

5-1-1993

Canadian Discord Over the Charlottetown Accord: The Constitutional War to Win Quebec

Jeffrey J. Cole

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>

 Part of the [Comparative and Foreign Law Commons](#), [Constitutional Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Cole, Jeffrey J. (1993) "Canadian Discord Over the Charlottetown Accord: The Constitutional War to Win Quebec," *Penn State International Law Review*: Vol. 11: No. 3, Article 7.

Available at: <http://elibrary.law.psu.edu/psilr/vol11/iss3/7>

This Comment is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

Canadian Discord Over the Charlottetown Accord: The Constitutional War to Win Quebec

I. Introduction

"Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992 — Yes or No?"¹ This was the question posed to the citizens of Canada in a nation-wide referendum held on October 26, 1992.²

The agreement of August 28, 1992, known as the Charlottetown Accord, proposed a package of sixty amendments to Canada's Constitution.³ Though the Accord addressed issues ranging from aboriginal self-rule to the establishment of new provinces, the heart of the agreement was a collection of provisions designed to keep Quebec from seceding from Canada.⁴

The natural isolation of French-speaking Quebec from English-speaking Canada has its origins in the colonial period of North America.⁵ The rift has persisted to modern times along language and cultural lines, with the possibility of Quebec's secession never far from the front of Canadian consciousness.⁶ When Canada severed its last legal ties with Great Britain in 1982 with a new constitution, it did so without Quebec's consent, the only province of Canada's ten not to approve.⁷

1. Terrance Wills, *Straight Answers to Your Big Questions; A Plain Guide to the Referendum*, MONTREAL GAZETTE, Oct. 17, 1992, at B4.

2. *Id.*

3. Martin W.G. King, *Canada's Prime Minister Faces Crisis After Referendum*, S.F. CHRON., Nov. 5, 1992, at A29.

4. *Why Canada is Still There*, WASH. TIMES, Nov. 9, 1992, at E2. The elements of the Charlottetown Accord not related to Quebec are not intended to be dismissed as unimportant in this Comment. They address substantial concerns. However, the primary purpose in drafting the agreement, and the public's foremost consideration in voting on it, was the Quebec issue. *Id.*

5. In a recent book on the modern constitutional crisis over Quebec, the editor comments on the extent of historical inertia that has brought Canada to the critical juncture of 1992: "Indeed, the current constitutional crisis in Canada is so deeply rooted in past events that it is hard to find a reasonable cutoff point in providing historical background for the story." R. Kent Weaver, *Constitutional Conflict in Canada*, in *THE COLLAPSE OF CANADA?* 1, 4 (R. Kent Weaver ed., 1992) [hereinafter *Conflict in Canada*]. This Comment is not intended to be an exhaustive Canadian history, but it will discuss the cultural and constitutional past to the extent necessary to put the Charlottetown Accord in a meaningful context.

6. R. Kent Weaver, *Political Institutions and Canada's Constitutional Crisis*, in *THE COLLAPSE OF CANADA?* 7 (R. Kent Weaver ed., 1992) [hereinafter *Political Institutions*].

7. See *infra* text accompanying note 85.

This uneasy and unnatural state of confederation has persisted to the present, despite repeated attempts to bring Quebec into the constitutional fold.⁸ The reason for Quebec's aversion to placing itself under formal federal control by signing the 1982 constitution is the same for its continuing flirtation with secession and sovereignty: Quebec desperately wants to preserve its distinctive French language culture.⁹ Quebec's desire for greater internal autonomy, free from central interference, embodies the classic federal struggle, a struggle which must end in either secession or compromise.¹⁰ The compromise that was the Charlottetown Accord was soundly defeated by Canadians inside and outside of Quebec on October 26, 1992.¹¹

The constitution would not be changed, and the Quebec crisis would linger. This Comment will analyze Canada's constitutional crisis over Quebec with a close look at the present, and a searching gaze to both the past and the future. Part II of this Comment discusses the historical underpinning of the modern Anglo-Franco rift that is at the core of Canada's persisting constitutional impasse. Part III discusses the complicated story of a decade's failed constitutional bargaining that has led to the critical juncture of the Charlottetown Accord. Part IV details the adoption of the Charlottetown Accord, the Accord's proposed amendments to the Constitution, and the legal arguments against those amendments. Part V offers some explanations for the failure of the Charlottetown Accord, and some possible implications of that failure for the future of Canada. Finally, Part VI offers some concluding remarks on the recent constitutional history of Canada.

II. History of Anglo-Franco Relations in Canada

A. Colonial Conflict

The current internal conflict that threatens to break Canada into two nations has its roots in an earlier contest between two European nations. The competing colonial agendas of Great Britain and France left a legacy of cultural division that has survived long after the departure of both countries from the North American continent.

France made the first bid for North America in 1534, when Jacques Cartier claimed the continent on present-day Canada's Atlantic shore.¹² This early venture was short-lived though, for when Cartier's "gold" proved to be iron pyrites, France abandoned her

8. See *infra* text accompanying notes 102, 168.

9. See *infra* text accompanying note 113.

10. Keith G. Banting, *If Quebec Separates: Restructuring Northern North America, in THE COLLAPSE OF CANADA?* 159, 159-61 (R. Kent Weaver ed., 1992).

11. Anthony Wilson-Smith, *What Happens Next*, MCLAN'S, Nov. 2, 1992, at 12.

12. DESMOND MORTON, *A SHORT HISTORY OF CANADA* 16 (1983).

claim for seventy years.¹³

When Samuel de Champlain came to the St. Lawrence River Basin in the dawn of the seventeenth century, the French were in North America to stay.¹⁴ New France was built not on gold, but on the fur trade.¹⁵ As fur supplies were depleted in the area immediately surrounding the St. Lawrence River Basin, New France expanded westward across modern Canada, and to the south along the Ohio and Mississippi rivers.¹⁶ This expansion made inevitable the ensuing conflict with Great Britain.¹⁷

With the rise of capitalism in 1650, England adopted a policy of aggressive colonialism.¹⁸ This policy produced two British efforts that contributed to England's eventual supremacy in North America. The first was an enforced settlement of the colonies, by which thousands of "rouges, vagrants and those who have no way of livelihood" were forcibly translocated to America to work the English plantations.¹⁹ The second effort was a massive military buildup which saw the British Navy swell from 39 ships in 1649 to 229 in 1660.²⁰

In 1664, England seized New Holland (present-day New York) from the Netherlands.²¹ This acquisition gave the British an unbroken string of colonies from Spanish Florida to New France, and the stage was set for the series of Anglo-Franco wars that would ultimately result in English dominion over North America east of the Mississippi.²²

The first round of conflict, which lasted from 1689 to 1713, ended with substantial concessions of land to the British.²³ These concessions foretold a willingness of France to sacrifice Canada that would be more fully realized in 1763.

13. *Id.*

14. *Id.* at 16-17.

15. *Id.* at 17.

16. STANLEY B. RYERSON, *THE FOUNDING OF CANADA* 130 (1963).

17. *Id.* at 132.

18. *Id.* at 134.

19. *Id.* at 135. While the English Atlantic seaboard colonies grew rapidly during this period, the development of New France was painfully slow, due in part to France's single-minded concentration on the fur trade, and to a lack of ice-free ports during a great portion of every year. *Id.* at 136.

20. RYERSON, *supra* note 16, at 135.

21. *Id.* at 136.

22. *Id.* at 136-37.

23. *Id.* at 147. One of the French concessions of 1713 was the Atlantic peninsular region of Acadia. *Id.* at 147. The 8,000 French Canadians who remained in Acadia would suffer terribly at the hands of the British in the second Anglo-Franco conflict of 1745-1763. In 1755, more than 6,000 French Acadians were deported as their homesteads were burned. RYERSON, *supra* note 16, at 186. As an isolated wartime event, the Acadian tragedy's importance in modern times may be only a small seam in a greater cultural unravelling, but its effect on contemporary French Canadians was clear: "The tragedy of the Acadians burned deep into the consciousness of the French Canadians on the St. Lawrence, and was not forgotten when later their own survival as a national community was at stake." *Id.* at 187.

