the Patriation Reference, it would be valid. We have seen, however, that the Supreme Court appeared to have accepted by the time of the Quebec Reference that the Canada Act 1982 had terminated any ongoing link with the United Kingdom Parliament. And, as we have also seen, this was the widely held view of the Canadian people as well as being what the legal advisers to the federal government had apparently intended. But, if the Court held, as Viscount Sankey had in 1935, that as a matter of strict law the continuing sovereignty of the United Kingdom Parliament was the rule, then that the Westminster Parliament would retain the power to legislate for Canada even without the latter's request and consent. It seems highly unlikely that a Canadian court would accept this argument, despite its classically neat logic, and this has been the opinion of most commentators, British and Canadian alike.[58]

The apparent termination of that link could also be explained within the Patriation theory (and hence British constitutional theory) by some of the views of parliamentary sovereignty put forward by Jennings and his followers. In 1984, as we have seen, Marshall summarized the explanation which might be put forward by adherents to the "new view". Using these explanations, then, a Canadian court might reason, first, that the United Kingdom Parliament had in 1982 bound itself to a strong manner and form requirement, that is, it obliged itself in the future only to legislate for Canada following appropriate request and consent from Canada. This might be an improvement on the pre-1982 situation which, at least according to the minority (convention), had left Canada vulnerable at any time to unsolicited legislation from Westminster, but it left Canada theoretically tied to the British or Commonwealth grundnorm and this is not what had been contemplated in the 1982 process. If it had been intended then it would leave open the

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[58]See, e.g., G. Marshall, Constitutional Conventions (Oxford, 1984), p. 205 and P.W. Hogg, Constitutional Law of Canada, 2nd ed. (Toronto, 1985), p. 47.

possibility, raised earlier, that in the event of constitutional paralysis in Canada, the federal government, as rightful representative of Canada at the international level according to the majority in the Patriation Reference, could seek an amendment to the 1982 Act via Westminster. If the conventional rule requiring substantial provincial consent had been violated that would not necessarily influence political actors at the British end if they followed their strict legal role. Of course, this scenario is highly unlikely, but it also seems unlikely that a Canadian court would accept an explanation of the Patriation process which could admit such a prospect.

A second line of reasoning derived from the "new view" of British parliamentary sovereignty involves the notion that the Westminster Parliament can be seen to have abdicated part of its sovereignty in 1982,[59] more specifically, its power to legislate for Canada. As a matter of British law, it seems odd that Parliament should not be empowered to legislate for Canada when it might certainly legislate for France or Chile. It has often been said that French or Chilean courts (and citizens) would certainly ignore such legislation but that British courts (and presumably those governed by the same constitutional system) would have to recognize it. The British experience with the European Community indicates that even a sovereign legislature may limit its sphere of legislative supremacy, but even in that context a crucial (and by now familiar) question remains: can that sovereign legislature later reclaim its fuller supremacy by means of direct legislation to that effect. As we have seen, the prevailing view in Britain at the moment is that it could. A Canadian court could, of course, have a different view on the matter, but if it did so it would probably rely on factors which related specifically to Canadian history and Canadian constitutional development. Accordingly, it would likely borrow to a considerable extent from arguments developed under the Independence theory, and it is to that branch of arguments that we will now turn.

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[59]Marshall, ibid., explains that this view has been accepted, at least by British commonwealth constitutional lawyers (and draftsmen) at least since the Nigeria Independence Act of 1960 wherein one finds words similar to those employed in the Canada Act 1982.

Our discussions of the Independence theory in Chapter 2 revealed that those who subscribed to the theory prior to 1982 felt that the Supreme Court of Canada could, consistent with an independent Canadian legal theory, make one or both of two crucial arguments which were otherwise excluded by the Patriation theory. First, there was the argument that a pre-1982 amendment using the Westminster Parliament would not have been valid unless it had gained the requisite level of provincial consent prior to enactment. As we have seen, this argument was clearly rejected by the majority (law) although it was recognized in the conventional sense by the majority (convention). At this stage in the analysis, however, we are mostly concerned with the legal position. A second argument suggested that Canadian request and consent (at least from the federal authorities) was a prerequisite of the legal validity of a Westminster-originating amendment of the Canadian constitution even prior to 1982. This argument was not considered in the Patriation Reference except by the minority (convention) which denied that it was a legal requirement despite its conventional force. The majority reasons on both law and convention leave the unsettling impression that the Court would have adopted the minority (convention) view of the matter had it been required to give an opinion. We have seen how, regrettably, the Supreme Court of Canada adopted the behaviour of a British court faced with a Parliamentary enactment. It acknowledged the untrammelled power of the Westminster Parliament to pass any law whatever and showed no inclination to reserve a power of judicial review. We have also seen how a more independent, Canadian approach to the question would have been to view the Westminster Parliament as part of the Canadian amendment process and therefore part of the judicially reviewable sphere of the Canadian legal process. A Canadian court should have been able to say that the requirement of Canadian request and consent might be a convention in British constitutional theory but that for Canadian purposes it was a requirement of law. We will examine in Chapter 7 the reasons why even the highest court of the country might be reluctant to make such a "political" decision in all but the clearest cases, but it is important to see that the argument

only had a realistic chance of success if channelled through the Independence theory approach.

If provincial consent and Canadian request and consent were not strictly required before 1982 we might be inclined to ask whether an independent Canadian constitutional theory had any sort of purchase on pre-1982 constitutional amendment and, in turn, whether it was at all relevant to the "patriation" process. There was, it seems, one issue which had not been dealt with in the Patriation Reference but which could have been untangled with help from the Independence theory. The Supreme Court referred frequently to the untrammelled powers of the United Kingdom Parliament but it did not say, and was not asked to say, whether those powers were based in continuing or self-embracing sovereignty.[60] Understood as a matter of British constitutional theory the answer could only be indefinite or qualified. British legal opinion leaned and arguably still leans toward continuing sovereignty. And one might wish to argue that even for Commonwealth purposes as viewed, say, from the point of view of the Judicial Committee of the Privy Council, it was best to stick to the assumption of continuing sovereignty in the event that any of the former colonies (or their courts) determined that it was politically desirable and legally possible once again to request legislation from the Mother Parliament. But in Canadian terms, it seemed that, at least on the eve of Patriation, the near-universal assumption was that the Westminster amendment procedure was being used to replace itself, for all time, with the Part V amendment procedure. If we were to put the assumption into the obscurer language of constitutional theory we could say that there was an assumption of self-embracing sovereignty.

Regardless of popular assumptions, was there any legal explanation for this process of legal continuity characterized by transfer and replacement of amendment powers? We have already seen that, despite Ross's initial doubts on the matter, both continuing and self-

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[60]G. Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 Law Q. Rev. 591 argues persuasively that though there are in-between positions which can be identified, there is a fundamental, unavoidable choice between continuing and self-embracing sovereignty.

embracing understandings of sovereign power were possible. Why then should we say that in Canadian constitutional theory Westminster's powers were self-embracing while in British or even Commonwealth terms they were continuing?

Some commentators have suggested that political independence or international recognition dictate such a conclusion (if not the same reasoning).[61] It has been argued here that independence by itself does not dictate any particular conclusion. There is no reason why a court in a newly independent country could not take the view that according to all relevant indicators it seemed clear that that country had decided to retain a system of constitutional amendment by the legal method of foreign enactment, however anomalous that might seem.

In the Canadian case. as we have seen, there appears to be little reason to assume that the mechanism of Westminster amendment was to be held in reserve even after a domestic procedure for amendment had been found. If one were to make such an assumption one might wish to return to 1931. As we have seen, and as Peter Hogg points out,[62] at that time it was not thought possible as a matter of law for the Imperial link ever to be truly severed. If that was the assumption then, one might argue, then how can we say that it had changed by 1982.

Even though the fact of independence did not lead to necessary legal results. it seems uncontroversial to say that it should naturally lead to an independent legal theory. While the Judicial Committee of the Privy Council remained the highest court of appeal for Canada the development of such a theory might have been stifled but certainly by the time the Supreme Court of Canada had taken over the leading role in constitutional interpretation it was natural that the Canadian court would occasionally take different views on various legal and theoretical questions from the British or other Commonwealth courts. And it

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[61] See B. Slattery, "The Independence of Canada" 5 (1983) Sup. Ct L. Rev. 369.

[62] Hogg, supra, p. 43.

would also be natural for it to do so on the basis of factors particular to Canadian political and social development.

We have seen how the question of continuing and self-embracing sovereignty had not been resolved even in the United Kingdom. It would have been surprising to see anything different. Such an arcane matter of constitutional theory would seldom be a matter for judicial determination. In the meantime, legal observers in the United Kingdom and Canada could have been expected to make predictions as to the likely view which a court might take.

We have already seen that in Canada at some time after 1931 (coincidentally it seems at about the time of the end of Privy Council appeal), Canadian constitutional commentators and political actors began to assume that there could be a final and irreversible transfer of constituent powers from Westminster to Canada at some time. This view had clearly crystallised by 1982. If the ultimate Canadian rule of recognition could ever have been said to contain a rule of continuing Westminster sovereignty (as counter-factual as that statement might be) then it would seem that it had evolved, and by the 1950s (and certainly by 1982) it could be said to contain a rule of self-embracing Westminster sovereignty with the results that followed.

It may seem contrary to legal ways of thinking to say that the ultimate rule of recognition could have had one form at one time and then evolved into another form. Those who follow Kelsen and Ross's view might argue that the Canadian (and, as it happens, British) grundnorm in 1867 and 1931 would have to the same as that which existed in 1982. There had, after all, been no break in legal continuity. According to that view, the grundnorm was probably one of continuing Westminster sovereignty from which there could be no legal escape.

The most telling criticism of Kelsen (and, implicitly, Ross) was suggested in the writings of Professors Raz and Finnis. Raz pointed out that the continuity and identity of a legal system was not dependent on the grundnorm; instead it was tied up with the continuity and identity of the political system. Finnis observed that the validity of present rules in a legal system was not dependent on uninterrupted connection to a grundnorm lying deep in a country's constitutional past; rather validity was dependent on proper legal process at the time of enactment even if that process no longer applied in the present. If the grundnorm of the historically first constitution was not required to govern legal continuity and determine present legal validity, then it seemed that it could indeed evolve over time. Of course, if one wished to determine all the norms of a legal system from the outset then one would have to assign a specific content to the grundnorm. But if one agreed with Hart that it was a formalistic error to assume that all rules in a legal system have a predetermined content, and if the most fundamental rules were linked to (changing) social and political factors then it was possible to assume that thinking about the ultimate rule of recognition could evolve before a court was ever, if ever, asked to determine the matter conclusively.

If a Canadian court were ever asked to determine whether, in 1982, the ultimate Canadian rule of recognition included a rule of continuing or self-embracing sovereignty, it would probably deal with the matter differently than the Judicial Committee might have done. It might note that initially Canadian thinking on the matter was conditioned by the perceived limits of British constitutional theory, but that once it had become clear that both continuing and self-embracing sovereignty were logically possible, the Canadian assumption was in favour of the latter. And if the Court agreed with Raz that the continuity and content of a legal system is ultimately related to the continuity and content of the political system, then it might consider some of the following factors and add them to its reasons: that Canada had been an independent nation at least since 1926-31 and one which, despite its attachment to the monarchy and the Commonwealth, did not seek to rely unduly on the United Kingdom; that there was a rebuttable presumption in favour of a close

connection or correspondence between the constitution and the political subjects of that constitution; that the close connection between the constitution and the government and governed is all the more important in a system of responsible government and democratic representation; that ideally the constitution should be perceived not only as legal but also as legitimate; that the larger historical context of a country's constitutional development should be relevant to the interpretation of the constitutions most fundamental rules; and that certainly once the courts of a country are independent of any foreign control or supervision they should be free to develop legal rules and principles which are based on the above factors. These considerations are closely connected to independence, federalism and legitimacy which were key components of the Independence theory.

It is submitted that if ever a Canadian court were asked whether following the passage of the 1982 Act the United Kingdom Parliament could have a role, with or without request or consent, in the amendment of the Canadian constitution, it would answer no. It could, consistently with the Patriation Reference, conclude that although until 1982 the United Kingdom Parliament had absolute power to legislate for Canada, its powers were, as a matter of Canadian law, self-embracing, and that therefore it could by means of the Canada Act 1982 both provide a new code on constitutional amendment in the form of Part V of the Constitution Act, 1982 and at the same time dictate that the Part V process entirely replace it as sovereign constituent legislature for Canada.[63]

If so, we may conclude that there is good reason to suppose that the "patriation" process was successful and that the new amendment provisions set out in the 1982 Act are now the only valid means of constitutional amendment. We will now consider those amendment provisions in Part III.

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[63]Accordingly, it may be more correct to say that s. 52 and especially subs. 52(3) is the key provision in the 1982 legislation rather than the Canada Act 1982 itself.

PART III -- AMENDING THE CONSTITUTION OF CANADA

CHAPTER FIVE

THE AMENDING FORMULAE

The process of constitutional amendment provides important information about the political culture of a country. The discussions which precede selection of the formula and the negotiations which accompany each attempt to use the formula once in place often expose the stress spots and irregularities in a country's overall political structure.

While the politics of constitution making and amending are very revealing, the amending formula itself is usually slightly unforthcoming. The amending formula in most constitutions is a fairly short and uncomplicated section of the larger constitutional document.[1] In Canada such is not and was never likely to be the case. The federal nature of the country, the numerous differences between the provinces of the federation and the extended process of finding an appropriate amending formula contributed to cause the drafting of the relatively long and complicated version of the formula which now appears in Part V of the Constitution Act, 1982.

Canadian constitution makers have not necessarily failed by producing an amending formula which consists of eleven sections rather than one. American observers have noted that the new Canadian amending formula provides clear answers to questions which were not covered in Article V of the U.S. Constitution.[2] The Supreme Court of the United

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[1] Article V of the American constitution provides a good example.

[2] W. Dellinger, "The Amending Process in Canada and the United States: A Comparative Perspective" (1982) 45 Law & Contemp. Probs 283, p. 298.

States has been forced to fill the gaps in Article V, and no doubt the Supreme Court of Canada will be asked to do the same with respect to Part V of the Constitution Act, 1982. In the Canadian case, however, many answers have been provided by the framers. Professor Hogg has referred to Part V as a "complete code" on constitutional amendment.[3] Codified documents require a special type of interpretation: all sections must be related to one another in such a way as to give each one a full but consistent meaning.

Subsection 52(1) of the Constitution Act, 1982 establishes the primacy of the "Constitution of Canada":

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

This provision effectively preserves the doctrine of repugnancy or inconsistency which had formerly been maintained by subsection 7(1) of the Statute of Westminster, 1931, and the Colonial Laws Validity Act, 1865.[4]

In order to be truly supreme, the Constitution of Canada must not only prevail over inconsistent provisions, it must also be entrenched, and this is accomplished by subsection 52(3):

> (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

The principal "authority" for amendment is contained in Part V of the Constitution Act, 1982, and that Part will be the subject of this and the next chapter.[5] Before moving on to

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[3]P.W. Hogg, Constitutional Law of Canada, 2d ed. (Toronto, 1985), p. 54 (hereinafter Hogg (1985)).

[4]See Hogg, ibid., pp. 42-3.

[5]Professor Stephen Scott notes that other parts of the Constitution of Canada may still be amendable by provisions provided therein. See S.A. Scott, "The Canadian Constitutional Amendment

the detailed provisions of Part V, however, it will perhaps be useful to dwell briefly on the important phrase, the "Constitution of Canada".

Prior to the proclamation of the Constitution Act, 1982, the notion of a "Constitution of Canada"[6] was of largely academic interest. Some authors of treatises on Canadian constitutional law felt obliged to define for their readers just what the scope of their analysis would be. Others simply plunged into the subject without bothering to deal with a difficult and ultimately not essential definition. As noted above, the "Constitution of Canada" is referred to frequently in the Constitution Act, 1982, and a more accurate definition is now necessary.

Subsection 52(2) provides the most useful information as to what the "Constitution of Canada" might be:

> (2) The Constitution of Canada includes
> (a) the Canada Act 1982, including this Act;
> (b) the Acts and orders referred to in the schedule; and
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).

It is not difficult to discover the contents of paragraphs (a), (b) and (c). Problems arise, however, when one attempts to determine whether subsection 52(2) is a comprehensive list of what comprises the "Constitution of Canada".

The academic debate thus far has focused on the meaning of the phrase "the Constitution of Canada includes"[7] in subsection 52(2). Most commentators have acknowledged that when the framers use "includes" rather than "means" the definition is

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Process" (1982) 45 Law and Contemp. Probs 249, p. 254 (hereinafter Scott (1982)); and Constitution Act, 1871, s.3.

[6]For a more detailed contextual discussion of this phrase, see the section entitled "Sections 38 and 42 -- the general procedure" below.

[7](Emphasis added).

not intended to be exhaustive.[8] Professor Cheffins takes this to be conclusive and therefore assumes that the definition is only partial.[9] Professor Hogg reasons otherwise. noting both the specificity of the list of acts and orders in the schedule and the "grave consequences (entrenchment and supremacy) of the inclusion of other instruments in the schedule"[10] and concludes that the definition must be exhaustive. Professors Scott and Lederman and others reject Hogg's strict view but refine in significant ways Cheffins' view. They point out that important "organic" or constitutive laws (e.g., Supreme Court Act,[11] Senate and House of Commons Act,[12]) have been left out of the list in the schedule referred to in paragraph 52(2)(b). Certain provisions in these laws are potentially of sufficient importance to justify their inclusion under the protection of subsection 52(3) and Part V, while other provisions are more trivial in nature. Scott and Lederman and others who take this intermediate point of view conclude that the framers were being deliberately cautious in avoiding an exhaustive definition, and they predict that the Supreme Court of Canada will be asked to determine which provisions have a "constitutional character" and which ones retain the normal status of ordinary laws.[13] This view satisfies both grammatical and common sense, but it places a great deal of responsibility on the Supreme Court of Canada, and there is no way of knowing at the present time whether the Court will choose to shoulder that burden. The question will arise in almost every amendment under Part V,[14] section 45 being the only procedure which does not refer to the "Constitution of

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[8]See P.W. Hogg, Canada Act 1982 Annotated (Toronto, 1982), p. 105 (hereinafter Hogg (1982)); R.I. Cheffins, "The Constitution Act, 1982 and the Amending Formula: Political and Legal Implications" (1982) 4 Sup.Ct L. Rev. 43, p. 53; and S.A.Scott, "The Canadian Constitutional Amendment Process: Mechanisms and Prospects" in C.F. Beckton & A.W. Mackay, eds, Recurring Issues in Canadian Federalism (Toronto, 1986) 77, p. 80 (hereinafter Scott (1986)).

[9]Cheffins, ibid., 53.

[10]Hogg (1982), supra, p. 105.

[11]R.S.C. 1970, c. S-19. The proposed Constitution Amendment, 1987, known as the Meech Lake Accord, would have added certain key provisions of the Supreme Court Act to the "Constitution of Canada". See Canada, Strengthening the Canadian Federation: The Constitution Amendment, 1987 (Ottawa, 1987), s.6. (hereinafter Meech Lake Accord).

[12]R.S.C. 1970, c. S-8.

[13]See Scott (1982), supra, p. 262. See also Professor W.R. Lederman, "Canadian Constitutional Amending Procedures: 1867-1982" (1984) 32 Jo. Comp. L. 339 who provides more detailed criteria for determining the relative status of provisions (hereinafter Lederman (1984)).

[14]The question may also arise if "ordinary" legislative changes are challenged on the grounds that the legislation is part of the "Constitution of Canada".

Canada", therefore we can expect to have an answer early on in the Canadian experience with constitutional amendment.

Part V of the Constitution Act, 1982 is entitled "Procedure for Amending the Constitution of Canada". However at least five distinct procedures can be identified. A certain nomenclature has emerged in Canadian writing on the subject.[15] The five different procedures may be described as follows:

(a) the general procedure -- sections 38 and 42

(b) the unanimous consent procedure -- section 41

(c) the some-but-not-all provinces procedure -- section 43

(d) the unilateral federal procedure -- section 44

(e) the unilateral provincial procedure -- section 45

Other provisions in Part V deal with the initiation, authorization and proclamation of amendments as well as the holding of constitutional conferences, and these will be discussed in Chapter 6.

Sections 38 and 42 -- the general procedure

The general procedure has always been the most important of the procedures, symbolically and practically, and this continues to be the case in the new provisions on amendment. The unanimous consent procedure set out in section 41 may be the "master key",[16] in that unanimity is always sufficient to effect any given amendment, but it is less interesting and less revealing in terms of Canada's constitutional history.

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[15]See Hogg (1985), supra, pp. 56-7; Lederman (1984), supra, p. 358; Scott (1986), supra, pp. 82-5; and J.P. Meekison, "The Amending Formula" (1983) 8 Queen's L.J. 99, pp. 107-8.

[16]Scott (1986), supra, p. 90.

There was for a long time a debate as to how much flexibility could be allowed in the amending formula while still safeguarding the interests of each member of the federation. Though unanimity satisfied the requirement of adequate protection, it placed a straightjacket on the constitution by rendering future alterations virtually impossible. It was in the interest of all provinces desiring constitutional change to support something less than unanimity for the general procedure. Accordingly, the unanimous consent provisions of the proposed Fulton-Favreau formula of the early 1960s were replaced in the 1971 Victoria formula proposals by a general procedure which required ratification by Parliament and as few as six provinces (necessarily including Quebec and Ontario). This procedure also formed part of the Prime Minister's proposed resolution of October 1980, but by that time many provinces had come to object to the part of the general procedure which provided a veto for Quebec and Ontario. An alternative was proposed by eight premiers in the April Accord of 1981 in which "the equality of the provinces within Canada" was recognized.[17] The veto power disappeared and was replaced by a right to opt out of certain amendments and to receive reasonable compensation, and the new general procedure called for approval of amendments by resolutions of the Senate and by two-thirds of the provinces representing fifty percent of the population. In the final stages of constitutional negotiations the right to compensation was cut down, but the balance of the April Accord general procedure was retained. The general procedure in the Constitution Act, 1982 is reasonably flexible, in that it stops short of unanimity and gives no province a veto. It allows for provinces to go their own way by opting out of amendments, but it provides little encouragement to do so given that compensation is available in few cases. These crucial aspects of the general procedure are the product of intense and lengthy negotiations, and the procedure will be analysed in that perspective.

The general procedure for amending the Constitution of Canada is set out in paragraphs 38(1)(a) and (b). The amendment must be authorized by

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[17]The April Accord, 16 April 1981, reprinted in (1985) 30 McGill L.J. 655, p. 656 [hereinafter April Accord].

> (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 census, at least fifty percent of the population of all the provinces.

The resolution referred to in paragraph 38(1)(a) presents few difficulties of interpretation. The Senate and House of Commons have played a central role in every amendment to the Constitution since 1867, each time preparing and authorizing a resolution for presentation to the United Kingdom Parliament. Under the new procedures, the last step is of course no longer necessary, but the Senate and House of Commons must still prepare and authorize an appropriate resolution, and the requisite number of provinces must do likewise. The voting and counting rules contained in the general procedure together with the rules on opting out and compensation will be discussed in Chapter 6. More substantive questions will be dealt with in examining section 42, to which the general procedure also applies. It should be noted before leaving section 38 that wherever there is an "amendment to the Constitution of Canada" which is not governed by one of the other procedures it will be governed by section 38. We will now examine section 42.

Before dealing separately with each of the matters set out in section 42, it should be noted that in the absence of this section these matters could arguably be amended either by the federal government alone under section 44[18] or by one specially affected province with or without the federal government under sections 43 and 45.[19] Section 42 recognizes that there is a broader national interest requiring constitutional protection, in this case by means of the general procedure in section 38.

The Prime Minister's October 1980 proposed resolution contained the same provisions which now appear in paragraphs 42(1)(a)(b) and (c). These deal with aspects of the federal governmental institutions, the House of Commons and Senate, which are

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[18] As in the case of paragraphs 42(1)(a)(b)(c)(d) and (f).
[19] As in the case of paragraph 42(1)(e).

clearly important to the provinces.[20] In the April Accord, the eight premiers added three new provisions which reflected their enlarged view of provincial interest in national matters, and these are now set out in paragraphs 42(1)(d)(e) and (f).

Paragraph 42(1)(a) directs that amendments in relation to "the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada" must be accomplished using the general procedure. The general provisions dealing with the House of Commons can be found in sections 37 to 52 of the Constitution Act, 1867. Subsection 51(1) provides six rules for readjustment of representation in the House of Commons as enacted most recently by the Constitution Act, 1974.[21] Cheffins argues that paragraph 42(1)(a) should refer to the "principles" of proportionate representation, the plural reference assuring that all of the rules set out in section 51 are protected. Cheffins feels that even in singular form the protection of all the rules is secure.[22]

It is just as likely that the use of the word "principle" in the singular was deliberate and intended precisely to avoid the interpretation favoured by Cheffins. As such, the general structure of proportionate representation would be protected, but the individual rules would still be subject to adjustment.[23] This, of course, leaves open the question of when a change to the general structure is so radical as to fall within the ambit of paragraph 42(1)(a), and that may be for the courts to determine. It should be noted that many of the new rules in section 51 protect and relate to the representation of the province of Quebec, and that that province is specially and uniquely affected by changes to these rules.[24] In

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[20]Hogg (1985), supra, p. 63; Meekison, supra, p. 116.

[21]S.C. 1974-75-76, c. 13.

[22]Cheffins, supra, p. 52.

[23]This appears to have been the approach taken by a majority of the British Columbia Court of Appeal in Campbell v. A.G. Canada (1988) 48 D.L.R. (4th) 321.

[24]The rules which appeared in the early amendments to section 51 of the Constitution Act, 1867 did not make specific reference to Quebec whereas the Constitution Act, 1974 refers to Quebec in the first rule and frequently uses the expression "other than Quebec". Compare British North America Act, 1943, 6-7 Geo. VI, c. 30 (U.K.) and British North America Act, 1952, S.C. 1952, c. 15, both of which are now repealed.

areas such as this, where no compensation is available and no veto possible, Quebec may feel most acutely the adverse effects of the new formula.[25]

Paragraphs 42(1)(b) and (c) cover amendments in relation to the Senate of Canada. The Senate has been the subject of a number of fairly radical institutional reform proposals,[26] and it is likely that a formal resolution for changes will be proposed in the near future.[27] The proposals are not the subject of this chapter. For the moment we will simply look at how paragraphs 42(1)(b) and (c) are likely to function.

Three sections in Part V deal explicitly with amendments to the Senate. The largest, catch-all or residual provision is section 44 which allows that "subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to ... the Senate" (emphasis added). This is essentially a continuation of powers granted to Parliament by British North America (No. 2) Act, 1949[28] and contained in Class 1 of section 91 of the then British North America Act, 1867.[29] Both the 1949 Act and Class 1 of section 91 were repealed by the Constitution Act, 1982. The content of the new section 44 will be dealt with later in this chapter. For now we are more concerned with the limiting phrase "subject to sections 41 and 42". Subsection 41(b) refers to the Senate – "the right of a province to a number of members in the House of Commons not less than the number of Senators by which a province is entitled to be represented" -- but this is really just the entrenchment of a permanent standard by which representation in the House of Commons

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[25]The Meech Lake Accord would have altered this precarious situation by subjecting this provision to the unanimous consent procedure, thereby guaranteeing a veto for Quebec (and all provinces).

[26]See, e.g., Canada, Special Joint Committee of the Senate and the House of Commons on Senate Reform, Report (1984) and Canada, Royal Commission on the Economic Union and Development Prospects for Canada, Report, vol. 3 (1985).

[27]The most recent proposals for constitutional change contained a large number of provisions which would have altered significantly the role of the Senate. See Canada, Consensus Report on the Constitution, Charlottetown, Final Text (28 August 1992) and connected Draft Legal Text (9 October 1992).

[28]13 Geo. VI., c. 81, now repealed.

[29]Now the Constitution Act, 1867. This power was exercised regarding the Senate in the 1965 amendment setting the retirement age of senators at 75. See Constitution Act, 1965, S.C. 1965, c. 4 and Meekison, supra, p. 118.

can be established.[30] The most important specific references to the Senate appear in section 42(1)(b) and (c). Four separate aspects are set out: (1) "the powers of the Senate"; (2) "the method of selecting senators"; (3) "the number of members by which a province is entitled to be represented in the Senate"; and (4) "the residence qualifications of Senators". It is not so important to distinguish each of these aspects from the others given that they are all governed by the general procedure, but it is necessary to define their content so as to determine what is excluded from the unilateral amending power of Parliament as set out in section 44. I will deal with them in order, beginning with "the powers of the Senate".

