

SUBMISSION ON BEHALF OF THE NEWFOUNDLAND BRANCH

OF THE CANADIAN BAR ASSOCIATION

TO THE

SENATE - HOUSE OF COMMONS SPECIAL JOINT COMMITTEE

ON THE CONSTITUTION OF CANADA

SUBMITTED BY:

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AND  
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I

INTRODUCTION

The Newfoundland Branch of The Canadian Bar Association is a voluntary group of lawyers whose members represents 85% of the lawyers practicing in the Province of Newfoundland and Labrador (hereinafter referred to as "Newfoundland"). The Branch felt it was necessary to make this submission concerning the proposed Constitutional reforms because of the polarization of the positions taken by the Federal and Provincial parties in this Province which is divisive and not conducive to the dialogue necessary to bring focus on Newfoundland's genuine concerns.

We accept and affirm that following the numerous efforts at Constitutional review in the recent past and in particular following the solemn promise of the people of Canada to the people of Quebec, prior to the recent Referendum, as expressed to them by all Premiers as well as a unanimous resolution of the House of Commons, that Constitutional change must take place and must take place soon.

Newfoundlanders cherish their status as Canadians and we wish to voice our concerns as Canadians to ensure that the new Constitution protects, not only the legitimate concerns of other Canadians, but also the legitimate concerns of this Province.

We will dwell on the particular concerns of this Province and we shall deal with them frankly and openly. Above all we recognize that this Nation must be preserved, that this Nation has recently withstood severe internal challenge, and that Constitutional change is essential not only because it was promised but because it was needed for the preservation of Canada. We support the patriation of the Constitution of Canada from Britain.

II

NEWFOUNDLAND PERSPECTIVE

Newfoundland acquired Responsible Government in 1855 and became a Dominion by virtue of the Statute of Westminster in 1931.

The territorial composition of the Island portion of Newfoundland was settled in 1904 with the resolution of the French Shore problem and Newfoundland's sovereignty over the vast Labrador territory was confirmed by the Report of the Judicial Committee of the Privy Council delivered in 1927.

Although the Great Depression caused severe economic hardship, the financial collapse of Newfoundland would not have occurred had it not been for the financial burden of servicing its large National debt. A major portion of this debt was composed of a War loan incurred during the First World War which was required for the organization, maintenance and equipment of the Royal Newfoundland Regiment which fought so gallantly in Europe.

The United Kingdom prevented Newfoundland from defaulting on its debts but the price was the withdrawal of Responsible Government which occurred on February 16th, 1934 when Newfoundland suspended its Constitution. By Letters Patent granted by His Majesty, the power to enact laws and administer the Country became vested in the Goernor and Commissioners who were appointed by the Government of the United Kingdom.

Newfoundland prospered during the Second World War and contributed significantly to the war effort by providing many volunteers for the Armed Services, helping Britain acquire naval strength by providing land bases for the United States of America and by lending Britain 40 million dollars interest free. After the War, it became obvious that Newfoundland was ready for the return of Democracy.

Members of a National Convention were elected on June 21st, 1946 and this body deliberated until the end of January, 1948. The debate centered on the Terms of Union that were offered by the Government of Canada and these Terms became the platform for the successful Referendum battle which took place on July 22nd, 1948 in which Newfoundland chose to become a Province of Canada.

The Government of Newfoundland appointed a Committee to negotiate the final Terms of Union and on December 11th, 1948 the authorized representatives of Newfoundland and Canada signed a Memorandum of Agreement containing the Terms of Union which were confirmed and given legal effect by the passage in the United Kingdom of the British North America Act, (1949). Newfoundland became a Province of Canada at midnight on March 31st, 1949.

The Terms of Union confirmed the Labrador boundary decision of the Privy Council and provided for the organization and funding of our denominational, educational school system. Newfoundlanders have always believed that the Terms of Union could not be changed without the consent of the people of this Province.

Since 1949 Newfoundland has made great strides within the Canadian Confederation and if a Referendum were held today, there would be an overwhelming vote confirming our status as a Province of Canada.

