

Navigating Meech Lake:
The 1987 Constitutional Accord

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Introduction

JOHN MEISEL

Few countries display as many paradoxes as Canada. One of its many seeming contradictions arises from the fact that although it is among the most enduring and successful states, it perpetually experiences deep anxiety about its identity and its capacity to survive as a credible polity. This chronic brooding about the country's national chances of survival is one of our most distinguishing characteristics. From time to time it is punctuated by acute crises in which the debate about the nature of Canada reaches fever pitch. The 1980s have turned out to be a period of such unusually intensive collective self-examination. The constitutional debates during the late Trudeau era, and again in the aftermath of the Meech Lake Accord, have riveted the attention of the political class and of many other Canadians on the question of the quintessential character of our country - both with respect to what, collectively, we are and to what we should be.

What are the essential powers needed by the federal government if Canada is to remain a viable state? What is the appropriate level of centralization in our political system? How best to deal politically with the presence of two major linguistic and cultural societies? What is the most effective way of selecting people for some of our major governmental institutions? How to ensure the full and equal participation of heretofore neglected and underrepresented groups? Where to draw the line between the particular rights protected by the Charter and the general powers required by governments to defend the public good? What is the appropriate procedure for bringing about fundamental constitutional change? As if the substance of these questions were not enough to arouse passionate concern, the intensity of the debate is heightened by two factors: the awareness that the answers provided may indelibly colour the future character of the country and our realization that if we make errors, we may jeopardize the capacity of Canada to survive at all.

In its winter issue of 1987, the *Queen's Quarterly* carried four important articles shedding light on some of the salient aspects of the so-called Meech Lake debate. Because of the quality of these papers, and the importance of the subject, the *Quarterly* and the Institute of Intergovernmental Relations of Queen's

decided to make these essays available to a wider public by reprinting them as a separate pamphlet. The authors of these four essays, which follow, represent a wide spectrum of viewpoints. They share an intimate knowledge of the issues they discuss, and an academic perspective which lifts their argument above that so often displayed by representatives and advocates of particular groups or interests. At the same time, they display deep concern for the matter at hand, and a tenacious commitment to the case they are making.

Both Peter Leslie's and John Whyte's pieces were originally presented to the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord. Leslie, while not unconcerned about some features of the Accord, makes a powerful case for its adoption in its present form. Whyte, on the other hand, considers it to be fraught with dangers, although he acknowledges the importance of reaching an agreement embracing the governments of Canada and all the provinces. Beverley Baines presents a trenchant and disquieting account of the Joint Committee's Report, casting doubt on the quality of its work, at least insofar as one aspect of its mandate is concerned. In the concluding article, Ramsay Cook places the famous "distinct society" clause in the context of Canada's long-standing debate over, and accommodation to, the special character of Quebec.

The excellent but often quite incompatible arguments over the Meech Lake Accord reveal that there is no objective set of criteria according to which the package of agreements can be judged. All depends on such subjective factors as the view one takes of the character of the country, of its government and, in the final analysis, of human nature itself.

The position we espouse on the 1987 constitutional initiative of the Prime Minister and the ten provincial premiers therefore reveals a great deal about our basic personality traits. Those who are seriously worried about it tend to be Hobbesians, sharing the view that: "The condition of man ... is a condition of war of all against all." They are inclined to expect, in other words, that the politicians who will be applying the new constitution will always be motivated by the rankest parochialism and will inevitably behave selfishly and destructively insofar as Canada is concerned. The Meech Lake advocates, on the other hand, tend to have the propensities of Pollyana: they see the rosy side, and anticipate that people will normally act generously and sensibly. Future politicians charged with making the new constitution work will, in this perspective, make the ground rules serve Canada well and will know how to benefit from the conciliatory climate engendered by the Meech Lake Accord.

It is a little scurrilous to make anyone conform to such absolute ideal types. These metaphors are perhaps a little far-fetched and certainly do not apply to everyone evaluating the Accord or the Langevin text. But it is not

unreasonable to see most of those involved in the debate *approximating* one or the other of the two extremes sketched here.

Beverly Baines's subject does not allow us to judge in which direction she is leaning, although her article makes it difficult to visualize the author as sharing many of Pollyana's traits. No reader, however, is likely to find it difficult to place the other three contributors on the Pollyana-Hobbes continuum. The real challenge, for those subjecting this volume and its conundrum to careful scrutiny, will be to identify their own appropriate location between the curmudgeon and the bleeding-heart poles. The future of Canada may depend on where they and the key decision-makers ultimately stand with respect to their expectations of the probable behaviour of future political leaders. If the optimists win, Meech Lake will pass; if the pessimists carry the day, the constitution industry will have to return from the drafting table to the drawing board.

Whatever the outcome, whether a new constitutional arrangement can be accepted now or whether we must start the process of finding one all over again, the key elements of the current debate, almost all of which are noted by our authors, will continue to be part of Canada's constitutional adjustments and adaptations.

This slender volume is, therefore, not likely to become a quaint historical relic. It is inescapable that the matters it raises will have to be resolved by those who, now and in the future, attempt to shape the basic outlines of the Canadian state.

*Submission to the Special Joint Committee
of the Senate and the House of Commons
on the 1987 Constitutional Accord*

PETER M. LESLIE

I Introduction

This submission expresses support for the 1987 Constitutional Accord, and urges Parliament and the provincial legislatures to endorse it. In what follows, I make the following arguments:

- it is urgent and important that changes be made in the Canadian constitution, so it becomes acceptable to Quebec
- the text of the accord negotiated among First Ministers 2-3 June is almost certainly not amendable either in its principles or in its wording: thus Parliament and the provincial legislatures must make basically a "yes or no" decision
- while there should be a presumption in favour of endorsement of the Accord, Parliament and the legislatures of the nine provinces that signed the partial Accord of 1981 have an obligation to scrutinize the 1987 Constitutional Accord, to make sure it is acceptable to themselves as well as to Quebec (which the Quebec National Assembly has declared it to be)
- several of the arguments made by those who have urged rejection of the Accord, or else its fundamental amendment, do identify major issues that demand attention; but the concerns that have been expressed are overblown, and can be alleviated by careful analysis of the Accord and its probable effects
- the Accord represents an attempt, and may offer an opportunity, to move into a new era of federal-provincial relations, in which governments can get away from the poisonous atmosphere of past battles; by virtue of the Accord, Canadian federalism may work a lot better in the future than it has in the past.

II An Agreement is Urgent and Important

"Government by consent" is generally acknowledged to be an essential characteristic of a free society. Violation of this principle offends against democracy and imperils the political stability of a country whose people are

committed to democracy. It should therefore be of great concern to all Canadians that Quebec, alone among the provinces, has never assented to the present ground-rules of Confederation. Those rules were significantly changed by the Constitution Act, 1982, which implemented an agreement reached by the federal government and nine provinces, Quebec alone dissenting, in November 1981. The changes made at that time could not have been accomplished under the amending formula the 10 governments agreed upon at that time. In other words, the Constitution Act, 1982 could not meet the test of its own rules. The Act was denounced by unanimous vote of the Quebec National Assembly.

The extraordinary proceedings by which the constitution was fundamentally changed in 1982 would probably have been regarded throughout Canada as illegitimate, except for the fact that the Government of Quebec was in the hands of a political party committed to political independence. It could be argued, and was argued, that the Parti Québécois had a vested interest in denying its assent to any constitutional package, regardless how favourable to Quebec. For political reasons, the PQ could never be satisfied.

This argument is plausible, but if invoked as justification for overriding Quebec's objections at the time, implies the following: as soon as a federalist party came to power in Quebec, giving evidence of wanting to cut a deal, the federal government and the nine provinces had a moral obligation to reopen the partial Accord of November 1981, and to bargain in good faith towards an amended Constitution Act acceptable to the government and people of Quebec. This process began a year ago. Now the First Ministers have fulfilled the promise implicit in the actions of an earlier group of First Ministers in November 1981. The Quebec National Assembly has endorsed the new agreement.

Some people have denied that there was good reason to reopen the substance of the partial Accord of November 1981, and they bristle when anyone speaks of "bringing Quebec into the constitution." Quebec is *in* the constitution, they say - and they are literally correct. The Government of Quebec has acknowledged that it is legally bound by the terms of the Constitution Act, 1982. The question, however, is one of *moral* exclusion, or the legitimacy of the Act and the propriety of the proceedings leading up to it. Evidently, for some people, it is enough that Quebec's representatives in the Parliament of Canada endorsed the Constitutional Resolution in 1982; they apparently consider the views of the Quebec National Assembly, then and subsequently, as irrelevant. Such people, it would seem, are unmoved by the fact that not a single Quebec provincial politician (to my knowledge) has ever endorsed the 1982 Act.

If, truly, the position consistently taken by all Quebec political parties is irrelevant or unimportant, nothing more remains to be said: there was no valid

reason (at least none emanating from Quebec) to re-inscribe constitutional issues on the public agenda. But that, wisely, was not the view of the First Ministers. If the provinces have any place in the constitutional revision process, as by the Constitution Act, 1982 they do, Quebec has that right as much as others. In 1981, at the very moment the other provinces successfully asserted their claim to be involved, Quebec was excluded. Perhaps this was justifiable under the circumstances, but those circumstances no longer obtain. To refuse Quebec the moral right to participate fully (though after five years' delay) in framing the ground-rules of Confederation is not justifiable now. Implicitly recognizing this, the Premiers' Edmonton Declaration of August 1986 acknowledged the priority of Quebec's constitutional agenda, as set out by Mr Gil Rémillard in May of that year; and they, together with the Government of Canada, have honoured their commitment to leave other constitutional issues for a later time. The moral validity of Quebec's position is the first and basic reason for negotiating, as the First Ministers have done, a new constitutional accord.

There are at least two additional reasons for wanting to bring Quebec into a constitutional framework it regards as legitimate. The first is that, at some unknown future time, there will probably be a new wave of Quebec nationalism. No one knows what form it will take, or what events may trigger it. However, the rest of Canada would be acting imprudently if it allowed a new independence movement to arise in a situation where the *indépendantistes* could evoke the events of 1981-82 as "a second Conquest," saying that the ground-rules for Confederation had been foisted upon Quebecers, and the province had never agreed to them. The 1987 Constitutional Accord removes a grievance, it blunts a weapon.

Finally, a constitutional accord is urgent and important for Canada because, reasonably enough, Quebec will not participate in any other constitutional changes until the agenda left over from 1981 has been settled. This makes the future development of the constitution, or its further adaptation to changing circumstances, extraordinarily difficult to achieve, and in some respects impossible. Some people regard Quebec's behaviour in this respect as blackmail: the word has been used. That attitude, however, can be justified only on the grounds that Quebec's exclusion in 1981 was its own fault, and the province must live with its mistakes. My own view, as I have explained, is different: the events of 1981 morally oblige the rest of Canada to reopen the partial accord reached at that time. From this perspective it seems legitimate and reasonable that Quebec should refuse to join in making other changes in the constitution until its own agenda, if put forward in a constructive spirit, has been dealt with. I suspect any other province would behave likewise in similar circumstances.

As things now stand, the 1987 Constitutional Accord is a necessary first step towards any other changes desired by the Government of Canada or by provincial governments. One of the features of the Accord is the promise to return later to issues such as Senate reform and jurisdiction over the fisheries. (The prospects for doing so successfully will be discussed later in this submission.)

In conclusion: the First Ministers had strong moral reasons for tackling Quebec's constitutional agenda, which has shaped the 1987 Constitutional Accord. It was essential to do so because justice demanded it. However, a new constitutional accord is also important for at least two other reasons. First, in its absence Quebec *indépendantistes* carry a bludgeon. Second, without Quebec's full participation in the further development of the constitution it will be extremely difficult, and in some matters impossible, to bring about changes in other areas. *In short, the costs of failure at this stage would be incalculable.* They would be incalculable, even without taking into account the likelihood of a severe political backlash in Quebec, if the First Ministers' agreement should be rejected by Parliament or by any provincial legislature.

III Is the Accord Amendable?

To say that an accord is desirable does not imply that the particular Accord now before Parliament is worthy of its endorsement. Parliament is called upon to make a judgment on this, and, at least in a formal sense, may choose among three possible options: to endorse the 1987 Constitutional Accord without amendment, to endorse it, subject to certain amendments, or to reject it. In practice, however, the option of endorsing the accord, subject to amendments, is almost certainly not available. If the Constitution Amendment, 1987, which forms part of the Accord, is amended in any particular by Parliament or by any *one* of the provincial legislatures, all the others too must accept the changes. While revisions at this stage are not absolutely inconceivable, the possibility of their being accepted by all the parties seems remote in the extreme. To take the improbable case, it may yet be shown that some clause or other appears to have implications not hitherto noticed. In other words, there may be a drafting error. In that situation all eleven governments and legislatures may agree to new wording that better represents the original intent. Except for changes to overcome a drafting error, however, it is hard to imagine changes at this stage. The "Langevin text" of 3 June, which adds precision to the "Meech Lake accord" of 30 April and indeed somewhat alters it, represents a delicate balancing of divergent interests and preferences. This is the text that is now before Parliament. It reflects a consensus position that was arrived at only with the greatest difficulty. The fact that the First Ministers came within a hair's breadth

of failure makes it hard to envision changes now, even changes that merely eliminate ambiguities.

It offends some Members of Parliament, and indeed many others, that there should be little if any opportunity for making changes at this stage. "Why hold hearings," it has been asked, "if the text is final?" The answer is clear: because Parliament and each of the provincial legislatures must have an opportunity to decide whether any part of the agreement is so thoroughly unacceptable that the whole must be rejected. If it seems undemocratic to present Parliament and the legislatures with a yes-or-no decision, one should remember that these are the first changes to the Canadian constitution, ever, where endorsement by all 11 legislatures has been required or sought. The process is far more rigorous than it has ever been before. Nor is it unusual or undemocratic that a legislature should be presented with a proposal on a take-it-or-leave-it basis. For example, the US Congress has voluntarily bound itself to accept or reject, without amendment, a bilateral trade agreement with Canada, if the President recommends it. That is the meaning of the so-called "fast track" procedure. Canada would not have entered into negotiations if the outcome were subject to re-negotiation on the floor of the Congress; and of course the restrictions that will apply to the Congress will apply also to Parliament. The radical nature of the decision, however, will not relieve either the Congress or Parliament of its responsibility to examine a draft agreement carefully and in detail. The same reasoning applies in the case of the Constitution Amendment, 1987.

The remainder of this submission assumes that the Meech Lake-Langevin accord is not amendable in substance. The 1987 Constitutional Accord almost certainly represents the only possible chance of securing agreement on a set of changes that are acceptable both to Quebec and to its Confederation partners, the other 10 governments. If, therefore, it is acknowledged that an agreement of some kind is urgent and important, there must be a strong presumption in favour of endorsing the First Ministers' handiwork.

IV Evaluating the Criticisms

Regardless of the desirability of reaching a new constitutional settlement, it is important to review the main arguments made against the Accord, asking oneself the following questions:

- Does the Accord establish an overall political imbalance that would have long-term negative consequences for Canada? Two such arguments have been advanced: that Quebec has been given more powers than the rest of the provinces, an inherently unstable situation; and that Canada, already dangerously

decentralized, has been set on a road to steadily increasing, debilitating, decentralization.