(1) "the powers of the Senate"

Section 18 of the Constitution Act, 1867 refers to "[t]he privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate" and states that these are "such as are from time to time defined by Act of the Parliament of Canada". Furthermore, such an Act "shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the members thereof" (emphasis added). Some of the Senate's powers are held jointly with the House of Commons and are listed, for example, in section 91 of the Constitution Act, 1867. Other powers are not entrenched but may be governed by the final limiting phrase in section 18 quoted above. The powers of the Senate are mostly contained in the Senate and House of Commons Act;[31] however, this Act is not listed in the schedule to the Constitution Act, 1982 and may not be included therefore in the Constitution of Canada to which section 42 is applicable. Accordingly, the powers would normally be alterable by Parliament; however, in order to exceed those powers held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom, a full-fledged amendment would be required, carried out by means of the general procedure. It should also be noted that there are powers of the Senate

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[30]This is set out in section 51A of the Constitution Act, 1867.

[31]R.S.C. 1970, c. S-8.

referred to in Part V, such as those in section 47 dealing with the adoption of resolutions without a Senate resolution. These would have to be altered by unanimous consent as they form part of Part V.[32]

(2) "the method of selecting Senators"

At present, the method of selecting senators is relatively simple. Sections 24, 26, 27 and 32 of the Constitution Act, 1867 govern the summons of the senators, the only direction being that the newly chosen senator be a "qualified Person", although section 32 adds that when a vacancy appears in the Senate (usually by reason of death or resignation of a senator and more rarely by reason of resignation or disqualification) the person who fills the vacancy must be both "fit" and "qualified". The Governor General performs the summoning in the Queen's name and, as always, under the advice of the Queen's Privy Council of Canada. Other than these indications, the method of selecting senators is left to the discretion of those charged with summoning senators. Presumably the inclusion of "the method of selecting senators" was done with Senate reform in mind.

(3) "represent[ation] in the Senate"

In the Upper House Reference,[33] the Supreme Court stated that "the system of regional representation in the Senate was one of the essential features of that body when it was created. Without it, the fundamental character of the Senate as part of the federal scheme would be eliminated." The system as set out in the original Constitution Act, 1867, section 22 and as amended by the Constitution Act, 1915,[34] the Newfoundland Act[35] and the Constitution Act (No. 2), 1975[36] provides for the number of members by which each

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[32]See section 41(e).

[33]Re: Authority of Parliament in Relation to the Upper House [1980] 1 S.C.R. 54, p. 76 (hereinafter Upper House Reference).

[34]5-6 Geo. V, c. 45 (U.K.).

[35]12-13 Geo. VI, c. 22 (U.K.).

[36]1975, 23-24 Eliz. II, c. 53 (Can.).

province is entitled to be represented in the Senate. It is now preserved by paragraph 42(1)(d) of the Constitution Act, 1982.[37]

(4) "residence qualifications"

Had subsection 42(1)(c) referred simply to the "qualifications of senators", provincial consent would be required for any amendment to the six subsections in section 23 of the Constitution Act, 1867.[38] As it stands, however, only subsections (3)(4)(5) and (6) appear to deal with "residence qualifications". Arguably only subsections 23(5) and (6) are covered by paragraph 42(1)(c), given that only in these subsections is the word "resident" actually referred to, and as the Supreme Court of Canada noted in the Upper House Reference,[39]

> [s]ome of the qualifications for senators prescribed in s.23 such as the property qualifications may not today have the importance which they did when the Act was enacted. On the other hand, the requirement that a senator should be resident in the province for which he is appointed [subsection 23(5)] has relevance in relation to the sectional characteristic of the make-up of the Senate.

We can at least be sure that the most important and relevant qualification in section 23 is protected by paragraph 42(1)(c).

By including paragraphs 42(1)(b) and (c) the framers of the new constitution have respected the notion, set out by the Supreme Court of Canada in the Upper House Reference, that the provinces do have an interest in certain changes to the Senate. The Court would probably interpret these paragraphs liberally in the event that radical changes

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[37]It is an open question whether or not the final paragraph of section 22 of the Constitution Act, 1867 regarding Quebec Senate representation is protected by the this part of paragraph 42(1)(d), though it is likely that this provision would be protected by the other part of paragraph 42(1)(d) which deals with residence qualifications. See subsection 23(6) of the 1867 Act.

[38]Provincial consent may still be required here to the extent that these subsections may be said to relate to "the method of selecting senators".

[39]Upper House Reference, supra, p. 76.

to the Senate were proposed, perhaps repeating the language with which it concluded the Reference:[40]

> [I]t is not open to Parliament to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process.

Alterations which would not have such an effect could be amended by Parliament alone under section 44. The distinctions are important not only for deciding whether provincial consent is required (as with the general procedure) or whether Parliament alone can decide (as with the unilateral federal procedure), but also for determining whether the amendment could be made without Senate approval (as provided for in section 47). The Senate could be circumvented in the case of sections 41 and 42 amendments but not in the case of section 44 amendments. Thus the Senate could not block an amendment to the representation rules in section 22 if the (provinces and) House of Commons chose to use section 47,[41] whereas it could block more minor alterations to the Senate and House of Commons Act.[42]

Paragraph 42(1)(d) covers amendments to the Constitution of Canada in relation to the Supreme Court of Canada. Along with the Senate, the Supreme Court of Canada has been the subject of numerous proposals for reform. Prior to 1982, alterations to Court structure, composition and procedure were accomplished by means of general legislation under the Supreme Court Act, this Act having been passed pursuant to section 101 of the Constitution Act, 1867.[43] Though paragraph 42(1)(d) clearly refers to the

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[40]Ibid., p. 78.

[41]This section will be examined in Chapter 6.

[42]R.S.C. 1970, c. S-19.

[43]Both the Supreme Court Act, R.S.C. 1970, c. S-19 and the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10 were passed pursuant to this section. It reads as follows:

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

Supreme Court of Canada and appears to subject amendments to the general procedure, there is considerable debate, nonetheless, over whether or not the federal Parliament has in fact lost its power to deal unilaterally with the Court. The dispute centres on the issue which was highlighted at the outset of this chapter, that is, the extent to which the new amending procedures apply solely to texts listed in the schedule as being included in the "Constitution of Canada". The issue is important in other sections of Part V, notably paragraph 41(d) which also deals with the Supreme Court of Canada. It may be useful to examine paragraphs 42(1)(d) and 41(d) before moving on to other issues.

Paragraph 42(1)(d) refers to the Supreme Court of Canada "subject to paragraph 41(d)". Paragraph 41(d) speaks of "the composition of the Supreme Court of Canada". Neither the Prime Minister's October 1980 Proposed Resolution[44] nor the February and April 1981 Proposed Resolutions[45] refer to the Supreme Court of Canada in the parts on the amending formula, therefore we must look to their place of origin, the April Accord, to find help in interpreting their meaning. The explanatory note to paragraph 9(d) of the April Accord, the corresponding text to paragraph 41(d), sheds light on the meaning of the word "composition" as it is used in this context.

> (d) This clause would ensure that the Supreme Court of Canada is comprised of judges a proportion of whom are drawn from the Bar or Bench of Quebec and are, therefore, trained in the civil law.[46]

Beyond the protection of Quebec judges trained in the civil law, it is likely that "composition" would protect the total number of judges on the Court,[47] and perhaps also their appointment by the Governor General in Council, their qualifications and the length and conditions of their tenure.[48] The explanatory note to paragraph 9(d) goes on to say

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[44]Reprinted in (1984-85) 30 McGill L.J. 755 (hereinafter October 1980 Resolution).

[45]Reprinted in (1984-85) 30 McGill L.J. 773 and 799 (hereinafter February 1981 Resolution and April 1981 Resolution).

[46]April Accord, supra, p. 665.

[47]Supreme Court Act, section 4. See Hogg (1985), supra, p. 65.

[48]Supreme Court Act, sections 4, 5 and 9. See Scott (1986), supra, p. 81.

that "[o]ther aspects of the Supreme Court of Canada are dealt with in section 10 [now section 42]".[49] Paragraph 10(d) refers to the Supreme Court of Canada "except with respect to clause (d) of section 9".[50] The explanatory notes state that "[t]his clause refers to all amendments relating to the Supreme Court of Canada except the composition which is dealt with in section 9, clause (d)".[51] This paragraph was eventually redrafted as "subject to" paragraph 41(d) which is less comprehensive than the earlier phrase "except with respect to" and appears no longer to justify the statement that "all amendments" other than those dealing with composition are included in paragraph 42(1)(d). This less rigid drafting may allow in the future for a three-category interpretation of amendments in relation to the Supreme Court of Canada, discussed below.[52] Whereas "except" implies the balance of matters dealing with the Supreme Court of Canada beyond its composition, "subject to" does not imply such a comprehensive approach, thereby leaving room for matters which have to do with neither the composition nor the important constitutional components of the Court. In order to discuss this issue of classification in more detail, it will be necessary to review the different points of view with respect to whether Parliament has retained its unilateral power to deal with amendments to the Court, despite the language of paragraphs 41(d) and 42(1)(d), or whether such amendments are now governed by the new procedures set out in Part V of the Constitution Act, 1982.

At the outset it should be pointed out that there is real ambiguity in this area. Most of the authors who have written on this question make a point of stating that the issue is "less than clear"[53] or "a matter for speculation".[54] Of course, until the Supreme Court of

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[49]April Accord, supra, p. 665.

[50]Ibid., p. 666 (emphasis added).

[51]Ibid (emphasis added).

[52]W.R. Lederman, "Constitutional Procedure and the Reform of the Supreme Court of Canada" (1985) 26 C.de D. 195 proposes such a three-category interpretation (hereinafter Lederman (1985)). Oddly enough the above argument is not used by Lederman to support his approach. This is discussed in greater detail, infra.

[53]Scott (1982), supra, p. 257.

[54]B.L. Strayer, The Canadian Constitution and the Courts (Toronto, 1983), p. 33. G. Tremblay, "La procédure de modification de la Constitution du Canada et ses puzzles" (1983) 43 R. du B. 1151, p. 1151 (hereinafter Tremblay (1983)) states that it is impossible to give a certain answer to this question.

Canada has interpreted the amendment rules, the proper interpretation of all of Part V will be uncertain. However, whereas some provisions appear to provide fairly clear answers, the provisions dealing with the Supreme Court of Canada are particularly ambiguous.

The literature in this area reveals three fairly distinct approaches to the problem. The first, or immediate-application approach accepts that paragraphs 41(d) and 42(1)(d) would apply to constitutional amendments regarding the Supreme Court while the second, or future-application approach, concludes that Parliament can still deal unilaterally with this subject matter until the Supreme Court Act or some part of the provisions dealing with the Supreme Court of Canada is entrenched in the constitution. The third is a set of intermediate approaches which contains a number of variations.

The immediate-application approach was most commonly found in the early commentary on the new amending formula. It was perhaps encouraged by the then-prevailing enthusiastic feeling that all provisions of the new constitution should have full meaning and immediate effect.

The approach can be summarized as follows. The Supreme Court of Canada has not been listed in the schedule as part of the "Constitution of Canada", and subsection 52(2) states that the Constitution of Canada "includes" the Acts and orders referred to in the schedule. It does not say "means" which is the usual expression for exhaustive definitions. It follows from this that the expression "Constitution of Canada" is flexible enough to be extended so as to include the Supreme Court of Canada; otherwise paragraphs 41(d) and 42(1)(d) would have no meaning.

Cheffins argues this approach most persuasively and recognizes but does not discuss other points of view.[55] Other adherents to this view are even less probing in their

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[55]Cheffins, supra, pp. 53-4.

analysis. Meekison does not discuss the issue in any detail but states that "it is now clearly established that any amendment to the constitution in these areas [Senate, Supreme Court of Canada] requires provincial participation".[56] Rémillard approaches the issue similarly in concluding, with little argumentation, that the Supreme Court Act is now part of the constitution by the effect of paragraphs 41(d) and 42(1)(d).[57]

This approach is seldom rejected out of hand by its critics. They merely point out that it is difficult and perhaps unwise to extend the list of Acts which form part of the "Constitution of Canada" and that the result of such an extension would be to include the most minor and inconsequential provisions in the Constitution of Canada, thereby watering down its content and providing entrenchment in an overbroad fashion.[58] These observers meet the statement that paragraphs 41(d) and 42(1)(d) lack meaning by arguing that these are anticipatory provisions whose purpose is to govern amendments to the Supreme Court of Canada when it or the Supreme Court Act are formally made part of the Constitution of Canada.[59] These critics' views can be understood more clearly if they are discussed together with their substantive proposals.

The future-application approach is adopted by those who believe that because no piece of legislation dealing with the Supreme Court of Canada (other than section 101 of the Constitution Act, 1867 which does not refer specifically to the Court) is included in the "Constitution of Canada", paragraphs 41(d) and 42(1)(d) can have no immediate effect.[60] Only when the Supreme Court of Canada has been made part of the Constitution will the

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[56]Meekison, supra, p. 116.

[57]See G. Rémillard, "Introduction" (1985) 26 C. de D. 5, p. 5 where the author states that the "Loi sur la Cour suprême qui était depuis 1875 une loi du Parlement canadien que l'on pourrait qualifier tout au plus de quasi constitutionnelle se retrouve partie de la constitution canadienne par le jeu de l'application de ces deux articles de la Loi constitutionnelle de 1982."

[58]See Scott (1982), supra, p. 262; Scott (1986), supra, p. 82; Strayer, supra, p. 33; and N. Finkelstein, Laskin's Canadian Constitutional Law (Toronto, 1986), p. 111.

[59]See Hogg (1985), supra, p. 63; Strayer, ibid., p. 47; and Finkelstein, ibid., p. 111.

[60]See Hogg, ibid., pp. 63 and 65; Strayer, ibid., p. 33.

protection of sections 41 and 42 take effect.[61] Until that time. Parliament can continue to amend the Supreme Court Act (and any other statute referring to the Supreme Court of Canada) unilaterally.

This cautious approach to paragraphs 41(d) and 42(1)(d) is certainly plausible, but, as critics have pointed out, it ignores the apparent purpose of these sections as manifested by the preparatory documents. The April Accord suggests that immediate, constitutionally entrenched protection was intended for the Supreme Court of Canada. Of course, the courts would not necessarily feel bound by such an interpretation.

The future-application approach appears to adopt an all-or-nothing position. This may make good legal sense, strictly speaking, but it leaves no room for the courts to attempt to resolve the ambiguity. For example, Hogg acknowledges Cheffins point that "includes" in section 52(2) allows an extended definition of the "Constitution of Canada",[62] but he chooses not to develop this possibility. Barry Strayer also recognizes the possibility of an expanded definition but rejects such an approach on the grounds that it would catch too many "minor, petty amendments".[63] Though the attitude is not voiced, there appears in both of these cases to be a reluctance to suggest that the courts should, if asked, draw a line somewhere in the grey zone between all and nothing. Those who adopt intermediate positions show no such reluctance.

The various intermediate approaches might also be characterized as proposals designed to encourage a creative response to this issue when it eventually reaches the court system. Whereas the first two approaches have the advantage of certainty, the

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[61]See Hogg, ibid., p. 63; Strayer, ibid., p. 47; Finkelstein, supra, p. 111; and G.-A. Beaudoin, "La réforme des institutions centrales: quelques jalons" (1984) 25 C. de D. 173, p. 185. This, of course, would have been the result of the addition of ss. 101A-E to the Constitution Act, 1867 in the manner proposed in the Meech Lake Accord, s.6. See Meech Lake Accord, supra.

[62]Hogg (1985), supra, p. 63n.

[63]Strayer, supra, p. 33. Finkelstein, supra, p. 111 also takes this view.

intermediate approaches suggest plausible interpretations of paragraph 41(d) and 42(1)(d), but acknowledge that there is much room for judicial guidance here.

Though it is difficult to predict which of the approaches will prevail eventually, the intermediate position may prove useful at some time in the future. As noted earlier, paragraph 42(1)(a) now uses the more flexible phrase "subject to paragraph 41(d)" rather than the phrase "except with respect to" originally proposed in the April Accord. The April Accord explanatory note to what is now paragraph 42(1)(d) contains references to the unusual situation of having amendment provisions in Part V for matters which are not specifically listed as being part of the "Constitution of Canada". A sample makes this point clear: "The Supreme Court is established by law of Parliament and not by the Constitution itself. This clause anticipates constitutional amendments relating to the Court."[64] A similar statement can be found in the explanatory note to what eventually became paragraph 41(d): "This clause would ensure that the Supreme Court of Canada is comprised of judges a proportion of whom are drawn from the Bar of the Bench of Quebec and are, therefore, trained in the civil law".[65] Elsewhere in the explanatory notes the language is affirmative (i.e., this clause ensures) not conditional, suggesting once again that this is a special case.

Such explanations undermine the first approach which assumes full and immediate application of the amending formula to any potential change to the Supreme Court of Canada. It is difficult to go to the other extreme, however, and to claim definitively that the amending formula has no effect at the moment on amendments relating to the Court. In between the extremes of the first two approaches there are various possibilities which will be discussed below. This project seems all the more worthwhile in light of former Chief Justice Dickson's opinion, with respect to sections 41 and 42, that they provide

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[64] April Accord, supra, p. 666.

[65] Ibid., p. 665 (emphasis added).

"some degree of entrenchment, the extent to which one cannot say at the present time".[66] Though this was said with reference to all of sections 41 and 42, it does seem to justify further investigation of imaginative intermediate approaches in order to determine the "degree" and "extent" of entrenchment.

The intermediate approaches can be divided into two major groups. The first group deals with paragraphs 41(d) and 42(1)(d) differently, arguing that the former is fully effective immediately while the latter is not effective until parts of the Supreme Court Act have been entrenched. The second group treats paragraphs 41(d) and 42(1)(d) together but reasons that these provisions affect only a part of the Supreme Court Act, it being up to the courts to draw the line.

The first group's approach is best represented by Professors Brun and Tremblay who begin using arguments from the immediate-application approach, noting that section 52 uses the word "comprend" (or "includes") rather than "désigne" (or "means") and that this allows us to give enough content to section 41 to give it meaning.[67] This is necessary because the Constitution does not refer elsewhere to "composition of the Court".[68] In the case of paragraph 42(1)(d), however, meaning can be given to it within the existing "Constitution of Canada" (i.e., paragraph 42(1)(d) covers section 101 of the Constitution Act, 1867),[69] and there is no need to go beyond that section.[70] Consequently, Parliament retains full power to amend the Supreme Court Act, subject only to the unanimous consent amending procedure which must be used when altering the composition of the Court. At this point, the argument picks up on the future-application approach and concludes that paragraph 42(1)(d) will have no effect beyond section 101 of

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[66]Interview, Ontario Lawyers Weekly, 27 July 1984, p. 14.

[67]H. Brun & G. Tremblay, Droit constitutionnel (Montreal, 1982), p. 368.

[68]Ibid.

[69]It should be noted that this section does not refer specifically to an established Supreme Court of Canada.

[70]Brun & Tremblay, supra, p. 370.

the Constitution Act, 1867 until such time as the Supreme Court Act is entrenched.[71] Brun and Tremblay do acknowledge that a fuller interpretation of paragraph 42(1)(d) is possible, but they join Hogg, Strayer and others in pointing out the practical difficulty of limiting the extent to which the Supreme Court Act is deemed to be constitutionalised.[72]

The intermediate approach to sections 41 and 42 is also adopted by Professor Scott. His writings also fall into the first group, but Scott's treatment of paragraph 42(1)(d) is more probing than that of Brun and Tremblay.[73] He states that together "[s]ubsections 41(d) and 42(1)(d) create a powerful implication that at least some of the federal statute law relating to the Supreme Court of Canada is now to be considered part of the 'Constitution of Canada'".[74] On a closer analysis, using the April Accord and explanatory notes as aids, Scott observes that the argument for effective and immediate entrenchment of paragraph 41(d) is more powerful than that with respect to paragraph 42(1)(d).[75] The logic of his analysis leads to the conclusion that "Parliament's power under section 101 is, save as regards the 'composition' of the court, intact".[76] While Scott acknowledges the force of this conclusion he is uncomfortable with the differing treatment of paragraphs 41(d) and 42(1)(d). The solution to this unease was alluded to in an earlier article by Scott and these earlier comments may have inspired other writers such as Lederman to elaborate on this position.[77]

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[71] Ibid.

[72] In a later article, Tremblay once again acknowledges that a more flexible approach to paragraph 42(1)(d) is possible, but he concludes that using this approach would open up a box of surprises ("une véritable boîte à surprises). Tremblay (1983), supra, p. 1152. See also G. Tremblay, "La réforme des institutions et de la formule d'amendement dans l'Accord du Lac Meech" in R. Forest, ed., L'adhésion du Québec à l'Accord du Lac Meech (Montreal, 1988), pp. 79-88.

[73] Scott (1986), supra. See also S.A. Scott, "The Supreme Court of Canada and the 1987 Constitutional Accord" in Forest, ibid., p. 131.

[74] Scott (1986), ibid., p. 81.

[75] Ibid.

[76] Ibid.

[77] See Scott (1982), supra, and Lederman (1985), supra.

Scott's earlier writing on this subject and an important article by Lederman make up the second group in the intermediate approach.

Scott's earlier analysis of paragraphs 41(d) and 42(1)(d) led him to believe that some part of the Supreme Court Act is entrenched, but that it is unlikely that the constitution makers intended to entrench the Act in all its detail. Scott concluded that the courts [78]

> will likely be disposed to adopt an intermediate position, attributing to some of the federal statutory provisions a "constitutional" character and to others not. This could give an entrenched status to the essential elements of the court's character without involving the inconvenience which an implied repeal of the pertinent portion of section 101 would entail.

Scott sets out a similar argument in his 1986 paper, but indicates once again that the courts must eventually take on the difficult task of drawing the line.[79]

> Where the line is to be drawn between that part of the Court's "organic" statute law which does form part of the "Constitution", and that which does not, will ultimately have to be settled by the Supreme Court of Canada itself, on a case-by-case basis.

A detailed elaboration of a viable intermediate position was set out in 1985 by an author who has in the past attempted to convince the Supreme Court of Canada of novel positions.[80] In an article entitled "Constitutional Procedure and the Reform of the Supreme Court of Canada", Lederman tackled the problem in very thorough fashion.[81]

Lederman begins by observing that section 101 of the Constitution Act, 1867 is inconsistent with the express purpose of paragraphs 41(d) and 42(1)(d) of the

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[78]Scott, ibid., p. 262.

[79]Scott (1986), supra, p. 82.

[80]See Anti-Inflation Reference [1976] 2 S.C.R. 373 (judgment of Beetz J.) and the Patriation Reference, supra, p. 783.

[81]Lederman (1985), supra.

Constitution Act, 1982. The former section gives Parliament the power to make laws for "A General Court of Appeal for Canada" while the latter two paragraphs subject this same Court to more onerous amending procedures. Lederman resolves this clear conflict by invoking "the governing rule of interpretation which directs that 'to the extent of the inconsistency', the later provisions (those of 1982) override and render inoperative the earlier provision (that of 1867)".[82]

Having reasoned that paragraphs 41(d)and 42(1)(d) have effective and immediate application, Lederman proceeds to establish criteria by which the sections of the Supreme Court Act can be separated and assigned to appropriate amending procedures. The proposed structure is divided into three categories:[83]

> (1) those sections that have to do with the basic composition of the Supreme Court of Canada
> ...
> (2) those sections that have to do with basic elements of the Court other than composition
> ...
> (3) those sections which are secondary or incidental provisions of the Supreme Court Act, having to do with detailed administration or operation of the Court, given that its essential elements have been settled by the sections falling within categories (1) and (2) above.

Of course, category (1) is linked to the paragraph 41(d) procedure, category (2) to paragraph 42(1)(d) procedure and category (3) to the residue. Lederman engages in a process of "reading down" paragraph 42(1)(d) both in order to reduce the inconsistency between section 101 of the 1867 Act and paragraph 42(1)(d) of the 1982 Act and to avoid the ridiculous result of subjecting even the most trivial provisions of the Supreme Court Act to the general amending procedure.[84] This approach still requires more definite lines, and Lederman joins Scott in assigning the task to the courts.[85] Until the matter is decided either by ordinary litigation or by a constitutional reference, Parliament

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[82]Ibid., p. 197.
[83]Ibid., pp. 197-8.
[84]Ibid., pp. 198-9.
[85]Ibid., p. 199.

will be uncertain as to which procedure to employ when altering aspects of the Supreme Court of Canada. Lederman. together with Brun and Tremblay, suggests that the Court might use the same type of analysis as was employed in the Upper House Reference of 1979 where distinctions between basic and secondary elements were made and detailed reasons provided.[86]

As was noted at the outset of this discussion, paragraphs 41(d) and 42(1)(d) are less than clear and no sure conclusions can be reached as to their likely application. The final result may turn on the way in which the question comes before the Court. If, for example, the question is raised in a reference, then the Supreme Court of Canada may take the safe and perfectly plausible route of ruling that paragraphs 41(d) and 42(1)(d) have no effect regarding amendments to the Supreme Court Act until Parliament has included part or all of that Act in the Constitution of Canada. Such an interpretation would be consistent with the April Accord[87] and attractive to less activist members of the Court. It would also alert federal and provincial law makers to the importance of agreeing on amendments which effectively entrench the Supreme Court of Canada.

If, on the other hand, the Supreme Court of Canada is presented, for example, with a reference by the province of Quebec via its Court of Appeal questioning unilateral federal alteration of important aspects of the Supreme Court of Canada, an activist court might well be willing to give immediate and effective meaning to paragraphs 41(d) and 42(1)(d) in order to protect Quebec's interests in the Court. In doing so, the Court could adopt either the immediate-application approach or the intermediate approach. The intermediate approach may well be favoured given that its flexibility allows for case-by-case definition of the new contours.

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[86] Ibid.; Brun & Tremblay, supra, pp. 370.

[87] See section 9(d) of the explanatory notes, April Accord, supra, p. 665: "This clause would ensure ... ." (emphasis added) and section 10(d) of the explanatory notes, April Accord, ibid., p. 666: "This clause anticipates constitutional amendment ... ." These sections of the explanatory notes were discussed above.

It should be noted that the federal and provincial legal advisers may have warned their governments that there is a real risk that the courts may feel bound to take the future-application approach. Accordingly, they have suggested that the composition and basic elements of the Supreme Court of Canada be entrenched. Such entrenchment proposals have appeared in most federal-provincial constitutional reform documents since at least 1987.[88]

The final two paragraphs of section 42 deal with the extension and creation of provinces. Alteration of boundaries between provinces is covered by paragraph 43(a) and requires the agreement of Parliament and the provinces affected.

Both paragraphs 42(1)(e) and (f) are new to constitutional proposals. No equivalent provision appeared in any of the drafts until November 1981 when the April Accord provisions were incorporated into the federal resolution. The topics do, however have some roots in earlier constitutional discussions.

Paragraph (e), the extension of existing provinces into the territories, was suggested by Nova Scotia in the discussions prior to the drafting of the April Accord.[89] The Maritime provinces have been concerned about this issue ever since Confederation. In 1867, Canada consisted of four provinces of roughly the same size whereas by 1905 five more provinces had been created (Manitoba, British Columbia, Prince Edward Island, Alberta and Saskatchewan). Existing provinces cannot now be extended without the consent of at least seven provinces, thereby giving the smaller Maritime provinces a collective veto over this process.

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[88]See, e.g., 1987 Meech Lake Accord, supra, ss. 101A-E.

[89]Meekison, supra, pp. 116-7.

Paragraph 42(1)(f) also has deep historical roots though it is new to proposals on constitutional amendment. Section 2 of the Constitution Act, 1871 (formerly the British North America Act, 1871) provided that Parliament could establish new provinces in the federal territories.[90] This power was used to create two western provinces.[91] In 1949, when Newfoundland was made a province from a former British colony, Parliament once again acted unilaterally, this time by means of a Resolution to the British Parliament and the resulting British North America Act, 1949.[92] That event provoked considerable and more general provincial concern.[93]

The Constitution Act, 1871 is still in effect, though,as Hogg suggests,[94] it has probably been implicitly repealed by paragraph 42(1)(f) of the Constitution Act, 1982, especially considering the words "notwithstanding any other law or practice" which appear in the more recent provision.

The interpretation of these two paragraphs does not appear to present any particular difficulties. Extension may become an issue if the western provinces resurrect the idea of a northern boundary extension into the Northwest and Yukon Territories.[95] The status of these territories might likewise raise the issue of establishing new provinces.

