

CANADA'S CONSTITUTIONAL CRISIS AFTER MEECH LAKE: SETTING A NEW COURSE FOR A EUROPEAN UNION?*

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I. INTRODUCTION

A new era in Canada's constitutional development began on June 23, 1990, when the proposed Meech Lake Accord¹ (Accord) collapsed.² This historic event represented the latest step in the evolution of Canada's Constitution. The Accord was designed to strike a new internal balance, or equilibrium, in Canada's constitutional architecture.³ Since the British Parliament statutorily created Canada as a legal governmental entity in 1876,⁴ the nation has struggled with the task of establishing a viable Canadian federal structure, sovereign and independent from Britain.⁵ Unfortunately, every scheme or proposal has been unacceptable to at least one of the provinces⁶ and has ended, as did the Accord, in failure.

At the present time, the Canadian national agenda is focused on devising a new constitutional order under which all the provinces can exist in harmony. Most commentators agree that the current constitutional status quo if left unmodified will be untenable.⁷

1. Meech Lake Accord, June 23, 1987, reprinted in PETER W. HOGG, *MEECH LAKE CONSTITUTIONAL ACCORD ANNOTATED* appendix 1 (1988) [hereinafter ACCORD].

2. See John F. Burns, *Canada Abandons Accords on Quebec*, N.Y. TIMES, June 23, 1990, § 1 (Foreign Desk), at 1.

3. See Thomas J. Courchene, *Meech Lake and Federalism: Accord or Discard?*, in *COMPETING CONSTITUTIONAL VISIONS: THE MEECH LAKE ACCORD* 122 (Katherine E. Swinton & Carol J. Rogerson eds., 1988) [hereinafter VISIONS].

4. British North America Act, 1867, 30 & 31 Vict., ch.3 (U.K.) renamed Constitution Act, 1867, by Canada Act, R.S.C., Appendices (No. 44)(1985)(Can.) reprinted in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (Albert P. Blaustein & Gisbot H. Flanz eds., 1983) [hereinafter BNA Act].

5. See Joel Bakan & Danielle Pinard, *Getting to the Bottom of Meech Lake: A Discussion on Some Recent Writings on the 1987 Constitutional Accord*, 21 OTTAWA L. REV. 247 (1989). See also Cairns, *The Canadian Constitutional Experiment*, 9 DALHOUSIE L.J. 87 (1984). This is commonly referred to as "patriation." The term is uniquely Canadian. It refers to the political movement to establish a legal system that does not require British Parliamentary consent and Royal assent to amend the Canadian constitution. *Id.*

6. See CANADIAN ENCYCLOPEDIA 1918 (James H. Marsh, ed., 2d. ed. 1988). Canada is comprised of the provinces of British Columbia (1871), Alberta (1905), Saskatchewan (1905), Manitoba (1870), Ontario (1867), Quebec (1867), Newfoundland (1949), New Brunswick (1867), Nova Scotia (1867), Prince Edward Island (1873), the Yukon (1898) and Northwest Territories (1870) (year indicates when entered into union). See *id.*

7. See, e.g., Thomas J. Courchene & John N. McDougall, *The Context for Future Consti-*

Quebec, the province which was to benefit the most from the Accord, renewed its discussions about becoming a sovereign state.⁸ In September 1990, Quebec created the Commission on the Constitutional and Political Future of Quebec⁹ (Quebec Commission). The Quebec Commission announced in March 1991 that it would give the other provinces twenty months to make proposals to Quebec for a new Canadian constitutional order.¹⁰ Quebec's government will then turn to its people and ask them to decide if Quebec will be associated with Canada or move for complete independence.¹¹

On the federal level, the Canadian Prime Minister, Brian Mulroney, placed before the Canadian House of Commons a document named *Shaping Canada's Future Together* on September 24, 1991.¹² The document contains twenty-eight proposals for constitutional reform including the changes the Accord would have implemented, as well as many new suggestions. The Prime Minister has proposed a vision for Canada's future which would maintain the current federal structure, while moving toward an economic union similar to the European Community (EC).¹³

Canada's present constitutional dilemma parallels the breakdown of other federal structures throughout the world. The individual states within the former Soviet Union, India, Yugoslavia and Czechoslovakia have become disenchanted with their existing federal orders and are experiencing what is referred to as "regional self-determination."¹⁴ Like Quebec, they are now exercising their right to decide by which fundamental laws they are to be governed.¹⁵ The dismantling of these existing federal structures magnifies the significance of the

tional Options, in *OPTIONS FOR A NEW CANADA* 105 - 09 (Ronald H. Watts & Douglas M. Brown eds., 1991) [hereinafter *OPTIONS*].

8. See discussion *infra* text part III.C.

9. See Guy Laforest, *Quebec Beyond the Federal Regime of 1867-1982: From Distinct Society to National Community*, in *OPTIONS*, *supra* note 7, at 105 - 06. The Quebec Commission is officially called *La Commission sur l'avenir constitutionnel et politique du Québec*. *Id.*

10. See John F. Burns, *Canadian Leader Appeals for Calm on Quebec Dispute*, *N.Y. TIMES*, June 24, 1990, § 1 (Foreign Desk), at 1.

11. *Id.*

12. *Shaping a New Future*, *TORONTO STAR*, Sept. 25, 1991, at A23 (reprinting the full text of all 28 proposals) [hereinafter *Shaping a New Future*].

13. *Id.* at proposals 7(11), 14(1), 14(5), 16, 28.

14. This phrase has been used by Professor Hilary K. Josephs of the Syracuse University College of Law to describe this recent global phenomenon. See also Carol Goar, *Small Wonder Foreigners Fear for Canada It'll Take More than Derek Burney's Bravado to Convince World We're not Just Another Fragmenting Federation*, *TORONTO STAR*, July 13, 1991, (Insight), at D4. See generally LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* (1978).

15. *Id.*

historical events in Western Europe where several states have come together to form a new legal order, the European Union.

The creation of the European Union has been an ongoing process. In 1951, the Treaty of Paris¹⁶ was adopted creating the first common market, for coal and steel, in Europe and planting the seeds for what became the EC. During the past forty years, this strict economic structure has developed slowly, integrating the diverse economies of the 12 member states into one entity.¹⁷ Agreements between the member states form the foundation of the economic legal order to which all governments, businesses and citizens of the EC adhere. The laws and institutions of the EC are separate from those of member states, but they were molded according to the common interests of the member nations and several fundamental principles.¹⁸ The European Community has recently undertaken the next phase of its development. The agreement completed at the Maastricht Summit in December 1991¹⁹ will transform the sophisticated economic entity into one clearly identifiable group, the European Union.²⁰ This agreement will strengthen the economic ties by adding an "economic and monetary union" to the EC framework and, independent of the EC, establish inter-governmental cooperation in the areas of foreign policy and security. The legal framework of the European Union has been described as a federal constitutional framework.²¹

In response to the Quebec Commission's request for proposals,

16. Treaty instituting the Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty]. The only authentic version of the treaty is in French.

17. See P.S.R.F. MATHUSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 6 (5th ed. 1990) [hereinafter MATHUSEN 5th]. The member nations of the EC are France, Germany, Belgium, Luxembourg, United Kingdom, Netherlands, Spain, Portugal, Italy, Ireland, Greece, and Denmark. *Id.*

18. See DOMINIK LASOK & JOHN BRIDGE, LAW & INSTITUTIONS OF THE EUROPEAN COMMUNITIES 27 (4th ed. 1987) [hereinafter LASOK]. See also discussion of the Schuman Plan *infra* text part IV.A.

19. *Maastricht Summit Succeeds on EC Economic and Political Union*, Eurecom (Monthly Bulletin of European Community Economic and Financial News), Vol. 3, No. 11, Dec. 1991 [hereinafter *Maastricht Summit Succeeds*]. The text of the agreement done at Maastricht was not available at the time this article was completed.

20. Bruce Barnard, *Making Sense of Maastricht*, EUROPE, Jan./Feb. 1992, at 14 [hereinafter *Making Sense of Maastricht*]. The European Union refers to a legal order which is comprised of a strict economic legal order known as the European Community and the agreements concerning inter-governmental cooperation between the member states in areas of foreign policy and security.

21. See Prodromos D. Dagtoglou, *The Legal Nature of the European Community, in THIRTY YEARS OF COMMUNITY LAW* 34 - 41 (1983) [hereinafter THIRTY YEARS] (two theories of the European model are discussed: a functional, or federal system, and a supra-national organization). See also LASOK, *supra* note 18 (the authors correlate the EC to either a federal system or a confederation).

individuals from every field in Canada have been offering suggestions for a new federal model.²² The EC had been suggested as a model for solving previous constitutional problems in Canada.²³ Once again, scholars are looking to Europe to see if such a system would be viable for Canada.²⁴

The purpose of this Note is to analyze whether the European Union is a viable solution to Canada's disintegrating constitutional order. Part II will discuss the historical background of the present constitutional order of Canada. It will examine the historical, political and social context that brought about changes in Canada's basic laws. In part III, the impact that the Meech Lake Accord would have had on the present constitutional framework in Canada and the events after its failure will be analyzed. Part IV will provide an overview of the historical context of the European Union's creation and the fundamental principles which guided it. Additionally, its institutions and the completion of the internal market by December 31, 1992, will be discussed. An overview of the Maastricht Summit will be provided to explain how its proposals for economic and monetary union as well as political cooperation will change the shape of the existing European Union. Finally, part V will outline possible constitutional structures for Canada and analyze the federal government's recent proposal. This Note concludes that federal institutions guided by fundamental principles governing limited areas of provincial sovereignty, like the European Union's, could form a new, socially legitimate Canadian constitutional order.

II. HISTORICAL BACKGROUND OF THE EXISTING CONSTITUTIONAL ORDER OF CANADA

A. *The British North America Act, 1867: The Founding Instrument*

The three British North American colonies²⁵ were confederated

22. See generally PHILIP RESNICK, *TOWARD A CANADA-QUEBEC UNION* (1991) [hereinafter RESNICK]; OPTIONS, *supra* note 7.

23. See David Matas, *The EEC as a Model for Canada*, 10 MANITOBA L.J. 259 (1980)(citing (1977) Canadian House of Commons Debates, at 3245, per Claude Wagner). Matas argued that the EEC model could not work for Canada because the provinces would never agree to a system where they would lose aspects of the sovereignty they now enjoy to the federal government. *Id.* at 279.

24. See Dan Soberman, *European Integration: Are there Lessons for Canada?*, in OPTIONS, *supra* note 7, at 191.

25. The colonies brought together were Canada, New Brunswick and Nova Scotia. See BNA Act, *supra* note 4, preamble. See also RONALD E. CHEFFINS, *THE CONSTITUTIONAL PROCESS IN CANADA* 24 - 25 (1969).

on July 1, 1867, when the British Parliament enacted the British North America Act, 1867 (BNA Act).²⁶ The three separate colonies were united into one federation which was divided into four provinces.²⁷ The individuals responsible for establishing the first confederal Canadian legal order were influenced by the constitutional experience of the United States²⁸ and the constitutional traditions of Great Britain.²⁹ The government, as established by the BNA Act, was comparable to the United Kingdom model of government, however, it divided governmental powers between a central Dominion government and provincial governments.³⁰ While the BNA Act provided the legal framework for,³¹ and placed limitations upon,³² the Canadian government, it did not provide an internal mechanism to amend the law that created the federation.³³ As Canadian legal independence from the United Kingdom (U.K.) came to be recognized in the twentieth century, the unsuitability of this process became apparent.

In 1919, Canada obtained independent international status when the U.K. requested that Canada, Australia, New Zealand and South Africa be given separate representation in the assembly of the League of Nations.³⁴ Canada's autonomy from the U.K. was evident by its participation in the 1919 Paris Peace Conference.³⁵ The irony of an

26. See BNA Act, *supra* note 4.

27. The BNA Act, 1867 created Ontario (formerly Upper Canada), Quebec (formerly Lower Canada), Nova Scotia and New Brunswick. See GERALD L. GALL, *THE CONSTITUTIONAL LEGAL SYSTEM* 43 (2d student ed. 1983).

28. See CARL J. FREIDRICH, *THE IMPACT OF AMERICAN CONSTITUTIONALISM ABROAD* 60 - 61 (1967). The United States Constitution of 1776 was the written document which influenced the drafting of the federal structure in Canada. In contrast to the U.S. model, where all powers remain in the states unless expressly given to the federal government, the BNA Act placed all residual powers in the Dominion, the federal government and the provinces have only certain enumerated powers. See E. RUSSELL HOPKINS, *CONFEDERATION AT THE CROSSROADS* 1 (1968).

