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THE MEECH LAKE ACCORD UPDATE

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THE MEECH LAKE ACCORD UPDATE

INTRODUCTION

In the months prior to 23 June 1990, constitutional debate centred on the 1987 Constitutional Accord (Meech Lake) has intensified. An important element in the discussions has been the positions expressed in the following documents:

* the reports of the Manitoba Task Force and the New Brunswick Select Committee on the 1987 Constitutional Accord;(1)

* proposed solutions to the evolving dilemma from the Premiers of Newfoundland (6 November 1989) and British Columbia (23 January 1990);

* motions for resolutions which would affect Meech Lake in the legislatures of New Brunswick (introduced 21 March 1990), Newfoundland (introduced 22 March 1990, passed 6 April 1990), and Quebec (passed 5 April 1990);

* the report of the Special Committee of the House of Commons to Study the Meech Lake Accord (released 17 May 1990).

Only the New Brunswick "companion resolution," the Newfoundland proposals and the Report of the Special Committee (the Charest Report) are discussed in detail in this paper. A consolidated text of the Meech Lake Accord and the New Brunswick resolution can be found in Appendix 1, but only clause 1 of the Accord is included in the body of the paper. The recommendations of the Manitoba Task Force are included in toto in Appendix 2.

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(1) An earlier version of this paper, The Meech Lake Accord: the Manitoba and New Brunswick Reports, included only the sections on the Manitoba and New Brunswick reports.

Newfoundland's proposals of November 1989 address Quebec's five original conditions for supporting the Constitution Act, 1982, which formed the basis for negotiations leading to the Accord. The proposals were presented to the First Ministers' Conference on 9-10 November 1989, at which time the Government of Newfoundland agreed to refrain from immediately seeking to rescind the province's approval of the Meech Lake Accord in order to facilitate further discussions on constitutional reform.

On 22 March 1990, the Premier of Newfoundland and Labrador gave formal notice of a resolution to rescind the province's earlier approval of Meech Lake, given on 7 July 1988, as provided for in section 46(2) of the Constitution Act, 1982. No discussions had taken place between the federal government and Newfoundland about the latter's position since early December 1989 and the Government of Newfoundland and Labrador concluded that "the step to rescind must now be taken to indicate firmly and unequivocally that Newfoundland's concerns with the Accord must be addressed." At the same time, the Premier tabled a revised constitutional accord, which he said was genuinely responsive to Quebec's legitimate concerns set out in the five original proposals, but which was also faithful to federalism.

Newfoundland's resolution to rescind approval, which was passed on 6 April 1990, did provide for authorization of the Meech Lake Accord if it were to be approved by a majority of the electors of Newfoundland and Labrador in a referendum, or by a majority of the electors of Canada in a national referendum, notwithstanding the results of a previous province-wide referendum.

On 19 January 1990, Premier Vander Zalm of British Columbia wrote the Prime Minister proposing a five point plan aimed at breaking the constitutional logjam. The first step would be to proclaim into force by 23 June 1990 those parts of the Meech Lake Accord which do not require the unanimous consent of all provinces. Over the next three years new resolutions would deal with a "Canada clause" to alleviate concerns about the distinct society clause; Senate reform; the implementation of the remaining provisions of the Meech Lake Accord; and other outstanding constitutional issues. Recent developments, including a letter from the

Premier to the Prime Minister in mid-April 1990, suggest that the Premier considers implementation of the plan, and particularly the first step proclaiming parts of the Meech Lake Accord, to be conditional on all other provinces approving the approach as a whole.

On 21 March 1990, Premier McKenna of New Brunswick tabled two resolutions: the resolution for the adoption of the Meech Lake Accord and a "companion resolution" for the adoption of additional constitutional provisions. In his speech to the Legislative Assembly, the Premier stated that the companion resolution was only a basis for the successful resolution of the current impasse, and not a "seamless web." He emphasized that the Assembly would not be asked to vote on either resolution "until there has been an opportunity to gauge the degree of support which our companion resolution may attract."

On 27 March 1990, the New Brunswick companion resolution was referred to a Special Committee of the House of Commons which was instructed to report to the House by 18 May 1990.

On 5 April 1990, the National Assembly of Quebec passed a resolution to reject all proposals that would amend or modify the Meech Lake Accord before ratification. Premier McKenna, testifying before the House of Commons Special Committee on 9 April 1990, interpreted this as meaning that Quebec would not tolerate a reopening of the Meech Lake Accord. However, he saw the companion resolution as in no way "deteriorating, subtracting from or threatening the Accord."

In his testimony before the Special Committee, Premier McKenna was asked what degree of support would be required for New Brunswick to pass the Meech Lake resolution. He replied as follows:

> We in New Brunswick will be the judge of what represents that commitment. ... At the present time, everybody in this country is saying that unless you do this, I will do this. ... We think it is time that somebody took a different approach completely. ... It will take a substantial commitment, I can say that much, but I do not want to go farther than that.

The New Brunswick "companion resolution" closely follows the recommendations of the New Brunswick's Select Committee. Premier McKenna

told the Special Committee: "[The New Brunswick committee's] report has guided our position on the accord since its publication in October 1989."

The Special Committee set itself an intensive and demanding schedule: between 9 April and 4 May, it heard some 160 witnesses in three provinces, the two territories and the National Capital Region. In its report, released 17 May 1990, the Committee made 23 recommendations, covering a broad range of concerns. At the end of the section on the "Committee's Mandate," the Committee noted that it had tried to address the problems to the best of its ability:

> Having done so we acknowledge that, in practical terms, the solution to the present impasse is in the hands of others and we respectfully submit the following report for consideration.

The Committee's report highlights the historical context of the Meech Lake Accord, accepting that the Accord is part of the "Quebec Round" of ongoing constitutional negotiations, as agreed by the Premiers at their 1986 Conference in Calgary.

The Committee noted that the issues under debate go back to the very creation of Canada: "The debate between supporters of greater provincial autonomy and those who believe in a more centralized federation has also been going on since 1867." It noted both that:

> Quebec did not agree with [the process leading to the 1982 constitutional changes] and maintained that substantial changes to the Canadian Constitution had been made without its consent; and
>
> This position has no legal effect, since the Constitution was patriated legally and the Constitution Act, 1982 applies to Quebec despite its disagreement. But the political consequences are very real.

After the 1985 elections, Quebec's five conditions for supporting the 1982 constitutional changes were: explicit recognition of Quebec as a distinct society; a guarantee of increased powers in matters of immigration; limitation of the federal spending power; recognition of a right of veto; and Quebec participation in appointing judges to the Supreme Court of Canada.

The Committee commented:

> During the course of our hearing witness after witness, even those most critical of the Meech Lake Accord expressed support for Canadian unity and the need to make Canada's second most populous province an active participant in federal-provincial negotiations and a participating member of the Canadian constitutional family. There was general agreement that Quebec's five proposals were reasonable for that purpose.

