Amending Canada’s Constitution

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Résumé
Ce texte souligne le besoin d’une nouvelle formule d’amendement constitutionnelle pour faciliter la réforme constitutionnelle du Canada. Il décrit, premièrement, la formule constitutionnelle actuelle et il énumère les obstacles à la réforme. Par la suite, il suggère une formule d’amendement constitutionnelle alternative, celle-ci moins restrictive avec des exigences plus atteignables qui, selon l’auteur, facilitera la réforme constitutionnelle nécessaire à un fédéralisme renouvelé.

Introduction
In Canada, we have the privilege of living in a constitutional democracy. This system of governance has proved to be successful for a number of years. However, what do you do when it goes awry? Short of anarchy, there are no non-revolutionary methods of changing our political system. The civilised method that our forefathers thought of was constitutional amendment. The creators of the Canadian Charter of Rights and Freedoms even built in a clause to deal with this matter. As a result they have placed the trust in Canadians, but mostly their elected officials, to follow the proper procedures to amend our constitution. The search for an alternative method for amending the British North America Act, 1867, has arguably been sought after since The Balfour Report in 1926, and ended with the entrenchment of the Charter of Rights and Freedoms in 1982. The patriation of the Constitutional Act 1982 “eliminated a role for Westminster

that had become embarrassing to British as to Canadian Politicians.”

The remaining question of whether the addition of a new general amending formula will take away Canada’s embarrassment of not being able to pass substantial constitutional amendments is addressed in the pages to follow. Past amendments to the Constitution of Canada have had problems getting a sweeping majority. There has also been a sentiment in Canada where since the governmental days of Mackenzie King, there has existed an assumption “that agreement of all provinces on an amending formula was a prerequisite for patriation.”

All Constitutions need to be changed with time. A country adapts with time, and so should its laws and constitutions. Garth Stevenson notes that “[o]ccasionally federal constitutions may have to be amended because the judicial interpretation of the existing constitution imposes an obstacle to necessary adaptation, but such occasions are in fact quite rare.” It is in this common idea of federalism that we now live. There is time for a change to our constitution. This has been attempted in the past, most notably in the forms of the Meech Lake Accord and the Charlottetown Accord.

With the several amending formulae now present in the Canadian Constitution, it should be easy to change what is desired in Canada’s Constitution. Each amending formula has a specific purpose. However, with the failures of the Meech Lake Accord and the Charlottetown Accord, it would appear that this assumption of ease with regards to amending the constitution is actually erroneous. Manfredi suggests that although “Canada’s intellectual and political elites have become increasingly convinced that equality, liberty, social justice, and national unity are simply a few constitutional amendments away,” this is actually not very plausible. The belief by some of Canada’s greatest minds that the answer to the great Canadian problems is obtainable through constitutional amendments is very doubtful. Therefore, this paper argues for a new general amending formula to the Constitution of Canada to aide in the constitutional reform process.

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2 Cairns, Alan C. Charter versus Federalism (Canada: McGill-Queen’s University Press, 1992), page 86

3 Stevenson, Garth. Unfulfilled Union (Ontario: Gage Publishing Limited, 1982), Page 215

4 Stevenson, Page 198

This paper will look at the general amending formula. The general constitutional amendment formula is too restrictive, and needs to be amended itself. This paper will be broken into three main sections. The primary section will analyze the current general amendment formula; the second will attempt to give a concise analysis of the problems with the current amendment formula, while dispelling federalist beliefs that a change should not occur on this issue; and the third will suggest an alternative to our current section 38(1) and other sections of the amending formula and its possible shortcomings.

What we have

First is the examination of the general amending formula: what it is and what it is not. The amending formulae for the constitution are provided for the reader (Appendix A). The first amending formula is commonly called the general amending formula, and it seems to be very limited; though federalists would argue this is the intended case so as to limit constitutional change. This general amending formula has strict guidelines, which insinuates one of two (perhaps both) things: that it was intentionally left difficult to amend the Constitution in order to preserve the framers original piece of work; or that the framers of this constitutional amending formula did not believe it would be very difficult to satisfy the requirements of the amendment formula. Of these two, the earlier suggestion is the most probable. In either case, we are left with it in Canada, and its main constructor, Peter Lougheed, is no longer left to defend it.