29. See GALL, *supra* note 27, at 46 - 48. See also HOPKINS, *supra* note 28, at 1.

30. The preamble of the BNA Act, 1867 states that the "Provinces . . . desire to be federally united . . . with a constitution similar in principle to that of the United Kingdom." BNA Act, *supra* note 4, at preamble.

31. BNA Act, 1867 creates and enumerates the powers of the branches of the federal government: The Executive §§ 9 - 16, The Legislature §§ 17 - 57 (Senate §§ 21-36 and House of Commons §§ 37 - 57), and The Judiciary §§ 96 - 101. See BNA Act, *supra* note 4.

32. BNA Act, *supra* note 4, at pt. VII.

33. See NEIL FINKELSTEIN, *1 LASKIN'S CANADIAN CONSTITUTIONAL LAW* 71 (5th ed. 1986) [hereinafter LASKIN'S].

34. See 4 AMOS J. PEASELEE, *CONSTITUTIONS OF NATIONS* 206 (3d ed. 1970).

35. See ROBERT M. DAWSON, *THE GOVERNMENT OF CANADA* 47 - 49 (5th ed. 1970). For a discussion of Canada's early treaty making see R.J. Delisle, *Treaty Making Power in Canada*, in *ONTARIO ADVISORY COMMITTEE CONFEDERATION* 115 (1967).

apparently sovereign nation having to request amendments for its constitution from another state increased with the passage of the Statute of Westminster, 1931.³⁶ Although this British law provided for Canada's independence from the U.K., the U.K. retained complete power to amend the BNA Act and the location of a court of final appeal.³⁷

The issue came into focus once again when Canada accepted compulsory jurisdiction of the Permanent Court of International Justice in 1930³⁸ and again when it became a United Nations member in 1945.³⁹ During the twentieth century, the federal and provincial governments in Canada made repeated efforts to "patriate"⁴⁰ Canada's Constitution, that is, formulate a procedure to amend its basic laws without British Parliamentary involvement.

B. *In Search of a Solution*

The search for a satisfactory procedure for amending the Canadian Constitution has been pursued since the Imperial Conference of 1926.⁴¹ The first significant discussions took place at the Dominion-Provincial Conference of 1927.⁴² The same issue was subsequently addressed by federal and provincial leaders in 1935-36, 1950, 1960-61, 1964, 1971, 1981 and 1987.⁴³

In 1935, a special committee was created by the Canadian House of Commons to address the amending problem.⁴⁴ Due to the urgency of the matter, it called for a Dominion-Provincial conference which produced a "Continuing Committee on Constitutional Questions."⁴⁵ The committee, composed of federal and provincial officials, proposed general amending procedures and an amendment to the Statute of Westminster to enable the Parliament of Canada to replace the BNA

36. Statute of Westminster, 1931, R.S., ch. 107 § 2; 1967 - 68; c.7 § 8 cited in Interpretation Act, R.S.C., ch. I-23, § ;1967 - 68 (Can.).

37. See DAWSON, *supra* note 35, at 48 - 50.

38. Canada deposited the instrument accepting compulsory jurisdiction of the World Court on July 28, 1930, accepted on September 20, 1929, 88 L.N.T.S. 282, ratified on July 28, 1930, 100 L.N.T.S. 155, and terminated jurisdiction on April 7, 1970, 724 U.N.T.S. 421.

39. Original signatory nation to U.N. Charter at the San Francisco Conference on June 26, 1945. See SHABTAI ROSENNE, DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 301 (2d ed. 1979).

40. See *supra* note 5.

41. See GUY FAVREAU, THE AMENDMENT OF THE CONSTITUTION OF CANADA (1965).

42. See DOMINION-PROVINCIAL CONFERENCES 1927, 1935, AND 1941 (1943).

43. See generally HOPKINS, *supra* note 28, at 267.

44. See *id.* at 268.

45. Conference Resolution Jan. 8, 1936. *Id.*

Act with a constitution.⁴⁶ This new constitution would include an amending process that would be exercised completely within Canada.⁴⁷ Although no final decision was ever reached, the basic principle that the establishment of an amendment procedure required negotiation between federal and provincial governments guided all subsequent conferences.⁴⁸

The concerns of World War II and post-war reconstruction sidetracked the "amendment procedure" problem until 1950.⁴⁹ The Right Hon. Louis St. Laurent⁵⁰ noted that the role of Canada in the two World Wars demonstrated its capacity to bear nationhood and he put the pursuit of an amending procedure back on the national agenda.⁵¹

Accordingly, a Constitutional Conference of federal and provincial officials met in Ottawa in January 1950.⁵² They proposed that provisions of the BNA Act which concerned six different areas should each have a different amending procedure.⁵³ However, no concrete decisions were made at this conference and the issue was left open for another meeting.⁵⁴

A conference of Attorney Generals met on four occasions throughout 1960 and 1961.⁵⁵ On December 1, 1961, the meeting produced a draft proposal called the "Fulton Formula."⁵⁶ The proposed scheme embodied a three-fold amending procedure with provisions addressing the delegation of legislative power.⁵⁷ Saskatchewan and Quebec objected to the entrenchment of this formula in the Canadian Constitution as it would give the federal government the right to

46. *Id.*

47. HOPKINS, *supra* note 28, at 268.

48. *Id.*

49. *Id.* at 268 - 69.

50. Prime Minister of Canada from 1948 - 57. See 3 THE CANADIAN ENCYCLOPEDIA 1946 (James H. Marsh ed., 2d ed. 1988).

51. See HOPKINS, *supra* note 28, at 268 - 69 (citing *National Broadcast* (CBC radio broadcast, May 9, 1949)).

52. See PROCEEDINGS OF THE CONSTITUTIONAL CONFERENCE OF FEDERAL & PROVINCIAL GOVERNMENTS (1951). First Session: Ottawa, Jan. 10 - 12, 1950; Second Session: Quebec, Sept. 25 - 28, 1950.

53. See LASKIN'S, *supra* note 33, at 74. For example, amendments concerning only the Canadian Parliament could be made by an act of the Canadian Parliament alone. *Id.*

54. See HOPKINS, *supra* note 28, at 269.

55. *Id.* at 270.

56. Fulton Formula, reprinted in 12 MCGILL L. J. 576 (1966 - 67) (The November 6, 1961 Draft Amendment formally named An Act to Provide for the Amendment in Canada of the Constitution of Canada). Named for the leadership provided by the then Federal Minister of Justice, Edmund D. Fulton.

57. See LASKIN'S, *supra* note 33, at 74.

amend any part of the constitution without the unanimous consent of the provinces as a temporary step toward patriation. Saskatchewan and Quebec feared that, once this short term remedy was created, no effort to find a better amending formula would be made within Canada.⁵⁸

In 1964, a Dominion-Provincial Conference addressed the amending issues that had been tabled by the 1961 Conference.⁵⁹ The Fulton Formula was revised by an Attorney Generals Conference in Ottawa. The Attorney Generals unanimously recommended the new "Fulton-Favreau Formula"⁶⁰ be passed by the Conference of Provincial Prime Ministers. It was unanimously accepted and subsequently approved by every provincial legislature except Quebec's in 1966.⁶¹ Quebec opposed the proposal, perceiving it to be inflexible and fearing that it would prohibit future constitutional change.⁶² Once again, a national political effort to patriate the Canadian Constitution failed.

Five years later, in 1971, at the Victoria Conference, another proposal for constitutional reform was drafted.⁶³ The Victoria Charter outlined an amending formula for Canadian patriation.⁶⁴ Once again, Quebec could not support the proposal because, among other things, the proposal did not change the distribution of powers in relation to the Social Security system.⁶⁵

In 1978, the Constitutional Amendment Bill, or Bill C-60, was introduced in the Canadian Parliament by the Trudeau government.⁶⁶ It was a unilateral attempt to reform aspects of the constitution over

58. See B.L. Strager, *Saskatchewan and the Amendment of the Canadian Constitution*, 12 MCGILL L.J. 443, 462 (1966 - 67).

59. See PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 54 (2d ed. 1985) [hereinafter HOGG].

60. Fulton-Favreau Formula, *reprinted in* 12 MCGILL L.J. 579 (1966 - 67) (The October 30, 1964 Draft Amendment formally named An Act to Provide for the Amendment in Canada of the Constitution of Canada). Named after the Federal Ministers of Justice principally involved at the conferences in 1961, Edmund D. Fulton, and in 1964, Guy Favreau. See Bora Laskin, *Amendment of the Constitution: Applying the Fulton-Favreau Formula*, 11 MCGILL L.J. 2 (1965).

61. See LASKIN's *supra* note 33, at 75.

62. See GUY FAVREAU, *THE AMENDMENT OF THE CONSTITUTION OF CANADA* (1965) [hereinafter *White Paper*]. This document was presented as a "White Paper" at the 1964 Dominion-Provincial Conference on the amending problem.

63. See LASKIN's, *supra* note 33, at 75.

64. *Id.* The procedure "required the consent of 1) Parliament, 2) any province which at any time contained more than twenty five percent of the Nation's population, 3) two Atlantic provinces and 4) two Western Provinces comprising at least fifty percent of the region's population." *Id.*

65. See DONALD V. SMILEY, *CANADA IN QUESTION: FEDERALISM IN THE SEVENTIES* 41 - 54 (1972).

66. See LASKIN's, *supra* note 33, at 75.

which the Federal Parliament had exclusive control.⁶⁷ The Trudeau government indicated its desire to take the first step towards bringing the Canadian Constitution under the control of the Canadian government by calling for consultation with provinces in a First Ministers' Conference.⁶⁸ However, this movement ended and the amending problem was left unsolved as a result of provincial opposition and a change in control of the federal government following the 1979 elections.⁶⁹

C. *The Rise of Quebec's Move for Independence*

The aforementioned proposals for a procedure to amend the Canadian Constitution without British Parliamentary approval had not been acceptable to Quebec. In fact, beginning in the late 1950s and early 1960s, a movement in Quebec referred to as the "Quiet Revolution"⁷⁰ increased the ethnic consciousness of that French-speaking province. One consequence was that the requirements that any proposed constitutional change would have to satisfy before Quebec would agree to them were considerably broadened. The question of an acceptable amending procedure to accomplish patriation became only one of the demands Quebec made before it would take part in any future changes to Canada's Constitution.

The Quiet Revolution was the beginning of the development of Quebec's independent identity, separate and distinct from Canada. This social and cultural transformation saw a decline in the role of the church and a migration of youth from the rural areas to urban cities. It resulted in changes in education, provincialization of business and market nationalism.⁷¹ The goal was for Quebec to have greater control over its own affairs,⁷² to become *Maîtres Chez Nous*.⁷³ From 1960-66, Quebec built an infrastructure modeled after a modern capitalist society.⁷⁴ These changes were the catalyst to a political move-

67. See BNA Act, *supra* note 4, § 91(1).

68. See generally PIERRE E. TRUDEAU, A TIME FOR ACTION: TOWARD THE RENEWAL OF THE CANADIAN FEDERATION (1978).

69. See LASKIN'S, *supra* note 33, at 75.

70. *Canada Survey: From New France to New Quebec*, THE ECONOMIST, June 29, 1991, at 7.

71. *Id.* at 7 - 8.

72. See WILLIAM D. COLEMAN, THE INDEPENDENCE MOVEMENT IN QUEBEC 1945 - 1980, 222 (1984).

73. This phrase reflects the sentiment of wanting to be "Masters in our House." See HENRY MILNER & SHEILAGH H. MILNER, THE DECOLONIZATION OF QUEBEC AN ANALYSIS OF LEFT-WING NATIONALISM 168 (1973).

74. *Id.* at 167. The provincial government began to regulate the economy and established many state enterprises most notably Hydro-Quebec, a regional electric production facility. *Id.*

ment that called for political change within Quebec.

