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What's In a Name? Newfoundland & Labrador and the Constitution Amendment, 2001

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1. CONSTITUTIONAL AMENDMENT IN CANADA

The Constitution of Canada, a strange chimeric beast, consists of a non-exhaustive mixture of codified elements — the *Constitution Acts, 1867-1982* themselves, the 30 British and Canadian statutes and executive instruments in its schedule, and other non-enumerated statutes — and uncodified constitutional conventions and constitutional principles.[1] Unlike Australia and the United States, the federal constitutions of which pertain primarily or exclusively to the federal order of government, the Constitution of Canada contain provisions for both the federal and provincial orders of government, which, in turn, necessitated establishing a *series* of amending formulas, not merely one. This is because some provisions pertain only to the provincial order of government, others only to the federal order of government, and others still engage matters common to both. Part V of the *Constitution Act, 1982* outlines the five classes of amending formulas, the subject-matter and constitutional provisions to which each applies, and two methods (resolution and proclamation on the one hand or statute on the other) by which these amendments are made.[2] Together, these amending formulas cover any and all

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[1] *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (S.C.C.) at paras. 883-884; *Re: Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.) at para. 148; *Reference re Senate Reform*, 2014 SCC 32 (S.C.C.) at para. 23; Adam Dodek, *The Canadian Constitution* (Toronto: Dundurn, 2013) at 17-18.

[2] Warren Newman, "Constitutional Amendment by Legislation", chapter 5 in

amendments to the text of the Constitution of Canada — they are exhaustive.[3]

The General Amending Procedure, outlined in sections 38 and 42, requires concurring resolutions from the House of Commons and Senate and at least seven provincial assemblies which combined represent at least one-half of the total population of the provinces. The Unanimity Procedure necessitates concurring resolutions from all ten provincial legislative assemblies and the House of Commons and Senate. The Section 43 Formula applies to matters that affect some but not all provinces, or only one province, and requires concurring resolutions by the House of Commons, Senate, and the legislative assemblies of the province or provinces to which the amendment applies.[4] However, these amendments can be passed without the agreement of the Senate. The Senate only exercises a suspensive veto over these multilateral amendments and cannot derail a multilateral amendment outright; if the Senate refuses to adopt a concurring resolution within 180 days (excluding when parliament is prorogued or dissolved), then the House of Commons can adopt its resolution again, which cuts the Senate out of the process altogether.[5] Either the House of Commons, Senate, or a legislative assembly can initiate an amendment under these multilateral procedures, which rely on concurring resolutions of legislative bodies and not acts of Parliament or a provincial legislature, and are then brought into force through a proclamation issued by the Governor General on the advice of the Queen's Privy Council for Canada (in practice, the federal Cabinet).[6] In contrast, the Section 44 and Section 45 Amending Procedures allow the Parliament of Canada and the provincial legislatures, respectively, to pass constitutional amendments as they would pass normal statutes.[7] Section 45 gives the provincial legislatures broad authority to "exclusively make laws amending the constitution of the province", while Section 44 allows the Parliament of Canada alone to alter the Constitution of Canada "in relation to the executive government of Canada or the Senate and House of Commons." The two rely on the same

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Constitutional Amendment in Canada, Emmett Macfarlane, ed., at 105-125 (Toronto: University of Toronto Press, 2016) at 105.

3 Section 52(3) of the *Constitution Act, 1982* says, "Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada"; *Objection by Quebec to a Resolution to amend the Constitution* , [1982] 2 S.C.R. 793 (S.C.C.) at 806; *Hogan v. Newfoundland (Attorney General)*, 2000 NFCA 12 (Nfld. C.A.) at paras. 64, 73, leave to appeal refused 2000 CarswellNfld 337 (S.C.C.). If the five amending formulas were not exhaustive, then they would be absurd, render moot fifty years of Canadian constitutional wrangling from 1931 to 1981, and undermine the Supremacy Clause of the *Constitution Act, 1982*.

4 Canada, Department of Justice, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2013) at 65-67.

5 Canada, *A Consolidation of the Constitution Acts, 1867 to 1982*, at 68.

6 Newman, "Constitutional Amendment by Legislation", at 105.

7 Canada, *A Consolidation of the Constitution Acts, 1867 to 1982*, at 68.3

method, but the Section 44 Amending Procedure covers a far narrow ambit than that under Section 45.

Since the Meech Lake Accord collapsed in bitter inter-provincial acrimony in 1990 and Canadians rejected the Charlottetown Accord in a referendum in 1992, the Constitution of Canada has gained a formidable reputation as unamendable and ossified. Of the five amending procedures, the Unanimity Amending Procedure has indeed proven insurmountable thus far, and the General Amending Procedure has only been used once.[8] But Parliament alone has enacted some amendments under the Section 44 Amending Procedure, most recently in December 2011.[9] The provinces have always remained free to amend their provincial constitutions by statute alone under Section 45, and the bilateral Section 43 Procedure, involving the provincial legislative assembly or assemblies concerned as well as the House of Commons and Senate, produced seven constitutional amendments between 1987 and 2001.[10] Constitutional amendments under Section 43 have abolished Quebec's denominational school system, affirmed the equality of New Brunswick's English and French linguistic communities, replaced the guaranteed ferry service to Prince Edward Island with a fixed link that became the Confederation Bridge, twice altered and then later abolished altogether Newfoundland's denominational schools, and, finally, added Labrador to the official name of Canada's tenth province.[11] All occurred bilaterally between one province and Ottawa.