- Does the Accord diminish the rights of individuals and groups, weakening the guarantees established in the Canadian Charter of Rights and Freedoms? Arguments along these lines have been made in relation to official-language minorities and in relation to (in the words of s. 15 of the Charter) "those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."
- Will the Accord effectively block further progress, on a Canada-wide basis, in the field of social policy, as a result of limitations on the federal spending power?
- Will the modification of the amending formula block further desired constitutional change, for example as regards the status of the Yukon and Northwest Territories, and as regards the Senate of Canada?
- Does the Accord not create conditions for unending federal-provincial conflict, for example in its provisions for the appointment of Senators and Supreme Court judges?

I shall argue that the concerns implied by these questions, while understandable, are either unwarranted or have been blown out of reasonable proportion. Naturally I, like others, have reservations. The Accord is a compromise document. It is implausible that any of the First Ministers would, unconstrained by the political context, propose exactly the Langevin text. But no one has the luxury of asking, any more than the First Ministers had, "Can I imagine anything I would like better than this?" Each of us has to ask, instead, "Is the Accord, on balance, and given the situation inherited from the events of 1980-82, a positive achievement?" To make up one's mind on this, it is necessary to weigh the principal criticisms that have been made of it. In what follows, I do so under seven headings, reflecting the preceding set of questions.

Political Imbalance: Quebec and the Other Provinces. It has been vigorously argued in recent years that Quebecers must have the opportunity of participating in the national government of Canada equally with residents of other provinces. Former Prime Minister Trudeau committed much of his political career to working for this goal, and it led him to oppose giving the Quebec government wider powers or a larger policy role than the other provinces had. He reasoned that if this happened, some federal policies applying to most of Canada would not apply in Quebec, and it would be resented if Quebec MPs were constantly

voting on issues that did not and could not affect their province – in effect, imposing on the rest of the country a set of policies that would not apply to themselves. Thus Trudeau opposed “special status” for Quebec and, even more, denounced the theory that Canada consists of “two nations” which may be equated roughly with Quebec on the one hand and the remaining nine provinces on the other. The question now at issue is whether or not the 1987 Constitutional Accord has moved Canada towards a political structure based on the “two nations” theory. Arguments suggesting that it has done so are as follows:

- Article 1 of the Constitution Amendment, 1987 – which is part of the Accord – inserts into the Constitution Act, 1867 a provision recognizing that “Quebec constitutes within Canada a distinct society”; the clause also affirms that the legislature and Government of Quebec have a responsibility “to preserve and promote the distinct identity of Quebec.” Another part of the same clause reads: “... the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada.” Parliament and the provincial legislatures are enjoined to “preserve” – but they are not enjoined also to “promote” – this fundamental characteristic of the country. In this respect the two declarations are treated differently. However, the courts are instructed to interpret the Constitution of Canada in a manner consistent with both declarations.
- The accord promises that the Government of Canada will “as soon as possible” conclude an agreement with Quebec giving that province a degree of control over immigration that other provinces will, at least for a time, not exercise. The agreement will incorporate the principles of an administrative arrangement (“the Cullen-Couture agreement”) made with Quebec in 1977. It will have the force of law and, under Article 3 of the Constitution Amendment, 1987, will limit Parliament’s paramountcy in immigration matters, as established in s. 95 of the Constitution Act, 1867; furthermore, it will override in some respects Parliament’s exclusive jurisdiction over “Naturalization and Aliens,” as established by s. 91.25. It is provided that other provinces may negotiate agreements on immigration too, and thereby acquire similar powers; but of course they may choose not to do so.
- Article 7 of the Constitution Amendment, 1987 promises “reasonable compensation” to provinces not participating in future national shared-cost programmes (more details on this will be provided below). Were Quebec to avail itself of this opportunity while other provinces did not, it would acquire a larger

policy role, or certainly the appearance of a larger policy role, than the other provinces.

In my opinion it is indeed correct to say that the immigration and cost-sharing provisions of the 1987 Accord would permit Quebec to play a larger policy role than other provinces. In the case of immigration, it has done so for 10 years, under the terms of an agreement negotiated while Mr Trudeau was Prime Minister. In the case of shared-cost programmes, the principle of opting out was introduced in 1965, Quebec being the only province to avail itself of an offer made to all provinces under the Established Programs (Interim Arrangements) Act. I am not aware that this lack of symmetry, either as regards immigration or as regards the programmes covered by the opting-out scheme, has been damaging to Canada. It is certain that not many people know about it. The "distinct society" clause, by contrast, has drawn a lot of attention. As noted, it is a guide to the interpretation of the Canadian constitution. It does not replace or invalidate any other part of the constitution. However, certain legal arguments based on other clauses may be strengthened by the description of Quebec as a distinct society, and by the affirmation that the Quebec government and legislature have responsibility for preserving and promoting its distinct identity. It would thus be incorrect to regard the clause as purely symbolic and without practical effect; but the extent to which it may ultimately affect the course of judicial interpretation is unknown. This makes some people nervous - Quebec nationalists, because they fear it may turn out to be an empty gesture, and also those hostile to any and every manifestation of Quebec nationalism, because they fear it may successfully be invoked to claim for Quebec a set of powers that other provinces have neither the incentive nor the constitutional basis to exercise. In short, people have given diametrically opposed interpretations of the clause and its long-run significance.

A response has been to say, in effect, "Let's be quite clear what it means before we assent to it." Or in other words, "Let's rewrite it to eliminate all ambiguity." But to demand this is tantamount to declaring that the search for a constitutional accord should have been abandoned well before the meeting at Meech Lake. In May 1986 Mr Rémillard signalled that recognition of Quebec's character as a distinct society was an essential feature of a constitutional settlement. It must surely be clear to anyone who understands even a little about Quebec politics, that no Quebec government could defend the wording of a "distinct society" clause which was utterly without practical effect, and shown to be so. Those opponents of Quebec nationalism who insist that the "distinct society" clause be rid of all imprecision or ambiguity are demanding exactly that.

Understandably, the desire to eliminate or reduce ambiguities is strong.

However, ambiguity cannot be entirely avoided; nor is it desirable to try. Every constitution that lasts more than a brief span of years will eventually have meanings imputed to certain phrases that were not intended when they were drafted. If the drafters make the mistake of trying to cover every conceivable situation or problem they will inevitably fail. All they can reasonably hope to do is to formulate general principles which will later be applied to situations not imagined at an earlier time. In this sense, every constitution contains ambiguities; without them there would be no need for judicial interpretation. Moreover – and this is probably the more significant point – many of the ambiguities one sees in the 1987 Accord are evidently deliberate. They are there because the First Ministers had to find some form of words upon which they could all agree. At times they chose to be cryptic, relying upon future Supreme Courts to make their rulings in as fair a manner as they can, given the then-existing circumstances. Reliance upon decisional rules, frequently involving the exercise of broad judicial discretion, is an inevitable feature of constitution-making which it is not only futile to try to avoid, but a mistake to attempt.

While it is unreasonable to ask for one-hundred-per-cent precision, it is important to note that the “distinct society” clause does not give the Quebec legislature a free hand to do whatever it thinks necessary to “preserve and promote” the distinctive character of Quebec. The division of powers is unchanged; only in cases of uncertainty, usually arising out of logical tension between two or more clauses of the constitution, can the “distinct society” clause be invoked as an aid to interpretation. Moreover, the clause is complex, affirming not only that Quebec constitutes *within Canada* a distinct society, but that the presence of English-speaking Canadians within Quebec (as of French-speaking Canadians in other provinces) is a fundamental characteristic of Canada. This is a declaration to which the courts must give effect. Further, the clause is counterbalanced by explicit recognition in the preamble to the Constitution Amendment, 1987 of “the principle of the equality of all the provinces.”

These features of the Accord counterbalance the recognition of Quebec as “a distinct society within Canada.” It is unwarranted and alarmist to allege that these words may confer upon Quebec significant powers that are denied to other provinces. It is expected that there will be differences of role or of policy responsibilities, flowing from the facts that almost 90 per cent of Canadian francophones live in Quebec, and more than 80 per cent of Quebecers are francophone. The “distinct society” clause recognizes this, but the constitution as a whole provides that this role and these responsibilities be fulfilled within a constitutional status not greatly different from that of the other provinces. In short, the alleged political imbalance between Quebec and the other provinces is a bogey. Another form of political imbalance – the weakening of federal power

vis-à-vis the provinces as a group - is also a matter of concern to many critics. This topic needs attention. However, it will be easier to consider it after other issues have been addressed.

The Accord and the Charter: Linguistic and Ethnic Minorities. Another concern that has been expressed about the "distinct society" clause is that it may diminish the scope of individual rights under the Canadian Charter of Rights and Freedoms. Critics have focussed especially upon the situation of official-language minorities, and other linguistic, cultural or ethnic minorities. The most charitable interpretation one can place upon these criticisms is that they reflect a misunderstanding of the intent of part of the Meech Lake agreement, before its clarification in the Langevin text. The Meech Lake statement referred to "French-speaking Canada" and "English-speaking Canada" and their concentration, respectively, in Quebec and in the other provinces. The explicit recognition of the facts that French-speaking Canada was "centred in *but not limited to* Quebec," and that English-speaking Canada was "concentrated outside Quebec *but also present in Quebec*" suggests that this was, both in conception and in its probable effects, a clause to reaffirm the rights of official-language minorities. The clause was evidently included in order to prevent misinterpretation of the words recognizing "that Quebec constitutes within Canada a distinct society." By itself, the latter statement might have been taken to mean that Quebec was to be equated with francophone Canada, the rest of the country being anglophone: thus it might have been taken to imply a backward step in relation to the rights of both anglophone and francophone minorities. To avoid this possibility, the recognition of Quebec as a distinct society within Canada was counterbalanced by the parts of the clause referring to the linguistically mixed character of Canada as a whole, although the two official-language groups are unevenly distributed across the territory. But this clause was interpreted by some critics as an attack on, rather than a reaffirmation of, the rights of linguistic minorities.

This reading of the clause struck me as perverse at the time, as it imputed, unconvincingly, great significance to the words "English-speaking Canada" and "French-speaking Canada," as if both were monoliths, each with its unique territory. Be that as it may, the Langevin text, as distinct from the Meech Lake agreement, rules out such interpretations. First, it refers to "English-speaking *Canadians*" and "French-speaking *Canadians*," clearly indicating that the reference is to individual rights. Second, the Langevin text contains the double disclaimer, that the clause is not to affect parts of the Charter referring to the multicultural heritage of Canada, or to aboriginal peoples. Finally, the

Langevin text adds a non-derogation clause relating to legislative powers over language, both federally and at the provincial level.

These clarifications, together with the fact that the language clauses of the Charter are untouched in either version of the accord, dispense with allegations that it weakens existing constitutional protections of the rights of linguistic, cultural or ethnic minorities.

The Accord and the Charter: "section 15" Groups. After the Langevin meeting, new criticisms of the Accord were voiced. If the article referring to Quebec as a distinct society was to contain a non-derogation clause so no one can invoke it to weaken aboriginal rights or to override s. 27 of the Charter (which declares that the Charter "shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians"), why could the principle of non-derogation not be made to apply also to all other groups? For example, s. 15 of the Charter prohibits discrimination based on "race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability," and s. 28 states that "the rights and freedoms referred to in it are guaranteed equally to male and female persons." However, the distinct society clause (Langevin version) provides for non-derogation only in relation to sections of the Charter dealing with multicultural groups and aboriginal peoples. By implication, it has been claimed, others are not similarly protected. For this reason, the Langevin text has been said to put other groups at risk. By far the most strongly articulated and politically powerful objections along these lines have been those expressed by women's organizations.

What is needed here is a sense of proportion. It is hard to regard the risk as significant. The distinct society clause does not supplant any part of the Charter; as an interpretation clause, it can be called into play only when there is conflict between two or more other clauses in the constitution, for example between the non-discrimination rights in s. 15, and s. 1, which reads: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The distinct society clause may have the effect of broadening the application of s. 1; women's and other groups are worried that this may occur, and that it may work to their detriment. Should one respond to this concern by providing that the distinct society clause will in no way diminish the force of s. 28? No, for this, truly, would place the "s. 15 groups" (other than women) in jeopardy. Such an amendment to the distinct society clause would single out gender equality rights for special protection. It would be indefensible to stop there. Then how about exempting the whole of s. 15? That could impact upon s. 1 in unpredictable ways, upsetting

the carefully worked out balance between legislative powers and the powers of the courts in safeguarding individual rights, as achieved in 1981.

The underlying issue here poses the same questions of political philosophy as characterized many of the best contributions to the 1980-81 debate over the Charter itself. To what extent is it desirable to have judicial protection of individual rights? Conversely, to what extent ought political processes to regulate relations between the individual and the collectivity, and relations among social groups, for example as defined by categories referred to in s. 15? The debate over earlier drafts of the Charter resulted in amendments that strengthened and extended its basic principles. On the other hand s. 33, the *non obstante* or "notwithstanding" clause, conferred upon Parliament and the provincial legislatures additional powers to exempt laws and administrative measures from the purview of several key clauses, notably s. 15. The champions of individual rights, or rather of the judicial protection of individual rights, remained unreconciled to the powers vested in legislatures by s. 33.

Social Policy: The Spending Power. The issues remaining to be discussed have to do, in one way or another, with the federal government's capacity for leadership and policy control within the federation. On this topic, modifications to the spending power have been of prime concern to many critics. In Quebec, the main objection has been that the spending power has not only been constitutionally recognized for the first time, but dangerously strengthened. It has been asserted that the spending power clause narrows the provinces' role by explicitly acknowledging that Ottawa may impose upon them its own policy goals and budgetary priorities, while leaving to the provinces only a certain degree of administrative discretion at the level of implementation. Outside Quebec, critics have asserted that the conditions that Ottawa will retain authority to impose are so loose, or so easy for the provinces to circumvent, that there will be neither policy reasons nor political incentive to introduce any new social programmes. Both lines of attack strike me as somewhat off-target, though the Quebec ones get a lot closer to it.

The first point to notice is that the Accord touches only one aspect, though an important one, of the federal spending power. Broadly defined, the spending power is the capacity imputed to and frequently exercised by the federal government to spend in areas of exclusive provincial jurisdiction, thereby playing a policy role where it lacks regulatory authority. Payments may be made (i) to individuals, as in the area of family allowances, (ii) to organizations and institutions other than the provincial government, as in the case of research grants to universities, and (iii) to provincial governments. Typically, in the case of grants to provincial governments, the federal government pays a share of

the costs of programmes or projects. Some are *ad hoc* arrangements negotiated bilaterally with each province, as in the case of regional development grants; others are continuing arrangements for sharing the costs, on a formula basis, of programmes which it is desired to see established across the country: hospital insurance and medicare are the outstanding examples. *The 1987 Constitutional Accord affects only new national shared-cost programmes; it does not touch existing ones, nor does it touch bilaterally negotiated, project-related, cost-sharing arrangements, and nor has it relevance to payments to individuals or non-government organizations and institutions. The most recent case of a shared-cost programme of the type that might, in the future, be affected by the Accord is medicare, introduced over 20 years ago in 1966.*

The dimension of the federal spending power that the Accord will affect became the subject of litigation two years ago, as a result of a challenge to the Canada Health Act (1984). The Supreme Court may eventually rule that parts of this Act constitute an attempt to exercise regulatory authority in an area of exclusive provincial jurisdiction, and are therefore *ultra vires*. The Accord will not apply in this case, because both medicare and the Canada Health Act pre-date it; but we may find it easier to understand the significance of the spending power clause if we imagine litigation on the Canada Health Act arising in a "post-Meech" context, as if the Constitution Amendment, 1987 had been in force from (say) 1965. Under its terms, in a new s. 106A inserted into the Constitution Act, 1867:

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

Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces.