Section 38 (1) of the Constitution of Canada sets out the general amending formula for changes to the Constitution. This formula requires the approval of the Senate and House of Commons and of the legislative assemblies of at least two-thirds of the provinces with at least 50% of the population of all provinces. The two-thirds 50% formula (colloquially referred to as the 7/50 formula) at present requires the approval of 7 provinces, representing at least 50% of the population of all the provinces. This seemingly short amending formula takes great skill to execute. The requirements of this amending formula require an ability to convince half of our population to change something. It also requires us to agree on a set of wording, and the party leaders from East to West to agree on various issues as well. This task has been proven very difficult when there are amendments of substance put forward. Among the features of the Constitution that may be changed in accordance with the 7/50 formula is perhaps the most important element in it is the distribution of legislative powers between Parliament and the provincial legislatures. This is the very substance of the federation.

The examples of previous attempts to use this amending formula are the Meech Lake Accord and the Charlottetown Accord. It should be noted “[t]his procedure is to be used, among other things, for amendments relating to the principle of proportionate representation in the House of Commons, some matters relating to the Senate and Supreme Court of Canada, and the establishment of new provinces.” Essentially this procedure needs to be used when presenting a combination of amendments to the constitution for efficiency reasons. It was also used in this fashion of previous federal governments so they could attempt to ‘lay claim’ on passing a set of major constitutional amendments that would affect all Canadian citizens.

To say that these two documents failed to change the constitution of Canada would be accurate. Each attempt had its own unique circumstances and its own unique reasons therefore for not passing. The Charlottetown Accord did not pass due to a major barrier involving the adoption process as facilitated by Section 38(1). This section of the Constitution did not allow for the Charlottetown Accord to pass through the constitutional framework primarily due to restrictions in the formula itself. The restrictions in particular of seven provinces consisting of fifty percent of the population mainly. Cairns speaks of what federalism really means when discussing such an issue as constitutional amending formulae and constitutional change. He states that “the essential principle of federalism is the equality of the provinces,” which is not reflected in the current general amending formula, calling for substantial change in this process of federalism.

This method of adopting proposed changes to the Canadian Constitution has been used in the past. These attempts, most notably the Meech Lake Accord and the Charlottetown Accord; have failed to be adopted primarily due to the restraints put on the adoption process of these amendments. As a result, we have the situation where there is a need for constitutional reform, it has been attempted, but has largely failed. What we indeed do have is “the entrenchment for all time of the worst possible amending formula,” what Reid calls “the messy seven-province formula.”

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7 Cairns, page 88
8 Stevenson, page 222
In the following section, the paper will explore the problems associated with the current amending formula, citing specific examples and authors on the issue.

What’s wrong with it?
The current general amending formula is an obstacle to Canadian federalism and in actuality the course of good democracy. Democracy requires that fundamental functions of a federalist state, such as constitutional revisions take place in order to reflect at the very least a basic compromise of what the citizens of the various sub-national regions hold dearest. While Section 38(1) does allow for the possibility of this process to occur, it does not encourage it to take place in practice. The notion of unanimous provincial consent was also doubted back in the year of 1931, when it was seen as “an exceedingly difficult obstacle.”10 In the case of the Meech Lake Accord, it has been noted that this knowledge of the inoperable constitutional amending formula came into existence shortly after the attempt of major constitutional amendment. Cairns refers to the general amending formula as “a formidable hurdle.”11 Cairns later notes that the current amending formula is “not stable” and calls it “a government-regarding amending formula,” both of which speak to the revision of the current general amending formula.12 Both of these documents were attempts of using the general amending procedure, however neither passed for varying reasons.

According to Hurley and Section 49 of the Constitution Act 1982, there was to be a meeting of the first ministers by April 17, 1997 in order to “review the provisions of the full amendment formula adopted in 1982.”13 While this meeting did take place, it was a very short meeting,14 implying that very little change to the amending formulae occurred. This is also noted by Heard and Swartz, who note that as a result of a lack of change to the current amending formula “future constitutional amendments will be much more difficult to achieve.”15 As a result, there needs to be a change in Section 38(1).

The current constitution is lacking on major issues, and some of these issues were addressed in the Meech Lake Accord. Today Canada still lacks Québec’s ratification of the constitution and a suggested reform of the Supreme Court of Canada.16 There were other issues central to both Meech Lake and Charlottetown Accords, such as a reform to the Senate, and Aboriginal self government. A Special Committee was established in Ontario to look at the agenda of the Meech Lake Accord. This Special Committee cited here, in a conclusion written by Ernie Eves and Michael Harris, recognizes “the importance of Québec returning to the constitutional fold.”17 This report highlights the importance of a reformulation of the amendment formula by showing that national unity and a feeling that all Canadians are represented by such the constitution is important. The lack of ratification attacks the legitimacy of the document that is binding on all Canadian citizens. If Meech Lake was indeed agreed to by our country, Québec, home of approximately 23.7 percent of Canada’s population,18 there might not be as strong a sentiment to separate as there is today. There is a school of thought that believes that this is not a problem, because we have been able to operate as a nation without Québec on board. However, the federal government’s actions in relation to Québec in terms of the Constitutional Act, 1982 may not be legitimate as a result of Québec not signing it.