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8 *Constitutional Amendment Proclamation, 1983*, SI /84-102. Constitutional historian James Ross Hurley recounts that this amendment under the General Amending Formula came about because section 37 of the *Constitution Act, 1982* mandated that a First Ministers' Conference be convened before 17 April 1983 to identify and proclaim aboriginal rights within the Constitution. The federal and provincial governments agreed in principle to a Constitutional Accord on Aboriginal Rights in March 1983, and the legislative assemblies of all provinces — except Quebec, where the Levesque government had decided to abstain from these multilateral amendments — passed concurring resolutions in support of this amendment between May and December 1983. Governor General Jeanne Sauvé proclaimed the amendment on 21 June 1984. As Hurley explains, this constitutional amendment bolstered Section 35 Rights so that they apply to "existing and future land claims agreements" and included a proviso applying aboriginal and treaty rights equally to men and women. James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems, and Prospects* (Ottawa: Minister of Supply and Services Canada, 1996) at 90-92.

9 Canada, Parliament, House of Commons, "An Act to Amend the Constitution Act, 1867, The Electoral Boundaries Readjustment Act, and the Canada Elections Act," Bill C-20, 41st Parliament, 1st Session, 2011-2013 (Ottawa: Parliament of Canada, 2011) (Royal Assent, 11 December 2015).

10 Canada, Department of Justice, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2013) at 67-68. As of 1 March 2022, the proposed *Constitution Amendment, 2022 (Saskatchewan)* has not been ratified.

11 Dwight Newman, "The Section 43 Bilateral Amending Formula", chapter 7 in *Constitutional Amendment in Canada,* Emmett Macfarlane, ed., at 147-163 (Toronto: University of Toronto Press, 2016) at 150; *Constitution Amendment, 1987 (Newfoundland Act)*, SI/88-11; *Constitution Amendment, 1993 (New Brunswick)*, SI/93-54; *Constitution Amendment, 1993 (Prince Edward Island)*, SI/94-50; *Constitution*

2. THE SECTION 43 AMENDING PROCEDURE

Sections 43 and 48 of the *Constitution Act, 1982* outline the process by which the *Constitution Amendment, 2001 (Newfoundland and Labrador)* came into being.

> 43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including
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> (a) any alteration to boundaries between provinces, and
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> (b) any amendment to any provision that relates to the use of the English or the French language within a province,
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> 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.[12]

The Section 43 Amending Procedure requires by implication that the legislative bodies involved adopt identical concurring resolutions, or else the Governor General-in-Council would not be able to proclaim a clear and mutually agreed upon constitutional amendment into force. James Ross Hurley, a Professor of Political Science at the University of Ottawa who literally wrote the book on *Amending Canada's Constitution,* remarked, "It almost goes without saying that the precise text of an amendment should be approved in identical terms by the necessary number of legislative bodies" because "anything else would be open to challenge."[13] However, preambles to these resolutions do not become part of the constitutional amendment, so the various legislative bodies party to the amendment could adopt different preambles to their resolutions, or no preambles at all.[14] In this case, the House of Assembly adopted a preamble with four recitals, including an instruction directing the Speaker to "forward a true copy of this Resolution to His Excellency the Governor General." In contrast, the House of Commons and Senate adopted a shorter preamble containing only two recitals which omitted any instructions that their Speakers forward the resolutions to the Governor General.[15]

Amendment, 1997 (Newfoundland Act), SI/97-55; *Constitution Amendment, 1997 (Quebec)*, SI/97-141; *Constitution Amendment, 1998 (Newfoundland Act)*, SI/98-25; *Constitution Amendment, 2001 (Newfoundland and Labrador)*, SI/2001-117.

12 Canada, *A Consolidation of the Constitution Acts, 1867 to 1982*, at 67.

13 James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems, and Prospects* (Ottawa: Minister of Supply and Services Canada, 1996) at 84-85.

14 *Ibid.,* at 84.

15 Newfoundland and Labrador, *House of Assembly Proceedings*, 44th General Assembly, 1st Session, Volume XLIV, No. 14 (29 April 1999); Canada, *House of Commons Debates*, 37th Parliament, 1st Session, Volume 137, Number 195 (30

Once the Section 43 Amending Procedure has been fulfilled, section 48 kicks in:

> 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 resolutions required for an amendment made by proclamation under this Part.[16]

In practice, the Minister of Justice and Attorney General of Canada determines when the conditions of the Section 43 Amending Procedure have been met and then submits a memorandum to cabinet recommending that the Queen's Privy Council for Canada advise the Governor General to issue the proclamation which amends the Constitution of Canada.[17] The obligatory "shall" in section 48 means that cabinet acting through the Queen's Privy Council *must* advise the Governor General to issue this proclamation, which means, in turn, that a minority government could not choose to ignore concurring resolutions of the House of Commons and Senate passed over its objections. Furthermore, the Governor General has neither a substantive role in determining the validity of the procedure under section 43 nor retains any discretion to reject the constitutional advice to issue the proclamation that amends the Constitution.[18] The Governor General would only participate in any protocol and ceremony relating to issuing the proclamation. As Hurley points out, this process insulates "the Governor General from involvement in the politics of constitutional amendment and possible court challenges."[19]

3. THE CONSTITUTION AMENDMENT, 2001

The *Constitution Amendment, 2001 (Newfoundland and Labrador)* officially changed the name of "Newfoundland" to "Newfoundland and Labrador." It did so by amending the *Newfoundland Act, 1949* constitutionally entrenched as item 21 in the schedule to the *Constitution Act, 1982*. Formerly known as the *British North America Act 1949,* this item contains the *Terms of Union of Newfoundland with Canada* and re-named them the *Terms of Union of Newfoundland and Labrador with Canada*.