The fall of New France under English rule was to be expected even before the "French and Indian Wars" of 1756-1763. Authorities in Paris considered abandoning the colony as late as 1755.²⁴ With the fall of Montreal in 1760, New France became occupied territory.²⁵ New France was formally surrendered to Great Britain three years later under the Treaty of Paris.²⁶

B. *British Rule*

The advent of British rule in northern North America began the French Canadian struggle for self-preservation — a struggle which, to the present day, serves to divide Canada. This factor of cultural separation imbues the English conquest described in the previous section with new meaning: "It was widely claimed at the time that Britain had warred on France in order to spread . . . 'the inestimable benefits of political liberty and the Protestant religion.'"²⁷ This seed of anglicization, planted in a colonial war, would not grow in New France. When the British assumed power, "Quebec retained a strongly entrenched population that was French-speaking, passionately Catholic, and utterly determined to avoid assimilation with its English-speaking Protestant conquerors."²⁸

The early years of English rule in Canada were characterized by an ostensible effort by the British to conciliate the French Canadians, coupled with a hidden agenda of anglicization. The imposition of a minority Anglo-colonial ruling class on a majority of French Canadians soon led to demands for an elected assembly.²⁹ This demand was granted by the Constitutional Act of 1791, which also served to divide the Province of Canada into two provinces: Upper Canada, corresponding to modern-day Ontario; and Lower Canada, modern Quebec.³⁰

Even the grant of representative government had an ulterior purpose. A major British proponent of the measure argued that the creation of Lower Canada with an elected assembly would be "the best means of conciliating the French inhabitants, as they would, by this measure, be made sensible that there was no intention to force

24. *Id.* at 191.

25. *Id.* at 196.

26. *Political Institutions*, *supra* note 6, at 17. At the Paris negotiations, France was faced with a choice in their bargaining: Canada, or the tiny Carribean sugar island of Guadaloupe. France chose Guadaloupe. RYERSON, *supra* note 16, at 196-97.

27. RYERSON, *supra* note 16, at 199.

28. *Political Institutions*, *supra* note 6, at 18. The British immediately took two steps to redefine their new colony. First, the sprawling, ill-defined vastness on New France was cut down to a smaller area along the St. Lawrence, roughly corresponding to the area now represented by eastern Ontario and Quebec. Second, New France was renamed the "Province of Quebec." RYERSON, *supra* note 16, at 201.

29. RYERSON, *supra* note 16, at 204.

30. *Id.* at 227.

British laws upon them."³¹ At the same time, the same man openly expressed his hope that an elected assembly "would in the long run lead to the complete anglicizing of the French Canadians."³²

The actual effect of an elected assembly was just the opposite, and it was in the new parliamentary arena that two strikingly modern issues first arose. First, the assembly became a forum for airing French Canadian grievances against English rule.³³ Second, the very first Lower Canadian Assembly, that of modern Quebec, saw a bitter conflict over "the use of French equally with English as an official language."³⁴

French Canadian nationalism continued to grow in the early 1800s. The English-speaking merchant class called for the anglicizing of the French Canadian community, and, with the help of the British colonial governors, sought to "impose their own minority rule in defiance of the elective Assembly."³⁵ This campaign met with a "wave of French Canadian national resentment."³⁶

By 1837, Anglo-Franco tensions in Lower Canada had reached a new peak.³⁷ The predominantly Francophone assembly had demanded executive power in the "Ninety-Two Resolutions" of 1834.³⁸ Great Britain rejected this demand and instructed its English governor to "govern the colony with or without an elected Assembly."³⁹ The armed rebellion that broke out in 1837 was easily snuffed out by the British in Quebec and in St. Eustache north of Montreal.⁴⁰ The effect of this failed rebellion on the French Canadian psyche was clear: "As in 1760, the *Canadiens* had been defeated. The bitterness of a second conquest engulfed the Lower Canadian leaders, leaving them paralyzed and despairing. Others would have to find strength and ingenuity to survive."⁴¹

By the 1860s England was weary of the financial burden of Canada and concerned with the rising power of Germany in Europe.⁴² It was in this eagerness to free itself from North American entangle-

31. *Id.* at 229.

32. *Id.*

33. RYERSON, *supra* note 16, at 229.

34. *Id.*

35. *Id.* at 278.

36. *Id.* This rise in French Canadian nationalism, in response to the concurrent English campaign to "unfrenchify" Quebec, saw the founding, in 1806, "of the newspaper *Le Canadien* as organizer and agitator for the popular cause." *Id.* at 279-80.

37. MORTON, *supra* note 12, at 27. Massive immigration produced, for the first time, a landless laboring class. *Id.* at 26. In 1832, there was widespread belief that the British had deliberately planned the cholera plague that had claimed hundreds of French Canadian lives. *Id.* at 27.

38. *Id.* at 27.

39. *Id.*

40. MORTON, *supra* note 12, at 28.

41. *Id.*

42. *Id.* at 86.

ments that the British Parliament united the four provinces of Nova Scotia, New Brunswick, Ontario, and Quebec into the new Dominion of Canada, by the British North America Act of 1867.⁴³ Quebec's fear of anglicization was at once a source of reluctance to join the new confederation, and an even greater motivation to do just that; the prevailing consensus was that only by joining Canada could the French identity be preserved against the expansionist tendencies of the United States.⁴⁴ British rule was in effect over, but Quebec's primary consideration of preserving its distinct society remained intact.

C. *Modern Conflict*

Not even the unifying power of the First World War could bring the French and English elements of Canada together in the early twentieth century. French Canadians' popular disinterest in the war was voiced by the sentiment of the Francophone leadership, who said that "[t]he real enemies of French Canada were not the Germans, . . . 'but English-Canadian anglicizers, the Ontario intriguers, or Irish priests.'"⁴⁵

Although Canada was not truly unified as the twentieth century wore on, it was not until the late 1960s that the modern signs of a Canada torn apart began to appear. It was in the late 60s and early 70s that the present factions crystallized into separatists and federalists, both inside and outside of Quebec.⁴⁶

Pierre Trudeau, a Francophone native of Quebec, became Prime Minister of Canada in 1968 on a platform of Canadian unity.⁴⁷ Trudeau rejected the idea of special status for Quebec. Instead, he envisioned Canada as a homeland for both French and English, and he acted on this vision with the passage of the Official Languages Act of 1969.⁴⁸

Meanwhile, in Quebec, Robert Bourassa rose to leadership of the federalist Parti Libéral.⁴⁹ In direct opposition to Bourassa's fed-

43. Clark R. Cahow, *Comparative Insights into Constitutional History: Canada, The Critical Years*, in *RESHAPING CONFEDERATION* 33, 47 (Paul Davenport & Richard H. Leach eds., 1984).

44. KENNETH MCNAUGHT, *THE HISTORY OF CANADA*, 133 (1970). Three hundred and thirty-three years after Jacques Cartier claimed Canada for France, it was another Cartier who urged his fellow French Canadians into the new Confederation. George Etienne Cartier insisted that it was "only within a new political nation of British North America that the cultural nation of French Canada could be safe from American conquest or English assimilation." MORTON, *supra* note 12, at 14.

45. MORTON, *supra* note 12, at 149.

46. *Id.* at 252-53.

47. *Id.* at 252.