THE PROCESS OF CONSTITUTIONAL REFORM

A. Manitoba

The Manitoba report on the Meech Lake Accord stated that "one of the most remarkable features of the presentations [made to the Task Force] was the substantial number which criticized the process of constitutional reform.... Many condemned it as secretive, elitist, exclusive, hasty, unrepresentative, and undemocratic" (p. 69). The Task Force concluded that the process used had undercut the legitimacy of the Accord, and recommended that future public hearings be held at all levels after the First Ministers develop a proposal for change, and before they sign it. It also recommended that the federal government hold hearings in any province where the provincial government does not do so.

B. New Brunswick

The New Brunswick Committee on the Meech Lake Accord considered the process which had produced that Accord to be one of four main issues.(2) Most people appearing before the Committee realized that the process leading to Meech Lake was a fait accompli, but were concerned that the executive approach to constitution building would become

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(2) "These included the process which produced the Accord; the relationship between the Accord's section 2 (containing the **distinct society** clause) and the Charter of Rights and Freedoms; the amending formula and the future of shared-cost programs if the Accord is approved in its present form" (p. 21).

entrenched. While accepting the importance of First Ministers' Conferences, the Committee regretted the lack of debate or public scrutiny and felt that the refusal to allow amendments to the Accord was a significant departure from basic parliamentary tradition.

The New Brunswick report recommended that the Legislative Assembly establish a Standing Committee on Constitutional Matters to consult and advise both before and after First Ministers' Constitutional Conferences, and that the Province of New Brunswick urge the Parliament of Canada and other provincial legislatures to establish similar committees.

The New Brunswick "companion resolution" would provide that no legislature in Canada could adopt a resolution approving a constitutional amendment before it had held public hearings on the matter (section 46.1). Premier McKenna, in his testimony before the Special Committee of the House of Commons on 9 April 1990, indicated the priority New Brunswick placed on improving the process: "I think the most important contribution we have made to the debate is to ensure that a process will be entrenched which will always require public process."

C. Newfoundland

Newfoundland's formal documentation has been structured around the existing provisions of Meech Lake and Quebec's original five proposals, rather than around the process involved. The 22 March 1990 News Release accompanying the notice of the resolution to rescind approval for Meech Lake, however, emphasized that the Premier felt strongly about opening up the constitutional process to allow for public debate:

> Constitutional change is not simply a matter for the prime ministers and premiers; it must meet with an acceptable level of approval of people in all parts of the country. The Premier believes that the worst flaw in the Meech Lake Accord is the process that resulted in the eleven first ministers telling 26 million people of Canada how they will be governed in the future, instead of the 26 million people of Canada telling the eleven first ministers how they will govern.

D. The Report of the Special Committee

The Committee Report agrees that "the Canadian people want a say in the development of their Constitution." It recommends that public hearings by Parliament and legislative assemblies be a part of future constitutional development (Recommendation #13).

THE DISTINCT SOCIETY CLAUSE

Clause 1 of the Meech Lake Accord, which follows, would create a new section 2 for the Constitution Act, 1867. There is no section 2 at present as the original section was repealed in 1893.

> 1. The Constitution Act, 1867 is amended by adding thereto, immediately after section 1 thereof, the following section:
>
> "2. (1) The Constitution of Canada shall be interpreted in a manner consistent with
>
> (a) the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and
>
> (b) the recognition that Quebec constitutes within Canada a distinct society.
>
> (2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed.
>
> (3) The role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed.
>
> (4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language."

A. Manitoba

The Manitoba report found that this clause "generated the most controversy and debate during the public hearings" (p. 12). The overwhelming majority of submissions were opposed to the clause in its present form, most often because they were concerned that it would divide Canada into two linguistic components and create two classes of Canadians by giving Quebec special status. Presenters were also worried about entrenching "such vague and undefined terms."

The Task Force felt that the Constitution is a symbol of our nationality and identity, and that an interpretive principle should not be limited to linguistic duality and the distinctness of Quebec. It recommended that the proposed section 2 should first confirm the distinctness of a Canadian national identity. It should then recognize the aboriginal peoples, the linguistic duality of Canada, the existence of Quebec as a distinct society within Canada, and the existence of Canada's multicultural heritage. It was suggested this clause be known as "the Canada clause." The report stated:

> The Task Force recommends that clause 1 of the 1987 Constitutional Accord be ratified only in an amended form. The Task Force recommends that clause 1 of the Constitution Amendment, 1987 be amended as follows:
>
> 1. The Constitution Act, 1867 is amended by adding thereto, immediately after section 1 thereof, the following section:
>
> > "2. (1) **The Constitution of Canada shall be interpreted in a manner consistent with the recognition that the following constitute fundamental characteristics of Canada:**
> >
> > (a) **the existence of Canada as a federal state with a distinct national identity;**
> >
> > (b) **the existence of the aboriginal peoples as a distinct and fundamental part of Canada;**
> >
> > (c) the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec;

(d) Quebec constitutes within Canada a distinct society; and

(e) the existence of Canada's multicultural heritage comprising many origins, creeds and cultures.

(2) The role of the Parliament **and Government** of Canada and the provincial legislatures **and governments to uphold** the fundamental characteristics of Canada referred to in paragraphs (1)(a), (b), (c) and (e) is affirmed.

(3) The role of the legislature and Government of Quebec **to uphold** the distinct identity of Quebec referred to in paragraph (1)(d) is affirmed.

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

The Task Force also proposed that subclauses (2) and (3), which describe the role of Parliament and the provincial legislatures in preserving the linguistic duality of Canada and of the legislature and government of Quebec in preserving and promoting the distinctness of Quebec within Canada, should be made parallel. It recommended that the two clauses refer both to the legislatures and governments, and that the word "uphold" replace "preserve" in subclause (2) and "preserve and promote" in subclause (3). It felt that the word "uphold" implies a strong sense of commitment but no new responsibilities or powers.

B. New Brunswick

The New Brunswick report took quite a different approach. Submissions argued that the existence of multiculturalism and aboriginal people should also be recognized as a fundamental characteristic of Canada. The Committee sympathized, but felt that existing sections of the Charter, together with clause 16 (see below) ensured that multicultural and aboriginal rights would be protected. It did not rule out the eventual inclusion of multicultural and aboriginal recognition in section 2(1), but

felt it is an issue that should be addressed at a future constitutional conference.

The phrasing of proposed section 2(1)(a), stating that linguistic duality is a fundamental characteristic of Canada, caused some concern. The territorial restriction, recognizing French-speaking Canadians as centred in Quebec but also present elsewhere in Canada, was considered too limited by the Committee. It recommended that the section be amended to refer to "the existence of French-speaking Canadians and English-speaking Canadians throughout Canada."

