

After Meech Lake: An Insider's View

Patrick J. Monahan

The Inaugural
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FOREWORD

This publication is the text of the inaugural Thomas G. Feeney Memorial Lecture delivered by Patrick J. Monahan at the University of Ottawa on 13 October 1990. Because of the clarity with which it deals with the reasons for the failure of the Meech Lake Accord and with the lessons that would apply to constitutional deliberations in the post-Meech era, it is particularly topical. Although the lecture has been published in the *Ottawa Law Review*, the Institute of Intergovernmental Relations is pleased to make the text of that lecture available to a wider public through publication in our *Reflections/Réflexions* series. The contributions to this series present the personal thoughts and arguments of their authors on a wide range of subjects touching in some way on federalism and intergovernmental relations. It is intended that these papers will place ideas into the public forum on a wide variety of public issues affecting our future development as a nation and a federation.

Patrick Monahan served as a constitutional advisor to the Premier and to the Attorney General of Ontario from July 1986 until September 1990. In that capacity he attended the meetings at Meech Lake and the Langevin Block in 1987 and also the week-long meeting at the Conference Centre in Ottawa in early June 1990. He was in an excellent position, therefore, to observe the processes by which the Meech Lake Accord was originally developed, the subsequent deliberations during the period 1987-90, and the ultimate demise of the Accord in June 1990. He draws on this experience in analysing the reasons for the failure of the Meech Lake Accord and the implications of that failure for Canada's uncertain constitutional future. A major theme he emphasizes is that the Meech Lake process must be understood in the context of the political inheritance of the 1981-82 constitutional settlement.

Since October 1990, Patrick Monahan has been Associate Professor at Osgoode Hall Law School, York University and Director of the York University Centre for Public Law and Public Policy. He is currently in the process of writing a book entitled: *Meech Lake: The Inside Story*, which is expected to be published during 1991.

Ronald L. Watts
Director
November 1990

SOMMAIRE

Cet article étudie les causes de l'échec de l'Accord du lac Meech et les répercussions de ce résultat sur l'avenir politique du Canada. L'auteur prend notamment le contrepied de la thèse très répandue de l'absence de leadership politique au pays comme schéma d'interprétation de l'échec de l'Accord. Celui-ci serait attribuable plutôt à divers facteurs dont l'origine remonte à l'adoption de la *Loi constitutionnelle de 1982*. La décision prise à l'époque d'ignorer le consentement du gouvernement du Québec lors de l'entreprise de rapatriement constitutionnel aura rendu nécessaire, par la suite, la mise en oeuvre d'une série de négociations dans le but de satisfaire les exigences du Québec. Cependant, la formule d'amendement enchâssée dans le texte constitutionnel de 1982 était si rigide qu'elle voua en fait toutes négociations à l'échec. Au surplus, il était prévisible qu'une telle situation allait compromettre subséquemment l'engagement du Québec envers la fédération canadienne.

L'auteur tire un certain nombre d'enseignements de l'épisode du Lac Meech en vue d'une éventuelle réforme constitutionnelle au Canada. Avec la présente formule générale d'amendement, les chances que le Québec voit ses revendications essentielles satisfaites sur le plan constitutionnel sont pour ainsi dire inexistantes. L'alternative qui s'offre donc au Québec consiste soit à accepter le statu quo — option la plus malaisée d'entre toutes —, soit à tenter de passer outre aux règles actuelles d'amendement constitutionnel. Patrick Monahan se penche enfin sur les conséquences que pourrait entraîner le recours à cette seconde option, laquelle irait, selon lui, à l'encontre des meilleurs intérêts de tous les Canadiens.

ABSTRACT

This paper examines the causes of the failure of the Meech Lake Accord, as well as the implications of the demise of the Accord for Canada's political future. The paper challenges the prevailing interpretation of the Accord's failure, an interpretation that centers on the shortcomings of political leadership. The paper argues that the Accord's failure is, in reality, a product of factors that can be traced back to the 1982 constitutional settlement. The 1982 decision to proceed without the consent of the government of Quebec made it necessary to undertake a subsequent series of negotiations designed to accommodate Quebec. The problem was that the amending formula entrenched in 1982 was so inflexible as to make any such negotiations prone to failure. Further, the predictable outcome of any such failure would be a destabilization of Quebec's commitment to the Canadian federation.

The paper draws a number of lessons from the Meech Lake experience for the future of constitutional reform in Canada. It is evident that there is no realistic possibility of securing a constitutional amendment addressing Quebec's concerns under the general amending formula. Quebec will be faced with the difficult and fateful decision of either accepting the status quo, or attempting to jump outside the existing rules for constitutional amendment. The paper analyses the implications of a break in legal continuity, concluding that it would be contrary to the best interests of all Canadians.

AFTER MEECH LAKE: AN INSIDER'S VIEW

INTRODUCTION

In the four months following the demise of the Meech Lake Accord on 23 June 1990, most Canadians took a welcome time-out from our seemingly interminable national preoccupation with the constitution. In the middle of June, with first ministers huddled behind closed doors in Ottawa for a week, Canadians had identified national unity as the single most important issue facing the country. But with the native standoff at Oka and the crisis in the Persian gulf dominating the political scene over the summer and autumn, the "national unity" issue began to fade from the national political consciousness.

Yet in the midst of this respite from debates over the constitution, there has been not much joy or relief visible across the land. Instead, there is a sense that the "fault-line" of Canadian politics shifted in a fundamental and irrevocable way on 23 June of this year. Precisely what this shift amounted to is difficult to articulate with any precision. Perhaps one way of expressing it is to say that the idea of Canada as a permanent fixture on the political landscape died on that day. Since 23 June, there has been an unspoken but palpable assumption that, from now on, all bets are off. Canada and Canadians had entered a new political era, an era in which no political structure, and even the idea of Canada itself, could no longer be taken for granted. Canadians are the heirs of a counter-revolutionary tradition and have always been content to remain within the marked boundaries of established and well-charted political channels. Now, for the first time, there is a sense that Canadians are prepared to break with their traditions and turn their collective bow towards uncharted waters.

Surveying the political landscape in the fall of 1990, it is difficult to summon up great optimism about our ability to overcome our current predicament. The fallout from the failure of Meech has opened very deep wounds across the country and fed historic regional grievances. Opinion polls have been telling us for many years that a growing number of Canadians in all parts of the country believe that their particular region receives too few benefits and too many burdens from Confederation.¹ The failure of Meech cannot help but increase this sense of regional alienation and heighten the urgency of claims for redress.

Quebec public opinion, in particular, has been radicalized by the failure of Meech, and there is now unprecedented support for political independence or "sovereignty association" with the rest of the country. With the death of Meech, Premier Bourassa declared that Canada was "not eternal" and that Quebecers

would undertake a fundamental re-examination of their links with the rest of the country. The National Assembly has constituted an extraordinary parliamentary commission to formulate a new series of Quebec proposals to present to Canada by 28 March 1991. The Quebec Liberal Party has initiated a parallel review process scheduled to be completed by 9 March 1991.

Elsewhere, however, there seems little patience for another effort to address Quebec's demands. Unlike in the late 1970s, there is a widespread sense that perhaps it is time to "let them go" coupled with the associated belief that a Canada without Quebec is viable. At a minimum, there is an insistence that any future constitutional round must deal with the concerns and grievances of all regions, rather than simply those of Quebec. Increasingly, voices are being raised in other parts of the country arguing that the existing federal structure is outmoded and must be fundamentally restructured. There is a growing sense across the country that national political institutions are no longer capable of representing the will of the people. The growing popularity of the Reform Party in western Canada and the CORE party elsewhere are manifestations of this desire for a "new deal" in which the regions will be better represented in national political institutions. The election of the New Democratic Party in Ontario is an indication that this desire for new approaches and solutions has taken hold even in once-staid Ontario.

The highly emotional and symbolic quality of this debate means it will be extremely difficult to bridge the differences which exist. But the problem is further complicated by the lack of any widely accepted and legitimate process for addressing and resolving these concerns. One thing upon which everyone seems agreed is that the elitist and closed-door character of the Meech Lake process has been discredited. But there have been few constructive or concrete suggestions about what, if anything, should replace bargaining between first ministers as a basis for amending the constitution. There is, instead, only an overwhelming cynicism about the motives of our political leaders and a rejection of their right to amend the constitution through a series of closed-door bargaining sessions.