It is a fact, however, that Newfoundland has public services which are less than those enjoyed by most Canadians. This Province has the highest per capita debt and also has the highest unemployment rate, the highest taxation rate and the highest cost of living in Canada. It is therefore essential that any changes in the Constitution of Canada must recognize our tremendous resource potential and it must ensure that Newfoundland is given the ability to develop and manage its natural resources in a manner that would make this Province a viable economic component of Canada.

III

NATIONAL PROSPECTIVE

The need for a new Canadian Constitution can best be confirmed by the fact that the Canadian First Ministers have been in search of Constitutional change for some time. These efforts were intensified in the 1960's and reached both their zenith and nadir in the First Ministers Conference of September 1980.

Canada's Constitution from the British North America Act of 1867 through to the British North America Act (1949) with the many intervening changes does not address the needs of a modern Canada. Apart from the special concerns that caused the Referendum in Quebec, and are reflected in Western isolationism, there are other concerns which find expression in the proposed Constitution Changes which deal with the Charter of Rights and Freedoms and provide for the entrenchment of the principle of Equalization.

The Federal Government's concerns include the power to manage the national economy, control over national defense and international relations and the need to affirm through Constitutional change a strong Federal presence so that the sheer size and diversity of this vast Country will not serve as the catalyst of its own destruction. Federal insistence on the principle of Equalization and the guarantee of Mobility and Language Rights are the proper concerns of the National Government.

Canada's position as a leader at the United Nations demands that human rights which Canada insists on for other Countries and which they have themselves subscribed to in international covenants <sup>e</sup> by enshrined in any new Constitution. These rights by their very definition must exist throughout Canada.

For these reasons, we favour patriation of the Constitution and after patriation the entrenchment of a Charter of Rights

and Freedoms and the principle of Equalization. We are concerned about the method of patriation and we also have suggestions for changes in the present Constitutional approach.

Just as there are areas where the Federal power must be paramount, there are also areas where the Provinces best protect and reflect the needs of Canadians through Provincial jurisdiction. These areas of local concern include cultural matters, local economy, resources and generally those areas where Provincial Governments are more appropriate to redress pressures from local interest groups. This would permit the special and local interest groups to find expression at the local level and this would ward off any threat to the Nation.

In future Constitutional reform we hope that areas of shared responsibility may develop. Fisheries appears to be an area where this joint control could be successful. There should be Federal involvement as fisheries involves international relations, jurisdiction over Canada's three oceans, as well as participation in policing and protecting Canada's interests with foreign nations. These are contrasted with areas of the fishery of a fairly local nature such as the licensing of fishermen, boats and fish plants and domestic management generally. We see these areas where the people of a Province can have a more direct voice through their Provincial Government as their expression regarding its policies can more directly cause change in this area.

IV

CONSTITUTIONAL PROPOSALS

1. SUBSTANCE

The House of Commons and Senate, by a Joint Resolution, will present an address to Her Majesty the Queen asking her to lay the Canada Act before the United Kingdom Parliament for enactment. This legislation would enact the Constitution Act, 1980 which is set out in Schedule "B" and would come in force on proclamation by the Governor General except for the general amending procedure and it would provide that the United Kingdom would no longer have authority to make laws for Canada.

The Constitution Act, 1980 contains a Charter of Rights and Freedoms and provides for consideration of regional disparities and equalization payments. Parts IV and V deal with the interim and permanent amending procedures and Part VI defines the Constitution of Canada, repeals and amends certain enactments set out in the Schedule and provides that the Constitution of Canada shall be written in English and French with both versions being legally binding.

2. METHOD

The Charter of Rights and Freedoms section of the Constitution Act, 1980 would include provisions for mobility rights, non-discrimination rights and minority language education rights. These would directly affect areas that are presently within the exclusive jurisdiction of the Province under our present Constitution. At the present time, matters that are within the sphere of Provincial jurisdiction cannot be changed without the consent of the Provinces, however, under the National Referendum provision, the jurisdictional areas of the Provinces may be altered without the consent of the Provincial Governments.

This "tie-breaking" procedure will change Canada from an essentially parliamentary system of Government into a republican populace system of Government. The present balance between the powers of the Federal and Provincial Governments will be dramatically and permanently altered. It is interesting to note that the National Referendum formula for amending the Constitution which would have such a profound affect on the Canadian Confederation was first introduced in these Constitutional proposals during October of 1980 and they have had no public consideration or debate and no mandate has been given by the people of Canada to the Federal Government for its introduction in the Constitution.