Though the procedure in this case may be clear and simple, the political ramifications are potentially serious. As Meekison has pointed out, a change in the number of provinces has a direct impact on the Senate, the amending formula and the

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[90]34-35 Vict., c. 28 (U.K.)

[91]See The Alberta Act, 1905, 4-5 Edw. VII, c. 3 (Can.) and The Saskatchewan Act, 1905, 4-5 Edw. VII, c. 42 (Can.).

[92]Now the Newfoundland Act, supra.

[93]Meekison, supra, pp. 116-7; Gérin-Lajoie, supra, ch. 3.

[94]Hogg (1985), supra, p. 63n.

[95]Meekison, supra, p. 117.

regional balance in Canada.[96] Accordingly, the political debates might become quite involved.

Were an additional province to be added to the Canadian Confederation, the amending formula in its general procedure would be altered in two important ways: first, the minimum number of assenting provinces would rise from seven to eight; and second, the "population of all the provinces" would change, thereby increasing the fifty percent requirement in real terms.[97]

Subsection 42(2) indicates that subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection 42(1). It was observed at the outset of the discussion of section 42 that these amendments apply nationwide and logically cannot involve effective dissent, opting out or compensation. The non-application of subsections 38(2)to (4) also means that the voting rules for the general procedure would be those ordinarily used and not the special rules of subsection 38(2).[98]

Having discussed the various rules under the general procedure, we will now move on to consider the second of the five procedures described at the outset of this chapter, the unanimous consent procedure.

Section 41 -- the unanimous consent procedure

Section 41 is arguably the supreme procedure in Part V because it provides the greatest degree of entrenchment, and it is reserved, therefore, for those things deemed to

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[96]Ibid.

[97]Some of the recent political debates provoked by the possibility of the creation of new provinces will be discussed in the concluding chapter.

[98]These procedural considerations will be discussed in Chapter 6.

be of greatest importance. Expressed another way, unanimous consent is sufficient to accomplish any type of amendment.[99]

The explanatory notes to the April Accord also acknowledge the widely-recognized need for a unanimous consent amending procedure. The eight premiers state that "some matters are of such fundamental importance that amendments in relation to them should require the consent of all the provincial Legislatures and Parliaments".[100] The unanimity procedure had not been included in the earlier federal drafts, and one would have to return to the early 1960s and the Fulton-Favreau formula to find such an acceptance of the rigid unanimity procedure.[101] Meekison notes that while unanimity was favoured for the most important subjects it was also felt that the unanimity rule should have a limited application.[102] Consequently, the list was held to five categories. We will now look at section 41 and the five categories.

Section 41 opens with a paragraph which describes the unanimous procedure as it must be accomplished for the matters listed in paragraphs 41(a) to (e). The proclamation must be issued in the same way as under section 38, except that in this case the Senate, House of Commons and "the legislative assembly of each province" must pass resolutions authorizing the amendment. The key linking phrase in section 41 is "an amendment to the Constitution of Canada in relation to the following matters" (emphasis added). The matters are set out below and are discussed individually.[103]

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[99]As Scott (1986), supra, pp. 89-90 has observed: "Because the amending process itself can be altered only under the "unanimous consent" procedure (Constitution Act, 1982, s. 41(e)) it follows that, with the unanimous consent of the federal and provincial authorities, any change in the constitutional system can be accomplished. In other words, if unanimous consent can be obtained, any desired amendment can be enacted. So the "unanimous consent" procedure is in a sense the dominant one, the master key to the Canadian constitution."

[100]April Accord, supra, p. 665.

[101]This is really a return to the compact theory of Confederation discussed in Chapter 2.

[102]Meekison, supra, p. 113.

[103]It should be noted that just as is the case regarding section 42, there are no special voting requirements. Normal voting rules apply.

Paragraph 41(a) refers to amendments in relation to "the office of the Queen, the Governor-General and the Lieutenant Governor of a province". This phrase appeared in the original Prime Ministerial Resolution of October 1980[104] and in subsequent federal versions. However, in those cases it was subject to the federal procedure (i.e., always something less than unanimity). As has been mentioned, it was only after the incorporation of the April Accord (following the First Ministers' Agreement of November 1981) that this class of amendment became subject to the unanimous consent procedure. The explanatory notes of the April Accord refer to this provision as "self-explanatory", the idea being that if a country has a monarchy it must protect the components of that system. As Professor Hogg points out, if this provision were not listed in section 41, arguably Parliament alone could make amendments regarding the office of the Queen and the Governor General, and the provincial legislatures alone could make changes to the office of the Lieutenant Governor.[105] Meekison recounts that listing this category under the general procedure was considered, but it was felt that in this case the offices of the Lieutenant Governor should remain uniform across the country, and considering that changes to the office of the Queen and Governor-General would inevitably affect the office of the Lieutenant Governor it was felt that the former should be included under the unanimous consent provisions as well.[106] In this way all provinces would be similarly dealt with and in the same manner as Parliament, and no province would have a vital part of its provincial Constitution affected without its consent. This amounts to giving all provinces a voice equal to that of the federal Parliament. This was considered sensible given the provincial reaction to the proposed changes to the office of the Governor General in Bill C-60 of 1978.

The question now arises as to what the words of paragraph 41(a) mean and include. Or, asked in another way, what can be considered "an amendment to the

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[104]See October 1980 Resolution, supra, paragraph 50(a).

[105]Hogg (1985), supra, p. 64.

[106]Meekison, supra, p. 114.

Constitution in relation to ... the Office of the Queen, the Governor General and the Lieutenant Governor of a province"?

At the outset, we must repeat that the phrase "Constitution of Canada" is not clearly defined. We are sure, however, that it includes the Constitution Act, 1867, and it is in that document that most of the relevant provisions are found with respect to the office of the Queen, Governor-General and Lieutenant Governor. Part III of the Constitution Act, 1867 deals with executive power, and section 9 vests "Executive Government and Authority of and over Canada" in the Queen. Section 10 refers to the Governor General "carrying on the Government of Canada on behalf and in the Name of the Queen". Section 58 provides for the appointment of a Lieutenant Governor for each province. Clearly, any change to these provisions would entail amendment by the unanimous consent procedure. Problems arise, however, when one considers not merely the existence of these offices, but also any proposed changes to their nature. Section 12 of the Constitution Act, 1867 provides that

> All Powers, Authorities, and Functions which under any Act ... are at the Union vested in or are exercisable by the respective Governors or Lieutenant Governors ... shall, as far as the same continue in existence and capable of being exercised after the union in relation to the Government of Canada, be vested and exercisable by the Governor General ... subject nevertheless (except with respect to such as exist under Acts of [the British] Parliament) to be abolished or altered by the Parliament of Canada.

Sections 64 and 65 and the statutory instruments admitting the other provinces perform the same function at the provincial level. The "Powers, Authorities and Functions" are set out in various British and Canadian statutes, but they are also established by convention.

In what cases will section 41(a) apply? It appears that sections 12, 64 and 65 incorporated these statutes and conventions into the constitution and also provide in some cases for the abolition or alteration of the "Powers, Authorities and Functions"

described therein by the Parliament of Canada (section 12) or the Legislatures of Nova Scotia and New Brunswick (section 64 and, implicitly subsection 92(1) of the former British North America Act, 1867) and Quebec and Ontario (section 65). It is arguable that because paragraph 41(a) is the later provision it implicitly repeals the power of Parliament and Legislature to abolish or alter the Powers, Authorities and Functions of the Governor General and Lieutenant Governors respectively. Such abolishing or altering can now perhaps be performed only by unanimous consent. This seems to be a workable though rigid reading of the new provisions. Accordingly, any change to the full range of powers vested in the representatives of the federal and provincial Crown would be subject to the unanimous consent rule. Cheffins provides examples: appointment of Prime Ministers and Premiers, appointment of cabinet ministers, removal of Prime Minister or Premier and cabinet by the Governor General or Lieutenant Governor, the prerogative powers of the Crown (e.g. appointment of ambassadors and signing of treaties and recommendation of money bills).[107] It is hard to see where this list might stop.

An alternative and perhaps more manageable interpretation is available. This reading would separate the "Office" of the Governor General and Lieutenant Governor from the "Powers, Authorities and Functions" which are attached to that Office. This interpretation is supported by the use of the word "Officer" in section 58 of the Constitution Act, 1867[108] suggesting that the "office" might be shorthand for the position or post rather than a catchword for all powers, authorities and functions that go along with it. This is the view taken by Brun and Tremblay simply in relation to the office of Lieutenant Governor,[109] but the reading is almost as persuasive for the federal equivalent though the word "officer" is not used in as clear a sense as in section 10.

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[107]Cheffins, supra, pp. 50-51.

[108]"... there shall be an Officer, styled the Lieutenant Governor ... ."

[109]Brun & Tremblay, supra, p. 358.

The result of the latter interpretation is that the "office" need not include the long list begun by Cheffins. The governor-in-council or lieutenant governor-in-council need not be included nor the powers, authorities and functions listed by Cheffins above. Only the office would be protected by the unanimous consent procedure and therefore only its essential attributes need be protected.[110] Brun and Tremblay adopt the view that no amendments may be made regarding this office without following section 41 in as much as the office is an integral part of the legislature (or Parliament)[111] and constitutional head[112] of the legislature or Parliament.[113] Accordingly, the range of protected provisions would be limited, the rest falling under the rule set out in sections 65 and 12 whereby Parliament and Legislatures can abolish or alter unilaterally. Once again, it will fall to the courts in any given case to draw the line between that which bound up with the "office" and that which falls beyond and is included in the broad category of powers, authorities and functions.

Paragraph 41(b) provides that "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 represented at the time this Part comes into force" is protected by the unanimous consent procedure. This right, known as "the Senate Floor", was recognized and protected in the Constitution Act, 1915[114] which added section 51A (providing rules for the readjustment of representation in the House of Commons) to the Constitution Act, 1867. A version of paragraph 41(b) has always appeared in proposed resolutions to patriate the constitution, with the notable exception of the Victoria formula resolution.[115] It should be noted that the "Senate Floor" protection is determined as of the date of Proclamation of Part V, that is April 1982, and therefore even alterations to the Senate or even abolition of the Senate will not affect the distribution of seats in the

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[110]Note that this type of language was used in the Upper House Reference, supra.

[111] "en tant que partie intégrante de la législature [du Parlement]"

[112]"chef constitutionnel"

[113]Brun & Tremblay, supra, p. 358.

[114]5-6 Geo. V, c. 45 (U.K.).

[115]See Meekison, supra, p. 114.

House of Commons.[116] Also, as Hogg points out, if section 51A had not been protected by paragraph 41(b) it would have probably been subject to amendment by Parliament alone under section 44.[117]

Of course, this type of protection benefits provinces with small and declining populations relative to the other provinces. It was originally enacted at a time when immigration to central and western Canada was creating a considerable imbalance in population figures. The Maritime provinces requested and received protection. The original version of Senate distribution provided in section 22 of the Constitution Act, 1867 for three divisions (Quebec, Ontario and the Maritime Provinces), each with twenty four senators. Within the Maritime division, twelve senators were to represent Nova Scotia and twelve New Brunswick. The Constitution Act, 1915,[118] Newfoundland Act[119] and the Constitution Act (No.2), 1975[120] brought the representation figures up to date and since 1915 regarded them as a minimum for representation in the House of Commons. Section 22 now provides for four divisions: Ontario, Quebec, the Maritime Provinces and the Western Provinces with each division receiving twenty four senators. Within the Maritime Division, Nova Scotia is to be represented by 10 senators, New Brunswick by 10, Prince Edward Island by 4. Within the Western Division, each of Manitoba, Saskatchewan, Alberta and British Columbia are to be represented by 6 senators. Newfoundland receives six senators as well, and the territories receive one senator each. Presently, Prince Edward Island and New Brunswick benefit from the "Senate Floor" limit,[121] and in the future Nova Scotia, Newfoundland, Manitoba and even Quebec may be likewise protected.

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[116] Ibid.
[117] Hogg (1985), supra, p. 65.
[118] 5-6 Geo. V, c. 45 (U.K.).
[119] 12-13 Geo. VI, c. 22 (U.K.).
[120] S.C. 1974-75-76, c. 53.
[121] Cheffins, supra, pp. 51-2.

It is especially important to the less populous provinces that section 51A be protected by the unanimous consent procedure. In the October 1980 federal version only protection by the general procedure was provided, allowing, for example, for alteration of the "Senate Floor" rule without the approval of Prince Edward Island and New Brunswick.[122] This could not happen under the present system and, given the high level of provincial self-interest involved here, it will be very difficult to amend section 51A. It seems, however, that the larger provinces could still weaken a small provinces representation in the House of Commons by increasing the number of seats without also raising that provinces proportion of seats. This could be done under the general procedure.

Looking now at paragraph 41(c), amendments to "the Constitution of Canada in relation to ... the use of the English or the French language" are "subject to section 43", governed by the unanimous consent procedure. Section 43 deals with "the use of the English or the French language within a province" and provides that in such cases amendments can be made with the agreement of Parliament and the legislative assemblies of the provinces to which the amendment applies. This some-but-not-all-province exception should not cause confusion in dealing with paragraph 41(c). The difficulty arises when one attempts to give meaning to the phrase which is common to both paragraphs 41(c) and 43(b): "the use of the English and French language".

Provisions dealing with the use of the English and French language are very common, especially at the federal level since the passage of the Official Languages Act. Were all these provisions to be protected by the paragraph 41(c) amending procedure, a very significant number of federal statutes would be subject to normal legislative amendment and repeal in the main, but rigidly controlled only in sections dealing with

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[122]October 1980 Resolution, supra, Part V.

the use of the English or French language. Given the volume of sections in question it is inconceivable that this is the result of paragraph 41(c).

The problem is clarified to a certain extent by remembering the phrase "Constitution of Canada" with which section 41 opens. If only parts of the Constitution of Canada which deal with the use of the English or French language are affected then the class of provisions will be drastically limited. If one assumes that the "Constitution of Canada" is limited to that which is described in subsection 52(2) then the ambit of paragraph 41(c) would be limited to a class of provisions which would include, for example, section 133 of the Constitution Act, 1867 and sections 16-22, 23, 55-57 of the Constitution Act, 1982.[123] This alone would provide a significant degree of entrenchment, but it would stop short of entrenching every provision of the Official Languages Act.[124] It is perhaps with this case that the courts will find most direction in drawing the line as to what the "Constitution of Canada" does and does not include.[125]

References to the use of the English and French languages are not new to amendment proposals. Class 1 of section 91, added by the British North America (No.-2) Act, 1949[126] specifically excluded these types of amendments from the federal amending power. Class 1, now repealed, provided for "the amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces ... or as

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[123]Hogg has added precision to this list suggesting that paragraph 43(b) would catch many of the language provisions in as much as they relate to one or more but not all provinces leaving only section 133 of the Constitution Act, 1867 in its application to federal institutions (but not Quebec institutions) and sections 16(1), 16(3), 17(1), 18(1), 19(1), 20(1), 22, 23 and 55-57 of the Constitution Act, 1982. See Hogg (1985), supra, p. 65n.

[124]R.S.C. 1970, c. O-2.

[125]Tremblay (1983), supra, pp. 1151-2 has this to say on point:

> Il n'en reste pas moins qu'il est impossible de donner une réponse certaine à cette question. Et s'il fallait que la définition de "Constitution du Canada" soit jugée extensible, d'autres lois que la Loi sur la Cour suprême pourraient y être incorporées en partie : certaines dispositions de la Loi sur les langues officielles pourraient ainsi être soumises " la règle de l'unanimité en vertu de l'article 41(c) de la Loi de 1982. À long terme une véritable boîte à surprises aurait étée créés.

[126]13 Geo.VI, c.8 (U.K.) (now repealed).

regards the use of the English or the French language". The proposed Fulton-Favreau formula, which was predominantly based on a unanimous consent procedure also included the use of the English and French languages as a separate class of amendment. The provision disappeared with the Victoria formula and the 1980 proposed resolution and only resurfaced with the April Accord. The signatories to that Accord explained this provision in uncomplicated and uncompromising terms:[127]

> This clause would require any changes to the Constitution related to the use of the English or French language either within the institutions of the federal government or nationwide to require the unanimous approval of Parliament and all legislatures.

As Meekison points out, this effectively gives Quebec, or New Brunswick for that matter, a veto or guarantee that Canada's linguistic duality will not be altered without its consent.[128] Linguistic provisions of a purely provincial nature such as the references to Quebec in section 133 of the Constitution Act, 1867 and subsections 16(2), 17(2), 18(2), 19(2), 20(2) applying only to New Brunswick are covered by procedures set out in section 43. As we will discuss later, section 43 allows constitutional protection of language to be treated as part of the provincial constitution without producing the result that such protection be unilaterally amendable by the provincial legislature as under section 45. Section 43 provides for something more than unilateral provincial amendment. It opens the way for other provinces to follow New Brunswick's lead on language provisions, initiatives which Parliament would be unlikely to oppose.

Paragraph 41(d) presents numerous difficulties of interpretation, the most important of which were set out in considerable detail in the discussion of its companion, paragraph 42(1)(d). Perhaps a brief review would be useful.

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[127]April Accord, supra, p. 665.

[128]Meekison, supra, p. 115.

It was noted in previous discussion that paragraph 41(d) which deals with the "composition" of the Court must be distinguished from paragraph 42(1)(d) which deals with the Supreme Court of Canada "subject to paragraph 41(d)". The April Accord provided a partial indication of the meaning of "composition" in stating in its explanatory notes that "[t]his clause would ensure that the Supreme Court of Canada is comprised of judges a proportion of whom are drawn from the Bar or bench of Quebec and are, therefore, trained in the civil law".[129] This sheds more light on the reasons for including paragraph 41(d) than it does on the content of the word "composition" in this context. Hogg proposes one sensible description of that content. He suggests that the total number of judges and the number of judges drawn from a particular region would likely be included while the mode of appointment would not.[130] Scott suggests that the appointment by the Governor General in Council, the qualifications and the length and conditions of tenure might also be included.[131] Cheffins goes along with Hogg in the belief that number and regional origin of judges would be included but that mode of appointment would not.[132] Lederman states that the sections of the Supreme Court Act dealing with "composition" are section 4 (dealing with Chief Justice, eight puisne judges and appointment by Governor General in Council), section 6 (dealing with the requirement that at least three judges be from the Province of Quebec and section 9 (dealing with the length and conditions of tenure).[133] The Supreme Court of Canada itself may eventually have to give more precise meaning to the word "composition".

A more difficult problem regarding paragraph 41(d) (and therefore paragraph 42(1)(d) as well) relates to whether or not the amendment provisions dealing with the Supreme Court of Canada have any immediate effect, given that the Supreme Court Act is not listed as being part of the "Constitution of Canada". In an earlier section, three

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[129]April Accord, supra, p. 665.

[130]Hogg (1985), supra, p. 65.

[131]Scott (1986), supra, p. 81. Scott sees these as going hand in hand with regional origin provisions.

[132]Cheffins, supra, p. 53.

[133]Lederman (1985), supra, pp. 197-8.

approaches were reviewed each of which led to different conclusions. The first approach assumed that the Supreme Court Act is now part of the "Constitution of Canada" and that paragraphs 41(d) and 42(1)(d) therefore apply immediately. The second approach excluded the Supreme Court Act from the "Constitution of Canada" and concluded that, until the Act is entrenched, Parliament can deal unilaterally with the Supreme Court of Canada, its composition and all. The third, or intermediate, approach, left to the courts the responsibility of deciding what parts of the Supreme Court Act are constitutionalised. There were a number of variations on this approach. According to one intermediate view, the "composition" of the Supreme Court of Canada is protected by paragraph 41(d), but the other provisions will not be protected by paragraph 42(1)(d) until the Supreme Court Act is itself entrenched. Another intermediate view calls on the Supreme Court of Canada to distinguish the "organic", and therefore "constitutional", parts of the Supreme Court Act from the more functional parts. The Court would probably draw a line which would allow full application of paragraph 41(d) to amendments regarding composition, and limited application of paragraph 42(1)(d) to the "organic" section of the Supreme Court Act. Other sections would remain under the unlimited control of the federal Parliament.

The first approach has some intuitive appeal but appears to be defeatable on strong legal reasons by the second approach. Whether or not an intermediate approach is chosen over the second approach will be determined by the courts at some later date, and the courts may perhaps be influenced by the manner in which the issue presents itself.

Scott points to yet another problem area in dealing with amendments relating to the composition of the Supreme Court of Canada. Most observers have assumed that section 6 and subsection 30(2) of the Supreme Court Act, concerning judges from Quebec, would be protected now or eventually by the unanimous consent procedure, given that they relate to composition. Scott notes that these provisions might equally be

dealt with by section 43 which covers amendments in relation to provisions of the Constitution of Canada which apply to one or more but not all provinces.

Paragraph 41(e) is truly the master key to Part V. It provides that "an amendment to this Part" must be made with the unanimous consent of Parliament and the legislative assembly of each province. The requirement of unanimity for this provision is not surprising for a number of reasons. As Meekison reports "[t]he amending formula and its specific provisions were thought to be of such fundamental importance that any change must require the consent of all partners in Confederation".[134] This is tacit acknowledgment of the weight of the compact theory in Canadian political and constitutional history. Indeed, unanimous consent requirements for altering the amending formula have been included in various proposals in addition to being respected in the search for an amending formula. The unanimity principle was, of course, ignored following the Supreme Court of Canada decision in the Patriation Reference, and definitively rejected as a pre-1982 principle in the Quebec Reference, but it still has a strong hold on amending formula discussions. It should also be noted that the pre-1982 practice allowed for resolutions of provincial governments, that is without the approval of the legislature. The Constitution Act, 1982 requires approval of the legislative assembly.

As stated earlier, it is not surprising given Canada's history that the amending procedures should be alterable only by unanimous consent. In fact, however, many constitutions do not provide at all for amendment of the amending procedures. In these cases, difficult theoretical debates arise.[135] In other constitutions, changes can be accomplished by something less than unanimity. This would have been dangerous in the Canadian case because it would have allowed for a change to the unanimous consent rules by something less than the Senate, the House of Commons and all the provinces.

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[134]Meekison, supra, p. 115.

[135]See Dellinger, supra, pp. 299-300.

Having provided for rigid, unanimous consent protection in section 41 for some categories of amendments, it followed that similar protection for the amending formula itself was necessary.

We have now looked at the general procedure and the unanimous consent procedure. This analysis will now move on to the some-but-not-all-provinces procedure set out in section 43.

Section 43 -- the some-but-not-all-provinces procedure

Section 43 has been described as producing "a strange result"[136] and as perhaps "the least satisfactory of those [sections] enumerated in Part V".[137] One exasperated commentator has referred to section 43 as "the Rubik's Cube of the Constitution Act, 1982, and in this instance no booklet is available to offer quick solutions".[138]

In this case, the language of the section is not particularly confusing; problems arise simply because section 43 fits somewhere between the general procedure of sections 38 and 42 and the unilateral provincial procedure of section 45. The deficiency, and hence the confusion, arises from a lack of any indication as to how these sections are to interact. We will look first at the history of the section, then at the meaning of the section as drafted, and finally at its relationship to other sections in Part V.

A some-but-not-all provinces amending provision appeared in the Prime Minister's proposed resolution of October 1980 in both the interim amending procedure (sections 33-40, section 34) and the permanent procedure (sections 41-51, section 43). Both of these sections are identically drafted with the exception of the phrase "Until Part

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[136]Hogg (1985), supra, p. 67.
[137]Scott (1982), supra, p. 276.
[138]Ibid.

V comes into force" which appears in section 34. The balance is the same and reads as follows:[139]

> ... 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.

This resolution clearly makes no specific reference to alteration of boundaries and the use of the English and French languages, but it represents early recognition of the need for a procedure to fill the gap between the general procedure and amendment of one province's constitution.

In the February 1981 proposed resolution contained in the Report to Parliament of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, the some-but-not-all provinces procedure was maintained in both the interim and permanent procedures,[140] but new sections were added to deal with the specific case of the language rights. Sections 38 and 48 are identically drafted except for the phrase "Notwithstanding section 40 [or 54]" and the section continues:[141]

> ... an amendment to the Constitution of Canada
> (a) adding a province as a province named in subsection 16(2), 17(2), 18(2), 19(2) or 20(2) or
> (b) otherwise providing for any or all of the rights guaranteed or obligations imposed by any of those subsections to have application in a province to the extent and under the conditions stated in the amendment 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.

This section is different from the present version in that it is worded in the singular ("a province"), and it refers simply to an amendment to the Constitution of Canada rather

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[139] October 1980 Resolution, supra, pp. 764-70.

[140] See sections 37 and 47 of the February 1981 Resolution, supra, pp. 785 and 790.

[141] Ibid.

than the October 1980 reference to "an amendment to the Constitution of Canada in relation to any provision".[142] Nonetheless, the section clearly contemplates amendment regarding "the use of the English and French language" as sections 16(2), 17(2), 18(2), 19(2) and 20(2) all deal with the case of use of English or French in New Brunswick's legislature, statutes, courts and public institutions. These early versions do not refer specifically to the alteration of boundaries between provinces, because it was presumed that such cases would be dealt with using the general procedure. The April 1981 proposed federal resolution which was prepared for examination by the Supreme Court of Canada in the Patriation Reference did not alter the February 1981 format.[143]

As in the case of many other sections, a more familiar version appeared in the April Accord of the Eight Premiers. This version was altered little before inclusion in the Constitution Act, 1982, but even the minor alterations are significant. Section 4 of the April Accord reads as follows:[144]

> 4. Amendments to the Constitution of Canada in relation to any provision that applies to one or more, but not all, of the provinces, including any alteration to boundaries between provinces or the use of the English and French language within that province may be made only 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 the Legislative Assembly of every province to which the amendment applies.

The April Accord text takes the general some-but-not-all provinces provision that had been present in the October 1980, February 1981 and April 1981 federal proposals, includes a provision regarding the use of the English and French language present in the February 1981 and April 1981 proposals, and adds a specific reference to alteration of boundaries between provinces. It also restores the phrase "amendments to the Constitution of Canada in relation to any provision" (emphasis added).

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[142]See s. 43 of the October 1980 Resolution, supra, p. 768 (emphasis added).

[143]See sections 38, 39, 48, and 49 of the April 1981 Resolution, pp. 812 and 817.

[144]April Accord, supra, p. 663.

Section 4 of the April Accord was substantially reproduced in the November and December 1981 resolutions and the Constitution Act, 1982 itself. A few important changes are worth noting. First, in the English text, the references to "any alteration to boundaries between provinces" and "the use of the English or French language" were separated from the body of the section and set out as (a) and (b) respectively, the "or" between the two ideas being replaced by an "and".[145] In addition, the phrase "the use of the English and the French language" was expanded and clarified by including in the final version "any amendment to any provision that relates to the use of the English and French language within a province". The addition of the words "any amendment to" was necessary grammatically given the separation of the two central notions, but the insertion of "any provision that relates to" was not grammatically necessary and can be said to narrow the scope of that section.

A second important change affects the debate over whether section 43 must be used in all cases to which it appears to apply or whether the general procedure or unilateral provincial procedures can be used where applicable. The April Accord provided that amendments of the sort described therein "may be made only by proclamation ... when so authorized by resolutions of the Senate and House of Commons and the Legislative Assembly of every province to which the amendment applies" (emphasis added). The Constitution Act, 1982, section 43 provides that amendment may be made "by proclamation ... only where so authorized by resolution of the Senate and House of Commons and the Legislative Assembly of each province to which the amendment applies" (emphasis added). The switch from "made only by proclamation ... when so authorized" to "made by proclamation ... only where so authorized" allows the interpretation that the procedure of section 43 does not necessarily have exclusive application in some-but-not-all provinces cases, but that once section 43

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[145]Apparently, the French version was thought to be sufficiently clear in its grammatical formulation and was not altered.

has been chosen its provisions have obligatory effect. This reasoning is vulnerable, however, to an argument based on the French text which states that "[l]es dispositions de la Constitution du Canada applicable à certaines provinces seulement ne peuvent être modifiées que par proclamation du gouverneur général ... autorisé par des résolutions du Sénat, de la Chambre des Communes et de l'assemblée législative de chaque province concernée". This formulation appears to suggest that both the procedure of section 43 and its provisions have obligatory and exclusive effect in cases of amendments involving some-but-not-all provinces. If one admits the idea of a hierarchy of amending formulae, however, then the more demanding procedures of sections 41 or 42 could suffice. There are obvious reasons for rejecting this interpretation, however. It could allow the will of the province most affected by an amendment to be overwhelmed by seven provinces. Obviously, amendments accomplished by unanimous consent would be beyond criticism.