The New Brunswick Committee acknowledged concerns about the wording of the distinct society clause, but felt that none of them are sufficiently crucial to justify tampering with the clause. It was influenced by the fact that the Meech Lake constitutional round was specifically to address Quebec's demands, among which the distinct society clause was paramount.

Responding to presentations that New Brunswick, as Canada's only officially bilingual province, was also a distinct society, the Committee noted that nothing precludes other communities from being recognized as distinct at a later date. In the interim, the Committee recommended that the Governments of New Brunswick and Canada immediately initiate the process for entrenching Bill 88, An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick, in the Constitution of Canada. Under section 43 of the Constitution Act, 1982, this would require the approval only of Parliament and the Legislative Assembly of New Brunswick. The Committee also recommended that the legislatures and governments of both New Brunswick and Canada be given a constitutional obligation to preserve and promote New Brunswick's two linguistic communities.

The Committee acknowledged concerns about the vagueness of the term "distinct society," but felt that broad language is appropriate in a constitutional document. As with the term "free and democratic society" in the Charter, it felt that "distinct society" is capable of growth and development by the courts over time.

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In accepting the distinct society clause without change, the New Brunswick Committee stated its belief that the proposed section 2 neither grants new powers nor derogates from the existing powers of the provincial or federal governments. It was described as an interpretive tool which does not grant any substantive powers and is understood as a fundamental aspiration and objective of the people and government of Quebec.

The Committee did, however, recommend changes in the wording of section 2(2). Submissions suggested that, as with Quebec in proposed section 2(3), the role of preserving the linguistic duality should involve the governments of Canada and the provinces as well as Parliament and the provincial legislatures. They also suggested that the various governments and legislative bodies be responsible for promoting linguistic duality as well as preserving it.

The Committee recommended that proposed section 2(2) affirm the role of the government, as well as the Parliament of Canada, to promote, as well as preserve, the fundamental characteristic of linguistic duality. It felt that it would be inappropriate, however, to expand the role of provincial legislatures.

In line with the Committee's recommendations, the companion resolution suggests various additions to the new section 2 of the Constitution Act, 1867. A new clause 2(1)(c) would recognize that the English and French linguistic communities in New Brunswick have equality of status and equal rights and privileges, and clause 2(3.1) would affirm or recognize the role of the Government of New Brunswick to preserve and promote this equality.

Additionally, the Parliament and Government of Canada would be given the expanded role of promoting, as well as protecting, the linguistic duality described as a fundamental characteristic of Canada in clause 2(1)(a).

The parallel accord would also entrench New Brunswick's Bill 88 in the Constitution by requiring the consent of both Parliament and the New Brunswick legislature to any amendment.

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C. Newfoundland

Newfoundland's proposal of November 1989 suggested changes to the proposed section 2 that are similar to the recommendations of the Manitoba committee. Newfoundland, however, would move the combined Canada clause and distinct society clause to a preamble, which is consistent with the province's interpretation of Quebec's original proposals, and delete any reference to governmental or legislative roles in protecting or promoting national or provincial identities. Additionally, Newfoundland would describe Quebec's distinctiveness as resulting from the facts that French-speaking Canadians are centred in Quebec and that Quebec uses the civil law system.

Newfoundland accepts that Quebec is distinctly different from any other society in Canada on the basis of language, culture and legal system; it does not accept that Quebec is different in its status and rights as a province.

In Newfoundland's view, there are two equalities to every federation: the equality of each citizen, as represented by a legislative chamber elected on the basis of representation by population; and the equality of each constituent part in its status and rights, as represented by equal representation in a second legislative chamber such as the Senate.

> Canada, however, has or is perceived to have a third equality; namely, the equality of each of the two founding linguistic cultures. ... Most Canadians now agree to describe this third equality as a "fundamental characteristic of Canada," and most Quebecers and many other Canadians agree that it has resulted in Quebec being accepted as a "distinct society" within Canada.

Newfoundland proposes that Quebec's distinct society could be preserved more appropriately by a special voting procedure in the Senate than by special legislative status. Pending full Senate reform, the November 1989 document proposes that the Senate would be divided into divisions: one division for senators from provinces where English is the provincial official language; one division for senators from provinces where French is the provincial official language; and one division for each province which is constitutionally bilingual. Every constitutional

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amendment affecting linguistic or cultural rights or the civil law system, including the proportion of civil law judges on the Supreme Court of Canada, would have to be approved by a majority of the entire Senate and a majority in each division of the Senate. The 22 March document would simplify this process by dividing the Senate into only two divisions: a civil law division including all Senators from Quebec, and a common law division including all Senators from the other provinces.

D. The Report of the Special Committee

The Committee approved the New Brunswick clauses recognizing the equality of the two official linguistic communities (Recommendation #4), and recognizing the role of the legislature and government of New Brunswick to preserve and promote that equality (Recommendation #5).

The Committee noted that the testimony from constitutional experts unanimously affirmed that the federal promotion of linguistic duality proposed by New Brunswick, would be limited to federal jurisdiction. Consequently, it endorsed the New Brunswick clause calling for the promotion of Canada's linguistic duality by the Parliament and Government of Canada (Recommendation #6).

Additionally, the Committee suggested that minority language rights should be included on the agenda of the Annual First Ministers' Conferences on the Constitution (Recommendation #7).

The Committee was interested in Manitoba's suggestion of a "Canada Clause" that would recognize aboriginal people and our multicultural heritage, also advanced by Newfoundland. It encouraged the First Ministers to recognize these fundamental elements in the body of the Constitution (Recommendation #18).

THE ACCORD AND EXISTING RIGHTS AND FREEDOMS

Clause 16 of the Meech Lake Accord states that nothing in the new section 2 would affect the interpretive principles protecting aboriginal rights and the multicultural heritage affirmed in sections 25

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and 27 of the Charter, the aboriginal rights affirmed in section 35, or federal jurisdiction over Indians and Indian lands.

A. Manitoba

The Manitoba report noted that concerns were raised, by women's groups in particular, that the inclusion of aboriginal and multicultural rights in clause 16 would mean that other rights, such as sex equality, would, by implication, not be protected. It was also felt that clause 16 implied a hierarchy of rights, and that its exclusion of sex equality rights could cause the courts to view sex equality as generally less important than aboriginal and multicultural rights. Finally, submissions from those concerned with women's rights argued that the refusal of 11 men to respond to concerns about women's rights and the Accord had had the unintentional symbolic effect of assigning women to a second class position in Canadian society.

The Task Force also heard from representatives of civil liberties organizations and of the mentally and physically disabled, who expressed similar concerns that the equality rights under the Charter might be endangered. Like the women's groups, they suggested that clause 16 should either be deleted or amended to ensure that nothing in clause 1 abrogated or derogated from the Charter.