It is clear from the recent Judgment of the Supreme Court of Canada dealing with a Reference concerning the Senate that the Federal Government cannot unilaterally pass legislation which would alter in any way the jurisdiction of the Provinces. This is effectively what the Federal Government is doing with its Resolution on Constitutional Change, however, it is conveniently using the "fiction" that it is not unilaterally altering the Constitution but that this is being done by the Parliament of the United Kingdom. This is a transparent attempt by the Federal Government to unilaterally change the Constitution of Canada.

The Federal Government is then putting the United Kingdom Parliament in the embarrassing position of making changes in the Constitution of Canada which have so far been rejected by the majority of the Provinces in Canada and surely the Parliament of the United Kingdom will have to take cognizance of the fact that the request by the



Federal Government without the concurrence of the Provinces is against all Conventions and Customs used over the years to amend the British North America Act when Provincial rights would be affected.

In a White Paper published by the Federal Government in 1965 entitled "The Amendment to the Constitution of Canada", the Federal Government indicated that there was a principle in Canada that "The Canadian Parliament will not request an amendment directly affecting Federal - Provincial relationships without the prior consultation and agreement with the Provinces."

We take the position that the Constitution of Canada should be patriated from the United Kingdom, however, any changes to the Constitution including provisions for an amending formula, a Charter of Rights and Freedoms and equalization should be made by Canadians through the consultation and agreement of the Federal Government and the Government of the Provinces of Canada.

IV THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The Constitution Act, 1980 includes a Canadian Charter of Rights and Freedoms (hereinafter referred to as the "Charter"). Much discussion has taken place as to whether there is any necessity to entrench Rights and Freedoms in a Constitution, however, we support the position taken by the Canadian Bar Association which passed a Resolution saying:

"The Constitution of Canada should embody a declaration of fundamental rights binding upon the federal Parliament and the provincial legislatures and the courts be empowered to enforce complete observance of such fundamental right."

The Committee on the Constitution of The Canadian Bar Association stated in their Report "Towards a New Canada" that the symbolic and educational importance of proclaiming the rights of the individual as being beyond the power of a transient legislative majority cannot be over exaggerated. The Committee pointed out that a Bill of Rights would have an important unifying effect and would educate all Canadians concerning the value of their civil liberties. An entrenched Bill of Rights would provide a standard for scrutinizing statutes and delegated legislation and would also be an effective instrument of enforcement of fundamental political and legal rights.

It is important to point out that the Constitutional Committee of the Canadian Bar Association released its Report in 1978 when

This clause is so broad that almost any emergency, real or apprehended, could lead to the suspension of the Charter. It is a historical fact that states do face crises which may challenge the existence of the nation and in these situations emergency measures including suspension of civil liberties would be necessary. Section 1 of the Charter should be changed so it is more specific as to the use of emergency powers.

An examination of the Constitutions of other nations shows that these countries set out the particular situations where emergency legislation may become operative and civil liberties be suspended. In France the test is:

"Where there exists a serious and immediate threat to the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfillment of its international obligations, and the regular functioning of the Constitutional public authorities has been interrupted."

In the United States the President is allowed to take "such measures as he considers necessary to suppress any insurrection, domestic violence, unlawful combination or conspiracy it opposes or obstructs the execution of the laws of the United States."

In Germany four situations trigger assumption of emergency powers:

- (a) Defence emergency which is an attack upon German territory by arms;
- (b) a state of international tension;
- (c) domestic challenges to state authority; and
- (d) natural catastrophies.

We suggest that the Charter should provide specific instances when the Charter can be overruled by emergency powers. We also feel that Section 4(2) of the Charter should be amended as the term "apprehended" is too vague.

The Legal Rights Section of the Charter contain many restrictions on legal rights which we deem to be unacceptable. The main problems

lie with Sections 8, 9 and 11(d) which refer to rights on search or seizure, detention or imprisonment and bail. These Sections provide that individual's rights are guaranteed "except on grounds, and in accordance with procedures, established by law." The law on these matters is primarily found in the Criminal Code of Canada and any changes in the Criminal Code could adversely affect the legal rights of the individual as set out in the Charter.