Some uncertainties may be dispelled if we notice that the section 43 procedure is the only one of the five which refers to the amendment of the Constitution of Canada in relation to a "provision" rather than a "matter". This indicates that section 43 is narrower in scope and designed principally to add or subtract a provision dealing with matters such as provincial boundaries, the use of the English and French languages within a province or some other topic which, according to its textual content (that is, on the face of it) applies not to all provinces but only to some or one.

Turning now to the meaning of the individual parts of section 43, it may be clearer to deal with the designated categories of amendment -- alteration to provincial boundaries and use of the English and French language -- before moving on to the general category of amendments relating to some but not all provinces.

The first category -- "any alteration to boundaries between the provinces" -- presents few problems of interpretation. However, it must be distinguished from two

other types of amendments, specifically those provided for in paragraphs 42(1)(e) ("the extension of existing provinces into the territories") and 42(1)(f) ("the establishment of new provinces"). While extension of British Columbia into the Yukon Territory or transformation of the Yukon Territory into a province would require amendment by the general procedure, an agreement by New Brunswick and Quebec to alter their common border would only require the consent of the two provinces and Parliament. As Meekison states, "[t]he reference to boundaries ensures that any existing provincial boundaries cannot be altered without the consent of the province concerned".[146] In the past, as Gérin-Lajoie has pointed out, alteration to boundaries was carried out by a simple resolution of the federal Parliament with little or no provincial consultation (by virtue of the Constitution Act, 1871).

The category referred to as "any amendment to any provision that relates to the use of the English or the French language within a province" presents us with a trickier problem. First of all, it must be distinguished from "the use of the English or the French language" referred to in paragraph 41(c), because the latter provision is made "subject to section 43".

As was discussed under paragraph 41(c), a sensible elaboration of this expression's content must begin with the idea that its scope is limited to the "Constitution of Canada". Thus, it was argued that the provisions of the Official Languages Act are not likely to have been entrenched simply by means of paragraph 41(c). However, paragraph 41(c) will protect by the unanimous consent procedure the parts of the "Constitution of Canada" which deal with the use of the English and French language insofar as those provisions relate to the federal government and all the provinces.[147] Other provisions of the "Constitution of Canada" dealing with "the use

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[146]Meekison, supra, p. 18.

[147]As was said earlier,this list will probably include section 133 of the Constitution Act, 1867 and sections 16(1), 16(3), 17(1), 18(1), 19(1), 20(1), 22, 23 and 55-57 of the Constitution Act, 1982. See Hogg (1985), supra, p. 65n.

of the English and French language" are excluded from the ambit of paragraph 41(c) by operation of section 43. The explanatory notes to the April Accord state[148] that this section would take within its ambit

> [a]ny amendments to the Constitution in relation to the use of the English or the French language within a province .... This provision would apply to those portions of section 133 of the B.N.A.Act which relate to the province of Quebec and those language provisions of the Manitoba Act which apply to Manitoba. This provision could make section 133 applicable to a province where it does not apply now but which wishes it to be applicable therein.

We can make this explanation more specific by identifying section 133 of the Constitution Act, 1867 in so far as it applies to Quebec, section 23 of the Manitoba Act and subsections 16(2), 17(2), 18(2), 19(2), 20(2) of the Constitution Act, 1982, applying only to New Brunswick.

As Brun and Tremblay point out, the parts of section 133 that relate to Quebec have never been part of the provincial constitution, and this was decided by the Supreme Court of Canada in the Blaikie case.[149] Consequently, the consent of the federal Parliament has always been necessary. The Forest case dealt with the similar provisions of the Manitoba Act.[150] The explanatory notes refer to making section 133 applicable to a province where it does not apply now, and this is really what New Brunswick has done in sections 16 to 20. It was also what the federal government contemplated in the February 1981 versions of the Constitution Act resolution when it added sections 37 and 47. These sections, as was pointed out earlier, provided specific directions on how such a province might proceed in order to include itself in the provisions of subsections

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[148] April Accord, supra, p. 663.

[149] A.G. Quebec v. Blaikie [1979] 2 S.C.R. 1016. Brun & Tremblay, supra, p. 355.

[150] A.G. Manitoba v. Forest [1979] 2 S.C.R. 1032. Banks, supra, p. 21 argues that paragraph 43(b) confirms that the language provisions in, for example, the Manitoba Act, 1870, are not part of the provincial constitution.

16(2), 17(2), 18(2), 19(2) and 20(2) of the Constitution. This type of provision was included in the April Accord and eventually appeared in the Constitution Act, 1982.

The final category in section 43 that we must discuss is the general class described at the outset of the section, that is "[a]n amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all provinces ...". The French version appears to refer only to more than one province ("certaines provinces") but Brun and Tremblay argue persuasively that the French expression can include the one province case and this interpretation is most consistent with the English version.[151]

If we turn again to the April Accord for guidance, we find the following paragraph in the explanatory notes:[152]

> Instances of matters falling within that category are, for example, the provisions of the Manitoba Act, the Terms of Union of Prince Edward Island and British Columbia, the Saskatchewan Act, the Alberta Act and the Terms of Union with Newfoundland. This provision ensures that any such amendment has the consent of the affected province or provinces.

Two points are worth making with reference to this explanatory note. First, all of the documents mentioned above are listed in the schedule to the Constitution Act, 1982 and are therefore included in the "Constitution of Canada".[153] Second, the rationale expressed here is that the province(s) affected should in all cases consent rather than be forced by essentially disinterested provinces to accept an amendment which affects the non-consenting province(s) especially. This situation could arise if section 43 did not exist and all amendments were subject to the general procedure. It also appears to lend support to the view that where section 43 applies its provisions are obligatory and no

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[151] Brun & Tremblay, supra, p. 367.

[152] April Accord, supra, p. 663.

[153] See paragraph 52(2)(b).

substitution is possible. It is difficult to come up with a comprehensive list of what the general category of section 43 might cover, but some commentators have provided suggestions. Hogg notes that section 93 of the Constitution Act, 1867 applies to only six of the ten provinces, while section 94 does not apply to Quebec and section 98 applies only to Quebec.[154] Sections 69 to 87 apply to only Quebec and Ontario, while section 88 applies only to Nova Scotia and New Brunswick.[155]

Before concluding this discussion of section 43 we should consider its relationship with other sections in Part V, specifically section 45 and sections 38 and 42.

Section 45 deals with amendments to the constitution of the province and provides that each province may amend its own constitution: "Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province." Section 45 is made subject to section 41 because the latter section protects by the unanimous consent procedure the office of the Queen and of the Lieutenant Governor, two very important parts of the provincial constitution. Section 45 is not made subject to section 43 though clearly parts of the provincial constitutions are included in the "Constitution of Canada" and could, it seems, be amended under the section 43 procedure as being amendments affecting "one or more, but not all, provinces". Of course, in both cases the province affected would have to consent and would thereby be protected. But are either of these procedures obligatory? As Hogg points out, section 43 is worded, especially in the French, in an obligatory manner, and if one gives full effect to this then the strange result arises whereby a province must in many cases seek approval from Parliament to amend its own constitution. This would be a radical departure from the system described in section 92(1) of the British North America Act, 1867 as it existed prior to 1982. As Hogg points out "there is no good reason for any involvement by the federal Parliament in a province's decision to make

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[154]Hogg (1985), supra, p. 66.

[155]Ibid., p. 67.

some change in those provisions governing its Legislature, its executive or its courts, which happen to be within an instrument which is part of the Constitution of Canada".[156] Hogg notes[157] that one possible way of reconciling sections 43 and 45 is to read

> s. 43 as applying to an amendment of a provision applying to a single province when that provision is contained in one of the instruments which comprise the Constitution of Canada, and to read s. 45 as applying to an amendment of the "constitution of the province" only when the provision to be amended is not to be found in any of the instruments comprising the Constitution of Canada.

Hogg rejects this hypothesis because it would mean "that section 45 was for no good reason much narrower than the old provincial amending power under Class 1 of section 92 which extended to provisions of those instruments which are now called the 'Constitution of Canada' ... ."[158]

Hogg then endorses an alternative hypothesis which allows that section 43 applies "to only those provisions of the Constitution of Canada which, although applicable to one province. do not come within the phrase "constitution of the province". This solution produces satisfactory common sense results.

An additional problem arises when one attempts to understand section 38 and 42 as they relate to section 43. Scott reviews the possibilities. He begins by observing that section 43 can be read as "simply attaching a condition upon the exercise of section 38, and requiring the consent of affected provinces in certain cases."[159] This interpretation would successfully avoid the anomalous situation where the general procedure could be used to authorize amendments affecting only three provinces (or less) without the

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[156] Ibid.
[157] Ibid.
[158] Ibid.
[159] Scott (1982), supra, p. 276.

consent of those same provinces.[160] Scott acknowledges, however, that despite the usefulness of this interpretation in avoiding such results, it is more likely that section 43 is an independent amending procedure. If so, Scott adds, "it is the least satisfactory of those [procedures] enumerated in Part V".[161]

Section 43 may not be a mere condition added to section 38, but even if it has independent status we must determine how it interacts with other procedures. Scott is generally of the view that "[m]utual exclusivity inter se of the various procedures of Part V, where it does not result from the very nature of the provision (as it does in the case of section 41), is of mischievous consequence and should be avoided as far as possible".[162] Where provisions overlap, in Scott's view, they should be read as "concurrent pro tanto". In the particular example of sections 38 and 43, a natural hierarchy exists, the former being more comprehensive and more difficult than the latter. Compliance with section 38 should then amount to "ipso facto compliance" with section 43. Scott favours this view because "[o]therwise it may prove impossible to include, in a single proposed amendment and as a single package, a single provision having effects upon different parts of the constitution".

Scott goes on to point out a further problem with section 43. He observes that though the amendment must apply to "a provision" that applies to one or more, but not all provinces, the substance of the new amendment need not be of that sort. Scott concludes that "[u]nless ... the scope of section 43 is confined by judicial construction, the result could be perfectly bizarre. Almost any sort of special constitutional

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[160] Scott provides an example:

> [A]n amalgamation of Nova Scotia, New Brunswick, and Prince Edward Island into a new province might otherwise be possible through section 38(1) (read with section 42(1)(d), which carries a non obstante clause), without these provinces being able to "dissent".

Scott (1982), supra, p. 276.

[161] Ibid.

[162] Ibid., p. 280.

arrangement could be made with the concurrence of the federal authorities and those of one or more provinces to which it would apply".[163]

In the end it seems that the interpretation which causes least mischief is the one which assumes that section 43 is an obligatory procedure designed to require the consent of the federal Parliament and the legislatures of those provinces affected in the event of an amendment to a provision of the constitution which, on its face, applies to one or more, but not all, provinces. Thus section 38 would be ousted in such cases, contrary to Scott's view, and section 45 would not apply as long as the provision in question was part of the Constitution of Canada.[164]

Section 44 -- the unilateral federal procedure

We come now to the fourth type of amendment procedure -- the federal Parliament acting alone. Section 44 provides that

> **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.

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[163]Ibid., p. 276. See Canada, Parliament, Special Joint Committee of the Senate and House of Commons, The Process for Amending the Constitution of Canada (Chairs: G. Beaudoin and J. Edwards) (20 June 1991) in which the Committee sets out, p. 28, a strict view based on the phrase "any provision". It states that section 43 is not to be used as a method of developing asymmetrical federalism. It cannot be used, for example, to alter the division of powers for one province because sections 91 and 92 apply, on their face, to all provinces. See also the Canada, Parliament, Report of the Special Joint Committee on the Constitution of Canada (Chairs: G. Beaudoin and D. Dobbie) (28 February 1992), p. 91.

[164]To date, there has only been one amendment to the Constitution of Canada which has been accomplished using section 43. In that case a provision of the Newfoundland Act was amended. The amendment related to denominational schools, a subject excluded from the authority of the provincial legislature. The Constitution Amendment, 1987 (Newfoundland Act) was introduced in the House of Assembly on April 10, 1987 and adopted that day. It was introduced in the House of Commons on June 23, 1987 and adopted that day. It was then transferred to the Senate which adopted it on June 30, 1987 after two days of debate. See Banks, supra, p. 21 and Canada, Federal-Provincial Relations Office, Amending the Constitution of Canada: A Discussion Paper (Ottawa, 1990), p.8.

A unilateral federal amending procedure has existed since 1949 when the British North America (No. 2) Act, 1949 (repealed by the Constitution Act, 1982) added Class 1 of section 91 to the British North America Act, 1867. This procedure was used, for example, when Parliament in 1965 set the retirement age of senators at 75 and in 1974 increased the size of the House of Commons.[165] The procedure was also examined by the courts in the Upper House Reference,[166] in which the Supreme Court of Canada gave a restrictive interpretation to Parliament's powers as set out in Class 1. Whether extensive or limited, the unilateral federal Parliament procedure has been a part of recent proposals for an amending formula. All of the versions since 1980, including the April Accord, provide for a procedure which is identical or very similar to that which is now set out in section 44. The apparent intention in all cases was to reproduce Class 1 of section 91 (just as section 45 was designed to reproduce Class 1 of section 92 as we will see later).[167]

Though section 44 may appear to replace Class 1 of section 91, the similarity of purpose is of limited usefulness in helping us to understand the more recent section. Two important differences must be pointed out. First, the scope of section 44 is limited in two ways: it is "subject to sections 41 and 42", and it applies only to amendments to the "Constitution of Canada". The latter expression appeared in Class 1 of section 91 of the British North America Act, 1867, but it necessarily had a different meaning in that context as will be discussed below. A second difference lies in the very fact that section 44 is now one of five amending procedures and must be read in that context. The expression "Parliament may exclusively make laws amending the Constitution of Canada" must be considered in this regard also.

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[165]Meekison, supra, p. 118. See Constitution Act, 1965, S.C. 1965, c. 4; Constitution Act, 1974 S.C. 1974-75-76, c. 13.

[166]Supra.

[167]The explanatory notes to the April Accord, supra, make this point clear: "This provision is intended to replace section 91(1) of the B.N.A. Act". See also Meekison, supra, p. 118 and Finkelstein, supra, p. 70.

Looking first at the scope of section 44, we notice the expression "subject to sections 41 and 42". As we have seen, these latter sections include provisions relating to the executive government (paragraph 41(a)), the Senate (paragraphs 42(1)(b) and (c)) and the House of Commons (paragraphs 41(b) and 42(1)(a)), and we need only reconsider the discussion of the sections set out above to see that a large part of what was Class 1 of section 91 has now been removed from unilateral federal legislative control.

It may be, however. as we also saw earlier, that certain aspects of the executive, Senate and House of Commons are not presently dealt with in the "Constitution of Canada" and for that reason may remain within Parliament's legislative competence. Of course, if they fall outside the ambit of the "Constitution of Canada" then not even section 44 can apply as it is also subject to that important qualification. However, one wants to ask what difference section 44 makes to the enactment process as compared to the normal legislative process. At a minimum, section 44 makes clear that the new amending procedures do not change the fact that important parts of the federal constitution are amendable by Parliament alone and are not as a matter of course subject to the more onerous procedures.

The phrase "Constitution of Canada" was used in Class 1 of section 91 and given meaning by the Supreme Court of Canada, but in section 44, as elsewhere in Part V, it has a different sense than it formerly had.

The opening sentence of Class 1 of section 91 read as follows: "The amendment from time to time of the Constitution of Canada, except as regards ... " As Paul Gérin-Lajoie and others have pointed out, prior to 1982 there was no satisfactory statutory definition of the "Constitution of Canada".[168] In the Upper House Reference, the

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[168]Gérin-Lajoie, supra, p. 23.

Supreme Court of Canada acknowledged this fact and eventually concluded that the phrase, as it appeared in Class 1 of section 91, could only refer to the truly federal aspects of the Constitution.[169]

The "Constitution of Canada" as it is now defined, according to section 52(2) and the schedule to which it refers, includes much more than purely federal components, notably the various provincial terms of union and creating acts which also contain parts of the provincial constitution. The new "Constitution of Canada" may comprehend what was included in the same phrase in Class 1 of section 91, but it is clearly not limited to that narrow definition.

It appears, then, that the potential scope of section 44 is broader than that of what was Class 1 given that the phrase "Constitution of Canada" has a larger purport; but at the same time, the phrase "subject to sections 41 and 42" limits section 44 in a greater way than the "except as regards ..." limited Class 1. In fact, what has occurred is that the framers of Part V have attempted to remove from the unilateral federal power all matters which the Supreme Court of Canada would have deemed "of national interest" (that is, the Queen, the Office of the Governor General, the Senate Floor rule, the principle of proportionate representation, the powers of the Senate, the method of selecting senators, the number of members by which a province is entitled to be represented in the Senate, the residence qualifications of Senators) and to leave the balance of federal constitutional concerns within the power of Parliament. This was done precisely by excepting the relevant paragraphs of sections 41 and 42 and enlarging the notion of the Constitution of Canada and referring to it in section 44.

A second difference between the old Class 1 of section 91 and the new section 44 is that the latter forms part of a series of comprehensive rules on amendment and

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[169]Supra, p. 69.

must be read in that context. Some confusion arises, however, when one notes the phrase "may exclusively make laws amending the Constitution of Canada".[170] Does "exclusively" mean that this is the only proper procedure for amendments which relate to "the executive government of Canada or the Senate and House of Commons" and which fall outside the grasp of section 41 and 42; or does "exclusively" simply mean that Parliament is acting on its own in this case, that is unilaterally? This issue reappears in section 45 where the same word is used.

Scott is of the belief that it would be of "mischievous consequence" to view each section in Part V as an exclusive procedure.[171] He argues that while sections 41 and 42 require the procedures described therein, section 44 has no such strict requirement (i.e., the word "only" is not used), and therefore other procedures such as the general procedure of section 38 should be equally available.[172] If Scott's argument on the text turns on the absence of the word "only" in section 44, then he may be precluded from arguing, as he does, that section 43 is not a self-contained provision, since it too contains the word "only" in a phrase similar to that found in section 41. Leaving section 43 aside, it is quite plausible that section 44 is not the only procedure available for amendments to the matters listed in it, and that the general procedure or unilateral procedures would be available as alternatives. In this case, "exclusively" takes on the meaning of "unilaterally", that is, Parliament on its own may make laws amending the Constitution of Canada. This interpretation is reinforced by the French version of section 44 which refers to "compétence exclusive" or "exclusive jurisdiction".

A final question which arises with respect to section 44 is the extent to which this section gives Parliament the power to modify or eliminate the components which make up "the executive government of Canada, or the Senate and House of Commons".

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[170] In French, "compétence exclusive". It should be noted that both sections 91 and 92 begin with the word "exclusively" referring to jurisdiction.

[171] Scott (1982), supra, p. 280.

[172] Ibid.

Provincial legislatures have always had the power to eliminate, for example, the upper chamber or legislative council and presumably these broad powers persist in section 45. But it is much less clear that the federal power is or has ever been as broad. The thrust of the Upper House Reference was to limit Parliament's powers in this regard. Most commentators[173] take the view that section 44 did not supplant that part of the reasoning in the Upper House Reference and that Parliament cannot use section 44 to eliminate unilaterally key components of the federal institutional structure. As Brun and Tremblay note, the Queen, Governor General, Senate and House of Commons are referred to in numerous places in Part V, and the unilateral federal power applies only "in relation to" these already existing elements.[174] Stephen Scott summarizes:[175]

> Section 44 gives no power to alter the federal lawmaking process ... through the subtraction of any of its elements. Nor does it appear to afford power to add further elements -- be they actors of other formalities -- as conditions of valid legislation.

The continued existence of the elements referred to in section 44 is presupposed. Only the unanimous consent and general procedures could be used for more radical changes to federal institutions.

Section 45 -- the unilateral provincial procedure

The last of the five amending procedures in Part V involves the provincial legislature acting alone to alter "the constitution of the province".[176] Section 45 sets out the procedure as follows:

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

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[173]See Scott, ibid., p. 277; Brun & Tremblay, supra, p. 364.

[174]Brun & Tremblay, ibid.

[175]Scott (1982), supra, p. 277.

[176]Unfortunately, the expression "constitution of the province" is not defined. See Banks, supra. pp. 22-3.

Such a provision has been a part of all the proposed resolutions since October 1980 and was also included in the April Accord. In the Accord, the explanatory notes indicate that this section was "intended to replace Class 1 of section 92 of the former British North America Act. Exceptions to this provision include the Office of the Lieutenant Governor".[177] The exception regarding the office of the lieutenant governor is accomplished by reference in section 45 to section 41. Such an exception was overtly set out in the old Class 1 of section 92 which read as follows:

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

If we assume, for now, that "subject to section 41" (in section 45) could read "except as regards the office of the Lieutenant Governor", then it is easier to highlight the differences between the old provision and the one which is designed to replace it.

What are the differences, then, between Class 1 of section 92 of the former British North America Act, 1867 and section 45 of the Constitution Act, 1982? Reading the opening words of section 92 as part of Class 1, we see that both section 45 and section 92 begin by giving the legislature of the province the exclusive power to amend the constitution of the province. The word "constitution" has lost its capital 'c' but that cannot be very significant. The most important difference lies in the fact that, as in the case of section 44, the provincial legislatures' powers are only one of five amending powers set out in Part V; and unlike section 92(1), section 44 does not include the phrase "notwithstanding anything in this Act". Bearing these differences in mind, we will now attempt to give some clear meaning to section 45.

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[177] April Accord, supra, p. 664.

In discussing section 44, the point was made that Parliament can amend the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons, but that amendments could never go so far as to eliminate one of those units or add a new one. Depending on what was proposed, either the unanimous procedure or the general procedure would have to be used. Is this true of Section 45 and the provincial legislature?

Part V uses three different expressions when referring to the provincial law-making bodies. In cases where initiation, ratification or dissent to a resolution are being described, the expression "legislative assembly" is used.[178] Where powers, rights or privileges are being referred to in the provincial sphere, the provincial legislature is referred to.[179] Reference to the provincial "government" is used, for example, in section 38(2) for greater certainty in identifying the provincial holders of the "legislative powers, the proprietary rights or any other rights or privileges" that are described therein.

What then is the "legislature" of a province as referred to in section 45, and to what extent can it modify itself? Ignoring the confusion raised by the wording of subsection 38(2) ("legislature or government"), it is logical to assume that legislature refers to the whole legislative process whereas assembly refers to the voting body. Thus, the "legislature" as it is referred to in section 45 probably refers to the lieutenant governor and provincial legislative assembly acting together.[180] The question still remains as to whether this legislature can alter the provincial constitution so as to reconstitute the components of that same legislature and legislative process.

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[178]See sections 46, 38(1)(b), 38(3)(4), 41 and 43.

[179]See section 38(2) and 40.

[180]This is the conclusion of Scott (1982), supra, p. 266.

Section 44 is subject to section 41 and 42 and, as we saw, this limited Parliament's ability to amend its own institutions in any significant way. Section 45 is limited only by section 41, and in the latter section only the provisions relating to the lieutenant governor and the English and French language can be said to affect the legislature's powers in section 45.

The phrase "the office of the lieutenant governor" was discussed under section 41(a). It should probably be given a restrictive interpretation as Brun and Tremblay suggest.[181] It refers to the lieutenant governor himself as an integral part of the legislature;[182] it does not refer to the lieutenant governor in council (or provincial government in other words).[183]

As concerns the English and French languages, the old version, Class 1 of section 92, was even less clear. Class 1 stated that the provincial amending power operated "notwithstanding anything in this Act", and included only one exception, that is, the Office of the Lieutenant Governor. The courts were presented with the difficult issue in the Blaikie case[184] in which it was necessary to determine whether or not section 133 formed part of the provincial constitution and was therefore amendable using section 92(1). As Scott points out,[185] this is no longer an issue because section 45 is made subject to section 41, but the court's reasoning in Blaikie may be useful in determining what forms part of the constitution, and what, therefore, can be modified by the provincial legislature. The Supreme Court in Blaikie did not base its decision, as did the Court of Appeal,[186] on the view that the "constitution of the province" referred only to Part V of the Act of 1867 which bore that title, rather it used more flexible reasons.

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[181] Brun & Tremblay, supra, p. 358.

[182] Re Initiative and Referendum Act [1919] A.C. 935, p. 944.

[183] See Bureau metropolitain des écoles protestants de Montréal c.Ministre [1976] C.S. 430, p. 453.

[184] [1979] 2 R.C.S. 1016.

[185] Scott (1982), supra, p. 278.

[186] [1978] C.A. 351.

The Supreme Court of Canada decided that only those laws which can be considered to relate to the internal constitution of the province by the fact that they relate to provincial institutions and the principles governing the relationship between individuals and institutions could be considered part of the constitution of the province.[187] Accordingly, sections such as section 133 which relate more to the conditions of federal union fall outside that provincial constitution. As Brun and Tremblay note,[188] the Supreme Court of Canada may revert to this type of reasoning in interpreting section 45. An amendment to section 85 of the 1867 Act lengthening the duration of the legislative assembly from four to five years would be a valid provincial amendment, whereas a change to section 80 abolishing the protected electoral ridings might be invalid.[189]

Similar reasoning might be used to determine whether or not the provincial legislature might reconstitute itself and its process. Scott points out in persuasive fashion that there is no grammatical reason in section 45 why the provincial legislature should not have a free hand.[190] Scott cites examples that might include establishing a referendum[191]

> as an alternative -- or even as a substitute -- lawmaking authority alongside, or in place, of the provincial legislature, or whether the referendum can be imposed as a superadded condition necessary for the valid enactment of all legislation, or of legislation of some defined classes. Another such question is whether -- so long as the law presently in force is carefully respected – additional houses can be added to the representative legislature or special majorities can be required in legislative houses, or for that matter, in the referenda.

Brun and Tremblay are of the view that the provincial legislature can modify the constitution of the province by transforming, even substantially, its own composition. The limit to this power is apparently nothing more than respect for the principle of

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[187] Brun & Tremblay, supra, p. 356.

[188] Ibid.

[189] Ibid.

[190] Scott (1982), supra, p. 279.

[191] Ibid.

parliamentary democracy.[192] Accordingly, the legislature could not be changed, in their view, by substituting the government for the legislature even if the government officials were elected.

Section 45 contains limits in its wording, and these have been discussed above, but it may also be limited by its interaction with other procedures in Part V. We have seen all along that the expression "Constitution of Canada" may be the key to determining what can and cannot be amended using Part V procedures. Section 45 is the only procedure of the five which does not use this expression. The question arises, then, as to whether or not section 45 can be used to amend parts of the constitution of the province which are also part of the "Constitution of Canada".[193] The answer to this question is extremely important given that large parts of each provincial constitution are included in the schedule to the Constitution Act, 1982 which lists the components of the "Constitution of Canada".

Hogg sets out the basics of an argument which would reduce section 45 to a provision to be used only to amend parts of the provincial constitution falling outside "the Constitution of Canada".[194] The argument is plausible, but as Hogg says it would leave "s. 45 for no good reason much narrower than the old provincial amending power under s. 92(1)".[195] Hogg proposes an alternative interpretation which would allow section 45 to apply to all parts of the provincial constitution except those expressly excluded in section 45 (i.e."subject to section 41").[196] This interpretation seems convincing.

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[192]Brun & Tremblay, supra, p. 362.

[193]Banks, supra, p. 22 answers in the affirmative.

[194]Hogg (1985), supra, p. 67.

[195]Ibid., p. 70.

[196]Ibid.

It may still be, as Scott argues,[197] that the unanimous consent and general procedure may also be available though this appears unlikely and would clearly be very unpopular with the provinces. Further, it would be a very much weakened substitute for Class 1 of section 92.

If Hogg's second interpretation is right, however, then it would certainly be true that section 43 would be left to apply "to only those provisions of the Constitution of Canada which, although applicable to only one province, do not come within the phrase "constitution of the province".[198] This conclusion is favoured by Tremblay who sees section 43 as a supplement to section 45 for provinces which do not yet, for example, have French and English as part of their provincial constitutions.[199] We will now turn to a consideration of some of the procedural elements of Part V.

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[197]Scott (1982), supra, p. 281.

[198]Hogg (1985), supra, pp. 69-70.

[199]Tremblay, supra, p. 1156.

CHAPTER SIX

PROCEDURAL ISSUES

To this point, the analysis of Part V has focused on the substantive meaning of the various amendment procedures. Most of the issues have involved question such as: To what sorts of situations will these sections apply? Are alterations to the Supreme Court of Canada caught by Part V at all? Can a province alter its constitution on its own? In this part of the chapter, we will leave those difficult questions behind and assume that an appropriately designed amendment is under way. This will enable us to focus on the procedure of constitutional amendment as it is spelled out notably in sections 38, 39, 46, 47, 48 and 49. We will also consider the rules regarding opting out and compensation as set out in sections 38 and 40.