I think it no overstatement to conclude that the Canada of 1990 is in serious trouble. Some years ago, it was common to hear Canadians quote with both pride and expectation Laurier's prediction that the twentieth century would belong to Canada. We are now facing a situation where there is a serious possibility that Canada as we know it will not even survive the century, much less lay claim to it.

Whether Canada does survive in roughly its current form will depend, I believe, on our ability to do two things. The first is to come to a deeper and more realistic understanding of how we arrived at our present predicament. In particular, this requires us to come to a more balanced understanding of what went wrong in the Meech process. As a participant in that process, my perspec-

tive is no doubt highly compromised.² But I regard much of the criticism of the Meech process to be shallow and unenlightening. The criticism has been unduly focused on personalities and political leaders, virtually ignoring a systematic analysis of why the Meech process unfolded in the manner it did.

Public policy does not develop in a vacuum, nor does it happen by accident. The actions and choices of political leaders are always an attempt to balance numerous competing claims and constraints. Moreover, the margin for manoeuvre possessed by political leaders is always far more limited than is suggested by popular accounts of their activities. These observations are commonplace, even trite, but they seem to have been forgotten in the chorus of criticism that has developed regarding the Meech Lake process. Meech Lake, far from being a product of arrogant or wilful political leaders, was an attempt to respond to a series of very powerful constraints and contradictory political pressures. These pressures and constraints greatly limited the range of available options and forced political leaders to pursue a narrow and very focused strategy. What is remarkable is not so much that this strategy failed but that it came so close to achieving success.

My first goal, then, is to provide an account of why the Meech process unfolded in the manner it did and to identify the reasons for its failure. Here I will challenge what is fast becoming the conventional understanding: that Meech failed because elitist politicians attempted to amend the constitution in an illegitimate manner and without proper public consultation. The fundamental problem with this conventional understanding is that it mistakes effects for causes. The secretive nature of the Meech process was a direct result of the conditions under which it was required to be negotiated. These conditions made it extremely difficult to achieve a successful outcome and structured the manner in which the negotiations were conducted. I will identify the nature of these obstacles, how they affected the negotiations, and what impact they will have in the future. In essence, my argument will be that the key to understanding the reasons for the failure of Meech lies in an analysis of the events of 1982 rather than those of 1987. I will suggest that it was the constitutional settlement of 1982 that set in motion a series of events and pressures that ultimately led us to our present predicament.

Coming to a balanced assessment of why Meech failed is important for more than mere historical reasons. The constraints and political forces which led to failure in the Meech process are still very much with us. These political forces will continue to constrain and to shape our political future, just as they have conditioned our political past. Unless we come to an awareness of their import and understand their influence, we will be certain to repeat our past mistakes.

A second precondition for success in the next round of discussions is a realistic assessment of the costs and the implications associated with various alternatives for fundamental constitutional change. There is currently a

tendency to overemphasize the shortcomings of our current political institutions, coupled with a romantic view of the benefits of the possible alternatives. The reality is that our current political institutions have proven themselves to be remarkably durable and flexible, while the alternatives are untested and will certainly produce effects that are virtually impossible to identify in advance. Moreover, there are very formidable political and legal obstacles standing in the path of anyone who would seek to re-order fundamentally our political institutions.

Thus in the second part I will look ahead to the future round of constitutional negotiations. I will identify the very formidable challenges which confront Canadians in the wake of the failure of Meech Lake. I will then sketch out the possible options for constitutional change that will likely attain prominence in the discussions of the next 12-18 months. Finally, I will assess the likelihood that any of these options could actually form an adequate response to our emerging political challenges.

I. WHY DID MEECH FAIL?

There have been a variety of explanations that have been offered for the failure of Meech Lake. One explanation is that the contents of the Accord were simply unacceptable to the vast majority of Canadians. Of course, few Canadians were familiar with the details of the agreement itself. But the agreement assumed a symbolic quality that conditioned Canadians' understanding of its meaning and their support for its contents.

The symbolic meaning of the Meech Lake Accord revolved around the debate over the significance of the "distinct society" clause. For Quebecers, the distinct society clause and Meech itself was a symbol of belonging. By accepting the symbolic recognition of Quebec as a "distinct society," the rest of Canada would have been validating Quebec's sense of its own identity and promising that that identity could be accommodated within Canadian federalism. Outside Quebec, on the other hand, the Accord had become a negative symbol — a symbol that one province was being granted special privileges not accorded to all provinces or to other constitutionally significant groups.

These contradictory symbolic images of the Meech Lake Accord, and the absence of a bridge between them, provides us with one account of the circumstances in which it failed. A related explanation for the failure of Meech is the process that led to its adoption. There are two often-repeated complaints about the Meech Lake process. The first has to do with the secretive, closed-door nature of the negotiations that led to its creation. The process provided minimal opportunities for public input and culminated in the political brinkmanship associated with the prime minister's infamous "toss of the dice." A second complaint about the process was the unwillingness of governments

and political leaders to entertain changes to the Accord once it had been drafted. The Accord was declared to be a "seamless web" that could only be changed in the event of an "egregious error."

The critics of the Meech process argue that the 1981-82 constitutional negotiations were conducted on a much different footing. Roger Gibbins, for example, has argued that in 1981, the Canadian public was intensely involved in the constitutional process prior to the final meeting in November of 1981. Thus, while that debate culminated in a secret meeting of first ministers, the prior public discussions had "set the context for and unquestionably shaped the outcome of those deliberations."³ Furthermore, as Gibbins points out, the final product of the closed-door discussions in 1981 was itself subject to modification and change.

The 1987 process, on the other hand, was conducted on an entirely different basis. Gibbins argues that there was no serious public debate preceding the meeting of first ministers on 30 April 1987. Furthermore, the final text signed by first ministers on 3 June 1987 was declared to be a seamless web that had to be ratified as is; the only possibility of changes would come in a "second round" of discussions following the ratification of Meech.

These various explanations for the failure of Meech immediately give rise to a second question: simply put, this question is "why"? What accounts for the negative symbolism associated with the Meech Lake Accord? Why did political leaders choose to negotiate the deal behind closed doors without any provision for public participation? To these questions, there tends to be a uniform, recurring answer. The critics of Meech tend to lay ultimate blame for its failure at the feet of the political leaders implicated in its creation. Political leadership, or its absence, is blamed for the fact that the debate over Meech tended to be framed in highly symbolic terms. Meech attained symbolic significance, it is said, because political leaders imbued it with this significance. Quebecers were told by their political leaders that a rejection of Meech was a rejection of Quebec. English Canadians, on the other hand, were subjected to threats and "blackmail" by political leaders who warned that Meech must be ratified or disaster would follow.

Political leadership was also blamed for the closed-door process associated with the drafting of the Accord. Alan Cairns, one of our leading political scientists, has summed up the reaction of many thoughtful Canadians to the Meech Lake process; Cairns describes the Meech process as "an oracular, *ex cathedra* style of governing more appropriate to theocratic rulers dictating to the faithful than to elected political leaders explaining themselves to the citizens to whom they are accountable."⁴ Cairns' emphasis on the "style of governing" associated with Meech reinforces the assumption that it is the personalities and the behaviour of political leadership that were primarily to blame for its failure.

These criticisms of political leadership are undoubtedly correct in many respects; the process was highly secretive, there was limited public discussion prior to a final agreement being signed and changes in the agreement were virtually ruled out from the very start. But this line of criticism, because it focuses on personalities and political leadership is, I would argue, ultimately misleading. It mistakes effects for causes, thereby diverting attention from a serious inquiry into the reasons Meech failed.

I will argue that the real underlying explanation for the failure of Meech Lake lies not in the events of 1987 but in the events of 1982. The Meech Lake process should be understood as a response to the political inheritance of the 1981-82 constitutional settlement. There were two central elements of this "political inheritance" which together defined the paths that subsequent political leaders would tread and shaped the product of their journey.