By way of example there could be an amendment to the Criminal Code which would state that all peace officers are deemed to hold Writs of Assistance. This would mean that a peace officer on reasonable grounds could search a person, a home or an automobile without having to obtain a search warrant. It is suggested that Sections 8, 9 and 11(b) of the Charter be amended by providing that these rights are subject only to the principles of fundamental justice.

Nothing contained in the Sections on Legal Rights increases the rights that a Canadian presently enjoys under the Bill of Rights and we suggest that Parliament give some consideration to increasing an individual's legal rights by entrenching in the Constitution the right of an individual upon arrest to be promptly informed that he has a right to remain silent.

Section 2 of the Constitution Act, 1980 deals with Fundamental Freedom and we are concerned how the Courts will interpret the concept of "freedom of religion" as it applies to Term 17 of our Terms of Union. Under Term 17, the denominational, educational system of schools is protected and provision is made for public funding. Our concern is heightened in that Section 25 of the Constitution Act, 1980 provides "any law that is inconsistent with the provisions of this Charter is, to the extent of such inconsistency, inoperative and of no force or effect."

There are two points of view with respect to the effect that the freedom of religion concept will have on Term 17 and these are:

- (a) By virtue of Section 25 of the Constitution Act, 1980, Term 17 will become inoperative;

- (b) That freedom of religion will be used by the Courts in light of Section 17 of the Terms of Union and the history and tradition of our denominational, educational school system in this Province.

The Branch has been unable to reach a consensus as to which of these views is the more likely. However, we do agree that a problem could arise if an atheist were denied employment with a denominational School Board because of his beliefs and it is now impossible to predict how the Courts would rule on this matter.

Mobility rights are set out in Section 6 of the Constitution Act, 1980 and while we agree with them in principle, we are concerned that the affirmative action provisions of paragraph 15(2) will be invalidated by the mobility rights of Section 6 and the local employment preference provisions of Newfoundland's petroleum regulations may be ruled invalid by the Courts. Consideration should be given to the designation of a Province as a disadvantaged area and this would justify the Province in enacting local employment preference provisions on an interim basis which would be eliminated when the economic benefits of the offshore resources put the Province on equal footing with the other Atlantic Provinces.

Just as we agree that mobility rights for individual Canadians should be entrenched in the Constitution, we also feel that the same argument would apply for a guarantee of mobility of goods, capital and services which would ensure that economic barriers cannot be set up by one Province against another Province. We also suggest that the right of an individual to hold property should be entrenched in the Charter.

The entrenchment of a Charter of Rights and Freedoms in a Constitution does not guarantee that these will be enjoyed by Canadians. As has been pointed out by many jurists, civil liberties do not rely on entrenched rights and freedoms, but rely on the eternal vigilance of all citizens. The entrenchment of a Charter will educate Canadians about their rights and it is this knowledge that will permit citizens to stand up for their rights and this will form the cornerstone of civil liberties in this our country.

the country. Despite the considerable amount of Federal support, Newfoundland has incurred a debt in the amount of a little less than 3 Billion Dollars to reach its present level of development. This crushing debt level is by far the largest per capita debt of any Province in the country; it is nearly twice the debt of the financially precarious Jamacian Government and is comparable to the debt ratio experienced by the poorer third world countries.

Newfoundland contributes more to Canada than it receives and at the same time, it is a "so called" have not Province. It is from this perspective that the Constitutional proposals have to be considered in relation to Newfoundland. Indeed it may fairly be said the present Constitutional strictures have made it difficult for our Province to alter the present distribution of wealth from Labrador resources.

One of the objectives of the Constitution of Canada is the integration of the Canadian economy. The free circulation of goods, services, capital and workers has not always been adequately protected under The British North America Act. We are strongly in favour of improving and protecting the Canadian economic union. Yet in balancing the demands of national integration and regional development, it is important to recognize that there may be interim measures required to answer a pressing problem in a particular region. Programs such as the Department of Regional Economic Expansion and job preference regulations for Northern workers are just two examples of such measures now employed by the Federal Government.