Before any particular amendment can be assigned to the appropriate amendment procedure, approved and proclaimed, it must be initiated or put forward.[1] Subsection 46(1) covers the initial stage in the process and reads as follows:

> **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.

Subsection 46(1) applies therefore to the general procedure, unanimous consent procedure and some-but-not-all provinces procedure. The two other procedures -- Parliament alone and province alone -- require no special rule as initiation and

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[1]E.g., Quebec initiated the Meech Lake Accord process with the adoption of a constitutional resolution by its National Assembly in Quebec City on June 23, 1987. See Canada, Federal-Provincial Relations Office, Amending the Constitution of Canada: A Discussion Paper (Ottawa, 1990), p. 9 (hereinafter 1990 Federal Discussion Paper).

amendment are undertaken by only one body: Parliament or the legislature of the province in the respective cases.[2]

Not surprisingly, a provision similar to subsection 46(1) has been part of each proposed resolution since October 1980, and this section produced no significant debate or explanation in the April Accord. Clearly, some person, body or group must initiate the proceedings and subsection 46(1) governs this process. Even though only three initiating bodies are mentioned -- the Senate, House of Commons or legislative assembly of a province -- the true initiative may come, for example, from the Prime Minister alone, a provincial conference or a lobby group. Whatever the origin, however, the amendment must be passed by one of the country's representative parliamentary institutions in order to begin the formal process of amendment. These are also the bodies which have the power to approve the amendment.[3] This formality is important both because it adds legitimacy to the process and because it provides a clearly identifiable moment from which the process of amendment can be followed for Part V purposes. Assents can be counted and delays can begin to run.

Subsection 46(1) does not force any significant changes to the ways in which ideas for constitutional amendments are proposed or initiated. In the past, one province, groups of provinces and the federal government acting alone or with one or more provinces have all proposed or initiated ideas. However, under the new system, the idea being initiated can now be elevated so as to give it legal status, that is by producing the appropriate resolution and referring in it to the procedures of Part V. As Stephen Scott points out, this does not oblige the other participants in the amendment process to respond to the resolution once initiated, "but, as matter of comity, the formal proposal of an amendment by a resolution enjoying legal status seems to command the attention of

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[2]See S. Scott, "The Canadian Constitutional Amendment Process" (1982) 45 Law and Contemp. Probs 249, p. 269 (hereinafter Scott (1982)).

[3]P. Hogg, Canada Act 1982 Annotated (Toronto, 1982), p. 105 (hereinafter Hogg (1982)).

the other participants, and to demand at least due consideration".[4] Scott contrasts this situation with the American one where, under Article V of the Constitution, Congress appears obliged to comply with a request by two-thirds of the state legislatures to call a convention.[5]

While it is true that certain practices developed over the years prior to 1982 for constitutional amendment discussion and no doubt many of these will be retained, it is inevitable nonetheless that new practices will emerge. The old practice of attempting to achieve unanimity may be kept even for amendments under the general procedure, but the possibility of dissent and amendments by something less than unanimous consent will no doubt change the dynamics of constitutional negotiations.[6] The past practice has also been to hold constitutional conferences in order to discuss new ideas for a future resolution on constitutional amendment, and this practice will probably continue at a more regular rate than that which is called for in sections 37.1 and 49.[7] Other possibilities are available and may well be used now that Part V clearly sets out the formal side of amendment. Peter Meekison reviews some of these possibilities:[8]

> In addition to provinces acting individually, they may act collectively through forums such as the Western Premiers Conference, the Council of Maritime Premiers or the Annual Premiers' Conference. Conversely, there is nothing to prevent the federal government from initiating a resolution in the House of Commons and then proceeding to secure provincial consent through a series of bilateral discussions with the provinces.

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[4]Scott (1982), p. 269.

[5]Ibid.

[6]Meekison suggests that perhaps the threat of opting out will be sufficient to produce modification to proposed amendments and that provinces may show greater willingness to search for consensus, secure in the knowledge that opting out will always be available (at least under the general procedure and for most cases which affect provincial interests). See J.P. Meekison, "The Amending Formula" (1983) 8 Queen's LJ. 99, p. 122.

[7]Since 1982 there have been three periods of intense constitutional discussion: 1983, 1987-90 and 1990-92. Each involved constitutional conferences, although there has been an attempt to broaden participation in recent years. This will be discussed below and in the concluding chapter.

[8]Ibid. p. 120.

Meekison also discusses a post-1982 example of how the new system might work. In September 1982, British Columbia proposed an amendment to add protection of property rights to the Canadian Charter of Rights and Freedoms. After adopting a resolution, British Columbia then began a campaign to gain the support of a sufficient number of provinces to approve the resolution.[9] Had this been successful, presumably Parliament would have been under great pressure to approve the resolution. Subsequent to British Columbia's attempt to protect property rights, New Brunswick (June 1983) and Ontario (November 1986) have followed suit, but never with any success in obtaining further support.[10]

It has been noted that a constitutional amendment initiative will usually follow some sort of discussion in one or other of the fora mentioned by Meekison above. Subsection 46(1) sets out the legal requirements for formal initiation. The successful amendment regarding aboriginal matters which eventually resulted in the Constitutional Amendment Proclamation, 1983[11] was preceded by a series of private preparatory meetings at the level of officials, ministers and representatives of the aboriginal peoples. After a successful first ministers' conference at which agreement on a legal text was obtained, the House of Commons formally initiated the amendment, adopting an official resolution on June 29, 1983 with the Senate and the requisite number of provinces following suit between June and December, 1983.[12] There were no public hearings either before the first ministers' meeting or during the debate on the subsequent amendment resolution.

In 1987 a crucial set of amendments, commonly known as the Meech Lake accord, were agreed to using much the same method. The accord was the product of a series of first ministers' meetings and bilateral and multilateral consultations at the level

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[9]Ibid.

[10]See 1990 Federal Discussion Paper, supra, p. 7.

[11]This is set out in (1984-85) 30 McGill L.J. 739.

[12]1990 Federal Discussion Paper, supra, pp. 7 and 22.

of minsters and officials capped off by a final, successful late-night negotiating session attended by all first ministers. Between the agreement in principle at Meech Lake and the preparation of a formal legal text, referred to as the Langevin text, only the province of Quebec held public hearings.[13] The Langevin text was approved on June 2-3, 1987 and the legislative assembly of the province of Quebec formally initiated the amendment process by adopting a constitutional resolution on June 23, 1987. In the end, the very limited level of public consultation at the stage of formulating the amendment initiative was in this case to prove fatal. Public hearings held by other provinces as part of their ratification process revealed that there was a significant level of dissatisfaction with the Meech Lake constitutional accord and the Langevin text. Given the fragile nature of the accord and the early initiation by Quebec of a formal text, any changes to the text dictated by the various public consultations were difficult to contemplate, and in the end, despite a last-minute attempt to come to a new agreement, the initiative was abandoned.

These two examples indicate clearly that Part V only deals with the formal aspects of constitutional amendment. Subsection 46(1) might set out the legal requirement for initiation of amendments, but it says nothing about the crucial factors of formulation and public consultation.

Once a resolution has been initiated, the formal process of amendment set out in Part V begins. It may never be completed by compliance with one of the five amendment procedures and proclamation, but the rules set out therein apply as long as the resolution is "alive". The "life" of a resolution is governed by subsections 39(1) and (2) which read:

> **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.

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[13] Ibid., pp. 8-9.

> (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.

The result of these two sections is that under no circumstance, except where all legislative assemblies have addressed the matter, dissenting or assenting accordingly, will an amendment under the general procedure be proclaimed before the expiration of one year after initiation,[14] and in no case will a proposed resolution be allowed to exist unproclaimed for longer than three years after initiation.

It is crucial to note at the outset that on its face section 39 applies only to amendments issued under subsection 38(1), that is, the general procedure (taking in section 42 amendments as well). Regarding subsection 39(1) this is logical. In the case of all the other amendment procedures it is clear which legislative body or bodies must ratify the proposed amendment, and once such ratification(s) have been obtained there is no reason to delay proclamation. If, however, subsection 39(2) does not apply outside section 38, then there will be no time limit for ratification regarding the other amendment procedures.

During the Meech Lake amendment process, the issue of the time limit was raised when it became apparent that the amendment might not be adopted by the requisite number of provincial legislative assemblies within a three-year period begun by the resolution initiating the amendment in June 1987, passed by the Quebec legislative assembly. The Meech Lake package contained a series of amendments, some of which, taken on their own, could have been passed using the general procedure, and some of which (notably an amendment to the amending procedure itself) could only have been passed following unanimous consent, under section 41. It was assumed from beginning

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[14]For example, the Constitutional Amendment Proclamation, 1983, supra was proclaimed one year after the first resolution was adopted. See 1990 Federal Discussion Paper, supra, Annex A, p. 22.

to end that the three-year time limit applied and that the amendment would die in June of 1990. And that is eventually what happened, according to most observers.

There is a very convincing argument, first raised by Mr Gordon Robertson, a former Clerk of the Privy Council, suggesting that no time limit at all applied to the Meech Lake constitutional amendment package. Robertson pointed out that since the different amendments which formed part of the package were being presented, and had been initiated, as a whole, they should be treated as one and governed by the appropriate amendment procedure, in this case the unanimous consent provisions of section 41.[15]

Nevertheless, all the key actors continued to assume that the three-year time limit applied, and federal publications issued after the supposed June 1990 deadline continue to make this assumption.[16] The reasons for the assumption were never explained and one can only guess that a rapid reading of section 39 had originally induced it, and that political considerations had made alternative views unpopular. All governments were interested after all in speeding up passage of the necessary resolutions. An argument in favour of the prevailing view was offered by Robertson. He noted that section 42(1) states that amendments relating to matters such as the selection of senators and the Supreme Court of Canada (both included in the Meech package) "may be made only in accordance with subsection 38(1)" (emphasis added) with which the three-year time limit was associated. Robertson suggests, however, that section 42 is drafted in that way so as to ensure that sections 43 and 44 are not used to circumvent it. Section 41 is a more difficult procedure than section 42 and accordingly where unanimous consent is available it is unlikely that the matters listed in section 42 can only be amended under subsection 38(1) and not under section 41. In any event, Robertson's most powerful

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[15]See G. Robertson, A House Divided: Meech Lake, Senate Reform and the Canadian Union (Halifax, N.S., 1989), pp. 15-20.

[16]See, e.g., Canada, Parliament, Report of the Special Joint Committee on the Constitution of Canada (Chairs: G. Beaudoin and D. Dobbie) (28 February 1992), p. 5: "The Accord was thus rendered null and void on June 23, 1990, three years after it was ratified by Quebec."

argument is that the package must be treated as one whole and that accordingly section 41 must apply. After the Meech Lake failure it has been suggested that large slates of amendments should in fact be initiated as separate amendments so as to allow the appropriate procedure to apply to each. This will allow passage of amendments under the general procedure even where unanimous consent cannot be obtained, but it will not remove the question whether any time limit applies to amendments not governed by the general procedure. Robertson has provided good reasons why it should not.[17]

Whether applicable to the general procedure or to all procedures, these timing rules give each legislative assembly opportunity to consider each amendment initiative[18] and prevent a proposed amendment from "limping along for many years, gradually picking up assents, and eventually coming into force without ever having had at any given time widespread support".[19] Dellinger points out that this system is preferable to that found in the United States where Article V gives no indication as to how long an unratified amendment can remain viable.[20] Meekison observes that the Canadian method of specifying maximum and minimum periods gives more options to the parties to amendment:[21]

> Depending on when a particular amendment first surfaces and its content, individual provinces may choose to delay a decision for a variety of reasons. The government of a province may be close to an election and decide to make the amendment an election issue. Alternatively, it could call a snap election on the matter and ask the electorate for an expression of their opinion. This course of action

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[17] With the failure of the Meech Lake Accord under a presumed three-year time limit there have also been calls for the time limit to be reduced. The Joint House and Senate Committee which examined the process for amending the Constitution of Canada recommended that the time limit be reduced from three to two years and that it apply to all types of amendments. See Canada, Parliament, Special Joint Committee of the Senate and House of Commons, The Process for Amending the Constitution of Canada (Chairs: G. Beaudoin and J. Edwards) (20 June 1991), p. 31.

[18] See P.W. Hogg, Constitutional Law of Canada, 2nd ed. (1985), p. 59 (hereinafter Hogg (1985)); Meekison, supra, p. 119. See also the explanatory notes to the April Accord, 16 April 1981, reprinted in (1984-85) 30 McGill L.J. 655, p. 662 (hereinafter April Accord)).

[19] Hogg (1985), supra, p. 59. See also Meekison, supra, p. 120.

[20] W. Dellinger, "The Amending Process in Canada and the United States: A Comparative Perspective" (1982) Law and Contemp. Probs 283 at p. 299. Meekison , supra, p. 120 notes that now Congress usually imposes a five year limit.

[21] Meekison, ibid., p 119.

> may be adopted if the provincial government is considering opting out of an amendment. Alternatively, the provincial government could hold a referendum on the proposed amendment. Another reason for delay is that a provincial government could wait to assess the degree of support for an amendment before reaching a final position.

The delays, then, give the provinces added protection and increased options. Parliament needs no similar protection because no amendment can become effective without debate and proper examination in Parliament.[22]

The delays in section 39 run from the date the resolution is initiated. Precision in counting this period may be extremely significant, and it may be necessary to determine whether the counting period begins on the date of the vote at the time of initiation or at the date the vote is reported in the Official Gazette. The April Accord is of little help here when it is compared to the final version of section 39, the framers having tried in vain to remove ambiguity from the text. A phrase which read "one year from the date of the passage of the resolution"[23] was changed to "one year from the adoption of the resolution initiating the amendment procedure". This change from "date of passage" to "adoption" is repeated in subsection 39(2), but it is of little help in answering our question. It seems most likely that the first date will be used rather than the publication date.

Once the resolution has been initiated, it must be dealt with within the minimum and maximum periods set out in section 39, as we have seen. This means that the provinces, House of Commons and Senate must assent or dissent, as the case may be, in the manner and in the numbers, percentages and proportions set out under the headings of the five amendment procedures. If any province wishes to dissent it must comply in the appropriate case with subsections 38(3) and (4). Such a province must do so prior to proclamation. If that province decides to revoke its dissent, it may do so

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[22] Ibid.

[23] April Accord, supra, s. 2, p. 662.

either before or after proclamation. In the case of non-dissenting provinces, different rules apply. It appears from subsection 38(3) that if a province remains silent and the amendment passes, it will take effect in the "silent" province nevertheless, that province having failed to express its dissent. Subsequent assent would be academic or of no consequence and it is not, therefore, dealt with in Part V. If a province assents, it will be counted as such at the time of proclamation, and it will therefore be instrumental in the approval and passage of the amendment. To assure the continued validity of the amendment, it was necessary to prevent revocation of assent after proclamation. Subsection 46(2) states that revocation of assent may occur at any time before proclamation.[24] There is no mention of revocation of assent after proclamation and the clear implication is that it is not permitted. The explanatory notes of the April Accord confirm this view.[25]

There is no mention in subsection 46(2) of the proper manner for revocation of assent. Subsection 38(3) states that a majority of members must support the revocation of dissent, and presumably the same system applies for revocation of assent. A specific provision to that effect would have been desirable. Though the Canadian provisions are imperfectly drafted, we can be thankful that the issue of revocation along with that of delays for proclaiming amendments has not been left untreated as in the case of Article V of the United States Constitution.[26]

A final rule should be dealt with under the subject of assents -- the role of the Senate. Though it is clear from section 46 that the Senate may initiate proposals for amendment, simply by passing an appropriate resolution, it is likely that most proposals, and hence resolutions, will emerge from the House of Commons and the provincial

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[24]The Province of Newfoundland and Labrador revoked its July 1988 assent to the Meech Lake Accord in April 1990. See 1990 Federal Discussion Paper, supra, p. 10. See also Banks, supra, p. 17.

[25]April Accord, supra, p. 664, subs. 6(2). Dellinger, supra, p. 299 states that "Silence in this instance is best construed as denial of power."

[26]Dellinger, ibid.

legislatures. If such is the case, then the Senate's primary function will be at the assenting stage as required by sections 38, 41, 42 and 43. Section 47 contemplates a situation where the Senate delays its assent or refuses to give it. In such cases, section 47 gives to the House of Commons the power to pass the resolution again 180 days after first passage and so to by-pass the Senate.

The idea of limiting the Senate's powers in constitutional amendment was first included in the 1971 Victoria formula. Meekison explains why this was thought to be appropriate.[27]

> The rationale behind this provision is that the Senate, an appointed body, should not be in a position to block the will of the democratically-elected House of Commons and the requisite number of democratically-elected provincial legislatures. It also means that, should the Senate reform eventually be initiated, the existing Senate could not veto any such reforms authorized by the House of Commons and the provincial legislatures.

This rationale was thought still to be valid when the federal government presented a new resolution in October 1980.[28] Section 44 of that document permitted the House of Commons to by-pass the Senate after a period of ninety days,[29] or half the time now allowed in section 47.[30]

In the February 1981 text of the federal resolution prepared following the hearings of the House and Senate Committee on the Constitution, the Senate regained its full status in amendment matters as the ninety day rule was eliminated.[31] This was, as Stephen Scott notes, "the price of the Senate's cooperation" in what was then a federal

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[27]Meekison, supra, p. 108.

[28]Reprinted in (1984-85) 30 McGill L.J. 755 (hereinafter October 1980 Resolution).

[29]Ibid., p. 768.

[30]Ibid., pp. 764-67. It should be noted that this rule applied only in Part V of the October 1980 text, and that under the alternative amending procedure of Part IV where a referendum was allowed, the Senate's powers remained equal to and coordinate with those of the House of Commons.

[31]Reprinted in (1984-85) 30 McGill L.J. 773, pp. 789-94 (hereinafter February 1981 Resolution).

initiative supported by only two provinces and vehemently resisted by all of one federal opposition party and part of another.[32]

The April Accord of 1981 signed by the eight dissenting provinces re-introduced the possibility of amendments without a Senate resolution, thus assuring its place in the final version of the Constitution Act, 1982. The explanatory notes refer to this as "a suspensive veto" for the Senate.[33]

Section 47 differs slightly from the April Accord text. First, the final version limits the application of section 47 to sections 38, 41, 42 or 43 whereas the April Accord equivalent applied to all amendments. The significance of this is that the Senate retains a full veto under section 44 where amendments are made by Parliament alone. A second difference is perhaps less important; however, it was necessary in order to conform with the language used elsewhere in Part V. References to "passage by the House of Commons of a resolution" in the April Accord were changed to "adoption by the House of Commons of a resolution" in section 47. Finally, section 47 adds "prorogued" to "dissolved" in subsection 47(2) in reference to periods in which the time will not be counted in computing the one hundred and eighty day period. We will now consider that subsection.

Subsection 47(2) deals with the computation of the one hundred and eighty day period and directs that "any period when Parliament is prorogued or dissolved" shall not be counted in computing this period. The main concern was to prevent the lengthy delay during election dissolution when neither the Senate nor the House of Commons is sitting and when no Parliamentary attention can be given to the matter. The April Accord stopped at this point. However, the final version of section 47 reverted to a phrasing which included prorogation and dissolution, presumably because prorogation can be

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[32]Scott, supra, p. 265.

[33]April Accord, supra, p. 663.

quite lengthy especially during the summer and Christmas holiday periods. Similar provisions dealing with computation periods for Parliament can be seen in section 44 of the October 1980 proposed resolution[34] and subsection 51(6) of the April 1981 proposed resolution.[35]

Subsection 47(2) was invoked during the process of ratification of the Meech Lake package of amendments. The House of Commons had originally adopted a resolution of assent on October 26, 1987. The Senate refused to adopt the Accord without amendment, thereby prompting the House of Commons to override the Senate by adopting the resolution a second time on June 22, 1988.[36] As we have seen, the ratification was to no avail as the unanimous provincial ratification which was required under section 41 was not obtained.

In certain cases -- where an amendment "derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province"[37] -- a province may opt out of the amendment even if it has been authorized by Parliament and seven other provinces representing fifty percent of the population of the provinces. Subsection 38(3) states that a province wishing to opt out in this way must express its dissent by passing a resolution supported by a majority of its members, and this must be done prior to the issue of the amendment proclamation. Such a resolution prevents the amendment from having effect in the dissenting province and may also entitle the province to reasonable compensation if the amendment involves a transfer of powers relating to "education or other cultural matters".[38]

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[34]October 1980 Resolution, supra, p. 768.
[35]Reprinted in (1984-85) 30 McGill L.J. 799, p. 819 (hereinafter April 1981 Resolution).
[36]Banks, supra, p. 17.
[37]Subsection 38(2).
[38]Section 40.

The alleged advantages of the dissent or "opting out" system were set out in the April Accord of 1981. The eight provincial premiers who drafted the Accord stressed in their news release that "the new amending formula combines flexibility and stability".[39] Flexibility was achieved by avoiding in the general procedure the unanimity and veto rules of the Fulton-Favreau and Victoria formulas, both of which allowed a single province to block an amendment. Stability was obtained by requiring both that the federal Parliament approve all amendments under the general procedure and that a substantial amount of provincial support be obtained. The explanatory notes to the April Accord recognize the fact that the dissent system has the dual advantage of acknowledging "the constitutional equality of the provinces as equal partners in Confederation" and assuring that "[a]ny constitutional amendment taking away an existing provincial area of jurisdiction or proprietary right should not be imposed on any province not desiring it."[40] Of course, a province may only dissent from amendments that derogate in some way from its powers, rights or privileges, given that it is not practicable or even possible in some cases to opt out of other amendments, notably those relating to altering federal institutions, creating new provinces, changing provincial boundaries etc. Within its domain, however, the opting out power is a very useful tool for independent-minded provincial governments.[41]

According to Meekison, the notion of dissenting or opting out of amendments first appeared in 1936. That proposal provided opting out for any amendment "in relation to matters coming within the classes of subjects enumerated in clauses (13) and (16) of section 92".[42] The idea reappeared in Alberta proposals of 1979 and was incorporated in the April Accord which eventually served as the basis for the Constitution Act, 1982.

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[39]April Accord, supra, p. 656.

[40]Ibid. at 659.

[41]Note, however, that this only works in one direction; or, in other words, it does not permit a province to acquire federal powers. This point is particularly relevant to the province of Quebec which has historically demanded not just constitutional protection in the form of vetoes and the right to opt out but has also sought additional powers.

[42]Meekison, supra, p. 110. See also P.Gérin-Lajoie, Constitutional Amendment in Canada (Toronto, 1951).

A number of controversial issues arise in the interpretation of the opting out provisions. Subsection 38(3) begins with the phrase "[a]n amendment referred to in subsection (2)". This indicates amendments which "derogate from the legislative powers. the proprietary rights and any other rights or privileges of the legislature or government of a province". "Legislative powers" clearly include those set out in section 92 of the Constitution Act, 1867, and Meekison expands that list to include sections 93 (education), 94A (old age pensions), 95 (agriculture and immigration) and the new powers contained in section 92A (non-renewable natural resources, forestry resources and electrical energy). According to Meekison, the phrase "proprietary rights" was included to ensure that natural resource rights were protected and subject to the dissent provisions in the case of undesirable amendments.[43] Section 109 of the Constitution Act, 1867 provides that "[a]ll Lands, Mines, Minerals and Royalties" belong to the provinces, and this provision is clearly caught by subsection 38(2). The last phrase of subsection 38(2), "or any other rights or privileges of the legislature or government of a province" has the potential to become an effective catch-all. Provisions which would probably fall within the scope of this phrase include section 60 (salaries of Lieutenant Governors), section 100 (salaries of judges) and section 125 (exemption of public lands from taxation). Arguments directed at including other provisions will no doubt be put forward in the future.

If the right to dissent applies to and is exercised on a given amendment, subsection 38(3) provides that the amendment "shall not have effect" in the dissenting province. At least two questions arise in this case: first, what is the meaning of "effect" and, second, if the dissent is revoked does the "effect" take hold retroactively?

It is most likely that the amendment's "effect" will be interpreted in the formal, textual sense. That is, in the case, for example, of a transfer of jurisdiction over hospitals from the provinces to Parliament, the words "Establishment, Maintenance, and

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[43]Meekison, ibid., pp. 110-11.

Management of ... Hospitals" would simply be removed from subsection 92(7) and inserted under section 91 and would be referred to in that way in matters which concerned the provinces which assented to the amendment in question. This alteration would not apply to the dissenting province and the legislative head "Hospitals" would be left as before, causing no effect, therefore, in legal and constitutional terms in the dissenting province.

"Effects" can also be interpreted to mean the practical or observable results of the transfer of jurisdiction. If heads of jurisdiction are treated like watertight units then transfers of powers by amendment are simple matters and the effects are notionally confined to the proper area of jurisdiction.

A possible alternative approach might lead to less narrow, text-based results. It might be argued, for example, that an amendment transferring power over hospitals to the federal government in all but one (dissenting) province should not allow federal exercise of that power in such a way as to inhibit the solitary province's own jurisdiction over hospitals. Thus, "effects", on this view, would include actual as opposed to merely textual effects. Accordingly, any new legislation by the federal government under its new "Hospitals" power would have to leave the dissenting province's equivalent powers fully intact. If, for example, the federal government, without consultation with the dissenting province, added a section to the new federal Hospitals Act requiring all hospitals to hook up to and direct all patient records to a national data bank system, a dissenting province might argue that the section was ultra vires the federal government given that it would have the significant effect of, practically speaking, obliging all hospitals, even those in the dissenting province, to use the new federally-arranged system. This example is theoretically no different from normal disputes over jurisdiction. In this case, however, the dispute is between the federal power over hospitals and the provincial power over hospitals. If the federal government were given the unlimited power to legislate under its new head of jurisdiction, it could severely limit the effectiveness of the enduring provincial

power over hospitals in the dissenting province. Subsection 38(3) may lend support to a dissenting province which wishes to object to these disruptive effects. It is more likely, however, that the narrower interpretation referred to above will be favoured, to the potential detriment of the dissenting province.

Subsection 38(3) states that in order to dissent or subsequently revoke its dissent, the legislative assembly of a province must pass the appropriate resolution supported by "a majority of its members". This last expression is also used in subsection 38(2) and will be discussed below. The proper interpretation is not clear, but the most likely answer to the problem is that the resolution must be supported by a majority of all the members listed on the roll as holding a seat at the time of the vote.[44]

Unlike the right to dissent which must be exercised prior to the issue of the proclamation, the revocation of dissent may be accomplished at any time before or after proclamation. It is not clear from subsection 38(4) whether the amendment then takes retroactive effect or whether it crystallizes on the day of the revocation vote. The answer to this question could be vital if the original amendment had dealt with, for example, taxation powers, product standards or environmental laws. Presumably the province would "receive" all the new legislation on the date of the vote of revocation of dissent and the effects would follow from that point. Or, possibly, federal legislation would be passed making clear that the legislation passed under the previously acquired head of power now applied as well to the previously-dissenting/now- revoking province

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[44]In earlier versions of the general procedure which included the right to dissent, the required vote had been two-thirds of a provincial assembly. This was part of the eight premiers alternative plan as late as March 1981, however the required majority was reduced to a "majority of the members" in the April Accord, supra. Scott, supra, p. 273 speculates that the driving force behind this change may well have been Premier René Lévesque who, a few days earlier, had been re-elected with a majority falling just short of two-thirds.

Under the present rules.[45] a dissenting province must, in most cases, continue to carry the financial burden of providing the services called for under its retained head of jurisdiction, even while assenting provinces receive the same at the expense of the federal government. Legislation, programmes and services dealing with hospitals, to take our earlier example, would have to be administered and paid for by the dissenting province, and discrepancies might gradually develop between federal and dissenting situations if the province in question had insufficient funds to maintain an increasingly expensive system of health care. It might be that some sort of compensation could be arranged at a political level, but there would be no constitutional guarantee.[46]

A constitutional guarantee of compensation exists only in very limited cases: compensation is available to a dissenting province where legislative powers relating to "educational and other cultural matters" are transferred from provincial legislatures to Parliament. Where such amendments are made, section 40 stipulates that "Canada shall provide reasonable compensation to any province to which the amendment does not apply".[47]

An informal system of "opting out" or "dissenting" with compensation has been in use in federal-provincial relations since 1960 when the first shared cost programmes appeared.[48] This system developed in order to avoid unequal treatment for provinces which decided not to participate in the programmes. "Opting out" was well-established by the early 1970s[49] and was eventually incorporated in various post-Victoria conference

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[45]All recent proposals to amend the amending formula have included a provision requiring that reasonable compensation be provided in all cases of opting out. This will be discussed in the concluding chapter.

