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Special Committee To A Study A Proposed
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Accord***

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Legislative Assembly of the Northwest **Territories**

Special Committee on Constitutional Reform

TECHNICAL BRIEF

to

The House of Commons Special Committee
to study a **proposed** Companion Resolution to the **Meech** Lake Accord

May 2, 1990

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Legislative Assembly of the Northwest Territories

Special Committee on constitutional Reform

TECHNICAL BRIEF

to

The House of Commons Special Committee
to Study a Proposed Companion Resolution to the Meech Lake Accord

May 2, 1990

LEGISLATIVE ASSEMBLY OF THE NORTHWEST TERRITORIES
SPECIAL COMMITTEE ON CONSTITUTIONAL **REFORM**

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Chairman

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Hon. Dennis **Patterson, M.L.A.**

Hon. Richard Nerysoo, **M.L.A.**

CONTENTS

Introductionpage 1

Summary of Recommendations .0...0 .0...0page 2

Analysis - Establishment of New Provincespage 4

Procedural Mechanism to Address the Current Impassepage 12

Summary of the **NWT** Additions **to** the New **Brunswick's** Companion Resolutionpage14

Consolidated **Text** of **Meech** Lake, New Brunswick and Northwest Territories' Amendments.***page 17

Appendix:

Constitution Act, 1871.page 30

Constitution Act, (No.1) 1975.0page 32

Constitution Act, (No.2) 1975.0page 34

Legislative Assembly of the Northwest Territories
Special Committee on Constitutional Reform

TECHNICAL BRIEF

to

The House of Commons Special Committee
to Study a Proposed Companion Resolution to the Meech Lake Accord

Background:

The Honorable Michael A. Ballantine, Minister of Justice and Chairman of the Legislative Assembly of the Northwest Territories Special Committee on Constitutional Reform, is pleased to present on behalf of the Committee this Technical Brief in accordance with the undertaking given in **Yellowknife** on April 18th, 1990 to the House of Commons Special Committee to Study a Proposed Companion Resolution to the Meech Lake Accord.

Chairman Charest in **remarks to Mr. Gordon Robertson during Committee** hearings on April 11th, 1990 in Ottawa, indicated that the **Committee** would be conducting further research into the issue of provincial status for the north. This Technical Brief is also intended as a contribution to that research effort.

Contents

This Technical Brief contains:

- PAGE 2 - a summary of the recommendations of the Government of the Northwest Territories;
- PAGE 4 - an analysis of the existing provisions of the Constitution relating to the establishment of new provinces which demonstrates that the New Brunswick **proposal is consistent with the amending formula contained** in the Meech Lake Accord;
- PAGE 12 - a procedural option to bridge **the** ratification of the Meech Lake Accord and the Companion Resolution;
- PAGE 14 - a summary and consolidated text of constitutional amendments for addition to the McKenna proposal to meet the concerns of the Northwest Territories without affecting Quebec's five demands.

LEGISLATIVE ASSEMBLY OF THE NORTHWEST TERRITORIES
SPECIAL COMMITTEE ON CONSTITUTIONAL REFORM

SUMMARY OF RECOMMENDATIONS

A. Procedure for Bridging the Meech Lake Accord and the New Brunswick Companion Resolution

1. It is proposed that a "Third Resolution" be adopted prior to June 23, 1990. This resolution would relate only to procedural matters. It would provide for an amendment to Part V of the Constitution Act, 1982. This amendment would have the effect of postponing the "**coming into force**" of the Meech Lake Amendment until a Companion Resolution comes into force. The amendment would require a constitutional conference to resolve outstanding issues, and would contain a commitment by all governments to the principle of constitutional renewal to bring about the full and active participation of all provinces and territories in Canada's constitutional evolution.
2. The legal text for this "Third Resolution" is contained on page 12.

B. The Process of Constitutional Reform

1. The participation of elected representatives from the territorial governments in processes of constitutional reform must be guaranteed through participation in all conferences and meetings of First Ministers.
2. Special consideration must be given to establishing a process for resolving outstanding issues relating to the aboriginal peoples of Canada. The aboriginal peoples must participate directly in any such process.
3. Whether or not the Meech Lake Accord is ratified there must be special consideration given to the process of **constitutional** reform:

A **system** of public hearings or referenda **should** be adopted to obtain the views of Canadians before amendments are finalized.

