The Difficulty of Amending the Constitution of Canada

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The Difficulty of Amending the Constitution of Canada

Abstract
The Charlottetown Accord of 1992 was a set of proposals for amendments to the Constitution of Canada. These proposals were designed to achieve a national settlement of a variety of constitutional grievances, chiefly those arising from Quebec nationalism, western regionalism, and Aboriginal deprivation. The Accord was defeated in a national referendum. In the case of Quebec, the defeat of the Charlottetown Accord, following as it did on the defeat of the Meech Lake Accord, has made the option of secession relatively more attractive, but there are sound pragmatic reasons to hope that Quebec will not make that choice. In the case of the West, there is evidence that the westward movement of wealth and political power is resolving regional grievances without the need for constitutional amendment. In the case of the Aboriginal peoples, the settlement of their land claims and their progress towards self-government can proceed under the existing Constitution. Thus the failure of comprehensive constitutional reform should not preclude Canada from managing the tensions that the reform movement was designed to resolve.
THE DIFFICULTY OF AMENDING THE CONSTITUTION OF CANADA

By Peter W. Hogg

The Charlottetown Accord of 1992 was a set of proposals for amendments to the Constitution of Canada. These proposals were designed to achieve a national settlement of a variety of constitutional grievances, chiefly those arising from Quebec nationalism, western regionalism, and Aboriginal deprivation. The Accord was defeated in a national referendum. In the case of Quebec, the defeat of the Charlottetown Accord, following as it did on the defeat of the Meech Lake Accord, has made the option of secession relatively more attractive, but there are sound pragmatic reasons to hope that Quebec will not make that choice. In the case of the West, there is evidence that the westward movement of wealth and political power is resolving regional grievances without the need for constitutional amendment. In the case of the Aboriginal peoples, the settlement of their land claims and their progress towards self-government can proceed under the existing Constitution. Thus the failure of comprehensive constitutional reform should not preclude Canada from managing the tensions that the reform movement was designed to resolve.

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I. THE NATIONAL REFERENDUM

In a national referendum held on 26 October 1992, the people of Canada answered no to the question they were asked. The question was, "Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?" The agreement reached on 28 August 1992 was the Charlottetown Accord, which was an agreement on a set of proposals for the amendment of the Constitution of Canada that had been reached by the Prime Minister, the ten provincial Premiers, the two territorial leaders, and the leaders of four national Aboriginal organizations.

A popular referendum is not of course part of the legal procedures stipulated by Part V of the Constitution Act, 1982 for the passage of constitutional amendments. Those procedures involve ratification by the Parliament of Canada and the legislatures of the provinces. In the case of the Charlottetown Accord, the unanimity procedure of section 41 of the Constitution Act, 1982 was the applicable one (because the proposals included changes to the amending

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1 The referendum was a national one, held under the authority of federal law everywhere except in Quebec, where the referendum was a provincial one held under the authority of provincial law: see infra notes 14 and 15. Technically, there were two referendums, but they were held at the same time on the same question, and the results were amalgamated into national figures.


3 The Accord, which was not in the form of a legal text, but a draft legal text, prepared by officials, was issued on 9 October 1992. The text of the Accord and the draft legal text is set out in the appendices to K. McRoberts & P.J. Monahan, eds., The Charlottetown Accord, the Referendum, and the Future of Canada (Toronto: University of Toronto Press, 1993).

4 Being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
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procedures), so that all eleven legislative bodies would have had to pass ratifying resolutions in order to convert the Accord into law. The reason the Charlottetown Accord was submitted to a national referendum was because the first ministers and leaders at Charlottetown agreed to take this step. This was a radical break with past practice—no previous amendment had been submitted to popular vote—and it was driven by widespread public discontent with "deals" made by politicians. Despite unprecedented public consultations for twelve months prior to the Accord, the final stage of reaching agreement inevitably turned into a prolonged, closed-door session of bargaining by the seventeen participants. It was felt that, in order to give legitimacy to the Accord, its approval by popular vote was necessary. This feeling was reinforced by the fact that several provinces, including Quebec, were committed by statute to submitting proposals for constitutional amendment to provincial referendums.

The referendum was decisively lost. The "no" side prevailed by a national majority of 54.4 per cent to 44.6 per cent. The "no" side prevailed in six of the ten provinces, including the province of Quebec. The referendum result spelt the end of the Charlottetown Accord, which never even started the process of ratification by the Parliament and the legislatures. The referendum result, following as it did the failure by the legislative bodies to ratify the Meech Lake Accord of 1987, also brought to an end the process of seeking constitutional change. Not only had all the political actors become weary of the long, strenuous process, it had become clear that for the immediate future at least, it was impossible to design a package of amendments that could command popular support in all regions of the country.