48. *Id.* The Official Languages Act provided for bilingual districts, "and for the transformation of the federal government and its agencies into institutions where Canadians of either official language could find service and employment." *Id.*

49. MORTON, *supra* note 12, at 253.

eralist agenda was the Parti Québécois, which was created in 1968.⁵⁰ The Parti Québécois promoted *souveraineté-association*, political sovereignty combined with economic association with Canada, and for the first time legitimized the idea of Quebec's secession.⁵¹

The separatist cause that was pursued politically by the Parti Québécois spilled over to the public, who resorted to demonstrations and rioting in 1969.⁵² The nationalistic rioting of 1969 proved to be only a prelude to the volatile events of 1970, and a crisis that fully exposed the depth of the modern Anglo-Franco division. On October 5, 1970, a British Trade Commissioner was kidnapped in Montreal.⁵³ Responsibility for this act, and for the subsequent abduction of Bourassa Labor Minister Pierre Laporte, was claimed by a separatist terrorist group, the *Front du Liberation du Québec*.⁵⁴ Such was the intensity of public sympathy for the terrorists that Trudeau declared an apprehended insurrection in Quebec and proclaimed the War Measures Act.⁵⁵ Ten thousand federal troops were sent into Montreal, Quebec, and Ottawa.⁵⁶

When the strangled body of Pierre Laporte was found a few days later, the "terrorists were no longer heroes."⁵⁷ The "apprehended insurrection" of 1970 was over, but the Parti Québécois and the idea of Quebec sovereignty grew. In 1990, for the first time, Quebec's secession from Canada attained majority support in Quebec.⁵⁸

The history of Anglo-Franco tensions in Canada, from the founding nation days of New France, through the British subjugation, to the October crisis of 1970, is long and complex. It would be a mistake to underestimate the relevance of these seemingly antiquated struggles to the present constitutional impasse. After all, the motto of Quebec still looks to the past: *Je me souviens* — "I remember."⁵⁹

III. 1980-1990: The Constitutional Prelude to the Charlottetown Accord

If the greater issue of Quebec separatism was shaped by over

50. Stéphane Dion, *Explaining Quebec Nationalism, in THE COLLAPSE OF CANADA?* 77, 79 (R. Kent Weaver ed., 1992).

51. *Id.*

52. MORTON, *supra* note 12, at 253.

53. *Id.* at 254.

54. *Id.*

55. *Id.* at 254-255.

56. *Id.* at 255.

57. MORTON, *supra* note 12, at 255.

58. Dion, *supra* note 50, at 79. The Parti Québécois won control of Quebec's provincial legislature in 1976, and remained in power until 1985, when Bourassa's Liberal Party regained control. *Id.* at 80.

59. *Id.* at 78.

300 years of cultural division, it has been the constitutional wrangling since 1980 that has more directly precipitated the Charlottetown Accord. Twice during the 1980s, with the patriation of the constitution in 1982, and the Meech Lake Accord in 1987, attempts were made to secure Quebec's position in the Canadian Confederation.⁶⁰ Quebec rejected Canada in 1982, and Canada rejected Quebec in 1987.⁶¹ Though both projects failed to solidify Quebec's position in Canada, they did shape the constitutional issues that would be addressed by the Charlottetown Accord in 1992. In the referendum on the Charlottetown Accord, Quebec and Canada rejected each other.⁶²

A. *The Patriation of Canada's Constitution*

The catalyst for Canada's persisting constitutional strife over Quebec came in the form of a 1980 sovereignty referendum in the province. The purpose of the referendum was to "mobilize public opinion within Quebec and thereby pressure the federal Government to negotiate a legal solution with the Quebec Government."⁶³

The referendum was organized by the separatist, Francophonic Parti Quebecois government of Quebec.⁶⁴ Their separatist proposal offered a deliberately moderate choice in an effort to win broad-based support.⁶⁵ In truth, this was not a referendum on sovereignty, but a plebiscite asking for a mandate to negotiate for political sovereignty, coupled with continued economic association with the rest of Canada.⁶⁶

Federalists inside and outside of the province were trying equally hard to defeat the sovereignty referendum. Prime Minister Pierre Trudeau promised Quebec voters that "a 'no' to sovereignty-association was not a vote for the status quo, and that the defeat of the referendum would be followed by constitutional change to better accommodate Quebec's aspirations."⁶⁷ Federalism won decisively in the May 20, 1980 referendum by a popular vote of 59.5% to 40.5%.⁶⁸ However, the Parti Quebecois had succeeded in provoking federal negotiations, for immediately following the referendum's de-

60. See *infra* text accompanying notes 63-100, 101-28.

61. *Id.*

62. Bob McKenzie, *Next Election Could See Rise of Separatists in Parliament*, *TORONTO STAR*, Oct. 27, 1992, at B4.

63. Edward McWhinney, *The Constitutional Patriation Project, 1980-1982*, 32 *AM. J. COMP. L.* 241, 242 (1984).

64. *Id.*

65. *Id.* at 243.

66. *Id.* The Parti Québécois still offered sovereignty-association, and actual separation would only follow a second referendum held for the final choice of Quebec voters. *Id.*

67. Peter W. Hogg, *The New Canadian Constitution*, 32 *AM. J. COMP. L.* 221 (1984).

68. *Id.*

feat, Trudeau presented the constitutional patriation project.⁶⁹ The constitutional war to win Quebec, which may have been lost at Charlottetown, had begun.

By "patriating" their constitution, Canadians eliminated the last vestigial authority of England's Parliament over their country.⁷⁰ Though Canada became a truly sovereign nation in 1931 by the Statute of Westminster, "authority to amend the Constitution remained in London due to an inability of the provinces to agree on a Canadian alternative."⁷¹ This "Canadianization" of the 1867 constitution, the adoption of an autonomous constitutional amending formula, and the creation of the Canadian Charter of Rights and Freedoms were the three major elements of the 1982 patriation package.⁷²

In the early stages of the patriation project, Trudeau was true to his promise to negotiate with Quebec and the other provinces on the specifics of constitutional change. The Prime Minister met with the ten provincial premiers throughout the summer and early fall of 1980, but failed to achieve any agreement.⁷³

Trudeau then resolved to proceed unilaterally, and on October 6, 1980, the Prime Minister introduced into the Canadian Parliament the first version of the patriation package.⁷⁴ The package, including an autonomous amending formula and the Charter of Rights and Freedoms, was passed by the House of Commons and the Senate on April 23 and 24, 1981, respectively.⁷⁵ This first incarnation of the patriation package was never sent to England for enactment by the United Kingdom Parliament, because by this time Trudeau's unilateral patriation initiative was under challenge in the Supreme Court of Canada.⁷⁶

By abandoning provincial negotiations and proceeding solely on the federal level, Trudeau had departed from his promise, made to Quebec voters before their sovereignty referendum, to amend the

69. McWhinney, *supra* note 63, at 243.

70. Hogg, *supra* note 67, at 222.

71. Gil Remillard, *The Constitution Act, 1982: An Unfinished Compromise*, 32 *Am. J. Comp. L.* 269, 279 (1984). This arrangement, requiring Great Britain to amend Canada's constitution, proved to be a formality, as the English Parliament always acted according to Canada's wishes in this regard. *Id.* Canada's constitution, before and after the 1982 patriation, is actually a British statute, the British North America Act of 1867. McWhinney, *supra* note 63, at 241. Patriation was significant because it gave Canada sole power to amend that statute. *Id.*

72. McWhinney, *supra* note 63, at 252.

73. Hogg, *supra* note 67, at 221-22.

74. *Id.* at 222.

75. *Id.* The passage of Trudeau's package in the federal parliament was a foregone conclusion, because in the parliamentary system of government, the chief executive is the head of the controlling party in the legislative branch. *Id.*

76. *Id.*

Constitution to better accommodate Quebec's aspirations.⁷⁷ Only two provinces supported the Prime Minister's initiative, and Quebec, along with two other provinces, had appealed the legitimacy of a unilateral patriation to the Supreme Court of Canada.⁷⁸

Two critical questions were presented to the Court: (1) "Was the consent of the provinces to the proposed amendments required by law?, and (2) Was the consent of the provinces to the proposed amendments required by convention?"⁷⁹ The Court, in a decision of September 28, 1981, answered no to the first question and yes to the second.⁸⁰ In a strictly legal sense, the federal government could proceed with the patriation with the support of only Ontario and New Brunswick.⁸¹ However, the Supreme Court added that "such a patriation would be illegitimate because it would violate a constitutional convention requiring patriation to be undertaken with the agreement of a substantial number of provinces."⁸²

In an effort to legitimate the technically legal patriation, Prime Minister Trudeau again convened with the provincial premiers.⁸³ By providing an "override clause" in the Charter of Rights and Freedoms, and substituting a new constitutional amending formula, Trudeau was able to gain the legitimizing support of nine provinces.⁸⁴ Quebec was the lone dissenter.⁸⁵ Quebec's dissent was rooted in the two substantive elements of the patriation package — The Charter of Rights and Freedoms and the new amendment procedure.