The Task Force agreed that Charter rights and freedoms are a symbol of national unity. Because of the importance of the issue, it felt it better to err on the side of too much protection of those rights. As requested by the majority of people making submissions, it suggested an amended clause 16 stating that nothing in the proposed section 2 to the Constitution Act, 1867, would affect the Charter. In short, the new interpretive principles would not apply to the Charter including, presumably, the decision as to what rights violations are demonstrably justified in a free and democratic society.

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B. New Brunswick

The New Brunswick report stated that "a major issue for presenters was the need to define clearly and specifically the Charter's supremacy in the Constitution." The Committee saw this issue as the need to maintain a fair balance between collective and individual rights, and believed that existing mechanisms would allow the courts to strike the appropriate balance. It felt that to make the Charter paramount is inappropriate and unnecessary. However, in recognition of the importance that Canadians attach to the Charter, it recommended that the Charter be affirmed as a fundamental characteristic of Canada.

The New Brunswick Committee also heard from numerous people concerned with the effect that the proposed section 2 might have on sex equality rights. The Committee noted that "all those involved in the framing of the Accord have stated that it was not their intention to affect gender equality." Overall, the Committee seemed to feel it unlikely that the Accord in its present state would affect gender equality rights. The Committee was, however, aware that the legal issues are complex:

> Understanding the interplay between sections 1, 15 and 28 of the Charter, section 52 of the Constitution Act, 1982 and sections 2 and 16 of the Accord posed a challenge for the Committee members. (p. 49)

Overall, the Committee remained concerned about the possibility of the erosion of gender equality, as well as the perception that gender equality rights might be eroded. It recommended that a reference to section 28 of the Charter, (which guarantees Charter rights to males and females equally, notwithstanding anything else in the Charter), be added to clause 16.

As recommended by Committee, the companion resolution would add section 28 of the Charter (sexual equality) to the list of Charter sections not affected by the interpretive provisions of section 2.

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C. Newfoundland

Newfoundland suggests that a clause be added specifically to clarify that nothing in the Preamble or in the new Senate provisions would derogate from the Charter. The controversial clause 16 would, therefore, be no longer necessary.

D. The Report of the Special Committee

The Committee noted New Brunswick's concern, also expressed by women's groups and others, that the Charter might be overridden by the distinct society clause. It quoted expert testimony that the distinct society clause would not affect rights, but should properly affect the interpretation of section 1, or the definition of when rights would be subject to such reasonable limits as could be demonstrably justified in a free and democratic society. The Committee cited the testimony of Roger Tassé, a constitutional expert involved in both the adoption of the Charter and the Meech Lake Accord, that the Supreme Court of Canada had already agreed, in the Bill 101 case, to take "the special situation of francophone as a minority group in Canada, in North America" into account even without Meech Lake.

The Committee recommended that the First Ministers affirm that the new section 2 of the Constitution "in no way impairs the effectiveness of the Charter of Rights" (Recommendation #11).

THE SENATE

Clause 2 of the Meech Lake Accord would entrench in the Constitution the interim agreement on the selection of Senators. Senators would be chosen from "names of persons" submitted by the government of the province involved.

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A. Manitoba

The Meech Lake Accord would require unanimous approval for all constitutional amendments affecting the Senate. The report of the Manitoba Task Force suggested that the existing amending formulas for Senate amendments be maintained; this is covered below, along with the amending formula.

The Manitoba report outlined the concerns of most of the submissions on the issue of Senate reform and the effect of the new appointing process. Most submissions claimed that the new nomination process could impede Senate reform, since the provinces with the most Senators would have a vested interest in maintaining the status quo. Some felt that an enhanced role for the Senate could result in legislative paralysis. Others felt that the new nomination process, together with other Meech Lake provisions, would seriously weaken the central government.

The Task Force, overall, agreed with the criticisms of the nominating process, but believed that the process is only interim. It stressed that it would not be averse to the removal of the interim Senate appointment provisions. If these were retained, however, the Task Force stated that the Yukon and the Northwest Territories should have the same right to submit names as the provinces. Finally, the report discussed Senate reform at some length and recommended the immediate creation of a Manitoba committee to study the question of Senate reform.

B. New Brunswick

The New Brunswick Committee report dealt very briefly with Senate appointments. The Committee shared the concerns expressed in a number of submissions about the existing method of nomination, but felt that this could be addressed only in the context of major Senate reform. Stating that the Senate has a meaningful role in protecting regional interests, the Committee accepted clause 2 as an interim measure. It did, however, recommend that the new provincial role in Senate nominations be extended to the governments of the Yukon and Northwest Territories.

The companion resolution does not refer to Senate reform, although the motion for the resolution acknowledges that "in order for the

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Senate to be a more effective national institution, its reform being a matter of pressing and substantial concern, First Ministers are committed to convene a Constitutional Conference to be held in western Canada on 1 November, 1990, following the proclamation of the [Meech Lake Accord]."

In his testimony before the Special Committee of the House of Commons, Premier McKenna emphasized his personal commitment to Senate reform, adding "we believe there are other personalities and provinces much more closely associated with the issue that should be bringing forward suggestions around which some consensus could develop."

The companion resolution provides that the territories, as well as the provinces, might submit the names of persons who might be summoned to the Senate when vacancies arise.

C. Newfoundland

Newfoundland is concerned that Senate reform should be introduced in this round of constitutional negotiations. The Newfoundland proposals of November 1989 include a detailed proposal for a triple-E Senate.

D. The Report of the Special Committee

The Report of the Special Committee agreed that the Yukon and Northwest Territories should participate in the selection of Senators and Supreme Court judges. It suggested that this oversight was the one "egregious error" of the Meech Lake Accord which required specific correction (Recommendation #8).

The Committee was also convinced that the unanimous consent rule for Senate reform should be moderated after approximately three years. The less restrictive formula to be adopted at that point would involve some concept of regional approval (Recommendation #17).

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IMMIGRATION

Clause 3 sets out a rather complex procedure to constitutionalize or entrench immigration agreements between the federal government and a province. The political accord accompanying the Meech Lake Accord would commit the federal government to concluding with Quebec an immigration agreement based on certain principles.

A. Manitoba

The Manitoba Task Force had serious reservations about clause 3, but decided against asking for an amendment. It was concerned that clause 3 could weaken the role of the federal government, and could result in new immigrants feeling stronger attachments to their provinces than to the nation as a whole. Overall, it felt their concerns could be dealt with by the revised distinct society (or Canada) clause.

The Task Force also felt it unwise to entrench in the Constitution the guarantee that Quebec will receive a number of immigrants "proportionate to its share of the population of Canada, with the right to exceed that figure by 5% for demographic reasons." First, it wondered if some other province might receive less than its fair share to compensate for that additional 5%. Second, and more important, it wondered whether a drop in Quebec immigrants in any given year would require a lowering of the national quota. The latter fear was allayed by a federal government opinion that the "guarantee" referred to was a "best efforts" undertaking rather than a strict legal guarantee.