As a result, political parties that emerged in the 1960s advocated independence and chose a course of radical change for Quebec. Among others, The *Front de libération du Québec (F.L.Q.)* and the *Rassemblement pour l'indépendance nationale (R.I.N.)* mobilized their efforts for a completely independent Quebec.⁷⁵ They envisioned Quebec as a completely sovereign nation with its own constitution.⁷⁶

In 1968, another party calling for Quebec's independence was formed by René Lévesque. The *Parti Québécois (P.Q.)* became the organization which gained popular support.⁷⁷ Lévesque's party was much less radical than the *F.L.Q.* and the *R.I.N.* It sought to obtain Quebec's independence through legitimate political channels. Its idea of independence recognized that there would be some form of economic association with Canada, but little else would exist between the two sovereigns.⁷⁸ In the aftermath of the "October Crisis"⁷⁹ and the reaction of the federal government, the *P.Q.* emerged as the lone party with a viable nationalist platform "committed to change within the system."⁸⁰

The *P.Q.*'s promise of independence won it the Quebec Provincial Parliamentary elections in 1976.⁸¹ The move for independence under the guidance of the *P.Q.* culminated in a provincial referendum which asked the citizens of Quebec to decide its future relationship with Canada. In its final form, the "sovereignty-association" referendum, if passed would have authorized the Quebec government to begin negotiations with the Canadian federal government on the issue of independence.

In May 1980, the referendum failed by a 3:2 margin.⁸² A decisive factor in the result was then Canadian Prime Minister Pierre Trudeau's promise of "renewed federalism" for all of Canada if the referendum was defeated.⁸³ Trudeau, a french Canadian, was op-

75. See RESNICK, *supra* note 22, at 20.

76. *Id.*

77. *Id.*

78. *Id.*

79. As part of their push for change, *F.L.Q.* members kidnapped two government officials and eventually killed one. The federal government responded by implementing martial law. See RICHARD HANDLER, NATIONALISM AND THE POLITICS OF CULTURE IN QUEBEC 9 (1988).

80. *Id.* (citing RICHARD BASHAM, CRISIS IN BLANC AND WHITE 197 (1978)).

81. *Id.* at 9 - 10.

82. The referendum was defeated 60% to 40%. See ACCORD, *supra* note 1, at 2.

83. See PIERRE FOURNIER, A MEECH LAKE POST MORTEM: IS QUEBEC SOVEREIGNTY INEVITABLE? 4 (S. Fischman trans. 1991). In a speech four days prior to the referendum, Pierre Trudeau, the Prime Minister at the time, made a promise to renew Canadian federalism

posed to Quebec's independence and dedicated his political efforts towards establishing a Canadian federation that included Quebec. Trudeau used Quebec's referendum for provincial sovereignty as a political device. He maintained that a "no" vote on the referendum was a "yes" vote for Canadian sovereignty from Britain; a green light to begin a new stage of constitutional development.⁸⁴ Following his promise and given the failure of Quebec's referendum, Trudeau began the next stage of constitutional development in Canada. The result was two amendments to the BNA Act, 1867: 1) the Canada Act, 1982;⁸⁵ and 2) the Charter of Rights and Freedoms.⁸⁶

D. The Canada Act, 1982 and the Charter of Rights and Freedoms

The Canada Act, 1982 and the Charter of Rights and Freedoms were added to the body of Canadian Constitutional law in 1982. The outcome was, among other things, a patriated constitution and, for the first time, the enumeration of individual rights protected by the federal government. However, while these additions to the constitution were acceptable to nine of the ten provinces, one did not agree: Quebec.

The sides were polarized regarding acceptable constitutional change after the failure of the Quebec referendum.⁸⁷ Once again, in October 1980, the provincial political factions were not able to agree on a viable solution.⁸⁸ This was followed by an announcement by the federal government that it would ask the British Parliament for approval of constitutional amendments without the prior consent of the provinces. This was a remarkable event as it was contrary to established constitutional conventions.⁸⁹

if the referendum was defeated. This contemplated patriation, a Charter of Rights and a thrust towards centralizing governmental powers. *Id.*

84. See generally Robert W. Kerr, *Constitution Act, 1980: Is It Constitutional?*, 30 U. NEW BRUNSWICK L.J. 73 (1981).

85. Canada Act, R.S.C., Appendices (No. 44)(1985)(Can.).

86. Constitution Act, 1982, pt. 1 (Canadian Charter of Rights and Freedoms), reprinted in *Canada*, in 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flianz eds. 1983).

87. See generally Thomas Berger, *The Charter: A Historical Perspective*, 23 U. BRIT. COLUM. L. REV. 603 (1989). The camps were drawn between those who supported the notion of a strong federal government and those who felt the provinces should properly maintain greater political power. Additionally, regional differences based on economic interest and cultural distinctiveness, especially language, divided the conference. *Id.*

88. *Id.*

89. See W.H. McConnell, *Cutting the Gordian Knot: The Amending Process in Canada*, 44 LAW & CONTEMP. PROBS. 195, 220 (1981); LASKIN's, *supra* note 33, at 75 - 76. The term "constitutional convention" was first used by Dicey in his *LAW OF THE CONSTITUTION* (1885). These rules developed through custom and precedent in British government and were

Canada's ability to amend its constitution prior to the 1982 amendments was guided by a mixture of written rules and constitutional conventions.⁹⁰ From 1867 to the present, no one single document has existed entitled "The Constitution of Canada."⁹¹ What is referred to as the Canadian Constitution is a body of law composed of written and common law rules, as well as constitutional conventions. These conventions have evolved out of practice and custom in Canadian government and are therefore usually unwritten. Constitutional conventions serve the vital function of ensuring that the framework of the constitution correlates with contemporary constitutional values of a given period.⁹²

Four principal constitutional conventions have emerged in Canada: (1) the U.K. Parliament would only take amending action upon formal Canadian request; (2) the Canadian Parliament had to act in making the request by joint address of the House and Senate; (3) no amendment would be made at the request of a province; and (4) the Canadian Parliament would not request an amendment directly affecting federal-provincial relations without prior consultation and agreement with the provinces.⁹³ Therefore, Trudeau's decision to go to the British Parliament with proposed amendments without first consulting the provincial governments directly conflicted with the fourth constitutional convention enumerated above.

Notwithstanding the conventions, the Trudeau-led federal government introduced a resolution in the Canadian Parliament. The resolution asked the U.K. Parliament to approve an act that would entrench a modified version of the Victoria Charter's amending formula⁹⁴ in the Canadian Constitution, thereby finally patriating Canada's Constitution.⁹⁵

This resolution was delayed by opposition in the Canadian Parliament and by eight provinces that disagreed with the bill.⁹⁶ The federal government also stalled the bill's passage to allow the Supreme Court of Canada time to rule on the constitutionality of its actions.⁹⁷

incorporated into the governments of the British colonies, i.e., Canada. See also W.S. Holdsworth, *The Conventions of the Eighteenth Century Constitution*, 17 IOWA L. REV. 161 (1932).

90. See LASKIN'S, *supra* note 33, at 72 - 73.

91. *Id.* at 72.

92. See Hogg, *supra* note 59, at 19 - 20.

93. See White Paper, *supra* note 62.

94. See COLEMAN, *supra* note 72.

95. See LASKIN'S, *supra* note 33, at 75.

96. Only Ontario and New Brunswick supported the federal resolution. *Id.*

97. *Id.* at 76.

In the *Patriation Case*,⁹⁸ the Supreme Court decided that it would be "unconstitutional in a conventional sense" for the federal government to lay this bill before the British Parliament without first having provincial agreement.⁹⁹ Accordingly, Trudeau had to have the support of the provinces for his patriation proposal.¹⁰⁰

Following the Supreme Court's ruling, the "Gang of Eight"¹⁰¹ provinces that joined political forces to oppose the federal initiative led a national debate over the manner in which constitutional change should take place. The result was another First Ministers' Meeting in November 1981.¹⁰² After months of deliberation, a deal was struck to which only the government of Quebec objected.¹⁰³

The result was the Canada Act, 1982 which encompassed two major amendments to the BNA Act, 1867 as well as renaming it the Constitution Act, 1867.¹⁰⁴ First, it transferred the power to amend the Canadian Constitution from the British Parliament to the Canadian Parliament.¹⁰⁵ This achieved the patriation of the Canadian Constitution. Secondly, it added a Charter of Rights and Freedoms¹⁰⁶ to the Constitution which established, for the first time, constitutional protection of individual rights from governmental encroachment. The protection encompassed, among other things, freedom of expression,¹⁰⁷ equality,¹⁰⁸ language,¹⁰⁹ mobility,¹¹⁰ association,¹¹¹ religion¹¹² and the press and other media of communication.¹¹³

98. Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 & 3), 125 D.L.R. 3d 1 (1982)(Can.).

99. *Id.* at 107. However, the Court made it explicitly clear that they were not ruling on the exact provincial agreement needed to put the constitutional stamp on federal action. *Id.* at 103.

100. See Gil Rémillard, *The Constitution Act, 1982: An Unfinished Compromise*, 32 AM. J. COMP. L. 269, 270 (1984) [hereinafter *Unfinished Compromise*].

101. The provinces opposing the federal action were: Alberta, British Columbia, Saskatchewan, Manitoba, Quebec, Newfoundland, Nova Scotia and Prince Edward Island. See LASKIN'S, *supra* note 33, at 75 - 76.

102. *Id.* at 76. See discussion *supra* part II.B.

103. *Id.* Its objection resulted in the Meech Lake Accord discussed *infra* text part III.

104. Section 1 of the BNA Act, 1867 was repealed and was substituted by: "This Act may be cited as the Constitution Act, 1867." See BNA Act, 1867, *supra* note 4, § 1.

105. Constitution Act, 1982, *supra* note 86, pt. V (Procedure for Amending Constitution of Canada), §§ 38 - 49.

106. *Id.* pt. 1 (Canadian Charter of Rights and Freedoms), §§ 1 - 34.

107. *Id.* § 2(b).

108. *Id.* § 15.

109. Constitution Act, 1982, *supra* note 86, § 16.

110. *Id.* § 6.

111. *Id.* § 2(d).

112. *Id.* § 2(a).

113. Constitution Act, 1982, *supra* note 86, § 2(b).

Both Houses of the Canadian Parliament passed the resolution in December 1981, thereby putting the proposal before the provincial governments. The proposed amending procedure in the Canada Act, 1982 was completely unacceptable to Quebec in its proposed form and was voted down by its parliament.¹¹⁴ René Lévesque, Quebec's Prime Minister, refused to sign it as proposed.¹¹⁵ The formula provided that the Constitution Act, 1867 could be amended with the consent of the federal government and at least two-thirds of the provinces (seven of the ten) whose aggregate population amounted to fifty percent of Canada's total population.¹¹⁶ However, it also provided that a province could "opt out" of an amendment which affected the province's legislative authority.¹¹⁷ In such cases where an amendment pertained to education or culture, the federal government would provide reasonable compensation to the province that opted out.¹¹⁸ Quebec, however, desired compensation for every amendment from which it opted out and therefore was dissatisfied with the proposed amendment.

Additionally, the Canada Act, 1982 enumerated a list of areas that were subject to the general amending procedure, but did not provide the right to opt out.¹¹⁹ This section related to the following matters: "the principle of proportionate representation of the provinces in the House of Commons,"¹²⁰ the powers of and the selection of the Senate,¹²¹ the number of members a province is entitled to have represent it in the Senate,¹²² the composition of the Supreme Court of Canada,¹²³ "the extension of existing provinces into the territories"¹²⁴ and "the establishment of new provinces."¹²⁵ Quebec objected to not having a veto over any amendments affecting these areas. It maintained that changes to these, the most fundamental aspects of Canadian federalism, should not be made without the consent of all the provinces

114. See *Unfinished Compromise*, *supra* note 100, at 269. Hon. Gil Rémillard, the Minister of Justice in Quebec, said the compromise was unacceptable because it was incomplete.

115. See MAJORIE M. BOWKER, *THE MEECH LAKE ACCORD WHAT IT WILL MEAN TO YOU AND CANADA: AN INDEPENDENT ANALYSIS* 10 (1990).

116. Constitution Act, 1982, *supra* note 86, pt. V (Procedure for Amending Constitution of Canada), § 38(1). This is commonly referred to as the "seven-fifty formula."

117. *Id.* § 38(3).

118. *Id.* § 40.

119. *Id.* § 42(1).

120. Constitution Act, 1982, *supra* note 86, § 42(1)(a).

121. *Id.* § 42(1)(b).

122. *Id.* § 42(1)(c).

123. *Id.* § 42(1)(d).