The Charter, while guaranteeing the rights of Canadian citizens, "directly challenge[d] the legislative authority of the Quebec

77. See *supra* text accompanying note 67. The actual outcome of the 1982 patriation was not at all what Quebec voters had expected after Prime Minister Trudeau's pre-referendum rhetoric: "At that time Trudeau pledged to renew federalism if the referendum of the Parti Quebecois was rejected. In Quebec the expression 'renewed federalism' was broadly understood as synonymous with 'new powers for Quebec in the federation.' Since no gain of that sort for Quebec was included in the Constitution Act of 1982, many Quebecers felt betrayed by Trudeau." Dion, *supra* note 50, at 111.

78. Hogg, *supra* note 67, at 222-23.

79. *Id.* at 223. The Supreme Court decision, *Re Resolution to Amend the Constitution* [1981], can be found at 1 S.C.R. 753.

80. *Id.*

81. Remillard, *supra* note 71, at 270.

82. *Id.*

83. *Id.*

84. Hogg, *supra* note 67, at 223. This override provision, commonly known as the "notwithstanding clause," allows Parliament or a provincial legislature to enact laws that contravene certain provisions of the Charter of Rights and Freedoms. This override clause provides: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." CAN. CONST. (Constitution Act, 1982) pt. I, § 33.

85. Hogg, *supra* note 67, at 223. In a second appeal to the Supreme Court following the agreement of the other nine provinces to the patriation, Quebec asked if a "substantial number of provinces" must include the agreement of Quebec. The Supreme Court held that it did not in *Re Attorney General of Quebec and Attorney General of Canada*, 140 D.L.R. (3d) 385 (1982). Remillard, *supra* note 71, at 271.

National Assembly in matters of language and education.”⁸⁶ The language and education rights in the Charter, found in sections 16 through 23, are immune from provincial override through the use of the notwithstanding clause of section 33. The notwithstanding clause can be invoked only to override rights found in sections 2 and 7 through 15 of the Charter.⁸⁷ The Charter’s language rights ensure the equality of the French minority outside of Quebec, as well as the English minority within Quebec. Sections 16 through 23 interfere with the ability of the Quebec legislature to promote the French language, and Parti Quebecois Premier Rene Levesque declared that “he would never permit Quebec’s legislative powers to be tampered with without his consent.”⁸⁸

For better or for worse, Quebec’s legislative power was impeded by the Charter. In 1983, Quebec’s Superior Court struck down a Quebec statute that limited the right to an English education to children whose parents had received an English education in Quebec.⁸⁹ The Court relied on section 1 of the Charter, a section immune to provincial override, which provides that “a rule of law may only restrict a right or liberty in a reasonable way, as that expression is understood in a free and democratic society.”⁹⁰

The constitutional amendment procedure adopted by the 1982 patriation was unacceptable to Quebec in two ways.⁹¹ The first source of Quebec’s dissatisfaction involves the right of any province to opt out of new amendments affecting a “province’s legislative authority, property rights, or any other right or privilege.”⁹² Such a dissenting province is entitled to federal compensation if the amendment pertains to education or culture, so that the province may fund its alternative program.⁹³ This opt-out right implicitly recognized Quebec’s unique cultural status by allowing it to pursue alternative programs in education and culture.⁹⁴ Quebec was dissatisfied because federal compensation for the opt-out procedure extended only to education and culture. Quebec would not be compensated if it chose to pursue an alternative environmental program, and Quebec’s taxpayers would be paying for the federal amendment Quebec could

86. Remillard, *supra* note 71, at 271-72.

87. *See supra* note 84.

88. Remillard, *supra* note 71, at 270.

89. *Id.* at 273; Quebec Association of Protestant Schoolboards v. P.G. an Quebec et al, C.S. 673 (1982).

90. Remillard, *supra* note 71, at 273 (citing Can. Const. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1).

91. Remillard, *supra* note 71, at 276.

92. *Id.* (CAN. CONST. (Constitution Act, 1982) pt. V. (Procedure for Amending Constitution of Canada), § 38).

93. Remillard, *supra* note 71, at 276 (CAN. CONST. (Constitution Act, 1982) pt. V (Procedure for Amending Constitution of Canada), § 40).

94. Remillard, *supra* note 71, at 276.

opt out of, as well as the provincially adopted alternative.⁹⁵ This appetite for provincial autonomy in all areas illustrates the federal struggle at work in 1982, as well as in the present. The concession of the right to reject new federal education or culture amendments was not enough. Quebec wanted complete freedom from federal interference.

Quebec's second point of contention over the amending formula is that the formula makes Quebec vulnerable to changes in federal institutions such as the Parliament and the Supreme Court.⁹⁶ Article 42 of the 1982 Constitution Act provides that amendments regarding the Court and principles of proportionate representation in the House of Commons must be made according to article 38, and are not subject to the opt-out procedure of article 40.⁹⁷ The effect of article 42 is that "certain fundamental rules of Canadian federalism could be modified against the wishes of Quebec, which accounts for [] 25% of the Canadian population."⁹⁸ To Quebec, a province with a demonstrated aversion to federal interference in provincial matters, such a possibility was in 1982, and is today, a cause for grave concern.

When the patriation project went into effect as the Constitution Act on April 17, 1982, it was without Quebec's consent.⁹⁹ Far from accommodating the special concerns of Quebec, the Constitution Act actually worked against Quebec's interests. Instead of achieving a major purpose of the project, that of solidifying Quebec's position in the Confederation, the lone dissenting province was, more than ever,

95. *Id.* at 277.

96. *Id.*

97. *Id.* Article 42 provides, in relevant part:

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

- (a) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;
- (b) the powers of the Senate and the method of selecting Senators;
- (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
- (d) subject to paragraph 41(d), the Supreme Court of Canada

CAN. CONST. (Constitution Act, 1982) pt. V (Procedure for Amending Constitution of Canada), § 42.

98. Remillard, *supra* note 71, at 277. Article 38 of the 1982 Constitution Act reads, in relevant part:

38(1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

- (a) resolutions of the Senate and House of Commons; and
- (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty percent of the population of all the provinces.

CAN. CONST. (Constitution Act, 1982) pt. V (Procedure for Amending Constitution of Canada) § 42.

99. Hogg, *supra* note 67, at 223-24.

illuminated as an outsider.¹⁰⁰

B. *The Failure at Meech Lake*

The 1987 Meech Lake Accord was an attempt to correct the damage done by the 1982 patriation of the constitution.¹⁰¹ When Brian Mulroney became prime minister of Canada in 1984, he condemned Quebec's isolation in 1982, and "committed himself to reintegrate Quebec in the constitution with 'honor and enthusiasm.'"¹⁰²

To this end, Mulroney convened with the ten provincial premiers at Meech Lake, and quickly reached an agreement on June 3, 1987.¹⁰³ Only five years after the constitutional overhaul of 1982, the Meech Lake Accord purported to further amend Canada's constitution, this time to Quebec's satisfaction.¹⁰⁴

The Meech Lake proposals directly addressed Quebec's sources of discontent with the Constitution Act of 1982. Quebec was dissatisfied with that document because it allowed federal control over Quebec through the Charter of Rights and Freedoms and the constitutional amending formula. The Meech Lake proposals, which sought to accommodate Quebec on those points, represented a dramatic shift of power from the federal government to Quebec and the rest of the provinces.¹⁰⁵

Foremost among the Meech Lake proposals was a "distinct society" clause recognizing Quebec's unique French language character.¹⁰⁶ This clause, which by Meech Lake would have been added to the constitution, was more than a formality recognizing a social and

100. *Id.* at 223.

101. Alan Cairns, *Ritual, Taboo and Bias in Constitutional Controversies in Canada, or Constitutional Talk Canadian Style*, 54 SASKATCHEWAN L. REV. 121, 123 (1990).

102. Dion, *supra* note 50, at 112.

103. *Id.*

104. Quebec's assent was more easily extracted in 1987 than in 1982. In 1982, it was the secessionist Parti Quebecois government that had refused to agree with the Constitution Act. In 1987, however, Quebec's Premier was Robert Bourassa, whose Parti Liberal had wrested control of Quebec's government from the Parti Quebecois in 1985. The federalist Bourassa conditioned Quebec's assent on a modest five-point list of demands, and his terms were essentially met by the Meech Lake Accord. Dion, *supra* note 50, at 112.