Although the Task Force did not recommend an amendment to the immigration provisions, it did recommend that the federal government continue to play a leading role in the immigration process. It also recommended that the provisions on immigration, and any agreements entered into, be reviewed at least every five years.

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B. New Brunswick

The New Brunswick Committee, in a single page, noted the concerns of those who appeared before it; sympathized with multicultural groups' concerns about possible discrimination if the provinces gain more autonomy over immigration policy; expressed its confidence that the Charter will protect such concerns as mobility rights, and that the federal government role as the key player in immigration policy will not alter; and affirmed the Accord's treatment of the issue.

Accordingly, the companion resolution makes no reference to immigration.

C. Newfoundland

Newfoundland shares Manitoba's concerns about the immigration provisions in Meech Lake, but considers the matter too important to be set aside for five years. Newfoundland "believes that [the provision] unacceptably weakens the critical federal power over immigration and the essential federal role in providing new Canadians with a sense of attachment to Canada as opposed to the particular province to which they initially immigrate."

The Newfoundland proposals do not contest Quebec's special interest in the area of immigration, but reflect the government's view that the Meech Lake provisions "go far beyond" what is required and unnecessarily impair the federal government's ability "to maintain a unique national identity." Consequently, Newfoundland proposes that the immigration provisions be amended to accommodate more clearly Quebec's special concern for the constitutional entrenchment of its role in immigrant selection, and that the entrenchment and amendment of federal-provincial immigration agreements be subject to the general amending formula (7/10 provinces with 50% of the population).

In its March 1990 document, Newfoundland agrees with Manitoba that the federal government should continue to play a leading role in the immigration process, and that provisions or agreements on immigration should be reviewed at least every five years.

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D. The Report of the Special Committee

The Committee also agreed that a review mechanism for the immigration provisions was desirable, but believed that this was an administrative matter best dealt with as required by circumstances (Recommendation #21).

THE SUPREME COURT

Clauses 4, 5 and 6 of the Accord deal with the Judicature section of the Constitution Act, 1867. Clauses 4 and 5 would simply add new headings. Clause 6 would entrench the Supreme Court of Canada as the final court of appeal, as well as certain provisions surrounding the Court's composition, qualifications, tenure, and salary. Appointments to the Court would have to be made from lists submitted by the provinces, and Quebec would be guaranteed three judges.

A. Manitoba

The Manitoba report noted that the majority of people appearing before the Task Force had some doubts about the new appointment process, and whether the provinces might nominate only persons with a specific legal philosophy. A major concern was that there was no provision to break the deadlock in the event that the federal government found all the names submitted to be unsuitable. This was a particular concern with the Quebec appointments in that any such deadlock would affect three potential appointments. The Task Force suggested that the clause be amended to provide for a deadlock-breaking mechanism, and proposed four possible models.

The Manitoba report also recommended that the territories be allowed to nominate Supreme Court judges.

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B. New Brunswick

The New Brunswick report similarly recommended that the territories be included in the process of appointments to the Supreme Court, citing briefs from the governments of the Northwest Territories and the Yukon "supported by several New Brunswick briefs which deplored the fact that the present amendment effectively shuts out territorial nominations to our highest court" (p. 53).

The New Brunswick Committee also recommended that a formal appointment process be established in each province and territory, reflecting a broad spectrum of society and including representation from the legal profession, the judiciary, the federal Department of Justice, and the provincial Attorney-General departments.

The companion resolution provides that the territories, as well as the provinces, might submit names of persons eligible for appointment to the Supreme Court.

C. Newfoundland

Newfoundland has concerns similar to Manitoba's about the new appointment process for Supreme Court judges, and recommends that appointments continue to be made by the federal government but that they require Senate approval. The three civil law appointments would require the approval of the majority of Senate members from Quebec, and the remaining appointments would require the approval of the majority of Senate members from the common law provinces.

D. The Report of the Special Committee

As mentioned in the comments on the Senate, the Committee agreed that the oversight about the ability of the Yukon and Northwest Territories to participate in the appointment of Supreme Court judges should be addressed (Recommendation #8).

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SHARED-COST PROGRAMS

Clause 7 of the Accord would add section 106A to the Constitution Act, 1867; it would require the federal government to compensate a province that opted out of a future national shared-cost program so long as the equivalent provincial program was compatible with national objectives.

A. Manitoba

The Manitoba report described this as "one of the most often criticized clauses during the hearings" (p. 53). There were concerns that the clause would threaten future programs such as childcare, weaken the ability of the federal government to provide national health and welfare programs, and increase regional disparities in social services. Presenters warned that this could have serious consequences for a small, less affluent province like Manitoba.

Various amendments to the clause were suggested, including its deletion from the Accord. The Task Force recommended deleting it entirely, noting that Manitoba has played a significant role in encouraging the development of national programs.

B. New Brunswick

The New Brunswick Committee took a different approach. After describing the serious concerns expressed about the effect that section 106A might have on national social and health programs, the Committee affirmed the importance of the federal spending power:

> The Committee is in full agreement with the explicit constitutional recognition of the federal spending power in matters of exclusive provincial jurisdiction. This constitutional power is absolutely necessary if the federal government is to ensure reasonably comparable levels of public services across the country. (p. 59)

The New Brunswick Committee, however, felt that section 36(2) of the Constitution Act, 1982 could be used to resolve the problem.

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Section 36 deals with equalization and regional disparities and subsection (2) states:

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

The New Brunswick Committee felt that if some provinces developed better services, thus increasing the basic standard of service for all Canada, section 36 puts a constitutional obligation on the federal government to ensure provincial governments had sufficient revenues to provide reasonably comparable levels of public services. Consequently it recommended that the provisions of section 36 be strictly applied, and that section 106A be accepted.

The companion resolution would amend section 36 by requiring that the Senate carry out an assessment of the effectiveness of the section in 1991 and every five years thereafter.

C. Newfoundland

Newfoundland understands and shares Quebec's concern that unilateral federal action in the exercise of its spending power could encroach on exclusive provincial jurisdiction, but feels that section 106A could undermine the federal government's ability to establish national programs with minimum national standards or to redress regional disparities.

Newfoundland proposes that a paragraph be added to the section exempting national programs expressly declared by Parliament to be a response to the commitment, set out in 36(1), to promote equal opportunities, redress regional disparities and provide essential public services.

Newfoundland also suggests some minor changes in wording, such as substituting "Parliament" for "the government" in recognition of the importance of House of Commons control over government spending.