In this case, the process occurred along the following timeline.

1. 29 April 1999: the House of Assembly of Newfoundland and Labrador passed a motion for the constitutional amendment;[20]
2. 30 October 2001: the House of Commons adopted a concurring resolution;[21]

October 2001) at 6695-6696; Canada, *Debates of the Senate,* 37th Parliament, 1st Session, Volume 139, Number 67 (6 November 2001) at 1641-1642.

16 Canada, *A Consolidation of the Constitution Acts, 1867 to 1982*, at 68.

17 Hurley, *Amending Canada's Constitution*, at 143.

18 *Ibid.*

19 *Ibid.*

20 Newfoundland and Labrador, *House of Assembly Proceedings*, 44th General Assembly, 1st Session, Volume XLIV, No. 14 (29 April 1999).

3. 20 November 2001: the Senate adopted its concurring resolution;[22]
4. 6 December 2001: Cabinet presented Order-in-Council PC 2001-2236 directing the Governor General to issue the proclamation promulgating the constitutional amendment into force; and,[23]
5. 6 December 2001: Governor General Adrienne Clarkson issued Proclamation SI/2001-117, which amended the Constitution of Canada and officially changed the name of the province from "Newfoundland" to "Newfoundland and Labrador."[24]

The Amendment to the Constitution of Canada reads as follows:

1. The Terms of Union of Newfoundland with Canada set out in the Schedule to the *Newfoundland Act* are amended by striking out the words "Province of Newfoundland" wherever they occur and substituting the words "Province of Newfoundland and Labrador".
2. Paragraph (g) of Term 33 of the Schedule to the Act is amended by striking out the word "Newfoundland" and substituting the words "the Province of Newfoundland and Labrador".
3. Term 38 of the Schedule to the Act is amended by striking out the words "Newfoundland veterans" wherever they occur and substituting the words "Newfoundland and Labrador veterans".
4. Term 42 of the Schedule to the Act is amended by striking out the words "Newfoundland merchant seamen" and "Newfoundland merchant seaman" wherever they occur and substituting the words "Newfoundland and Labrador merchant seamen" and "Newfoundland and Labrador merchant seaman", respectively.
5. Subsection (2) of Term 46 of the Schedule to the Act is amended by adding immediately after the word "Newfoundland" where it first occurs the words "and Labrador".
6. This Amendment may be cited as the *Constitution Amendment, 2001 (Newfoundland and Labrador)*.

The *Constitution Amendment, 2001 (Newfoundland and Labrador)* only amended item 21 in the schedule to the *Constitution Act, 1982* and replaced "Newfoundland" with "Newfoundland and Labrador" in four instances therein. For whatever reason, this constitutional amendment did not purport to replace instances of "Newfoundland" with "Newfoundland and Labrador" in other constitutional documents and notably left several references to "Newfoundland" intact in four provisions of the *Constitution Act, 1867*. Two of these provisions remain active and relevant today, while two others can be

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[21] Canada, *House of Commons Debates*, 37th Parliament, 1st Session, Volume 137, Number 195 (30 October 2001) at 6707.

[22] Canada, *Debates of the Senate,* 37th Parliament, 1st Session, Volume 139, Number 67 (6 November 2001) at 1722.

[23] Canada, Privy Council Office, P.C. 2001-2236: Order directing that a PROCLAMATION do issue amending the CONSTITUTION OF CANADA to replace the words "Province of Newfoundland" with "Province of Newfoundland and Labrador", 6 December 2001.

[24] *Constitution Amendment, 2001 (Newfoundland and Labrador),* SI/2001-117.

regarded as spent with no continuing application. Section 22 outlines the representation of the provinces and territories in the Senate and still says "Newfoundland shall be entitled to be represented in the Senate by six members."[25] Section 37 likewise lists the number of MPs assigned to each province in the House of Commons, including "seven for Newfoundland." In contrast, section 146 provided a blueprint for admitting the remainder of British North America into the Dominion of Canada, and section 147 dealt with how Newfoundland and Prince Edward Island would be represented in the Senate after joining Confederation — both of which have now happened and neither of which needs to remain operative. The Department of Justice could have invoked its doctrine of "indirect amendment" to justify substituting "Newfoundland and Labrador" for "Newfoundland" in sections 22 and 37 but chose not to do so in its latest compilations of the *Constitution Acts* from 2013 and 2021, despite other notable examples where it has altered the text of the *Constitution Act, 1867* in the absence of clear constitutional amendments authorizing such alterations.[26]

In addition, the *Constitution Amendment, 2001* did not alter any of Newfoundland and Labrador's provincial statutes and provincial constitution. To that end, the Legislature of Newfoundland and Labrador passed a regular statute in November 2001 which also entered into force on 6 December 2001 simultaneously with the constitutional amendment. The *Name of the Province Act* complemented the constitutional amendment and replaced "Newfoundland" with "Newfoundland and Labrador" in all the province's statute laws, with the exceptions of those for the Royal Newfoundland Constabulary, the legislation creating Memorial University, and other acts "incorporating a professional or occupational group that includes the name 'Newfoundland' in its title."[27] This statute probably qualifies as an amendment to Newfoundland and Labrador's provincial constitution under the Section 45 Amending Procedure, though the legislature did not expressly present the bill as such.