The first element of this "political inheritance" was the ground rules for constitutional change. The *Constitution Act, 1982* established a new set of decision rules for future constitutional amendments, decision rules that were extremely rigid and unwieldy. The attempt to satisfy these unwieldy decision rules was a central preoccupation of the Meech round and constitutes an important part of the story of why it failed. The second element of the political inheritance of 1982 was the decision to proceed in the absence of Quebec, the so-called "exclusion" of Quebec. The decision to proceed without Quebec in 1981 defined the subject matter of the Meech round and had important implications for the manner in which those negotiations had to be conducted. Whether Quebec's exclusion in 1982 was "justified" in some absolute sense is not my concern. The point is that the exclusion of Quebec made necessary a set of negotiations structured around the idea of "bringing Quebec back in" to the constitution. It also significantly increased the political risks associated with such a set of negotiations while at the same time reducing the prospects for a successful outcome.

By tracing the failure of Meech Lake back to the 1982 round of negotiations, I am merely reiterating the simple truth that I identified earlier. This simple verity is that for every cause there is an effect and that political choices are always a response to real or to perceived constraints that exist in a particular political environment. The Meech Lake Accord, as with all political choice, must be situated in the context of the structural limitations and constraints that conditioned its development. This is not to suggest that the participants in the process were utterly blameless or rendered entirely helpless in the face of external pressure. Nor should it be supposed that the structural factors somehow predetermined the outcome. Real choices and options did exist, despite the constraints imposed by the political and legal environment. The point is that it is only possible to come to a balanced assessment of the choices that were made by situating them in the context in which they were made.

THE POLITICAL INHERITANCE OF 1982: THE AMENDING FORMULA

Much of the public discussion surrounding the adoption of the *Constitution Act, 1982* related to the decision to entrench fundamental rights in the Charter. Yet an equally important, if less prominent feature of the 1982 Act was the new amending formula for future constitutional amendments. In fact, the Meech Lake round of discussions is important evidence that the 1982 amending formula may have far greater effects on Canada's political evolution than anything contained in the Charter. There were three elements of the amending formula that had profound implications for the Meech Lake round of discussions. The first was the requirement of unanimous provincial consent for a number of important constitutional amendments; the second was the three-year time limit for certain constitutional amendments; the third was the requirement that constitutional amendments be ratified by provincial legislatures. Let me examine in turn each of these elements and trace their implications for the Meech Lake round of discussions.

The First Element: The Unanimity Requirement

One of the most important elements structuring any set of negotiations is the level of consent required in order to reach agreement. Prior to 1982, the precise level of consent required for a constitutional amendment had been a matter of protracted political and legal debate. The 1982 Act settled the controversy by providing that for certain amendments, unanimous provincial consent was required.

This requirement proved significant in 1986 when Quebec announced its five "conditions" for consenting to the 1982 constitution. Under the rules established by the 1982 *Constitution Act*, at least two of Quebec's "five conditions" required the consent of all ten provinces and the federal houses of Parliament. This meant that any constitutional settlement of Quebec's demands would require unanimous consent of all 11 governments and legislatures.

A decision rule requiring unanimity is bound to produce quite different bargaining behaviour than a rule requiring some lesser degree of consent. A unanimity requirement, because it gives each party a veto, tends to encourage inflexibility and an unwillingness to compromise from one's preferred or optimal bargaining position. A province that refuses to compromise can do so with the certainty that the other parties to the negotiation are powerless to override its objections. Some lesser requirement of consent, on the other hand, introduces an element of uncertainty into the negotiations. Under this decision rule, no single province or even group of provinces can hold to its original or preferred position without the fear that some other coalition will be formed that will override their objections. Each party to the negotiation faces the risk that the need for its consent will be dispensed with entirely, with the result that its concerns will not be reflected at all in the final bargain. This uncertainty acts

as a powerful incentive for *all* the participants to compromise and to seek common ground, thereby increasing the likelihood of a negotiated settlement.

A requirement of unanimity makes it more difficult to reach agreement for a second, related reason. Because each party has a veto on the outcome, there is a strong temptation to attempt to link the subject matter of the negotiations to other unrelated matters. Any party to the negotiations can attempt to extract concessions on these other, unrelated matters in return for its agreement on the particular issues under negotiation. It is obvious that any attempt to introduce extraneous matters into the negotiations significantly reduces the likelihood of a successful outcome. It multiplies the issues that need to be resolved and makes it less likely that an acceptable set of trade-offs can be constructed.

The crucial effect of these different decision rules on bargaining behaviour is dramatically illustrated by the 1981 round of constitutional negotiations. The distinctive feature of these negotiations was that they began on the footing that unanimous provincial consent was required, followed by a period when only "substantial consent" was thought necessary. After September 1981, the Supreme Court had determined that some undefined level of provincial consent was required, and this requirement was conventional only, as opposed to strictly "legal."⁵ By comparing the behaviour of governments in the first period with their behaviour following the Supreme Court's decision, we can obtain an important illustration of the crucial impact that decision rules have on bargaining behaviour. Significantly, the bargaining behaviour of the provinces varied dramatically depending on which decision rule governed the negotiations.

Prior to September 1981, when the provinces maintained that unanimous consent was necessary, the eight provinces opposed to the federal government's proposals maintained a common front of opposition. Each member of the "gang of eight" adhered strictly to a common set of demands and refused to entertain any compromise in their position. However, after the Supreme Court determined that only "substantial consent" was required, the provinces found it impossible to maintain this common front. At the November 1981 First Ministers' Conference (FMC), seven of the eight dissident provinces compromised and reached an agreement with the federal government; the pressure to compromise was so great that the parties to the agreement were prepared to proceed in the absence of the province of Quebec and risk the "incalculable consequences" promised by Quebec Premier René Lévesque.

Implications — The unanimity requirement had one rather obvious impact on the Meech Lake round; because the Accord required the consent of all Legislatures, two provinces with less than 10 percent of the national population were able to block the passage of the Accord. But the impact and significance of the unanimity requirement was evident from the very beginning of the process, not just at its conclusion. Because each province had an absolute veto, there was a limited incentive for compromise and each province's concerns

would have to be met before an agreement could be obtained. Moreover, there was no other source of countervailing pressure on any of the provinces which might have induced them to compromise or modify their positions. This structured the negotiations throughout and foreshadowed the "province's round" character of the eventual outcome.

Quebec came to the table seeking symbolic recognition of its distinctiveness as well as a number of defined powers designed to preserve and promote this distinct identity. Every other government around the table had a veto over the negotiations. And these other governments had both substantive and symbolic interests in the outcome of the negotiations. In particular, a number of provinces were firmly committed to the principle of the equality of the provinces. This was a principle for which the "gang of eight" had fiercely fought in the 1982 negotiations. They had succeeded in securing its recognition in the 1982 constitutional settlement, particularly in the amending formula which rejected the concept of special vetoes for individual provinces in favour of a generalized right to "opt out." Each province had also secured an individual veto over any future changes to the amending formula. The provinces which had fought for and secured acceptance of the equality principle in 1982 were certain to resist any attempt to diminish its centrality in the Meech discussions.

The obvious solution was to grant Quebec the special powers that it desired while granting similar powers to the extent possible to all other governments. Thus Quebec's demand for a veto on future constitutional amendments could be met by extending a similar veto to all governments. This "squared the circle" between Quebec's demand for recognition on the one hand and the provincial equality principle on the other. The only Quebec demand not susceptible to this solution was the "distinct society" clause; but this was largely symbolic and was expressly declared not to diminish the powers of any other government.

This approach — meeting each of Quebec's five conditions by generalizing those conditions in favour of all the provinces — has been severely criticized by a number of commentators. But the unanimity requirement inherited from 1982 meant that an approach along these lines represented the only practical way of arriving at a negotiated agreement. Any other approach would have been confronted with the fact that a single province possessed a veto over the total package. And, as we shall see, certain other features of the Meech Lake discussions made the consequences of failure very significant, thus increasing the pressure to achieve agreement.

The Second Element: The Three-Year Time Limit

The parties to the Accord proceeded on the footing that the agreement was subject to a three-year ratification period.⁶ This is in contrast to the 1981-82 round, in which there was no formal time limit for the ratification by the Federal Houses and the Parliament at Westminster.