D. The Report of the Special Committee

The Committee saw merit in New Brunswick's proposal that the Senate carry out an assessment every five years, but recommended that this be addressed in the context of a reformed Senate (Recommendation #12). It also recognized the concerns of the Premier of Newfoundland and Labrador about the effect of this provision on less developed areas. It urged that any Companion Resolution should provide that the federal ability to comply with section 36 not be impaired (Recommendation #22).

THE AMENDING FORMULA

Clauses 9, 10, 11 and 12 would affect the constitutional amending formulas. Clause 9 contains the actual changes, while clauses 10-12 consist of minor technical amendments to reflect a numbering change.

Section 40 of the Constitution Act, 1982 states that a province which opts out of an amendment transferring provincial powers over education or other cultural matters to the federal government will receive reasonable compensation. Clause 9 would extend the federal obligation to provide compensation to provinces opting out of any transfer of provincial power to the federal government.

Section 41 of the Constitution Act, 1982 lists those amendments which require the unanimous consent of the provinces. Section 42 states that changes relating to proportionate representation in the House of Commons, the powers of the Senate and selection and qualifications of Senators, provincial representation in the Senate, the Supreme Court (other than the composition), the extension of new provincial boundaries and the creation of new provinces can all be made by seven provinces representing 50% of the population. Clause 9 of the Meech Lake Accord would move to section 41 all of the matters at present in section 42, with the result that such amendments would require unanimous consent.

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A. Manitoba

The Manitoba report found that the expansion of the unanimity requirement to the matters now listed in section 42 was the second most contentious provision in the Meech Lake Accord. Most submissions claimed that the unanimity requirements would "freeze and stultify" the Constitution. The Task Force noted that it weighed the arguments on unanimity very carefully. It agreed with those who argued that applying the unanimity provisions to amendments concerning the Senate would frustrate Senate reform and deny the aspirations of westerners. Applying those same provisions to the creation of new provinces would likely deny the aspirations of northerners. The report therefore concluded that amendments relating to the powers of the Senate, selection of Senators, residence qualifications of Senators, provincial representation in the Senate, the extension of existing provinces or the creation of new provinces should remain in section 42, and not require unanimity.

B. New Brunswick

The New Brunswick Committee felt that on the whole the matters subjected to the unanimity provisions by the Meech Lake Accord are "fundamental democratic principles and institutions of Canada and for this reason it is important that all provinces be in agreement on changes" (p. 63). The one exception was the creation of new provinces, which the New Brunswick Report recommended remain in section 42. It also recommended that the territories be consulted in the creation of new provinces.

The companion resolution would not directly change the amending formulas set out in the Meech Lake Accord, including paragraph (41(i), which requires the unanimous consent of all provinces and the federal government for the establishment of new provinces. It does, however, add a new section 43.1, which provides that, notwithstanding 41(i), new provinces could be established in the territories where authorized by Parliament.

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C. Newfoundland

Newfoundland believes that the requirement of unanimity, or the extension of a constitutional veto to all provinces, would place Canada in "a permanent constitutional strait jacket" and "effectively halt all significant constitutional change."

> Accordingly, Newfoundland recommends that Quebec's proposal for a constitutional veto be addressed through special votes in the Senate. Under Newfoundland's proposal, Quebec, through its senators acting at the national level, would have an effective veto over constitutional amendments affecting linguistic or cultural rights, or civil law judges on the Supreme Court of Canada. This would respect the fundamental precept of the equality of provinces since it would not give the Quebec legislature or government a status that no other provincial legislature of government had.

Additionally, Newfoundland prefers that amendments extending existing provinces or establishing new ones should require only the approval of Parliament and the relevant provinces or territories.

D. The Report of the Special Committee

The Committee agreed with the position of New Brunswick and the territories on the creation of new provinces; that is, that the territories should be able to become provinces under the same conditions as have existed since 1867 (Recommendation #9).

CONSTITUTIONAL CONFERENCES

Clause 13 of the Meech Lake Accord, which would become section 50 of the Constitution Act, 1982, would provide for a yearly constitutional conference to discuss Senate reform, roles and responsibilities in relation to the fisheries, and such other matters as are agreed upon.

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A. Manitoba

The report of the Manitoba Task Force suggested that the majority of submissions criticized compulsory annual First Ministers' conferences because they reinforce the trend towards executive federalism and possibly stimulate provincial demands for additional power. It was also argued that aboriginal matters must be included on the agenda and aboriginal people must be invited to the conferences. The Task Force decided it could not overlook the omission of invitations to the government leaders of the Yukon and Northwest Territories to relevant conferences.

The Task Force decided not to recommend deletion of the clause, however, because it serves as an avenue to Senate reform. The Task Force described the omission of aboriginal issues from the constitutional conference agenda as a grievous error. It recommended the agenda described in section 50 be expanded to include constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of aboriginal rights to be included in the Constitution of Canada. A further recommended amendment would require that both aboriginal representatives and elected representatives of the governments of the Yukon Territory and the Northwest Territories be invited to constitutional conferences when appropriate.

B. New Brunswick

Submissions presented in New Brunswick expressed strong objections to fisheries jurisdiction being placed on the permanent agenda of annual constitutional conferences. Additionally, aboriginal groups and the territories sought assurance that they would be represented at future constitutional conferences. The Committee agreed that the governments of the Northwest Territories and the Yukon must be represented at First Ministers' Conferences called to discuss issues related to their interests, and that aboriginal groups must be represented at conferences to discuss aboriginal issues. It had serious doubts about a constitutionally fixed agenda, and recommended that all references to specific agendas be deleted from the Accord. It also recommended, however, that fisheries, aboriginal rights and Senate reform become priorities in constitutional discussion.

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The companion resolution would make several additions to the Meech Lake provisions on constitutional conferences. The agenda of such conferences would be expanded to include "constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples." The Prime Minister would be required to invite representatives of the aboriginal peoples, and elected representatives of the territorial governments, to participate in such discussions.

In addition, a new paragraph would clarify that roles and responsibilities in relation to fisheries need not be included on the agenda after the first conference, and that this agenda item would not include jurisdictional issues.

C. Newfoundland

Newfoundland is concerned about the entrenchment in the Constitution of two annual First Ministers' conferences (a constitutional conference and a conference on the state of the Canadian economy, provided for in clause 8 of the Accord). The proposals of November 1989 recommend the deletion of constitutionally entrenched First Ministers' conferences on the grounds that a reformed Senate is a more appropriate and effective forum for provincial and regional concerns about national policy.

D. The Report of the Special Committee

The Committee recommended that a Companion Resolution should provide for separate constitutional conferences on aboriginal issues every three years, rather than that aboriginal issues be added as an agenda item to the annual Conferences on the Constitution (Recommendation #10).

The Committee also recommended that, as suggested by the Manitoba Task Force, the Prime Minister should invite representatives of the governments of the Yukon and Northwest Territories to participate in discussions on relevant agenda items at the First Ministers' Constitutional Conference (Recommendation #19), as well as the Economic Conference (Recommendation #20).