[46] Hogg (1985), supra, p. 61.

[47]G. Tremblay, "La réforme des institutions et de la formule d'amendement dans l'Accord du Lac Meech" in L'adhésion du Québec à l'Accord du Lac Meech (Montreal, 1988), p. 87 says this amounts to a veto for federal transfers in education and culture but only a "suspensive" or temporary veto otherwise (clearly, because of the high cost involved to the dissenting province).

[48]F. Morrissette, Le droit de retrait ('opting out') avec compensation au Canada et l'article 40 de la Loi constitutionnelle de 1982" (1984) 15 R.G.D. 221, p. 266.

[49]See R. Simeon, Federal-Provincial Diplomacy (Toronto, 1972).

alternative proposals for an amending formula. Its clearest expression appeared in the April Accord of 1981.

In the April Accord, the eight premiers suggested that compensation be given in all cases where a province dissents from an amendment under the general procedure. The explanatory notes offered a simple set of reasons for this rule:[50]

> This provision is designed to prevent a taxpayer, resident in a province to which the amendment does not apply, from paying twice: first in his or her federal tax bill and second, to the province which continues to exercise the jurisdiction.

Opting out with compensation was the backbone of the eight premiers' proposal until the November 1981 First Ministers' Conference when weaknesses began to emerge in their collective posture. By the morning of November 5, all provinces, with the important exception of Quebec, had agreed along with the federal government to accept the April Accord amending formula including its right to opt out or dissent, but to "delete [the section of the formula] which provides fiscal compensation to a province which opts out of a constitutional amendment".[51]

In a last-minute attempt to placate the province of Quebec, compensation was restored for amendments relating to education or other cultural matters, but the principle of automatic compensation was lost. Quebec's hostile reaction to the loss of compensation ignored the token offering regarding educational and other cultural matters, and focused instead on the punitive, illusory and costly nature of a right to opt out that is not accompanied by a right to compensation.[52]

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[50]April Accord, supra, p. 662.

[51]See First Ministers' Agreement on the Constitution, 5 November 1981, reprinted in (1984-85) 30 McGill L.J. 684, p. 685.

[52]Morrissette, supra, p. 268 describes Quebec's reaction to the November 5, 1981 agreement:

> Le Québec soutenait notamment que le droit de retrait sans compensation financière devenait punitif, illusoire et coûteux pour les citoyens de la province exercant son droit de retrait suite à un amendement constitutionnel transférant un pouvoir provincial au fédéral. Ces derniers pourraient effectivement avoir à payer

The question of full compensation is still part of the ongoing constitutional negotiations regarding the amending formula and was one of the changes suggested in the Meech Lake Accord (s. 9).[53] In the absence of new amendments to this section and failing political arrangements, compensation can only be guaranteed in law in cases of amendments dealing with "education or other cultural matters".

In order to understand section 40, it is clear that the expression "legislative powers relating to education or other cultural matters" must be defined. Educational matters have a a relatively clear content, but cultural matters are a new and relatively unknown area of constitutional consideration. It is no secret that, in political affairs, the government of Quebec is anxious to define "cultural" in very broad terms, including such diverse matters as international relations, communication and immigration. In legal terms, then, the courts may well be asked to determine the scope of the better-known notion of education as well as the more politicized notion of cultural matters.

In her lengthy article on section 40, France Morrissette deals only briefly with this subject. She states that in judging the "educational" or "cultural" character of the transferred power, the courts will proceed by means of the process of constitutional characterization, an exercise with which they are familiar.[54]

> les taxes fédérales prélevées pour défrayer le coût du programme provincial semblable; ce qui équivaudrait à de la double taxation.

These comments echo those found in the explanatory notes to the April Accord, supra.

[53] Morrissette, ibid., p. 269 predicted in 1984 not only that a return to universal compensation was unlikely, but that amendments transferring legislative powers were likely to be few in number, bearing in mind that there have only been two such amendments since 1867 (Unemployment Insurance, 1940 and Old Age Pensions, 1951, 1964).

[54] Ibid., p. 270:

> En jugeant du caractère "éducatif" ou "culturel" du pouvoir transféré, les cours ne feront que procéder à un exercise de qualification constitutionnelle auquel elles sont habituées et qui s'avère nécessaire vu le caractère vague de l'expression "domaines culturels" de l'article 40. Il s'agit là en effet d'un concept général susceptible de comprendre plusieurs réalités que les tribunaux devront définir au fur et à mesure.

The analysis is not perhaps as simple as Morrissette indicates. It is possible to imagine a number of different approaches that the court might take in determining what is educational or cultural. A first approach might involve treating the phrase "educational or other cultural matters" as limiting the sense of education, restricting it to its cultural aspect so as to exclude, for example. vocational training. It might also be argued that education narrows culture, ensuring that it is not interpreted so as to include the broader political concerns mentioned earlier. Yet another alternative approach would be to require the court to identify the educational or cultural aspect of the amendment transferring legislative power and to compensate only to that extent. Canadian courts are familiar with this process of identifying different aspects, though it might be difficult quantifying the compensation in accordance with the extent to which the amendment affects "education or other cultural" aspects. This last approach would provide a court with a flexible tool for determining the amount of compensation.

Quantification of compensation is in fact a difficult matter in all cases. The payment of such compensation in section 40 is guaranteed by the phrase "Canada shall provide". The word "Canada" appears rather than the "Parliament of Canada" or "Government of Canada" because this is the practice in drafting sections which deal with money matters.[55] More important are the words "shall provide" because these raise the obligation to provide reasonable compensation beyond a moral one.[56] Morrissette suggests a useful comparison between sections 36 and 40 of the Constitution Act, 1982.[57] Section 36 states that "Parliament and the government of Canada are committed to the principle of making equalization payments". If the framers intended section 40 to be less than a legal obligation then language similar to that used in section 36 could have been employed; instead, the

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[55]See sections 111, 125 and Re: Authority of Parliament in Relation to the Upper House [1980] 1 S.C.R. 54.

[56]Scott, supra, p. 274 asks whether section 40 creates an obligation to pay.

[57]Morrissette, supra, pp. 272-3.

phrase "Canada shall provide" was used, and there can be little doubt that an enforceable legal obligation has been created.[58]

Important questions regarding the text of section 40 arise with respect to the phrase "reasonable compensation". It is important to find the answers to a number of questions such as: who determines what is "reasonable compensation"?; on what basis is it determined?; and how often can this determination be reassessed, if at all?

We have assumed that the phrase "Canada shall provide" produces a legal obligation, but we have not yet discovered who enforces the obligation and determines its nature. Morrissette observes that it would be unjust to allow the federal government to assess what is "reasonable compensation" because of the risk of upsetting the federal balance of power over time, an eventuality which the Constitution is designed to prevent.[59] Section 40 would provide little protection for dissenting provinces if the federal government could always set the "reasonable compensation" for amendments transferring legislative power over education and other cultural matters.

The logical arbiter, then, for such a question is the Supreme Court of Canada or the court system. The courts often quantify remedies in cases dealing with matrimonial, tortious, contractual and other disputes, but they may be reluctant to enter into the complicated world of federal-provincial financial disputes, even if requested to do so in a reference case. Courts in most countries are wary of straying into areas of political debate where legal signposts are few and far between. In the United States the courts have drawn up a test to help decide whether a question is justiciable or non-justiciable. In Baker v.

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[58]Morrissette, ibid., p. 274 supports this conclusion by quoting from Prime Minister Trudeau who, following the removal of the compensation provisions for all but educational and cultural matters, spoke of what would have been the national government's obligation to compensate financially or fiscally in all cases of opting out had the right to compensation not been reduced: "ce qui est enlevé, madame le Président, c'est une disposition constitutionnelle qui aurait obligé le gouvernement national si une province exercait ce droit de retrait, de compenser financièrement ou fiscalement ... ."

[59]Ibid., p. 275.

Carr,[60] the United States Supreme Court ruled that a question is political (that is. non-justiciable) if one of the following questions can be answered in the affirmative: has the Constitution referred the question to a particular political body?; would a judicial decision on the question risk placing the government in and embarrassing position in its foreign affairs or risk creating serious social and political problems within the country?; and does the Court lack objective and non-discretionary criteria in order to answer the question? The answer to the first question in the case of section 40 is clearly negative. As we have seen, the Constitution of Canada is silent as to who should decide on what is "reasonable compensation", and it would be contrary to the spirit of the Constitution to allow the federal government to do so. In answer to the second question, it is difficult to see a way in which a Court's answer to this question would put the government at risk either externally or internally. The third question presents most difficulty: can objective and non-discretionary be found to determine what is "reasonable compensation"? This brings us already beyond the question of who determines and on to the question of how or on what basis "reasonable compensation" is determined.

A first suggestion can be found in the April Accord, section 3:[61]

> **3.** The Government of Canada shall provide reasonable compensation to the government of [a dissenting] province, taking into account the per capita costs to exercise that jurisdiction in the provinces which have approved the amendment.

This method of determining "reasonable compensation" was removed from the final version of the section in the Constitution Act, 1982, perhaps because it was not useful in dealing with the educational and cultural matters,[62] areas which are of particular importance and therefore of added per capita expense to Quebec. Because compensation for these matters was offered as a salve to heal Quebec's wounds, it would have been

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[60](1962) 369 U.S.186.

[61]April Accord, supra, p. 662.

[62]Although it should be noted that there was no reference to per capita costs in the full compensation text of s. 42 proposed in the Meech Accord, s.9.

improper to make explicit reference to a system of compensating which uses the per capita cost of exercising educational and cultural jurisdiction outside Quebec as a measure. By leaving the method of determining reasonable compensation vague, the framers may have intended to allow this matter to be determined in a flexible manner, perhaps according to the extent to which educational or cultural matters have been affected in a given amendment. perhaps even in cases where only a small aspect is involved. Such a flexible approach may be desirable given the range of potential amendments which may require consideration by the courts, but too much flexibility may violate the test of justiciability in Baker v. Carr should that test be adopted by Canadian courts. Can an objective and non-discretionary standard be found which is sufficiently flexible to be applied in the potentially varied compensation situations?

France Morrissette proposes such a standard in her article on section 40. She suggests a test of "absence of financial or fiscal penalty", one which has not only governed federal-provincial relations on shared cost programmes since 1960 but which has also been accepted as fair by First Ministers in numerous Constitutional Conferences.[63] Absence of financial or fiscal penalty and hence "reasonable compensation" would exist, according to this test, where a dissenting province (according to subsection 38(3)) is exempted from the new tax which the federal government decides, in one case, to levy specifically to finance a programme set up following a transfer of legislative powers in educational or cultural matters; or where no new tax is levied because the federal government uses funds from the Consolidated Revenue Fund and the dissenting province receives what the federal government would have spent had it acquired jurisdiction in that province.[64] There are elements of the April Accord proposal in this test, but Morrissette shows how the more sophisticated test of "absence of financial or fiscal penalty" can be applied to more situations. Morrissette further justifies this test by noting that it is consistent with the principle of equality of citizens of Canada before the law as set out in section 15 of the

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[63]Morrissette, supra, p. 279.

[64]There is a much more detailed discussion of this idea in Morrissette, supra.

Charter.[65] In any case, such a test would probably satisfy the third requirement in a Baker v. Carr-type test, that of an objective and non-discretionary criterion.

A last question with regard to "reasonable compensation" has to do with how often, if at all, compensation can be reassessed following the original amendment. It is difficult to imagine immediate compensation which anticipates in any reasonable or just way all future exercise of the newly transferred power by the federal government or all future penalties incurred by a dissenting province as a result of not transferring its powers in education or other cultural matters. Consequently, the courts will be called upon to assess and reassess the reasonableness of the compensation taking into account some of the factors discussed in the section on determining reasonable compensation.

If the Canadian courts are to examine the issue of reasonable compensation, we might want to look briefly at how the cases will arrive in the court system. When a dissenting province decides to object to the compensation offered by the federal government in negotiations it would presumably proceed by way of a reference to the court of appeal of the province and ultimately to the Supreme Court of Canada. This is likely to be the most common occurrence. In fact, the existence of the reference procedure[66] might encourage a Canadian court to answer difficult, somewhat political questions regarding compensation, whereas an American court, unaided by reference powers, might fall back on Baker v. Carr and refuse. It may arise that a citizen of a dissenting province objects to the compensation agreed to by his province in negotiations with the federal government. Recent standing rules laid down by the Supreme Court of Canada[67] would very likely cover and permit the citizen's action. It is also possible that a citizen might wish to base the opposition to the compensation agreement on section 15 of the Charter and the remedy provisions of section 24.

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[65]Morrissette, supra, p. 282.

[66]The Meech Lake Accord would have constitutionalized this procedure.

[67]See, e.g., Minister of Justice v. Borowski [1981] 2 S.C.R. 575.

Leaving the topic of opting out and compensation and returning to the central example where an amendment to which the general procedure applies is proceeding normally toward eventual proclamation, there remain a number of important procedural rules regarding the ratification of such a proposed amendment which we have yet to consider. These rules are set out in section 38 and will be discussed below.[68]

Some confusion arises in determining the way in which a resolution under section 38 must be authorized.[69] Subsection 38(1) is silent on this question, but it is clear that some sort of majority is necessary in order to authorize the resolution properly.[70] In the absence of other prescriptions, the regular rules on quorum and voting would apply, and a majority of those present at the vote would suffice.[71] The normal risks of the legislative process would apply: low attendance and snap votes, for example.

In certain cases, however, it appears that an additional requirement may be added. Subsection 38(2) states that amendments made under subsection (1) "shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies", but this rule applies only to amendments which "derogate from the legislative powers, the proprietary rights or any other rights or

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[68]We are principally concerned with subsections (1) and (2) which read as follows:

> 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 census, at least fifty percent 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).

[69]In the United States this question had to be resolved by the National Prohibitions Case (two-thirds of members voting in Congress constitutes a quorum not two-thirds of entire membership). See Dellinger, supra, p. 404.

[70]See Scott (1982), supra, pp. 273.

[71]See Constitution Act, 1867 sections 36, 37 for the Senate and sections 49, 50 for the House of Commons.

privileges of the legislature or government of a province". Scott points out that as a matter of historical fact the legislative framers did not intend to impose different counting rules for different amendments under the general procedure. However, the provincial legal advisors would not agree to eliminate the phrase, "supported by a majority of the members of each".[72] The fact that the phrase was permitted to stand allows an argument to be made that, prima facie, the words are not superfluous and must be given legal meaning, logically one which is different from a case where, as in subsection 38(1), the additional phrase is not used.[73] If subsection 38(2) is construed in this manner, presumably amendments of the type described in that section would have to be approved by a majority of all members who have a seat at the time of the vote, that is, excluding only members who no longer hold their seats because of death or resignation. The April Accord, from which this provision was drawn, uses the expression "actual membership", which reinforces the idea that the majority is taken from the number of members on the roll (i.e. including absentees[74]) at the time of the vote, rather than the number at a time when the legislative body has its full complement, say, following a general election. Though the vote in this case need not be authorised by a majority of the total number of potential members in the legislative body, it must at least have the support of a majority of members active at the time of the vote, as opposed to a majority of those present and voting. The effect of this rule, then, is to prevent a snap vote on the amendment resolution on a day when the legislative body in question is poorly attended.[75]

It appears, then, that the best reading of subsection 38(2) leads to the conclusion that the regular rules[76] of the legislative body apply in all cases except where the proposed amendment "derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province". When such cases arise,

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[72]Scott (1982), supra, p. 272.

[73]See Scott, ibid., p. 273 where this point is developed.

[74]See Banks, supra, p. 18.

[75]See Hogg, supra, note 3 p. 58n.

[76]Note that the House of Commons' rules still require only a quorum of twenty (see section 48 of the 1867 Act and Banks, supra, p. 18.

though the determination may well be difficult, the more stringent rules on the requisite majority apply.[77]

The resolutions of the provincial legislative assemblies present more varied and interesting difficulties. The rules regarding requisite majorities are the same as those discussed above, in that, where subsection 38(2) applies, the more stringent requirements take precedence over those used in the day-to-day business of the legislature. New problems arise where it becomes necessary to add the provincial authorizations together to produce a majority comprised of two-thirds of the provinces having fifty percent of the population of the provinces.

It is worth noting initially that the general procedure requires assent from the legislative assembly and not merely from the Premier and his or her cabinet. The practice before 1982 was that the provincial government was not obliged to seek approval from the legislative assembly (nor from the now defunct legislative councils). Of course this was not a legal rule, given that no formal amending formula existed, but it was confirmed on numerous occasions in practice.

A number of observers of the 1981 constitutional negotiations regretted the lack of democratic input into the constitutional discussions.[78] Paragraph 38(1)(b) assures that even if preliminary discussions are held at first ministers' conferences or cabinet meetings, the provincial legislative assemblies will be guaranteed an opportunity to debate and vote on the resolution.[79]

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[77]Scott notes that the Supreme Court of Canada could apply the more stringent rules in all cases given the importance of the resolution being voted on, however there is nothing in the text of subsection 38(1) to support this interpretation. See Scott (1982), supra, p. 272.

[78]G.-A. Beaudoin, Book Review (1985) 30 McGill L.J. and E. McWhinney, Canada and the Constitution (Toronto, 1982), p. 46.

[79]Recent issues regarding public participation in the amendment process will be discussed in the concluding chapter.

Provincial authorization of amendment resolutions must meet two tests. First, two-thirds of the provinces must adopt a resolution of assent and, secondly, those provinces must make up at least fifty percent of the population of all the provinces.

The two-thirds requirement presently means that seven provinces must agree to an amendment.[80] This number will change if new provinces are added, but as Scott has noted, such an occurrence is unlikely given that new provinces cannot be established without provincial approval under the general procedure.[81] For the moment seven provinces suffice.

The fifty-percent requirement ensures that the more populous provinces still have considerable influence. Though Quebec and Ontario have lost the veto which they each held in most pre-1982 amending formula proposals, the present formula does at least result in a need for one of either Quebec or Ontario in order to authorize a resolution. This is a result of the fact that the combined population of those two provinces is over fifty percent of the population of all the provinces.

The product of all the proportions and percentages is that at least one of the four Western provinces, at least one of the four Atlantic provinces and at least one of the two Central provinces must be part of the seven or more provinces which authorise the resolution.[82] This arrangement is very similar to the general procedure in the Prime Minister's October 1980 proposed resolution as set out in section 41 of that document.[83]

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[80]Hogg (1985), supra, p. 58; Scott (1982), supra, p. 270.

[81]Scott, ibid.

[82]Hogg, (1985) supra, p. 58; Meekison, supra, note 11 p. 109.

[83]Supra, p. 767. Section 41 is described in the margin notes as the "General procedure for amending the Constitution of Canada" and it reads as follows:

> **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 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

The obvious difference is that the new general procedure gives a regional veto to the Atlantic, Western and Central provinces whereas the October 1980 proposal provided separate vetoes for Quebec and Ontario. The new formula gives no advantages to any particular province other than those acquired or lost by shifts in the population statistics, whereas the October 1980 proposal provided a permanent veto for Quebec and Ontario and any other province which at any time attained the level of twenty five percent of the population of Canada.

Under the present general procedure for amending the Constitution of Canada, population statistics will be very important. Paragraph 38(1)(b) refers to "the then latest general census". It is unclear whether "then" refers to the time of the proclamation or the time of the resolutions. If, for example, a sufficient number of provincial resolutions were passed in the year 2000 so as to comply with section 38, but while the proclamation was being prepared (or while waiting for the delay in subsection 39(1) to expire, or while waiting for federal approval in the case of a provincially initiated amendment) the census for the year 2001 was published indicating that the level of provincial authorization was less than fifty per cent, would the new census apply? The April Accord, in which the new general procedure was first set out, referred to "the latest decennial census",[84] but this was altered in the November 1981 draft resolution to read "the then latest general census"[85] which had been the favoured phrase in all previous federal drafts. It appears that "then

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(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 percent 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 percent 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 percent 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.

[84]April Accord, supra, p. 660.

[85]Reprinted in (1984-85) 30 McGill L.J. 825, p. 837.

latest" was intended to refer to the time of proclamation, that being the only moment which can be specified easily and applied to the provincial authorizations given at that time. Consequently, amendments proclaimed in a census year will have to conform with the new population statistics for the calculation of the fifty percent approval.

In calculating the fifty percent requirement, it should also be borne in mind that the total in question is measured against the population of all the provinces, not the population of Canada as a whole.[86] Accordingly, the population of the Yukon and Northwest Territories must be excluded along with the expatriate population in the armed forces and diplomatic corps, if they are not deemed resident in any particular province. Constitutional amendments will usually be approved by well over fifty percent of the population because of the two-thirds requirement, but on rare occasions the precise population statistics may be vital.

The procedure set out in section 38 applies to the important categories set out in subsection 42(1). As subsection 42(2) indicates, neither the dissent and compensation rules nor the more stringent voting majorities provided for in subsection 38(2) have any application to subsection 42(1). The same is true for the procedures set out in sections 43, 44 and 45.[87]

Once the amendments contemplated in Part V have been assented to -- by adoption of a appropriate and sufficient resolutions in the provincial legislative assemblies, House of Commons and Senate as the case may be -- the resolution must be proclaimed in order to become law and part of the constitution. Section 48 directs that "forthwith on the adoption of the resolutions required" in Part V "The Queen's Privy

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[86]The Prime Minister's proposed October 1980 Resolution, supra, used the expression "the population of Canada" in subparagraph 41(1)(b)(i), whereas section 38 now refers to "the population of all the provinces".

[87]See Banks, supra, p. 20. It has already been noted that the more stringent voting majorities do not apply to section 41; it goes almost without saying that the opting out and compensation rules cannot apply.

Council for Canada shall advise the Governor General to issue a proclamation under this Part." As Professor Hogg points out, this section and especially the phrase "forthwith" appears to contradict subsection 39(1) which prohibits the issuance of a proclamation until one year has elapsed from the initiation of the amendment, unless all the provinces have considered the resolution and assented or dissented. Hogg concludes that section 48 must be read as subject to the more specific requirement of subsection 39(1).[88]

The Queen's Privy Council means, for all intents and purposes, the Cabinet, and under our system inherited from Great Britain it is usual that the Cabinet advise rather than order the Queen or her representative, the Governor General, to proclaim the new amendment. Presumably the Governor General is not then obliged to proclaim it, just as he or she is not obliged to sign a bill into law. It may be, as Scott notes, that the Queen's Privy Council as a body or the members of the Council individually are under an imperative duty to advise the Governor General in the manner described in section 48. By whom this duty might be enforceable is, however, an unresolved problem.[89] This is designed to avoid any delay by the Queen's Privy Council in getting the proclamation process under way once the necessary assents to the resolution have been obtained. This gets around an issue under the American Constitution as to whether an amendment is immediately valid upon obtaining the requisite level of state ratifications or whether Congressional promulgation is required.[90]

The last provision of the amending formula is section 49 which requires that a conference of all the first ministers be held before April 17, 1997, in order to review the provisions of Part V. Any changes to the formula will occur only if unanimity can be achieved.

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[88]Hogg (1982), supra, p. 99. See also Banks, supra, p. 23.

[89]Scott, supra, p. 264.

[90]See Dellinger, supra, p. 403.

In addition to these purely procedural questions, there are a number of theoretical issues which are of general relevance to the new Canadian process of constitutional amendment. We will consider some of these in the next chapter.

CHAPTER SEVEN

LIMITS ON AMENDMENT

A first basic question which arises is as to the relationship between Part V on amendment and other parts of the Constitution of Canada. This question can be further divided into two more precise questions. First, are amendments to the Constitution under Part V governed by the Canadian Charter of Rights and Freedoms which was also added to the Constitution in 1982? And secondly, can the amendment procedures be used to amend any matter whatever in the Canadian constitution, no matter how vital to the system of federally-organized, judicially-supervised, representative democracy? The Canadian courts have already provided preliminary answers to the first question, while the second question is likely to remain confined to the arcane debates of legal theory.

In Reference Re an Act to Amend the Education Act (Ontario)[1] the Supreme Court of Canada was asked, inter alia, whether the 1982 Charter of Rights and Freedoms had the automatic effect of repealing any preexisting parts of the Constitution inconsistent with it. Madame Justice Wilson, speaking for a majority of the Court, noted that "it was never intended ... that the Charter could be used to invalidate other provisions of the Constitution".[2] The question was asked again, in more pointed terms for our purposes in examining constitutional amendment, in a series of challenges to the 1987 Meech Lake proposals to amend the Constitution of Canada. The Courts were asked effectively whether the Charter prevailed over the Part V provisions on amendment of the Constitution of Canada.

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[1](1987) 40 D.L.R. (4th) 18.
[2]Ibid., p. 60.

A first, surprising answer to this question was provided in the case of Penikett v. R.[3] A brief introduction to this case may be necessary. As noted earlier, in the late spring of 1987 the federal and provincial first ministers agreed to a set of constitutional amendment proposals which came to be known as the Meech Lake Accord. This Accord included various provisions which, if adopted, would have reduced the influence of the Yukon and Northwest Territories. Both territories had hoped eventually to become full-fledged provinces, and the Accord threatened to make this more difficult (by subjecting subsections 42(e) and (f) to the unanimous consent amendment procedure). Furthermore, the Accord dealt with matters such as appointment of Senators and Supreme Court of Canada judges and representation at constitutional conferences in such a way as possibly to violate such Charter-protected principles as due process and equality in so far as the Territories and their citizens were concerned. The government leader of the Yukon Territorial Government, the Honourable Mr Tony Penikett brought an action seeking a declaration, inter alia, that the Meech Lake Accord amendments would violate the Charter and were therefore unconstitutional.[4]

Mr Justice McDonald of the Yukon Territory Supreme Court presented the key constitutional question as follows: "Does the Canadian Charter of Rights and Freedoms apply to Pt. V of the Constitution Act, 1982?".[5] He answered the question in the affirmative but did not have to declare the Meech Lake Accord amendments unconstitutional because he decided elsewhere in the judgment that such a question was premature. It may be useful for our purposes to consider the learned judge's reasons regarding the question set out above.

Mr Justice McDonald structured his reasons in the form of a series of responses to the arguments put forward by the Attorney General of Canada, who argued of course

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[3][1987] 5 W.W.R. 691 (Yukon Territory Supreme Court).

[4]A parallel action was taken in the Northwest Territories, Sibbeston v. A.G. Canada (1988) 48 D.L.R. (4th) 691 with similar results.

[5]Penikett, supra, p. 699.

that the Charter should in no way apply to Part V.[6] Counsel for the Attorney General of Canada's first three arguments were based on section 32 of the Charter. Counsel argued that the adoption of the resolutions approving the proposed amendments (as required by Part V) was not within the scope of Charter. Section 32 of the Charter indicated that the Charter applied "to the Parliament and government of Canada in respect of all matters within the authority of Parliament" and "to the legislature and government of each province in respect of all matters within the authority of the legislature of each province". Counsel argued that the resolutions required by Part V were not Acts of Parliament and not caught by section 32, supporting this view with a reference to section 33 which referred to Parliament together with Acts of that Parliament. Still referring to section 32, counsel pointed out that a resolution approving a constitutional amendment was not a "matter" within the authority of either Parliament or of the provincial legislatures; rather amendments were clearly outside the authority of either, being for the most part the product of the Senate, House of Commons and provincial legislative assemblies acting in concert.

Mr Justice McDonald rejected the arguments based on section 32, stating that "Parliament" in section 32 could be interpreted in its wider sense, and so include resolutions of Parliament. Furthermore, he felt that section 33 could be of no assistance, and that the resolutions were indeed "matters" as described by section 32 as no amendment could be approved without resolutions of Parliament and the legislative assemblies, and that therefore constitutional amendments were matters arguably within their joint jurisdiction.

A fourth argument by the counsel for the government of Canada claimed that, once adopted, the Meech Lake slate of amendments would be part of the Constitution of Canada and beyond any possibility of "inconsistency" (section 52) with that

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[6]See generally, ibid., pp. 699-717.

Constitution. Mr Justice McDonald stated that this argument begged the question. He asserted that if the procedure used to adopt the Meech Lake amendments did not comply with the rules in Part V or, and here his remarks became more controversial, if the substance of those amendments was inconsistent with the Charter, then they would never become part of the Constitution of Canada in the first place. Counsel for the Attorney General's fifth argument anticipated such an approach and stated that because a proposed constitutional amendment was not "law" it could not be inconsistent with the provisions of the Constitution of Canada (here the Charter) as contemplated by section 52. Mr Justice McDonald expressed no opinion on that argument.