2. INTERPROVINCIAL TRANSMISSION OF HYDRO POWER

The proposed Constitutional amendments do not address the legitimate demands of Newfoundland to be entitled to market its hydro resources without being unduly restricted by the

VI ECONOMIC IMPLICATIONS

1. ECONOMIC CONSEQUENCES - NEWFOUNDLAND

It is important in assessing the Constitutional proposals of the Federal Government to briefly summarize the economic position of our Province since Confederation. The Province has been the recipient of large amounts of Federal grants which have contributed greatly to the economic development of this Province.

The fact that the Federal Government still contributes large sums of money in the form of equalization payments and unemployment insurance, among other things, has been well documented and publicized over the years.

It may come as a surprise to most Canadians that Newfoundland contributes more in economic terms to Canada than it receives. We refer to the tremendous economic contribution to the Quebec economy arising out of our hydro development on the Upper Churchill as well as our iron ore resources in Labrador City, Wabush and Knob Lake. The Economic Council of Canada recently reported that Quebec receives some 600 Million Dollars in annual economic benefits as a result of hydro power supplied from the hydro development on the Upper Churchill alone. This exceeds the annual amount of transfer payments from the Federal Government to the Province by way of equalization payments and unemployment insurance benefits. At the same time, Quebec also receives annually substantial economic benefits from the development and processing of our Labrador iron resources.

While Quebec receives upwards to ONE BILLION DOLLARS ANUALLY from our Labrador resources, this Province is in severe economic circumstances. We have the highest rate of unemployment and the lowest level of public services of any Province in

intransigence of a neighbouring Province. While it is unquestioned that at the present time the Constitutional authority resides in the Federal Government to regulate interprovincial transfers of electricity, there is no available mechanism to compel the Federal Government to exercise its jurisdiction and it has been unwilling to do so to date.

The National Energy Board provides a mechanism whereby pipeline companies can obtain the right to expropriate a right-of-way for a pipeline. There ought to be a mechanism, similar to that contained in the National Energy Board Act for pipelines, to deal with interprovincial and international hydro power transfers which right ought to include provision for the expropriation of a power corridor if it can be demonstrated to be in the public interest as well as economically feasible.

The perceived failure of the Federal Government to respond to the demands of the Province highlight the necessity of a provision in the Constitution whereby a Province can compel the Federal Government to exercise its authority where it can be shown to be in the public interest. The Newfoundland experience with hydro power clearly demonstrates that the political process can result in the undue restriction of the rights of smaller and poorer Provinces.

The commitment to an economic union as exemplified by the mobility of labour clause appears hollow when one Province can be allowed to impede the development of resources in another Province. Surely mobility rights should be extended to include mobility and free interprovincial access of goods, capital and services.

The time for Constitutional renewal seems to be the appropriate time to establish an absence of economic barriers in Canada.



If the rights of smaller and poorer Provinces are to be protected, then a Province has to be given some means of initiating the process to obtain its right to develop its natural resources for its own benefit.

3. PROPOSED RESOURCE AMENDMENT

During the present Constitutional debate, there has been a dialogue between the New Democratic Party and the Federal Government with respect to the right of the Provinces to manage and control their own resources. A tentative agreement was reached between the Prime Minister and the Leader of the New Democratic Party with respect to the Provinces' right to management and control of certain resources as well as indirect taxation and concurrent jurisdiction in interprovincial trade.

We support those initiatives. Yet the exchange of correspondence between the Prime Minister and the Leader of the New Democratic Party excluded hydro resources from the proposed amendments. This Committee made strong representations to all political parties in Ottawa that hydro ought to be included in any such amendment.

The Minister of National Revenue who is Newfoundland's representative in the Federal Cabinet has just indicated that hydro will be included in this amendment. Subject to any reservations on the wording of the amendment, we are strongly in favour of the granting and confirming to the Provinces the power to manage and control their own resources including hydro, to indirect taxation and to concurrent jurisdiction in interprovincial trade subject to Federal paramountcy and so long as such rights do not unreasonably discriminate between the Province and other parts of Canada. We laud the efforts to accomplish this result for its economic impact on this Province will be significant.