Not every issue is a constitutional issue. A system for screening issues before they become part of a constitutional agenda should be considered. Such a system should also include a role for Canadians to present their views.

Consideration should be given to **the** need for annual constitutional conferences. The political debate on national issues should be conducted in the House of Commons and the Senate except in exceptional circumstances.

4. The conference provided for in section 49 of the Constitution Act, 1982 should be convened in the near future to discuss the amending formulae and processes for including Canadians more directly in discussions on the processes of constitutional reform.

c. Recommendations on the Legal Text

1. The New Brunswick Companion Resolution, if it were ratified, would address many of the substantive concerns which the Government and Legislative Assembly of the Northwest Territories have with the legal text of the Meech Lake Accord. However, the Northwest Territories recommends some additions to the Companion Resolution to address outstanding concerns.
2. A summary of the proposed additions to the legal text is found on page 14. A consolidated text of the Meech Lake Accord, New Brunswick Companion Resolution and Northwest Territories proposals is found on page 18.

ANALYSIS

Establishment of New Provinces: The New Brunswick Proposal

The New Brunswick proposal for a companion resolution proposes that a new section, 43.1, be added to the Constitution Act, 1982 to meet the concerns of the Northwest Territories and Yukon with respect to provincehood for the north. The New Brunswick proposal reads as follows:

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

Interpreting the Meech Lake Amending Formula

Some witnesses before the House of Commons Special Committee have suggested that the New Brunswick proposal would "simply cancel out what is now in the Meech Lake Accord", or that it would represent "a difficult reversal" of an element of Meech Lake which would be unacceptable to Quebec and perhaps other provinces. [Presentation by Professor Peter Russell, April 11, 1990, unofficial transcript]. On careful examination, however, it appears that this is an interpretation which does not take into account other provisions of the Constitution and may misinterpret the effect of the amending formula on the establishment of new provinces.

Section 42(1) (f) of the Constitution Act, 1982 has commonly been interpreted to date as giving provinces a role in the establishment of new provinces. Section 42(1)(f) will become section 41(i) under the Meech Lake Accord and therefore, according to some interpretations, each province would have a veto over the establishment of new provinces. Section 41(i) reads as follows:

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

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

The Importance of the New Brunswick proposal in Relation to Establishing New Provinces

The analysis which follows provides an alternative interpretation to the sections quoted above which leads to the conclusion that provinces do not have any role in the establishment of new provinces other than in **respect** of consequential amendments to the Constitution of Canada having a direct effect on the provinces in constitutional law.

Parliament throughout Canadian history has had exclusive jurisdiction over the establishment of new provinces. It must be pointed out that at no time since the amending formulae were created in 1982 have the provinces provided any substantiated or defensible arguments:

1. to demonstrate that the creation of new provinces will affect any provincial powers, rights or privileges under the Constitution of Canada;
2. to justify an extension of provincial jurisdiction to matters directly affecting the constitutional status and development of the territories;
3. to demonstrate that the political and economic effects associated with establishing new provinces constitute a rationale for provincial involvement in the establishment of new provinces, particularly when other more significant political and economic issues affecting provinces are **not** caught by any amending formula.

The New Brunswick Proposal is a necessary addition to the Meech Lake Accord to verify the alternative interpretation set out below. This alternative interpretation is more consistent with the history and constitutional principles underlying the establishment of new provinces and our federal system generally. In the Canadian federation the provinces have not had jurisdiction over matters outside their boundaries. To interpret the amending formula otherwise would lead to the perverse conclusion that the constitutional development and status of the territories are matters **which** are now ultimately controlled by the provinces.

The Power to Create New Provinces

The Constitution Act, 1871 vests substantive legislative powers in Parliament. The establishment of new provinces is a "matter" within the authority of Parliament under this Act. The **Act** has

never been appealed or directly amended in this regard. The 1871 Act continues to be **"part** of the Constitution of **Canada"** by virtue of s.52(2) (b) , and is listed as item five in **the schedule to the Constitution Act, 1982.**

Effect of the 1982 Amending Formulae on the 1871 Act

The amending formulae set out in Part V of the Constitution Act, 1982 are procedural matters. Part V is entitled I'Procedure for Amending the Constitution of Canada". In discussing the relationship between the Charter of Rights and the amending procedures in Part V, the Yukon Court of Appeal stated in Penikett v. A.G. of Canada (leave to appeal to the Supreme Court of Canada denied) that:

The word **"matters"** in section 32(1) of the Charter parallels its use in sections 91 and 92 of the Constitution Act, 1867. Constitutional powers in Canada have always been divided between Parliament and the provincial legislative assemblies by these sections.