Under the terms of this article, the federal government would presumably have to satisfy the court, if the Canada Health Act were challenged under it, that the Act furthered a credibly "national" objective, such as making high-quality health care available to all Canadians – the principles of "comprehensiveness," "universality" and "accessibility" – and that the conditions it imposed (e.g., the ban on "extra billing") supported such objectives. Opponents would probably have difficulty arguing that the objective was not a national one, but they might have greater success in establishing that the ban on extra-billing was not closely enough related to the objective to warrant a financial penalty such as the

Canada Health Act authorizes the federal Minister of Health to impose on provinces that permit this practice. In other words, I think the new s. 106A, if it applied, might marginally assist opponents of the Canada Health Act.

There is no point trying to go further in guessing the outcome of litigation in hypothetical future cases, but the scenario I have sketched out may help us to imagine how the new s. 106A will work. First, Ottawa will have to be clear about the national objective or objectives it hopes to accomplish in introducing a new shared-cost programme, and it will have to be able to establish that any conditions imposed on transfers to provincial governments support the objective(s) in question. Second, if a province is to claim compensation for non-participation, it must have found its own way of meeting the objective(s) stated by Parliament. The obligations thus laid on (respectively) the federal and provincial governments will set up a bargaining dynamic in which, in future cases, Ottawa will be able to exercise leadership and policy initiative. But it will have an incentive to adapt any new programmes to the needs of individual provinces. The provinces, on the other hand, will have the latitude to find innovative solutions to problems that are felt across the country, or to devise new features of programme design that are more effective or efficient than Ottawa's. Further room for negotiation is provided by the fact that it may be unclear whether or not a programme is cost-shared (medicare and hospital insurance have not been cost-shared in the traditional sense since the introduction of Established Programs Financing, or EPF, in 1977). Another factor also giving both orders of government an incentive to bargain is that what constitutes "reasonable compensation" may be hard to establish when programme design varies considerably by province (as under the Canada Assistance Plan), when a formula results in widely varying shares of programme costs being met from the federal transfer (as in the early years of medicare), or a formula is not even based on programme costs (as, under EPF, it is not).

Will the federal government retain the incentive to launch new programmes when its control over programme design is less than absolute? Yes, I believe so, if the initiatives in question are supported by public opinion, as medicare was in 1966. If public opinion pressures Ottawa to "do something," it will also pressure the provinces to respond to the federal initiative. They may do so in different ways. However, if diversity dismays those critics of the accord who are repelled by the thought of a patchwork of provincial programmes with differing standards, a useful corrective would be to examine the differences that now obtain among the provinces in the design of individual programmes that are cost-shared. The programmes in question are *provincial programmes, in areas of exclusive provincial jurisdiction*; cost-sharing is a device to ensure that they have certain features in common, making them also, in a sense, national ones. I can-

not see this dual character of the programmes in question being disturbed by the spending power clause in the Constitution Amendment, 1987, even if not all provinces participate in a given new programme. Some, conceivably all, may choose not to do so – but if they are to qualify for the federal fiscal transfer, they must design programmes of their own that are compatible with objectives written into federal law. To demand uniformity is to opt, not for federalism, but for a unitary state.

Amending Formula. In large measure, Quebec has been impelled to seek a constitutional settlement with its Confederation partners because of unfavourable demographic trends, the result of which is to diminish over time its political weight within the federation. It has sought constitutional protection against deterioration in its capacity to withstand encroachments on its powers, especially because other provinces, which do not have to defend a linguistic and cultural minority against assimilation, may not have the same determination to preserve certain of *their* powers. This explains the importance to Quebec not only of the “distinct society” clause, but of obtaining changes to the 1982 constitutional amending formula.

The amending formula in the Constitution Act, 1982 establishes a unanimity rule (favourable resolutions in Parliament and the provincial legislatures) for a narrowly defined class of amendments; otherwise, the approval of Parliament and two-thirds of the provincial legislatures is required, provided those provinces contain at least 50 per cent of the population of all provinces. It is also provided that where the general rule applies, a province may exempt itself from the effect of an amendment derogating from its legislative powers or proprietary rights (e.g., in natural resources), by resolution of the legislature. In the case of amendments transferring powers over education or cultural matters to the federal government, an opting-out province is entitled to “reasonable compensation.” The intended effect of these provisions was apparently to place all provinces in a formally equal position, without requiring unanimity for everything and without setting up a situation where, at least in education or cultural matters, a province could be levered through financial inducements into giving up legislative powers.

The shortcomings of this amending formula for Quebec are two-fold. First, the structure of certain central political institutions, such as the House of Commons, may be altered in ways that reduce Quebecers’ influence within them, and Quebec may be powerless to stop such changes. The right of withdrawal may be effective in the case of legislative powers, but as Mr Rémillard stated in May 1986, “One cannot withdraw from an institution.” Second, withdrawal may be costly, except in the case of education or cultural matters, where the

federal government is required to offer "reasonable compensation."

There were essentially three ways of accommodating the concerns expressed by Quebec.

- One, a non-starter, would be to give Quebec a veto where other provinces had none. This would have violated the principle of equality of status among the provinces, a key feature of the current amending formula.
- A second option would have been to tighten up the general amending formula, requiring the assent of two-thirds of the provinces containing 75, 80, or even 85 per cent of the population. This would give Quebec an indirect veto, though if the required figure were 75 per cent its veto power would disappear if the clause were not "grandfathered." Grandfathering would also have violated the equal-status principle, and would probably have been unacceptable to some or all of the other provinces. Thus the formula would have had to stipulate 80 or 85 per cent.
- The third possible choice was the one preferred by the First Ministers: (i) to extend provinces' right to "reasonable compensation" in the case of subjects other than education and cultural matters, and (ii) to give all provinces a veto over major changes in the structure of the House of Commons, Senate and Supreme Court, and over the extension of existing provinces into the territories as well as the establishment of new provinces.

The criticism of the tightened-up formula is that it is too rigid. It has been said that the new formula will prevent further reforms in the structure or role of the Senate, and rule out the Yukon and the Northwest Territories ever acquiring provincial status. These criticisms, though perhaps over-categorical, are well taken, and I share them. But they are not the whole story. To round out the picture, one should acknowledge two facts. First, of the three options for a new amending formula, the one chosen is the least rigid. One could not have reached a settlement without responding to Quebec's deep and justifiable dissatisfaction with the existing formula. Second, specifically on the Senate and the status of the territories, the underlying issue is the relative political weight of the various provinces and regions. Reforms, especially as may relate to provincial representation in the Senate, are desired in some parts of the country because it is hoped they will reduce the political weight of central Canada, the provinces of Ontario and Quebec. These two provinces together can, under the present (1982) or any practically conceivable formula, stop any constitutional amendment. Thus it may be doubted that raising from seven to 10 the number of provinces whose endorsement is required for any amendment is a significant change, particularly when the smaller provinces are likely to en-

dorse changes that will favour, precisely, small provinces. The matter is obvious in the case of Senate reform. However, it applies also to the creation of new provinces, because a change in the territories' status, involving the addition of two or three provinces to the existing 10, would strengthen any "small provinces' coalition."

I make no prediction about the likelihood of further Senate reform, or about the creation of new provinces, under the amending formula contained in the 1987 accord. Obviously changes in these areas will be made marginally more difficult to accomplish than they are now. However, I would add, as a general observation, that one might envision such changes only as parts of a new "package deal." I do not know what would have to be included in the package to ensure its acceptance, but the contents might well be about the same under the proposed 1987 formula as under the 1982 one.

Appointments to Senate and Supreme Court. The federal government now appoints Senators and also Justices of the Supreme Court. The 1987 Constitutional Accord will alter this practice by binding the federal government to make such appointments only from lists submitted by the provincial governments; but the Accord provides also that the persons named must be "acceptable to the Queen's Privy Council for Canada." There is no provision for a deadlock-breaking mechanism in cases of disagreement. These provisions establish a mutual veto for both categories of appointment, but some critics have alleged that in practice the provinces will gain full control. They believe, in other words, that Ottawa has simply handed over the power of appointment to the provinces. In support of this interpretation it has been said that provinces will be able to go on indefinitely making nominations but that the federal government will not be able, for fear of appearing unreasonable, indefinitely to go on rejecting them: the provinces can simply wear Ottawa down, because the initiative rests exclusively with them.

This prognostication neglects some relevant considerations. It is necessary to recognize that a constitution establishes certain parts of the machinery of government, which, over time, are complemented by the creation of additional institutions and a set of practices or conventions that make the formally established parts of the machinery workable. Political parties and the principles of cabinet government are examples. In the case of appointments to the Supreme Court and the Senate it is conceivable that machinery will be devised to regularize the process (for example, consultative committees to screen potential nominees to the Supreme Court), and it is quite predictable that practices will arise that acquire the force of convention. For example, it has been suggested that when a Senate vacancy is to be filled, provinces submit a "list" of only one - that person having been elected in a form of primary election. In

this case the federal government would find it impossible to reject the sole provincial "nominee" as unsuitable; but nor would the appointment have fallen to the provincial government. If such a convention became established, Canada would have acquired a Senate that was both elected and effective, though obviously not composed of an equal number of Senators from each province.

While one cannot safely predict what new machinery and processes may surround and envelop the appointments section of the 1987 accord, more limited observations are possible. The federal government, faced with an unacceptable slate of provincial nominees to fill a Senate vacancy, could simply leave the position open. A standoff could be prolonged almost indefinitely. In filling vacancies in the Supreme Court, except in the case of the three justices from Quebec, the federal government can choose from among nominees put forward by two or more provinces. Provincial governments would have a strong incentive to nominate outstanding candidates.

The situation relating to Quebec nominees would be different, because here the federal government has not the latitude of accepting nominees from other provinces. Nonetheless, delay is an option if the Quebec nominee or nominees is (are) unacceptable. Should the provincial government start to play games with the nomination, "inadvertent" leaks could reveal this; and conversely, if Ottawa were being unreasonable, the same tactic could be employed on the provincial side. None of this I consider likely, and certainly not desirable; but it is necessary to imagine such scenarios in order to realize that both sides, under the provisions of the 1987 Accord, retain considerable bargaining power. The result is likely to be an informal process of negotiation, or a formal process of consultation involving third parties, such that appointments are truly *jointly made*. I believe both orders of government will have every incentive to act reasonably and responsibly in the appointments process. The Canadian public, particularly in the case of appointments to the Supreme Court, would not put up with anything else.

To those who say the absence of a deadlock-breaking mechanism sets up an unworkable situation, or a situation having the potential for endless and unresolvable conflict, I would point to the structure of government in the United States. In that country the "checks and balances" written into the constitution provide for multiple veto-points, but business does get conducted; the machinery is made to work, because the consequences of its not working would be intolerable. The mutual veto set up by the Constitution Amendment, 1987, as regards appointments to the Supreme Court and the Senate, can certainly be made to work, preserving a real voice for both the federal and the provincial governments. Finally, and this is the most important point, a mutual-veto procedure will result in high quality appointments, increasing the legitimacy of both institutions.

Political Imbalance: Excessive Decentralization. Where one line of criticism of the 1987 Constitutional Accord alleges that special powers have been given to Quebec, and deplores this, another line of criticism has been that, to satisfy the other provinces, everything Quebec wanted was given to all. The result has been, according to this second group of critics, the further decentralization of an already dangerously decentralized federation. This complaint is, to a large degree, a compendium of others that have already been discussed; they relate to immigration policy, the Charter of Rights and Freedoms, social policy and the spending power, the formula for new constitutional amendments, and the appointment process for Senators and for judges of the Supreme Court. I have argued that concerns raised under these heads are exaggerated, and in some cases without foundation.

Also mentioned as a change contributing to a dangerous - and debilitating - degree of decentralization, are the provisions for annual First Ministers' meetings on the constitution as well as on the economy. Annual constitutional meetings are not, in my opinion, necessary: as much as possible, a constitution should be left alone. But I do not see that the mere fact of holding them will erode federal power. A federal government that is uninterested in protecting its jurisdiction will give parts of it away, or let policy control slip unobtrusively (if possible) into provincial hands; a stronger or more determined federal government will see that these things do not happen. Whether or not there are annual meetings on the constitution is irrelevant. What is vitally relevant, however, is the range of bargaining powers that the federal government retains, and whether these have been reduced by the 1987 accord. On this subject, I think the pro-centralist critics have been shallow in their analysis.

The essence of the Meech Lake agreement is that almost all its clauses will intensify the processes of intergovernmental negotiation, mostly on a bilateral basis. This has been illustrated in my earlier comments, particularly those on the spending power and the appointment process (Senate and Supreme Court). In these sections I have argued that the federal government retains a great deal of leverage, though rather less capacity for unilateral action. Whether, as a result of future negotiations, power shifts to the provinces or to Ottawa will be determined by public opinion, by economic, fiscal, and social factors shaping the public agenda, and by the personalities and capacities of political leaders at both the federal and provincial levels. Decentralization is possible, but so is a reaffirmation of central power.

The most likely way that a centralizing trend may be brought on is by developments in the economic sphere, occurring to a large extent outside of Canada. I think some of the critics of the 1987 Accord have considered that economic factors will require a strengthening of central power, but that the Ac-

cord will lessen Ottawa's capacity to meet external economic challenges. *However, I can see nothing in the Accord that would have this effect.* None of its provisions touches federal powers over the economy. Perhaps the pro-centralist critics think the new rules affecting the spending power might do so, but most of the relevant initiatives would be, not "national shared-cost programmes," but bilaterally negotiated ones. The latter are not within the purview of the spending power clause. The only sort of national shared-cost programme I can think of as being relevant – and this is a real possibility – would be one for training technologically competent manpower, to facilitate the growth or implantation of "innovation-reliant" industries. My earlier analysis of the spending power provisions in the Accord suggests that such an initiative would be entirely feasible. Here, as in other respects, outcomes will be determined not by the institutions or rules put in place by the Accord, but by a whole complex of attitudinal, economic, and social factors.

v The Future of Federal-Provincial Relations

The 1987 Constitutional Accord hardly touches the federal division of powers, but it will profoundly affect the manner in which they are exercised. It will alter the dynamic of federal-provincial relations, creating a modified framework for federal-provincial interaction in policy formation. It will be an enormous achievement if such processes of interaction can be made less acrimonious, more productive. Intergovernmental co-operation will become all the more important if the external economic environment continues to deteriorate, and/or if budget deficits impose ever-tighter constraints on social policy. In the 1987 Constitutional Accord the First Ministers have taken a significant step toward improving the climate of federal-provincial relations. The spending power clause, in particular, provides a glimpse of how a better-mannered relationship may be brought about. There, the federal government retains significant policy initiative, but shows itself ready to relax unnecessary, unproductive, conflict-generating controls over policy design. In other areas – key appointments, First Ministers' conferences – a framework for co-operation has been established. In one area, immigration, a new division of policy responsibilities within a scarcely-modified division of powers (the field has been a concurrent one since 1867) is foreshadowed, conceivably establishing a model for agreements in other areas, such as communications. In all these ways, the Accord encourages transition to a new era for federal-provincial relations, in which the poisonous atmosphere of past battles can dissipate. Governments and the public have become accustomed to viewing the operation of the federal system as a continuing contest, a rivalry in which one order of government loses

whatever the other gains. The idea that there can be mutual gain has too often been overpowered by the participants' combative instincts.