105. Timothy S.B. Danson, *Nothing but Tears; The 1987 Constitutional Accord*, 13 QUEEN'S L. J. 110, 112 (1988).

106. Dion, *supra* note 50, at 112. The distinct society clause of the Meech Lake Accord provided, in relevant part:

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

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

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

The Constitutional Amendment, 1987, § 1.

historical fact.¹⁰⁷ It was to be an interpretive tool for the courts in reviewing Quebec language and education legislation.¹⁰⁸ The distinct society clause was Francophonic Quebec's answer to the language rights guaranteed by the 1982 Charter of Rights and Freedoms.

As discussed earlier, the language rights in the Charter are immune from provincial override through use of the notwithstanding clause.¹⁰⁹ However, article 1 of the Charter makes it clear that the rights set forth in the Charter are in no way absolute. Article 1 provides: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*"¹¹⁰ Without a distinct society clause, courts have construed article 1 narrowly against the provinces, so that statutes cannot easily limit Charter rights. This was the case in *Quebec Association of Protestant School Boards v. P.G. and Quebec et al.*, described in the previous subsection.¹¹¹ There, the Quebec Superior Court held that the Quebec statute limiting English educations to children of parents who had received English educations in Quebec was not a reasonable limit on Charter rights under article 1.¹¹² Since minority education rights are set out in section 23 of the Charter, a section which cannot be overridden with the notwithstanding clause, the Quebec statute was void.

With a distinct society clause, however, statutes such as the one described above could be held to be reasonable limits on Charter rights under article 1. This ability to override language rights, which would otherwise be secure from the notwithstanding clause, is what Francophonic Quebecers hoped to gain through a distinct society clause.¹¹³

The Meech Lake Accord, in addition to satisfying Quebec's problems with the Charter, also made broad concessions regarding constitutional amendments. Quebec rejected articles 38 and 40 of the Constitution Act, because provinces opting out of national shared cost programs in areas other than education and culture would not receive federal compensation.¹¹⁴ The Meech Lake Accord allowed a province to opt out of any national shared cost program, and still

107. Danson, *supra* note 105, at 112.

108. Deborah Coyne, *Constitutional Reform and The Charter of Rights and Freedoms*, 55 SASKATCHEWAN L. REV. 203, 211 (1991).

109. See *supra* note 84.

110. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1 (emphasis added).

111. See *supra* text accompanying notes 111-12.

112. *Id.*

113. Coyne, *supra* note 108, at 211.

114. See *supra* text accompanying notes 111-12.

receive federal compensation for its own alternative plan.¹¹⁵

Quebec's second source of dissatisfaction with the 1982 amendment procedure was centered on article 42, which allowed the possibility of federal institutions such as Parliament and the Supreme Court to be changed without Quebec's consent.¹¹⁶ Meech Lake purported to change this by requiring the unanimous consent of all ten provinces to constitutional amendments regarding Parliament and the Supreme Court.¹¹⁷ This proposal would have given Quebec, as well as the other nine provinces, the equivalent of a veto on any article 42 matter.

The Meech Lake Accord seemed to be the answer to all of Quebec's problems. Indeed, in becoming the first province to ratify Meech Lake on June 23, 1987, Quebec had signalled its willingness to rejoin Canada's constitutional family.¹¹⁸ But in these early days following the agreement of the premiers, Prime Minister Mulroney was premature in claiming that Quebec had been restored to the constitution.¹¹⁹ For the Meech Lake Accord to be amended into the constitution, it had to be ratified by the federal Parliament and all ten provincial legislatures by 1990.¹²⁰

Meech Lake came under increasingly greater criticism as the June 1990 ratification deadline approached. The secretive procedure by which eleven men had written the Accord was criticized as elitist and unresponsive to the will of the common Canadian.¹²¹

The substantive elements of the Accord came under even greater fire. Former Prime Minister Trudeau and others excoriated the distinct society clause, which they believed would lead to an erosion of Charter language rights for the Anglophone minority within Quebec and the Francophone minority outside of Quebec.¹²² The Meech Lake amending proposals were seen as a deadly blow to central power through an unacceptable increase in provincial power. The power to opt out of all federal shared cost programs with federal compensation, while attractive to the premiers at Meech Lake, was a power that could end such uniform, national programs such as child care.¹²³ Similarly, many predicted that the provincial veto right over article 42 amendments, amendments affecting proportionate

115. Bryan Schwartz, *Refashioning Meech Lake*, 17 MANITOBA L.J. 19, 40 (1987-1988).

116. See *supra* text accompanying notes 96-98.

117. Schwartz, *supra* note 115, at 42.

118. *Id.* at 21.

119. Dion, *supra* note 50, at 112.

120. *Id.*

121. Danson, *supra* note 105, at 110. Parliament and the several provinces to ultimately ratify Meech Lake held desultory public hearings on the accord, at which "independent" witnesses appeared to invariably support the Accord. Schwartz, *supra* note 115, at 20-21.

122. *Political Institutions*, *supra* note 6, at 62.

123. Danson, *supra* note 105, at 119-120.

representation and the Supreme Court, would lead to paralysis on the federal level.¹²⁴

In the end, two provinces failed to ratify the Accord by the June 1990 deadline.¹²⁵ The Meech Lake Accord, which had held great promise for Quebec, was dead. In truth, the rejection of the 1987 deal was deeper than the dissent of two provinces. A poll taken six months after the ratification deadline revealed that "nearly seventy percent of Canadians outside Quebec would not endorse further concessions to Quebec, even if it meant that the province would separate."¹²⁶

It was not surprising that separatist sentiment did soar in Quebec following the collapse of Meech Lake.¹²⁷ The nationalistic fervor that had subsided since the defeat of the 1980 sovereignty referendum had returned.¹²⁸ It is ironic that this renewed nationalism in Quebec was inspired by the failure of the Meech Lake Accord, an agreement that only three years before had offered hope for constitutional unity in Canada.

IV. The Charlottetown Accord

Work on the Charlottetown Accord began soon after the failure of Meech Lake. Like the Meech Lake Accord, Charlottetown had as its primary objective an end to the constitutional rift with Quebec. With such a goal, it was necessary to return to the core reasons for Quebec's constitutional disenchantment: the Charter of Rights and Freedoms and its lack of a distinct society clause; and the 1982 amending formula as it relates to opting out of national shared cost programs, and changes to federal institutions such as Parliament and the Supreme Court.

The Charlottetown Accord addressed these substantive issues differently from Meech Lake. It would have been foolish to try a failed approach a second time. Indeed, the Charlottetown Accord differed from Meech Lake in almost every respect, procedurally and substantively, except one: its ultimate failure.

A. *Procedural aspects of the Charlottetown Accord*

From the very beginning, the moving forces behind the Charlot-

124. *Id.* at 126.

125. Dion, *supra* note 50, at 113. Newfoundland and Manitoba were the provinces who blocked the Meech Lake Accord. Both provinces had voted new governments into power since 1987. In Manitoba, a native Canadian legislator prevented Meech Lake from coming to a vote through procedural delays. This was significant in light of aboriginal frustration with the accord's silence on aboriginal rights. *Political Institutions*, *supra* note 6, at 63.

126. Dion, *supra* note 50, at 113-14.

127. *Political Institutions*, *supra* note 6, at 25.

128. *Conflict in Canada*, *supra* note 5, at 3.

tetown Accord were determined to avoid the errors that inspired such public aversion to the Meech Lake Accord. Meech Lake was vilified as elitist for the secrecy with which a small group of high ranking government officials sought to adopt it.¹²⁹ By contrast, the evolution of the Charlottetown Accord could not have been more public and inclusive of special interests. The Special Joint Committee on a Renewed Canada travelled across the country seeking views on the early proposals.¹³⁰ This committee received 3,000 submissions and heard testimony from 700 individuals.¹³¹

Recommendations from this committee served as the basis for discussion at the first of the familiar meetings between the Prime Minister and the provincial premiers.¹³² Also present at this first meeting, held March 12, 1992 in Ottawa, were representatives of two groups that had been excluded from the Meech Lake meetings, the territories and Canada's aboriginal peoples.¹³³ These negotiations proceeded throughout the spring and summer of 1992 in various cities across Canada, until consensus was reached at Charlottetown on August 28, 1992.¹³⁴

Far more important than Charlottetown's adoption process was its ratification procedure, the means by which the August 28 agreement would be amended into the Constitution. As with the Meech Lake Accord, the Charlottetown Accord required the ratification of all the provinces and the federal Parliament.¹³⁵ Unlike Meech Lake, however, the populace of each province would control its legislature's ratification action through its response to a referendum on the Charlottetown Accord.¹³⁶ With a simple yes or no vote, the citizens

129. See *supra* note 121 and accompanying text.

130. *Canada Votes '92; Consensus Report on the Constitution, Preface*, TORONTO STAR, Sept. 21, 1992, at A12 [hereinafter *Canada Votes*].