4. QUEBEC'S IRREDENTIST DESIGNS ON LABRADOR

Adding Labrador to the official name of the province recognised and affirmed the reality of Labrador's status as a distinct mainland and co-equal partner as opposed to a mere colony of the island of Newfoundland. The *Labrador Act*, *1964*, which the Smallwood government introduced, added Labrador to the province's coat of arms, ordered that all official publications

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[25] Canada, *A Consolidation of the Constitution Acts, 1867 to 1982*, at 6.

[26] James W.J. Bowden, "'Indirect Amendment': How the Executive Branch Unilaterally Alters the Text of the Constitution of Canada," *Commonwealth Law Bulletin* 44, no. 1 (2019): 31-42; Canada, Department of Justice, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2013); Canada, Department of Justice, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2021).

[27] *Name of the Province Act, 2001* (Newfoundland and Labrador) c. N-3.1, s. 1-4.

and stationary published by the Government of Newfoundland shall refer to Labrador as well, and gave the Lieutenant Governor-in-Council some flexibility in "prescrib[ing] the use of the word 'Labrador' coupled with references to the province in other matters."[28] Labrador found its way onto licenceplates under that latter provision.[29] But the wording of section 4 of the *Labrador Act* makes clear that the official name of the province remained only "Newfoundland." Changing the name of the province itself would require a constitutional amendment to the *Terms of Union of Newfoundland with Canada* of 1949 plus additional provincial legislation.

This constitutional amendment also brings up the fascinating history of the Labrador Boundary Dispute between the Dominion of Newfoundland and the Dominion of Canada, which the Judicial Committee of the Privy Council adjudicated in favour of Newfoundland's claim in 1927. Even though this bilateral use of the Section 43 Amending Procedure in 2001 involved concurring resolutions only from the House of Assembly of Newfoundland and Labrador, the House of Commons, and Senate, the debates in the House of Commons reveal that the Governments of Canada and Newfoundland and Labrador tried to assuage Quebec that this proposed constitutional amendment would not affect the inter-provincial boundary between Quebec and Labrador. The constitutional amendment of 2001 spoke to two audiences. Within Newfoundland and Labrador, it built upon earlier provincial legislation and acknowledged the distinct culture and political aspirations of Labradoreans. But the constitutional amendment also contained another implicit message that Quebec must drop its irredentist claims a portion of southern Labrador and accept the fact that the *Terms of Union* constitutionally entrenched the Labrador Boundary in accordance with the Judicial Committee of the Privy Council's ruling of 1927. That is why even though this constitutional amendment only involved bilateral concurring resolutions in St. John's and Ottawa, Quebec City loomed in the background as an unofficial third party. This political consideration comes through the debates of the House of Commons and to a lesser extent in the Senate.

Quebec objected to the JCPC's ruling in 1927 and has consistently refused to accept the established and constitutionally entrenched border between Quebec and Labrador ever since. The website of the Government of Quebec and its official maps of the Province of Quebec describe the inter-provincial boundary with Labrador with the caption, "This border is not definitive."[30] Quebec contests the southern border of Labrador along the 52nd Parallel and instead claims that the border runs farther north at the height of the land east of the Romaine River and Long Lake.[31] The Ministry of Energy and Natural

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[28] *The Labrador Act, 1964*, R.S.N. 1990, c. L-3, s. 1-4.

[29] Canada, *Debates of the Senate,* 37th Parliament, 1st Session, Volume 139, Number 67 (6 November 2001) at 1642.

[30] Quebec, Ministry of Natural Resources, "[Map of] Quebec," July 2000; Quebec, Ministry of Natural Resources and Wildlife, 2011.

[31] Quebec, Ministère de l'Énergie et des Ressources naturelles, « Cartes et information

Resource's detailed map shows that Quebec's claim encompasses the watersheds of all the rivers that discharge into the Gulf of St. Lawrence — notably all branches of the Natashquan, the Little Macatina, the Joir, all branches of the St. Augustine, the St. Paul, and the Bujeault — which would allow Quebec to dam them unencumbered for hydroelectricity and to lay claim to any mineral resources within these mountains. Quebec does not claim any territory encompassing the drainage basins of rivers that discharge into the Labrador Sea, but it nevertheless characterises the entire inter-provincial border between Quebec and Labrador as "non-definitive" on its official maps. For the most part, Quebec's claim remains abstract because this territory does not include any permanent settlements, though it could become subject to indigenous lands claims. However, the territory that Quebec covets would also capture about 15 kilometers of the Trans-Labrador Highway in the northern basin of the St. Augustine River. More audaciously still, Elections Quebec's official electoral map of the province also depicts the riding of Duplessis as encompassing this section of southern Labrador with the wording: "Privy Council's Border of 1927 (non-definitive)."[32] In other words, Quebec has gone so far as to claim in principle that the Member of the National Assembly for Duplessis could represent constituents who do not live in the province of Quebec and who therefore do not and cannot vote in Quebec's elections. In practice, Elections Quebec does not presume to set up shop in this territory, which lacks permanent settlements, but this claim and these electoral maps raised the ire of two Premiers of Newfoundland and Labrador, Danny Williams in 2007 and Dwight Ball in 2016.[33]