The current amending formula also weakens the federal government’s powers. What if something needed to be changed, but then a province such as Québec decided to not abide? The fact that constitutional amendment vetoes exist (though indirectly through the requirement of fifty percent of the population19) is disturbing. The fifty percent requirement

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10 Gérin-Lajoie, Paul. Constitutional Amendment in Canada (Canada: University of Toronto Press, 1950) page 207
11 Cairns, page 62
12 Cairns, page 63, 64
13 Hurley, page 78
14 Conversation with Dr. James Kelly, November 22, 2003 via e-mail.
15 Cairns, page 62
16 Select Committee on Constitutional Reform, Report on the Constitution Amendment 1987, 1st Session 34th Parliament 37 Elizabeth II (Ontario: Queen’s Park, 1988)
17 Ibid, page 9
19 Since any combination of two of the following three provinces would veto the tabled amendments: Québec, Ontario and British Columbia.
means that Québec or Ontario, but not necessarily both, must consent. There has been expressed discontent with the idea of the current formula essentially having a veto system among the provinces.\textsuperscript{20} However, others could make the argument that this leads to increased federal power as the rigidity of the formula prevents a single province from dominating the constitutional amendment talks, even though some provinces have more clout than others, thus increasing a need for a strong balanced representation of all Canadian provinces. Another point on this issue of federal power would be the idea of changing the current requirement of the creation of a new province from the current general amending formula back to the requirements prior to 1982.\textsuperscript{21} Before 1982 the federal government could unilaterally create a new province and in effect this area of the British North America Act, 1867 gave the federal government more unilateral power. The federal and provincial governments operated under this condition previously, which suggests that since areas of the amending formula need to be replaced, that it might not be in the interest to have them relying on a stringent and restrictive amending formula. Rather, that it would be in the power of the federal government, increasing the power to the federal government.

Our current amendment formula leads to a tyranny of the majority for three provinces, Ontario, Québec and British Columbia.\textsuperscript{22} This is when two provinces, such as Ontario and Québec or Ontario and British Columbia can join together by not voting for a particular amendment. However if Québec and British Columbia were to join together, this would not constitute a problem, as the combination of these two provinces only amounts to 36.77\%\textsuperscript{23} of the population which is well below the current fifty percent requirement. This allows the two earlier combinations of Ontario with British Columbia and Ontario with Québec to effectively have a veto, since if the two provinces work together by voting to not adopt the amendment, this stops the amendment in its tracks, due to the fact that Ontario combined with either one of the other two provinces have an population that adds together to constitute fifty percent of the entire population. The issue of vetoing a constitutional amendment raises many issues, one of which is legitimacy of the provinces who can realistically enforce this power. When the province of Québec, which has not ratified the constitution, can veto future amendments of such a major working of federal democracy, there is a problem with the amending formula. It is noted that Québec still has a legal obligation to abide by the Constitution and therefore logically should still be able to have an affect on its amendment.

Given these seemingly impossible problems, the constitution has nonetheless been amended since the implementation of Section 38.\textsuperscript{24} Only one amendment utilized Section 38, that being the first of the amendments listed below:


2. \textit{Constitution Act, 1985} (Representation) permitted future changes to the distribution of seats for Parliament to be done by ordinary statute.


5. \textit{Constitution Amendment Proclamation, 1993} (Prince Edward Island) cleared the way for the "fixed link" bridge to replace ferry services to P.E.I.

6. \textit{Constitution Amendment Proclamation, 1997} (Newfoundland Act) allowed the Province of Newfoundland to create a secular school system to replace the church-based education system.

7. \textit{Constitution Amendment, 1997} (Québec) permitted the province to replace the denominational school boards with ones organized on linguistic lines.

\begin{itemize}
\item \textsuperscript{20} Monahan, Patrick and Lynda Covello. \textit{An Agenda For Constitutional Reform.} (Ontario: Becker Associates, 1992) Page 42
\item \textsuperscript{21} Canada, Privy Council Office. \textit{Amending Formula} (1992), page 2
\item \textsuperscript{24} Though it should be noted that Sec. 38 was not used for these constitutional amendments, the constitution still changed in significant forms.
\end{itemize}
8. Constitution Amendment, 1998 (Newfoundland) allowed the province to abolish the denominational school system.