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5 The Preface to the Charlottetown Accord, supra note 3, describes the committee hearings and reports, the six national conferences, and the prolonged meetings of the seventeen federal, provincial, territorial, and Aboriginal delegations that preceded the Accord.

6 M. Cernetig, "Result a unique measure of societal boundaries, analysts say" The [Toronto] Globe and Mail (28 October 1992) A4 at A4. See also Referendum 92, supra note 2 at 4, which reports that 54.3 per cent of Canada, excluding Quebec, voted "no" and 45.7 per cent voted "yes"; and Rapport 92, supra note 2 at 49, which reports that 56.68 per cent of Quebec voted "no" and 43.32 per cent voted "yes."

7 Although the vote in Quebec was similar to the vote in the rest of Canada, the reasons for the vote were quite different. Outside Quebec, there was a widespread sentiment that Quebec had been given too much. Inside Quebec, the prevailing sentiment among French speakers was that Quebec had not been given enough!

II. THE CHARLOTTETOWN ACCORD

The Charlottetown Accord was an attempt to resolve a number of tensions that had developed within Canada as the result of the size and diversity of the country.

The most important tension was nationalist sentiment in the province of Quebec. It was the most important because it had the capacity to break up the country. The Accord tried to satisfy Quebec with, among other things, a clause recognizing Quebec as a distinct society (clause 1); the expansion of the unanimity requirement for constitutional amendments (clause 57), which would give each province a veto; a guarantee of 25 per cent of the seats in the House of Commons (clause 57); and the devolution to the provinces of some federal powers (Part 3).

Another tension was caused by “western alienation,” which is the sense that the interests of the western provinces have usually been subordinated to the interests of central Canada, where the bulk of the population lives (and votes). The Accord tried to satisfy western Canadians with an elected Senate (clause 7) in which each province would have an equal number of members (clause 8).

Another tension was caused by Aboriginal people. A primary step in the solution to their current state of deprivation is self-government. The Accord included a recognition that the Aboriginal peoples had an inherent right of self-government within Canada (clause 41), as well as provisions for making that right a reality through agreements with the other levels of government (clauses 45, 46, and 50).

In addition to the three constituencies mentioned, namely, Quebec, the West, and Aboriginal peoples, the constitutional discussions were affected by the views of many other groups, who used the various opportunities for participation to make constitutional demands. Business associations, trade unions, minority language speakers, women’s groups, and many others all campaigned actively to place their political objectives on the nation’s constitutional agenda. The Charlottetown Accord tried to accommodate their various (and often contradictory) claims with the Canada Clause (clause 1) and the Social and Economic Charter (clause 4). The anodyne provisions of these parts of the Accord succeeded in pleasing very few people.
III. QUEBEC

A. The Search for an Accommodation

Quebec, with its French language and culture, its civil law, and its distinctive institutions, is not a province like the others. The accommodation of Quebec within Canada has always been the driving force behind the various constitutional arrangements of the settlements of the St. Lawrence valley. A variety of accommodations can be traced from the time of the British victory on the Plains of Abraham, which was formalized by The Royal Proclamation, 1763. These have been: The Quebec Act, 1774, which restored the French civil law; The Constitutional Act, 1791, which divided Quebec into Upper and Lower Canada; The Union Act, 1840, which reunited the two Canadas; and The British North America Act, 1867, which established a federal government and recreated a separate province in the territory of Quebec. It is the last arrangement that has lasted the longest by far, because it has enabled the French language and culture to survive and flourish in Quebec, within Canada, which is one of the most prosperous countries in the world. To an outside observer, it is hard to see what is wrong.

Nonetheless, the last two decades have seen an intensive effort to redefine the role of Quebec in the Canadian federation. In order to understand why, it is necessary to travel back to the constitutional settlement of 1982. That settlement was a major achievement, curing several long-standing defects in the Constitution of Canada. The Canada Act 1982 terminated the power of the Parliament of the United Kingdom over Canada. The Constitution Act, 1982, which was a schedule to the Canada Act, introduced new amending procedures, which could be operated without recourse to the United Kingdom. As well as the adoption of domestic amending procedures (sections 38-49),

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14 (U.K.), 1982, c. 11 [hereinafter Canada Act].
a charter of rights was adopted (sections 1-34).\textsuperscript{15} Aboriginal rights were recognized (section 35), equalization grants were guaranteed (section 36), provincial powers over natural resources were extended (sections 50 and 51), and the Constitution of Canada was defined and given supremacy over other laws (section 52). But the Constitution Act, 1982 signally failed to accomplish one of the goals of constitutional reform: the better accommodation of Quebec within the Canadian federation.