A constitutional amendment is not a **"matter"** within the authority of either Parliament or the provinces. The amending power is vested in a joint decision of both federal and provincial authority.

Section 32(1) (a) of the Charter of Rights and Freedoms is intended to confirm that the Charter applies, inter alia, to **"all matters"** within the authority of Parliament including all matters relating to the Yukon Territory and Northwest **Territories"**. The decision in the Penikett case leads to the conclusion that we must draw a distinction between the word **"matters"** in the context of a **division** of powers, and the word **"matters"** as it is used in the Part V amending formulae. The 1871 Act clearly vests in Parliament the legislative power to create new provinces. It must be remembered that the vesting of this **"matter"** in Parliament under the 1871 Act pre-dated **Parliament's** power to amend the Constitution of Canada and therefore it should not be confused with the **"matters"** referred to in Part V.

Provinces Were Not Given Jurisdiction over New "Matters" by the Amending Formulae

Careful reading of the amending formula in section 42 of the Constitution Act, 1982 (and the relevant section of the Meech Lake Accord) reveals that there has been no **conferral** of new legislative powers to the provinces in respect of the establishment of new

provinces. In other words, the establishment of new provinces is not a "matter" which is now within the powers of the existing provinces.

Prior **to** 1982, Parliament had the power **to** amend **the** Constitution of Canada by virtue of section 91(1) which was added by the Constitution Act (No. 2), 1949. That power allowed Parliament to amend any part of the Constitution of Canada:

... **except** as regards **matters** coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces or as regards rights or privileges by this or **any other constitutional act** granted or secured to the legislature or the government of a province. . . . (Emphasis added.)

The establishment of new provinces was a matter exclusively within the power of Parliament under the 1871 Act. So prior to 1982, Parliament could have amended the 1871 **Act** unilaterally. With the repeal of section 91(1) in 1982, Parliament is now only able to amend the 1871 **Act** under the procedures prescribed by **Part V** of the Constitution Act, 1982. But this change in amending formulae did not alter Parliament's exclusive legislative jurisdiction to establish new provinces under the 1871 **Act**.

What Occurs When a New Province is Established?

The federal Acts establishing Manitoba, Alberta and Saskatchewan serve as examples of the sorts of things contained in establishment Acts for new provinces. Some of the key elements are as follows:

- a) identification of boundary
- b) making the Constitution Acts apply mutatis mutandis to the new province
- c) representation in the Senate
- d) representation in the House of Commons
- e) identification of executive power
- f) establishment of a legislature
- g) continuation of courts
- h) education provisions
- i) ~~annual~~ subsidies
- j) public lands.

What Amendments are Caught by the 1982 Amending Formula?

The amending formula in section 42 applies only **to** "an amendment to the Constitution of Canada". As noted above the 1871 Act is part of the Constitution of Canada. In other words, the amending formula

would be engaged not when a new province is established, but rather in the case where Parliament seeks to amend the 1871 Act or makes some other amendment, as a consequence of establishing a new province, which affects powers, rights or privileges of existing Provinces under the Constitution. This interpretation is consistent with the other amending formulae contained in the Constitution Act, 1982.

The 1871 Act provides that at the time of establishment of a new province Parliament may make provision for the constitution and administration of any such province and for its representation in Parliament. Pursuant to the 1871 Act, Parliament is not able to alter the provisions of the Act establishing the new province once it has been passed. After it has been established, the new province has powers to amend its own Constitution. A provision to this effect used to be contained in **s.92(1)** of the Constitution Act, 1867 but this was repealed in 1982 and replaced by section 45 of the Constitution Act, 1982.

It is clear that the federal legislation that would establish a constitution for a new province need not lead to an amendment of the Constitution which would affect any existing provinces. The federal Act setting out the new province's constitution need not even become part of the "**Constitution of Canada**" as that term is defined by section 52 of the Constitution Act, 1982. Provinces such as British Columbia and Nova Scotia for example, have constitutions which are not contained wholly within the "Constitution of Canada" [See Dixon v. AG of B.C.; MacLean v. AG of Nova Scotia].