Because of the extended period available for ratification, a number of governments proceeded at a rather leisurely pace before seeking legislative ratification of the Accord. By the end of 1987, nearly seven months after the Accord had been signed, it had been ratified by only three provinces, Quebec, Alberta and Saskatchewan. Contrast this with the experience in 1981; there was no time limit for ratification, yet the period between intergovernmental agreement and ratification was less than five months.⁷

There is an inverse relationship between the length of time required for ratification and the likelihood that an amendment will become law. The first and most obvious reason is that the passage of time brings with it the possibility that governments might change. Given the inherently adversarial relationship between governments and opposition parties in a parliamentary system of government, opposition parties who come to power will not necessarily want to carry forward with the constitutional projects of their predecessors.

But the passage of time decreases the likelihood of an amendment being ratified for a second, less direct reason. In any political situation, delay tends to favour the opponents of a measure. Delay provides the political opposition with the opportunity to mobilize support and to focus attention on the political costs of any proposed measure. Indeed, many political battles are won or lost on process questions rather than on the substantive merits, with opponents concentrating their energy on defeating a proposal through the simple expedient of forcing a delay in its consideration.

In the Meech Lake round, delay clearly worked against the ratification of the Accord. Within months of the agreement, two governments who were not parties to it had been elected and had evinced doubts about proceeding with ratification. More importantly, a broadly based and well-organized opposition to the Accord had developed among women's groups, native organizations and other "rights seeking" groups. While the Accord initially enjoyed significant public support, by the end of 1987 public support for the Accord began dropping like a stone.⁸ Clearly, time was on the side of the opponents of the Accord. As the deadline of 23 June 1990 approached, certain commentators suggested that the deadline was "artificial" and should be extended to permit more time for public debate. But given the inverse relationship between delay and the successful ratification of a measure, such a further delay would have been futile, only further eroding public and governmental support and eliminating the slim chances of the Accord becoming law. Thus there was no attempt to extend the deadline for ratification for the simple reason that such an extension would have decreased rather than increased the chances of the Accord's success.

The Third Element: The Requirement of Legislative Ratification

The 1982 amendment procedure entrenched a requirement of ratification by all legislatures for certain constitutional amendments. This represented a very

significant change from 1981-82. Even though the Supreme Court of Canada had declared that the "substantial consent" of the provinces was required for fundamental constitutional change, this merely required the consent of governments as opposed to legislatures. The only legislative resolution required in the 1981-82 round was the resolution approved by the federal Senate and House of Commons.

There were three principal effects flowing out of the requirement of legislative ratification, all of them tending to make ratification more difficult. The first and most obvious effect was delay; with 11 legislative resolutions required, the time period between intergovernmental agreement and final ratification would be much longer. Given the inverse relationship between delay and the prospects for ratification outlined above, this longer time period represented a significant additional hurdle. The second related effect of requiring legislative approval was to increase the opportunities for opponents of the Accord to block ratification. Opponents of the Accord could attempt to take advantage of the various mechanisms that opposition parties possess to block government measures within the individual legislative processes. This was particularly significant in Manitoba with the government in a minority situation after 26 April 1988. The minority position of the government in Manitoba meant that any modifications in the Accord designed to permit its ratification had to receive the support of at least one of the opposition parties, in addition to the government of the province. Nor would the support of the party leaders necessarily guarantee ratification, as the experience in Manitoba in June 1990 illustrated. The opposition of a single member, Elijah Harper, resulted in the Accord never even coming to a vote prior to the 23 June deadline.

The third effect flowing out of the requirement of legislative approval was more indirect but was arguably the most important. There is no mechanism that currently exists to coordinate the decisions or the deliberations of individual legislatures. Yet the amending formula requires each legislature to enact precisely identical constitutional resolutions. This requirement of identical resolutions from 11 different legislatures presented a coordination problem of very considerable proportions. Each legislature would consider a constitutional resolution in isolation without any framework for coordinating its individual deliberations with those taking place in other provinces or between governments. The absence of an effective "feedback loop" meant that if each legislature were permitted to enact amendments on its own, it would prove impossible to ensure that identical resolutions were enacted by all 11 legislatures and the process would be rendered unworkable.

The only mechanism or forum that provided an opportunity for trade-offs to be made between competing provincial positions was negotiation among first ministers. These negotiations are typically designed to reach agreement on a formal legal text embodying a proposed constitutional amendment. Any such

legal text will necessarily reflect a series of trade-offs, with the final wording representing a delicate balance between the competing positions of the various parties.

What is crucial to remember is that even a relatively minor change in that wording will upset that balance and eliminate the consensus which formed the basis of the agreement in the first place. Thus even apparently minor changes will require a re-opening of negotiations designed to take account of any changes that have been made.

A concrete example from the Meech Lake discussions will illustrate the crucial impact of even minor changes in legal wording. The communiqué of 30 April 1987 included a stipulation that the federal government would provide compensation to a province that did not participate in a shared-cost program in an area of exclusive provincial jurisdiction if the province undertook an initiative that was compatible with "national objectives." There was a good deal of criticism of this provision between the Meech Lake meeting and the Langevin meeting in June 1987, with critics suggesting that there should be greater precision regarding the meaning of "national objectives." This matter was extensively debated during the Langevin meeting with the governments of Ontario and Manitoba insisting that the "national objectives" had to be defined by the Parliament of Canada, rather than by the provincial governments. There was some resistance to this argument from the province of Quebec, which had been maintaining publicly that the "national objectives" did not necessarily refer to the particular objectives associated with the shared-cost program that was under consideration.

The result of these discussions was that the final legal text was clarified to specify that the shared-cost program was to be "established by the Parliament of Canada"; this implicitly recognized that the objectives of the program would be defined by the Parliament of Canada rather than by the provinces. The English version of the final legal text also added the word "the" prior to "national objectives," reflecting the view that the objectives must be linked to the particular shared-cost program rather than to some more generic conception of "national objectives."

This wording reflected a clear compromise between the desire to ensure that the federal government had the responsibility for defining the national objectives, countered by a desire to ensure flexibility for provincial governments in implementing those objectives. The clause had been clarified to a considerable degree, but further attempts to clarify the clause were considered and found unacceptable by the government of Quebec at the Langevin meeting.⁹

It is of course possible to denounce this relatively modest change in wording as trivial or insufficient to deal with the public concerns that had been expressed. The fact remains, however, that it was this modest change in wording, in conjunction with various other modifications agreed to at the Langevin

meeting, that permitted all governments to support the Accord. If the text were to be modified, even slightly, then the compromise that constituted the basis of the agreement would also be altered and the intergovernmental consensus would cease to exist.

This understanding of the significance of the final wording of the constitutional resolution helps to explain why it was so difficult to provide an opportunity for individual legislatures to consider amendments. Any amendments by individual legislatures, even those which were apparently relatively minor, would alter the delicate balance between competing interests reflected in the legal text. Moreover, there is no mechanism for permitting the amendments proposed by individual legislatures to form the basis for a new series of trade-offs that might give rise to a new consensus. Each legislature considers amendments on its own, in isolation from the legislatures and governments in other provinces. There is no forum or process whereby the concerns or objections of individual legislatures might be traded-off against one another. The result is that opening the process to amendments by individual legislatures would lead to an inevitable unravelling of any agreement, as individual legislatures enacted amendments that met the particular concerns of their constituents, without addressing the concerns or perspectives of residents elsewhere. There was no "feedback loop" that would permit the concerns or objections of individual provinces to be coordinated with each other so as to permit an amendment to be successfully ratified.

The way in which this coordination problem was overcome was to eliminate any possibility for individual legislatures to consider possible amendments. Legislatures were asked to approve a single constitutional resolution which had been agreed to by governments on a "take-it-or-leave-it" basis with no opportunity to consider even apparently minor amendments. But this approach created a whole series of subsidiary problems. Despite the legal requirement of 11 separate legislative votes on the constitutional resolution, there was no meaningful opportunity to consider amendments, no matter how minor or narrow they might appear to be. Even in a parliamentary system of government with executive control of the legislature, there is normally some scope for the legislature to modify proposals from the government. The absence of any such discretion in the consideration of a constitutional resolution thus created an exceptional situation which seemed an affront to normal democratic principles and procedure. There was an obvious and very public contradiction between the apparent and the real power of legislatures, a contradiction that undermined the credibility of the process and fuelled a perception that the whole exercise was little more than a sham. What was particularly difficult was that this inherent contradiction between the apparent and the real role of individual legislators would be played out on 11 separate occasions, with each repetition further discrediting the process in the minds of the public.