The Premier of Quebec had been the sole dissenter to the constitutional settlement of 1982; the Quebec National Assembly had passed a resolution condemning the settlement; and Quebec had even sought relief in the courts, though without success.\textsuperscript{16} Nor were Quebec's concerns without substance. The new amending procedures denied a veto to Quebec, something that in the past had always been recognized in practice. The new Charter of Rights restricted the powers of the provincial legislatures, and, in particular, limited the capacity of the Quebec National Assembly to implement French language policy.\textsuperscript{17} Thus, the outcome of the constitutional changes of 1982 was a diminution of Quebec's powers and a profound sense of grievance in the province.

In assessing the gravity of Quebec's alienation resulting from the constitutional changes of 1982, it is important to cast one's mind back two further years to Quebec's referendum on sovereignty association, which was held by the Parti Québécois government on 20 May 1980. The referendum was defeated by a popular vote of 59.5 per cent to 40.5 per cent.\textsuperscript{18} In the referendum campaign, the federalist forces promised that a "no" to sovereignty association was not a vote for the status quo, and the defeat of the referendum would be followed by constitutional change to better accommodate Quebec's aspirations. The defeat of the referendum was in fact immediately followed by a series of federal-provincial conferences in the summer and early fall of 1980, but these conferences failed to yield agreement on the specifics of constitutional


\textsuperscript{16} Re Objection by Quebec to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793.

\textsuperscript{17} This concern was shown to be justified by the later decisions of the Supreme Court of Canada in Quebec (A.G.) v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66 (striking down Quebec's restrictions on admission to English-language schools) and Ford v. Quebec (A.G.), [1988] 2 S.C.R. 712 (striking down Quebec's prohibition of English-language commercial signs).

change. On 6 October 1980, despite the absence of a federal-provincial agreement, Prime Minister Trudeau introduced in the House of Commons a resolution calling for the set of constitutional amendments that, after substantial alteration, became the *Canada Act 1982* and the *Constitution Act, 1982*. For the reasons explained in the previous paragraph, these 1982 changes did not fulfil the promises made during the 1980 referendum campaign in Quebec.

Quebec was of course legally bound by the *Constitution Act, 1982* because the Act had been adopted into law by the correct constitutional procedures. However, the government of Quebec thereafter refused to participate in constitutional changes that involved the new amending procedures. And the government opted out of the new *Charter of Rights* to the maximum extent possible under section 33 by introducing a "notwithstanding clause"¹⁹ into each of its existing statutes and into every newly-enacted statute.²⁰ In these ways, the point was made that the *Constitution Act, 1982* lacked political legitimacy in the province of Quebec.

B. The Meech Lake Accord

In 1984, Prime Minister Trudeau resigned, and, after an election later in the year, the Progressive Conservative government of Prime Minister Mulroney took office. One of the new government's policies was to achieve a reconciliation with Quebec. In 1985, an election was held in Quebec, and the Parti Québécois government was defeated. The new Liberal government of Premier Bourassa moved to seek a reconciliation with the rest of Canada. The government announced five conditions that were required for Quebec’s acceptance of the *Constitution Act, 1982*. These were: (1) the recognition of Quebec as a distinct society, (2) a greater role in immigration, (3) a provincial role in appointments to the Supreme Court of Canada, (4) limitations on the federal spending power, and (5) a veto for Quebec on constitutional amendments.²¹

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¹⁹ Section 33 enables the Parliament or a provincial legislature to override most of the provisions of the *Charter of Rights* by including a provision in a statute declaring that the statute is to operate notwithstanding a particular provision of the *Charter of Rights*.


²¹ See *Québec Free to Choose: Report of the Constitutional Committee of the Québec Liberal Party* (Quebec: Constitutional Committee of the Québec Liberal Party, 1991) (Chair: J. Allaire) at 12 [hereinafter Allaire Report]; and *Report of the Commission on the Political and Constitutional*
The Prime Minister and the other provincial Premiers agreed to negotiate on Quebec’s five conditions. The outcome of those negotiations was the Meech Lake Accord of 1987, which was an agreement entered into by all eleven first ministers on a set of amendments, essentially giving effect to Quebec’s five conditions. This seemed at the time to be an immensely important development, reconciling the government of Quebec to the Constitution Act, 1982. However, in order to become law, the Accord had to be ratified by resolutions of the Senate and House of Commons and of the legislative assembly of every province.\textsuperscript{22} It was ratified by the Senate and House of Commons\textsuperscript{23} and by eight of the ten provinces, but it was not ratified by all ten provinces.\textsuperscript{24} The Accord, therefore, lapsed. A unique opportunity to resolve a serious political problem was thus squandered.