As indicated above, the 1871 Act makes specific reference to provisions for the representation of the new province in the Senate and House of Commons. **It** must be noted however, that the two northern territories already have guaranteed representation in the House of Commons and the Senate under the Constitution of Canada by virtue of the Constitution Act (No.1), 1975 and the Constitution Act (No.2), 1975. The establishment of a new province would not necessarily lead to a change in this representation.

Any other consequential amendments to existing sections of the "Constitution of Canada" might, depending on the subject matter, require resolutions of provincial legislatures under the amending formulae **in the** Constitution Act, 1982. However, a review of the specific matters enumerated in sections 41 and 42 of the Constitution Act, 1982 does not reveal any matter which would likely be the subject of an amendment when a new province is established. Once a new province is in existence, Parliament and the legislature of the new province could initiate any "house keeping" amendments that might be necessary by using the s.43 formula.

Protecting Provincial Interests by Opting Out

There appears to be a common misunderstanding that provincial powers, rights or privileges under the Constitution will be affected by the creation of new provinces, although no province has yet articulated how this could happen.

The powers of provinces relate to matters within the province. Section 38(2) and (3) of the Constitution Act, 1982 permit an existing province to opt out of any amendment that "derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government" of that province. Clearly these provisions protect the existing provinces from any consequential amendment to the "**Constitution of Canada**" that might be contained in any federal Act to establish a new province passed pursuant to the 1871 Act.

Section 42(2), **it will** be noted, does not allow a province to **opt** out of an amendment to the Constitution **in** relation to the establishment of new provinces. As stated above, **if this is** interpreted to mean an amendment to the 1871 **Act**, the **prohibition** against **opting out** is logical: the power to create new provinces lies exclusively with Parliament. The only change that could be made to the 1871 Act that would change that exclusivity would be a sharing of the power with the provinces. This would be adding to provincial powers rather than derogating from provincial powers and would fall within **s.38(1)** of the Constitution Act, 1982.

It must also be noted that the section 38 amending formula, the so-called "7/50 formula", actually requires "two thirds of the provinces" for an amendment. The use of a ratio in this section, instead of a fixed number such as "7", indicates that the drafters contemplated an increase or decrease in the number of provinces.

The operation of this amending formula can be affected in two ways

- a) an increase or decrease in the number of provinces
- b) an increase or decrease in the population in some or all of the provinces (the population of the territories is not included in the calculation under section 38, regardless of its size).

While variations in the number of provinces, or population size in any particular province, might affect the numerical operation of the amending formula these are matters over which provinces have not, and should not, have any control.

Fluctuations in population in another province and establishment of new provinces, are very clearly matters outside, as opposed to within, a province. The opting out provision allows a province to "**defend**" itself against any amendment which would affect **its powers**

rights or privileges. However, to interpret the formula as giving provinces an active role in creating new provinces is as repugnant as finding that the Constitution now permits provinces to tamper with or influence population growth in other provinces.

Protecting Provincial Interests Through a Veto

If the Meech Lake Accord were ratified, any amendment to the Constitution of Canada in relation to a matter enumerated in s.41 of the Constitution Act, 1982 would require the consent of all the provinces and Parliament. Again, the existing provinces are completely protected. The veto power could be exercised wherever a provincial legislature believed its interests would be adversely affected. So after Meech Lake, the 1871 Act could not be amended to add powers to the provinces unless all provinces agreed. As indicated above, under s.42 and **s.38(1)** in the Constitution Act, 1982 only seven provinces having 50 percent of the population of all the provinces would have been required to make such a change.

The contention that establishing new provinces will make it more difficult to achieve unanimity for future constitutional amendments, even if it is true, does not appear to have any direct bearing in constitutional law. Achieving unanimity is dependent on politics, not on law. The unanimity formula is based on the principle of provincial equality. It was not intended as a formula to exclude regions or provinces based on how they might vote on an issue.

Conclusion

The New Brunswick proposal for a new **s.43.1** would clarify that Parliament may continue to establish new provinces in the territory pursuant to the 1871 Act, notwithstanding **s.41(i)** of the Meech Lake Accord. However, section 41(i) of the Meech Lake Accord would not be without meaning: it would be engaged if there were ever an attempt to alter the 1871 Act or Parliament's exclusive power under the 1871 Act. Furthermore, an amendment to the Constitution of Canada which was made as a consequence of establishing a new province, would still require provincial resolutions if a **provincial power**, right or privilege under the Constitution were affected.