The Accord cannot guarantee an end to such habits of mind, but it does establish a framework within which new, more co-operative habits can take hold. The hope that they will do so may prove too fond: in that case there remain plenty of opportunities for hard bargaining both by Ottawa and by the provincial governments. However, if "the spirit of Meech Lake" can be kept alive, more joint action to respond to domestic aspirations and foreign challenges may be forthcoming. The Accord will prove, in these circumstances, a facilitating instrument. That, as well as the desire to settle unfinished business from 1980-82, is a powerful reason to endorse the Accord.

*Submission to the Special Joint Committee
of the Senate and the House of Commons
on the 1987 Constitutional Accord*

JOHN D. WHYTE

The Constitutional Accord, 1987, has been represented simply as the product of a process designed to end Quebec's exclusion from the constitutional reform process. One witness to the Special Joint Committee has portrayed it as an extraordinary process that rounds out the reform that 10 governments acceded to in November, 1981. These characterizations of the present Accord serve to diminish the scope of constitutional reform that is actually being effected and to present criticism of the Accord as indifference to the question of the legitimacy in Quebec of our constitutional order.

It is true that it was the Government of Quebec's initiative that commenced the round of talks leading to Meech Lake and that it is Quebec's agenda that is reflected in the various parts of the Accord. However, the results of this process are not merely modest and insignificant changes to our constitutional order. If the Accord's extensive and far-reaching changes are wrong for Canada we do not owe it to Quebec to accept it. The isolation of a province from the processes of statecraft has weakened, and will weaken, Canada. But the restoration of that province to the status of full participant is not in itself justification for fundamental changes that will alter Canada for the worse and will erode Canada's presence as a nation. The sentiment that allows reconciliation with Quebec to blind us to the faults of Meech Lake is like the sentiment uttered by one of the First Ministers that he would not have agreed to the 1981 Accord without Quebec's agreement to it. These views reflect the politics of the nursery; they reflect a political ethic that cannot face that the interests of some will necessarily be damaged when action is taken on behalf of a whole community.

The Constitutional Accord 1987 changes the terms of our national structure in the following ways:

- 1) It conduces towards one of the two language policies that historically have competed for domination in Canada since confederation. I am not suggesting that such fundamental conflict must never be resolved, or that the resolution found in the current accord is necessarily unacceptable, but only that the 1987 Accord represents a decisive movement in respect of this basic social and political conflict.

- 2) It alters the terms of fiscal transfers between levels in a federal state.
- 3) It amends the rules for constitutional amendment.
- 4) It effects a major change in the appointment process for two highly significant central institutions – the upper house of the legislative branch and the nation's Supreme Court. In addition, it causes a significant alteration in the political dynamic that has traditionally shaped the relationship between the elected House of Commons and the appointed Senate.
- 5) It changes constitutionalism and the constitutional process from being an extraordinary form of political competition in Canada (which it has been for much of the nation's life) and makes them commonplace political processes; perennial constitutional discussion is entrenched and attempted constitutional reform will become the dominant genre by which we seek political accommodation.

My interest, at the outset, is not to demonstrate the lack of prudence in these reforms but only the momentousness of what is being done. The process that has been followed involved only two lengthy days of discussion among First Ministers. (One of those days was without the ongoing aid of either the opinions of political advisors or legal and policy analysis.) The result of that process is now going through the process of formal adoption under political terms that are designed to preclude any retreat from mistakes or any refinements. Canada is being altered in, at least, five significant ways. It makes no sense if the exercise of Parliamentary responsibility over such significant constitutional change becomes absolutely governed by the twin constraints of not altering the terms of a *deal* and not offending the people and government of Quebec. This constitutional change is serious *for Canada*; it is a serious exercise in re-fashioning the fundamental legal order; it is a moment of high Canadian statecraft. It would be mistaken to suppress these features in the present process through focussing on the fact that a *pact* has been made between First Ministers.

The second preliminary comment is to raise the question of the importance of national will. It is, of course, not self-evident that the political unit that most deserves self-determination, autonomy and sovereign authority is the nation state. In some matters, perhaps, Canada should be subject to the authority of other nations or groups of nations. In some matters ultimate self-determination should be enjoyed by persons, or families or provinces. Both the Charter of Rights and the federalism principle recognize the rightness of the autonomy of smaller sub-state units. There is no abstractly correct arrangement of political authority.

Having said that, it is, however, true that a nation needs to have the capacity of self-definition. There is need for a residual capacity to re-form and re-arrange ourselves as a nation. Control over those processes in a nation needs to belong to the nation. Those powers do not belong to the political entity of a nation – they do not belong to Canada – when they cannot be exercised except by the consent of others whether it be some other dominating nation or the concurrence of every member of society or every political unit of the nation. This is a complex idea: if a country's political voice and its political freedom are defined for it by outsiders or by its component parts it does not enjoy sovereignty; it is, in short, not a nation. To put it another way, a nation that is in thrall to each and every one of its parts, be it its individual people or its political entities, is not sovereign. It can only reflect a sovereignty that is held elsewhere.

In this concern for the preservation of the capacity to express our will as a nation, I am not claiming that it is only the central order of government – only the Parliament of Canada – that can speak for Canada. I am not saying that the provincial role in the processes of constitutional reform are of secondary importance or of minor legitimacy. A federal state can only re-define itself when both orders of government speak because it is only when both orders speak that the people are fully represented. As Professor Bryan Schwartz has observed, Parliament represents only the section 91 side of Canada and the provinces only the section 92 side. It does not follow from this, however, that the provincial side must give its consent unanimously. The normal democratic idea of majoritarianism is that political units define future actions and, so, in the expression of national will, both sides of the population need to be represented and a majority of the people need to support each side. Because we are also a federal state the consent of the provincial side requires the added condition that the majority of the people represent at least a majority of the provinces. (In 1982, the actual rule we adopted in Part v of the Constitution Act is that consent from the provincial side is to be indicated by a majority of the people in two-thirds of the provinces.)

National self-determination is neither the aggregate of personal self-determination nor the aggregate of provincial self-determination. It is the expression of the unique political unit called Canada.

The critical framework advanced here is not relevant only to changes to the amending formula. Concern with the appropriate conditions for the expression of our national will relates also to those changes which seem to place each and every province at the centre of those matters which, through our older constitution, we have identified as instruments of national expression. These are the central institutions of Parliament and the Supreme Court and the spending power under s.91(1A) of the Constitution Act, 1867.

The summary criticism of the 1987 Constitutional Accord is that, notwithstanding its symbolic restoration of Quebec to Canadian constitutionalism, it places Canada under disability as a nation; it restricts the ways that the nation, both through its central instruments and through its constitutional processes, can develop.

The above represents a serious charge against the 1987 Constitutional Accord. Since it is a charge that would lead to the undermining of the national reconciliation with Quebec that took place in June of this year it requires substantiation. Mere fears that the new constitutional arrangement will create a political dynamic that is different, and might even be difficult, are not reason enough to destroy the act of integration that has taken place. Those who continue to oppose the 1987 Accord after it has been accepted and approved by Quebec must realize that they argue not simply against the adoption of certain terms for reconciliation, they argue to undo the historical *act* of reconciliation and that is a course with clear harmful, long-term consequences for Canada. Therefore, the deficiencies of the Accord must be serious and they must be likely.

Yet, how can we know the consequences for the Canadian polity of putting in place what is proposed in this Accord? The Accord clearly alters fundamental structures and fundamental rules but how political actors will behave in response to these changes is only a matter of speculation. Clearly the concerns expressed in this submission about the consequences for Canada do not reflect the sanguine view of political developments that some have taken before the Committee. Some would describe the consequences of the Accord that I describe as falling within what the Queen's brief (the 13 August 1987 Brief signed by eight Queen's University professors and four others) has described as "unrealistic 'worst case' scenarios."

However, this debate over which prediction of the future is most likely to be fulfilled is exactly the right enquiry for the task of constitutional adoption. The constitutional text is being rewritten. The fundamental rules for the exercise of public government are being changed. Those who assume political responsibilities and exercise political authority will be empowered and constrained in new ways. The current process is not merely symbolic or rhetorical. Its result, the new Constitution, is designed to shape political conduct and it will. We can only know whether what is proposed is wise and will lead to beneficial changes through attempting to predict what will in fact be the changes that are produced. The Queen's Brief says, "Important constitutional changes always involve uncertainties and risks." However, it would be wrong to abdicate from

serious scrutiny of the likely political effects of the proposed textual reform simply because we cannot know, for certain, the consequences. Constitution-makers, like legislators, attempt to shape the future. They do this by predicting the effect of the choices they make and they cannot absolve themselves of their responsibility not to do harm by simply uttering that changes always involve risk. Nor can they avoid this responsibility by pointing to the undoubted virtue that lies behind the original decision to act.

What follows is what I consider to be a responsible description of the effects of the proposed constitutional changes.

1 Language Policy and the New Interpretation Section

Countries, like Canada, with more than one major language group face a choice in designing how those languages are to be reflected in the political organization of the nation. All languages but one can be suppressed. Alternatively, dominant languages can be assigned on a geo-political basis so that some portions of the country will, at least at an official level, use one language while other sections will use others. A third solution is to promote bilingualism or multilingualism throughout the nation. From time to time certain provinces have adopted the first strategy. Canada has not. Nor has it, at the constitutional level, chosen between the second and third strategies. However, the development of a bilingualist sensibility during the last quarter century has been a reflection of the third strategy, although it has not been constitutionalized. The question is whether the proposed s. 2(1) of the Constitution Act, 1867, adopts the strategy of creating unilingual language enclaves and rejects the idea of promoting national bilingualism. In my view, it appears to.

By subsection (4) of the proposed interpretative section the impression is given that, as a matter of judicial interpretation, s. 2(1) will not cause changes in the powers enjoyed by Parliament and the provinces. Even if this proved to be true, the section gives clear political direction to, and grants political legitimacy to, unilingualist language policies. What it labels as a fundamental characteristic of Canada is the existence of French-speaking Canadians and English-speaking Canadians. Furthermore, it labels as a fundamental characteristic of Canada that these groups of Canadians are located in specific geographic areas. The section creates a connection between distinct language populations and the place of those populations. This is not a value-free sociological observation. While what is described in s.2(1) may be accurate, the description is imprinted with a clear legal direction that powers are to be in-

terpreted in the manner which reflects that fact. Social observation acquires normative force in this section and politicians are required to respect that normative condition. So are judges.

It is sometimes observed that an interpretation clause creates no real change in the constitutional arrangement. This is wrong. The requirement that the Constitution of Canada be interpreted in a manner consistent with the described social condition places a high level of duty on interpreters to resolve ambiguities in a way which reflects the social reality which is normativized by the section. Since there are virtually no terms in the sections of the Constitution allocating powers to the federal and provincial levels, or in the Charter of Rights, that are not ambiguous the scope of application for this direction is wide. In this connection it might be remembered that the normative force of the Canadian Bill of Rights was conferred by language which, in essence, is no stronger than the direction found in s. 2(1) of the Constitutional Accord. Section 2 of the Canadian Bill of Rights states that the laws of Canada are to be "construed and applied" so as not to abridge the terms of the Bill of Rights.

The terms of subsection (4) which seem designed to blunt the impact of the otherwise powerfully expressed interpretative section, would if read literally, make s. 2 a largely futile exercise. The interpretative strategy in dealing with subsection (4) is likely to be to let it prevent significant transfers of power, but, at the same time, let s. 2(1) shape, to a limited degree, the meaning given to all constitutional terms which impact on language policies. For example, s. 23(3) of the Charter of Rights states that minority language education shall be provided where the number of persons enjoying the right to minority language education warrants the provision of that education. The new s. 2 could well be used as an interpretative aid in coming to an understanding of the numbers of persons required to warrant minority language education. If my assumption that s. 2(1) expresses a preference for language duality based on geographic regions is correct, the "numbers warrant" test will be more stringently applied against interests of French and English minorities.

The force of the interpretative provision is compounded by the language of subsections (2) and (3) of s. 2. Those subsections mandate Parliament and the legislatures to preserve the characteristics which are described in subsection 1. If the Constitution requires governments and legislatures to preserve the social fact of the connection between language groups and the geographic space that they occupy there could be seen to be placed on those bodies a duty to oppose bilingualism, or at least a requirement not to promote it.

Lest it be thought innocuous to identify certain social facts and require that the constitutional powers be interpreted in light of them and to make legislatures and Parliament obliged to preserve those facts, it might be worth

considering whether we would find it acceptable for the Constitution to state at the outset that its terms are to be construed in a manner consistent with the fact that Canada's dominant racial group is Caucasian. (I need not even mention our reaction to the idea of a constitutional obligation on legislatures to promote that reality.) I'm not suggesting that the racist overtones of the hypothetical provision that I have described is equatable in every way with the linguistic provisions that are actually proposed; a provision relating to racial phenomena in Canadian society is more egregious than one relating to linguistic phenomena. The example does, however, illustrate that the proposed s.2(1) is not just innocuous description but has significant normative force. The normative force that it has, although not "ugly," does conduce to linguistic separateness. In my view, it would have been better had we left out of the Accord this normativization of our linguistic makeup.

There is reason to be less hostile to the clause recognizing Quebec's society as distinctive because of that province's dominant francophonism. While such a clause must be discomfoting to those who benefit from official bilingualism in Quebec, it is certainly conceivable that francophonism in North America requires that the Quebec government enjoy a special capacity to promote the French language.

There seem to me to be two possible long-term consequences to the enactment of s.2 of the Constitution Act, 1867. The first is that, regardless of legal determinations, politicians will read the section as legitimating unilingualist political drives. If that happens, and if the course of bilingualism in Canada is checked with the aid of this section, this political ethic will sooner or later reflect itself also in national politics. The case for official bilingualism in Canada cannot, I believe, be sustained entirely on the basis of Quebec's interests. When francophonism outside of Quebec is no longer a cause which attracts political support, then even official national bilingualism will come under attack. The second consequence is that if the long-term effect of the section is to legitimate the slowing down or suspension of bilingual education and if Canada remains officially bilingual we will produce a nation of citizens who are not qualified to govern at a national level. One of the social costs of an enclave-based language policy is that it is the elites who will realize that power at the national level accrues to those few people who can communicate to the whole nation. The rest of the population will become disintitiled to govern. In other words, the strong bilingualist policy of recent decades has, as its overriding political virtue, not just that it produces a hospitable national environment for francophonism, but that it is democratic. One of the potential consequences of the 1867 Constitutional Accord is the diminution of democracy in Canada.