C. The Charlottetown Accord

The lapse of the Meech Lake Accord caused great disappointment in the province of Quebec because it seemed to indicate that the rest of Canada was unwilling to make any accommodation to Quebec. This caused an increase in nationalist sentiment in the province. That change in public opinion was reflected in the Allaire Report, which was a report of the Constitutional Committee of the Quebec Liberal Party.\textsuperscript{25} That Report called for a radical


\textsuperscript{22} The unanimity procedure of section 41 of the \textit{Constitution Act}, 1982 was applicable because the Accord included provisions relating to the composition of the Supreme Court of Canada (section 41(d)) and a change in the amending procedures (section 41(e)).

\textsuperscript{23} The Senate actually refused to ratify it, but was overridden by the House of Commons under section 47 of the \textit{Constitution Act}, 1982.

\textsuperscript{24} The government of New Brunswick changed in 1987 before ratification, and the new Liberal government of Premier McKenna refused to ratify the Accord. The same thing happened in Manitoba in 1988, and the new Progressive Conservative government of Premier Filmon refused to ratify the Accord. The government of Newfoundland changed in 1989 after ratification, and the new Liberal government of Premier Wells acted under section 46(2) of the \textit{Constitution Act}, 1982 to revoke the previous ratification. In an attempt to bring the dissenters on board, a companion accord was agreed to by the First Ministers in Ottawa on 6 June 1990, which proposed some changes to the original Accord. This was followed by New Brunswick’s ratification, but the legislative assemblies of Manitoba and Newfoundland adjourned without bringing the issue to a vote by 23 June 1990. Section 39(2) of the \textit{Constitution Act}, 1982 caused the process to lapse on that date, which was three years from the date of the first legislative ratification, which had been by Quebec on 23 June 1987.

\textsuperscript{25} \textit{Supra} note 21.
decentralization of the Canadian federation, a reduction in the power and size of the federal government, the elimination of appeals from the Quebec courts to the Supreme Court of Canada, a veto for Quebec over constitutional amendments, and the abolition of the Senate. The Report called for a referendum "before the winter of 1992"\(^{26}\) for the purpose of ratifying a constitutional agreement with the rest of Canada. If no constitutional agreement had been reached by that time, the referendum would still be held, but would instead be used for the purpose of ratifying "Quebec's assumption of sovereign statehood" along with "an offer to form an economic union with the rest of Canada."\(^{27}\) The Allaire Report was greeted with disbelief outside Quebec, but on 10 March 1991, it was adopted with minor amendments as policy by the convention of the Quebec Liberal Party.\(^{28}\)

A second report, by a committee of Quebec's National Assembly, came out after the Allaire Report. The Bélanger-Campeau Report recommended that "a referendum on Quebec sovereignty" be held in the summer or fall of 1992.\(^{29}\) It also recommended the establishment of a special parliamentary commission with the duty to "assess any offer of a new partnership of a constitutional nature made by the Government of Canada, and to make recommendations in this respect to the National Assembly."\(^{30}\) The Report made no suggestions as to what that "new partnership" might look like, and indeed made no recommendations for constitutional change, although it repeatedly asserted that radical change was necessary.

In compliance with the two Quebec reports, the Quebec National Assembly in 1991 enacted a statute that required a referendum "on the sovereignty of Quebec" to be held no later than 26 October 1992.\(^{31}\) The date of 26 October 1992 became the deadline for the constitutional discussions that followed, as the rest of Canada confronted for a second time since 1980 the possibility that Quebec would vote in a popular referendum to secede from the Canadian

\(^{26}\) Ibid. at 46.


\(^{29}\) Supra note 21 at 80.

\(^{30}\) Ibid. at 81.

federation. It was obviously essential that there be a federalist constitutional proposal available by the time Quebeckers voted on 26 October 1992. As related above, the Charlottetown Accord was reached on 28 August 1992. Quebec immediately enacted an amendment to its referendum statute to change the topic of the referendum from "the sovereignty of Quebec" to "the agreement concerning the new constitutional partnership resulting from the meetings on the constitution held in August 1992."32 The Quebec referendum was held on 26 October 1992. On the same day, a federal referendum was held in the rest of the country. Both referendums asked the same question, namely, "Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?"33 As related above, the Charlottetown Accord was decisively defeated in the referendum vote, both in Quebec and in the rest of Canada.

The Accord had proposed basically the same set of changes as the Meech Lake Accord, as well as a permanent guarantee to Quebec of 25 per cent of the seats in the House of Commons (even if the province's population eventually fell below 25 per cent of the country's total) (clause 21(a)), and the devolution to the provinces of some federal powers. Evidently, these proposals were not enough to satisfy the majority of Quebec voters. The unfortunate result is that no change was made in the Constitution. Although the referendum (and the recession) seem to have taken the steam out of nationalist sentiment in Quebec for the time being, when the issue of secession arises again, Quebeckers will have to choose between the present Constitution and secession. They cannot have the halfway house that was designed for them at Charlottetown. The "no" vote in the referendum has made the independence option relatively more attractive.