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OTHER MATTERS

The Report of the Special Committee to Study the Proposed Companion Resolution to the Meech Lake Accord drew conclusions on a number of related issues.

Having heard expert testimony on the question of whether or not the 23 June 1990 deadline was absolute, the Committee acknowledged that there was "legal debate over the significance of this date." It was of the opinion, however, that 23 June 1990 is a "political reality" (Recommendation #1).

The Committee also recognized that there was an important issue of "certainty" with respect to any Companion Resolution, and that for the impasse to be broken, "the question of 'certainty' will have to be addressed and unequivocally resolved" (Recommendation #2).

The Committee agreed that the timing of and process involved in additional constitutional amendments could be addressed only by First Ministers (Recommendation #3), but stated that a Companion Resolution process has the best prospect of solving the current constitutional impasse (Recommendation #14). It further agreed that the New Brunswick companion resolution, with changes and additions, was the appropriate basis from which to address the impasse (Recommendation #15), and that the House of Commons should provide an assurance of support for a Companion Resolution at the appropriate time (Recommendation #16).

Finally, the Committee concluded that Senate reform is of fundamental importance to the country, but that the prospects for any constitutional reform appear remote unless the current impasse can be overcome. It recommended that "Senate reform should be a priority issue for the next constitutional round" (Recommendation #23).

APPENDIX 1

Meech Lake Accord
and New Brunswick Resolution

CONSOLIDATED TEXT

MEECH LAKE ACCORD AND NEW BRUNSWICK RESOLUTION

SCHEDULE

CONSTITUTION AMENDMENT, 1987

Constitution Act, 1867

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

Interpretation

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

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

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

(c) the recognition that, within New Brunswick, the English linguistic community and the French linguistic community have equality of status and equal rights and privileges.

Role of Parliament and legislatures

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

Role of Parliament and Government of Canada

(2.1) The role of the Parliament and Government of Canada to promote the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed.

Role of legislature and Government of Quebec

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

Role of legislature and Government of New Brunswick

(3.1) The role of the legislature and Government of New Brunswick to preserve and promote the equality of status and equal rights and privileges of the two linguistic communities referred to in paragraph (1)(c) is affirmed.

Rights of legislatures and governments preserved

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

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

Names to be submitted

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

Choice of Senators from names submitted

(2) Until an amendment to the Constitution of Canada is made in relation to the Senate pursuant to section 41 of the *Constitution Act, 1982*, the person summoned to fill a vacancy in the Senate shall be chosen from among persons whose names have been submitted under subsection (1) by the government of the province or territory to which the vacancy relates and must be acceptable to the Queen's Privy Council for Canada."

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

"Agreements on Immigration and Aliens

Commitment to negotiate

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

Agreements

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

Limitation

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

Application of Charter

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

Proclamation relating to agreements

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

Amendment of agreements

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

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

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

Application of sections 46 to 48 of Constitution Act, 1982

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

Amendments to sections 95A to 95D or this section

95E. An amendment to sections 95A to 95D or this section may be made in accordance with the procedure set out in subsection 38(1) of the *Constitution Act, 1982*, but only if the amendment is authorized by resolutions of the legislative assemblies of all the provinces that are, at the time of the amendment, parties to an agreement that has the force of law under subsection 95B(1)."

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

"General"

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

"Courts Established by the Parliament of Canada"

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

"Supreme Court of Canada

Supreme Court continued

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

Constitution of court

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

Who may be appointed judges

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

Three judges from Quebec

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

Names may be submitted

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

Appointment from names submitted

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

Appointment from Quebec

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

Appointment from other provinces

(4) Where an appointment is made in accordance with subsection (2) otherwise than as required under subsection (3), the Governor General in Council shall appoint a person whose name has been submitted by the government of a province, or territory, other than Quebec.

Tenure, salaries, etc., of judges

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

Relationship to section 101

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

References to the Supreme Court of Canada

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

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

Shared-cost program

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

Legislative power not extended

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

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

"XII - CONFERENCES ON THE ECONOMY AND OTHER MATTERS

Conferences on the economy and other matters

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

XIII - REFERENCES

Reference includes amendments

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

Constitution Act, 1982

( ) Section 36 of the *Constitution Act, 1982* is amended by adding thereto the following subsection:

Senate review

"(3) The Senate shall, in 1991 and every five years thereafter, carry out an assessment of the results achieved in relation to the commitments of Parliament, the legislatures, the goverment of Canada and the provincial governments set out in this section and a report of every such assessment shall be presented to the conference next convened under section 148 of the *Constitution Act, 1867* after the assessment is completed."

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

Compensation

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

Amendment by unanimous consent

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

(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(b) the powers of the Senate and the method of selecting Senators;

(c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(d) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province was entitled to be represented on April 17, 1982;

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

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

(g) the Supreme Court of Canada;

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

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

(j) an amendment to this Part."

( ) Section 43 of the said Act is renumbered as subsection 43(1) and is further amended by adding thereto the following subsection:

Amendment to New Brunswick Act

"(2) An amendment to the Act of the Legislature of New Brunswick entitled *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, chapter O-1.1 of the Acts of New Brunswick, 1981, may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the Legislative Assembly of New Brunswick."

( ) The said Act is further amended by adding thereto, immediately after section 43 thereof, the following section:

Amendment relating to new provinces in the territories

"43.1 Notwithstanding paragraph 41(i), an amendment to the Constitution of Canada in relation to the establishment of new provinces in the territories may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons."

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

Amendments by Parliament

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

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

Initiation of amendment procedures

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

Public hearings

46.1 No measure relating to an amendment to the Constitution of Canada may be adopted by the House of Commons or the legislative assembly of a province pursuant to section 38, 41, 43, 43.1 or 46 unless public hearings in relation thereto are first held by the House of Commons or legislative assembly, as the case may be."

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

Amendments without Senate resolution

"47. (1) An amendment to the Constitution of Canada made by proclamation under section 38,41 or 43 or 43.1 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution."

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

"PART VI

CONSTITUTIONAL CONFERENCES

Constitutional conference

50. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once each year, commencing in 1988.

Agenda

(2) The conferences convened under subsection (11) shall have included on their agenda the following matters:

(a) Senate reform, including the role and functions of the Senate, its powers, the method of selecting Senators and representation in the Senate;

(a.1) constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples;

(b) roles and responsibilites in relation to fisheries; and

(c) such other matters as are agreed upon.

Exception

(3) The matters referred to in paragraph (2)(b) do not include issues relating to jurisdiction and are not required to be included on the agenda of conferences convened under subsection (1) after the first such conference is convened.