In fact, the inter-provincial border between Newfoundland & Labrador and Quebec most certainly is definitive and constitutionally entrenched under Newfoundland's *Terms of Union* of 1949. Quebec contests the border in direct violation of the Constitution of Canada, so "the border is not definitive" only tautologically, because Quebec says that it is not. No other provinces within Canada, nor the federal order of government itself, nor any foreign state, recognise this territory as in dispute, nor the legitimacy of Quebec's irredentist claim; all acknowledge that the territory by rights belongs to the Province of Newfoundland and Labrador and that from 1927 to 1949 it belonged to the Dominion of Newfoundland. A simple syllogism can easily topple Quebec's claim.

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géographique, Répertoire des services Web et donnes géographiques, Coubes de niveau », 2016.

[32] Quebec, Élections Québec, « Cartes individuelles des 125 circonscriptions électorales : Duplessis », 31 Jaguar 2017.

[33] CBC News, "Dispute Flares Up Again Over Quebec-Labrador Border," 22 January 2007; The Canadian Press, "Quebec Election Map Revives Controversy Over Labrador Border Dispute," *Global News,* 8 April 2014; The Canadian Press, "Why Peace Won't Come Quickly for Quebec and Newfoundland and Labrador," *Maclean's,* 4 December 2016.

1. Item 21 of the Schedule of the *Constitution Act, 1982,* the *Newfoundland Act*, contains Newfoundland and Labrador's *Terms of Union* upon joining Confederation in 1949.[34]
2. These constitutionally entrenched *Terms of Union* define the border between Quebec and Labrador in accordance with the Judicial Committee of the Privy Council's ruling in 1927.

> The Province of Newfoundland shall comprise the same territory as at the date of Union, that is to say, the island of Newfoundland and the islands adjacent thereto, the Coast of Labrador as delimited in the report delivered by the Judicial Committee of His Majesty's Privy Council on the first day of March, 1927, and approved by His Majesty in His Privy Council on the twenty-second day of March, 1927, and the islands adjacent to the said Coast of Labrador.[35]

3. Therefore, Quebec's historical grievance about the JCPC's ruling of 1927 became immaterial in 1949, and the adoption of the *Constitution Act, 1982* then subjected border disputes to a new constitutional amending procedure. The borders between the provinces of Quebec and Newfoundland and Labrador form part of the Constitution of Canada and cannot be altered unilaterally on the claim of the National Assembly or Government of Quebec, but only by way of a multilateral constitutional amendment under section 43(a) — "an alteration of the boundaries between provinces" — involving concurring resolutions of the House of Assembly of Newfoundland & Labrador, the National Assembly of Quebec, the House of Commons, and the Senate. Even between 1949 and 1982, an inter-provincial boundary dispute would have fallen under a similar procedure contained in section 3 of the *British North America Act, 1871*.[36] The Supreme Court of Canada noted this same chain of reasoning as recently as 2020:

> "The *Constitution Act, 1982* recognizes that the *Newfoundland Act*, including the 1927 border, forms part of the Constitution: s. 52(2)(*b*); Sch., s. 21. It also notes that 'any alteration to boundaries between provinces' requires the authorization of 'the legislative assembly of each province to which the amendment applies': s. 43(*a*)."[37]

In other words, Quebec's argument against the JCPC's ruling of 1927 must now be regarded as an *historical* question separate from legal-constitutional fact, because the *Terms of Union of Newfoundland and Labrador with Canada* entrenched the JCPC's decision on the boundary of Labrador into the

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[34] Canada, Department of Justice, *A Consolidation of the Constitution Acts, 1867 to 1982* (Ottawa: Her Majesty the Queen in Right of Canada, 1 January 2013) at 74.

[35] Canada, Department of Justice, *British North America Act, 1949 Enactment No. 21*: *Schedule: Terms of Union of Newfoundland with Canada*, 7 January 2015.

[36] *The British North America Act, 1871* (Imperial) 34-35 Vict., c. 28, s. 3.

[37] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (S.C.C.) at para. 263.

Constitution of Canada, and the boundaries between provinces can now only be amended under section 43(a) the *Constitution Act, 1982*.

5. THE PARLIAMENTARY DEBATES ON THE CONCURRING RESOLUTIONS, 1999–2001

On 20 March 1996, the Lieutenant Governor of Newfoundland and Labrador opened the 1st session of the 43rd General Assembly with the Speech from the Throne prepared by Liberal Premier Brian Tobin, who had recently transitioned from the federal cabinet of Jean Chretien to leading the provincial Liberals to a parliamentary majority.[38] The very first line contained Tobin's bold declaration that he would seek to change the name of the province from "Newfoundland" to "Newfoundland and Labrador."