D. Prognosis

Will Quebec eventually decide to secede? It is very hard to predict political events, but it is surely relevant to notice that Quebec has been remarkably successful in promoting the French language and culture, and in building a sound economy. In addition, Quebec has been


33 Supra note 2.
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very successful in asserting its influence within the federal government. All this has been accomplished within the framework of the present Constitution. From a practical point of view, it is difficult to see what Quebeckers would gain by secession, and it seems undeniable that secession would have adverse economic consequences, for Quebec especially but also for the rest of Canada. One is entitled to hope that prudence and pragmatism will rule the day and will keep Quebec within Canada.

IV. THE WEST

A. Distinctive Economy

A second force of constitutional change is western regionalism. This is based not on a distinctive language or culture, but on the distinctive economic base of the four western provinces. Their economies depend upon the primary production of grain, wood, metals, oil, gas, and other minerals. Because the bulk of Canada's population is concentrated in Ontario and Quebec, federal policies have tended to favour the manufacturing industries and consumers of central Canada. This tendency has been reflected in the tariffs that protect domestic manufacturing and in transportation and energy-pricing policies, for example. The Progressive Conservative government of Prime Minister Mulroney, which came to power in 1984, moved to deal with the principal complaints by entering into a Free Trade Agreement with the United States, abolishing the National Energy Program, liberalizing the controls on foreign investment, and subjecting transportation and energy prices to the market. These changes reflect a westerly shift in political power caused by the steady growth in population and wealth of the western provinces. The population growth means that the western provinces now have more seats in the House of Commons than Quebec. As for wealth, Alberta is far and away the wealthiest of the ten provinces on a revenue per capita basis, and British Columbia ranks third after Ontario.35

34 Both Liberal Prime Minister Trudeau (1968-79 and 1980-84) and Progressive Conservative Prime Minister Mulroney (1984-93) came from Quebec and were elected with strong majorities in Quebec.

B. Senate Reform

The constitutional dimension of western regionalism has taken the form of advocacy of Senate reform. Because the population of the West is still greatly outnumbered by central Canada, it is inevitable that the House of Commons, composed as it is on the basis of representation by population, will tend to favour the interests of central Canada. The solution is a “triple-E Senate,” which would be equal, elected, and effective. The composition of the triple-E Senate would be based on the equality of the provinces; each province would be represented by the same number of senators. The senators would be elected; they would therefore have a political mandate to exercise real power. And, the Constitution would confer real power on the Senate so that it would become an effective part of the legislative process.

The argument for a triple-E Senate is that the elected senators would vote to protect the interests of their province or region. That does not happen now, it is said, because the senators are appointed by the federal government. The trouble with the argument is that the representation of states or regions also does not occur in Australia, which has a triple-E Senate. The Senate in Australia consistently votes on party lines. The party affiliation that enabled each senator to become elected overwhelmingly dominates regional considerations. It is true that the Australian experience might not be replicated in Canada, but it is hard to see why not. In Canada, as in Australia, the political parties are accustomed to insisting upon and obtaining from their members strict loyalty to the party’s legislative programme, even if (as is occasionally inevitable) the programme has adverse effects in some regions. Party discipline is insisted upon and obtained because it is the key to the operation of responsible parliamentary government. It is not required, and does not exist, in the presidential system of government, so that the functioning of the triple-E Senate of the United States has no predictive value for a triple-E Senate in Canada.

If a Canadian triple-E Senate were to become simply a party House, it would be an institution of little value. When its party majority was the same as that of the House of Commons it would offer little or no resistance to the government’s legislative programme. When the Senate’s majority was controlled by the opposition party, it would oppose much of the government’s legislative programme. Indeed, differences of opinion between the two Houses could lead to the stultification of the government’s ability to govern, since they could extend even to the granting of supply. It was the refusal of the
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Australian Senate to grant supply to Prime Minister Whitlam in 1975 that caused the Governor General to dismiss the Prime Minister, even though he had a safe majority in the House of Commons. In his place, the Governor General installed a Prime Minister who could not command a majority in the House of Commons, and whose only role was to act as a caretaker until an election could be called.36

C. The Charlottetown Accord

The Charlottetown Accord proposed that the Senate be an elected body (clause 7),37 with equal representation from each province (clause 8). There would be sixty-two senators, six from each province and one from each territory.38 Elections would be held at the same time as elections to the House of Commons. The Senate would not be a confidence chamber, so that the defeat of a government bill would not entail the resignation of the government (clause 10). The Senate would have no power to block supply bills (clause 13). The defeat of most other bills would trigger a joint sitting with the (more numerous) House of Commons, and the fate of the bill would be determined by the majority vote at the joint sitting (clause 12). In these ways, the Accord sought to moderate conflict between the two Houses and to preserve the supremacy of the House of Commons.