10. Constitution Amendment 2001 (Newfoundland and Labrador) officially changed the name of the Province of Newfoundland to the Province of Newfoundland and Labrador.25 26

The original Meech Lake Accord meeting was held on April 30, 198727; it was then reviewed once again by the Prime Minister and all ten Premiers on June 03, 1987.28 Its downfall was the dissident voices of Newfoundland, New Brunswick and that of Manitoba. Some provinces viewed it as a Québec Accord, and an elitist one at that.29 The Charlottetown Accord was also defeated, according to Lusztig, because all of: substantial constitutional reform; it was proposed by elites, and the process of consultation encourages groups who were not truly interested in changing rights to come to the forefront.30 Another concern about the Meech Lake Accord, and perhaps even an explanation why it failed to pass, is due to a fear of the provinces outside of Québec. It is suggested that this might have been seen as favouring Québec at a cost to the rest of the nation:

La reconnaissance du Québec comme société distincte et l’affirmation du rôle particulier qui est attribué, à cet égard, à la législature et au gouvernement du Québec, ont suscité chez plusieurs la crainte que ces innovations constitutionnelles n’affaiblissent la protection que la Charte accorde, depuis 1982,

au Québécois et ne placent ces derniers dans une situation d’inferiorité par rapport aux autres Canadiens.31

Both of these situations had limited success for different reasons, however, they did have one commonality, which is the amending formula. Section 38(1) is too restrictive, and a more relaxed formula might actually allow for greater substantive constitutional change by taking away the fear of trying to appease a strong majority of Canadian provinces. Reasons for the need to amend will be discussed at a later time. This notion is explored in the next section of the paper, where the suggestion of an new amending formula, afterwards providing a critique of this new system.

How to change it

Below a new general amending formula is suggested, after which an outline of possible criticisms of this new formula will appear. When looking at the suggested amendments, one is reminded of the Victoria Charter. The Victoria Charter suggested many changes in 1971. Some key elements to this Charter discussion were “fundamental freedoms and political rights, language rights, the composition and appointment of the Supreme Court of Canada, income security, and a constitutional amending formula.”32 When reading Part IX of the Victoria Charter33 (Appendix B), the proposed amending formula sparks interest, and questions.34 These principles and ideas as laid out in the Victoria charter are reflected in the new suggested general amending formula.

As for the amendment of Section 38(1) itself, the suggestion is to make the general amending formula more open and useful to parliament so as to obtain constitutional amendments through an elected body, rather than being largely restricted to the courts that perform constitutional micro change. The change to the amendment formula would be the removal of the requirement of at least seven provinces containing at least fifty percent of the population. The new general amending formula would read:

At least two western and two eastern provinces as well as either Québec or Ontario. Additionally the consent of the House of Commons is required.35 This would ensure that there is an agreement from at least the traditionally alienated provinces, and at least one of the two major concentrations of the Canadian population. Though provinces could still team up to effectively veto the amendment. The new Section 38(1) includes restrictions as to which provinces are to agree, for the reason of the cultural diversity of Canada and the need to have these distinct views represented at the federal level. The second amendment that would be added is a Section 38(5) clause, where by the constitution would read:

Notwithstanding the provisions of section 38(1), in the case of the secession of a province, there shall be a referendum held by the federal government, the referendum should only be admitted to those provinces who share affected borders. The referendum posed will constitute of a clear question as deemed by the Supreme Court of Canada, which must constitute a clear majority of at least fifty plus one percent of the Canadian population of citizens who meet the minimum requirements of holding citizenship for at least three years in Canada. The result of this referendum will be brought to the bargaining table, which shall constitute those provincial premiers.36

Next, the abolishment of Section 38(3) and subsection (4). As the term has been used “opting out clause,” there is no rational use of it. If a significant constitutional amendment can be passed without the consent of a province such as Ontario, then a significant proportion of the population is not affected. The abolishment of these sections, simply put, will increase the probability of passing major constitutional change, which is needed. Finally, Section 41(b), (c) and subsection (d) would be abolished. These sections of the constitution are superfluous. In fact, they have the possibility of hindering the progress of the government.