124. Constitution Act, 1982, *supra* note 86, § 42(1)(e).

125. *Id.* § 42(1)(f).

as the new amending formula would allow.¹²⁶ Nine other provinces, however, accepted the proposal and the new constitutional amendments were formally incorporated into Canadian constitutional law when the Canada Act, 1982,¹²⁷ including the Charter of Rights and Freedoms, was presented to and approved by the British Parliament and received Royal assent on April 17, 1982.¹²⁸ Thus, a new amending procedure was introduced into the Canadian Constitution without Quebec's consent, thereby ending the U.K.'s colonial involvement in Canada.¹²⁹

The underlying problem with the implementation of this constitutional framework was that it was not accepted by all the provinces. This flaw conflicts with the fundamental concept of the legitimacy of constitutional law.¹³⁰ Constitutional law must be both socially and politically legitimate. The fact that a majority of provinces accepted this amending procedure makes it legal, but not legitimate.¹³¹ Thus, the job of final patriation will not be completed until a constitutional framework acceptable to all the provinces is created. The Meech Lake Accord was drafted to create a federal order under which all the provinces could agree. However, just like many of the previous proposals, it failed to be ratified by all the provinces.

III. THE MEECH LAKE ACCORD: THE LATEST STAGE OF CANADIAN CONSTITUTIONAL DEVELOPMENT

Canada's constitutional development began its latest chapter on April 30, 1987, when a First Ministers' Meeting ended at Meech Lake, Quebec.¹³² Canada's current Prime Minister, Brian Mulroney, moved to try to address the needs of French-speaking Quebec and have those needs included in the Constitution Act, 1867. The conference produced the Meech Lake Accord,¹³³ signed by all the provincial and the federal leaders.¹³⁴ Quebec agreed to sign the Constitution Act

126. See *Unfinished Compromise*, *supra* note 100, at 277 - 78.

127. Canada Act, R.S.C., Appendices (No. 44)(1985)(Can.).

128. *Id.*

129. See Ray Romanow, "Reworking the Miracle": *The Constitutional Accord 1981*, 8 QUEEN'S L.J. 74 (1982).

130. See Richard S. Kay, *The Creation of Constitutions in Canada and the United States*, 7 CAN. U.S. L.J. 111, 120 - 23 (1984).

131. *Id.* Quebec never formally passed the resolution to adopt the Constitution Act, 1982.

132. See ACCORD, *supra* note 1, at preface. The actual text of the Meech Lake Accord was drafted on June 3, 1987 at a second meeting in Ottawa. *Id.*

133. For full text with annotations see ACCORD, *supra* note 1.

134. See FIRST MINISTERS' MEETING ON THE CONSTITUTION, APR. 30, 1987, *reprinted* in 17 MANITOBA L.J. 107 (1987). The goal, as stated in the Draft Statement of Principles, was

in exchange for the incorporation of the Accord into the constitution.¹³⁵

Quebec's Minister of Justice, Gil Rémillard, was given authority to inform the provinces and the federal government of the prerequisites necessary for Quebec's support of the 1982 amendments to the Constitution Act, 1867. In May 1986, he outlined five conditions: 1) explicit recognition of Quebec as a distinct society; 2) a guarantee of increased powers in immigration matters; 3) limitation of federal spending power; 4) recognition of a right to veto proposed amendments; and 5) Quebec's participation in the appointment of judges to the Supreme Court of Canada.¹³⁶

A. *The Accord's Impact on Canada's Existing Constitutional Order*

The amendments to the Constitution Act, 1867 contained in the Accord specifically addressed Quebec's demands. Additionally, the seventeen sections included in the Accord made several other changes to the existing constitutional framework. First and foremost, it would have granted the francophone province special status as a "distinct society."¹³⁷ Clause 1 of the Accord would have added a new section 2 to the Constitution Act, 1867 which would have provided:

The Constitution of Canada shall be interpreted in a manner consistent with (a) the recognition that the existence of French-speaking Canadians, centered in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and (b) the recognition that Quebec constitutes within Canada a distinct society.¹³⁸

This provision adds that the "role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to [above] is affirmed."¹³⁹ Significantly, the next paragraph explicitly affirms that it is the role of the legislature and Government of Quebec to "preserve and *promote* the distinct

to transform the Meech Lake Accord into the 1987 Constitutional Accord, an amendment to the Constitution Act, 1867. *Id.*

135. See Gil Rémillard, *Quebec's Quest for Survival and Equality Via the Meech Lake Accord*, in *THE MEECH LAKE PRIMER: CONFLICTING VIEWS OF THE 1987 CONSTITUTIONAL ACCORD* 28 (Michael D. Behiels ed. 1989) [hereinafter *MEECH LAKE PRIMER*].

136. *Id.* at 29.

137. See *ACCORD*, *supra* note 1, cl. 1, at 11 (proposed new § 2 to the Constitution Act, 1867).

138. *See id.*

139. *Id.* cl. 1, para. 2.

identity.”¹⁴⁰

The “distinct society” clause gives something to Quebec that is not given to any other province. It has the ability to “preserve and promote” while the other provinces can only “preserve.” Questions have been raised about the meaning of this clause and its significance in light of the unique powers Quebec possessed under the pre-existing constitutional order.¹⁴¹ One constitutional scholar, Professor Peter W. Hogg, believes that while it could be argued that this is a new grant of power, the better view is that this section merely recognizes existing powers.¹⁴² He adds, however, that although this clause may only be symbolic, the Accord contains several other sections that give “concrete expression” to the notion of a distinct society.¹⁴³

The sections concerning immigration,¹⁴⁴ Senate reform,¹⁴⁵ federal spending¹⁴⁶ and Canadian Supreme Court appointments¹⁴⁷ illustrate the power Quebec would have had to promote its distinctness under the Accord. The Accord would have added five sections covering immigration to the Constitution Act, 1867.¹⁴⁸ The new scheme would have obligated the Canadian federal government to negotiate an agreement relating to immigration with any province making a request.¹⁴⁹ Such agreement would gain constitutional status when executed in accordance with the paragraphs of this section.¹⁵⁰ The end result would have guaranteed Quebec the ability to participate in the selection of individuals taking up permanent or temporary residence within its territory.

In addition to immigration, the Accord would have “constitutionalized” Quebec’s representation on the Supreme Court of Canada.¹⁵¹ The BNA Act, 1867 did not provide a court of last appeal in Canada, rather the right of appeal was to the British Privy Council. The Supreme Court now in existence was established by federal statute in 1875.¹⁵² The new sections in the Accord would have explicitly

140. *Id.* cl. 1, para. 2(3) (emphasis added).

141. See ACCORD, *supra* note 1, at 12 - 13.

142. *Id.*

143. *Id.*

144. *Id.* at 21.

145. ACCORD, *supra* note 1, at 15.

146. *Id.* at 35.

147. See *id.* cls. 4 & 5, at 27 (proposed new sub-headings and sections to Constitution Act, 1987, §§ 101A - 101E).

148. See Constitution Act, 1867, *supra* note 104, § 95.

149. See ACCORD, *supra* note 1, cl. 3 at 21 (new § 95A).

150. *Id.*

151. *Id.* at 32.

152. Supreme Court Act, R.S.C. ch. S - 19 (Canada 1970).

placed the Supreme Court in the constitution of Canada for the first time.¹⁵³

These sections would have also established the criteria for the appointment of Supreme Court judges. Significantly for Quebec, one paragraph specifically provided that "[a]t 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 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."¹⁵⁴ The appointments under this section could have only been made from names of persons submitted by the Government of Quebec.¹⁵⁵

The Accord also reformed the Senate which was one of Quebec's demands¹⁵⁶ for joining the Constitution Act, 1867. Appointments to the Senate were, and still are today, made solely on the advice of the federal cabinet by the Governor General.¹⁵⁷ The Accord would have limited appointments to individuals whose names had been submitted by the province from which the Senate vacancy was created.¹⁵⁸ The effect of this would have been to transfer the power to choose representation in Ottawa from the federal level to the provincial level, thereby achieving more effective representation.

Similarly, Quebec's demand for limitation on federal spending was addressed by the Accord. Section 7 provided:

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.¹⁵⁹

This section would have allowed provinces to opt out of national shared-cost programs established by the federal government. It would have changed the existing scheme by providing "reasonable compensation" to any province that did not take part in such a program, but developed its own initiative "compatible with the national

153. See ACCORD, *supra* note 1, at 31.

154. *Id.* at 27 (new § 101B(2)).

155. *Id.* at 28 (new § 101C(3)).

156. See Quebec's demands discussed *supra* text part II.

157. Constitution Act, 1867, *supra* note 104, § 24.

158. ACCORD, *supra* note 1, cl. 2 (new § 25).

159. *Id.* at 37, cl. 7. (new § 106A(1)).

objectives."¹⁶⁰

One of the most significant changes the Accord would have made to satisfy Quebec was the procedure to amend the constitution. As previously discussed,¹⁶¹ this issue had been one of the most controversial aspects of constitutional change in Canada throughout the twentieth century, and was one of the reasons Quebec did not sign the Canada Act, 1982.¹⁶²

The Constitution Act, 1867 provides the existing procedure for amending the constitution. Currently, a province can opt out of a constitutional amendment and receive reasonable compensation when the change deals with education or other cultural matters.¹⁶³ The Accord would have expanded this right to any amendment from which a province opted out.

Additionally, under the existing amending scheme, changes affecting the Senate, the House of Commons, the Supreme Court and the extension and creation of new provinces were subject to the "seven-fifty formula."¹⁶⁴ The proposed changes in the Accord would have required changes to these categories to receive provincial unanimity. Thus, Quebec, as well as any other province, would have had a veto over changes to these fundamental areas of the federation.

Along with a provision calling for an annual constitutional conference of First Ministers,¹⁶⁵ these were the changes proposed by the Accord that were to satisfy Quebec and encourage it to sign the Constitution Act, 1867. In accordance with the Constitution Act, 1867 amending procedure, the Accord had to be ratified by all ten provincial legislatures within three years to become part of the Canadian Constitution.¹⁶⁶ The Accord became the center of national debate during this time period, but ultimately failed to become law due to lack of provincial approval on June 23, 1990.

B. The Accord's Ratification Process

The Accord was sent to the legislatures of every province for approval of the amendment in hopes of firmly placing it into Canadian constitutional law. The process of provincial acceptance was long and drawn out. The Accord itself was criticized by politicians, constitu-

160. *Id.*

161. See discussion *supra* text part II.B.

162. See discussion *supra* text part II.D.

163. Constitution Act, 1867, *supra* note 104, § 40.

164. See *supra* note 116.

165. ACCORD, *supra* note 1, cl. 8 (new § 50).

166. See Constitution Act, 1867, *supra* note 104, §§ 39(2), 41.

tional experts, academics and citizens.¹⁶⁷ Some provinces felt that the Accord ceded too many powers to the provinces,¹⁶⁸ while others, especially Quebec, faulted it for not giving enough powers to the provincial governments. Women's groups denounced it for not reaffirming principles of sexual equality.¹⁶⁹ Finally, because it was drafted by a small group of leaders without effective open public debate, scholars criticized its lack of democratic process.¹⁷⁰

On June 23, 1987, Quebec's legislative assembly approved the Accord as did the Saskatchewan assembly three months later.¹⁷¹ While other provinces debated, it seemed certain that final legitimate patriation, which would include Quebec, was inevitable. Nonetheless, as the June 23, 1990, deadline drew near, the future of the Accord became less certain. The Canadian political agenda was almost exclusively devoted to the constitutional problem. In Newfoundland, Manitoba and New Brunswick, the legislatures decided they would not sign the Accord unless certain modifications were introduced.¹⁷² On June 3, 1990, Prime Minister Mulroney called all the provincial Prime Ministers to Ottawa for negotiations. In trying to resolve the concerns of the provinces, Mulroney placed considerable pressure on the undecided provincial leaders to ratify the Accord.

The Federal government, sensing that the provinces would not ratify in time for the deadline, announced they would apply to the Canadian Supreme Court for a time extension. The Prime Minister of Newfoundland described this as the "final manipulation" and adjourned the Newfoundland House of Assembly without a vote on the Accord.¹⁷³ On the eve of June 23, 1990, adoption was formally blocked in the Province of Manitoba.¹⁷⁴ The end result was the col-

167. See generally MEECH LAKE PRIMER, *supra* note 135; Bryan Schwartz, *Fathoming Meech Lake*, 17 MANITOBA L.J. 1 (1987).