Arguments six and seven were even farther reaching. Counsel for the government of Canada argued that the amending procedure set out in Part V effectively replaced the procedure which had existed before 1982, that is, the procedure based on the United Kingdom Parliament. Accordingly, the resolutions required under Part V after 1982 could not be considered "law" any more than the resolutions adopted requesting amendments from the United Kingdom Parliament before 1982 could be considered law. Mr Justice McDonald dismissed this argument by stressing that the issue of what was "law" under section 52 did not arise before 1982.

The seventh and final argument was that once a constitutional amendment becomes part of the Constitution, its validity cannot be threatened by the Charter because one part of the Constitution cannot be invoked to invalidate another part of the Constitution. Mr Justice McDonald acknowledged that this argument was unassailable unless it could be said that the Charter was special in some respect, and the learned judge was inclined toward that view. He acknowledged that the Supreme Court of Canada decision in Reference Re An Act to Amend the Education Act (Ontario)[7] meant that the Charter did not necessarily invalidate other apparently inconsistent parts of the

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[7]Supra.

Constitution, but he concluded that there was still room for the Charter to limit or be applied to constitutional amendments.

This final argument is perhaps the most interesting. It seems that Mr Justice McDonald was not just concerned with the first question set out in the first paragraph of this chapter (whether the Part V amendments are governed by the Charter) but also by the second, more general question (whether there are any limits at all to the substance of constitutional amendments). By way of argument in favour of a limited amendment power, the learned judge set out the far-ranging hypothetical amendments that counsel for the government of Canada was willing to accept:[8]

> The position taken by counsel for the Government of Canada during the argument upon this application was that any resolution for constitutional amendment, which has obtained the approval of the Senate and the House of Commons and the requisite number of provincial legislative assemblies as provided for in s. 38 or s. 41 of the Constitution Act, 1982, is valid no matter how directly or indirectly the content of the amendment is inconsistent with or infringes or denies a right or freedom guaranteed by the Charter. Would a constitutional amendment be valid that requires every citizen or resident of Canada to adhere to an organized religious faith, whether a particular one, or any one of his or her choice, notwithstanding s. 2(a) of the Charter which protects the fundamental freedom "of conscience and religion"? Yes, say counsel for the Government of Canada. Would a constitutional amendment be valid which expressly repeals s. 3 of the Charter (which protects the right of every citizen "to vote in an election of members of the House of Commons or of a legislative assembly") and expressly provides that only a certain class of citizen has the right to vote? Yes, say counsel for the Government of Canada. Would a constitutional amendment be valid that expressly repeals s. 11 (d) of the Charter (which protects the right of "Any person charged with an offence" to "be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal") and expressly provides that the trials of all accused persons be by courts consisting of persons responsible to the executive? Yes, say counsel for the Government of Canada. Would a constitutional amendment be valid which abolishes all superior courts, i.e, all courts of general jurisdiction? Yes, say counsel for the Government of Canada.

The second and third examples make clear that Mr Justice McDonald was not just concerned to ensure that the Charter governed the substance of proposed amendments

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[8]Supra, pp. 709-10. See L. Orfield, The Amending of the Federal Constitution (Ann Arbor, Michigan, 1942), p. 122 on the danger of reductio ad absurdam arguments.

but also to guarantee that the Charter itself, or at least certain vital parts of it remain unamendable, even by direct means. He referred to the Charter as "an impenetrable fortress".[9] The learned judge backed up this bold conclusion with a surprising authority. Returning to the point discussed earlier regarding the power of the House of Commons, Senate and provincial legislatures to do everything that the United Kingdom Parliament could have done prior to 1982, he then examined various British cases and commentaries in which it has been said that the power of the United Kingdom Parliament is not untrammelled, though here he seemed to be contradicting the unequivocal wording of the Patriation Reference.[10] He noted that the standard view in the United States[11] was that there was no limitation on the power of amendment, but also quoted from an Indian constitutional authority[12] to the effect that certain fundamental matters in the Constitution might be immune from amendment while other less important matters might not. In the Canadian case, the learned judge remarked that Part V did not set out a procedure providing specifically for the amendment of the fundamental rights and freedoms set out in the Charter and that, accordingly, it could be presumed that such rights and freedoms were unamendable.

In answer to the question which he set out for himself, then, Mr Justice McDonald responded that the provisions of the Charter do apply to Part V on amendment. He left open the question of how exactly the Charter might do this, although he did set out certain possibilities:[13]

> [T]he court will likely wish to consider whether the application of the Charter in the circumstances has the effect of invalidating the particular amendment, or some less organic consequence, such as causing it to be "read down" or otherwise treating the relevant provision of the Charter as a

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[9] Ibid., p. 707.

[10] See the discussion of the Patriation Reference and the untrammelled powers of the United Kingdom Parliament in Chapter 1.

[11] Citing Rhode Island v. Palmer, 253 U.S. 350 (1920).

[12] D.K. Sen, A Comparative Study of the Indian Constitution, vol. 1 (1960). He might also have wished to mention that under the 1949 Basic Law of the Federal German Republic Articles 1 and 20 are apparently placed outside the scope of the amending power by Article 79(3).

[13] Supra, p. 716.

> source for the interpretation for the amendment short of holding it to be invalid. In deciding what impact the Charter will have upon the particular constitutional amendment, the court will likely take into account the purpose of the Charter as a whole, the purpose of the particular Charter-guaranteed right or freedom with which the amendment is alleged to be inconsistent, and the provisions of s.1 of the Charter.

As we will see, the view expressed by Mr Justice McDonald in this judgment does not appear to be the prevailing view in Canada, and was overruled by the Court of Appeal, but if the issue is ever litigated before the Supreme Court of Canada, the arguments canvassed above will no doubt reappear.

In the Yukon Territory Court of Appeal, Nemetz C.J.Y.T., Hinkson and Macdonald JJ. A. rejected the lower court decision on whether the Charter applied to Part V of the Constitution Act, 1982. The Court of Appeal noted that the Constitution of Canada is made up a series of documents which were passed at different times, but it stressed that these documents must be "read together to arrive at the constitutional framework for Canada".[14] After setting out section 52 in full, the Court asked whether section 32 of the Charter could be interpreted to include an amendment properly enacted under Part V, concluding that the reference to "all matters", referred to above in the judgment of Mr Justice McDonald, could not apply to procedures under the amending formulas. This was essentially counsel for the Government of Canada's argument that amendments are matters within the authority of Parliament and the provincial legislative assemblies together not within the authority of either entity acting on its own. As the Court of Appeal said[15]

> [t]he Parliament of the United Kingdom possessed the power to amend the Constitution of Canada until 1982. This power, as embodied in Pt. V of the Constitution Act, 1982, is now possessed jointly by Parliament and the provincial legislative assemblies. A constitutional amendment is not a "matter" within the authority of either Parliament or the provinces. The amending power is vested in a joint decision of federal and provincial authority.

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[14] Penikett v. R., [1988] 2 W.W.R. 481, p. 487.

[15] Ibid., pp. 488-89.

It should be noted that this seemed to leave open the question whether the Charter could be said to apply to amendments by Parliament acting alone or a provincial legislative assembly acting alone under sections 44 and 45 respectively. This will be dealt with briefly below.

In the end, the Court of Appeal adopted the view first expressed in Reference Re An Act to Amend the Education Act (Ontario)[16] to the effect that "no part of the Constitution is made by virtue of s. 52 paramount over another".[17] But the Court also chose to go further by expressing an opinion on the larger second question of whether there could be any limit on the amendment powers set out in Part V. In so doing it appeared to confuse the logical requirement of a supreme legislative power with the non-essential possibility of an ultimate legislature, unlimited or untrammelled in the scope of its powers:[18]

> We find no limitations in the 1982 Act upon the scope of the power to amend the Constitution conferred by ss. 38 to 43. To decide otherwise would be to deny to the elected representatives of Parliament and the several legislatures the ultimate power of amending the Constitution.

Another Canadian court may wish to reconsider this obiter dictum at a later time. It is now accepted even in British constitutional theory that there is no logical requirement that the legally sovereign body be able to legislate on absolutely all matters imaginable.[19]

In the Canadian context, the question is clearly governed by section 52, and, perhaps, section 32, in so far as the Charter is concerned. Section 52 clearly states that "[t]he Constitution of Canada is the supreme law of Canada" and that "[a]mendments to

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[16] Supra.

[17] Penikett, supra, p. 488.

[18] Ibid.

[19] See H.L.A. Hart, The Concept of Law (Oxford, 1961), pp. 64-76, especially p. 69.

the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada". These words indicate that to the extent that amendment is possible, Part V must be applicable, but they do not indicate whether all types of amendments are possible. If we keep Mr Justice McDonald's worst case scenarios in mind and add to them any amendments which would threaten seriously the federal structure, judicial function, representative institutions, democratic processes, fundamental rights and federal structure, it is possible to imagine a case where the courts might be asked to declare that such amendments are simply not possible. We will see below why courts are extremely reluctant to make such decisions, but it is important to stress that there is no logical impediment to them doing so. The Supreme Court of Canada might well try to avoid the unequivocal language used by the Yukon Territory Court of Appeal in order to keep its options open.

It should be noted that Mr Justice McDonald's reasons cannot be rejected out of hand. Section 32 seems open to interpretations favourable to either side of the argument. And in the event that Parliament and the requisite number of legislative assemblies attempted to amend the Constitution in a way which seriously threatened freedom of religion, for example, there would clearly be a conflict between two parts of the "supreme" Constitution and no clear indicators as to how to resolve the internal inconsistency. Mr Justice McDonald suggested that the new amendment might be "read down" so as to conform better, but a high degree of reading down eventually amounts to a declaration of invalidity. If a Canadian Court were ever to declare that a certain type of amendment was invalid, despite the fact that it had been proclaimed following the proper procedure, it would be bringing into the Canadian constitution the same type of limitation on amendment as appears, for example, in section 79 of the German Basic Law.[20] It would no doubt be argued that had the framers of the 1982 Act intended such

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[20]Section 79 of the German Constitution reads as follows:

> 79 (1) The Basic Law can be amended only by the laws which expressly amend or supplement the text thereof.
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> (2) Any such law shall require the affirmative vote of two-thirds of the members of the Federal Diet and two-thirds of the vote of the Federal Council.

a result, they would have included wording to that effect, following the German example. But it must be said that even before 1982, some judges of the Supreme Court of Canada showed a willingness to recognize principles which were not expressly mentioned in the Constitution but presumed by its overall structure.[21] Indeed, the most striking example of this type of reasoning from principle came after 1982 in the Manitoba Reference.[22] There the Court gave temporary validity to almost a century of improperly enacted Manitoba legislation on the basis of the fundamental constitutional principle of the rule of law. In that case, the Court showed a willingness to recognize fundamental principles whether or not expressly set out in the text of the Constitution of Canada:[23]

> The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in any specific provision, the principle of the rule of law is clearly a principle of our Constitution.

It is difficult to draw up a list of fundamental principles. These might include, for example, the judicial system, the democratic process, the representative system and many of the rights and freedoms which, in American terms, might be seen as "inalienable". It would be ironic and indeed nonsensical if certain fundamental rights which were originally put in constitutions in order to recognize their importance and to ensure their protection, could, by virtue of their encapsulation in textual form, be eliminated by the process of amendment. Perhaps the courts might be prepared to

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> (3) Amendments of the Basic Law affecting the division of the Federation into states, the participation on principle of the states in legislation, or the basic principles laid down in articles 1 and 20, shall be inadmissible.

(Emphasis added).

[21]This is usually referred to as the "implied bill of rights theory". For a brief discussion see P.W. Hogg, Constitutional Law of Canada (Toronto, 1985), pp. 635-8.

[22]Reference Re Manitoba Language Rights [1985] 1 S.C.R. 721.

[23]Ibid., p. 750.

recognize true amendments while refusing to accept something amounting to an attempted elimination of such fundamental principles.

It was mentioned above that the Court of Appeal judgment in Penikett did not deal with the question whether the Charter could have any application to amendments under sections 44 and 45, that is, amendments accomplished by the House of Commons and Senate or by one of the provincial legislative assemblies. The latter half of the question, relating to section 45, was dealt with by the Nova Scotia Supreme Court, Trial Division in Maclean v. A.G. Nova Scotia.[24] That case arose out of a piece of provincial legislation which attempted to expel from the legislative assembly any member who had been convicted of an indictable offence punishable by imprisonment for more than five years and to prohibit him from being nominated or elected to the legislative assembly for a period of five years dating from his conviction. The member directly affected by the legislation challenged its constitutionality claiming that it violated the Charter in numerous ways. Counsel for the provincial government claimed that the Act was an amendment to the constitution of the province made pursuant to section 45 of the Constitution Act, 1982 (as stated in the preamble to the new Act) and as such it was not reviewable by the court. Glube C.J.T.D. took notice of the decision by the Ontario Court of Appeal in Reference Re An Act to Amend the Education Act (Ontario)[25] to the effect that no provision of the Constitution of Canada is made paramount over any other, but he could not agree that the Constitution of Nova Scotia formed part of the Constitution of Canada. In his view, section 45 was added to Part V in order to make clear that there was no special amending formula applicable to the provinces when dealing with their own constitutions (unless parts of those constitutions were included in the texts listed as together forming the Constitution of Canada, although Glube C.J.T.D. does not make this clear). If section 45 referred only to the process of amendment, then substance could still be governed by the Charter, and that was the learned Chief Justice's

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[24](1987) 35 D.L.R. (4th) 306.
[25](1986) 25 D.L.R. (4th) 1.

opinion. He did not develop the argument further, but we might want to note, remembering the arguments put forward in Penikett, that the procedure under section 45 could indeed be seen as one of "matters within the authority of the legislature of each province" and so conform with section 32. It seems that Glube C.J.T.D. was justified in concluding that the Charter applies to amendments to the provincial constitution under section 45.[26]

There has not yet been any decision on whether the Charter applies to amendments under section 44 which provides that, "subject to sections 41 and 42, the 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". Unlike section 45, this section does refer to the Constitution of Canada. If we borrow the argument made earlier in the Penikett case, we might want to say that once the proper procedure has been followed an amendment under section 44 is part of the supreme law and not to be invalidated by another provision of that supreme law. In this case, the argument seems to lack weight. Amendments under section 44 are accomplished by means of an act of the federal Parliament, that is the House of Commons and Senate acting together with the Governor General of Canada. Section 32 of the Charter seems to indicate that the Charter should apply in such cases: "This Charter applies ... to the Parliament and government of Canada in respect of all matters within the authority of Parliament". An Act of Parliament would appear to be caught. If this is assumed to be the case, then we can predict that the Charter will apply to Part V when sections 44 and 45 are being used. Accordingly, the courts might be asked to invalidate an amendment under these sections not only on the basis of improper procedure but also for reasons of improper, or Charter-violating substance.

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[26]McEachern C.J.S.C. had come to a similar conclusion in Re Dixon and A.G. British Columbia [1987] 1 W.W.R. 313.

In order to understand better the distinctions between the procedure and substance of amendments it may be appropriate to consider briefly the role of the courts in supervising constitutional amendment. This issue has been considered by eminent American constitutional commentators, and we may wish to consider some of their views on the matter.

In some of the cases mentioned above, judges have made the distinction between the process and the substance of constitutional amendment. Part V is a more complicated amending procedure than its American equivalent, Article V, and we have seen how many of its provisions may require judicial clarification. But is there really a clear justification for judicial review of the process of amendment much less for the substance of amendment?

In the American context, the debate seems to turn on the extent to which the democratic institutions have an opportunity to overturn (by subsequent amendment) the highest court's interpretations of the constitution.[27] The most strict observers of Supreme Court activity, such as Professor Robert Bork, feel that constitutional amendment is so difficult that the Court should show great restraint, or great fidelity to the original intention of the Framers of the Constitution, in deciding all manner of constitutional decisions.[28] A more liberal and more common approach would give the Court freer reign to argue from principle in order to bring the Constitution into tune with modern developments, but would insist on a higher degree of restraint in dealing with amendment matters. And regarding constitutional amendments, even more liberal observers feel that the Court should rule on procedural questions only with close

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[27]See F.W. Scharpf, "Judicial Review and the Political Question" (1966) 75 Yale L.J. 517.

[28]R. Bork, "Judicial Review and Democracy" in Encyclopaedia of the American Constitution, vol. 3 (New York, 1986) pp. 1061-1064.

attention to the text of the Constitution and should refrain from deciding substantive questions in all but the most extreme cases, or simply not at all.[29]

The views of Professor Tribe are particularly lucid in this area. In a reply to Professor Dellinger who had called for wider scope for judicial review of constitutional amendment, Professor Tribe argued that the Court could find a valid basis for determining the validity or "fit" of constitutional amendments, but that such a calculus should take place at the level of constitutional politics rather than constitutional law. His observations are directly relevant to the discussion above regarding the inherent or implied limitations on constitutional amendment:[30]

> [T]he issue of judicial supervision has also arisen, and could arise again, with respect to amendment substance. ... Consider the question of how well or badly a human life amendment, a balanced budget amendment, or a gun control amendment would "fit" with the Constitution. ... The Constitution does provide guidance of a sort -- not decisive, but suggestive -- for assessing the appropriateness of proposed amendments. Far from being a mere assortment of unconnected rules and standards, the Constitution can surely be understood as unified, although not rendered wholly coherent, by certain underlying political ideals: representative republicanism, federalism, separation of powers, equality before the law, individual autonomy, and procedural fairness. We may choose to reject some or all of these ideals, to override them, or to recast them, but as long as we retain some commitment to the Constitution -- as long as we are amending it instead of discarding it -- we cannot simply ignore its fundamental norms. An amendment prohibiting atheists from holding federal office, for example, would clash with the current Constitution's paramount concern for freedom of conscience no less than a statute to the same effect would run counter to the current establishment clause.

Tribe's argument appears to lend very strong support to the view that the courts should decide whether the substance of any particular amendment is consistent with the Constitution as a whole and to determine validity on that basis. In fact, as indicated earlier, Tribe argued that those who amend the Constitution -- Congress and the various

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[29]See what could be referred to as the "Dellinger-Tribe Debate" in the Harvard Law Review. See W. Dellinger, " The Legitimacy of Constitutional Change: Rethinking the Amendment Process" (1983) 97 Harv. L. Rev. 386-432; L.H. Tribe, Comment, "A Constitution We Are Amending: In Defence of a Restrained Judicial Role" (1983) 97 Harv. L. Rev. 433-46; and W. Dellinger, "Constitutional Politics: A Rejoinder" (1983) 97 Harv. L. Rev. 446-50.

[30]Tribe, ibid., p. 438-9.

states -- should have such considerations in mind; but he also argued that the courts should not interfere, even if an amendment is antithetical to crucial constitutional principles or highly trivial and hardly deserving of inclusion in the Constitution:[31]

> [A]llowing the judiciary to pass on the merits of constitutional amendments would unequivocally subordinate the amendment process to the legal system it is intended to override and would thus gravely threaten the integrity of the entire structure. ... The merit of a suggested constitutional amendment is thus a true political question -- a matter that the Constitution addresses, but that it nevertheless commits to judicially unreviewable resolution by the political branches of government.

Accordingly, Professor Tribe suggests a test which would assist a court in determining whether or not it should consider a question on amendment, whether regarding substance or procedure.[32]

> In each case, courts should ask themselves how seriously an adjudication on the merits of a challenge to some aspect of an amendment's ratification or rejection would threaten the unique role of the amendment process -- an inquiry that should lead courts to broad deference on procedural as well as substantive aspects of amendment ratification.

It is not surprising to see that the American theory of constitutional amendment and judicial review is based to a very large extent on political considerations. Only Congress and the state legislatures are elected and can claim to represent the sovereign People. At least one Canadian commentator has suggested that judges should either be elected or be encouraged to show great judicial self restraint.[33] Traditionally, however, Canadian constitutionalism has showed a higher regard for law than for legitimacy. The choice of Westminster-routed patriation over a constitutional convention and referendum was just one example of that tradition. Furthermore, the Canadian practice of seeking advice from the courts in the form of constitutional references is likely to continue.[34]

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[31] Ibid., p. 441-2.

[32] Ibid., p. 443.

[33] E. McWhinney, Canada and the Constitution (Toronto, 1982), p. 89.

[34] Meech Lake would have made the reference procedure formal. See Canada, Strengthening the Canadian Federation: The Constitution Amendment, 1987 (Ottawa, 1987), subs. 101E(2).

Given the complexity of the amending procedures, it is hard to imagine that the courts will not be asked, either in multi-party litigation or in references to rule on the process of constitutional amendment. It will always be important to know whether the amendment has been validly approved and proclaimed. It may be important to recognize that any court decision on any procedure less than the unanimous consent procedure could be undone by a subsequent amendment. Thus, following American advice, the courts might show less restraint in considering the more minor rules regarding the more flexible procedures and more restraint when approaching the unanimous consent procedure. On questions of substance, some of which we have already considered, it seems likely that Canadian courts will be impressed by the logic of Professor Tribe's arguments, leading them to consider the substantive validity of constitutional amendments only where directed to do so (perhaps in dealing with sections 44 and 45) or in the extraordinary circumstances mentioned above.

We have seen that there is no logical reason why the power of constitutional amendment in Part V need be unlimited, but we have also seen why there are strong reasons for a court showing great restraint before it finds any limitation not clearly indicated by the text or perhaps by the constitution's most well-established principles. That same judicial restraint explained in part the reluctance of the Supreme Court of Canada to define the Canadian aspects of a Westminster-based amendment procedure prior to 1982. If a Canadian court were ever to take the bold step of recognizing certain fundamental principles of the Canadian constitution which cannot be amended or which limit the substance of constitutional amendments, it would probably only do so in the highly exceptional case where principles are so uncontroversial that the court would be shielded from any criticism that it had usurped a role better-suited to the political process. The Supreme Court of Canada was prepared to take the bold step of recognizing the exceptional requirements of the rule of law in the Manitoba Reference. There is clearly much scope for a Canadian theory of constitutional law and

constitutional amendment now that the patriation process is finally and irreversibly accomplished.

CONCLUSION

The three parts of this thesis have examined in turn the Canadian attitudes towards the prospect of "patriation", the possible explanations for "patriation" once it occurred in 1982, and the likely interpretations of the new Canadian amending formula contained in Part V of the Constitution Act, 1982. In examining the new amending formula it has been noted in several instances that there have been many discussions regarding changes to the amending formula and other changes to the Constitution. In fact, these discussions are ongoing, and it may be useful to look briefly at what provoked them and what might be their likely outcome.

To a very large extent, the proposals for changes to the amending formula have involved the province of Quebec. The November 5, 1981 first ministers' agreement[1] which served as the basis for the Constitution Act, 1982 had been arrived at without the consent of the government of Quebec. The Supreme Court of Canada had decided in the Patriation Reference that there was a constitutional convention requiring the consent of a substantial number of provinces, and that, in any event, constitutional law required only that the amendment be enacted by the Westminster Parliament whose powers, as we have seen, were untrammelled. This was confirmed by the Supreme Court of Canada in the Quebec Reference.[2]

Whatever the legal state of affairs, the Quebec government felt that the new constitution, which it referred to disdainfully as the Canada Bill, lacked any legitimacy in Quebec. The government of that province announced that it would not participate in any

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[1]See First Ministers' Agreement on the Constitution, 5 November 1981, reprinted in (1984-85) 30 McGill L.J. 684-89.

[2]Re: Objection to a Resolution to Amend the Constitution [1982] 2 S.C.R. 793 (hereinafter.Quebec Reference).

constitutional conferences until its grievances had been dealt with.[3] With respect to the amending formula, the government of Quebec had two major objections. These had been initially expressed in a Resolution of the National Assembly on December 17, 1981[4] and later appeared in the policy papers of both the nationalist Parti québécois government which had been in power from 1976 to 1985 and the more federalist Liberal Party which has governed the province since 1985.[5] First, Quebec called for a veto over modifications to federal institutions and the establishment of new provinces. It has already been noted that the power to opt out of amendments could be of no use to a province where section 42 matters were concerned. Quebec sought to put this right by reasserting the power of veto which had been the cornerstone of its constitutional amendment policy until the 1981 April Accord which has been discussed above. Secondly, Quebec demanded that the right to reasonable compensation in cases where opting out was possible be extended to all matters, not merely those involving education and culture.

The Liberal Government of Pierre Elliott Trudeau had not been at all sympathetic to Quebec's demands. In its view, the nationalist Parti québécois government would not have accepted any agreement in 1981 and was, in any event, legally bound by the new Constitution, as the Supreme Court of Canada had confirmed in the Quebec Reference. Trudeau retired in 1984 and in that same year the Liberal party under its new leader, John Turner, was defeated by the Progressive Conservative Party under Brian Mulroney. Mulroney immediately showed himself to be more sympathetic to Quebec's feelings of insult and exclusion, and he undertook to negotiate a new constitutional accord which would allow Quebec to accept the new Constitution "with honour and enthusiasm".[6] The

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[3]The Constitutional Amendment Proclamation, 1983, reprinted in (1984-85) 30 McGill L.J. 741-743, came into force without any involvement by the Quebec government as it required only the approval of seven provinces representing fifty percent of the population of all the provinces, as set out in section 38 of the Constitution Act, 1982.

[4]Reprinted in (1984-85) 30 McGill L.J. 720.

[5]See Quebec, Draft Agreement on the Constitution: Proposals by the Government of Quebec (Quebec, 1985).

[6]See Letter from Prime Minister Brian Mulroney to Premier Réné Lévesque, reprinted in (1984-85) 30 McGill L.J. 750-1.

Parti québécois government was soon replaced by Robert Bourassa's Liberals, and by 1986 discussions were under way. In August of 1986 the other provincial premiers agreed at an Edmonton meeting that the next round of constitutional negotiations should be a Quebec Round, that is, motivated principally by a desire to deal, in so far as possible, with the grievances of Quebec. In the end, Quebec's requirements merged with those of other provinces, but an agreement was arrived at by April 30, 1987, and it became known as the Meech Lake Accord.[7]

The Accord was quite elaborate and need not, for our purposes, be examined in all of its detail. If we consider, first, Quebec's two demands regarding the amending formula, we can see that Quebec's wishes were satisfied by giving the same protection or compensation to all provinces. Section 9 of the proposed Constitution Amendment, 1987 would have given all provinces a veto over the matters set out in section 42. This would have been accomplished by simply adding subsections 42(a) to (f) to section 41, thereby subjecting them to the unanimous consent procedure. Section 9 of the Meech Lake amendment package would have guaranteed reasonable compensation to a province in all cases of opting out under subsection 38(3). Other amendments to Part V were merely housekeeping matters.

There is still much debate in Canada as to what combination of factors combined to defeat the Meech Lake package of amendments.[8] Some provinces objected to the parts of the package which would have formally recognized that "Quebec constitutes within Canada a distinct society".[9] Others disagreed with the decentralising elements of the agreement. Despite all the objections, the Accord came very close to being adopted. Just over one year following the initiation of the Meech Lake amendment resolution by the legislative

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[7]The Meech Lake Accord can be found in a federal document, Canada, Strengthening the Canadian Federation: The Constitution Amendment, 1987 (Ottawa, 1987) (hereinafter Meech Lake Accord).

[8]For informed views from English and French Canada see Richard Simeon "Why did the Meech Lake Accord Fail?" and P. Fournier, "L'Échec du Lac Meech : un point du vue québécois" in R.L. Watts & D.M. Brown, eds, Canada: The State of the Federation: 1990 (Kingston, 1990).

[9]See Meech Lake Accord, supra, s. 1.

assembly of Quebec, it had been ratified by the House of Commons (twice, thereby circumventing the Senate) and by eight of the ten provincial legislative assemblies representing over ninety three percent of the population of all the provinces.[10] Had the package been divided up into smaller parts, some of it could have been proclaimed under the general procedure. As we have seen, the package was negotiated, initiated and ratified as a whole. The amendments to the amending formula which were proposed were not in the end as controversial as other parts of the package, but their inclusion ensured that unanimous provincial consent was required (para 41 (e)). And, rightly or wrongly, it was assumed that the unanimous consent procedure was governed by the three-year time limit. As the last days of that three-year period elapsed and as two small provinces succeeded in blocking the way forward for the others, the amending formula came to be seen as more than just a procedure, but in fact part of the problem.[11]

As a result, following the failure of Meech in June of 1990, the federal government set up a Special Joint Committee of the Senate and the House of Commons on the Process for Amending the Constitution of Canada.[12] The Committee was asked[13]

> to consult broadly with Canadians and inquire into and report upon the process for amending the Constitution of Canada, including, where appropriate, proposals for amending one or more of the amending formulae with particular reference to:
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> (i) the role of the Canadian public in the process;
> (ii) the effectiveness of the existing process and formulae for securing constitutional amendments; and
> (iii) alternatives to the current process and formulae
> ... .