Confusion between ordinary politics and constitutional law appears to lie at the heart of the desire of some provinces to control the constitutional status and development of the territories. Using the New Brunswick proposal for guidance, it is possible to interpret the various provisions of the Constitution Acts, 1867 to 1982, in a manner consistent with the principle that provinces in our

federal system should not be empowered by the Constitution to meddle in the affairs of other jurisdictions, whether they be provinces or territories.

LEGISLATIVE ASSEMBLY OF THE NORTHWEST TERRITORIES
SPECIAL COMMITTEE ON CONSTITUTIONAL REFORM

A PROCEDURAL MECHANISM TO ADDRESS THE CURRENT IMPASSE

A Third Resolution:

The Northwest Territories Special Committee on Constitutional Reform has recommended that the Meech Lake Accord and New Brunswick Companion Resolution, or some variation of it, should be "ratified" at the same time. Considering the complexity of issues such as Senate reform and other matters it is unlikely that a complete Companion Resolution could be negotiated by June 23, 1990.

Therefore, the Northwest Territories Special **Committee** recommends consideration of a procedural mechanism which would allow the Meech Lake Accord and Companion Resolution to "come into force" at the same time. The Meech Lake Accord could be ratified by June 23, 1990 but the amendments flowing from it would not come into force until a Companion resolution has been ratified.

The mechanism proposed is a "Third Resolution" which deals only with procedural matters. This resolution would be ratified prior to June 23, 1990 and a proclamation of the Governor General would issue prior to June 23, 1990 to add this procedural mechanism to the Constitution of Canada. All substantive discussions on the Meech Lake Accord and Companion resolution could then continue at the constitutional conferences required by this procedural section. During the "cooling off" period, leading up to this conference, a more balanced and complete vision of Canada should be sought.

The Third Resolution would be a schedule to an Accord reached by First Ministers. The Accord would contain commitments by Manitoba, New Brunswick and Newfoundland to ratify the Meech Lake Accord prior to June 23, 1990.

The text of the proposed amendment follows:

"Constitution Act, 1982

The Constitution Act, 1982 is amended by **adding** thereto, **immediately** after section 48 thereof, the following section:

48.1 (1) Notwithstanding any other provision of this Act, an amendment to the Constitution of Canada pursuant to the Constitution Amendment, 1987 proposed by the 1987

Constitutional Accord (**Meech** Lake Accord) shall not come into force until the repeal of this section.

(2) This section may be repealed only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province.

(3) The government of Canada and the provincial governments are committed to the principle of constitutional renewal to bring about the full and active participation of all provinces and territories in **Canada's** constitutional evolution.

(4) A constitutional conference composed of the Prime Minister of Canada, the first ministers of the provinces, and the elected leaders of the governments of the Yukon Territory and the Northwest Territories, that includes in its agenda the items referred to in this section, will be convened by the Prime Minister of Canada by June 23, 1991.

(5) The Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in discussions on any item on the agenda of a conference convened under subsection (4), that, in the opinion of the Prime Minister, directly affects the aboriginal peoples of Canada."

LEGISLATIVE ASSEMBLY OF THE NORTHWEST TERRITORIES
SPECIAL COMMITTEE ON CONSTITUTIONAL REFORM

SUMMARY OF

PROPOSED ADDITIONS TO THE NEW BRUNSWICK COMPANION RESOLUTION

All provisions of the New Brunswick proposal would remain the same except for the additions listed below.

Constitution Act, 1867

1. Add to the new section 2 of the Constitution Act, 1867 the following:

"2.(1) ...

(a.1) the recognition that the distinct societies of aboriginal peoples within Canada constitute a fundamental characteristic of Canada; and

2(2.1) The role of the Parliament and Government of Canada to promote the fundamental **characteristics** of Canada referred to in paragraphs (1)(a.1) and (1)(a) is **affirmed.**"

2. Renumber **s.148** of the Constitution Act, 1867 as **s.148(1)** and add the following subsection:

"148.(2) The Prime Minister of Canada shall invite the elected leaders of the governments of the Yukon Territory and the Northwest Territories to participate in discussions at confererices convened under subsection (1) ."

Constitution Act, 1982

3. ~~Add~~ to the Constitution Act, 1982 immediately after section 36 the following heading and section:

"Constitutional Conference

37.(1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once every two years, commencing in 1990.