In short, the 1982 rules for legislative ratification had created a process without providing a mechanism to ensure that the process could function effectively. The *Constitution Act, 1982* had established a formal legal role for individual legislators. But no provision had been made to link legislative deliberations with the earlier discussions between governments, or with the deliberations of other legislatures. The only place where trade-offs between competing positions could be made was through discussions between first ministers. But each first minister is linked only to a single legislature. This meant that each legislature would play the role of a "rubber-stamp" for the decisions and compromises made by first ministers.

The absence of an effective "feedback loop" linking individual legislatures with each other or with other governments represents a serious design defect in the 1982 constitutional rules. The means chosen to remedy the defect — essentially to deny any meaningful role for legislatures — had the unintended consequence of undermining public support for the process and the substance of Meech Lake. Thus this particular feature of the 1982 amending formula represents one of the key elements in any explanation as to why Meech Lake failed.

THE POLITICAL INHERITANCE OF 1982 REVISITED: THE EXCLUSION OF QUEBEC

Much has been written about the decision to proceed without the consent of the government and National Assembly of Quebec in the 1982 round of discussions. Within the province of Quebec, the exclusion of Quebec has been portrayed as a monstrous betrayal of the promises of "renewed federalism" made during the referendum campaign. Others, most notably former Prime Minister Pierre Trudeau, argue that Quebec was excluded because its political leaders were separatists who were unwilling to consider any reasonable accommodation with the other provinces or the federal government.

I want to put this debate to one side for a moment and consider a second-order issue. This issue is whether or not the exclusion of Quebec made it necessary to attempt to "bring Quebec back in" at some subsequent point in time.

I take the view that, *regardless* of your attitude towards the events of 1982, those events made it necessary to achieve some new accommodation with Quebec. This, in effect, was the price of the decision to proceed over the objections of Quebec. The decision to proceed may have been perfectly legal and consistent with constitutional convention. But it produced a political dynamic that could not be simply ignored.

There are principled as well as pragmatic reasons supporting this conclusion. In terms of political principle, a basic cornerstone of our system of government is voluntary consent. The Quebec government, even the government headed by Mr. Bourassa in 1985, did not accept the political legitimacy of the arrange-

ments negotiated in 1982. Nor would any future Quebec government, regardless of political stripe, willingly accept the existing constitutional arrangements. Thus the constitutional arrangements of 1982 lacked basic moral and political legitimacy in the province of Quebec. This legitimacy could only be conferred as a result of the willing consent of the government of Quebec to the Canadian constitution.

There were pragmatic political considerations that also pointed towards the same conclusion. Quebec nationalism was a latent force in the mid-1980s. But it was certain that Quebec nationalist forces would witness a resurgence at some point in the future. At that point, the political illegitimacy of the 1982 settlement would only add fuel to nationalist fires in the province. If the constitutional issue remained unresolved, it would then constitute a political crisis of major proportions. Moreover, the refusal of Quebec to consent to the *Constitution Act, 1982* meant that the province refused to participate in any other constitutional discussions. This meant that other constitutional amendments, such as those dealing with aboriginal rights or Senate Reform, would be more difficult to secure. The significance of Quebec's absence from the table was illustrated at the 1985 and 1987 First Ministers' Conferences on Aboriginal rights, in which it proved impossible to secure the necessary consent from the other nine provinces to advance successfully an amendment.

There were thus compelling reasons in favour of securing Quebec's willing consent to the *Constitution Act, 1982*. It should be noted that there have been a few prominent dissenters from this view. Commentators such as the former Prime Minister, Pierre Trudeau, have argued that the consent of the Quebec government is simply unnecessary since the province is already legally bound by the 1982 Act.¹⁰ But it is significant that this argument about dispensing with Quebec's consent is of recent vintage, appearing in the days following the negotiation of the Meech Accord. In the period prior to the negotiations at Meech Lake, no one inside or outside the province of Quebec was suggesting that Quebec's consent to the constitution was superfluous. In the two or three years leading up to the meeting of 30 April 1987, there was virtual unanimity among both English and French Canadian elite opinion that the events of 1982 required some form of redress.

There are many examples of this consensus which could be identified, but only a few will be noted here. The Macdonald Commission, in its comprehensive analysis of the future of Canadian institutions published in 1985, concluded that it was necessary to seek a "renewed understanding between Quebec and the rest of Canada."¹¹ The Commission proceeded to advance a series of concrete proposals which might form the basis of this renewed understanding. At the same time, political leaders in all parts of the country, and from all political parties, adopted a similar view. This included the prime minister and the leaders of the two major national opposition parties as well as the premiers

of all the provinces. Even those who were later to become the most vigorous critics of the Meech Lake Accord initially supported the attempt to reconcile Quebec to the constitution. For instance, the *Toronto Star* reacted to the proposals made by Minister Rémillard at Mont Gabriel in May of 1986 with the observation that the constitution lacked moral standing in the province of Quebec and that "it behooves us to address Quebec's concerns."¹²

The conclusion that flows from this analysis is that the constitutional amendments of 1982 were achieved with a price attached. That price was the negotiation of a subsequent accommodation with the duly elected government of Quebec. The decision to proceed unilaterally in 1982 made it essential that there be some attempt to "bring Quebec back in" to the constitution. If this observation is correct, then there are at least six additional conclusions that follow:

1. Any such negotiations would necessarily be highly symbolic and politically charged.

Symbolism is an inherent part of all constitutional negotiations, since changes to a constitution always implicate intangible, symbolic considerations. As has often been pointed out, it is for this reason that constitutional negotiations are notoriously difficult to resolve successfully.¹³ But any negotiations structured around an attempt to "bring Quebec back in" to the constitution would have a heightened sense of symbolism attached to them. Part of the explanation for this heightened symbolism lies in the collective memory of the events of 1982 themselves. Within Quebec, these events had been portrayed as a "betrayal" of Quebec by the rest of Canada. This perception of 1982 may not have been widely shared among English Canadians. But the mere fact that English Canadian political leaders conceded that a "Quebec round" was necessary constituted an implicit admission of the legitimacy of Quebecer's views on this issue. Thus the issuance of the "Edmonton Declaration" of 1986 calling for a "Quebec round" reinforced within Quebec the idea that the province had suffered a "wrong" in 1982.

2. This meant that the Meech Lake negotiations would only ostensibly be about dry constitutional texts. The real subject matter of the discussions, at least in the province of Quebec, would be about "honour."

Quebec, finding itself betrayed, now sought to restore its dignity and honour. The only question for Quebecers was whether English Canadians were prepared to make amends for the events of 1982.

The centrality of the idea of honour is reflected throughout the process. Prime Minister Mulroney, in his famous Sept-Îles speech of August 1984, framed the issue in terms of Quebec accepting the 1982 constitution with "honour and enthusiasm."¹⁴ Minister Rémillard announced Quebec's "five conditions" in a speech entitled: "Nothing Less than Quebec's Dignity Is At Stake In Future

Constitutional Discussions.”¹⁵ In the main body of the speech, after enunciating the five conditions, Minister Rémillard summarized his presentation by noting that “what we are asking for is the respect of the dignity and pride of the people of Quebec and respect of the province’s historic rights.” This emphasis on considerations of honour and dignity ran very deep throughout these discussions in the province of Quebec, exemplified by Premier Bourassa’s declaration in early 1990 that Quebec refused to re-enter Confederation “on our knees.”

3. While the substance of the negotiations would be important, of equal if not greater importance was the form or public face of these negotiations.