Participation of aboriginal peoples and the territories

(4) The Prime Minister of Canada shall invite representatives of the aboriginal peoples of Canada, and elected representatives of the governments of the Yukon Territory and the Northwest Territories, to participate in the discussions on the matters referred to in paragraph (2)(a.1) at the conferences convened under subsection (1)."

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

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

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

References

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

General

Multicultural heritage and aboriginal peoples

16. Nothing in section 2 of the *Constitution Act, 1867* affects section 25 or 27 or 28 of the *Canadian Charter of Rights and Freedoms*, section 35 of the *Constitution Act, 1982* or class 24 of section 91 of the *Constitution Act, 1867*.

CITATION

Citation

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

APPENDIX 2

MANITOBA TASK FORCE ON MEECH LAKE

SUMMARY OF RECOMMENDATIONS

A SUMMARY OF RECOMMENDATIONS

The Task Force is unable to recommend ratification of the 1987 Constitutional Accord in its present form. The Task Force therefore unanimously recommends that the Legislative Assembly take the appropriate action on the following six amendments to the Meech Lake Accord and on the following three recommendations which do not involve amendment.

RECOMMENDATIONS FOR AMENDMENT

1. Canada Clause

The Task Force recommends that clause 1 of the 1987 Constitutional Accord be ratified only in an amended form. The Task Force recommends that clause 1 of the Constitution Amendment, 1987 be amended as follows:

> **1.** The Constitution Act, 1867 is amended by adding thereto, immediately after section 1 thereof, the following section:
>
> **"2. (1) The Constitution of Canada shall be interpreted in a manner consistent with the recognition that the following constitute fundamental characteristics of Canada:**
>
> **(a) the existence of Canada as a federal state with a distinct national identity;**
>
> **(b) the existence of the aboriginal peoples as a distinct and fundamental part of Canada;**

(c) the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec;

(d) Quebec constitutes within Canada a distinct society; and

(e) the existence of Canada's multicultural heritage comprising many origins, creeds and cultures.

(2) The role of the Parliament **and Government** of Canada and the provincial legislatures **and governments to uphold** the fundamental characteristics of Canada referred to in paragraphs (1)(a), (b), (c) and (e) is affirmed.

(3) The role of the legislature and Government of Quebec **to uphold** the distinct identity of Quebec referred to in paragraph (1)(d) is affirmed.

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

2. Rights Protection Clause

The Task Force recommends that clause 16 of the 1987 Constitutional Accord be ratified only in an amended form. The Task Force recommends that Clause 16 be amended as follows:

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

3. Supreme Court

The Task Force recommends that clause 6 of the 1987 Constitutional Accord be ratified only in an amended form.

The Task Force recommends that Clause 6 of the Meech Lake Accord be changed as follows:

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

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

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

(4) Where an appointment is made in accordance with subsection (2) otherwise than as required under subsection (3), the Governor General in Council shall appoint a person whose name has been submitted by the government of a province **or territory** other than Quebec.

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

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

(2) For greater certainty, section 101A shall not be construed as abrogating or derogating from the powers of the Parliament of Canada to make laws relating to the

reference of questions of law or fact, or any other matters, to the Supreme Court of Canada."

The Task Force further recommends that the First Ministers review the appointment process at a future constitutional conference with attention to the concerns raised by Manitobans.

4. Spending Power

The Task Force recommends that the 1987 Constitutional Accord be ratified only in an amended form. The Task Force recommends that section 7 be deleted from the Meech Lake Accord.

5. Amending Formula

The Task Force recommends that Clause 9 of the 1987 Constitutional Accord be ratified only in an amended form. The Task Force recommends that Clause 9 of the Meech Lake Accord be changed as follows:

> **9.** Sections 40 to 42 of the Constitution Act, 1982 are repealed and the following substituted therefor:
>
> > "**40.** Where an amendment is made under subsection 38(1) that transfers legislative powers from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.
> >
> > **41.** An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:
> >
> > > (a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
> > >
> > > (b) the right of a province to a number

of members in the House of Commons not less than the number of Senators by which the province was entitled to be represented on April 17, 1982;

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

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

(e) the Supreme Court of Canada;

(f) an amendment to this Part."

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

(a) the powers of the Senate and the method of selecting Senators;

(b) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(c) the extension of existing provinces into the territories; and

(d) notwithstanding any other law or practice, the establishment of new provinces.

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

The Task Force suggests that the corresponding Clauses 10, 11, and 12 should be deleted from the Constitution Amendment, 1987.

In accordance with the Task Force recommendations on the Amending Formula, subsection (2) of section 25 should read:

(2) Until an amendment to the Constitution of Canada is made in relation to the Senate pursuant to section **42** of the Constitution Act, 1982, the person summoned to fill a

vacancy in the Senate shall be chosen from among persons whose names have been submitted under subsection (1) by the government of the province to which the vacancy relates and must be acceptable to the Queen's Privy Council for Canada."

6. Constitutional Conferences

The Task Force recommends that clause 13 of the 1987 Constitutional Accord be ratified only in an amended form. The Task Force recommends that clause 13 be amended as follows:

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

"Part VI

Constitutional Conferences

50. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once each year, commencing in the year this Amendment is proclaimed.

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

(a) Senate reform, including the role and functions of the Senate, its powers, the method of selecting Senators and representation in the Senate;

(b) roles and responsibilities in relation to fisheries;

(c) constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those people to be included in the Constitution of Canada; and

(d) such other matters as are agreed upon.

(3) The Prime Minister of Canada shall

invite representatives of the aboriginal peoples of Canada to participate in the discussions of the matters set out in the agenda pursuant to paragraph (c) of subsection (2).

(4) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

The Task Force recommends that the First Ministers revoke annual Constitutional Conferences once the items in subsection (2) have been resolved.

FURTHER RECOMMENDATIONS

1. Senate

The Task Force recommends the immediate creation of a Manitoba committee to study the question of Senate reform. The Task Force recommends that Senate reform be given top priority in future constitutional discussions. The Task Force recommends additional research into the following areas in preparation for the Constitutional Conferences on this issue; means of selecting Senators, methods of representation, number of Senators, powers, functions, relationship with the House of Commons, location, and possible abolition if reform proves impossible. The Task Force recommends that future constitutional discussions on Senate reform encompass these issues.

2. Immigration

The Task Force recommends that the federal government continue to play a leading role in the immigration process. Furthermore, the Meech Lake Accord provisions on immigration and agreements pursuant thereto should be reviewed at least

every five years with a view to their possible amendment or revocation. This recommendation does not involve a formal amendment to the Meech Lake Accord provisions on immigration.

3. The Constitutional Process

The Task Force recommends that public hearings be held at the federal and provincial levels of government after the first ministers develop a proposal for constitutional change and prior to the signing of the proposed constitutional change. The Task Force further recommends that if a province chooses not to hold public hearings, then the federal government should hold hearings within that province to give the public the opportunity to participate in constitutional reform.