> I take great pleasure in welcoming you to this First Session of the Forty-third General Assembly of the Province of Newfoundland. It is time to change the name of our Province to reflect the reality that it is made up of two equally important parts, Newfoundland and Labrador. My Government will bring forward legislation to change the name of the Province from Newfoundland to Newfoundland and Labrador. This will require an amendment to the Terms of Union to be approved by the House of Assembly and by Parliament.[39]

In reality, this required not a statute passed by the legislature (Lieutenant Governor plus House of Assembly) but a motion of the House of Assembly alone. Premier Tobin did not get around to tabling the motion until the 1st session of the next House of Assembly three years later on 29 April 1999; it passed unanimously the same day.[40]

The House of Commons and Senate then needed to pass concurring resolutions, which they did in late 2001. Brian Tobin presented the first resolution in the House of Assembly as Premier in 1999 and by a curious quirk of fate, he also presented the concurring resolution in the House of Commons on 30 October 2001 as the Minister of Industry after having returned once more to federal politics in October 2000. Tobin mentioned that he had first promoted the amendment in his first Speech from the Throne in March 1996, noting: "It has been the long-standing practice of the Government of Canada to take positive action in response to provincial requests for bilateral

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[38] Canada, Privy Council Office, "Twenty-Sixth Ministry," in *Guide to Canadian Ministries Since Confederation,* (Ottawa: Her Majesty the Queen in Right of Canada, 31 April 2017). Tobin was Minister of Fisheries and Oceans from 4 Nov. 1993 – 8 Jan. 1996 before leaving to take on the leadership of the Liberal Party of Newfoundland and Labrador. He then re-joined Chretien's cabinet on 17 October 2000 as the Minister of Industry.

[39] Newfoundland and Labrador, *House of Assembly Proceedings*, 43rd General Assembly, 1st Session, Volume XLIII, No. 1 (20 March 1996). Incidentally, this also comes from the era where Lieutenant Governors and Governors General referred to the incumbent ministry as "My Government" instead of as "Your Government."

[40] Newfoundland and Labrador, *House of Assembly Proceedings*, 44th General Assembly, 1st Session, Volume XLIV, No. 14 (29 April 1999).

amendments to the constitution." Bizarrely , he also emphasised that he "had consulted with members of the Bloc Quebecois" — even though this constitutional amendment had nothing to do with Quebec and did not involve a resolution of the National Assembly. Continuing with this trend of treating Quebec as a *de facto* party to the constitutional amendment, Tobin added that he had "consulted with the Government of Quebec on behalf of the Government of Canada, as has the Government of Newfoundland and Labrador." Finally, he thanked "all members from all parties, but notably colleagues from Quebec on both sides of the House."[41] Again, Tobin here singled out Quebec.

Conservative MP Scott Reid alluded to the reasons why Tobin felt the need to involve Quebec in a bilateral amendment under the Section 43 Procedure to which Quebec was not a party: an historical dispute over the Labrador Boundary. Reid provided a brief overview of the JCPC's ruling on the border between the Dominion of Canada and the Dominion of Newfoundland in 1927 and expanded upon a book which he had written in 1992 on Quebec's territorial claims.[42] Canada took the view that the "coast of Labrador" referred to a narrow littoral sliver that extended only a few miles inland and that the rest of the watersheds in the interior belonged to Canada, while Newfoundland argued that "coast of Labrador" referred to the watersheds that discharged into the Labrador Sea; the JCPC ultimately decided in favour of Newfoundland on that question, with the exception of the southern border of Labrador, which follows the 52nd Parallel instead of the watersheds of all the rivers that flow into the Gulf of St. Lawrence, which would have put the boundary a bit farther north and given Quebec more territory. Reid concluded:

> One could dispute whether that was a wise addition or change to the original formula. Whatever the case, the boundary was agreed by both parties. It was written into the Constitution of Canada when Newfoundland and Labrador joined Canada, and it is not subject to any form of dispute. There is no legal argument that any of the territory is not clearly and distinctly a constitutionally protected territory of the province of Newfoundland and Labrador.[43]

Reid correctly summarised the history of the Labrador Boundary Dispute and the constitutional facts of the matter. But Bloc Quebecois MP Richard Marceau opined otherwise. Marceau started off by dismissing the amendment as "minor", which it was to the extent that it did not change anything but the name of Newfoundland, but he nevertheless prevaricated against the

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41 Brian Tobin (Ministry of Industry), "Government Orders: Constitution of Canada, " in *House of Commons Debates,* 37th Parliament, 1st Session, volume 137, no. 105 (30 October 2001) at 6696-6697.

42 Scott Reid, *Canada Remapped: How the Partition of Quebec Will Reshape the Nation* (Vancouver: Arsenal Pulp Press, 1992) at 39, 55.

43 Scott Reid, "Government Orders: Constitution of Canada," *House of Commons Debates* (30 October 2001) at 6700.

resolution at great length and threatened that the Bloc quebecois would vote against it.

> The amendment introduced by the federal government and sponsored by the Ministry of Industry reflects a diluted version of the previous position of the government of Newfoundland, and that is good. If it had been any different, the Bloc Quebecois would not have been able to support the motion [. . .].[44]

In fact, the resolution that Tobin introduced in the House of Commons as Ministry of Industry in October 2001 is identical to that which he introduced in the House of Assembly as Premier in April 1999; the logic of the Section 43 Amending Procedure requires identical concurring resolutions, or else the Queen's Privy Council for Canada could not advise the Governor General to proclaim into force a proper constitutional amendment on which all assemblies have agreed.