Given the centrality of considerations of “honour,” any negotiations must be seen as restoring the dignity and honour of Quebec. If Quebec was seen to be dishonoured in any way, either in terms of process or outcome, then the negotiations would end in failure. The result would be a further alienation of Quebec from the rest of Canada and resurgence of radical nationalism in the province of Quebec.

4. Quebec’s political leaders could not be seen to be making concessions to the rest of Canada.

Quebec had stated its five conditions for re-entry into the Canadian constitutional family. There could be no question of Quebec “backing down” or modifying its demands to accommodate concerns in other parts of the country. Any such move to “back down” would constitute a loss of face and negate the symbolic purpose of the negotiations — the restoration of the honour and dignity of Quebec.

5. Failure in the negotiations had to be avoided at all costs, since it would be seen as a rejection of Quebec and of Quebec’s “historic rights.”

A failure to conclude an agreement would mean that the rest of the country had rejected a series of minimal and legitimate demands from Quebec. English Canada would have proven itself unwilling to provide redress for the events of the early 1980s. Thus the decision to commence negotiations was a fateful one, since it was imperative that they result in a satisfactory agreement.

It should be emphasized that this requirement that the negotiations produce a negotiated solution was a unique feature of the Meech Lake negotiations. Canadians had been discussing the constitution off and on for about 60 years. But these various negotiations had never been conducted against the backdrop of serious political instability in the event the negotiations failed. Political leaders in previous settings had always been free to leave the constitutional table without reaching agreement, secure in the knowledge that such a result would not imperil the future of the country. In the Meech round, a new and unprecedented set of ground rules came into play, ground rules that made a negotiated agreement virtually mandatory.

6. In the event that an agreement to "bring Quebec in" was negotiated, there would be no scope for Quebec political leaders to agree to subsequent modifications.

Any further concessions after the signing of an agreement would be seen within Quebec as "backing down" in the face of pressure from English Canada. Thus it was absolutely essential that Quebec political leaders not make any further compromises once an agreement had been signed. In fact, it would be preferable for Quebec leaders to allow a negotiated agreement to lapse rather than to make concessions in the hope that the agreement might be ratified. While non-ratification of an agreement would give rise to serious negative consequences, the implications of "amending" the agreement were arguably even more serious. The making of such concessions would constitute a fatal "loss of face," in which Quebec would be seen to be negotiating "on its knees." This would be a contradiction of the symbolic purpose of the negotiations and produce a profound political destabilization in Quebec.

All of these conclusions highlight the extremely limited flexibility available to Quebec's political leaders. Whatever minimal flexibility that they did possess was at its high point in the early stages of the negotiations. The longer the negotiations continued, the more limited was their room for manoeuvre. A long and protracted series of negotiations would give rise to the impression within Quebec that the rest of Canada was unwilling to meet their "minimal demands." The negotiations would have to be relatively short and smooth if the outcome were to be successful.

As for political leaders in English Canada, their flexibility in the negotiations was only marginally greater than that possessed by Quebec. For one thing, the perceptions within English Canada of the events of 1981-82 were the mirror image of those held in Quebec. The referendum and the 1982 constitutional settlement were seen as a just resolution of outstanding constitutional claims. In Pierre Trudeau's words it was one that established a "creative equilibrium between the provinces and the central government...set to last a thousand years."¹⁶ Outside Quebec, the failure of the Quebec government to accept the *Constitution Act* of 1982 was attributed more to the presence of a separatist government in Quebec City than to any inherent injustice in the process or its result.¹⁷ There was little support outside Quebec for the view that Quebec had legitimate grievances as a result of the 1982 constitutional discussions. This meant that there was limited tolerance in the rest of the country for significant concessions to Quebec to "make amends" for the events of 5 November 1981.

A second complicating factor within English Canada was an emerging political ideology in favour of the "equality of the provinces." If the idea of "special status" had been the rallying cry for Quebec nationalists, the idea of

provincial equality had been an equally powerful organizing principle for the rest of the country. The former Prime Minister, Pierre Trudeau, had resisted Quebec's claims for "particular status" on the basis that it violated the essence of the federal principle itself. The claim that all provinces were juridically equal had been advanced vigorously by the western provinces in the constitutional discussions of the late 1970s. By the mid-1980s, there was a widespread political constituency in English Canada committed to the idea that provincial equality was "inherent" in the idea of federalism itself. Any attempt to tamper with the equality principle would be characterized as an attack on the very bedrock of Canadian federalism.

A third factor limiting the flexibility of English Canadian political leaders was the changing demographic characteristics of the country. Prior to the Second World War, the Canadian population had been dominated by persons of either British or French descent. Thus the central task of political institutions up to that time had been the attempt to reconcile the competing claims of these two "founding peoples." But in the years following 1945 Canada has become increasingly multicultural and multiracial as the British and French elements of the population have declined dramatically. By 1981 the "other" — non-British and non-French — had passed the French component of the population and is now nearly one-third of the population. By the first half of the twenty-first century the "other" could be the single largest element of the population.¹⁸

These trends have profound implications for politics in this country at both a substantive and symbolic level.¹⁹ In terms of symbolism, these developments represent a head-on challenge to political activity structured around the axis of French-English relations. Yet it was this very axis that was at the heart of the Meech Lake negotiations. The challenge for English-Canadian leaders would be to resolve the issue of Quebec's place in confederation without appearing to assert the primacy of French-English relations. One hesitates to suggest that such a task verges on the impossible. But it is certainly a formidable challenge for which there is no obvious or uncontroversial solution.

MAKING MEECH: FROM MONT GABRIEL TO THE OTTAWA UNION STATION

It is becoming increasingly commonplace to conclude that Meech Lake failed because of "political bungling." But my argument thus far has been designed to show how the Meech negotiations were confronted by a series of very formidable legal and political obstacles. These obstacles included an unwieldy and rigid amending formula; issues that were highly symbolic and thus not readily amenable to compromise; and political forces that reduced the flexibility of the negotiators on both sides and limited their ability to make concessions.

Far from an exercise in political bungling, the Meech process was an attempt to overcome these challenges and constraints which I have identified. I will not

attempt here to provide a full account of the negotiations that began in the summer of 1986 and concluded in the week-long marathon session in the former Ottawa train station this past June.²⁰ Instead, I want to focus very briefly on three of the major critiques that have been levelled against the Meech process and consider these criticisms in light of the factors I have identified.

Critique One: Meech Was Bungled Because it Focused Exclusively on the Concerns of the Province of Quebec

This is one of the often-repeated explanations as to why Meech failed. It is said that the focus on the concerns of the province of Quebec led to the "exclusion" of other groups, such as aboriginals, women and ethnocultural Canadians. These groups, it is said, were sympathetic to the concerns of the province of Quebec. Their objection was that Quebec's agenda was being considered in isolation from their constitutional grievances.

This argument ignores one of the key constraints on the Meech negotiations, the rule requiring unanimous consent of all provincial governments. As earlier indicated, this decision-rule makes negotiated solutions extremely difficult. A unanimity rule grants each party to the negotiations a veto and enables them to hold out until their particular agenda has been satisfied. It also encourages parties to the negotiations to attempt to link the negotiations with other extraneous concerns.

The presence of the unanimity rule made it essential that the subject-matter of the negotiations be limited in advance. Unless some limiting ground-rules were established, it would be virtually impossible to reach a negotiated solution. The unanimity rule meant that the list of items under negotiation would continually and inexorably expand, making any comprehensive settlement simply unattainable. This, of course, is what did happen anyway, despite the decision to restrict the agenda to the five conditions identified by Quebec. Alberta and Newfoundland added the issues of "Senate Reform" and "Fisheries" to the agenda and required that they be addressed. But given the Edmonton Declaration, these provinces were prepared to accept that their concerns would only be addressed in a preliminary fashion in the Meech Lake agreement itself. They were prepared to concede that a comprehensive settlement of their outstanding claims would have to await a second round of negotiations. In short, it can be said that the decision to restrict the agenda to a limited number of items was an essential precondition to any negotiated settlement. Had the negotiations been conducted on the footing that any and all outstanding claims would be satisfied, unanimous agreement would have proven simply impossible.