D. Prognosis

The defeat of the Charlottetown Accord spelt the end of the triple-E Senate idea because Senate reform requires an amendment to the Constitution. Is this a problem? As in the case of Quebec, it is possible to take an optimistic line. The growth in the population of the western provinces and their increasing relative wealth is causing a steady

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37 It was proposed that the senators be elected, either by the population of the province or by the members of the legislative assembly. The latter option is really appointment by the provincial government.

38 Separate Aboriginal representation was also contemplated (clause 9).
westward shift of political power. Indeed, as related above, traditional western grievances respecting tariffs, freight rates, and energy prices have already been dealt with—without a triple-E Senate. It seems likely that the West will continue to be successful in asserting its influence in the development of public policies without the aid of a triple-E Senate.

V. ABORIGINAL PEOPLE

A. Entrenchment of Rights

A third force of constitutional change is the demand by the Aboriginal peoples of Canada—the Indian, Inuit, and Métis peoples—for constitutional recognition of their traditional rights.

The Aboriginal peoples made some important constitutional gains in the Constitution Act, 1982. Section 35(1) of the Act declared that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Initially, it was not entirely clear what this meant (which may have helped the governments to agree to it). However, in R. v. Sparrow, the Supreme Court of Canada held that section 35(1) was an effective protection of Aboriginal rights. The effect of section 35, the Court held, was to invalidate legislation that had the effect of extinguishing or abridging an Aboriginal or treaty right. Section 35 did not revive rights that had been extinguished validly before 1982, but a valid extinguishment involved a “clear and plain” intention to extinguish. The mere fact that an aboriginal right—in this case, the right to fish—was extensively regulated in 1982 did not mean that the right had been extinguished, not even partially extinguished to the extent of the regulation.

The Sparrow decision does not mean that all regulation in existence in 1982 (and all future regulation) is necessarily invalid. Because section 35 is not part of the Charter of Rights, it is not subject to section 1 of the Charter of Rights, which specifies that Charter rights are not absolute, but are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” However, the Court in Sparrow held that Aboriginal rights were not

40 Ibid. at 1105.
41 Ibid. at 1091 and at 1099.
42 Supra note 15.
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absolute either. They were subject to regulation by federal law, provided the federal law could satisfy a standard of justification not unlike that erected by the Court for section 1 of the Charter. In particular, the federal law would have to serve a "compelling and substantial" objective, such as the conservation of a resource, and the law would have to impair the Aboriginal right as little as possible, for example, by giving priority to Aboriginal harvesters.

B. Definition of Rights

The Court in Sparrow found that Mr. Sparrow was exercising an existing Aboriginal right to fish for salmon in the mouth of the Fraser River, because he "was fishing in ancient tribal territory where his ancestors had fished from time immemorial." This confirmed that Aboriginal people are indeed entitled to rights arising out of their long possession of lands prior to European settlement. Moreover, the Court said that section 35 guaranteed those rights "in a contemporary form rather than in their primeval simplicity and vigour." This confirmed that Aboriginal rights had evolved to take advantage of the progress of technology: for example, the steel hook, the gun, the mechanical trap, and the use of money were all included in modern Aboriginal rights.

This was all significant, but Sparrow said very little about the identification and definition of Aboriginal rights; and, indeed, said very little about what would satisfy the "clear and plain" rule for extinguishment. In that sense, Aboriginal rights remain dependent upon the unpredictable decisions of courts.

One solution to the problem of identifying and defining Aboriginal rights is an amendment to the Constitution clarifying the meaning of existing Aboriginal rights in section 35. That task was in fact contemplated by the Constitution Act, 1982, section 37 of which required that a constitutional conference of the first ministers and representatives of Aboriginal peoples be convened to consider "the identification and definition of the rights of those peoples to be included in the Constitution of Canada." That conference was held in 1983 and those

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43 Ibid. at 1109.
44 Ibid. at 1113 and at 1119.
45 Ibid. at 1095.
attending it did agree upon some clarifications to section 35, and, in particular, that modern land claims agreements were to count as treaties for the purpose of the section 35 guarantee. They also agreed that the process should continue in at least two additional constitutional conferences. These products of the 1983 conference were embodied in a constitutional resolution that was enacted by the seven-fifty formula. \(^{47}\) In fact, all legislative bodies passed the resolution except for Quebec, which was boycotting the constitutional amending process to which it had never agreed.