4. OFFSHORE JURISDICTION

A time of Constitutional change is also a time for remembering past experiences that have contributed to the development of Canada. An examination of Canadian history furnishes many examples of transfers of resources to the Provinces to ensure that the Province becomes a viable economic unit. Quebec and Ontario were each ceded large tracts of Northern territory by the Federal Government. Several Prairie Provinces were created without ownership of their natural resources and these were voluntarily ceded to them by the British North America Act (1930).

There is both justification and compelling necessity for the Federal Government to follow the sensible precedents of the past and confirm Provincial jurisdiction with respect to offshore resources. It should be emphasized that all the Provinces of Canada are in favour of this action.

The National interest will continue to be served by the Federal paramountcy powers with respect to Interprovincial trade as well as the Federal taxing powers and the Federal powers of Peace, Order and Good Government. These powers still allow a reasonable and fair portion of revenues to flow to the Federal Government consistent with the aims and objectives of the Federal Government as expressed in the *Carte blanche nationale de l'énergie* the National Energy Policy unveiled last month.

The greatest beneficiary of such a policy would be the Province of Newfoundland. The economic factors already mentioned clearly illustrate that the Province has to be given access to its resources if it is to be able to repay its enormous debt and still provide a reasonable level of public services. This initiative is especially justifiable when one considers that geographic factors render it difficult for this Province to benefit from such measures as the extension of the Natural Gas pipeline to Nova Scotia.

5. STATUTE OF WESTMINSTER AMENDMENT

If the Federal Government is not going to accede to our request for confirmation of Provincial offshore jurisdiction, we would at least request that item 16 of Schedule 1 of The Constitution Act, 1980 be deleted entirely. This Section repeals the references in the Statute of Westminster to Newfoundland as a Dominion. There is some concern that this could weaken the Province's position in a legal battle to resolve ownership of offshore minerals. Of course, if the Federal Government accedes to our request that the Provincial offshore rights be confirmed subject to Federal paramountcy, we do not object to any housekeeping with respect to the Statute of Westminster.

It should also be noted that our Terms of Union establish that the Statute of Westminster, 1931 now applies to Newfoundland in the same manner as it applies to the other Provinces of Canada.

6. EQUALIZATION AND REGIONAL DISPARITIES

Part II of the Constitution Act, 1980 deals with equalization and regional disparities. We support the commitment that the Federal and Provincial Governments of Canada are committed to:

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparity in opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

We suggest that Section 31(2) be amended to clearly provide that any equalization payments to be provided by the Federal Government should be made directly the Provincial Governments rather than direct infusions of Federal funds into the economy of the Provinces.

VII AMENDING PROVISIONS

1. CONSTITUTIONAL AMENDMENT

The inability of the Provinces and the Federal Government to agree upon a satisfactory amending formula for the Canadian Constitution has been the principal stumbling block in the way of Constitutional reform ever since serious efforts to patriate the Canadian Constitution have been underway. Because a Constitution reflects the division of power between individuals, governments and institutions an amending formula will have a strong bias to the status quo. All parties who are subject to the Constitution will properly see the amending process as posing a threat to their position. There must however be a mechanism whereby a National will for change can crystalize into actual change. A difficult and time consuming amending process should not be regarded as a hindrance to change but rather as a test of the strength of the National will.

In Western democracies, a prime function of a Constitution has been the protection of minorities. The massive size of Canada combined with its low population makes it necessary that a Canadian Constitution not only protect the usual minority groups based on race and the like but it must also protect regional minorities.

In our view the onus placed on the Provinces in order to have a proposal considered by Section 41 under Part V or the interim amending provisions is so high that these provisions cannot practically be used by the Provinces.

The Part V amending provisions of the Constitution Act, 1980 are substantially set out in Sections 41, 42, 43, 47 and 50. In Newfoundland, discussion of the merits or demerits

of these Sections has focused primarily on their relationship to our Terms of the Union. Particular attention has been given to the Terms affecting our boundary and our denominational education rights. It is our view that the Terms of Union can be altered without the consent of the Province of Newfoundland under the proposed amending formula.

Before dealing with the individual sections and amending mechanisms, it is appropriate to deal with one point of view that has been discussed publically. Some have expressed the view that the Terms of Union constitute a contract which can not be altered by one side without the consent of the other. We are of the view that this interpretation has no validity. The Terms of Union had no effect until given force of law by the British North America Act, 1949. If a British Parliament can give effect to the Terms of Union then likewise it can amend them or provide for a mechanism for their amendment. The Constitutional Resolution proposes that the British Parliament should provide a mechanism for amending all Acts making up the Constitution of Canada, one of which is the British North America Act of 1949.