Marceau then insisted that no Government of Quebec has ever "officially recognized the jurisdiction of the Newfoundland government over Labrador" or the JCPC's ruling from 1927. But being a lawyer,[45] Marceau should have understood that Newfoundland's *Terms of Union* entrenched the boundary between Quebec and Labrador in the Constitution of Canada and thereby demoted Quebec's claim over the territory to an historical grievance and curiosity and subordinated it to the procedure under section 3 of the *British North America Act, 1871*. Marceau continued:

> Premier Bouchard warned his Newfoundland counterpart against the negative interpretation that could have been generated in Quebec by presenting a motion to officialize the name of Newfoundland and Labrador, thus legalizing and officializing the 1927 judicial decision.[46]

Here Marceau employed a false chain of reasoning. In fact, changing the name of the province did not "legalize and officialize" the JCPC's ruling from 1927; instead, it was the *Terms of Union* which "officialized the 1927 judicial decision" in 1949. This constitutional amendment exists independently of the inter-provincial boundary and had no effect on it. Marceau then taunted Tobin for having stated in 1999 that "The resolution passed by the House of Assembly and now being considered by the federal government would simply legalize what has been the boundary of this province as confirmed by the British Privy Council decision of 1927." It is true that Tobin did not state the facts accurately in that instance. If anything, he inadvertently revealed the unstated implication of this constitutional amendment — a warning that Quebec must drop its claim to Labrador — and conflated it with the fact that adding "Labrador" to "Newfoundland" had no effect whatsoever on the inter-provincial border between Quebec and Labrador.

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[44] Richard Marceau, "Government Orders: Constitution of Canada," *House of Commons Debates* (30 October 2001) at at 6700-6701.

[45] Parliament of Canada, ParlInfo, "Mr. Richard Marceau, M.P.".

[46] *House of Commons Debates* (30 October 2001) at 6701.

Marceau then read into the record a letter that Brian Tobin as the federal Ministry of Industry had sent Premier Bernard Landry of Quebec earlier in 2001:

> The amendment proposal aiming at changing the name of Newfoundland will have no impact on the present border between Quebec and Newfoundland. Replacing the name of Newfoundland by Newfoundland and Labrador in the Terms of Union is a symbolic measure which acknowledges in a significant way that Labrador is an essential and full partner of the province, with its own geography, history and culture.[47]

Tobin's successor as Premier of Newfoundland and Labrador, Roger Grimes, also sent Landry a letter on 23 October 2001: "I wish to reiterate that this is only a change of name, which in no way changes our position regarding our common border or our position on the issue." Tobin and Grimes tried to assuage Landry too much. The border between Labrador and Quebec is not merely "Newfoundland's position" on a debateable issue: the border, as the JCPC determined it in 1927, is a fact entrenched in the Constitution of Canada. Marceau, however, kept insisting that Quebec held some veto over this process. He described these letters from Tobin and Grimes as a "guarantee" — when, in reality, they merely stated a fact — "required as a *sine qua non* condition for the approval of Quebec of the constitutional initiative of Newfoundland."[48] He then lamented that no constitutional amendment recognising "Quebec as a nation" had passed and decried "the disconcerting ease with which this historic amendment to the constitution that we are debating today will be enacted." Marceau here contradicted himself: he calls the amendment "historic" where he had begun his speech by dismissing it as "minor." Marceau then accused the Government of Canada of being "biased toward Newfoundland and the other provinces of Canada, to the exclusion, of course, of Quebec",[49] when, in fact, the earlier constitutional amendments proposed in the Meech Lake and Charlottetown Accords that would have recognised Quebec as a distinct society stalled because they failed to meet the higher threshold of the Unanimity Amending Procedure, not because of some nefarious plot against Quebec.

Marceau concluded that Quebec would accede to this amendment (which did not materially affect it and to which it was not a party) only because it would enact merely a "minor change to the constitution" and amounted to a nothing more than a "cosmetic change [. . .] which would have no impact, except perhaps for a stronger feeling of belonging for the 30,000 inhabitants of Labrador in the province of Newfoundland."[50] Like many Quebec nationalists, he will pounce on any perceived slight against Quebec and simultaneously dismiss nationalist sentiments amongst another group of

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47 *Ibid.,* at 6702.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.,*

people. He closed his petulant salvo with the pedantic observation that since "Labrador" can also serve as a geographic term for the northeastern Ungava landmass in addition to the political entity, Newfoundland therefore cannot claim all of "Labrador" in the geographic sense — a technically true but wholly irrelevant statement.[51] This is like saying that the Republic of Ireland should not use "Ireland" in its name because "Ireland" also serves as a geographical term for the whole island and thus encompasses both the Republic of Ireland and Northern Ireland. Marceau assured the House that "the Bloc Quebecois will not be opposing this motion," yet some honourable members clearly did. *Hansard* does not record a vote on division, but the voicevote shows that some MPs cried "nay!" against the motion, which nevertheless carried over their objections.[52]

Debate in the somnolescent upper chamber proceeded in muted fashion by comparison. Senator Pierre Claude Nolin of Salaberry, Quebec echoed the erroneous argument of the Bloc Quebecois in the other place that adding "Labrador" to the name of the province somehow affected the border or would define the inter-provincial boundary in the Constitution of Canada for the first time.[53] Senator Gerald Beaudoin corrected the record and explained that the *Terms of Union of Newfoundland with Canada* of 1949 already constitutionally entrenched the border as defined by the JCPC in 1927 into the Constitution of Canada: "the legal issue is settled and constitutional case law is clear on this."[54] The Senate adopted the motion on 20 November 2001.