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[10]See Canada, Federal-Provincial Relations Office, Amending the Constitution of Canada: A Discussion Paper (Ottawa, 1990), p. 9

[11]That the failure of the Meech Lake package could be blamed to a large extent on the amending formula, at least from the perspective of the federal government was made clear in Amending the Constitution of Canada: A Discussion Paper, ibid.

[12] See Canada, Parliament, Special Joint Committee of the Senate and House of Commons, The Process for Amending the Constitution of Canada (Chairs: G. Beaudoin and J. Edwards) (20 June 1991) (hereinafter Beaudoin-Edwards)

[13]See Orders of Reference, Beaudoin-Edwards, ibid., p. vii.

The first reference point was an acknowledgement that the public had perhaps not had an adequate opportunity to respond to the Meech Lake Accord. In its final report, the Beaudoin-Edwards Committee noted that many expert witnesses had expressed the view that the amending formula itself was not really to blame but that the political process surrounding the formal legal rules of the formula had been inadequate.[14] Accordingly, the Beaudoin-Edwards Committee recommended,[15] for example, that Parliament amend its procedural rules

> to make mandatory the holding of public hearings on any proposed constitutional amendment initiated by the Government of Canada, or to which the Government of Canada has given agreement in principle, such hearings to be held early enough to allow for changes to the proposal.

It recommended that the provincial legislatures do likewise.[16] This was in direct response to the Meech process whereby a deal which had been negotiated in private by first ministers and their advisers was then presented to the Canadian public as a fait accompli. Only Quebec had held public hearings before the private agreement took on its legal form. There is no doubt that in the future no important Canadian constitutional amendment will be attempted without a reasonable opportunity for individuals and groups to make their views known. Already, in the most recent attempt to arrive at a new constitutional compromise to replace Meech, the federal and provincial governments went to at great pains to make way for public input.[17]

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[14] Ibid., p. 14.

[15] Beaudoin-Edwards, supra, p. 55.

[16] Ibid.

[17] For example, following the demise of Meech, the federal government has set up the Joint Committee on the Amending Formula, the Citizen's Forum on Canada's Future and the Joint Committee on a Renewed Canada which toured the country and heard what the members of the Canadian public had to say on the amending formula, their vision for the future and the full range of possible constitutional changes. See Beaudoin-Edwards, supra; Canada, Citizens' Forum on Canada's Future, Report to the People and Government of Canada (Chair: Keith Spicer) (27 June 1991); and Canada, Parliament, Report of the Special Joint Committee on the Constitution of Canada (Chairs: G. Beaudoin and D. Dobbie) (28 February 1992) (hereinafter Special Joint Committee).

The second point of reference gave the Beaudoin-Edwards Committee the opportunity to hear testimony and come to some conclusions on the existing amending formulae which had allegedly been an important factor in the failure of Meech. The Beaudoin-Edwards Committee noted that the central tension in the search for an appropriate amending formula was the need to grant special protection for Quebec and the unwillingness to abandon a doctrine of provincial equality.[18] It was this tension which had been resolved in the Meech Accord by giving all provinces vetoes, but that in turn had produced what many saw as excessive rigidity in the constitutional amendment procedure. The Committee proposed that an earlier proposed formula of regional vetoes be revived. It would have replaced the general procedure found in sections 38 and 42 and the unanimous procedure in section 41 with a regional formula, according to which a constitutional amendment would require the approval of the Senate and House of Commons and each of four regions, one of those regions being Quebec. It was recommended that the unanimous consent procedure be retained respecting the use of the English and the French language, the proprietary rights of the provinces, the offices of the Queen, Governor General and Lieutenant Governor and any changes to those matters.[19]

The Beaudoin-Edwards Committee dealt with some familiar proposals for changes to the amending formula and added some new ideas to the list. It came to no conclusion regarding reasonable compensation under section 40 but recommended instead that further study be made,[20] especially regarding the possibility of constitutionally sanctioned delegation of legislative powers.[21] It discussed the advantages and disadvantages of short and long time limits for constitutional amendments and concluded that the time limit should

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[18]Beaudoin-Edwards, supra, p. 19.

[19]This would seem to have left the unanimous procedure vulnerable to indirect amendment using the easier four-region procedure seeing as amendments to the amending formula would have apparently been governed by the easier procedure.

[20]Beaudoin-Edwards, supra, p. 69,

[21]Ibid., p. 29. The possibility of delegating legislative powers had been noted in the April Accord. This idea was abandoned in the November 1981 First Ministers' Agreement. See (1984-85) 30 McGill L.J. 659 and 684.

be reduced from three to two years and that it should apply to all amendment procedures.[22] New ideas included a proposal that any amendment to the Constitution of Canada affecting the aboriginal peoples should require their consent and a proposal that the extension of existing provinces into the territories as well as the creation of new provinces require only the consent of the Parliament of Canada and the legislature of any territory or province affected. The first of these new ideas would have been a completely new addition to Part V while the second would have necessitated an amendment to subsections 42(1)(e) and (f).

The third and final point of reference for the Beaudoin-Edwards Committee concerned alternatives to the then-current processes and formulae. The federal government was aware at the time it set up the Beaudoin-Edwards Committee that the failure of Meech had produced a constitutional crisis which might necessitate extraordinary solutions. Not only had the Canadian public expressed in numerous ways a desire to become more involved in the process, but Quebec had announced that it would no longer participate in constitutional discussions until the rest of Canada produced a proposal that was at least as good as Meech;[23] and the rest of the Canadian provinces had made clear that Quebec's round was over and that Canada's round (meaning a full slate of new provincial demands) had now begun. Clearly, new and greater strains were being placed on the process of constitutional amendment. By way of attempted response, the Committee examined the possibility of using referenda and constituent assemblies. In the end, the Beaudoin-Edwards Committee stopped short of recommending that either be formally included in the amendment procedure. It proposed instead "that a federal law be enacted which would enable the federal government, at its discretion, to hold a consultative referendum on a constitutional proposal" either to confirm the existence of a national consensus or to facilitate the adoption of the required amending resolutions.[24] In either case the referendum was to require a national majority as well as a majority in each of the four

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[22] Ibid., pp. 30-31.

[23] Quebec was not to return to the constitutional discussions until August, 1992, as discussed below.

[24] Ibid., p. 42.

regions. It stopped short of recommending a full-blown constituent assembly made up of specially selected representatives of all sectors of Canadian society. Instead, it opted for a parliamentary solution, proposing the creation of yet another Joint Committee which would consider new federal proposals for large-scale constitutional reform.[25]

A new set of federal proposals appeared in September 1991 in a document entitled Shaping Canada's Future Together.[26] It confirmed that the constitutional agenda now extended well beyond the demands of Quebec, embracing not only entrenchment of the Supreme Court of Canada but also reform of the Senate, aboriginal self-government, legislative and administrative delegation, and more. The proposals were surprisingly vague regarding amendments to the amending formula, although oddly firm in rejecting the Beaudoin-Edwards Committee's regional veto proposal only three months after it had been recommended.[27] Federal authorities were clearly of the view that it was a political non-starter as far as other provinces were concerned. The proposals expressed the federal government's general preference for a slightly modified version of the Meech Lake Accord amending formula. Clearly, any hard work regarding changes to the amending formula was being left to the Special Joint Committee on a Renewed Canada which had already been established in response to the Beaudoin-Edwards Committee recommendations.

The Special Joint Committee had been set up in June 1991, immediately upon the publication of the Beaudoin-Edwards Committee's report, referred to above. The federal proposals were made public on September 24, 1991 and on the next day, September 25, 1991, the Special Joint Committee held its first public meeting. It was to hold seventy eight meetings totalling 227 hours of hearings. It heard from over 700 individuals and received nearly 3 000 submissions before submitting its report in February 1992.[28]

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[25] Ibid., p. 50.

[26] Canada, Parliament, Shaping Our Future Together: Proposals (Ottawa, 1991).

[27] Ibid., p. 23.

[28] Special Joint Committee, supra, p. 3.

The report was wide-ranging, consistently with the newly-expanded constitutional agenda. Again, we will focus on the amending formula, keeping in mind that the prospects for changes to the amending formula were now tied to the progress of a wide array of other constitutional proposals.

The Special Joint Committee dealt with the same, expanded list of amending formula issues that had emerged with Meech and its fall-out, but various changes of emphasis could be sensed. Certain important new proposals now appeared uncontroversial. For example, the Special Joint Committee confirmed that it was desirable to give to aboriginal peoples a veto over any amendment to the Constitution affecting their rights.[29] The Committee also included the idea of reasonable compensation in relation to any matter in all of its various proposals.[30] In earlier proposals this idea had seemed more controversial and uncertain. The idea of tinkering with the time limit so as to reduce it from three to two years and make clear that it applied to all amendment procedures was not mentioned by the Special Joint Committee. Presumably more important matters were to be dealt with first. The Special Joint Committee placed special emphasis on the familiar issue of the place of Quebec in the amending formula, and it also devoted more space than might have been expected to the issue of the effect of new provinces on the amending formula.

On the first key issue -- the place of Quebec in the amending formula -- the Special Joint Committee made it very clear that in its view resolution of this issue was essential "if we are to emerge from the current constitutional crisis".[31] It has already been noted that full compensation in cases of opting out was firmly recommended by the Committee. We have seen that opting out is useful to Quebec and other provinces in the event of amendments transferring legislative powers, but it is of no use when amendments to federal

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[29] Ibid., p. 32.
[30] Ibid., pp. 93-4.
[31] Ibid., p. 92.

institutions are intended. Accordingly, the Committee proposed five approaches to amending the amending formula which might solve this problem:[32]

> 1) One option is the unanimity procedure set out in section 41 of the Constitution Act, 1982. It could be expanded to include all the items set out in section 42 which are now subject to the general procedure (with the exception of the establishment of new provinces and the extension of existing provinces which we discuss in detail below. This would mean that the agreement of all provinces would be needed to make changes to representation in the House of Commons. the powers and method of selection of the Senate, the minimum number of members of a province in the Senate and the Supreme Court of Canada.
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> ... .
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> 2) A second option would be to require the consent of two Atlantic provinces, Ontario, Quebec, and two western provinces representing 50 per cent of the population of that region for any amendment to the principle of representation in the House of Commons, the powers and composition of the Senate and the Supreme Court of Canada ... . This recommendation is similar to other "regional veto" proposals ... .
>
> 3) A third option would be to amend section 42 to require that, with the exception of the creation of new provinces or the extension of existing provinces into the territories, Quebec must be among the provinces consenting to any future amendment relating to the matters listed in that section (House of Commons, Senate, Supreme Court of Canada) ... .
>
> 4) A fourth option would be to leave the general procedure for amending the Constitution as it is, but upon the request of any province or combination of provinces representing the regions of Canada, a referendum would be required for an amendment under that section to enter into force. Implicit in this suggestion is that Quebec constitutes one of the regions of Canada.
>
> 5) A fifth option would be to amend the general procedure for amendment, to require that Quebec be among the two-thirds of the provinces for all amendments under that procedure ... .

Each of these proposals would indeed have provided a veto for Quebec over changes to the federal institutions, although in doing so each provided a different degree of scope and flexibility. The fourth option was clearly the most radical in that it gave a potential veto not to the legislative assembly of Quebec or any other province or region but to the people of that province or region by way of a referendum. And only the first option could be said to respect the idea of the constitutional equality of the provinces, an idea which some

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[32] Ibid., pp. 93-4.

provinces had come to insist upon with the same fervour that Quebec demanded its veto. It was not surprising then to see that the proposed accord of July 1992 which was negotiated by the federal government and all provinces except Quebec included a proposal to change the amending formula along the lines described in option one of the Special Joint Committee report.[33]

On the issue of the effect of new provinces on the amending formula, the Special Joint Committee continued the trend of making the creation and extension of provinces much easier as far as constitutional amendment was concerned. Not only had the Yukon and Northwest Territories challenged the Meech Lake concept of unanimous consent for new and extended provinces, as we saw in the Penikett and Sibbeston litigation,[3] [4] but they had also continued to lobby the federal government even after the failure of their court challenges and, more importantly, after the failure of Meech. The Special Joint Committee acknowledged the concerns of the territories and recommended that under no circumstances should amendments regarding the creation and extension of provinces be governed by a more rigid procedure than that found in section 42. The Committee also acknowledged the concerns of existing provinces regarding the dilution of their powers under the general procedure in the event of the creation of new provinces. It noted that Premier Penikett of the Yukon had stated that his government would be happy to consider the possibility of acquiring the status of a province without at the same time acquiring the right to be considered a province for the purposes of the amending formula.[35] The July 1992 first ministers' agreement actually went further than either the Special Joint Committee or Premier Penikett had been contemplating just half a year earlier. The July proposed constitutional package would have replaced the section 42 rules on creation of new provinces with the pre-1982 provisions allowing the creation of new provinces through a

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[33]See the "Summary of proposed constitutional package" in The Globe and Mail, Saturday, July 11, 1992, p. A6 (hereinafter July 1992 package).

[34]See Penikett v. R. [1987] 5 W.W.R. 691 (Y.T.S.C.); [1988] 2 W.W.R. 481 (C.A.); and Sibbeston v. R. [1988] 2 W.W.R. 501 (N.W.T.C.A.).

[35]Special Joint Committee, supra, p. 95.

mere act of Parliament following appropriate consultation. Presumably subsection 42(1)(e) regarding the extension of provinces into the territories would remain unchanged. As to the effect of the admission of new provinces on the general procedure, the July 1992 package would provide that upon the admission of such provinces. the general procedure would be altered from a two-thirds/fifty per cent formula to a three-quarters/fifty percent formula.

The July 1992 package was agreed to by the federal government, aboriginal leaders and all provinces except Quebec (which awaited an appropriate offer from the rest of Canada). Whereas the Meech Lake Accord would have made a number of changes that were principally designed to satisfy Quebec's demands, the July 1992 package had a much grander design. It included provisions regarding social and economic union, regional development, a reformed Senate, a constitutionally entrenched Supreme Court of Canada, a re-allocation of federal and provincial powers and aboriginal self-government. The size of the package reflected the attempt to satisfy or at least appease all major constitutional actors in Canada. This of course raised the constitutional stakes, and this even before Quebec had expressed a firm intention to negotiate on the basis of this package.

It has already been noted that the July 1992 package proposed that amendments to the amending formula to ensure that any changes to the Senate or Supreme Court of Canada that had been governed by the general procedure should henceforth be governed by the unanimous consent procedure. It appeared also, as noted above, that the extension of provinces into the territories was to continue to be governed by the general procedure but that the creation of new provinces was to be subject only to enactment by the federal Parliament, with the consequent change to the general procedure described above. Not surprisingly, the July 1992 package suggested that reasonable compensation should be available in all instances of opting out. The package picked up as well on the more recent suggestions that there should be aboriginal consent to future constitutional amendments that directly affect aboriginal peoples, although a mechanism by which that consent might be

expressed had not yet been devised. This package then awaited reaction from Quebec and from a disaffected Canadian public.

Even if the Canadian public remained unenthusiastic, reaction from the government of Quebec was sufficiently positive to organize a series of meetings in August 1992 with the parties to the July 1992 package (federal, aboriginal and nine-province provincial representatives) and a Quebec delegation. Those meetings culminated on August 28, 1992 with unanimous agreement on what came to be known as the Charlottetown Accord.[36]

Amidst much fanfare, Prime Minister Brian Mulroney announced to Parliament, on September 8, 1992, that in accordance with the post-Meech Lake pledge to consult the people over constitutional change, there would be a plebiscite (hence, non-binding), to be held on October 26, 1992, in which Canadians would be asked to endorse the Charlottetown Accord.[37] In the event of a positive response to the plebiscite, the formal, legal ratification process would begin, facilitated, politically-speaking, by a nation-wide popular mandate.

The Charlottetown Accord was as far-reaching as any constitutional proposal since 1980-82. It went beyond the Meech Lake Accord in order to ensure support from all quarters.[38] It retained the so-called "distinct society clause" from the Meech Lake Accord, recognizing Quebec's special nature and mission, but added a "Canada clause" in order to reflect other important national values. It called for an equal and elected Senate with powers to ratify key federal appointments. It "constitutionalised" the Supreme Court of Canada, just as the Meech Lake Accord would have done, and provided that judges be

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[36]See Canada, Consensus Report on the Constitution, Final Text (28 August 1992) (hereinafter Charlottetown Accord). This agreement was eventually put into legal form in Canada, Consensus Report on the Constitution, Draft Legal Text (9 October 1992) (hereinafter October 1992 Draft Legal Text).

[37]See Canada, Office of the Prime Minister, Notes for an Address by Prime Minister Brian Mulroney (8 September 1992). The plebiscite question was to be: "Do you agree that the constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?".

[38]See Canada, Parliament, Government of Canada, Our Future Together (Ottawa, 1992).

chosen from lists provided by provincial authorities. The Senate and Supreme Court of Canada proposals responded to long-standing Western-province demands. The Accord also proposed that the inherent right of aboriginal people to self-government be set out in the Constitution. This would have given aboriginal governments their own areas of jurisdiction, to be negotiated through provincial agreements over a period of years. The provinces were also to acquire new areas of jurisdiction, together with new limits on the power of the federal government to spend in areas of provincial jurisdiction. Other provisions sought to encourage social and economic union, nation-wide, in areas such as health care, higher education, social services and benefits, the environment and movement of goods, services, people and capital. Despite the recognition and rejuvenation of national projects and national institutions, there was a widely-held perception that the Charlottetown Accord weakened the national government by giving too much power to the provinces and, especially, to Quebec.[39]

Our principal concern in this thesis is of course the amending formula. The proposed changes to Part V recommended in the Charlottetown Accord resembled closely the July 1992 package discussed above. The Accord, and particularly the October 1992 Draft Legal Text provided a much higher degree of precision. All amendments to the Constitution of Canada in relation to the Senate (with the exception of the current Senate reform proposals) were to require unanimous consent. This was accomplished by moving subsections 42(b) and (c) with minor alterations to section 41.[40] Regarding the Supreme Court of Canada, all matters except "the method of selecting judges in the Supreme Court of Canada" were to be dealt with under the unanimous consent procedure of section 41.[41] Accordingly, only the nomination and appointment process was to be dealt with under the general procedure.[42] These changes to the amending formula reflected a preference, evident since the Meech Lake Accord and, later, the Special Joint Committee, for satisfying

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[39]See Maclean's [Magazine], 2 November 1992. p. 16.

[40]October 1992 Draft Legal Text, supra, s. 32.

[41]Ibid.

[42]Ibid.

Quebec's demands for a veto over amendments to central institutions by granting that same veto to all provinces.

Regarding the creation of new provinces, the provisions set out in the October 1992 Draft Legal Text once again provided more detail to the proposals of the July 1992 package. It would have repealed subsections 42 (e) and (f) and replaced them with the rules contained in the Constitution Act, 1871.[43] Accordingly, the federal Parliament acting alone was to be empowered to create new provinces, but such new provinces would not have had any role in the general and unanimous consent procedures (sections 38(1), 41 and 42) without the unanimous consent of all the provinces and of the federal government.[44] Furthermore, the provisions of the Constitution Act, 1871 were to be modified so as to require the consent of the Yukon and/or Northwest Territories in the event of any extension of provincial boundaries into the territories.[45] These rules corresponded closely to the proposals of Premier Penikett discussed above, and represented clear successes for the territorial governments' political efforts.

Consistently with the recent trend of accepting the idea of full compensation in the event of any province opting out of an amendment affecting provincial legislative powers, the Charlottetown Accord and the October 1992 Draft Legal Text proposed an amendment to section 40 to carry this out.[46]

Finally, regarding the amending formula, the new constitutional agreement provided that the consent of aboriginal peoples be required regarding any future constitutional amendments affecting them. A new section 45.1 would have also permitted aboriginal peoples to initiate any amendment to the Constitution of Canada directly referring

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[43] 34-35 Vict., c. 28 (U.K.).

[44] October 1992 Draft Legal Text, supra, s. 32.

[45] Ibid., s. 21.

[46] Charlottetown Accord, supra, p. 40 and October 1992 Draft Legal Text, ibid.

to them or amending a provision directly referring to them.[47] The increased involvement of aboriginal peoples in the law and politics of the constitution will necessitate a re-thinking of our legal and political theory regardless of the failure of the 1992 constitutional process.[48]

In the end, the Charlottetown Accord and the detailed October 1992 Draft Legal Text came to nothing. The people of Canada voted overwhelmingly against the constitutional proposals in the October 26, 1992. Only forty-four percent of Canadians supported the Accord, and, by region, only three provinces and one territory voted in favour.[49] The Accord had failed to obtain the support of the Canadian people despite what Prime Minister Mulroney had referred to as "the most far-ranging and thorough process of consultation and discussion ever held by a Canadian Government and, perhaps, by any government in a modern industrialized State".[50]

It is difficult to predict what will happen in the coming months and years regarding the amendment of the Canadian constitution. The proposed alterations to the amending formula which were first proposed in the Meech Lake Accord have been supplemented and refined to such an extent that they could be adopted at any time, or, more likely, as soon as a new consensus can be reached on other matters. However, such changes to the amending formula may soon be viewed as idle tinkering in comparison with more weighty and complex issues which may emerge.

The Charlottetown Accord was seen by many, both inside and outside Quebec, as a last chance for Canada. There is now a very real chance that Quebec will opt for full or

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[47] October 1992 Draft Legal Text, ibid., s. 33.

[48] See B. Slattery, "First Nations and the Constitution: A Question of Constitutional Trust" (1992) 71 Can. Bar Rev. 261.

[49] Maclean's [Magazine], supra, p. 18 and p. 13.

[50] See Notes for an Address by Prime Minister Brian Mulroney (8 September 1992), supra, p. 1.

partial separation, whether by legal or non-legal means.[51] Non-legal separation could result in constitutional paralysis for the rest of Canada, at least for amendments requiring the consent of all provinces. Both of these scenarios -- separation and paralysis -- may eventually require legal resolution. Courts in Quebec may be asked whether a Constitution for a self-declared separate and sovereign Quebec could justify its own legality,[52] with or without recourse to the "popular sovereignty" of the people of Quebec. The Supreme Court of Canada might be asked whether constitutional paralysis could be avoided in Canada either by adapting the former rule of unanimity to deal with the "emergency" of Quebec's separation or non-participation,[53] or even by having recourse, with appropriate request and consent, to the Westminster Parliament. Possible approaches to some of these issues have already been suggested, but there are many other aspects of these and other problems that require further thought. Clearly, the answers to these and other questions must be worked out within the structure of Canadian constitutional theory, influenced as that theory is by constitutional texts as well as such considerations as independence, legitimacy, democracy, representation and other local factors. In a recent article, Professor Brian Slattery has stressed that we must now[54]

> think in fundamental ways about the Constitution and the principles that animate and sustain it. Unhappily, our traditional stock of constitutional ideas is of little help here. Unlike the United Kingdom and the United States, we have no widely-held doctrines that account for the origins and nature of the Constitution and explain its claims on our loyalty. So far as we have a theory at all, it is one grounded in imperial constitutional law, which by invoking the ghost of Empire Past raises more problems than it solves. But if our Constitution is no longer the creature of British constitutional rule, what has it become?

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[51] See Quebec, National Assembly, Committee to Examine Matters Relating to the Accession of Quebec to Sovereignty, Draft Report, 16 September 1992.

[52] See, e.g., J. Raz, The Concept of a Legal System: An Introduction to the Theory of Legal System, 2nd ed. (Oxford, 1980), p. 139.

[53] See Reference re Manitoba Language Rights [1985] 1 S.C.R. 721.

[54] Slattery, supra, p. 264.

This thesis has attempted to explain through the development of an independent Canadian constitutional theory how the imperial link was broken by the final amendment of the Constitution of Canada enacted by the Westminster Parliament. That final amendment produced a new procedure for constitutional amendment which appears to exclude any recourse to the earlier imperial mechanism. The new amending formula and the Canadian constitution as a whole are grounded in Canadian constitutional theory, but it remains to elaborate how that is so, while at the same time observing, analysing and at times willing along the day-to-day development of our fundamental constitutional text.

This thesis began with a discussion of Canadian attitudes toward the prospect of the so-called patriation of the Canadian constitution. Two dominant understandings were identified in Part I: the Patriation theory and the Independence theory. The first, best represented by the majority of the Supreme Court of Canada in the Patriation Reference, accepted that constitutional amendment prior to the 1982 patriation process was ultimately governed by the United Kingdom Parliament whose powers were absolute and untrammelled. Accordingly, enactments for Canada by that Parliament could not be judicially reviewed, even by Canada's highest court, apparently regardless of Canadian request and consent and certainly, as in the Patriation Reference, regardless of the level of provincial consent. Adherents to the Independence theory, far fewer in number until after 1982, acknowledged the importance not only of the internationally-recognized independence of Canada at least since 1926-31, but also the independence of their constitutional understandings at least since 1949 when the Supreme Court of Canada took over from the Judicial Committee of the Privy Council as the last court of appeal for Canadian matters. Whatever the merits of the Independence theory prior to 1982, the Patriation theory was dominant. For all intents and purposes, the highest norms of the Canadian legal system were assumed to be governed by the notion of a sovereign United Kingdom Parliament. This naturally explained the inevitable recourse to Westminster to patriate the Constitution (as opposed to recourse to the Canadian people, for example), but

it did not after all explain the generally accepted view that after passage of the Canada Act 1982, the ability of the sovereign Parliament at Westminster to legislate for Canada was finally and definitively terminated.

Part II discussed the perplexing idea of sovereignty as it has been developed in British (and accordingly, pre-1982 Canadian) constitutional theory. Both a traditional Diceyan view and a less absolutist "new view" were identified, and it was concluded that as a matter of British law and theory, the idea of sovereignty is unresolved, though tending toward what is known as "continuing sovereignty". It was assumed nonetheless that if ever the United Kingdom Parliament attempted to legislate for Canada post-1982, the Canadian courts would ignore such legislation. Assuming that this must be the right answer, an attempt was made to imagine how the Supreme Court of Canada might explain why it must ignore post-1982 legislation from Westminster, especially in the light of the heavy emphasis in the 1981 Patriation Reference on the absolute and untrammelled powers of that sovereign legislature. It was argued that the Supreme Court of Canada would most likely do so by returning to some of the basic principles of the Independence theory, that is by separating Canadian and British understandings of the sovereignty of that same Westminster Parliament. In Canadian terms the Westminster Parliament was a piece of amendment "machinery" which had been kept by default in 1867 and consciously chosen in 1931. Whereas in 1931 or thereabouts it had been assumed that that "amending formula" could not replace itself because of the notion of the continuing sovereignty of the Westminster Parliament, by 1949 and certainly by 1981-82, it was generally assumed, by Canadians at least, that it could provide for its own replacement in the form of what was to become Part V of the Constitution Act, 1982. Furthermore, the choice of this self-embracing interpretation could be supported by reference to highly relevant Canadian social and political factors such as independence (political and judicial), federalism and legitimacy.

In Part III, the post 1982 amending formulae were examined with a view toward their future application. Substantive validity of amendments was considered together with procedural requirements, and this Part concluded with a consideration of the possible limits on constitutional amendment, whether judicial, Charter-based or inherent.

The thesis began with a brief overview of the history of the Canadian amendment process and ended with a summing up of recent failed attempts to alter in important ways both the Constitution and its new amending formula.

It has been seen in this thesis that although politicians had to worry about the Constitution being, in one key sense, "brought home", legal theorists needed to think of it as a Canadian constitution governed already, even regarding its Westminster element, by a distinct Canadian constitutional theory. As we have seen, the continued influence of a sovereign Westminster Parliament, itself governed by a well-developed (if ultimately unresolved) British constitutional theory, inhibited the growth of an independent Canadian theory. Now that the Constitution has clearly been patriated, accomplished as we have seen, by the "self-embracing" and, for all practical purposes, irreversible process of 1982, Canadians have no reason not to develop a vibrant theory of the Canadian constitution, based in part on principles common to other legal systems, such as the rule of law, but also on Canadian social and political factors. This process has begun in a most impressive way with respect to the Canadian Charter of Rights and Freedoms, under the able guidance of a revitalised Supreme Court of Canada. But the "patriation" process brought home more than just a Charter; it also established a domestic procedure for the amendment of the Constitution of Canada, that is Part V of the Constitution Act, 1982. There is much scope for further study of both the patriation and the amendment of the Constitution of Canada.

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