Sections 41, 42 and 43 provide alternate mechanisms for the amendment of the Constitution of Canada. Section 41 provides a mechanism which is based upon resolutions of the Federal and Provincial Parliaments. Section 42 provides a mechanism which is based on a referendum. Section 43 deals with a limited class of amendments, those affecting one or more but not all Provinces.

2. SHORT-CUT MECHANISM

Section 43 has been mentioned as offering some protection to a Province to which unique provisions of the Constitution, (i.e. Section 17 of the Terms of Union) apply. In our view this involves a strained and unrealistic interpretation

of Section 43. Section 43 provides that an amendment to the Constitution in relation to any provision that applies to one or more but not all Provinces may be made where it is authorized by Resolution of the Federal Parliament and the Provincial legislature in the Province affected by the amendment. This Section is permissive and upon a plain and ordinary reading simply provides a "shor cut" mechanism for amending the Constitution. To say that this Section means that an amendment which does not affect all the Provinces requires consent of the Provinces affected is not borne out by the language of this Section or other portions of the Act. If Section 43 is to have the effect of requiring Provincial consent except in cases where the entire nation is affected, it would have to have language more upon the lines of that contained in Section 50.

In order to give protection to regional minorities, we would suggest that any amendment to the Constitution affecting one or more but not all the Provinces shall not be made without the consent of the Province or Provinces affected by the amendment. This would prevent alternation of Provincial boundaries without the consent of the Provinces affected and would likewise ensure unique rights such are as exhibited in Newfoundland's Terms of Union. This should also meet the legitimate desires of the Province of Quebec to preserve its position with respect to Culture and Language Rights. However, if this is not sufficient we do not see that there is anything inherently wrong with giving the Province of Quebec a veto on Constitutional amendments in the area Language and Cultural Rights.

3. VICTORIA FORMULA

The Section 41 formula for amendment has the effect of creating different classes of Provinces. It does not appear to be any reason why a Province , merely because it at sometime attained the figure of twenty-five percent of the national

population, should have a veto in perpetuity. Further within the Atlantic region, the view of Prince Edward Island becomes of no consequence. No combination of Prince Edward Island with another Province can of itself satisfy the terms of the Section. The proposal to do away with the fifty percent of the regional population requirement in the Atlantic Provinces leads to the other extreme. A combination of Newfoundland and Prince Edward Island having a population smaller than New Brunswick would satisfy the regional requirement even though these Provinces represent less than one-third of the regions population. Similar mathematical problems arise in the Western region. Given these mathematical problems there seems to be no logical basis for the regional provision. The concept of regional representation could have strange effects. In view of the difficulty in reaching a consensus on an amending formula, we feel that this system is as good as any that has had significant support. This was essentially the formula adopted in the Report "Towards a New Canada".

4. REFERENDUM FORMULA

The Referendum proposal put forward by Section 42 is not in any way acceptable. The reasons for this are two-fold. Firstly, there are reasons which stem from the content of this Section itself and secondly, there are reasons which relate to the method being used to put the amending provision in place.

We would point out that unlike the amending formula put forward in Section 41, the Referendum system has not been the subject of political and public debate in this Country for any extensive period of time. This formula involves a fundamental change in the Canadian system of Government. It moves from a system of Parliamentary supremacy towards a populist system. *systemic populism*  
We are satisfied that no consensus exists amongst Provincial Governments or amongst the population as a whole as to the use of a Referendum for amending the Constitution.

The time limit imposed upon the deliberations of this Committee on the Constitutional proposals precludes the possibility of any consensus. The proposal for amendment by Referendum could not obtain the support necessary to satisfy the criteria established in the Constitutional proposals for future amendments. It seems to us improper that an amending formula should be passed when it can not even meet the same level of support which would be required hereafter pass amendments.