131. *Id.* During this same period, all the provinces and territories "created forums for public consultation on constitutional matters." *Id.* The public was further informed of the issues by a series of six televised national conferences between January and March of 1992. These programs featured discussions on possible constitutional reform among experts, advocacy groups, and citizens. *Id.*

132. *Id.*

133. Thomas C. Palmer, Jr., *Woe Canada: Separation Anxiety North of the Border*, BOSTON GLOBE, Nov. 1, 1992, at 85.

134. *Canada Votes, supra* note 130, at A12. The agreement of August 28, 1992, entitled *Consensus Report on the Constitution: Charlottetown*, represented the initial consensus on proposed constitutional change. This raw agreement was eventually reworked into the Draft Legal Text of the Charlottetown Accord, October 9, 1992 [hereinafter *Draft Legal Text*]. This second document, which was mailed to every Canadian household before the referendum, is what is cited in this Comment.

135. *Canadian Voters Reject Reforms; Constitutional Plan's Fall a Blow to Efforts to Preserve Unity*, STAR TRIBUNE, Oct. 27, 1992, at 1A [hereinafter *Plan's Fall*].

136. *Id.* In theory, the referendum was a non-binding plebiscite. A provincial legislature could ratify the Accord even if the public rejected it in the referendum. However, Prime Minister Mulroney, who desperately wanted the Accord ratified, made the policy that the will of the people would determine the fate of the Charlottetown Accord. Mulroney said that it would be "'morally unacceptable' for a provincial legislature to pass the reforms after rejection by its voters." *Id.*

of Canada decided if their constitution would be amended on the basis of the agreement reached on August 28, 1992 at Charlottetown.¹³⁷

B. The substantive proposals of the Charlottetown Accord regarding Quebec

The broad agreement that was ultimately reached as the Charlottetown Accord had begun as a package narrowly focused on accommodating Quebec.¹³⁸ However, aboriginal leaders and representatives from the western provinces had their own demands, and the scope of the agreement was expanded to oblige them. The results of these accommodations were provisions for aboriginal self-rule and a reformed Senate in Parliament.¹³⁹ Still, the heart of the deal was the Quebec question, and the now familiar issues were confronted yet again, each with a new approach.

1. Recognition of Quebec as a Distinct Society.—The Charlottetown Accord recognized Quebec's distinctive French language culture, but quite differently from the distinct society clause of the more narrowly focused Meech Lake Accord.¹⁴⁰ As a result of the input from a greater variety of interest groups, the Charlottetown Accord melded this distinct society recognition into a more expansive "Canada Clause."¹⁴¹ In addition to recognizing Quebec as

137. See *supra* text accompanying footnotes 1 and 2.

138. *Plan's Fall*, *supra* note 135, at 1A.

139. Sections 1 and 35 of the Charlottetown Accord recognized the right of self rule for aboriginal peoples as one of three orders of government in Canada, along with the federal and provincial levels. *Draft Legal Text*, § 1, § 29 (Oct. 9, 1992).

Section 4 of the Charlottetown Accord proposed a Senate comprised of six senators from each province, in place of the current senate which allots senate seats by population. *Draft Legal Text*, § 4 (Oct. 9, 1992). This measure was designed to give the sparsely populated western provinces equal footing with the highly populated provinces in one of the two houses of Parliament. *Wills*, *supra* note 1, at B4.

140. See *supra* note 106.

141. The Canada Clause reads, in full:

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

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

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

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

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

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

a distinct society, the Canada Clause enumerated several other characteristics of Canada to aid the courts in interpreting the Constitution.¹⁴² Some of these enumerated characteristics included the recognition of racial, gender, and ethnic equality.¹⁴³

2. *The right of a province to opt out of a national shared cost program.*—Quebec's desire for greater provincial autonomy is fully manifested in its wish to pursue its own governmental programs instead of participating in national shared cost programs. The 1982 Constitution Act gave the provinces the right to opt out of these national programs, but only provincial alternatives in the areas of education and culture would receive federal compensation.¹⁴⁴ Quebec protested against this provision because financial constraints precluded opting out of other national shared cost programs. Quebec's taxpayers would be funding the rejected federal program as well as the provincially adopted alternative.¹⁴⁵ The Meech Lake Accord went to the opposite extreme on this issue, proposing federal compensation for any shared cost program a province might choose to opt out of.¹⁴⁶

The Charlottetown Accord proposed a solution midway between the extremes of the existing 1982 procedure and the failed Meech Lake alternative. Charlottetown essentially expanded the areas under which a province could opt out and still receive federal compensation.¹⁴⁷ Those areas, which would have been added to the ex-

cultural and racial diversity;

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

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

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

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

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

(4) For greater certainty, nothing in this section abrogates or derogates from the aboriginal and treaty rights of the Aboriginal peoples of Canada.

Draft Legal Text, § 1 (Oct. 9, 1992).

142. *Id.*

143. *Id.*

144. *See supra* text accompanying note 93.

145. *See supra* text accompanying note 95.

146. *See supra* text accompanying note 115.

147. Section 16 of the Charlottetown Accord provides, in relevant part:

(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 coming into force of this section in an area of exclusive provincial jurisdiction, if the province

isting areas of education and culture, were forestry, mining, tourism, housing, recreation, and municipal and urban affairs.¹⁴⁸

3. *Federal Institutions.*—Quebec objected to article 42 of the 1982 Constitution Act because it allowed constitutional amendments to federal institutions such as Parliament and the Supreme Court without Quebec's consent.¹⁴⁹ The Charlottetown Accord, like Meech Lake before it, proposed unanimous consent among the provinces to constitutional amendments regarding the Supreme Court and Parliament.¹⁵⁰ The rationale for this veto power, which would be enjoyed by all ten provinces, is that Quebec should be able to protect itself from changes wrought on central national institutions by the Anglophone Canadian majority.¹⁵¹

The Charlottetown Accord proposed three reforms to Parliament and the Supreme Court beyond their vulnerability to constitutional amendment. All three of these proposals were designed to protect Quebec's interests on the federal level. The most striking of these was the proposal to guarantee Quebec twenty-five percent of the seats in the House of Commons in perpetuity.¹⁵² Seats in the House of Commons are determined by population, and though Quebec currently has almost twenty-five percent of Canada's population, that percentage is expected to dwindle.¹⁵³ The promise of a quarter of the Commons seats was partially intended to compensate Quebec for its reduced presence in the Senate under section 4 of the Charlottetown Accord.¹⁵⁴

The second of the three reforms to federal institutions was a unique procedural requirement to be followed in the reformed Senate. Section 4 of the Charlottetown Accord provided for a "double majority" rule that would have protected Quebec from intrusive federal legislation: "A bill that materially affects the French language or culture in Canada must, in order to be passed by the Senate, be approved by a majority of senators voting and by a majority of French-speaking senators voting."¹⁵⁵

carries on a program or initiative that is compatible with the national objectives.

Draft Legal Text, § 16 (Oct. 9, 1992).

148. Wills, *supra* note 1, at B4, noted in *Draft Legal Text*, § 11 (Oct. 9, 1992).

149. See *supra* notes 96-98 and accompanying text.

150. *Draft Legal Text*, p. 48, § 32 (Oct. 9, 1992).

151. John Whyte, *A Guide to the Charlottetown Accord; Trying to Identify Canada and its People*, OTTAWA CITIZEN, Oct. 17, 1992, at B2.

152. *Draft Legal Text*, § 5 (Oct. 9, 1992).