168. See Gefard Beaudoin, *Constitutionalizing Quebec's Protection at the Supreme Court and in the Senate*, in MEECH LAKE PRIMER, *supra* note 135, at 385. The proponents of this argument complained that the Accord would provincialize federal institutions. For example, the Supreme Court of Canada would be influenced because the Accord gave Quebec the right to have three of the judges appointed from their province. See ACCORD, *supra* note 1, at 27-28, § 101(b)(2); discussion *supra* text part III.A.

169. See Mary Eberts, *The Constitution, The Charter and the Distinct Society Clause: Why are Women Being Ignored?*, in MEECH LAKE PRIMER, *supra* note 135, at 302.

170. See Bryan Schwartz, *Refashioning Meech Lake*, 18 MANITOBA L.J. 19, 20 (1989). See also Alan C. Cairns, *Citizens and Their Charter: Democratizing the Process of Constitutional Reform*, in MEECH LAKE PRIMER, *supra* note 135, at 109.

171. See ACCORD, *supra* note 1, at 1.

172. See THE ECONOMIST, July 18, 1990 (Country Report).

173. See John F. Burns, *Canadian Leader Appeals For Calm On Quebec Dispute*, N.Y. TIMES, June 24, 1990, § 1, at 1.

174. See Mary Walsh, *Elijah Harper Stands Out As A Chief Among Canada's Indians*,

lapse of the Accord. Thus, Canada is left without a constitution incorporating all of the provinces under one unified constitutional framework.

C. Canada's Constitutional Development After the Failure of the Meech Lake Accord

The Premier of Quebec, the leader of Quebec's Liberal Party, Robert Bourassa, announced, on the day following the collapse of the Accord, that Quebec would carry on as a "distinct society," capable of assuming its own development.¹⁷⁵ He added that his government would not take part in any more multilateral talks, only bilateral negotiations with the Federal government. Bourassa and Jacques Parizeau, leader of the P.Q., have taken action by initiating a law that established a commission to determine the future of Quebec.¹⁷⁶ The Quebec Commission,¹⁷⁷ also known as the Bélanger-Campeau Commission,¹⁷⁸ is comprised of thirty-six leaders from different sectors of Quebec.¹⁷⁹ The Quebec Commission is dominated by economists, but has given priority to cultural, political and strategic considerations.¹⁸⁰ Analysts following the activities of the Quebec Commission feel that it is trying to answer two questions.¹⁸¹ First, what powers are required for Quebec to preserve and promote its distinctiveness?¹⁸² Second, what process should be established in order to attain those powers?¹⁸³

L.A. TIMES, Sept. 4, 1990, part H, at 2. In the Manitoba legislature, Elijah Harper, the only native Indian in Manitoba's Assembly, successfully blocked the passage of the Accord. By using political knowledge and strategy he accomplished what no one in Canada thought was possible. He said "no" to Prime Minister Mulroney and the constitutional Accord. His feat sparked a feeling of pride in the Indian population of Canada which began a chain reaction of political unrest throughout the nation's Indian territories. The thrust of their objection was based on the fact that they had been left out of the constitutional amendment process. *Id.*

175. See John F. Burnis, *Canadian Leader Appeals for Calm on Quebec Dispute*, N.Y. TIMES, June 24, 1990, § 1, at 1.

176. See Laforest, *supra* note 9.

177. *Id.* at 106.

178. Named after the co-chairpersons who lead the Commission, Jean Campeau and Michel Belanger. *Id.* at 104.

179. Shortly after the collapse of the Accord, the Premier of Quebec, Robert Bourassa, formed a committee on the future of Quebec. The job, given to economists and business leaders, is to recommend a plan for the future direction of the province. Many have speculated that this could be a proposal to move for sovereignty as an independent nation distinct from Canada. See Frank Perrotta, *Two Businessmen on Quebec Panel*, BOSTON GLOBE, Aug. 26, 1990, at A5.

180. See Laforest, *supra* note 9, at 107.

181. *Id.*

182. *Id.*

183. *Id.*

The Quebec Commission reported its findings to Quebec's Parliament in March 1991 and recommended that it pass a law requiring a provincial referendum on sovereignty.¹⁸⁴ The provincial government introduced legislation that would call for a vote on Quebec's future no later than October 1992.¹⁸⁵ It also proposed that, during this interim period, proposals from the rest of Canada should be reviewed to decide what should be on the ballot when Quebec's citizens decide their future constitutional order.¹⁸⁶

Separatist sentiments in Quebec are at an all-time high after the other provinces rejected the Accord and Quebec.¹⁸⁷ Based on action taken by the Quebec government, some critics feel that the federal structure that has existed in Canada from 1867 through 1982 is now "dead."¹⁸⁸ Disenchantment with the pre-existing federal system is giving way to a distinct Quebec nationalism. Meanwhile, the other provinces are also calling for changes in Canada's federal order.¹⁸⁹ Western provinces, sensing the federal government's favoritism towards Quebec, are also calling for changes in the federal arrangement.¹⁹⁰ Aboriginal groups,¹⁹¹ as well as the Territories, are pushing for greater representation in any process that leads to the creation of a new Canadian structure.¹⁹²

Similarly, dissatisfaction with existing constitutional organizations is also occurring in the former Soviet Union, India, Yugoslavia, and Czechoslovakia.¹⁹³ This trend, which has been referred to as "re-

184. See *Quebec Government Introduces Referendum Bill*, REUTERS REP., May 15, 1991, (Money Report).

185. *Id.*

186. *Id.* See also Peter M. Leslie, *Options for the Future of Canada: the Good, Bad and the Fantastic*, in *OPTIONS*, *supra* note 7, at 123. The author undertakes a general discussion of the spectrum of options that may come before the Commission.

187. See, e.g., PIERRE BOURGAULT, *NOW OR NEVER! MANIFESTO FOR AN INDEPENDENT QUEBEC* (David Homel trans. 1991). Pierre Bourgault, a long time advocate of Quebec sovereignty, outlines his vision for an independent Quebec.

188. See Laforest, *supra* note 9, at 103.

189. See *A Survey of Canada*, THE ECONOMIST, June 29, 1991, at 4, 14.

190. See William Clairborne, *Canada's Western Provinces Want More Independence: Failure Of Meech Lake Accord Set Stage For Provincial Leaders' Call For Increase In Regionalism*, WASH. POST, July 28, 1990, § 1, at A12. The provincial leaders of British Columbia, Manitoba, Alberta and Saskatchewan seek a "blueprint for the new realities of the 1990s." *Id.* In response to a perceived federal bias, they are proposing to collect their taxes regionally. This would give them greater control over public spending and increase their autonomy from Ottawa. *Id.*

191. See David C. Hawkes & Bradford W. Morse, *Alternative Methods for Aboriginal Participation in Processes of Constitutional Reform*, in *OPTIONS*, *supra* note 7, at 163.

192. *Id.*

193. See *Small Wonder Foreigners Fear for Canada It'll Take More than Derek Burney's*

gional self-determination,"¹⁹⁴ reflects the reality that individuals do not easily renounce their national identities, and will resist attempts to homogenize their communities into large collective or federal bodies.¹⁹⁵ However, while federal unions are breaking down throughout the world, in Europe, national distinctiveness has been reconciled with universalism.¹⁹⁶ The politically, socially, and culturally diverse member states of the European Union have joined together under one common legal order. This supposed pre-federal system has been developing and integrating slowly since the Treaty of Paris was signed in 1951. The experience of the European Union member states offers Canada a possible model to solve its constitutional crisis.

IV. THE EUROPEAN UNION: A POSSIBLE MODEL FOR CONSTITUTIONAL DEVELOPMENT

The way in which the diverse nations of the European Union came together and agreed on a legal framework has broad implications for a method of constitutional change. Born out of economic need, it has developed slowly over time, enlarging and integrating its laws and institutions. It is not a uniform legal structure, rather it is comprised of three separate elements. First, the member states economic policies are bound under the treaties of the EC. Second, separate from the framework of the EC and its institutions, the member states cooperate at an inter-governmental level in the areas of foreign policy and security. Finally, the member states also have undertaken inter-governmental cooperation in police matters. The result is not a strict federal constitutional structure but in many ways the members states have become a constitutionally organized entity that was not established by one all-encompassing document.

The present status of the European Union's fundamental institutions, its structural organization and distribution of political and legal power are unique to the experience of its member states. While it is instructive for Canada to examine the European Union as it exists today, to make a useful comparison, the origins and evolution of the European Union must also be analyzed.

Bravado to Convince World We're not Just Another Fragmenting Federation, TORONTO STAR, July 13, 1991, (Insight) at D4.

194. See *supra* note 14.

195. See Laforest, *supra* note 9, at 112 (citing K. Minogue & B. Williams, *Ethnic Conflict in the Soviet Union: the Revenge of Particularism*, in A. MOTYL BUILDING BRIDGES: SOVIET NATIONALITIES IN COMPARATIVE PERSPECTIVE (1990)).

196. *Id.* at 113.

A. Historical Background of the European Union and the EC's Fundamental Principles

Political events in the late 1940s increased the likelihood of a third war between Eastern and Western powers. The collapse of the Moscow Conference in 1947 concerning the future of Germany, the Prague Coup in 1948 and the Berlin Blockade in 1948 all combined to raise tensions. A call for immediate action to resolve the growing political tension between the East and West was rendered obsolete when the Soviets exploded their first atomic bomb in 1949.¹⁹⁷

At the center of this post-World War II crisis was the status of Federal Germany. The traditional rivalry between France and Germany and the threat of future confrontation had to be reconciled. To ensure that Germany would not have the ability to re-militarize, the economic factors of a war machine, steel and coal, had to be dealt with. The United States had developed the Marshall Plan to return economic health to the war-torn "olde world" economy.¹⁹⁸ Additionally, the formation of the Organization of European Economic Cooperation (O.E.E.C.) made some type of an agreement between France and Germany, as well as the other European states inevitable.

In 1950, the Foreign Minister of France, Robert Schuman, devised a plan to integrate Germany and other western European states into one economic federation. This plan was revolutionary in that it did not seek to merely maintain an equilibrium of interests, but to "fus[e] the interests of the European peoples . . ." ¹⁹⁹ The Schuman Plan sought to achieve this goal and maintain peace through four fundamental principles which continue to guide the EC today.

First, Schuman proposed an order where the common institutions were superior to those of the individual member states.²⁰⁰ Recognition of this principle would ensure that democratic and peaceful relations between the States would prevail. It would also replace nationalistic and domineering attitudes with an era of cooperation between the States based on common interests.

Second, the governing institutions had to have the power to execute their functions for the collective.²⁰¹ Procedures were to be established to ensure that the individuals operating the institutions were

197. See PASCAL FONTAINE, *EUROPE - A FRESH START: THE SCHUMAN DECLARATION 1950 - 90*, 9 (1990) [hereinafter *SCHUMAN DECLARATION*]. This event marked the end of East-West dialogue and the beginning of the Cold War. *Id.*

198. See MATHUSEN 5th, *supra* note 17, at 6.

199. *SCHUMAN DECLARATION*, *supra* note 197, at 17 (quoting Jean Monnet's *MEMOIRS*).

200. *Id.* at 19.

201. *Id.*

not national delegates. They would have an allegiance to the new federation and act independently for the benefit of all the States.

Cooperation between the independent institutions and member states was the aim of the third principle. The institutions would be affecting the macroeconomic policies of the member states. Because these are normally matters of concern for each state's government, they would have to allow the states to defend their national interests to ensure the independence of the institutions. The institution created would necessarily allow member states to exercise their interest in a limited manner. Therefore, cooperation between the governing institutions would ensure that individual member interests were recognized, but that the common interest would prevail.²⁰²

Finally, given the principle of states' representation discussed above, the principle of equality among states was established.²⁰³ This would eliminate discrimination and domination of larger states over smaller states. The progress of the new union would not be impeded by a requirement of unanimous consent or influenced by proportional representation. Thus, equality for all member states in each new institution was placed into the newly emerging European order.

B. ECSC - The First Community

On May 9, 1950, Robert Schuman took his plan from concept to reality by proposing the European Steel and Coal Community²⁰⁴ (ECSC) as the "first stage of European Federation."²⁰⁵ This Treaty became the first common legal order between the original member states of the EC. It called for a change in control over French and German coal and steel production from national authorities to a high authority that was only responsible to the Community. The threat of war would be removed through joint control over the major inputs of war: steel and coal. The proposed Community would adhere to the basic principles of the Schuman Plan.