This new amending formula would allow for the possibility of greater federalism to prevail. This is strictly true since there would be fewer provisions on the federal government to amend Canada’s Constitution. These reduced restrictions place more potential power in the federal governments possession, as the increase for potential future amendments is drastically increased. The federal government has a difficult job, considering the vastness of the geographical area it must rule. Making the general amending formula easier to operate with would allow for a strong probability in increased efficiency when looking directly at constitutional amendments. Though centralists might argue that this weakens the power or clout of the federal government, it does not. This new amending procedure would better facilitate the power of the federal government by increasing efficiency and increasing the probability of constitutional amendments occurring. This is true, since there would be fewer restrictions on the government to satisfy a majority of the provinces, all of which have competing interests, but also easier for provincial initiated proposals to pass. The new amending formula also abolishes the need to have a resolution from the Senate. The lack of this seemingly redundant hurdle simply increases the efficiency of the procedures. This new approach to accomplishing the general amendments to the constitution would also allow for much needed reforms to take place, such as the ones that were slated in the Meech Lake and Charlottetown Accords. Examples of needed reforms are the appointment process for the Supreme Court of Canada, the Senate (or the abolition there of), and addressing such issues as Québec not signing the Constitutional Act of 1982 and Aboriginal Self Government.

There is still a problem with the suggested amending formula, since it would allow for the problem of the last referendum in Québec about separation, whereby the yes side lost by less than a single percentage point. This is true, since the current suggestion does not include a binding referendum, which would indeed hinder the progress of the federal government. Though this may not necessarily clear up the problem, since a result may be the Supreme Court of Canada effectively re-writing the law, or even force the government to amend the wording to be something much stricter, such as seventy-five percent. The new wording of this amendment is a good first step to clarifying what is meant in section 38.

There have been two different methods towards constitutional amendments suggested by Monahan and Covello. They argue that “[t]he first of these proposals is to convene a constituent assembly or a constitutional convention to consider changes to the constitution.”35 This system puts the process of proposals out of the elected elite and back into the hands of ordinary Canadian citizens. The second suggestion is a call for the use of a “referenda in the amending process” when dealing with

35 This is the work of the author.
36 Ibid.
37 Monahan and Covello, page 81
constitutional change. Essentially this would change the amending process by demanding a binding referendum on the Canadian citizenry. This leads to two questions: (1) would the referendum be established on a province by province basis, or (2) a national referendum? A national referendum would give a more collective sense of the Canadian citizenry, rather than partitioning the country into their provinces and territories. These suggestions will be critiqued in the following section of the paper. In the next section, the paper suggests the possible errors if this new system of constitutional amendments is adopted.

Critiques of the new system
The above method suggested by Monahan and Covello would not be well supported in Canada. The first method calls for a committee of citizens to be present while drafting the new national proposals. The average citizen does not have enough understanding of the subjects at hand, nor would they be able to come to an agreement on some issues (e.g. Distinctive Society Clauses). There are some areas of governing, such as drafting constitutional bills, which should be left up to those who know the field best, as has been done in the past. The counter argument displayed on this issue, is that those who are our elected officials are out of touch with those who elected them. Perhaps an ad hoc committee comprised of a representative majority of the educated Canadian population would better facilitate this concern, similar in nature to the Ontario budget citizen juries. Additionally, there would still be the problem of a concrete understanding of these citizens as to how the constitutional amending discussions play out, and that it is more of a bargaining process, whereby the objective might be to obtain a better position strictly for who you represent, rather than trying to block another citizen / areas interest. The second suggestion is a referendum to be held. The suggested plan of action, as detailed in the previous section of this paper, addresses this issue by forcing a binding referendum on each province involved, and thereby forcing the elected officials to follow what their citizens demand of them. A binding referendum on a province by province level also has difficulties. Some provinces now require a referendum; however, this requirement is only by statute and could be easily repealed. Such challenges presented would be the commissioning and wording of questions asked on the referendum. Assuming that the question would be set by the House of Commons, an equitable question would therefore be assumedly asked. A possible solution to this issue would be to have a federal referendum, and to have the results broken down by province.