These observations of long-term consequences might well fall within the

category of "unrealistic 'worst-case' scenarios." However, my understanding of constitutional language, and the force that interpretative provisions such as those found in s.2(1) can have on the meaning ascribed to other terms in the constitutional text, leads me to be concerned that these consequences are not unrealistic.

II Alterations to the Federal Spending Power

The most significant question with respect to the proposed s.106A of the Constitution Act, 1867 is whether it will cause the frustration of a legitimate federal role in social regulation. My conclusion is that it is possible to see political actors exercising their rights under s.106A in ways which effectively bring an end to certain structures for federal spending. However, the risks to the development of new national social policies may be one of those tolerable costs, in light of the larger agenda of constitutional reconciliation.

The federal spending power has been used over the last quarter century for a number of purposes. It has been the instrument for extending social programmes (often developed first within provinces) to all of Canada and it has been used to promote economic development and to blunt the processes of economic adjustment. Both of these sets of objectives are vital elements of a national policy. Our social and economic concerns must at some root level be expressed at a national level. In fact, federal competence over basic levels of social and economic existence is, to my mind, guaranteed by the peace order and good government clause of s.91 of the Constitution Act, 1867. Traditionally, federal initiatives in the areas of social and economic policies have been checked by the operation of the federal principle which requires that the general federal powers of peace order and good government, taxation and spending should not be exercised in a manner which defeats or destroys the provincial role. The question is whether this minimum federal role in guaranteeing certain social and economic conditions has been significantly undermined. In other words, has the capacity to meet the basic substantive purposes that lie behind our existence as a nation been damaged?

In some ways federal power over these concerns through the use of spending power has been significantly enhanced by s.106A. The section seems to remove ambiguity about both the presence of a spending power and its scope. It has replaced conceptual limits on the spending powers with a mechanistic limit and when that limit does not apply, federal power is less likely to be checked than it would have been before the new section. On the other hand, the check created by s.106A, when it applies, is considerable. By my reading of the section, the conditions placed on provincial claims for compensation are minimal.

The provinces are to be compensated for either "programs or initiatives." Since the word "initiatives" must denote some manner of public regulation other than programmes, it would seem to encompass regulatory instruments such as taxation or subsidies and other devices that trigger the desired conduct by the private sector. Furthermore, the requirement that the programme or initiative be "compatible" could not, in the context of the sentence in which "compatible" appears, be stringently construed. Finally, the "objectives" that the provincial programme or initiative must match are not likely to be understood so as to let the federal level impose conditions or standards of the sort that heretofore have been imposed. (Although the word "objective" carries no clear meaning on its face, when compared with the language used in the immigration provisions of the Constitution Accord 1867, it appears that "objectives" will necessarily be read to include only very general goals.)

The real reason why the provision may not hamper federal spending is not because the conditions for receiving compensation are rigorous but because the provision seemingly relates to such a narrow category of federal spending. The federal government could be able to achieve most of its purposes through expenditures which do not fall within the category of "a national shared-cost program" and could, therefore, be able to avoid the need to offer compensation. Unfortunately, there are two factors which make this conclusion too sanguine. First, the sense that we have of the concept "shared-cost program" derives from the usage of that word by government, and by writers on political economy, over the past two or three decades. There is no assurance that the rather narrow meaning given to that phrase through this usage will persist throughout decades of constitutional interpretation. If the phrase were to be given its meaning in ordinary language it could include all federal expenditures directed towards purposes for which there is also a provincial contribution of some sort. The categories of federal programmes which triggered the right of provinces to compensation would be considerably broader.

The second cause for concern is uncertainty about the effect of uncertainty. The federal government in initiating a shared-cost programme will, under the massively indeterminate language of s.106A, have no real way of predicting either the extent to which they will be obliged to make transfers to provinces without political credit or political accountability or the extent to which their conception of appropriate social regulation will be put in place. In fact, what they can be sure of is that there will be a high incentive for provinces not to engage in shared-cost programmes but to take compensation. The federal government will not be able to assess (at least, until after years of jurisprudence has been developed) the extent to which they will be able to avoid their obligation to compensate. Further, (although this might be an alarmist assumption)

it is certainly plausible that for at least some provinces a political ethic will develop which will require those provinces not to collaborate with federal programmes but to run independent programmes with federal funding. In other words, even if, in terms of the social objectives being sought by the shared-cost programme, it was sensible to expect there to be federal/provincial collaboration there will develop a second order political value in favour of provinces using every opportunity for the realization of provincial autonomy.

These are speculations and the possibilities identified do not make s.106A a grave mistake. On the other hand, it would be a grave mistake to proceed on the belief that s.106A is bound to set the stage for creative and constructive federal/provincial diplomacy.

III Changing the Rules for Constitutional Amendment

The proposed s.40 of the Constitution Act, 1982 provides for reasonable compensation to be paid to any province that opts out of a constitutional amendment that derogates from the powers of a province. This is a significant amendment to the ordinary amending formula found in Part v of the Constitution Act, 1982. It creates an incentive for opting out of constitutional amendments of such strength that it is unrealistic to assume that it will not be difficult for some provinces, if not most, to adopt the opt-out route. This will, of course, be especially true for those provinces in which there develops a political imperative for pursuing strategies which underscore provincial autonomy. As described above, even if a proposed amendment is one for which there is general approval, some provincial governments will be under pressure to achieve those purposes through provincial programmes funded by the federal level. I do not consider it alarmist to posit the possibility of the strength of the political value that will attach to choices which underscore independence, separateness and provide for a constitutional guarantee, without possibility of federal revocation, of transfer payments to the province. I think that we should see this as a very attractive political option that will not be resisted.

The consequence of this is that the federal level will choose not to pursue those constitutional amendments which lead to an irrevocable commitment to underwrite the costs of separate regulatory regimes. In short I see the effect of the proposed s.40 of the Constitution Act, 1982 to be the creation of a real bar to constitutional amendments of the sort that derogate from provincial legislative powers.

This, of course may not be a tragic matter. However, under my earlier described conception of the need of a nation to have the capacity to define for itself basic arrangements that will meet new realities, it seems to me to be un-

wise to structure into the constitutional amendment formulae features which create either a bar, or, at least, a strong impediment, to some classes of reformation.

The other elements of the provisions relating to the amendment of the amending formulae is the movement of matters that require the approval of two-thirds of the provinces with 50 per cent of the population to the list of matters that require the consent of the federal level and all of the provinces. Quite simply there are matters within this list which should not be made unavailable to constitutional reform except on the condition that all provinces agree, in particular, on the matter of reform of the Senate. As it will stand, provinces will have the power to control appointments to the Senate and for some provinces this will represent a significant power in the shaping of Senate membership. I believe it is unrealistic to expect reform of the Senate that would reduce that provincial power even though there may be compelling reasons to have the Senate serve some function other than the representation of provincial interests in federal matters. Even if amendment of the Senate were left in the present s.42 the new provincial power with regard to the Senate would create a strong bar to reform. The new requirement of unanimity serves virtually to guarantee that reform based on a significantly different conception of the Senate is impossible. Reverting to the theme of the need to preserve the capacity to express national will, it is important to regard structuring of central institutions as one of the main ways of expressing that will - of redefining the country. It would seem to be an imprudent step in Canadian statecraft to foreclose that area of national expression - to place power over the reform of central institutions in thrall to the consent of each and every one of the provinces within Confederation.

iv Changes to the Appointment Process of the Senate and the Supreme Court of Canada

Whether these amendments effectively transfer the power to appoint Senators and judges of the Supreme Court of Canada to the provinces depends entirely upon the extent to which the federal level will retain discretionary authority not to appoint a person or persons nominated by the provinces. Again, we cannot know for certain how political actors will exercise new powers created by the 1987 Constitutional Accord. In my view, it is responsible to predict that the grounds on which the federal level may refuse to appoint the persons provincially nominated for either institution will be extremely narrow. If provinces, under the new arrangement, nominate credible, responsible persons and if they make public those nominations, the federal level will be hard pressed to refuse those nominations simply on the grounds of ideological difference, party

difference, difference in jurisprudential assumptions or difference in conception of the federal principle.

The analogue that is available to use in order to determine how the two participants in the appointment process might interact is the American model of executive nomination and Congressional approval. In that system the grounds upon which Congress may refuse to approve are extremely narrow and cannot and do not operate to prevent political and ideological shifts occurring in regulatory agencies, the foreign service or the Supreme Court of the United States.

Some witnesses to this Committee have expressed the hope that the new appointment procedure for the Supreme Court of Canada will open the door to a fuller consultative process. Although the new provisions do not preclude this, we must ask whether it is reasonable to expect that provinces, having acquired significant control over the formation of the Senate and the Supreme Court of Canada, will now donate back that capacity to a consultative process. Such a process would proceed on two assumptions, the first being that all participants (which would be both levels of government and whatever other interests are represented) would need to agree on a candidate and, second, that the process would be done in secret. Both constraints would significantly diminish the degree of control that provinces will acquire over Senate and Supreme Court membership. It is, I believe, a vain hope to expect that the new consultative processes that are dreamed of will come into place.

It has been suggested that provinces would not dare to use openly their powers so as to shape the ideology represented by the membership of the Senate and Supreme Court of Canada; the electorate would not approve of this sort of agenda being pursued in the making of appointments to these high offices. That view does not match my conception of what the electorate expects by way of political behaviour from its provincial governments. All provincial electorates see themselves as having vital and important interests to protect and they approve of those governments which exercise their powers to protect the province and disapprove of those governments that squander political power for no advantage to provincial interests.

The question that is presented, then, is what is the harm of provincial appointments to the Senate and the Supreme Court of Canada. The first harm is the consistent denial that what is at stake in new s. 25 and 101C is the transfer of appointing power from the federal level to the provincial level.

Second, the infusion of province-based interest in these two central institutions serves to compound the effect that in shaping a national programme or a national jurisprudence, the significant political and judicial actors will be under a mandate to reflect the interests of various provinces. This is certainly

not how we conceive of a court. (It may be that our notions of judicial impartiality will be sufficiently strong that the process of judging will not be altered. However, I am sceptical about how resistant judicial decision-making is to political value.) Nor is it the way that we have thought of the Senate. The Senate has been considered as an element of national politics and not as a mediating point for provincial concerns. My own view of the need for national policy definition leads me to be concerned about a Senate the role of which becomes the reflection and accommodation of provincial political interests.

A further feature of the proposed s. 25 of the Constitution Act, 1867, relating to the appointment of senators, is that the Senate will likely acquire a political legitimacy that it has not had under the present juxtaposition of an elected Commons and an appointed Senate. The political vulnerability that the present Senate sometimes displays will disappear when the implicit mandate of senators is to represent, at the federal level, the interests of those regions from which they are appointed. The tensions that are inherent in the bi-cameral legislative arrangements of the United States and Australia will, I predict, arrive in Canada quickly after the institution of the new appointment procedure. These tensions do not lead to an unworkable arrangement, nor are they unhealthy. In fact there is much to be said for a strong upper chamber. What is important is to recognize the profound nature of the change that is being put in place and reflect on whether the new structure and the new political dynamic are what we truly want. Furthermore, as I have indicated under heading III, above, it strikes me as being unlikely that we shall be able to move from the arrangement that is created by the Constitutional Accord, 1987, at any time in the future. This means that the changes that we effect need to be ones that we are certain are appropriate for Canada. What is being proposed here is not a minor alteration in the nature of the Canadian Senate. It is a very significant change to the structure of the Parliament of Canada. It is one that has the potential to harm the development and expression of national policies and, ultimately, has the capacity to change the way Canada governs itself, defines itself and develops itself.

v The Annual Constitutional Conference

The 1987 Constitutional Accord proposes a new Part VI of the Constitution Act 1982. It creates a constitutional requirement for a constitutional conference to be held every year. There is no time limit to this requirement. Even if the agenda items in s. 50(2) were ever satisfied the obligation to meet on constitutional matters would continue. In this country there is a constant demand for important political accommodation between interests - regional and national, provincial

and federal, producers and consumers, investors and users of capital, and so forth. These issues are very often national in scope and the search for their solution is put at the top of our political agenda. What seems to be the wrong conception of constitutionalism is to expect that these political tensions should be resolved through constitutional agreement. Although there is nothing in the new Part vi which requires constitutional resolution of political differences, the sheer availability of constitutional discussion and constitutional negotiation will serve to make these annual conferences the forum for much of the major political debate in this country. If this were to happen two things would suffer greatly – first our sense of the role of constitutionalism and, second, the role of normal legislative political accommodation.

This scenario, perhaps more than any other in this submission, is based on unsubstantiable speculation. On the other hand, it is the portion of the Constitutional Accord 1987 which is easiest to amend. It makes little sense to build into our governmental system a process which misconceives the role of constitutional politics – that attempts to use our constitution to express transitory senses of appropriate accommodation and, insofar as agreement is ever reached, blocks future adaptation and refinement. Constitutional politics is cumbersome for a reason. It requires us to be serious about our purposes and sure of our goals. It requires us to think twice, and thrice, about changing the structure we live under. It is not a politics which is designed for annual invocation. It is not a politics that is designed for common, short or closed meetings. It is meant to be a politics of national self-definition. To my mind the Meech Lake process did not pass the test of appropriate constitutional politics; it seems wrong to create now a system that will tend to bring all our constitutionalism to the level of that process.

Gender and the Meech Lake Committee

BEVERLEY BAINES

During August 1987 five national women's organizations told the parliamentary Committee on the Meech Lake Accord that the Accord put women's Charter-based equality rights at risk.¹ These organizations were the National Association of Women and the Law (NAWL), the Women's Legal Education and Action Fund (LEAF), the Canadian Advisory Council on the Status of Women (CACSW), the National Action Committee on the Status of Women (NAC), and the Ad Hoc Committee of Women on the Constitution. Although these organizations gave hours of testimony about the risk to women's Charter-based equality rights,² the Committee remained unmoved. In their final *Report* the Committee acknowledged that nothing had "given rise to more searching examination and consideration ... than this issue," but they refused to recommend that the Accord be changed to ensure that women's Charter-based equality rights would not be jeopardized.³

The Committee explained their refusal by saying that the women's "fears ... are not justified" (*Report*: 55). Now "not justified" is a phrase that covers a multitude of sins. Its meaning is never self-evident; yet one must be found in order to render the Committee's refusal intelligible. In this context, for instance, perhaps it meant that the Committee thought the women were wrong. Or perhaps the Committee meant to signify that there were countervailing fears which were more compelling. Or again, more practically speaking, perhaps it meant that the Committee did not understand what the women were saying. In what follows I examine each of these possibilities in turn. Of course there would be a special irony attached to concluding that the Committee did not understand what the women were saying since the Accord is generally defined in linguistic and cultural (or familial) terms. Such irony notwithstanding, however, that conclusion is the most consistent with the facts.