6. CONCLUSION

The territory which now makes up Labrador, as part of the province of Newfoundland and Labrador, has fallen under three polities within British North America: Rupert's Land of the Hudson's Bay Company, Newfoundland, and Quebec (including its earlier iterations as the Province of Canada and Lower Canada). Several Imperial statutes and executive instruments — notably the *Royal Proclamation of 1763,* the *Quebec Act, 1774,* the *Newfoundland Act, 1809,* and the *British North America Act, 1825* — variously assigned portions of modern Labrador to both Lower Canada and Newfoundland. This uncertainty and confusion, compounded by the absence of proper surveys until well into the late 19th century, contributed to the boundary dispute, which the JCPC definitively resolved in 1927.[55] Old maps of the Dominion of Canada or British North America from the 1880s and 1890s sometimes depict Labrador as a littoral sliver with the bulk of the landmass belonging to Quebec.[56] Quebec could argue that the JCPC resolved the dispute

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[51] *Ibid.,* at 6703.

[52] *Ibid.,* at 6706-6707.

[53] Canada, *Debates of the Senate,* 37th Parliament, 1st Session, Volume 139, Number 70 (20 November 2001) at 1706.

[54] *Debates of the Senate* (20 November 2001) at 1721.

[55] *Re: Labrador Boundary*, 1927 CarswellNfld 1 (Jud. Com. of Privy Coun.) at 411-417.

unfairly and *should* have awarded the territory encompassing the watersheds of all rivers that flow into the Gulf of St. Lawrence to the Dominion of Canada instead of to the Dominion of Newfoundland based on its general methodology of defining "the coast of Labrador" as the drainage basin of rivers which discharge into the Labrador Sea. In fact, the JCPC gave strong consideration to this argument but ultimately ruled that the *British North America Act, 1825*, which defined Labrador's southern boundary as the 52nd Parallel, must prevail over the definition of "the coast of Labrador" based on drainage basins which the JCPC applied to the rest of the territory in dispute.[57] The artificial 52nd Parallel therefore prevailed on the southern border over the natural geographic height of the land and watersheds.

But only a constitutional amendment under section 43(a) of the *Constitution Act, 1982* could alter the *inter-provincial* and constitutionally entrenched boundary between Quebec and Labrador; Quebec could not do so unilaterally, nor could any international body arbitrate Quebec's claim if Canadian sovereignty means anything. International arbitration only applies to international borders, like that which settled the Alaskan Boundary Dispute in 1903. And, ironically, even if Quebec seceded from Confederation to become its own independent and sovereign state, the principle of succession of states means that all its current borders — including those with Newfoundland and Labrador as defined by the JCPC's ruling of 1927 and the *Terms of Union of Newfoundland and Labrador with Canada* — would remain the same.[58] Even Jacques Parizeau promoted this principle as an argument against the partition of Quebec.[59] Furthermore, section 3 of the *Constitution Act, 1871* would then still apply, and the consent of the Legislature of Newfoundland and Labrador would therefore still be required to alter an international boundary between Quebec and Labrador.

> The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase of diminution or alteration of territory in relation to any Province affected thereby.[60]

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56 "Political Map of the Dominion of Canada" in *Handbook on Canada* (Toronto: Publication Committee of the Local Executive of the British Association for the Advancement of Science, 1897), i.

57 *Re: Labrador Boundary*, 1927 CarswellNfld 1 (Jud. Com. of Privy Coun.) at 428.

58 James Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 2006), at 667-672; Carsten Thomas Edenroth and Matthew James Kemner, "The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards" (Fall 1996) 17:3 *University of Pennsylvania Journal of International Economic Law* 756.

59 Reid, *Canada Remapped*, at 37.

60 *The British North America Act, 1871* (Imperial) 34-35 Vict., c. 28, s. 3.

Unlike the constitutional amending procedure under Section 43(a), which requires a resolution from the legislative assembly, this would have required a statute passed by the legislature (assembly plus Lieutenant Governor).

At this stage, Quebec could only ever hope to press its claim and annex part of southern Labrador by way of the first constitutional amendment under the Section 43 Amending Procedure to involve more than one province, in this case, with concurring resolutions of the House of Assembly of Newfoundland and Labrador, the National Assembly of Quebec, and the House of Commons and Senate of Canada. Newfoundland and Labrador possess something which Quebec covets. At the very least, Quebec City would have to enter into negotiations with St. John's and offer neighbourly concessions and inducements in exchange for the watershed of Labrador north of the 52nd Parallel that discharges into the Gulf of St. Lawrence. These could include releasing Newfoundland & Labrador from the dreaded contract on the Churchill Falls Hydroelectric Project before 2041 and paying some reparations for the $28 billion in profit that Quebec generated between 1969 and 2019.[61] But the House of Assembly of Newfoundland and Labrador would never cede part of Labrador on Quebec's refusal to recognise the JCPC's ruling alone.

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[61] CBC News, "Quebec's Top Court Rules for N.L. in Churchill Falls Dispute with Hydro-Quebec" (20 June 2019) *CBC News*.