(2) A conference convened under subsection (1) shall have included on its agenda items respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions at the conferences convened under subsection (1).

(3) The Prime Minister of Canada shall invite the elected leaders of the governments of the Yukon Territory and the Northwest Territories to participate in discussions at conferences convened under subsection (1)."

4. Add to paragraph 43(1) (a) of the Constitution Act, 1982 the following:

"43.(1) . . .

(a) any alteration to the boundaries between provinces, between provinces and territories, or between territories, and

(b) . . .

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province or territory to which the amendment **applies."**

5. Add to the Constitution Act, 1982 immediately after **s.46.1** the following section:

"46.(2) The Procedures for amendment under ~~sec~~ 43(1) may be initiated either by the Senate or the House of Commons or by the legislative assembly of a territory."

6. Add to section 50 of the Constitution Act, 1982 the following:

"50.(1.1) The Prime Minister of Canada shall invite the elected leaders of the **governments**

of the Yukon Territory and the Northwest Territories to participate in discussions at conferences convened under subsection (1).

50.(2) . . .

(a.1) constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples, where a conference has not been convened on such matters in that year under section 37."

CONSOLIDATED TEXT OF THE NORTHWEST TERRITORIES PROPOSAL
AND NEW BRUNSWICK RESOLUTION

SCHEDULE

CONSTITUTION **AMENDMENT**, 1987

Note: The text of the Northwest Territories **proposal** is contained in square **brackets** [1. **New** Brunswick's proposals are underlined. The Northwest Territories supports the New Brunswick proposals, and to reflect this square brackets have been placed around the underlined text.

Constitution Act, 1867

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

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

[**(a.1.)** the recognition that the distinct societies of aboriginal peoples within Canada constitute a fundamental characteristic of -Canada; and

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

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

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

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

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

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

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

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

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

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

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

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

"Agreements on Immigration and Aliens

95A. The Government of Canada shall, at the request of the government of any province, negotiate with the government of that province for the purpose of concluding an agreement

relating to immigration or the temporary admission of aliens into that province that is appropriate to the needs and circumstances of that province.

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

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

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

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

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

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

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

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

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

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

'General'*

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

"Courts Established by the Parliament of **Canada"**

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

"Supreme Court of Canada

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

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

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

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

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

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

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

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

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

101E. (1) Sections 10I.A to 101D shall not be construed as abrogating or derogating from the powers of the Parliament of Canada to make laws under section 101 except to the extent that such laws are inconsistent with those sections.

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

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

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

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

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

"XII - CONFERENCES ON THE ECONOMY AND OTHER MATTERS

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

(2) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in discussions at conferences convened under subsection (1).

XIII - REFERENCES

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

Constitution Act, 1982

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

"(3) The Senate shall, in 1991 and every five years thereafter carry out an assessment of the results achieved in relation to the commitments of Parliament, the legislatures of the Government of Canada and the provincial governments set out in this section and report every such assessment shall be presented to the conference next convened under section 48 of the Constitution Act 1867 after the assessment is completed."

() The said Act is further amended by adding thereto, immediately after section 36 thereof, the following heading and section:

"CONSTITUTIONAL CONFERENCE

37. (1) A Constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once every two years, commencing in 1990.

(2) A conference convened under subsection (1) shall have included on its agenda items respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions at the conferences convened under subsection (1) .

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions at the conferences convened under subsection (1) ."

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

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

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

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

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

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

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

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

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

(g) the Supreme Court of Canada;

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

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

(j) an amendment to this Part. "

() Section 43 of the said Act is renumbered as subsection 43(1) [and amended as follows]:

"(1) (a) any alteration to the boundaries between provinces, [between provinces and territories, or between territories,] and

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions ~~of the~~ Senate and House of Commons and of the legislative assembly of each province [or territory] to which the amendment applies."

() [The said section] is further amended by adding thereto the following subsection:

"(2) An Amendment to the Act of the Legislature of New Brunswick entitled An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick, chapter 0-1.1 of the Acts of New Brunswick 1981, may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the Legislative Assembly of New Brunswick."

[() The said Act is further amended by adding thereto, immediately after section 43 thereof, the following section: 1

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

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

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

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

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

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

The said Act is further amended by adding thereto immediately after section 46.2 thereof, the following section:

46.2 The procedures for amendment under section 43.1 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a territory.

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

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

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

"PART VI

CONSTITUTIONAL CONFERENCES

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

(1.1) The Prime Minister of Canada shall invite the elected leaders of the governments of the Yukon Territory and the Northwest Territories to participate in discussions at conferences convened under subsection (1).