153. Palmer, *supra* note 133, at 85.

154. David Vienneau, *How the Deal Will Affect Canadians*, TORONTO STAR, Oct. 18, 1992, at H1. By eliminating representation by population in the Senate in favor of six senators per province, Quebec and the other highly populated provinces would have lost senate seats. See *supra* note 139.

155. *Draft Legal Text*, § 4 (Oct. 9, 1992).

Finally, the Charlottetown Accord would have constitutionalized the existing statutory requirement that three of the nine Supreme Court judges be appointed from the civil bar of Quebec.¹⁵⁶

C. *Legal Criticisms of the Charlottetown Accord*

Aside from the complaint that Quebec's twenty-five percent guarantee in the House of Commons was undemocratic, most of the Charlottetown Accord escaped serious legal criticism.¹⁵⁷ The glaring exception to this generalization was the Canada Clause, with its recognition of Quebec as a distinct society.¹⁵⁸

Quebec's desire for a distinct society clause goes far beyond some need for a ceremonial recognition of its unique French language character. Quebec hoped that if the courts could rely on a constitutionally entrenched distinct society clause as an aid to interpreting the constitution, Quebec legislation that might otherwise violate Charter language rights could be upheld as reasonable limits on those rights.¹⁵⁹

Pierre Trudeau again came out very strongly against the distinct society clause. The former prime minister feared exactly what Quebec Francophones hoped to gain: That a distinct society clause would be used to promote the French culture at the expense of the Charter rights of Quebec's Anglophone minority.¹⁶⁰ The Canada Clause, with its distinct society clause and its recognition of Quebec's legislative right to promote its French culture, could have compelled the courts to allow just such a result.¹⁶¹

Prime Minister Mulroney, in response to Trudeau's charges, claimed that the Canada Clause would in no way impinge on the rights contained in the Charter of Rights and Freedoms.¹⁶² Mulroney went on to voice a popular legal sentiment that if anything undermines the Charter, it is the notwithstanding clause that Trudeau agreed to in return for provincial support of the 1982 Constitution Act.¹⁶³

Neither side was fully satisfied with the distinct society clause

156. *Draft Legal Text*, § 15 (Oct. 9, 1992).

157. Palmer, *supra* note 133 at 85.

158. *See supra* note 141.

159. *See supra* text accompanying notes 109-13.

160. *Without Equality, 'One Has a Dictatorship' - Trudeau*, TORONTO STAR, Oct. 3, 1992, at C5.

161. *See supra* note 141.

162. *The View From the Top; Wilhelmy Affair Hurt Yes Side, Mulroney Says, But Referendum Fight Isn't Over*, MONTREAL GAZETTE, Oct. 7, 1992, at B3 [hereinafter *Wilhelmy Affair*].

163. *Id.* Mulroney pressed for the removal of the notwithstanding clause in the Charlottetown negotiations, but was blocked by the premiers. Mulroney said of this effort: "the provincial premiers are well aware of the bonanza they were handed by Mr. Trudeau in 1982, and to say that they were reluctant to give it up is quite an understatement." *Id.*

as it was presented in the Charlottetown Accord. The Canada Clause included the distinct society recognition along with a host of other characteristics of Canada.¹⁶⁴ Quebec nationalists complained that the distinct society clause was diluted by locating it in the context of other fundamental aspects of Canada, such as equality in race, ethnicity, and gender.¹⁶⁵ Others claimed that by including some identities, such as race, and excluding others, such as disability, the Canada Clause created a hierarchy of equality rights under the Charter: a higher order of rights for those included in the Canada Clause; and a lower order for those not included.¹⁶⁶

The defeat of the Charlottetown Accord in the October 26, 1992 referendum rendered these arguments moot for the present, but they are worth consideration should similar proposals be presented in future constitutional negotiations.

V. Failure and its consequences

A. *Why Did Charlottetown Fail?*

In the aftermath of the 1982 patriation, an effort that concluded with Quebec's conspicuous dissent, one writer looked hopefully to the future for a solution to Canada's constitutional impasse:

Perhaps a generation from now, after another exhausting series of referenda on the provincial and the federal level, both Anglophone and Francophone voters will approve a mutually satisfactory constitution, one that hands down the law to the parliaments of Canada in the name of We the People of Canada. Perhaps, in a very British show of good sense, parliamentary sovereigns in Ottawa and all the provinces will reach a sensible agreement that all of them can explicitly affirm in the name of the parliamentary sovereigns of Canada. Perhaps Canada will find its own distinctive path to democratic reconciliation and individual liberty.¹⁶⁷

That hoped-for reconciliation in a mutually acceptable constitution was not achieved by the Charlottetown Accord. The voters of Quebec and five other provinces voted no to the referendum question; they did not agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992.¹⁶⁸

There are a number of reasons why voters rejected the Charlot-

164. See *supra* note 141.

165. Whyte, *supra* note 151, at B2.

166. *Id.*

167. Bruce A. Ackerman & Robert E. Charney, *Canada at the Constitutional Crossroads*, 34 U. TORONTO L. J. 117, 134 (1984).

168. Wilson-Smith, *supra* note 11, p. 12. The Charlottetown Accord was defeated in Quebec, Nova Scotia, Manitoba, Saskatchewan, Alberta, and British Columbia. It passed in Ontario by only two tenths of one percent. *Id.* at 13.

tetown Accord. The foremost of those reasons turned on a matter of perspective: Voters outside of Quebec thought Quebec was given too much in the Accord, and Quebec voters thought their province received too little.¹⁶⁹ Quebec Premier Robert Bourassa, in an effort to assure Quebec voters that the Charlottetown Accord was a great step forward in Quebec's provincial power, said: "[w]ith this legal text we have the absolute proof that the current government of Quebec got more in the negotiations than any other (Quebec) government in 125 years."¹⁷⁰ Despite such assurances from Bourassa, Quebec voters had been given cause to doubt that their premier had lobbied strongly enough for Quebec's interests in the Charlottetown negotiations. In late September, it was widely reported in the media that one of Bourassa's top aides believed that the premier had conceded too much in the constitutional talks.¹⁷¹

Voters outside of Quebec believed that the price for appeasing Quebec was too high. The provincial veto right over constitutional amendments was seen as tantamount to dismantling the federal government, a concession too extreme even for blocking a possible Quebec secession.¹⁷²

Aside from the "too much-too little" debate, the depth and complexity of the Charlottetown deal posed problems of its own. Sixty diverse constitutional amendments are simply too many to vote on with a simple yes or no.¹⁷³ A person may reject the entire package in the basis of a single offensive provision. With a deal with as many varied proposals as the Charlottetown Accord, it was almost inevitable that the "No" side would prevail, merely on the basis of a coalition of differently motivated no votes.¹⁷⁴ If this result is to be avoided in the future, Canada would be wise to proceed incrementally, with a series of narrowly focused referenda on specific constitutional amendments.¹⁷⁵

169. Palmer, *supra* note 133, at 85.

170. Edison Stewart, *Yes Side Sees New Weapon in Legal Text*, TORONTO STAR, Oct. 11, 1992, at A1.

171. Barry Came & Nancy Wood et al, *Defining Moments: Four Performances that Shaped the Referendum of 1992*, MCLEAN'S, Nov. 2, 1992, at 26. This was the so-called "Wilhelmy Affair." A top Bourassa aid told Dianne Wilhelmy that Bourassa had "caved in" in the negotiations. The conversation, which took place over a cellular telephone, was intercepted and recorded by an electronic eavesdropper. The tape was leaked to the press, and the damning criticism of Bourassa was made public. *Id.* at 26.

172. Charles Rusnell, *Rhetoric Wears Thin; Debate Does Little to Clarify Issues for Confused Canadians*, OTTAWA CITIZEN, Oct. 15, 1992, at C3.

173. King, *supra* note 3, at A29.

174. *Vote Should Be On One Item at a Time*, MONTREAL GAZETTE, Nov. 6, 1992, at B2.