If by "not justified" the Committee meant to signify that the women were wrong, then the Committee meant to speak categorically. However the issues before the Committee, or at least those to which the women spoke, were all very controversial. That is, they were matters about which people with expertise and experience could legitimately disagree. At no time did the Committee

question the women's expertise and experience. Indeed all five of these national women's organizations have impeccable credentials in the area of women's Charter-based equality rights. Four had actively lobbied for women's Charter-based equality rights during the 1980-81 constitutional negotiations, while the fifth - LEAF - had originated from the success of those lobbying efforts. One - NAC - is the largest women's organization in Canada, representing approximately 530 member groups with a combined membership of over three million women from all walks of life (*Minutes*: 13: 22). As well, more than half of the twenty women who spoke to the Committee on behalf of these five organizations are lawyers and/or law professors. These facts alone make it unrealistic to suggest that the Committee meant to speak categorically.

Instead, when the Committee found the women's fears "not justified," perhaps they were speaking comparatively. Needless to say the comparison most likely to concern the Committee was with those who feared re-opening the Accord. Although the latter have rank on their side,⁴ surely the question is not one of power but of reasonableness. But is it reasonable to fear re-opening the Accord to ensure that women's Charter-based equality rights are not jeopardized? We need only look to history - indeed to very recent Canadian history - for the answer. In November 1981 after the Constitutional Accord was signed, the women's lobby successfully pressured all of the first ministers into re-opening their decision in order to exempt s. 28 from the override provision in s. 33.⁵ Now if any Accord deserved to collapse upon re-opening, it was that one because it excluded Quebec. Yet the 1981 Accord survived re-opening; and so it seems not only unreasonable but also unrealistic to fear that the 1987 Accord would collapse were it re-opened to remove the risk to women's Charter-based equality rights.

What remains, therefore, is to determine whether "not justified" has a more pragmatic meaning. Does it in fact signify that the Committee did not understand what the women were saying? An affirmative answer would not be surprising since the relevant chapter in the Committee's *Report* is effectively silent about what these women actually said. That is, the chapter sets out no quotations from any of these women although it does set out fourteen quotations from nine male witnesses, one of whom never even appeared before the Committee (*Report*: 55-68).⁶ Of course the Committee did not absolutely refuse to set out quotations from female witnesses because there are three quotations from two Quebec francophone women.⁷ But these three quotations are problematic because they are the only quotations in the chapter that are not attributed to named witnesses (*Report*: 62, 64). Thus, at least in the chapter most relevant to women's Charter-based equality rights, the *Report* either silences women or it leaves them unnamed.

Moreover, this chapter of the *Report* also renders female witnesses virtually invisible. It refers to only one female witness by name even though 26 women represented the five national and two Quebec women's organizations at the hearings and 23 of them spoke.⁸ By contrast, the *Report* names 10 male witnesses⁹ in this chapter and, where appropriate, always gives them professional status. For example, the four male law professors and two male lawyers named in the chapter are always referred to as Professor or Maître respectively. Yet although the only female witness named is both a law professor and a lawyer, she is always referred to as Ms.

When women are rendered virtually invisible, are so blatantly unnamed and are so effectively silenced as they are in this chapter of the Committee's *Report*, it is extremely difficult to avoid alleging gender-bias. But I have more substantive fish to fry. Nor is the substantive evidence hard to find. All that is necessary is to compare what the Committee apparently understood the women to be saying with what the women actually said. What they actually said is reported in the *Minutes*, while what the Committee apparently understood is contained in the text of their *Report*.

According to their *Report*, the Committee apparently believed that the national women's organizations had raised the following issues. First, that the linguistic duality and distinct society clauses of the Accord should not be entrenched in the Constitution Act, 1867.¹⁰ Second, that women's Charter-based equality rights should be treated as a "special case" for the purposes of s. 16 of the Accord.¹¹ And third, that women wanted a "guarantee" of "automatic paramountcy" for their Charter-based equality rights. Although these issues offered the Committee the chance to score points, they did not represent what the women had actually said.

First, with respect to entrenchment (*Report*: 55, 56), the genesis of this issue remains somewhat unclear. It would seem that the Committee chose to ignore the fact that all of the national women's organizations began their presentations by explicitly welcoming Quebec's participation in the Constitution as a distinct society¹² and, instead, focussed on the women's references to the Ontario Separate School Funding case.¹³ In this case the Supreme Court of Canada ruled that the separate school funding legislation, which would ultimately be passed pursuant to the denominational education provision of the Constitution, was immune from invalidation by the Charter.¹⁴ Since the denominational education provision was entrenched in the Constitution Act, 1867 (in s. 93), the Committee apparently construed the women's references to this case as opposition to the entrenchment of the linguistic duality and distinct society clause.

This conviction led the Committee, in turn, to argue that the women had

misunderstood the “true meaning” of the Ontario Separate School Funding case (*Report*: 57-60). The Committee’s argument began with the majority judgment of Madame Justice Bertha Wilson and, more specifically, with her statement that “It was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the constitution, particularly a provision such as s.93 which represented a fundamental part of the Confederation compromise” (*Report*: 58). Although her statement could be interpreted as immunizing all constitutional provisions from invalidation by the Charter, the Committee argued that Wilson could not have meant to extend Charter immunity to provisions such as the linguistic duality and distinct society clauses.

As the Committee initially explained it, Charter immunity would not extend to the linguistic duality and distinct society clauses because those clauses were interpretation clauses. But the Committee’s explanation included a tautological definition of interpretation clauses. In their words, an interpretation clause “directs the courts on how to *interpret* other constitutional provisions” (*Report*: 59). So their explanation was not persuasive. More importantly, however, the Committee’s underlying argument that Charter immunity did not extend to interpretation clauses was also unpersuasive because they had provided neither reasons nor authority for it.

By contrast there was at least initial authority for the Committee’s next explanation because it involved Mr Justice Estey’s minority concurring opinion. He had provided a basis for distinguishing between constitutional provisions when he stated that Charter immunity should extend only to “distinctions that are expressly permitted by the Constitution Act, 1867” (*Report*: 58). While the Committee conceded that his words would cover the linguistic duality clause, they tried to minimize their concession by arguing that it added “nothing to the preferred status of the two founding languages already entrenched in the Charter” (*Report*: 60).¹⁵ And they refused to concede that his words would catch the distinct society clause.

According to the Committee, the distinct society clause was not “inherently discriminatory” (*Report*: 60). What they meant was that it was not a provision “which *cannot* be exercised except in a manner inconsistent with the Charter” (*Report*: 60). When the Committee’s words are compared with those of Estey, it becomes obvious that the Committee has twisted his words. On the one hand, the Committee referred to provisions containing distinctions that *mandated* Charter violations; on the other hand, Estey had referred to provisions containing distinctions that expressly *permitted* Charter violations. As this comparison reveals, clearly Estey’s more permissive approach could catch the distinct society clause. And so, once again, the Committee’s argument was unpersuasive because they had provided neither reasons nor authority for it.

Ultimately, therefore, the Committee seemed to resolve the question of the "true meaning" of the Ontario Separate School Funding case by accepting the opinions of the constitutional experts who gave it a restrictive interpretation. Only two such experts were named - William Lederman and Yves Fortier (*Report*: 59 and *Minutes*: 12: 89).¹⁶ Interestingly enough, moreover, these two experts disagreed about a very significant point. Lederman argued that the linguistic duality and distinct society clauses would "remain subject to Charter restraints" (*Minutes*: 7: 26, 7: 27) while Fortier argued that "to exempt ... the Charter from the effect of the distinct society clause ... would mean the death of the Meech Lake Accord, period" (*Report*: 67).¹⁷ Their disagreement is significant because it illustrates precisely the point that the national women's organizations were making when they raised the Ontario Separate School Funding case in the first place.

By raising that case, the women wanted to call attention to the fact that it had created uncertainty about the relationship between the Charter and the linguistic duality and distinct society clauses. But this fact seems entirely to have escaped the Committee's notice, even after their own experts jointly identified it. What matters, of course, is not that everybody except the Committee agreed about this uncertainty but that it did not lead the national women's organizations to oppose the entrenchment of the linguistic duality and distinct society clauses. To the contrary, the women simply took the uncertainty for what it was and sought to resolve it by proposing that their Charter-based equality rights be included in the Accord.

Apparently their proposal was also misunderstood by the Committee, giving rise to the next issue which the Committee stated in terms of the women wanting their Charter-based equality rights to "be treated as a special case" for the purposes of s. 16 of the Accord (*Report*: 60). Nothing could have been further from the truth. What all five national women's organizations said was that, far from being a special case, women were just like the groups already included in s. 16 and that was why their omission was indeed so egregious.¹⁸ Under these circumstances, therefore, the real question is why the Committee so misunderstood the women's proposal that they redefined it in terms of its antithesis.

Indeed redefinition was a particularly curious approach for the Committee to adopt, given that they had already acknowledged that they could not figure out why s. 16 existed in the form in which it did. As they put it, "various distinguished constitutional experts ... had great difficulty in providing a legal rationalization as to why certain sections are included in s. 16 and why others are left out" (*Report*: 61). So, for example, the Committee rejected the rationalization that all of the sections included in s. 16 were interpretative because at least

two of the aboriginal peoples sections were not interpretative at all. And they also quoted at least three constitutional experts who said that s. 16 served no useful legal function.¹⁹

Their own words notwithstanding, however, the Committee did adopt a *de facto* rationalization which they imposed on the national women's organizations. This rationalization surfaced when they demanded examples showing that the linguistic duality and distinct society clauses could have a "negative effect" on women's Charter-based equality rights and then dismissed the many which were given as "hypothetical possibilities" (*Report*: 63-4). Implicitly, therefore, the Committee subscribed to the rationalization that pragmatic considerations justified exemption. Yet pragmatic considerations were never in fact required of the aboriginal peoples nor of the people who rely on the multicultural heritage provision and whom in all other respects women resemble when they litigate Charter-based equality rights cases.

To the contrary, the only demand actually made of aboriginal and multicultural groups was that of conformity to certain abstract general standards. These general standards were described by the federal Minister of State for Federal-Provincial Relations when he said that "the various references to aboriginal peoples relate to collective rights" and also that "because multiculturalism and native peoples related to groups with a cultural aspect, it was thought appropriate to put in that non-derogation clause" (*Report*: 61-62). When the women provided examples and argument which related to their "collective rights" and "cultural aspect" as a group, however, it was as if neither their examples nor their argument counted.

Instead what counted was what the two Quebec francophone women's organizations said.²⁰ La Fédération des femmes du Québec and the Quebec Council on the Status of Women both said that Quebec women did not fear the concept of the distinct society (*Report*: 64). Nevertheless, there was some discordance in their respective presentations. For example, the Fédération "deplored the fact that the concept of the distinct society had not been defined," while the Quebec Council believed "that an attempt to define it could restrict its scope."²¹ Thus it was not surprising when the Fédération and the Council also disagreed over whether s. 16 should contain some reference to women's Charter-based rights. While the Council said no, the Fédération had no objection.

Moreover the reason which the Fédération gave for allowing some reference to women's Charter-based rights in s. 16 is pivotal to understanding why the Committee insisted on treating women as a special case. As long as women were treated as a special case, the Committee could ignore the fact that the Fédération had stated that "the amendment is necessary in the interests of con-

sistency, rather than to reassure certain groups" (*Minutes*: 13: 46). In other words, they could ignore the fact that the Fédération and the national women's organizations had given the same reason – consistency – for treating women like aboriginal and multicultural groups. Instead, by treating women as a special case, the Committee was able to focus on the difference between the national and Quebec women's organizations. Obviously, therefore, there was considerable political mileage to be gained when the Committee so misunderstood the proposal made by the national women's organizations that they redefined it in terms of its antithesis.

Yet the Committee lost whatever political mileage they might have gained from dividing the national and Quebec women's groups when they raised the third issue about a "guarantee" of "automatic paramountcy" for women's Charter-based equality rights (*Report*: 68, 143). The Committee wrongly attributed this claim to the national women's organizations. It is true that these organizations were prepared to live with the situation as it existed under the 1982 Charter; but they never described that situation as one of paramountcy for women's equality rights.²² To the contrary, that claim was made only by the Quebec Council (*Minutes*: 15: 82). At minimum, therefore, this misattribution suggests that the Committee saw the various women's organizations as more or less fungible.

More poignantly, it also reveals how glaringly the Committee even misunderstood the argument presented by the Quebec Council. After all, it was not surprising that the Quebec Council asserted that the linguistic duality and distinct society clauses were no threat to women's Charter-based equality rights, given that they also believed that the Charter already guaranteed the paramountcy of women's equality rights. By contrast, therefore, it was very surprising when the Committee pillaged the Quebec Council's belief about paramountcy while upholding their assertion about the absence of any threat. Under these circumstances, the metaphor about sawing off the limb behind you does seem apt.

In summary, therefore, the three issues on which the Committee relied to deny that women's fears were justified seem instead to attest to the contrary. Indeed what the Committee's *Report* provides is eloquent testimony to the fact of an enormous gap between what the Committee apparently understood the women to be saying and what the women actually said. It is as if the women and the Committee were speaking "different languages" (Gilligan 173). Nor is that a suggestion which I make lightly, given that three women were regular members of the Committee. Nevertheless, the fact remains that these three were outnumbered by the fourteen other regular members of the Committee, including the co-chairs, who were male, as were the two joint clerks and the three

legal counsel from McCarthy and McCarthy.

Perhaps the latter could not hear the women's voices. After all, Carol Gilligan herself has argued that: "As we have listened for centuries to the voices of men ... , so we have come more recently to notice not only the silence of women but the difficulty in hearing what they say when they speak" (173). If this were so, however, then they should also have followed Gilligan's advice about recognizing that "truths are carried by different modes of language and thought" (173). And that is where the Committee so clearly failed us, ironically even as they were in the course of examining the linguistic and cultural implications of the Accord.

NOTES

- 1 The Canadian Charter of Rights and Freedoms is Part I of the Constitution Act 1982 which was enacted as Schedule B to the Canada Act 1982 (UK) 1982, c. 11. The sex equality rights provisions are s. 15 and s. 28 which read as follows:
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.
- 2 Canada, Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord, *Minutes of Proceedings and Evidence* (Ottawa: Queen's Printer, 1987), 4 August 1987, 2: 80-2: 97 (NAWL); 5 August 1987, 3: 110-3: 137 (LEAF); 20 August 1987, 10: 82-10: 106 (CACSW); 26 August 1987, 13: 21-13: 42 (NAC); 31 August 1987, 15: 127-15: 156 (Ad Hoc Committee). These organizations also made submissions to the Committee about other deficiencies in the Accord but those submissions do not serve as the basis for my critique. Subsequent references to the *Minutes of Proceedings and Evidence* will be given in abbreviated form as *Minutes*.
- 3 Canada, Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord, *Report* (Ottawa: Queen's Printer, 1987), 55. Subsequent references to this *Report* will be placed in the text of this article followed by page references.
- 4 For example, the Prime Minister and the Minister of State for Federal-Provincial Relations. See also Peter Leslie's submission to the Committee as reprinted in this volume.
- 5 Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution*, 84-95. Even though Quebec was excluded from the 1981 Accord, the Premier issued a public statement saying that Quebec would never have consented to an override on s. 28: 91. See also Chaviva Hosek, "Women and the Constitutional Process," 291-95 and Katherine J. de Jong, "Sexual Equality: Interpreting Section 28," 510-12.