Critique Two: Meech Was Bungled Because it Gave Premier Bourassa More Than He Asked For

This is another frequent criticism of the Meech process, focusing on the differences between the original "five conditions" and the terms of Meech Lake itself. According to this critique, the original five conditions were reasonable and moderate. The problem is that Meech Lake went beyond the "five conditions"; instead of recognizing the distinct society of Quebec in a preamble, Meech Lake inserted it in the main body of the constitution; Meech Lake granted the special powers claimed by Quebec to all the provinces rather than to Quebec exclusively; and Meech Lake addressed other matters that were never included in Quebec's demands and which were raised only at the last minute by other provinces.

Certain aspects of this critique are based on a simple misapprehension of how the negotiations proceeded. For example, there has been a great deal of criticism of the fact that the "distinct society" clause was included in the main body of the constitution rather than a preamble. But it is important to observe that the May 1986 speech by Minister Rémillard referred to the need to recognize the distinct identity of Quebec without specifying where this clause would appear. By the fall of 1986, the government of Quebec had tabled with the federal government and with each of the provinces a proposed constitutional "text" reflecting the five conditions. The Quebec constitutional proposals specified that the recognition of the distinct identity of Quebec would be included in the main body of the constitution. Other governments accepted this principle and the negotiations leading up to 30 April 1987 were largely focused on the precise wording of such a clause rather than its location. Thus it is simply factually incorrect to claim that the distinct society clause went beyond what Premier Bourassa himself had requested.

The other problem with this critique is that it ignores the fact that the "five conditions" outlined in May of 1986 were only a starting point for the negotiations. It was inevitable that there would be significant differences between this starting point and the eventual outcome of the negotiations. More importantly, the changes that were agreed to were not the result of a lack of "political will" or the product of bungling, but simply a response to the constraints I have earlier identified. Matters such as Senate Reform and Fisheries were added to the agenda because each province possessed a veto over the negotiations. Similarly, the gains made by Quebec were extended to all other provinces in order to secure their consent for the package. This was the only approach that satisfied Quebec's demands while not offending the "equality of the provinces" principle. In the absence of these modifications, the original "five conditions" could simply not have formed the basis of a unanimous agreement.

Critique Three: Meech Was Bungled Because the Process Was Undemocratic

The attack on the Meech Lake process is perhaps the most frequently voiced and vehement criticism of the Quebec round. As noted above, the critique has two distinct components. First, it is noted that the negotiations that produced the accord were conducted entirely in private with no opportunity for public input. Second, once the Accord was negotiated governments refused to entertain any modifications or changes to its terms.

It is beyond dispute that the entire Meech process was conducted behind closed doors, involving only the first ministers and their advisors. It should also be acknowledged that the secrecy surrounding the Meech process was exceptional, with far fewer opportunities for public discussion and input than had been the case in previous constitutional discussions. For example, prior to the meeting of 30 April 1987, no government had even publicly conceded that negotiations on Quebec's five conditions had in fact begun. The meeting of 30 April was described by the prime minister and by Senator Murray as an "exploratory meeting" to determine whether negotiations should commence, rather than a "formal negotiating session."²¹ Then, when an agreement was announced, all governments were united in their unwillingness to consider substantive changes.

These elements of the critique of the Meech process are obviously correct. The more difficult and interesting question is: what is the explanation for the secretive and inflexible approach that was adopted throughout the Meech negotiations? It is in responding to this question that the critique of the Meech process begins to break down.

Popular criticism of the Accord tends to blame errant and misguided political leadership for conducting the process in a manner that doomed it to failure. The reality is precisely the opposite of this popular image. The Meech Lake Accord was negotiated behind closed doors because this was the only approach that stood any chance of succeeding. A more public process stood virtually no prospect of resulting in a unanimous agreement on Quebec's five conditions.

Consider the prospects for resolving Quebec's five conditions as they appeared in the summer of 1986. The government of Quebec had proposed a reasonable set of conditions for acceptance of the Canadian constitution. But translating those five general principles into the basis for a unanimous agreement between governments was still a long shot. The sobering fact was that in over 60 years of constitutional negotiations, there had *never* been unanimous agreement on Quebec's place in Confederation. The constitution was a "genie in a corked bottle."²² Once the bottle was uncorked, there was a danger that the genie would "grow to unpredictable proportions, or become unmanageable."

Thus as early as the Mont Gabriel conference in May 1986 there was already an emerging consensus as to the strategy that would be necessary in order to secure Quebec's adherence to the constitution. The Report of the Mont Gabriel

Conference, published early in 1987, clearly outlined the elements of this strategy. First, the agenda must be limited to the five conditions outlined by Mr. Rémillard. Second, "a preliminary set of informal discussions should take place behind closed doors" in order to identify whether a consensus was possible.²³ Only when such a consensus was identified should the negotiations enter a public phase.

The working assumption underlying this approach was that the Quebec government would find it very difficult to retreat from a specific proposal once that proposal was publicly known. Thus by conducting "informal negotiations" on a private basis, Quebec gained a measure of flexibility in the negotiations which a public discussion would have precluded. The description of the initial discussions as "exploratory" rather than as "formal negotiations" also reflected an attempt by the Quebec government to preserve the option of walking away from the negotiation table without the risk of significant political instability.

This strategy "worked," at least in the sense that it permitted all governments to reach a unanimous agreement on Quebec's five conditions. Quebec officials conducted two cross-country tours of provincial capitals in the summer and fall of 1986 in order to gauge reaction to their proposals. In presenting their proposals, Quebec officials stressed that they were "working documents" only and that they were willing to entertain modifications in the interests of achieving consensus. Through a process of give and take, the proposals were modified until a consensus began to emerge in March and April of 1987. But the Quebec officials stressed that the moment the substance of the negotiations became public, all their flexibility would instantly disappear. Thus a successful outcome was entirely dependent on the ability to conduct the negotiations on a private and confidential basis.

Once an agreement was negotiated, it was impossible for the government of Quebec to agree to any substantive amendments. The reasons for this have been outlined earlier: any modifications to the Accord would be interpreted within Quebec as "backing down" in the face of pressure from English Canada. The ratification phase was subject to a classic zero-sum dynamic. Quebec having determined its "minimal conditions," the only remaining issue was the willingness of the rest of English Canada to meet these conditions. There was absolutely no possibility of the Accord being amended after June of 1987 and being re-ratified by the province of Quebec.

The impossibility of amending the Accord at this stage to take account of the concerns of English Canada was illustrated by the experience of the Charest Committee in early 1990. After insisting for nearly three years that the terms of the Accord were a "seamless web," the government of Canada altered its stance and agreed to the appointment of the Charest Committee in April 1990. The mandate of the Charest Committee was to make recommendations regard-

ing a companion resolution, which would have in effect amounted to amendments to the original Accord.

The change in approach was initially hailed as a breakthrough in the ratification process with groups outside Quebec congratulating the government for its willingness to finally consider substantive amendments. The Committee duly conducted public hearings and developed a package of proposals that would have met some of the concerns expressed by opponents of the Accord. But the difficulty with the new approach was instantly revealed by the reaction of the government of Quebec to the proposals. The proposals were denounced within Quebec as a "humiliation" and an attempt to convert the Quebec round into a "Canada round." Nationalist critics in Quebec pointed to the sheer number of the recommendations in the Charest report as evidence of the fact that the gains that Quebec had secured in the original Accord were being threatened. Following the resignation of Lucien Bouchard, the federal government's chief political minister for Quebec, Premier Bourassa pronounced the proposals to be "unacceptable" to the government of Quebec. Reflecting the zero-sum dynamic of the negotiations, Premier Bourassa insisted that no changes were possible to the distinct society clause, even changes that could be described as mere "clarifications" of the original and agreed meaning of the clause.

The Charest committee episode was one of the most revealing of the entire Meech process. The committee proposals were a classic attempt to achieve a compromise that succeeded in satisfying no one. While the proposed amendments were seen as a "humiliation" in Quebec, for English Canadian critics of the Accord such as Clyde Wells or Gary Filmon, the problem with the proposals was that they did not go far enough. Arguably, the federal government's decision to strike the committee complicated the whole process and made prospects of ratification even more remote. By proposing substantive amendments to the Accord, the committee reinforced an impression held by many English Canadians that amendments to the Accord were still possible in the spring of 1990. This hope was a false one, but it was widely and tenaciously held. It took six days and nights in the former railway station in Ottawa to finally convince Gary Filmon, Sharon Carstairs, Gary Doer and Clyde Wells of the true nature of the choice they had to make.