The new formula for the general constitutional amendments is expensive. It requires, out of convention, that there be a referendum in each province, instead of what happened with the Charlottetown Accord, where by convention there was a national referendum. However, it should be noted that it is arguable if the convention even exists now. There is doubt that any government would take the associated political costs of not having a referendum for such an important change in Canadian history. Referendums are expensive. The cost of the last Referendum in 1992 was approximately $103 500 000. If the same referendum were to be held today, with the same circumstances of conduction, it would cost $126,305,084.75, according to the Bank of Canada’s inflation calculator. (This figure may not be complete in its analysis, please see Appendix C for further information). With the current low voter turnout in federal elections, obtaining a high enough voter turnout for something such as this matter might not be plausible. To complicate this matter further, and to add to the pessimistic view, the amendment could be seen as increasing federalism by the public (though it would entirely depend on its actual usage in practice). With the increased desire for provincial autonomy, as demonstrated by support for the former Alliance and Reform Parties of Canada in previous elections, western provinces would probably be less likely to vote in favour of such a constitutional change. Alternatively, they might find that it increases their power of voice, especially in British Columbia due to the population concentration. The electorate, thanks to the help of a federal opposition party, could view this amendment as increasing federalism, or rather the opportunity to do so. This is a concern since the combined total population of the Western Provinces is 30% of the entire Canadian population.

The new general amending formula may be viewed as offensive to either Québec and or Ontario. This new amending formula does not require

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38 Ibid., page 82
39 It should be noted that the author intends “true representative majority” to include, geographical location, ethnicity, gender, race, religion, age and sexual orientation in order to comply with the constitution and any read-ins thereof by the Supreme Court of Canada not mentioned here.

both major provinces to be on board (although neither does the current amendment formula). As a result, one or rather perhaps even both major stakeholders in the population concentration in Canada would be offended. One could safely assume that Québec would be a louder voice to oppose this formula because of a historical feeling of neglect historically, a lack of a distinct society clause, and a lack of ratification or rather acceptance of the Constitutional Act 1982. These may be seen as key issues blocking the new amendment formula.

Another reason for the non-plausibility of the suggested amending formula would be its ratification in the first place. In order to make a constitutional change of this nature, one that does indeed affect now and the future of federal provincial relations, one would have to adhere to section 41(e), which is referred to the unanimity clause, which states that one would require a seal from the Governor General, the Senate, the House of Commons and resolutions from each provincial legislature. Given that the Charlottetown Accord did not pass, it would be seemingly difficult to assure Canadians that more federal power for change by publicly elected officials would benefit all. The sense of negativity towards politicians would provide a major hindrance, as opposition parties would probably spin the issue in the media to appear as though the government of the day is imposing radical and sweeping changes that do not benefit the average Canadian.

Another issue with the proposed amending formula is its regional aspect. For example what would happen if Manitoba, Saskatchewan, P.E.I., New Brunswick and Québec decided to be against the new suggestions? This would mean that approximately 33% 43 of the Canadian population was against a serious reform. This also suggests that the total possible “yes votes” is small (33%) and this is magnified by our l ow voter turnout.

The problem with relaxing the current amendment formula as has been proposed is that there is a strong possibility of getting active amendments that are on issues often seen as important and divisive matters. There is great danger in this. With Québec sovereignty a possibility, a disenfranchised western society, and an unhappy east coast, one wonders what will be the straw that breaks the proverbial camel’s back. Arguably, if the amendment formula were too relaxed, something that is not in the best interest of the entire country could be passed. This could further cleavages, and reduce the social cohesion that we have in Canada. However, if the amendment formula is too restrictive as our current one is, than it holds back necessary progressions in the country. The idea that Québec has still not agreed to the patriation of the Charter of Rights and Freedoms 1982 is troubling. However, this may be the leverage that relaxes the amendment procedure. This suggests that we might not need a tighter amending formula, rather that if one province, even if it has a substantial concentration of the population is not on board, that life in Canada would continue. The political backlash is the leverage point of the provinces.

Another issue about relaxing the current general amending formula would be that some people think that it is not strong enough. Federalists (Centralists) might argue that the relaxation of the general amending formula will lead to strong provinces and territories, though more likely province building. This would further the fragmentation of the notion of what is ‘Canadian.’ A suggested response to this would be to add a section 38(5), which is explained above. This would enable the country to follow through on a clear path for the secession of a province. The problem is that there will be dissenting views as to how far the notion of a collective Canadian interest should be brought to. It has been suggested that it only extend as far as those provinces in which there is a common border shared. However, if for example, Québec should secede, Eastern provinces such as PEI will be affected, rather it is on the basis of trade and or tourism et cetera, there could be negative implications for those who wish to provide some type of business transaction of the people of the island. The lack of such an item as the proposed section 38(5) perhaps is good for the current struggle of the more western provinces in their hopes of attaining provincial autonomy. Since a tyranny of the minority, as is the situation of Québec as suggested by Forest44, would ensure that since Québec could not realistically secede, neither could western provinces in reality. This issue of succession is a topic of another paper, and as a result will cease to be discussed here.