The Referendum provisions shift the balance of power in Constitutional matters. One party, namely the Federal Government decides when Referendums will be called, what question will be asked and what the rules will be. The effect of Section 42 is to give one of the parties to the Canadian Federation a trump card in perpetuity. If this proposition had been agreed to by the Provinces or had overwhelming national support, it might be acceptable, however in light of the manner in which it is attempted to be imposed in the absense of wide base of support, we are of the opinion that the Referendum mechanism is totally unacceptable.

Amendment by Referendum presents the greatest danger to Newfoundland and other Regional minorities. Canada is a Country which has been plagued throughout its existence by lack of understanding of one Region by another. The Regional concepts of West and Atlantic in the Constitution Act, 1980, S. 41 are at best bureaucratic divisions. The Province of Newfoundland has never considered itself to have an especially strong identity with the three Maritime Provinces. While it participates in Atlantic Provinces associations, it has strongly resisted taking identical positions with the three Maritime Provinces on major issues such as Maritime unity and the "offshore." To suggest that a bare majority or perhaps even less than a majority of the voters in two other of the



Atlantic Provinces could satisfy the regional requirement for the passage of a Constitutional amendment contrary to the interests of Newfoundland is not acceptable. For instance, a Referendum could be proposed to create one Province of the Atlantic Provinces. Under the existing formula every last voter in Newfoundland could vote against the proposition and the necessary consequential amendments, but such an arrangement could still be imposed on this Province. We feel, therefore, that the proposal contained in Section 42 should be withdrawn.

VIII FRENCH VERSION

Section 54 of the Constitution Act, 1980 provides for the enactment of official French versions of the Constitution of Canada defined by Section 51. Part of the Constitution of Canada would be our Terms of Union and it would also include the Report of the Judicial Committee of the Privy Council of 1927 which delineated the boundary between Labrador and Quebec. Under the provisions of Section 54, the French version will be prepared by the Minister of Justice and shall be enacted by the Governor General under the great seal of Canada. Since Section 55 provides that legally the English and French versions of the Constitution are of equal validity, then some provision should be made to provide that any Province concerned with the French translation should agree on the French translation before it becomes law.

This submission should not be interpreted as any lack of support for the translation of the Canadian Constitution into the French language and the provision that the French and English versions of the Constitution Act, 1980 and the Constitution of Canada are of equal authority and are equally binding.

IX CONCLUSION

1. Although the people of Quebec recently chose to remain part of Canada by Referendum, we would point out that the first Referendum by which people chose to become Canadians, took place in Newfoundland in July, 1948. Although Confederation won with fewer than 53% of the voters, Newfoundland has developed a great deal within Confederation and a vote concerning membership in the Canadian union would be overwhelming in favour of Canada.
  
2. We favour patriation of the Constitution but urge that the amending formula and any other changes in the Constitution should be made in Canada by Canadians. Newfoundland would like to be assured that its boundary and other cherished traditions will not be changed without the consent of the Government of this Province.
  
3. Although there are some features of the Section 41 amending procedure that are distasteful, we accept that it is probably the only amending formula that has reached any degree of consensus in Canada. We urge rejection of the Referendum formula provided for in Section 42 as it will change Canada from a Parliamentary Confederation to a Republican Populous system of Government. It is a formula which has had no national dialogue and has not been given the benefit of discussion at Federal-Provincial Conferences, nor by this Committee, the Parliament of Canada or the Provincial legislatures.
  
4. Newfoundland's contribution to the economy of Canada should be recognized and there should be Constitutional changes which would permit Newfoundland to develop its resources unimpeded by Provincial boundaries and the Federal Government should ensure that Newfoundland becomes an economically viable Province by confirming the offshore jurisdiction resources to this Province

as it has done in the past to the Western Provinces, Ontario and Quebec.

5. We also urge the Federal Government to extend the time limit of this Committee for consideration of the Constitutional proposals and we suggest that this Committee be permitted to visit each of the Provinces of Canada and its territories and receive written and verbal submissions from the people of this great Country. The will of Canadians concerning Constitutional proposals should not be confined to political polls but the expression of Canadians should be invited and encouraged by Parliament.

In conclusion, I would like to thank the Chairperson and members of this Committee for the opportunity of making a written and oral submission on behalf of the Newfoundland Branch and we thank you for your patience, attention and interest.

We wish you luck in your deliberations.