- 6 The nine male witnesses quoted in this chapter were Yves Fortier, William Lederman, Jack Pickersgill, Lowell Murray, Wayne MacKay, Robert Décar, Laurent Picard, Edward McWhinney, and Peter Hogg. Hogg never appeared before the Committee.
- 7 Despite one erroneous page reference, it was not difficult to ascertain from the *Minutes* the names of the two Quebec francophone women being quoted. Two of the quotations were by Ginette Busque (the quotation on p. 62 and the second quotation on p. 64) and one was by Francine McKenzie (the first quotation on p. 64).
- 8 The 26 women were Helena Orton, Patricia File, Bev Baines, France Houle, and Brigitte Mornault representing NAWL; Lucie Lamarche, Marilou McPhedran, and Beth Symes representing LEAF; Sylvia Gold, Tina Head, Judith Nolte, and Anne-Marie Smart representing CACSW; Louise Dulude, Noëlle-Dominique Willems, and Wendy Williams representing NAC; Ginette Busque, Claire Bonenfant and Charlotte Thibault representing the Fédération des femmes du Québec (FFQ); Francine McKenzie, Jocelyne Olivier, and Marie Rinfret representing the Quebec Council on the Status of Women; and Mary Eberts, Linda Nye, Pat Hacker, Nancy Purdy, and Akua Benjamin representing the Ad Hoc Committee. Only Mary Eberts was named in Chapter VI.
- 9 The nine already named in footnote 6 plus Gérald Beaudoin.
- 10 While the linguistic duality and distinct society clauses are part of section 1 of the Accord, were they to be proclaimed by all of the Canadian legislatures then they would become part of s. 2 of the Constitution Act, 1867. Either way, they read as follows:
2. (i) The Constitution of Canada shall be interpreted in a manner consistent with (a) the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and (b) the recognition that Quebec constitutes within Canada a distinct society.
- 11 Section 16 is one of the non-derogation clauses in the Accord. It is also known as the aboriginal peoples and multiculturalism clause. It reads as follows:
16. Nothing in section 2 of the Constitution Act, 1867 affects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982 or class 24 of section 91 of the Constitution Act, 1867.
- 12 *Minutes* 2: 81 (NAWL), 3: 110 (LEAF), 10: 82 (CACSW), 13: 22 (NAC) and 15: 129 (Ad Hoc Committee).
- 13 *Minutes*, 2: 82, 2: 88 and 2: 91 (NAWL); 3: 118, 3: 119, 3: 123 and 3: 131 (LEAF); 10: 85, 10: 93, 10: 96, 10: 99, 10: 101 and 10: 102 (CACSW); 13: 26 and 13: 31 (NAC); and 15: 131, 15: 144 and 15: 145 (Ad Hoc Committee).
- 14 *Reference re an Act to Amend the Education Act, (Ontario)* (1988), 40 D.L.R. (4th) 18, (Supreme Court of Canada) (also known as the *Bill 30* case).
- 15 See John Whyte's submission to the Committee as reprinted in this volume, for the contrary argument that the linguistic duality clause did indeed differ from the French and English language provisions in the Charter.
- 16 The Committee also named the Quebec Council on the Status of Women but not their constitutional experts, neither in the *Report* nor in the *Minutes*. As well, the Committee referred to Professor Beaudoin in this context but he never mentioned the

- Ontario Separate School Funding case, neither in his testimony before the Committee nor in his written submission (*Minutes*: 2: 62-2: 79 and 2A: 13-2A: 43).
- 17 The federal Minister of State for Federal-Provincial Relations, Lowell Murray, also held this latter view (*Minutes*: 2: 40, 2: 51). But the Quebec Minister of Intergovernmental Affairs, Gil Rémillard, did not see the Charter as a threat to the distinct society: "Nothing Less Than Quebec's Dignity is at Stake in Future Constitutional Negotiations," speech delivered at Mont Gabriel, 9 May 1986.
- 18 *Minutes*: 2: 93 and 2A: 52-2A: 54 (NAWL); 3: 116, 3: 118 and 3: 131 (LEAF); 10: 85 and 10: 94 (CACSW); 13: 24, 13: 28, 13: 29, 13: 34 and 13: 39 (NAC); and 15: 133 (Ad Hoc Committee).
- 19 *Report*: 62-63 (MacKay, Décaré, and Fortier).
- 20 *Minutes*: 13: 42-13: 57 (FFQ) and 15: 79-15: 91 (Quebec Council).
- 21 *Minutes*: 13: 44 (FFQ) and 15: 82 (Quebec Council).
- 22 *Minutes*: 2: 82, 2: 83 and 2: 94 (NAWL); 3: 113, 3: 118 and 3: 132 (LEAF); 10: 85, 10: 92, 10: 95 and 10: 99 (CACSW); 13: 36 and 13: 39 (NAC); and 15: 131, 15: 132, 15: 135, 15: 144 and 15: 155 (Ad Hoc Committee).

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Alice in Meechland
or
The Concept of Quebec as "A Distinct Society"

RAMSAY COOK

If the recognition of Quebec as a distinct society turns out not to mean anything, Quebecers will realize it and begin fighting again.

Claude Morin, *The Globe and Mail*, 3 November 1987

No discussion of constitutional matters in Canada should take place without ready access to a copy of Lewis Carroll's standard reference work, *Through the Looking Glass and What Alice Found There*. Certainly that is true of the 1987 Constitutional Accord and especially of Section 2, which refers to "a fundamental characteristic of Canada" and describes Quebec as "a distinct society." A moment's thought about those seemingly innocent phrases should remind us of Alice's first discussion with Humpty Dumpty.

"Don't stand there chattering to yourself like that," Humpty Dumpty said, looking at her for the first time, "but tell me your name and your business."

"My name is Alice, but -"

"It's a stupid name enough!" Humpty Dumpty interrupted impatiently. "What does it mean?"

"*Must* a name mean something?" Alice asked doubtfully.

"Of course it must," Humpty Dumpty said, with a short laugh: "*my* name means the shape I am - and a good handsome shape it is, too. With a name like yours, you might be any shape, almost."

The difficulty with the terms "fundamental characteristic" and "distinct society," as they are used in the 1987 Constitutional Accord, is that they describe something that rather than being "a good handsome shape ... might be any shape, almost." Like Humpty Dumpty I think that names should have understood meanings. In Section 2 of the Accord they do not.

Historically, at least since the early nineteenth century, francophones in British North America/Canada, developed a consciousness of their distinctiveness both individually and collectively. The most obvious badge of that distinctiveness was language while the civil code provided a legal foundation for difference. And, at least until recent decades, Catholicism and the church were linked to that identity. Also, it was long insisted by many nationalists - even when the facts contradicted them - that French-Canadians

were naturally an agricultural people (Brunet 133-66; Trudeau 3-91). Finally, and most important, French-Canadian distinctiveness was founded upon an interpretation of the past that made the collectivity unique: the struggle for survival in North America made this "petit peuple" North American, but not Anglo-Saxon, French-speaking, but not French. From that sense of uniqueness grew a sense of mission that assigned French-Canadians the task of continuing that quest for survival and fulfillment as a distinct "race," "people," or "nation" (Cook, *Maple Leaf* 96-122).

Until the 1960s that "people" or "nation" usually included francophones wherever they lived in Canada and even, sometimes, included those who had emigrated to the United States. Moreover, whatever term was used to describe the collectivity - "race," "nation," "people" - it was intended to describe a cultural and sociological entity rather than a political or constitutional one - except perhaps in the case of those who followed Louis-Joseph Papineau (Morissoneau). Of course, within that cultural and sociological definition, those francophones who lived in the St Lawrence Valley, "the homeland," were central. After 1867, when the province of Quebec was created, that territorial definition was strengthened since it was the one province with a francophone majority. Even so, that distinctiveness was called French-Canadian, more than Québécois. (This confusion of French-Canadian and Québécois often irritated members of the Diaspora, Acadians and Franco-Manitobans, who insisted that their way of being French-Canadian was as valid as that of the Québécois.)

In the period stretching roughly from the Second World War to 1960, as part of the so-called Quiet Revolution, the concept of distinctiveness changed as did the focus of that distinctiveness. Once the obvious facts of industrialization and urbanization were accepted, the "myth" of "ruralism" was rejected. As the outlook and ambitions of francophones grew more secular, the centrality of the church and religion in the definition of distinctiveness was questioned. In some ways French-Canadians seemed to be becoming less "distinctive." Soon it came to be recognized that the dangers and challenges of industrial society made the state a necessary instrument not only of modernization but also as a means of preserving and promoting cultural and sociological distinctiveness (Behiels). And that, in turn, further reinforced the territorial definition of francophone distinctiveness. Without entirely losing sight of the Diaspora, Quebec French-Canadians were becoming Québécois. This term, of course, was not entirely satisfactory since about 20 percent of Québécois were non-francophones and thus not members of what had traditionally been thought of as the "distinct" "people" or "nation." That remains a somewhat confused issue. But what does seem clear is that the contemporary sense of distinctiveness retains from the past an emphasis on language, a sense of a common history

(though there is less agreement about its meaning than there once was), and a conviction that Quebec, both geographically and constitutionally, is the focus of that distinctiveness (Cook, *Canada, Quebec* 68-86). But it should also be added that language in the new context means something more than an instrument of a culture in a literary or philosophical sense. In the debate over Bill 101 the issue was clearly power and social mobility, though the matter of culture, purity of language and other traditional preoccupations, was not wholly absent. Professor Fernand Dumont summed up the new situation aptly when he observed that "Le langage n'est pas que poésie. Il est aussi le pouvoir" (*Québec et le lac Meech* 137).

The idea that the distinctiveness of Quebec should be recognized constitutionally is far from new. Indeed the very act of creating that province in 1867 was, implicitly, a recognition of distinctiveness. But the British North America Act also included several explicit recognitions of that fact. For example, Section 94 recognized the civil law of Quebec as distinct and, if the intent expressed in that provision had been fulfilled ("uniformity of all and any laws relative to Property and Civil Rights" in all provinces except Quebec), Quebec would have had a "special status" in that area. In addition the special character of Quebec was recognized in Section 133 which not only made French, for the first time, an official language of Canada, but also made Quebec, alone among the original provinces, bilingual. In this, and in some other ways, Quebec has never been a province exactly like the others for its historic characteristics made some constitutional variations desirable.

It was not until the 1950s, perhaps because some Quebeckers had begun to realize that Quebec's traditional distinctiveness was disappearing under the impact of urban and industrial growth, that arguments began to be devised to justify demands for a wider recognition of Quebec's power to defend its distinctiveness. These arguments were given systematic form in the *Rapport de la Commission royale d'enquête sur les problèmes constitutionnels* (1956), commonly known as the Tremblay Commission. Though that Commission's definition of Quebec's distinctiveness was remarkably traditional - a French-speaking Roman Catholic society, spiritual rather than material in its values and goals - it made a powerful argument for provincial autonomy in areas into which the new federal welfare state was moving, and insisted that Quebec was not a province like the others.

During the 1960s a new political and bureaucratic elite transformed the familiar process of constructing a provincial welfare state into an exercise in nation-building. A new nationalist ideology both legitimized that process and redefined the concept of "distinctiveness" into a Quebec-centred, secular doctrine (Smith ch. 6). Like French-Canadian nationalists in the past, the neo-

nationalists of the 1960s were both moderate and persistent. Only a small fringe group demanded outright independence and linguistic uniformity in the manner of nineteenth-century nationalists in Europe and post-1945 nationalists in the colonial world. Instead their demands were for a recognition of the priority of the French language in Quebec, and the recognition of Quebec as a "province pas comme les autres," with, according to the intensity of the theorist's nationalism, a "different status," a "particular status," a "special status," "associate states," or "sovereignty" accompanied by "association." For various reasons - lack of definition, unworkability, federal opposition, lack of popular support, among others - none of these proposed constitutional methods of recognizing Quebec's distinctiveness was realized (Cook, *French Canadian Question* 62-78). But the thrust behind the demand, and the rhetoric supporting it, never totally dissipated even though the "mood" of Quebec altered radically leaving the nationalist movement, at least temporarily, in disarray and even exhaustion (Clift; Bouchard).

Perhaps a rough measure of that new "mood" is the new phrase that has been adopted in the latest attempt to capture Quebec's special character. That, of course, is "distinct society" or, alternatively, "distinct identity," phrases which seem to avoid the implication of "national" or "quasi-national" status. And that, at long last, brings us to the 1987 Constitutional Accord which enshrines these phrases. The point of this introduction has merely been to demonstrate that the idea of French-Canadian/Quebec distinctiveness is not new either historically or in terms of constitutional practice. It is a reality. Therefore to criticize the concept of a "distinct society" as it appears in the Accord is not to reject the fact of that distinctiveness. It is to criticize the Accord for its inadequate reflection of the reality.

Though the term "distinct society" has a familiar ring it assumed a central place in constitutional discussions only after the Quebec Referendum of May 1980 and especially after the proclamation, without Quebec's formal adherence, of the Constitution of 1982. The Quebec provincial Liberal party, in its 1985 programme, set out as one of its conditions for accepting the new constitution "l'inscription, dans un préambule de la nouvelle constitution, d'un énoncé reconnaissant explicitement le Québec comme foyer d'une société distincte et pierre d'assise de l'élément francophone de la dualité canadienne" (*Québec et le lac Meech* 53). Other conditions, designed to give meaning to that concept, included a veto on constitutional amendments, limitations on the federal spending power, constitutional recognition of the Cullen-Couture agreement on immigration, and the right of the Quebec government to participate in the nomination of Supreme Court justices from that province.

In his now often cited, but perhaps less frequently read, speech at Mont-

Gabriel 9 May 1986, Gil Rémillard, as a minister in the Bourassa government, repeated these conditions, stating that the recognition of Quebec as a "distinct society" should include increased powers in immigration, limitations on the spending power, a veto on constitutional amendments, and the right to "participer au processus de sélection et de nomination de ses juges." This latter condition was especially important, he argued, because the court's rulings touched values "qui font partie essentiellement de la spécificité québécoise comme le droit civil et, sous certains aspects, les droits et libertés fondamentales."

In that speech the Quebec minister made two additional points of importance in light of the subsequent Meech Lake agreement. The first concerned the new Quebec government's view of the Canadian Charter of Rights. After four years of interpretation, he said, the Charter was "un document dont nous pouvons être fiers comme Québécois et Canadiens." Consequently the new government would no longer use the *non obstante* clause in relation to articles 2 and 7 to 15. "Nous voulons que les Québécois soient aussi bien protégés quant à leurs droits fondamentaux que les autres Canadiens."