There is a school of thought that exists that believes that incremental change maybe the only option for Canada’s amending procedures for the Constitution.45 Some title the difficulties we as Canadians face on this issue “constitutional paralysis,” 46 while others just think that major bundled change had its chances with Meech Lake and Charlottetown Accords. The end result is the same. There is, some argue, no

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44 Forest, page 56

45 Gibbms, Roger. Time Out: Assessing Incremental Strategies for Enhancing the Canadian Public Union (Toronto: C.D. Howe Institute, 1997)

46 Lasztig, page 747–771.
chance for a bundled proposal for constitutional change left in Canada. Forest seems to present evidence in this light as well, as other Canadians outside of Québec were seeing the first major attempt at constitutional change since 1982 as a threat to their stance.47

Given the above analysis, and the plausible problems with the new suggested amendments, the reader and the writer are left at a cross roads. The current system has obvious errors, some of which have been brought to the forefront. On the other hand, elected officials can never entirely appease an entire electorate. There have been many books, journal articles and special committees’ reports specifically on issues like this in the past. The fact is that we have survived for twenty one years with the current constitution, and if left unaltered there is a possibility it will last another five years, maybe even ten years. Much like the reader is at a cross roads, so are Canada’s parliamentarians. If they propose the changes, such as those that are put forward in this paper, there would exist dissent from every angle (or so it would seem). It would seem that no matter which road our elected officials choose, there will always be a dissenting view. Forest speaks of the tyranny of the majority that Canadians outside of Québec reportedly felt when faced with the amendments proposed in the Meech Lake Accord. However, if the suggested general amending formula is implemented we could well see the pass of such a set of constitutional changes like Meech Lake or Charlottetown which could lead to the tyranny of the minority, or what others call over-representation. Banting and Simeon suggest that “the sheer difficulty of successfully amending the constitution undermines what little political incentive remains on any side to re-open the debate.”48 This quote stresses just how important for the future of Canadian politics major modifications in Section 38(1) are.

The abolishment of Section 38(3) and subsection (4) could also be met with some problems. The favourably titled ‘opting out clause’ currently allows provinces to opt-out of a constitutional amendment so long as it has a ‘majority’ of its members vote in an option that expresses their dissent before the proclamation. However, this can be reversed if a counter vote by a majority of its members were to take place once again before the proclamation. This is in essence a safety valve, in which if the government of a province were to change the minds of the voters. However, it is unnecessary and does not send a clear message about the intentions of the citizens at large. Also, this measure would effectively stop a major constitutional change from passing. The Canadian Constitutional Act is equipped with a better facilitated clause, Section 33. In Section 33, dubbed the ‘Notwithstanding Clause’ governments can opt-out of a provision of entrenched legislation. With regards to section 41, and the abolishment of subsections (b), (c) and (d), these sections are simply not needed for changing the constitution. Rather, they simply present more hurdles for our elected and accountable officials to overcome.

There is a choice to be made by our federally elected officials. The choice referred to here is indeed rather to promote more attempts under the current constitutional amending formula or to adopt a new general amending formula, so as to obtain a better ability of being able to adopt a set of constitutional values as seen in the past with the Meech Lake and Charlottetown Accords. The choice of the adoption of a new amending formula or to continue with our current formula is difficult as it has the potential to change the very nature of how our government is run in the future. The new amending formula also has the possibility of changing the face of how playing the game of Canadian politics is played forever. ■

Appendix A

Constitution Act, 1982

PART V

PROCEDURE FOR AMENDING THE CONSTITUTION OF CANADA

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

(a) resolutions of the Senate and the House of Commons; and

(b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of the provinces.

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

47 Forest, page 56.
(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

39. (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

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

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

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

(b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

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

(d) the composition of the Supreme Court of Canada; and

(e) an amendment to this Part.

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

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

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

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

(d) subject to paragraph 41(d), the Supreme Court of Canada;

(e) the extension of existing provinces into the territories; and

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

(2) Subsections 38(2) to 38(4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all provinces, including

(a) any alteration to boundaries between provinces, and

(b) any amendment to any provisions that relate to the use of the English or the French language within a province may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to executive government of Canada or the Senate and House of Commons.

45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

46. (1) The procedures for amendment under sections 38, 41, 42, and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of province.