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

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

(a.1) constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples [where a conference has not been convened on such matters in that year under section 37;]

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

(c) such other matters as are agreed upon.

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

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

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

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

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

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

General

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

CITATION

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

11. THE BRITISH NORTH AMERICA ACT, 1871

34-35 Victoria, c. 28.

An Act respecting the establishment of Provinces in the Dominion of Canada.

[29th June, 1871]

Whereas doubts have been entertained respecting the powers of the Parliament of Canada to establish Provinces in Territories admitted, or which may hereafter be admitted, into the Dominion of Canada, and to provide for the representation of such Provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament:

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

1. This Act may be cited for all purposes as The British North America Act, 1871. Short title.

2. The Parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament. Parliament of Canada may establish new Provinces and provide for the constitution etc. thereof.

3. The Parliament of Canada may from time to time with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of each Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby. Alteration of limits of Provinces.

4. The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province. Parliament of Canada may legislate for any territory not included in R.wta-

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5.
R.S., 19520

Confirmation of Acts of Parliament of Canada. 23 & 33 Vict., (Canadian) cap. 3. 33 Vict., (Canadian) cap. 3.

5. The following Acts passed by the said Parliament of Canada, and intitled respectively,—“An Act for the temporary government of Rupert's Land and the North Western Territory when united with Canada”; and “An Act to amend and continue the Act thirt-two and thirt-three Victoria, chapter three, and to establish and provide for the government of “the Province of Manitoba,” shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor General of the said Dominion of Canada.

Limitation of powers of Parliament of Canada to legislate for an established Province.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

No. 41

CONSTITUTION ACT (No. 1), 1975

(BRITISH NORTH AMERICA ACT, 1975)

[Note: The short title (in italics) of this Act, which was enacted as Part I of the Northwest Territories Representation Act, was changed to the present title by the Constitution Act, 1982 (No. 44 infra). See also the note to section 3 of this Act.]

23-24 Elizabeth II, c. 28 (Canada)

[Assented to 13th March, 1975]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

.....

PART 1

CONSTITUTION ACT, 1867

2. Subsection 51 (2) of the Constitution Act, 1867, as enacted by the British North America Act, 1952, is repealed and the following substituted therefor:

Yukon Territory and Northwest Territories

“(2) The Yukon Territory as bounded and described in the schedule to chapter Y-2 of the Revised Statutes of Canada, 1970, shall be entitled to one member, and the Northwest Territories as bounded and described in section 2 of chapter N-22 of the Revised Statutes of Canada, 1970, shall be entitled to two members.”

Short title and citation

3. This Part may be cited as the British North America Act, 1975, and the British North America Acts, 1867 to 1974-75 and this Part may be cited together as the British North America Acts, 1867 to 1975.

N° 41

LOI CONSTITUTIONNELLE N° 1 DE 1975

(ACTE DE L'AMÉRIQUE DU NORD BRITANNIQUE, 1975)

[Note: Le titre abrégé (en italique) de cette loi, constituant la partie I de la Loi sur la représentation des territoires du Nord-Ouest, a été remplacé aux termes de la Loi constitutionnelle de 1982 (n° 44 infra). Voir aussi la note accompagnant l'article 3.]

23-24 Elizabeth II, ch. 28 (Canada)

[Sanctionnée le 13 mars 1975]

Sa Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète:

.....

PARTIE I

LOI CONSTITUTIONNELLE DE 1867

2. Le paragraphe 51(2) de la Loi constitutionnelle de 1867, dans la version qu'endonne l'Acte de l'Amérique du Nord britannique, 1952, est abrogé et remplacé par ce qui suit:

«(2) Le territoire du Yukon et les territoires du Nord-Ouest, dans les limites et selon la description qu'en donnent l'annexe du chapitre Y-2 et l'article 2 du chapitre N-22 des Statuts révisés du Canada de 1970, ont droit respectivement à un et à deux députés.»

3. La présente Partie peut être citée sous le titre: Acte de l'Amérique du Nord britannique, 1975; les Actes de l'Amérique du Nord britannique, 1867 à 1974-75, ainsi que la présente Partie, peuvent être cités ensemble sous le titre: Titre abrégé et référence

Acres de l'Amérique du Nord britannique, 1867 à 1975.