Germany agreed to the proposal and began negotiations with France, the Netherlands, Belgium, Luxembourg and Italy.²⁰⁶ In

202. *Id.* at 20 - 21.

203. SCHUMAN DECLARATION, *supra* note 197, at 21 - 22.

204. See ECSC Treaty, *supra* note 16.

205. See P.S.R.F. MATHUSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 6 (4th ed. 1985) [hereinafter MATHUSEN 4th].

206. The United Kingdom was asked to join in the negotiations, but the concept of a High Authority was viewed as inconsistent with the principle of parliamentary supremacy in Britain. See Peter Herzog, *The European Communities: A Model for a Settlement in the Middle East?*, 13 SYRACUSE J. INT'L L. & COM. 509, 512 (1987).

Paris, on April 18, 1951, the Treaty establishing the ECSC was signed by the six member nations (the Six).²⁰⁷ Approximately one year later, on July 25, 1952, the national parliaments of each member state ratified the ECSC and placed the development of the EC in motion.²⁰⁸ The result was that all barriers to trade in coal and steel between the Six were abolished by 1953.

The Treaty creating the ECSC is considered to be the first instrument of European integration.²⁰⁹ Its most important characteristic is its "supra-national" construction.²¹⁰ This was not another inter-governmental organization, but a "quasi-federation" concerning one economic area with the signatory states retaining their sovereignty over everything else.²¹¹

Institutionally, the ECSC was comprised of a High Authority,²¹² a Council of Ministers,²¹³ an Assembly²¹⁴ and a Court of Justice.²¹⁵ The High Authority was the executive body whose management decisions concerning the steel and coal industry were binding on the member states. The function of the Council was to harmonize the national economies in the steel and coal markets.²¹⁶ Limited political control was focused in the Assembly. The Court's role was to monitor the application of the ECSC Treaty and review the High Authority's decisions.²¹⁷ Thus, the establishment of the ECSC was proof that in spite of diverse national interests a supra-national structure was a viable means of unifying sovereign states.²¹⁸

C. *The Early Setbacks of the EC*

In response to historical events of the time, the Six endeavored to take steps to develop the Community. The Korean War, which had begun in June 1950, and the cold war tension between the West and the emerging Soviet Bloc had focused the attention of member states on the formation of a common defense community. However, by April 27, 1952, when the Treaty establishing the European Defense

207. See ECSC Treaty, *supra* note 16.

208. See MATHUSEN 4th, *supra* note 205, at 7.

209. See LASOK, *supra* note 18, at 12.

210. *Id.*

211. *Id.*

212. See ECSC Treaty, *supra* note 16, arts. 8 - 19.

213. *Id.* arts. 26 - 30.

214. *Id.* arts. 20 - 25.

215. *Id.* arts. 31 - 45.

216. See LASOK, *supra* note 18, at 13.

217. *Id.*

218. *Id.* at 14.

Community was signed, the international political scene had eased with the death of Stalin, only to ease further the following year with the end of the Korean war.²¹⁹ In light of these developments any notion of abandoning national military forces appeared too extreme a measure. The Treaty was signed and ratified by five members, but was rejected by the French National Assembly on August 31, 1954.²²⁰ This reluctance to transfer control to the EC dissolved any chance of forming a European Political Community Treaty that had not even been signed yet, but was proposed.²²¹

Despite these setbacks, integration of the member nations moved ahead. The future proposals were less ambitious and were not elevated to the same level as the previous proposals. This is one of the characteristics which has led to the successful development of the EC. When one proposal is not acceptable to the member nations, instead of trying to redraft another proposal on the same scale, the group takes a step back and seeks a more modest approach towards integration.

D. EEC and Euratom

The next step toward integration was formally taken in 1955 when the idea of a common market and the joint development of transportation and energy was submitted to the Foreign Ministers of the member states.²²² As a result, the Six signed the Treaty establishing the European Economic Community²²³ (EEC) and the Treaty establishing The European Atomic Energy Community²²⁴ (Euratom) in

219. See MATHIJSSEN 4th, *supra* note 205, at 7.

220. See Herzog, *supra* note 206, at 514. See also EDWARD FURSDON, THE EUROPEAN DEFENSE COMMUNITY, A HISTORY 295 - 97 (1980).

221. See Herzog, *supra* note 206, at 514.

222. The general proposals were approved at a conference of Foreign Ministers in Messina, Sicily in June of 1955. The Belgian Minister for Foreign Affairs, Paul-Henri Spaak, was given the job of reporting with a feasibility study known as the "Spaak Report." At this time again an invitation to join the community was made to the United Kingdom, once again they did not accept. See H. HEISER, BRITISH POLICY WITH REGARD TO THE UNIFICATION EFFORTS ON THE EUROPEAN CONTINENT 96 (1959). See also 1 HANS SMIT & PETER HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY P5 - P6 (1990).

223. Treaty establishing the European Economic Community, done Mar. 25, 1957, 298 U.N.T.S. 11 (entered into force Jan. 1, 1958) reprinted in EUROPEAN COMMUNITIES-COMMISSION, TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 115 (abr. ed. 1987) [hereinafter EEC Treaty].

224. Treaty establishing the European Atomic Energy Community, done Mar. 25, 1957, 298 U.N.T.S. 44 (entered into force Jan. 1, 1958) reprinted in EUROPEAN COMMUNITIES-COMMISSION, TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 385 (abr. ed. 1987) [hereinafter Euratom Treaty].

Rome on March 25, 1957.

A distinction between the three existing treaties was apparent. ECSC and Euratom, were viewed as sectoral.²²⁵ In contrast, the principal function of the EEC was to establish a common market and the progressive approximation of the economic policies of the member nations through "harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it."²²⁶

The foundation of the development was based on four basic principles adopted by each member nation. These are: (1) free movement of goods between the member states;²²⁷ (2) a common agricultural policy;²²⁸ (3) the free movement of persons,²²⁹ services²³⁰ and capital²³¹; and (4) a series of common policies.²³² While the EEC Treaty promotes commonality in these areas, it left subject to each member state, the harmonization of these policies.²³³

E. Integration and Enlargement

Although the three treaties, ECSC, EEC and Euratom, were executed in the same manner as traditional international agreements between sovereign states, the drafters were aware that they were creating something very different from traditional international law.²³⁴ The EC Treaties create their own legal system based on fundamental principles upon which the development of a modern consti-

225. The two treaties were drafted to integrate specific sectors or markets common to the member states. See MATHUSEN 4th, *supra* note 205, at 108.

226. See EEC Treaty, *supra* note 223, art. 2.

227. *Id.* arts. 9 - 37.

228. *Id.* arts. 38 - 47.

229. *Id.* arts. 48 - 51.

230. See EEC Treaty, *supra* note 223, arts. 59 - 66.

231. *Id.* arts. 52 - 58, (7 - 73).

232. *Id.* arts. 74 - 84.

233. The member states are obligated to ensure their policies maintain an overall equilibrium in the balance of payments, confidence in currency, stable prices and high employment, all areas of common concern. See EEC Treaty, *supra* note 223, arts. 103 - 09.

234. See MATHUSEN 4th, *supra* note 205, at 1. In international law, sovereign states enter into agreements that create mutual obligations. In contrast, the states that signed the EC Treaties limited their own sovereign rights by transferring them to institutions over which they have no direct control, and endowed them with powers they will not always possess themselves. See Herzog, *supra* note 206, at 513. Professor Herzog noted in passing that "in spite of the somewhat technical language the drafters viewed this as much more than just a regulation of an industry. They hoped it would provide the basis for a future of closer cooperation among the peoples of Europe . . ." *Id.*

tutional framework can be established.²³⁵

F. Merger of the Three Communities

The next major transformation in the composition of the EC was the adoption of the Merger Treaty on April 8, 1965.²³⁶ This agreement merged the communities in fact, though not from a strictly legal point of view, by placing them all under the control of common institutions.²³⁷

Originally, the ECSC was guided by a supra-national High Authority with wide regulatory and administrative powers over the member states and individual firms.²³⁸ In contrast, the EEC and Euratom were less supra-national than the ECSC. For example, the EEC Treaty created a Commission as the executive rather than a High Authority.²³⁹ Its independent decision-making powers were much narrower than were those given to the ECSC High Authority.²⁴⁰

The Merger Treaty provided for one Commission,²⁴¹ one Council of Ministers,²⁴² one European Parliament²⁴³ and one European Court of Justice for all three Communities.²⁴⁴ The Commission, sitting in Brussels, is composed of seventeen members who hold office for four

235. The law was originally termed "supra-national." The reasoning was that all member states had to apply Community law over their domestic law, and that law was common to all member states. See MATHUSEN 4th, *supra* note 205, at 2.

236. Treaty Establishing a Single Council and a Single Commission of the European Communities, April 8, 1965 in force July 1, 1967 reprinted in 4 I.L.M. 776 (1965) [hereinafter Merger Treaty].

237. See MATHUSEN 5th, *supra* note 17, at 8.

238. The High Authority was comprised of nine independent personalities appointed by the governments of the Six. It consulted a Council of Ministers composed of representatives of the member state's government for consent on certain acts. The High Authority was controlled judicially by the Court of Justice. See ECSC Treaty, *supra* note 16, arts. 7 - 19.

239. See EEC Treaty, *supra* note 223, art. 4(1); Euratom Treaty, *supra* note 224, art. 3(1).

240. The distinction between the two is apparent from the nature of the treaties. The ECSC was a treaty-law (*traité-règles*) which enumerated rules for every situation and thus the High Authority's discretion could not be expanded. In contrast, the EEC treaty is an outline treaty (*traité-cadre*) which sets out broad principles which the legislative body it created would have to enact upon from time to time. See Giancarlo Olmi, *The ECSC the First European Federal Structure*, in THIRTY YEARS, *supra* note 21, at 2.

241. See EEC Treaty, *supra* note 223, arts. 155 - 63.

242. See Merger Treaty, *supra* note 236, arts. 1 - 8; EEC Treaty, *supra* note 223, arts. 145 - 54.

243. See Merger Treaty, *supra* note 236, arts. 9 - 19; EEC Treaty, *supra* note 223, arts. 137 - 44.

244. See Merger Treaty, *supra* note 236, art. 30; EEC Treaty, *supra* note 223, arts. 164 - 88.

years and are chosen by mutual agreement of the member states.²⁴⁵ The role of the Commission is to be the "initiator and co-coordinator of Community policy; it is the executive agency of the Community; it is the guardian of the Community Treaties."²⁴⁶

A representative from each member state sits on the Council of Ministers.²⁴⁷ The Council meets periodically, normally in Brussels or Luxembourg.²⁴⁸ The voting rules of the Council vary according to the subject matter being discussed, but its principal role is as the legislative body of the EC. It enacts legislation, subject to the powers of the Commission and European Parliament, and "ensure[s] coordination of the general economic policies of the member states."²⁴⁹

The Assembly, or European Parliament, consists of representatives from each member state. The 518 representatives are elected by direct universal suffrage.²⁵⁰ Although this body has no direct legislative powers, it does have the power to affect proposals in certain instances when acting in cooperation with the Council and Commission.²⁵¹ The European Parliament has three months to approve, amend, or reject proposals submitted to it by the Council.²⁵² Proposals may be sent back to the Commission for re-examination.²⁵³ However, there is no binding force behind opinions issued or amendments proposed by the Parliament.²⁵⁴ In contrast, the European Parliament has the power to amend and the sole power to approve the annual budget of the EC.²⁵⁵

The Court of Justice also sits in Luxembourg and is composed of thirteen judges²⁵⁶ and six advocate generals.²⁵⁷ In general, the Court is a catalyst for integration by ensuring that EC law takes effect within each member state's legal system.²⁵⁸ The Court can hear dis-

245. See EEC Treaty, *supra* note 223, art. 158.

246. See LASOK, *supra* note 18, at 112.

247. See EEC Treaty, *supra* note 223, art. 146.

248. *Id.* art. 147.

249. *Id.* art. 145.

250. *Id.* art. 138(3). France, Germany, Italy and the U.K. have 81 representatives; Spain 60, Netherlands 25, Belgium, Portugal, and Greece 24, Denmark 16, Ireland 15 and Luxembourg 6. *Id.* art. 138(2).

251. See EEC Treaty, *supra* note 223, art. 149(2).

252. *Id.*

253. *Id.* art. 149(2)(d).

254. See MATHUSEN 5th, *supra* note 17, at 22.

255. See EEC Treaty, *supra* note 223, art. 203.

256. *Id.* art. 165.