The two additional conferences that were now mandated by the new section 37.1 of the Constitution Act, 1982 were also held in April, 1985 and March, 1987 and the participants struggled with the proposal of expressly including in section 35 the right of Aboriginal self-government. That task proved to be too difficult and they failed to agree on a resolution for a constitutional amendment. There did not seem to be disagreement on the idea of entrenching Aboriginal self-government. Nor was there disagreement on the idea that the precise forms and structures of each government would vary from one Aboriginal community to another, and would need to be negotiated with the two levels of government by each Aboriginal community. It seems fair to say that considerable progress was made on the issue of recognizing a right of Aboriginal self-government.

However, the drafting problems proved insuperable. The Aboriginal leaders could not accept language that implied that Aboriginal self-government was contingent upon the governments entering into self-government agreements. Such language would suggest that self-government was not one of the existing Aboriginal rights already protected by section 35. On the other hand, the recognition of an inherent, free-standing right of self-government could lead to judicial enforcement, which might involve the creation by the courts of Aboriginal political structures that had not been agreed to by the people who would come under the new political authority. In addition to this basic problem of definition, it was difficult to settle in advance the relationship between the institutions of Aboriginal self-government and the other parts of the Constitution of Canada, especially the federal legislative power over "Indians, and Lands reserved for the Indians" (section 91(24)) and the Charter of Rights.

\(^{47}\) The Constitution Amendment Proclamation, 1983, SI/84-102, reprinted in R.S.C. 1985, App. II, No. 46, added subsections (3) and (4) to section 35, as well as replacing section 25(b) and adding subsections 35.1 and 37.1 of the Constitution Act, 1982.
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After the failure of the last Aboriginal rights conference in March, 1987, the first ministers became totally preoccupied with the Meech Lake Accord and its ratification. This pushed Aboriginal rights off the constitutional agenda, and caused most Aboriginal groups to oppose the Accord. They did so although clause 16 of the Accord expressly affirmed that the new distinct society clause did not affect any of the provisions of the Constitution concerned with Aboriginal rights. This clause made clear that the Accord did not worsen the constitutional status of Aboriginal peoples. Of course it was reasonable to expect that if the Quebec round were successfully completed, the issue of Aboriginal self-government would resume its place on the constitutional agenda. However, Aboriginal leaders were so frustrated by the deferral of their aspirations in favour of those of Quebec that they played a prominent role in the defeat of the Meech Lake Accord.

C. Land Claims Agreements

Although Sparrow concerned Aboriginal rights, it is clear from the language of section 35 that treaty rights possess the same guaranteed status. Moreover, treaty rights possess the inestimable advantage that they are written down in black and white, and do not suffer from the uncertainty of Aboriginal rights. Furthermore, section 35, since its amendment in 1983, expressly states that rights acquired under modern “land claims agreements” are treaty rights within section 35. In Sparrow, the Court commented that section 35 “provides a solid constitutional base upon which subsequent negotiations can take place.”

This was, I think, a realistic acknowledgement that aboriginal rights are best clarified, confirmed, and brought up-to-date by the negotiation of land claims agreements. The terms of such agreements then become treaty rights that are constitutionally protected by section 35.

Many Aboriginal people already have treaty rights of varying degrees of comprehensiveness. In the 1700s, in eastern Canada, treaties of peace and friendship were entered into with the Indian nations, but these did not typically involve the cession by the Indians of their lands. As European settlement proceeded westward, a series of numbered treaties were entered into with the Indian nations. These treaties, which cover a large part of Canada in Ontario and the prairie provinces, on their face do cede land to the Crown in return for promises of protection, assistance, and hunting and fishing rights, and the

\[48\] Supra note 39 at 1105.
reservation of portions of the treaty lands for the Indians. There are still specific land claims by Aboriginal peoples in the treaty areas, but these claims are based on treaty promises that have not been fulfilled rather than on Aboriginal rights.

By the 1920s, when the last of the numbered treaties had been entered into, there remained vast areas of Canada where no treaty making had taken place. These included Inuit lands in Labrador, northern Quebec and the Northwest Territories, and Indian lands in British Columbia, the Yukon, and the Northwest Territories. As to these lands, the federal government, supported by the provinces, took the position that the Aboriginal peoples had no title, and there was no need to enter into treaties with them. This policy changed after the decision of the Supreme Court of Canada in *Calder v. British Columbia (A.G.)*. In that case, six of the seven judges held that the Nishga people of British Columbia possessed Aboriginal rights to their lands that had survived European settlement. The six judges, however, split evenly on the question of whether those rights had been extinguished or not. After *Calder*, the federal government resumed the treaty-making process in the regions of Canada where there were no treaties.