Short title

3. This Part may be cited as the *Constitution Act (No. 1), 1975*.

[Note: The original section 3 (in italics) was repealed and a new section substituted by section 31 of the *Miscellaneous Statute Law Amendment Act, 1977* (No. 43 *infra*). The section enacted in 1977 was repealed and the new section 3 substituted by the *Constitution Act, 1982* (No. 11 *infra*).]

3. Titre abrégé de la présente partie : *Loi Titre abrégé constitutionnelle n° 1 de 1975*.

[Note : L'article 3 (dont la version originale est en italique) a été abrogé et remplacé aux termes de l'article 31 de la *Loi corrective de 1977* (n°43 *infra*) et, de nouveau, aux termes de la *Loi constitutionnelle de 1982* (n° 44 *infra*).]

.....

.....

CONSTITUTION ACT (No. 2), 1975

(BRITISH NORTH AMERICA ACT, (No. 2) 1975)

[Note: The present short title was substituted for the original short title (in italics) by the *Constitution Act, 1982 (No. 44 infra)*.]

23-24 Elizabeth 11, c. 53 (Canada)

An Act to amend the Constitution Acts, 1867 to 1975

[Assented to 19th June, 1975]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Constitution of
Senate altered

1. Notwithstanding anything in the *Constitution Act, 1867*, or in any Act amending that Act, or in any Act of the Parliament of Canada, or in any order in council or terms or conditions of union made or approved under any such Act,

(a) the number of Senators provided for under section 2 I of the *Constitution Act, 1867*, as amended, is increased from one hundred and two to one hundred and four;

(b) the maximum number of Senators is increased from one hundred and ten to one hundred and twelve; and

(c) the Yukon Territory and the Northwest Territories shall be entitled to be represented in the Senate by one member each.

"Province"

2. For the purposes of this Act, the term "Province" in section 23 of the *Constitution Act, 1867* has the same meaning as is assigned to the term "province" by section 28 of the *Interpretation Act*.

LOI CONSTITUTIONNELLE N° 2 DE 1975

(ACTE DE L'AMÉRIQUE DU NORD BRITANNIQUE N° 2, 1975)

[Note : Le titre abrégé (en italique) a été remplacé aux termes de la *Loi constitutionnelle de 1982 (n° 44 infra)*.]

23-24 Elizabeth 11, ch. 53 (Canada)

Loi modifiant les Lois constitutionnelles de 1867 à 1975

[Sanctionnée le 19 juin 1975]

Sa Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète:

1. Par dérogation à la *Loi constitutionnelle de 1867*, aux lois modifiant cette loi, aux lois du Parlement du Canada, aux arrêtés en conseil ou aux termes et conditions d'union pris ou approuvés en vertu de ces lois,

Modification à
la composition
du Sénat

a) le nombre de sénateurs prévu à l'article 21 de la *Loi constitutionnelle de 1867*, dans sa forme modifiée, est porté de cent deux à cent quatre;

b) le nombre maximal de sénateurs est porté, de cent dix à cent douze; et

c) le territoire du Yukon et les territoires du Nord-Ouest ont le droit d'être représentés au Sénat par un sénateur chacun.

2. Pour l'application de la présente loi, le terme «province» a. à l'article 23 de la *Loi constitutionnelle de 1867*, le même sens que dans l'article 28 de la *Loi d'interprétation*.

Short title and
citation

3. *This Act may be cited as the British North America Act, (No. 2) /1975, and shall be included among the Acts that may be cited as the British North America Acts, 1867 to 1975.*

3. *La présente loi peut être citée sous le titre: Acte de l'Amérique du Nord britannique n' 2, 1975, et doit être comprise dans la liste des lois qui peuvent être citées sous le titre: Actes de l'Amérique du Nord britannique, 1867 à 1975.*

Short title

3. This Act may be cited as the *Constitution Act (No. 2), 1975.*

[Note: Section 3 (in italics) was repealed and the new section substituted by the *Constitution Act, 1982 (No. 44 infra).*]

3. **Titre abrégé :** *Loi constitutionnelle n° 2 de 1975.*

[Note : L'article 3 (en italique) a été abrogé et remplacé aux termes de la *Loi constitutionnelle de 1982 (n° 44 infra).*]