257. See *id.* art. 166.

258. The Court of Justice has ruled that Community law must take direct effect in member states and become part of the national law. See Case 26/62, Van Gend en Loos v. Netherlands, 1963 E.C.R. 1, [1963] CMLR 105.

putes between states, citizens and corporations concerning EC law.²⁵⁹ Therefore, the EC is comprised of three distinct legal communities established by separate treaties all operating under one legal order.²⁶⁰

At the signing of the Treaty of Rome in 1957, a timetable of twelve years was set as the transitional period for creating a common market in all sectors of the economy.²⁶¹ Economic prosperity in the early sixties put the Six ahead of schedule. In December 1964, the Commission moved to adopt a plan for rapid development of a single market. It was proposed that the EC finance all expenditures on a common agricultural policy, reform EC financial arrangements and strengthen the power of the European Parliament.²⁶²

However, the strengthening of the EC institutions was not acceptable to all member nations. Specifically, in June 1965, France refused to take its Council seat because agricultural policy talks were deadlocked.²⁶³ This action prevented the Council from making any further decisions.

The conflict was resolved in January 1966 by the "Luxembourg Compromise."²⁶⁴ The member states appeased France's objection to the proposed changes to the EC, especially their worries over majority voting on subjects that affected vital interests of member nations.²⁶⁵ The other countries agreed they would try to obtain unanimous consent on all future decisions.²⁶⁶

The Community continued to progress in spite of these set-backs. Guided by the principles of the Schuman Plan, the Community leaders focused on coordinating the sovereign power which each member state had transferred to the EC into one harmonious federation. This

259. See Herzog, *supra* note 206, at 530.

260. The citizens living in a member state refer to the three legally distinct communities as the "European Community." Therefore, it was decided by the European Parliament and the Council that the term "European Community" would be used on all official documents except for legislation whenever possible and appropriate. See *Resolution of 16 February 1978 on a Single Designation for the Community*, 63 O.J. EUR. COMM. (No. 13.3) 36 (1978).

261. See EEC Treaty, *supra* note 223, art. 8. See SMIT & HERZOG, *supra* note 222, at 1 - 111 to 1 - 113 (discussing the so-called acceleration decisions and a general background to art. 8).

262. See THIRTY YEARS, *supra* note 21, at 5.

263. *Id.*

264. Luxembourg Compromise reprinted in 3 COMMON MKT. L. REV. 469 (1966). See also Herzog, *supra* note 206, at 517.

265. See THIRTY YEARS, *supra* note 21, at 5.

266. *Id.* Although not a fully binding agreement, the effort to obtain unanimous consent on future decisions became the common practice of the Council and is known as the Luxembourg Compromise. See Herzog, *supra* note 206, at 518 - 19.

approach has allowed the diverse member states of the EC to advance with unanimous consent.

This positive move forward was enhanced by subsequent meetings between the leaders of the governments of the member states, beginning in December 1969. During this Summit Conference at the Hague, it was decided that the respective Foreign Ministers would study potential steps to achieve political unification and consider ways to enlarge the EC.²⁶⁷

The product of these meetings was the first report of the Foreign Ministers.²⁶⁸ According to this report, the plan called for cooperation and consultation between member states who were to harmonize their policies and encourage joint action. This report also laid the foundation for a system calling for the Foreign Ministers to meet four times a year in political cooperation outside the strict framework of the EEC Treaty, thereby enhancing the ability of the EC to speak with one voice on common issues.²⁶⁹

G. *The First Enlargement*

On January 22, 1972, the Treaty of Brussels concerning the accession of United Kingdom, Ireland, Denmark and Norway was signed.²⁷⁰ This Treaty and the appended Act concerning the accession of the new members modified the existing Treaties to address the problems created by the accession of new member states to the EC.²⁷¹ The institutions were adapted to assimilate the new members, and transitional arrangements were implemented to allow for smooth integration.²⁷² The Treaty of Brussels was ratified by the governments of Ireland, Denmark and the United Kingdom, but not Norway.²⁷³ Thus, by 1973 the EC had nine member nations.

Throughout the seventies, the European Union was faced with economic hardship. The oil embargo of 1972 by OPEC and the destabilization of the U.S. dollar caused market shocks that put EC

267. See SMIT & HERZOG, *supra* note 222, at P - 11.

268. Adopted October 27, 1970. *Id.*

269. Decided at the Paris Summit, October, 1972. *Id.* at P - 12.

270. Treaty of Brussels, Jan. 22, 1972, in force Jan. 1, 1973, reprinted in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES: TREATIES AMENDING THESE TREATIES (1978).

271. See MATHUSEN 5th, *supra* note 17, at 10.

272. See THIRTY YEARS, *supra* note 21, at 7.

273. In a May election, 83% of the Irish voters said "yes." In September 1972, 63.5% of the Danish electorate said "yes" and in October the House of Commons in Britain passed the European Communities Act by a wide majority. Notably 53% of the Norwegians voting on the referendum said "no." *Id.*

members on economic alert.²⁷⁴ However, the European Union remained one cohesive entity throughout this period of serious economic hardship.

Greece applied for membership on June 12, 1975, and after conditions for accession were formalized, it became the tenth member in January 1981.²⁷⁵ Portugal and Spain applied for membership in 1977. The Treaty of Accession and Act concerning the conditions of accession was concluded in Madrid on June 12, 1985, and were effective January 1, 1986.²⁷⁶ The EC now consists of twelve member states.

H. *The Single European Act and "1992"*

In the early eighties, a downturn in the world economy affected EC progress. Some members were unhappy with the way the EC was carrying out the financing and distribution of funds. Other members were concerned with increasing Community expenditures and a corresponding downturn in revenues.²⁷⁷ The European Parliament, recognizing the need for greater political unity, proposed a draft Treaty for a European Union in 1984.²⁷⁸ Additionally, the Commission issued a "White Paper" on the completion of the EC internal market.²⁷⁹ Together these two documents represented movement toward completion of a single internal market set for December 31, 1992.²⁸⁰

The result of this push forward was the Single European Act²⁸¹ designed to implement institutional changes to the EC which would facilitate further harmonization between the members. This instrument contained four major areas of concern: (1) provisions concerning political cooperation in foreign policy; (2) provisions to complete the internal market by 1992; (3) provisions conferring new areas of competence in substantive areas of law on the EC institutions; and (4) provisions that alter the way the EC institutions operate.²⁸² These changes affected the decision making process of the EC. By removing

274. See Herzog, *supra* note 206, at 521.

275. See *Documents Concerning the Accession of the Hellenic Republic to the European Communities*, 22 O.J. EUR. COMM. (No. L 291)(1979).

276. See *Documents Concerning the Accession of the Kingdom of Spain and the Portugese Republic to the European Communities*, 28 O.J. EUR. COMM. (No. L 302)(1985).

277. See Herzog, *supra* note 206, at 526.

278. Draft Treaty on European Union, 27 O.J. EUR. COMM. (No. C 77) at 33 (1984).

279. *Completing the Internal Market, White Paper from the Commission to the European Council, Milan, June 28 - 29, 1985*, 85 COM. 310 (1985).

280. See EEC Treaty, *supra* note 223, art. 8(a).

281. Single European Act, 25 I.L.M. 503 (1986).

282. See J.A. Usher, *The Institutions of the European Communities After the Single European Act*, 19 BRAXTON L. J. 64 (1987).

the unanimity rule when adopting Directives which eliminate technical trade barriers, and replacing it with a qualified majority voting rule,²⁸³ the movement toward a single internal market was launched.²⁸⁴

Today, the member states and the institutions of the EC are planning for the December 31, 1992, completion of the internal market. The EC's internal economic market represents twelve member states, communicating in ten official languages, composed of 327 million individuals who produce a Gross Domestic Product of \$4.8 billion annually.²⁸⁵ This strict economic structure represents one part of the European Union. In addition to the economic treaties, the member states also engage in inter-governmental cooperation in several political areas.

I. The Maastricht Summit: The Next Phase of European Integration

The internal market is planned to be completed by the end of 1992. This is a significant year in the history of the EC. It marks the beginning of its transformation into a European Union.²⁸⁶ On December 11, 1991, the heads of the governments of the 12 member states concluded a summit conference on the future of Europe in Maastricht, the Netherlands (Maastricht Summit).²⁸⁷ The Maastricht Summit conference produced a document establishing criteria for economic and monetary union (E.M.U.) by as early as 1996 and no later than 1999.²⁸⁸ This will strengthen the existing economic structure of the EC. Additionally, and more significantly, it calls for political union among member states in foreign policy and security. This agreement was formalized in a signed treaty among the 12 member states on Friday, February 8, 1992.

The Maastricht Summit calls for fixed exchange rates and a sin-

283. See Herzog, *supra* note 206, at 528.

284. See MICHAEL CALINGAERT, *THE 1992 CHALLENGE FROM EUROPE: DEVELOPMENT OF THE EUROPEAN COMMUNITY'S INTERNAL MARKET* 11 (1988).

285. See STATISTICAL OFFICE OF THE EUROPEAN COMMUNITIES, *BASIC STATISTICS OF THE COMMUNITY* 99, 39 (28th ed. 1991) (The population figure is for 1990. The Gross Domestic Product figure is for 1989, which was reported as 4,406,900 ECU. An ECU, European Currency Unit, is a basket unit based on a certain quantity of each member states currency, weighted on the basis of the average gross national product over five years (1969 - 73) and of the intra-Community trade of each member state. In 1989, the conversion rate for one ECU was \$1.27(U.S.)).

286. *Programme of the Commission for 1992*, RAPID, Feb. 12, 1992, at para. 1, available in LEXIS, EUROPE Library, ALLNWS File.

287. *Maastricht Summit Succeeds*, *supra* note 19.

288. *Id.*

gle currency for all member states by no later than January 1, 1999. If, however, by January 1, 1996, some member states have satisfied a set of economic criteria,²⁸⁹ then the formation of a European Central Bank and a single currency will begin.²⁹⁰ If no members have satisfied the economic criteria by 1998, then the members will meet and decide which states qualify to begin the process on January 1, 1999.²⁹¹ To ensure that the E.M.U. is achieved, an European Monetary Institute will be created in 1994 which will eventually become the European Central Bank.²⁹²

In addition, the leaders at the Maastricht Summit agreed to an "even closer union among the people of Europe"²⁹³ by calling for political union among the member states. The plan will begin, as other proposals for change in the European Union have been initiated, by unifying small areas of what was formally under the domestic control of each member state. First, it provides for a common foreign and security policy which will operate at the inter-governmental level.²⁹⁴ In 1996, this will be reviewed to see if it should remain at the inter-governmental level or be placed under the power of the institutions of the EC.²⁹⁵ The Maastricht Summit increases the power of the European Parliament concerning legislation in certain areas.²⁹⁶

Additionally, immigration and asylum for all the member states will also be dealt with through inter-governmental cooperation.²⁹⁷ The proposals at the Maastricht Summit, if ratified, will create a European Police Intelligence agency (Europol) to deal with drug trafficking and organized crime.²⁹⁸ It will also establish a European citizenship and create a cohesion fund to provide economic aid to the poorer member states.²⁹⁹ Enlargement negotiations, which concern a

289. Although the text of the Maastricht Summit was not available, several sources reported the economic criteria as including: 1) an inflation rate not more than 1.5 percentage points higher than the EC's three lowest rates among member states; 2) a budget deficit not in excess of three percent of Gross Domestic Product; 3) a long term interest rate not more than two percentage points higher than the EC's three lowest; and 4) no devaluations of a currency against any other within the Exchange Rate Mechanism of the European Monetary System for at least two years. *Id.*

290. *Id.*

291. *Maastricht Summit Succeeds, supra* note 19. As part of the compromise at Maastricht, the U.K. and Denmark can opt-out of the final stages of the EMU.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Making Sense of Maastricht, supra* note 20, at 14.

296. *Maastricht Summit Succeeds, supra* note 19.