At the time of writing (1993), comprehensive land claims have been settled with the Inuit and Cree of the James Bay area of northern Quebec, the Inuvialuit of the Mackenzie Delta-Beaufort sea region, the Gwich’in of the western Northwest Territories, the Inuit of the Nunavut region in the eastern Northwest Territories, and the Yukon Indians. These agreements grant large areas of land to the Aboriginal signatories, as well as considerable sums of money. In addition, however, the agreements constitute sophisticated codes with respect to such matters as development, land use planning, water management, fish and wildlife harvesting, forestry, and mining. The general governmental structures that are contemplated by these codes contain guaranteed representation for the Aboriginal people, who are thereby assured a continuing role in the management of the resources of the entire region covered by the agreement, not just their own settlement land.

D. Self-government

The comprehensive land claims process would seem to be the ideal forum for the definition of the right of self-government of the claimant group. Initially, however, the federal government felt

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committed to the constitutional amending process (described above) as the exclusive vehicle for the entrenchment of rights of self-government. Now, the federal government is willing to negotiate self-government agreements as part of the comprehensive land claims process, with the important proviso that such agreements are not to be regarded as giving rise to section 35 treaty rights. The federal government's concern, no doubt, is not to preempt the constitutional amendment process in which the provinces would be participants along with the Aboriginal organizations.

E. Participation in the Amending Process

This brings me to my final point, which is the constitutional amending process itself. As noted in the previous paragraph, constitutional amendments, by their very nature, can alter the constitution itself and everything else, including Aboriginal and treaty rights. In the past, constitutional amendments have had the effect of altering Indian treaty rights.$^{50}$ It seems essential, therefore, that Aboriginal peoples be participants in the amending process when their interests are implicated. For example, the accession to provincial status of the federal territories could inadvertently impair rights acquired under land claims agreements if Aboriginal interests were not being watched carefully.$^{51}$

F. The Charlottetown Accord

The Charlottetown Accord proposed that the Constitution be amended to recognize explicitly "that the Aboriginal peoples of Canada have the inherent right of self-government within Canada" (clause 41). This inherent right was to be non-justiciable for a period of five years (clause 42) during which (as well as afterwards) the federal and provincial governments were committed to the negotiation of self-

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$^{51}$ An important step in this direction was taken in 1983, when section 35.1 was added to the Constitution Act, 1982 by section 3 of the Constitution Amendment Proclamation, 1983, supra note 46. In section 35.1, Canadian governments are said to be "committed to the principle" that there be Aboriginal participation in constitutional conferences before amendments are made to the specifically Aboriginal provisions of the Constitution.
government agreements. The self-government agreements would be justiciable and would create treaty rights that were protected by section 35 of the Constitution Act, 1982 (clause 46). The Charter of Rights would apply to the institutions of self-government (clause 43).

With respect to future constitutional amendments, the Accord proposed that aboriginal consent would be required to those amendments “that directly refer to the Aboriginal peoples” (clause 60).

G. Prognosis

The failure of the Charlottetown Accord was a serious set back for the movement towards Aboriginal self-government. However, that movement can and will continue within the framework of the present Constitution. Self-government agreements are now being negotiated by several Aboriginal nations, and there is no reason other than current federal government policy why the agreements, which are modern treaties, cannot have the constitutional protection of section 35 of the Constitution Act, 1982. No amendment of the Constitution is needed to set up Aboriginal governments, nor to give them constitutional protection.

VI. CONCLUSION

The Charlottetown Accord was an ambitious attempt to achieve a national settlement of a variety of constitutional grievances, and especially those arising from Quebec nationalism, western alienation, and Aboriginal deprivation. As is the nature of any settlement, the federal, provincial, territorial, and Aboriginal leaders accepted the need for compromise, and the Accord gave no leader all that he or she would have desired. When the leaders turned to the hustings to defend their handiwork in the national referendum, they were unsuccessful in persuading a majority of the people of the need for reconciliation and compromise. Those opposed to the Accord were more successful in characterizing the Accord’s compromises as faults, and in questioning the need for comprehensive constitutional renewal.

The thesis of this paper has been that, without constitutional amendment, Canada can function reasonably effectively to deal with the grievances that gave rise to the Charlottetown Accord. One should also take comfort from the fact that it is always difficult to amend a country’s constitution. Machiavelli, writing in 1513, said “there is no more
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delicate matter to take in hand, nor more dangerous to conduct, nor more doubtful in its success, than to set up as a leader in the introduction of changes [to the constitution].”52 Machiavelli would not have been surprised by the referendum result.

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