Second, though not listing it as one of his specific conditions, Rémillard expressed a profound concern about the inadequate protection provided for francophone groups *hors* Quebec, especially in the matter of control over schools and the issue of "sufficient numbers" required to warrant minority language schools. These matters, he thought, should be part of a new constitutional package (*Québec et le lac Meech* 54-60). These then were the general propositions advanced by the Liberal government of Quebec as a negotiating position in the discussions leading up to the signing of the Meech Lake-Langevin Block Accord.

Before turning to an examination of Clause 2 of that Accord, the one dealing with Quebec as a "distinct society," two observations seem in order. The first is that the description of Quebec as a "distinct society" is not part of the preamble, as the Liberal government had demanded, but is rather a substantive interpretive clause covering the constitution and the Charter. Second, all those areas which the Minister outlined at Mont-Gabriel are dealt with separately, meeting Quebec's conditions almost to the letter: a Quebec veto (though now given all provinces) on an extended list of constitutional changes requiring unanimous consent (including Senate reform and the admission of new provinces) guarantees respecting Quebec's role in the appointment of Supreme Court justices (again other provinces receive similar rights), and a limitation on the spending power. Whatever one may think of these provisions they certainly seem congruent with those conditions set out by the Quebec government. To that, however, the Accord adds the interpretive clause, leaving

the concept of "a distinct society" undefined. Thus the task of giving meaning to that sociological and psychological phrase will be left to the courts. It is not, as is normal, interpreting the application of a defined constitutional term but the definition of the term itself that our elected representatives have turned over to the judiciary. Moreover, it is not just the definition of *any* term that is given the courts. It is the definition of what has always been a primordial aspect of Canadian history and constitutional concern: the relations between French- and English-speaking Canadians and the place of Quebec in the Canadian constitution. What are the problems that are raised by this decision?

Any careful reading of s. 2 of the Accord will demonstrate that it is shot through with contradiction, confusion, and ambiguity. Section 2 (a) recognizes "the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada." That, presumably, refers to an ethnic group whose mother tongue is French and whose roots extend back to the beginning of the European part of our history. In addition, s.2(a) recognizes "English-speaking Canadians, centred in Quebec but also present in Quebec." That, presumably, *does not* refer to an ethnic group but rather to the fact that English is the *lingua franca* of those of many mother tongues other than French. To put this another way, French is both a defining characteristic of an ethnic group and one of Canada's two official languages; English is simply one of the two official languages. These two entities are not, therefore, equivalents though the Accord leaves the unwary with the impression that they are.

Or are they equivalents? Here we come to the question of defining the term "a distinct society." To what does this phrase refer? Is it to "Quebec" or to "the French-speaking Canadians centred in Quebec?" Those, of course, are not the same. Many francophone Quebecers, especially among those who have joined the debate over the Accord believe, or hope, that the term "a distinct society" refers to the francophone majority. English-speaking Quebecers, naturally, fear and reject that conclusion and hope that "a distinct society" refers to a bilingual, multi-cultural society. Gil Rémillard, the Quebec Minister of Intergovernmental Affairs, appears to accept the first interpretation; those who speak for Alliance Québec defend the latter.¹

In the debate in the Quebec National Assembly in June 1987, Premier Robert Bourassa offered what is presumably the official view of his government in this matter. He stated: "The French language is a fundamental characteristic of our uniqueness, but there are other aspects, such as our culture and our institutions, whether political, economic or judicial." These were not defined, he said, because definition "would confine and hamper the National Assembly in promoting this uniqueness." Then, he added - and I italicize:

It must be noted that Quebec's distinct identity will be protected and promoted by the National Assembly and government, and its duality preserved by our legislators. It cannot be stressed too strongly that the entire constitution, including the Charter, will be interpreted and applied in the light of the section proclaiming our distinctiveness as a society. As a result, in the exercise of our legislative jurisdictions we will be able to consolidate what has already been achieved, and gain new ground.

Finally, after a reference to the safeguard clause confirming existing powers over language, he added "We have for the first time in 120 years of federalism managed to provide constitutional underpinnings for the preservation and promotion of the *French character of Quebec*."²

Here, then, is a crystal clear statement of the view that "distinct society" and "French character" are interchangeable concepts. But elsewhere only confusion reigns.

Senator Lowell Murray, one of the architects of the Accord, nicely - I refrain from saying intentionally - expressed this confusion when he explained the lack of definition:

We decided not to define Quebec's distinct society more clearly. If, in the 1930's, anyone had tried to define Quebec's specificity, it might have been said that Quebec was Catholic and French-speaking. I don't think today's politicians would use these kinds of terms to define Quebec's specificity.

Here the reference is exclusively to the francophone majority.

But the learned Senator then continued:

We all know that we can quickly draw up a list of those characteristics that describe Quebec. There is the obvious fact that Quebec is the only province to have a French-speaking majority and an English-speaking minority. There is also the fact that it uses the civil code and that it evolved under a different Crown for 150 years before the 1763 Royal Proclamation. There are also the cultural and social institutions. As you can see it would be easy to draw up a list, but that list might unduly limit the concept itself (Joint Committee 41).

Now there are two interesting aspects to this part of the statement. The first is that the "distinct society" now includes both French- and English-speaking people. Second, and equally revealing, is the fact that Senator Murray's list contains *nothing* that is not already guaranteed in the 1867 version of our constitution: the civil code, control over education presumably being the "social

and cultural institutions" referred to, and official bilingualism which is what seems to follow from his description of the population's ethnicity. Does that mean that the concept of "a distinct society" is merely a description of the *status quo* as established in 1867? That would surely surprise many Quebecers.

Another witness before the Joint Committee, Yves Fortier, appeared to agree with Senator Murray's second definition, but to go a step further. "Quebec society within Canada is not defined solely by the characteristics of the Francophone majority, and clause 2 states this specifically," Fortier contended. "Quebec's distinctive society is composed of English-speaking Canadians, native people, and people from ethnic groups" (Joint Committee 33). Now I find no reference to "native people" and "ethnic groups" in s. 2. It may be that s. 16, the so-called non-derogatory clause, adds these groups to Quebec's distinctive identity. If so, is the Quebec government and legislature responsible for the preservation and promotion of French, English, aboriginal, and multicultural rights? Again I think that might be an unwelcome surprise to some Quebecers. "Preservation," maybe. But anyone familiar with the last 20 years of debate over language and culture in Quebec could be forgiven any amount of scepticism about "promotion."

Nor does the Report of the Joint Committee add any light to this obscurity; indeed on this, as on much else, it only obfuscates the matter further. When Zebedee Nungak, of the Inuit Committee on National Issues, himself a Quebecer, expressed the fear that his people might be "out-distincted by a distinct Quebec," the Committee's majority replied that: "The members of the Joint Committee have no doubt that other communities within Canada might also be defined as 'distinct societies' and the fact that they are not referred to in Section 2 does not mean that these other characteristics or other cultural groups have been rejected or given second class status" (Joint Committee 40).

Whether Nungak was satisfied with the Joint Committee's evident reluctance to choose is unrecorded. He may have thought of an Inuit version of Gilbert and Sullivan's insistence that where everybody is "distinct," nobody is "distinct." Or perhaps he was moved to turn to Alice:

"When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I chose it to mean - neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master - that's all."

As so often, Humpty Dumpty was right. Section 2 is not merely a description

of some supposed sociological construct. It is an interpretive clause concerned with the allocation of power. And that is where the issue of who is "master" must be confronted. Let me illustrate.

The "Legislature and Government of Quebec" is given the "role ... to preserve and promote the distinct identity of Quebec. ..." It obviously matters very much, in language policy, for example, which of Senator Murray's "distinct societies" is referred to - "the French-speaking Canadians centred in Quebec," or a bilingual Quebec? The history of Quebec since 1968 suggests that it cannot be both. Who will be master?

The "Parliament of Canada and the provincial legislatures" have the "role ... to preserve the fundamental characteristic of Canada ..." and, apparently, the existing geographical distribution of that characteristic. Does that, for example, mean preservation of a situation in Alberta where it is, evidently, unacceptable to ask a question in French in the provincial legislature? Distinction seems to come in varying fundamental hues. And does preservation include policies devised by the federal government and applicable to the inhabitants of the distinct society of Quebec? When the Canada Council and the SSHRC make grants to Quebecers to study the French language in that province, compose Quebec music and poetry is that merely preserving or is it promoting? The same question might be raised about the CBC/Radio Canada and the NFB/ONF. Under the "distinct society" clause a future Quebec government will be able to challenge federal "promotion" of francophone culture - and perhaps even anglophone or allophone culture - in Quebec on the ground that Quebec, not Ottawa, has the role of "promoting" that society's "distinct identity." It is even possible that "reasonable compensation" may be demanded by Quebec when it opts out of federal programmes in this area (*Québec et le lac Meech* 70).³

Yet it is surely absurd that, given the proposition that the existence of French- and English-speaking Canadians represents "a fundamental characteristic of Canada," that the federal government and parliament should not have an explicitly recognized "role" to "promote" as well as "preserve" that characteristic. The term "preserve" conjures up the image of an endangered species. Under the new Accord that is surely the potential fate of linguistic minorities unless "governments" as well as "legislatures" are mandated to "promote" as well as "preserve" their languages.

The second area of concern turns on the relationship between the "distinct society" (and "fundamental characteristic") interpretive clause and the Canadian Charter of Rights and Freedoms. Section 16 of the Accord, in exempting s. 25 and 27 of the Charter, s. 35 of the 1982 Constitution Act and clause 24 of s. 19 of the British North America Act from interpretation "in a manner

consistent with" clause 2, obviously leaves the rest of the Charter subject to clause 2. That means, at least potentially, that those rights and freedoms, which are the foundation of Canadian citizenship, may vary from one part of Canada to another if, in some way, "preserving" our "fundamental characteristic" or "preserving and promoting" Quebec's distinct identity appears to require it. Attention has frequently, and rightly been drawn to the impact that this interpretive requirement may have on the "sexual equality" provisions. But that concern should not be allowed to disguise the possibility that "Fundamental Freedoms," "Democratic Rights," "Legal Rights," and "Language and Educational Rights" also fall under this rule of interpretation.

This potential problem is troubling for at least two reasons. First, the Accord's architects, especially Senator Lowell Murray, have on the one hand claimed that rights such as "sexual equality rights" are not subject to this rule of interpretation. ("[I]ls ne cèdent le pas à aucune disposition d'interprétation.") But at the same time Senator Murray has insisted that the Charter cannot be exempt from the interpretive clause because that "viderait virtuellement de tout son sens la disposition ce société distincte" (Murray). Are both arguments possible? Surely not.

Second, if we return to Rémillard's moderate set of conditions we note that he not only indicated the Quebec government's willingness to accept the full application of the Charter, "un document dont nous pouvons être fiers comme Québécois et Canadiens," but he never once suggested that the concept of "distinct society" should be applied to its interpretation, since his party's platform had asked only that the phrase be included in the constitution's preamble. The shift in positions at Meech Lake has never been explained.

To the extent that the interpretive clause (s. 2), could potentially vary the character of Canadian citizenship rights, it is unacceptable. Mr Justice Lucien Cannon's judgment in the Alberta Press case (1937) remains as convincing now as it was 40 years ago. He stated:

Every inhabitant of Alberta is a citizen of the Dominion. The province may deal with the property and civil rights of a local and private nature within the province, but the province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discussion of matters of public concern (8 SCR AT 123).

It is, of course, easier to identify the problems created by the lack of definition in the "distinct society" clause than it is to arrive at a formula that would both clarify the clause and win the consent necessary for the Accord's approval. The Accord's supporters have concluded that the only acceptable solution is

to leave the matter to the courts. That seems nothing less than an abdication of responsibility. Terms like "fundamental characteristic," "distinct society" and "distinct identity" are not legal terms, but rather sociological and psychological. They are, presumably, statements about the shape and values of a community. Those statements require definition by the elected representatives of a democratic society. As Professor Léon Dion has written: "Plutôt que de laisser aux tribunaux le soin de décider à toutes les instances juridiques à partir de cas particuliers, demandons plutôt à nos législateurs d'avoir le courage de définir les objectifs de cette société devant le Québec et le Canada entiers" (*Québec et le lac Meech* 95). To do less than that almost certainly assures continuing controversy over precisely the issue which the Meech Lake Accord claims to settle, namely, the status of Quebec and of the francophone community within Canada.

But what alternatives exist? One possible approach would be to amend Section 16 to exempt the whole of the Charter from the vague conditions described in Section 2. Having done so, a more specific constitutional provision dealing with Quebec's powers in the language field should be devised increasing the province's control in that sensitive area. Such a clause would fulfill Rémillard's Mont-Gabriel goal: "Nous voulons assurer aux Anglophones du Québec les droits linguistiques auxquels ils ont droits. Ces droits doivent se situer évidemment dans le context du caractère francophone de la société québécoise et du ferme désir du gouvernement d'en assurer le plein d'épanouissement" (*Québec et le lac Meech* 60).⁴

The adoption of this strategy would remove some of the objections to the Accord that have been heard both in Quebec and elsewhere for it would clarify some of the ambiguity of the "distinct society" clause. And by increasing Quebec's power over language policy it would go a step beyond the original conditions set by the current Quebec government.

In conclusion I would simply reiterate my essential concern. As it stands in the Constitutional Accord of 1987 the "distinct society" clause may mean much or nothing. If it means much, we need to know how much. If it means nothing, we should think again. Otherwise Professor Daniel Latouche may be right that "dans 50 ans, la seule chose qui distinguerait le Québec serait une clause affirmant sa différence" (*Québec et le lac Meech* 123). Or to return to Alice, we might recall Humpty Dumpty's complaint that he would not recognize Alice at a future meeting since her face was just like everyone else's. He continued,

"Now if you had two eyes on the same side of the nose, for instance, or the mouth at the top - that would be *some* help."

"It wouldn't look nice," Alice objected. But Humpty Dumpty only shut his eyes and said "Wait till you've tried."

Once defined the "distinct society" may not "look nice," but it will be recognizable. And that, in my view, would make the constitution understandable without the aid of a Looking Glass.

NOTES

- 1 The conflicting views are outlined in *Le Québec et le lac Meech*.
- 2 See *Canadian Parliamentary Review*, 10 (1987) for an unofficial translation of this speech.
- 3 Writing in reference to this matter Professor Robert Décary of the University of Montreal: "Ainsi, la dualité sera-t-il l'affaire des parlements fédéraux et provinciaux, tandis que le caractère distinct du Québec sera-t-il l'affaire de seul Québec, s'exprimant par son Assemblée nationale et par son gouvernement? ... le Québec devient le seul maître d'oeuvre de la protection et de la promotion de son caractère distinct. Ensuite, le gouvernement du Québec se voit reconnaître un statut constitutionnel relativement à cette protection et à cette promotion, ce qui pourra signifier, notamment, le droit de participer en tant que gouvernement à de nombreuses activités internationales."
- 4 The position taken by the Lévesque government in 1985, while more restrictive than the Anglophone community in Quebec would find easily acceptable, represents a realistic basis on which to begin serious discussions about allowing Quebec the same power in language matters as is enjoyed by the other provinces. See *Projet 20*.

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