297. *Id.*

298. *Id.*

299. *Id.*

states application for membership into the EC, will be accelerated.³⁰⁰ Finally, the Maastricht Summit provides for more qualified majority voting in the Council.³⁰¹

As the European Union completes the final stages of economic integration, the proposed changes at the Maastricht Summit have begun the movement towards closer political ties among the member states. The European Union is transforming from a sophisticated trading bloc into a clearly identifiable group.³⁰² Since it was created, the European Union has been contemplated to encompass more than just economic regulation. The founders realized political constraints existed which would not allow complete integration to be achieved by one agreement at one point in time. Therefore, it has developed slowly, integrating the diverse member states first economically and now politically. This framework under which the member states have been brought together represents what has been called a constitutional order.³⁰³

V. OPTIONS FOR A NEW CANADIAN CONSTITUTIONAL ORDER

A. *The Range of Possible Solutions*

In the wake of the Quebec Commission's request for proposals for a new Canadian federal scheme, numerous suggestions have surfaced. One Canadian scholar points out that a new federal order could take several forms,³⁰⁴ ranging from an unlikely status quo model to a "radically asymmetrical federation."³⁰⁵ The proposals fall into three general categories covering a continuum of structural models.³⁰⁶ At one extreme, new federal orders have been suggested. These would resemble the existing order in Canada where sovereignty is divided between provincial and federal governments. Any federal form would require a reallocation of the powers and responsibilities at each level of government.

At the opposite end of the spectrum, two separate and distinct sovereign states would be created out of the existing federal order.

300. *Making Sense of Maastricht*, *supra* note 20, at 14.

301. *Id.* See also discussion *supra* text at part IV.F.

302. *Id.*

303. See CALINGAERT, *supra* note 284, at 11.

304. Ronald L. Watts is a Professor of Political Studies at Queen's University who specializes in the creation, operation and disintegration of old and new federations. OPTIONS, *supra* note 7, at xvii.

305. *Id.* at 24.

306. See Ronald Watts, *Canada's Constitutional Options: An Outline*, in OPTIONS, *supra* note 7, at 24.

This would fulfill the goals of the separatists in Quebec. It would require that all economic and political ties between Quebec and the rest of Canada be severed. Canada's \$400 billion national debt and all financial assets would have to be divided between the two new states.³⁰⁷ In addition, many questions arise from this model concerning the Atlantic provinces which would be cut off from the rest of Canada. Still other questions center on the status of existing treaty relationships with other nations, and the possible revisions to the remaining Canadian federal order.³⁰⁸

In the middle of the continuum, a new institutional structure could be created based on a confederal model. Here, the characteristics of the sovereign states would remain vested in each member, but a superstructure would be organized to manage common policies with approval from member states.³⁰⁹ This form of political order would resemble the P.Q.'s "sovereignty association."³¹⁰ Additionally, this model could take the form of a common market such as the EC. Canadian scholars who had previously looked at the EC as a possible solution to Canada's former constitutional problems rejected it as a comprehensive model for change.³¹¹ It was argued that by adopting an EC model, Canada would ignore its historical reality. The EC was designed to promote unity and develop centralization, whereas Canada's historical dynamic is one of decentralization.³¹² However, given the inevitable re-negotiation of the Canadian federation, scholars examining developments in Europe today maintain that while it may not be a model that can be directly adopted, it exemplifies the ingenuity that can be employed to create institutions around which a constitutional framework can be organized.³¹³ Additionally, these scholars had looked at Europe before the European Union Treaty existed which may now make it a more suitable model to follow.

307. See Martin Cohn, *Why Quebec Debt Report Doesn't Add Up*, TORONTO STAR, July 20, 1991, (Insight) at D1.

308. See Ronald Watts, *Canada's Constitutional Options: An Outline*, in *OPTIONS*, *supra* note 7, at 27.

309. *Id.* at 24.

310. See discussion *supra* text part II.C.

311. See, e.g., David Matas, *The EEC as a Model for Canada*, 10 *MANITOBA L.J.* 259 (1980).

312. *Id.* at 279-80.

313. See Dan Soberman, *European Integration: Are there Lessons for Canada?*, in *OPTIONS*, *supra* note 7, at 205.

B. The Federal Government's New Proposal to Shape the Future of Canada

The idea of a new federal order based on the experience in Europe has been incorporated into the federal government's new proposal for constitutional change. On September 24, 1991, the Canadian House of Commons received a document from Prime Minister Mulroney entitled *Shaping Canada's Future Together*.³¹⁴ The document contains twenty-eight sections each of which is a proposal for constitutional reform including many similar to those contained in the Meech Lake Accord.³¹⁵ It also contains a host of new proposals which are more ambitious and far reaching than the Accord. In particular, it proposes changes which would lay the foundation for an economic union modeled implicitly on the EC.

The government's reform package is broken down into three parts separately titled: I) Shared Citizenship And Diversity; II) Responsive Institutions For A Modern Canada; and III) Preparing For A More Prosperous Future. Part I addresses the meaning of being a Canadian and recognizes the diversity within the country. It recognizes the rights of aboriginal peoples to participate in the current constitutional deliberations and reaffirms Quebec's distinctiveness.

In addition, section 7 of the proposal calls for the incorporation of a "Canada Clause" into the Constitution Act. This would be the corollary to Quebec's distinct society clause in section 2. It would contain specific characteristics and values acknowledging who Canadians are and who they aspire to be. Characteristics such as equality of men and women, responsibility to protect and preserve the environment and a contribution to building a strong Canada of peoples from many cultures and lands are included.

Section 7 would also add a clause that would establish the free flow of people, goods, services and capital as a basic Canadian characteristic. This language is the centerpiece of the EC's economic union. The EEC Treaty specifically enumerates these as the bases for developing a common market between its members.³¹⁶ By adopting this as a fundamental characteristic, Canada would shape a federal order similar to the EC.

Building on these basic characteristics, part II of the new propo-

314. See *Shaping a New Future*, *supra* note 12.

315. Most notably section 2 recognizing Quebec's Distinctiveness, section 9 and 10 aimed at Senate reform, section 12 addressing Supreme Court appointments, section 13 proposing an amending formula and section 19 covering immigration. *Id.*

316. See EEC Treaty, *supra* note 223, arts. 9, 48-73.

sal would reform existing federal institutions. The result would be equitable representation and effective control in each branch of government for the provinces and the territories. The most significant change would be to the Senate. It would become an elected body, but remain secondary to the House of Commons as a legislative body. Finally, the federal government's proposal calls for a change to the Supreme Court appointment procedure and the constitutional amending formula.

While the first two parts of the reform package hint at an economic union, part III makes it clear that the Canadian federal government wants to move towards an European model. Specifically, section 14 would add a "common market clause" to the Constitution Act, which would provide that "Canada is an economic union within which persons, goods, services and capital may move freely without barriers or restrictions based on provincial or territorial barriers."³¹⁷ This section would prohibit both the Parliament and Government of Canada, and the legislatures and governments of the provinces from contravening this principle by law or practice.³¹⁸

The Parliament of Canada would have the exclusive power to make laws for the efficient functioning of the economic union under the proposed section 15.³¹⁹ This section, however, requires that any law made pursuant to this section must receive approval from two-thirds of the provinces to have effect.³²⁰

Section 16 calls for the harmonization of provincial and federal economic policies. This is identical to the language in the EEC Treaty that establishes such harmonization as a fundamental principal of the common market.³²¹ The federal government would improve the coordination of the budget-making process as well as monetary and fiscal policies among the provinces. Lastly, an independent agency would be established to monitor and evaluate the macroeconomic policies of the provinces and the federal government.

Finally, the last proposal indicates that the federal government envisions that the future constitutional order in Canada will be based on an economic union modeled after the EC. Section 28 calls for the creation of a "Council of the Federation."³²² This Council would be

317. *Shaping a New Future*, *supra* note 12, sec. 14(1).

318. *Id.* sec. 14(2).

319. *Id.* sec. 15(1).

320. *Id.* sec. 15(2).

321. See EEC Treaty, *supra* note 223, art. 2.

322. *Shaping a New Future*, *supra* note 12, sec. 28.

added to the constitutional framework of Canada.³²³ It would be composed of federal, provincial and territorial governments who would "decide issues of inter-governmental coordination and collaboration."³²⁴ Its mandate would be to vote on proposed legislation aimed at enhancing the functioning of the economic union under section 15. Thus, the major institutional change of this proposed Canadian federal order would be the addition of a governmental body like the Council established by the EEC Treaty. This is evidence that the Europe's successful experience has influenced Canadian decisionmakers in their efforts to create a new constitutional order.

C. The European Union: A Viable Solution for Canada?

The federal government's proposed constitutional reforms, discussed above, incorporate an economic union into its vision of a new Canada. Other commentators also believe that the inevitable re-negotiation of the present federal order could result in one resembling the emerging European Union. This new model of constitutional order, as it has emerged in western Europe, provides Canada with a viable course to follow when making changes to its fundamental legal order. It will provide a stable economic union upon which closer political ties can slowly be established among the provinces, territories and aboriginal peoples.

What has emerged from the European experience, is a formula for integrating diverse societies under one legal order, sharing in its burdens and benefitting from its successes. The structure, as it has materialized, is one that is socially legitimate, because it has unanimous approval from all the member nations. It forms the basic common legal order that all the member states must follow and therefore represents a constitutional framework under which diverse national identities can co-exist.

A European Union type of federation would allow all the provinces to remain united in one Canadian legal order. The debate in Canada over constitutional change has forced every province to re-examine its own identity. In this regard, establishing a European Union framework would allow each province to maintain and promote its unique cultural identity. This is especially true for Quebec which has demanded constitutional recognition of its distinctness within Canada. Each province would retain a large degree of sovereignty to ensure control over areas of important provincial concern. This has

323. *Id.*

324. *Id.*

worked in Europe and is perhaps the modern way in which sophisticated groups will agree to be part of a larger legal order.

Additionally, the historical context and the founding principles of the Schuman Plan provide insight to the foundation of the successful development of the European Union. The original member states united in order to preserve peace and minimize the threat of German re-militarization. Today, Canada does not face any type of internal military threat, but does have an impending social need to define its national identity. By establishing certain principles to guide the formation of a Canadian legal order, the provinces could begin a new era of integration. The result would be a constitutional framework that develops slowly, but is socially and legally legitimate because it has the approval of all its members.

The provinces realize that the breakdown of the Canadian union as it exists today would have a negative economic impact in every province. Unanimous agreement on a legal order could be reached if fundamental principles were developed and aimed at the creation of an economic union. This would allow each province to maintain a large degree of control in its internal affairs while benefiting from the larger economic market in which it could participate. First, the provinces could maintain the economic ties that already exist in Canada. These bonds range from a common currency, to a federal monetary system, to common trade agreements with third countries. This economic framework would form the basis for allowing the provinces to develop closer political ties over time.

The provinces have been unable to agree on a federal structure proposed by one document, such as the recent Accord or the original BNA Act. The European Union began over forty years ago by focusing on economic integration and now, after the Maastricht Summit, political integration. If the Canadian provinces can reach consensus on an economic order, then they can move slowly toward closer political union. Given the complexity of the competing interests throughout Canada,³²⁵ this solution may have a greater likelihood of success than trying to create in one document an acceptable constitutional structure before Quebec's October 1992 deadline.

325. See Thomas J. Courchene & John N. McDougall, *The Context for Future Constitutional Options*, in *OPTIONS*, *supra* note 7, at 33-51. The authors define the context for change broadly including "geographic determinism (both physical and socio-economic), demolingistics (the interaction among language, culture, and population), globalization and its impact on nation states, Canada - U.S. free trade, debt - and deficit-driven fiscal decentralization and aspects of the institutional/political malaise across [Canada]." *Id.* at 34.

VI. CONCLUSION

Since 1867, when the first Canadian union was established, the provinces, especially Quebec, have struggled to create a federal order acceptable to all. The failure of the Meech Lake Accord, the latest attempt to resolve this dilemma, has made the reorganization or the breakdown of the present Canadian order inevitable. As other federal orders around the world also experience regional self-determination, a model for collective federal unification has evolved in western Europe. The European Union has brought together culturally and politically diverse states under one common legal order, with each retaining the power to promote its own unique identity. Its basic institutions were founded on fundamental principles that have guided it through economic and political integration.

The context for constitutional change in Canada is marked by complex competing factors and forces. Such an environment does not lend itself to the creation of a constitutional structure based on one all encompassing document. A new era of integration could begin by establishing certain fundamental principles that receive unanimous agreement. These principles would re-define the Canadian federal order according to the contemporary constitutional values of all the provinces, territories and aboriginal peoples. The existing federal order could be modified and institutions could be established guided by these principles. They would first establish an economic union based on the existing Canadian infra-structure. This would set the stage for slow political integration. Thus, following the European Union's model of constitutional change could teach Canada a timely lesson in its search for a new constitutional configuration.

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