(2) A resolution of assent for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42, or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the
adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

48. The Queen’s Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolution required for an amendment made by proclamation under this Part.

49. A constitutional conference of the Prime Minister of Canada and the first ministers shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part. [Note that this requirement was satisfied at the 1996 First Ministers Conference]

Appendix B
Part IX - Amendments to the Constitution
Art. 49. Amendments to the Constitution of Canada may from time to time be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assemblies of at least a majority of the Provinces that includes
(1) every Province that at any time before the issue of such proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada;
(2) at least two of the Atlantic Provinces;
(3) at least two of the Western Provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Western Provinces.

Art. 50. Amendments to the Constitution of Canada in relation to any provision that applies to one or more, but not all, of the Provinces may from time to time be made by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assembly of each Province to which an amendment applies.

Art. 51. An amendment may be made by proclamation under Article 49 or 50 without a resolution of the Senate authorizing the issue of the proclamation if within ninety days of the passage of a resolution by the House of Commons authorizing its issue the Senate has not passed such a resolution and at any time after the expiration of the ninety days the House of Commons again passes the resolution, but any period when Parliament is prorogued or dissolved shall not be counted in computing the ninety days.

Art. 52. The following rules apply to the procedures for amendment described in Articles 49 and 50:
(1) either of these procedures may be initiated by the Senate or the House of Commons or the Legislative Assembly of a Province;
(2) a resolution made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Art. 53. The Parliament of Canada may exclusively make laws from time to time amending the Constitution of Canada, in relation to the executive Government of Canada and the Senate and House of Commons.

Art. 54. In each Province the Legislature may exclusively make laws in relation to the amendment from time to time of the Constitution of the Province.

Art. 55. Notwithstanding Articles 53 and 54, the following matters may be amended only in accordance with the procedure in Article 49:
(1) the office of the Queen, of the Governor General and of the Lieutenant Governor;
(2) the requirements of the Constitution of Canada respecting yearly sessions of the Parliament of Canada and the Legislatures;
(3) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons and the Legislative Assemblies;
(5) the number of members by which a Province is entitled to be represented in the Senate, and the residence qualifications of Senators;
(6) the right of a Province to a number of members in the House of Commons not less than the number of Senators representing the Province;
(7) the principles of proportionate representation of the Provinces in the House of Commons prescribed by the Constitution of Canada; and
(8) except as provided in Article 16, the requirements of this Charter respecting the use of the English or French language.

Art. 56. The procedure prescribed in Article 49 may not be used to make an amendment when there is another provision for making such amendment in the Constitution of Canada, but that procedure may nonetheless be used to amend any
provision for amending the Constitution, including this Article, or in making a general consolidation and revision of the Constitution.

Art. 57. In this Part, “Atlantic Provinces” means the Provinces of Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland, and “Western Provinces” means the Provinces of Manitoba, British Columbia, Saskatchewan and Alberta.

Appendix C

Source: http://www.elections.ca/loi/com2001/Statistics/sta03_e.html#costs

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Referendum/Plebiscite year</th>
<th>Total costs</th>
<th>Cost per elector on the final list</th>
</tr>
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<tbody>
<tr>
<td>Canada</td>
<td>1992</td>
<td>$103 500 000</td>
<td>$7.541</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>1997</td>
<td>$1 476 000</td>
<td>$3.84</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>1988</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>1967</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Quebec</td>
<td>1995</td>
<td>$63 571 503</td>
<td>$12.50</td>
</tr>
<tr>
<td>Ontario</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Manitoba</td>
<td>1952</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>1991</td>
<td>$361 264</td>
<td>$0.55</td>
</tr>
<tr>
<td>Alberta</td>
<td>1971</td>
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<td>N/A</td>
</tr>
<tr>
<td>British Columbia</td>
<td>1991</td>
<td>$567 4552</td>
<td>$0.29</td>
</tr>
<tr>
<td>Yukon Territory</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>1992</td>
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<td>$30.88</td>
</tr>
<tr>
<td>Nunavut</td>
<td>1997</td>
<td>$180 000</td>
<td>$14.95</td>
</tr>
</tbody>
</table>

1 This figure does not include electors in Québec, as the 1992 referendum was conducted in Québec under Québec referendum legislation.

2 As the 1991 provincial referendum was conducted in conjunction with the 1991 general election, the administration of both events was combined. This number represents additional costs which are solely related to the conduct of the 1991 referendum.

Note: “N/A” indicates that the information is not available. A dash (−) indicates that the information is not relevant for that jurisdiction.

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