175. This narrowly tailored approach to constitutional reform has already been employed following the failure of the broad brush Charlottetown Accord. On February 1, 1993, the Canadian Parliament approved an amendment to the constitution that secures equality of status for the English (majority) and French (minority) language communities in one province only, New Brunswick. Edison Stewart, *Constitution Soon to Offer Protection for Accadians*,

Finally, the effect of political campaigns on the referendum cannot be underestimated. For example, Jacques Parizeau, leader of the separatist Parti Quebecois, repeatedly said that the October 26 vote was a referendum on the Accord, not on sovereignty.¹⁷⁶ By framing the referendum this way, Parizeau could credibly claim that Quebec voters had not rejected sovereignty in the case that the Accord were approved in Quebec. At the same time, if voters believed Parizeau's characterization of the referendum, they would feel more comfortable rejecting the Accord even if they did not favor separation. Prime Minister Mulroney publicly exposed this political tactic by Parizeau, and predicted that if the Accord failed in Quebec, Parizeau would in fact claim that Quebec had voted for sovereignty.¹⁷⁷ As it turned out, Mulroney was correct. When the Accord was defeated in Quebec, Parizeau claimed that Quebec had voted for sovereignty, and said: "The detour they imposed on us is over. We're back on the way, the highway to sovereignty. Yesterday was the No to end all Nos."¹⁷⁸

B. Future Implications of the Failure of the Charlottetown Accord

Was Parizeau correct in his claim that a sovereign Quebec is now inevitable? There are strong indications to both support and refute his claim. The Charlottetown Accord is the third unsuccessful attempt in ten years to bring Quebec into the constitutional family of Canada. Both the people of Canada and their leaders are fatigued from a decade of constitutional wrangling, and it is doubtful that there will be the will to rejoin the fray of constitutional talks.¹⁷⁹ The poll taken after the demise of the Meech Lake Accord was vindicated with the defeat of the Charlottetown Accord. Seventy percent of Canadians were against endorsing further concessions to Quebec, even if it meant that Quebec would secede.¹⁸⁰ Even Brian Mulroney, who based his candidacy for Prime Minister in the restoration of Quebec, has said that the defeat of the Charlottetown Accord would be "the beginning of the process of dismantling Canada."¹⁸¹

There are equally good indications that Quebec secession is unlikely. Quebec is not homogeneously separatist, as has been demonstrated by the 1980 sovereignty referendum, and by opinion polls

TORONTO STAR, Feb. 2, 1993, at A12.

176. James Mennie, *Opponents Agree on Meaning of No; Breakup of Canada*, MONTREAL GAZETTE, Sept. 24, 1992, at A1.

177. *Wilhelmy Affair*, *supra* note 162, at B3.

178. *Quote. . . Unquote*, MONTREAL GAZETTE, Nov. 1, 1992, at B2.

179. Mennie, *supra* note 176, at A1.

180. *See supra* text accompanying note 126.

181. *Wills*, *supra* note 1, at B4.

since the defeat of the Charlottetown Accord.¹⁸²

Perhaps most significantly, Quebec has inadvertently demonstrated that it can adequately promote its French culture within the existing constitutional framework, and without a distinct society clause.¹⁸³ Quebec's Bill 101, which stipulated that "French must be the usual language of work, instruction, communication, trade, and business in Quebec," was struck down in part by the Supreme Court as an unreasonable limit on the freedom of expression in Article 2 of the Charter of Rights and Freedoms.¹⁸⁴ Premier Bourassa responded by invoking the notwithstanding clause to pass a new law.¹⁸⁵ That new law was Bill 178, which prohibited the use of English on commercial signs in Quebec.¹⁸⁶

The speculation on the issue of Quebec secession should end no later than 1994, the latest possible time for Quebec's next provincial election.¹⁸⁷ Sovereignty will be the defining issue in that election, and both main parties must consider their approach to this issue.¹⁸⁸ The Parti Québécois has promised to draft a provisional Quebec constitution and hold a referendum on sovereignty within eight months of election.¹⁸⁹ Bourassa's Parti Libéral must move closer to a sovereigntist position if it hopes to win re-election.¹⁹⁰ The official policy of the Parti Liberal, adopted in March of 1991, calls for political sovereignty should renewed federalism prove impossible.¹⁹¹

The impossibility of renewed federalism may have been demonstrated by the failure of the Charlottetown Accord. Thus, Canada faces the prospect of a sovereigntist government in Quebec no later than 1994, regardless of which party wins the impending provincial

182. See *supra* text accompanying note 68; Robert Gibbens, *Tough Challenge for Quebec's Separatist Leaders*, FIN. TIMES, Oct. 28, 1992, at 4.

183. Dion, *supra* note 50, at 91.

184. *Id.*; Ford v. Quebec, 54 DLR 4th 577. Freedom of expression is found in Article 2 of the Charter, an article that is vulnerable to provincial override through the use of the notwithstanding clause. See *supra* text accompanying note 87.

185. Dion, *supra* note 50, at 93.

186. *Id.* Provincial legislation passed through the use of the notwithstanding clause must be affirmatively renewed every five years, or it will pass out of existence. Sandro Contenta, *Quebec's 200-year-old argument takes a new tack*, TORONTO STAR, Feb. 24, 1993, at A17. The five year waiver period on Bill 178 runs out in December of 1993, posing the incendiary issue of whether or not to renew the French-only sign law. *Id.* The Quebec *Conseil de la Langue Francaise* is considering a recommendation to the Quebec National Assembly that small businesses be allowed to post bilingual signs. *Id.*

187. Don MacPherson, *Cold Comfort; Referendum Result Shows Equality Party Doomed*, MONTREAL GAZETTE, Nov. 10, 1992, at B3.

188. *Id.*

189. Tu Than Ha, *Quebec's No Vote is Distinct: Parizeau: 'We're Back on the Highway, the Highway to Sovereignty'*, MONTREAL GAZETTE, Oct. 28, 1992, at A1; MacPherson, *supra* note 187, at B3.

190. Sandro Contenta, *Quebecers Enjoy Lull Before Sovereignty Storm*, TORONTO STAR, Nov. 1, 1992, at A10.

191. Sandro Contento, *Bourassa Vows Tough War Against Separatist Wave*, TORONTO STAR, Oct. 27, 1992, at B1.

election.¹⁹²

Canada also faces a definite change in leadership, and a possible change in governments, at the federal level. Prime Minister Mulroney announced his resignation as head of the Progressive Conservative Party on February 24, 1993.¹⁹³ His party will select a new leader to replace Mulroney as Prime Minister and lead the Conservatives into the national elections in the fall of 1993.¹⁹⁴

VI. Conclusion

The possibility of Quebec's secession is an issue that will only unfold with time. The more immediate issue is the constitutional strife that has consumed Canada for the last decade. Whatever harm may be wrought by the conjectured secession of Quebec, it is clear that the the constitutional wrangling over that possibility has already harmed Canada. It has truly been a constitutional war, and as in any other war, there has been attrition. The best example of that attrition has been the infliction of the notwithstanding clause on the Charter of Rights and Freedoms in 1982. It is a hollow guarantee of rights when a province can override freedom of expression, freedom from unreasonable search and seizure, and the freedom from cruel and unusual punishment.¹⁹⁵ By shackling such an urgent issue as aboriginal self-rule to the seemingly irreparable Quebec problem, the recognition of aboriginal rights was unfairly delayed by the Charlottetown Accord. Though neither Meech Lake nor Charlottetown were ultimately ratified, they diverted the leaders of Canada from mundane but very real problems such as the economy. The proposed amendments illustrated a country's divisions in a vain attempt to bring the country together. Pierre Trudeau's dream of a unified, multicultural Canada is a worthy ideal, but if the cost of pursuing that ideal has finally outweighed its benefits, it may be time to surrender the fight.

Jeffrey J. Cole

192. Some of the scenarios of a divided Canada deserve mention. On an economic level, The Royal Bank of Canada has predicted that the breakup of Canada would result in a 16 percent drop in the standard of living by the year 2000. This translates into a loss in personal income of as much as \$3,200 per year. *Plan's Fall*, *supra* note 135, at 1A.

Issues of particular concern to the United States would be the effect of a divided Canada on the North American Free Trade Agreement, and the possible application of some of the remaining provinces for U.S. statehood. Banting, *supra* note 10, at 176-77.

193. *Canadian Prime Minister Mulroney Quits; Ruling Party's Weakness Cited*, FACTS ON FILE WORLD NEWS DIGEST, Feb. 25, 1993, at 110 F1.

194. *Id.*

195. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2, § 8, § 12.