THE FAILURE OF MEECH LAKE: A REASSESSMENT

When Canadian political leaders began negotiations aimed at securing Quebec's willing acceptance of the constitution, most commentators agreed that the time was ripe for a successful outcome. By the summer of 1986, all the elements necessary for a resolution of Quebec's historic claims for a renewed federalism seemed to have fallen in place; a federalist government had been elected in Quebec on the basis of five relatively modest "conditions"; the

nationalist fires in Quebec had cooled following the referendum and constitutional debates of the early 1980s; the government in Ottawa was committed to securing the signature of the Quebec government on the constitution; and the premiers of the other nine provinces had all agreed to put aside their own concerns and focus exclusively on a "Quebec round" as a priority matter.

Yet despite these positive indications, the negotiations ended in stalemate and the country was left more divided and embittered than it had been in many years. Understanding what went wrong and how, if at all, it might be fixed, becomes a matter of some urgency. For if we were unable to resolve the "Quebec question" in the relatively tranquil atmosphere of 1986, what prospects are there for finding a solution in the much more threatening political climate of 1990?

The first lesson of the Meech process is that, despite the apparent tranquility prevailing in 1986, there were a series of unnoticed but very significant obstacles standing in the way of a successful resolution. The Meech Lake discussions were conducted in the context of contradictory structural constraints and imperatives, each of them pulling in precisely opposite directions. These structural factors channelled and conditioned the choices made by political leaders, and established the framework within which those choices would be debated and assessed by the public. Together, these structural factors made the achievement of an agreement extremely difficult and ensured that any agreement that was reached would be fragile and easily unravelled.

The first structural imperative was the formal decision rules for constitutional change which had been established in 1982. These decision rules subjected the process to a series of rigid formalities that made the achievement of a constitutional amendment extremely difficult. All provinces were granted a veto over significant constitutional changes, including changes sought by the province of Quebec. Furthermore, the amending formula did not simply require the agreement of governments, as had been the case prior to 1982, but required identical constitutional resolutions passed by 11 legislatures. However, while the amending formula required legislative resolutions, there was no effective mechanism or forum for linking the deliberations of individual legislatures with each other. The only mechanism for making the trade-offs necessary to achieve the required level of consensus was an intergovernmental agreement. Previous experience had shown that even achieving a consensus among governments was difficult; since 1940, there had been unanimous intergovernmental agreement on only three relatively minor constitutional amendments. Now, for the first time, it would be necessary to arrive at an agreement that would be acceptable to all governments, and then to secure the ratification of that agreement in precisely identical terms in 11 legislatures.

The exclusion of Quebec from the 1982 constitutional settlement provided the focus of the negotiations. Some regarded the "single-issue" character of the discussions as a positive sign, suggesting that the agenda would be manageable

and therefore susceptible to an agreement. But again, this single-issue focus for the negotiations had serious downsides in terms of achieving a positive resolution. The focus on a single issue made it more difficult to achieve the trade-offs necessary to secure agreement. It also increased the likelihood that any agreement would be viewed in "zero-sum" terms with easily identifiable winners and losers.

All of these factors reduced flexibility and possibilities for compromise, favoured private negotiations between governments over public debate of the issues, and limited the ability to permit amendments in the event that governments were able to reach agreement. But at the same time, a participatory political culture reflected in the Charter of Rights claimed that a process dominated by governments was an unacceptable basis for constitutional amendment. The three-year time period and the need for legislative ratification provided multiple veto points where the amendment could be blocked by its opponents. Furthermore, the creation of a formal role for individual legislators without any meaningful opportunity to influence the final outcome fuelled public cynicism and opposition to the Accord.

The process and the substance of the Accord responded to some of these pressures and imperatives but ignored others. Governments were able to overcome the obstacles standing in the way of achieving an initial unanimous agreement. But in overcoming these obstacles, they failed to take account of the need to provide for meaningful public input into the process.

By the mid-1980s, the legitimacy of elite accommodation as a basis for amending the constitution had eroded dramatically. There had been a fundamental shift in our constitutional culture, a shift in which government domination of the constitutional amending process had come to be seen as "arrogant elitism."²⁴ This shift in constitutional culture was by no means an isolated phenomenon; it was consistent with a growing trend, beginning in the 1960s, to reject traditional values and the presumed authority of political leaders. The current generation of Canadians has begun to question traditional deference to authority and hierarchy, while asserting individualistic values, a willingness to experiment with new ideas and a rejection of traditional roles.²⁵ The enactment of the Charter of Rights in the early 1980s was perfectly consistent with this emphasis on individualistic values and the need to feel personally in control of one's own life. The Charter was seen as a tool whereby groups once relegated to the periphery — such as native peoples, women, ethnic minorities, the disabled or the elderly — could discover a political voice and assert their autonomy and demand for social justice within the wider society. The enactment of a Charter of Rights was thus a reflection of and a further impetus to a political consciousness founded on a defence of individual rights.

This rights consciousness rejected the values of deference associated with parliamentary sovereignty and saw the courts rather than political leaders as the

primary defenders of individual liberty. Moreover, having tasted limited success in the 1981 amendment process, women's groups, aboriginals and others had awakened to their very significant ability to influence and to alter constitutional agreements signed by governments. They had come to regard the constitution as "of the people" rather than simply as an affair for governments and political elites. These groups have quickly come to constitute what Cairns and others have termed "Charter Canadians," dedicated to vigorously resisting any attempt by governments to threaten or erode their hard earned pride of place in the constitutional order.

These groups focused their attack on the "distinct society" clause and the potential threat it posed to Charter rights, insisting that the Accord be amended to secure the primacy of the Charter. There was a paradoxical quality to the attack on the distinct society clause. Whatever its potential effect, the clause clearly constituted a less serious encroachment on individual rights than the notwithstanding clause which had been accepted in 1982.²⁶ Moreover the distinct society clause paralleled a similar clause referring to multiculturalism found in the Charter itself. These elements of the 1982 constitution were far greater potential threats to individual rights than anything in the distinct society clause, yet they had been agreed to with relatively little fuss. This simply underscored the fact that the trouble with the distinct society clause was the symbolic messages it contained and transmitted. The undemocratic nature of the process whereby Meech had been negotiated was a symbol of the primacy of governments and elected political leaders in constitutional change. And the reference to the "distinct identity" of Quebec symbolized a politics in which French-English relations were regarded as primary. These symbolic messages were regarded as anachronistic at best and downright offensive at worst by many of the critics of the Accord.

It is impossible to identify any single "cause" or isolated event that single-handedly accounts for the failure of Meech Lake. But perhaps the best way of explaining the failure of the Accord is to say that it fell victim to the very circumstances that compelled its creation. The exclusion of Quebec in 1982 made it necessary to undertake a "Quebec round" of negotiations. But the amending formula which governed the process was cumbersome and inflexible. It made it necessary to resort to a process that undermined the credibility of the final product. As the uncertainty dragged on, public sympathy within English Canada for the very idea of a Quebec round eroded dramatically.

This is not to suggest that failure was by any means inevitable. Indeed, despite the numerous obstacles I have outlined, an agreement was achieved between 11 governments in April of 1987 and very nearly enacted into law in June 1990. Had certain events unfolded in a slightly different fashion, one can imagine the Accord having been ratified and the debate having been resolved. But, while failure was not inevitable, there are at least two sobering conclusions

that flow from this analysis. The first is that the failure of the Accord cannot be attributed simply to a failure of political leadership. There were certain structural imperatives, imperatives that flowed out of the 1982 constitutional settlement, that played a key role in Meech Lake's eventual demise. There is no reason to believe that a simple change in political personalities will, by itself, enhance the prospects for success in any future negotiations over Quebec's place in Canada.

Many critics have argued that a more participatory and open process would have resulted in a unanimous agreement that would have been ratified. These critics claim that there was widespread acceptance of Quebec's "five conditions" and that there was a basis for consensus if the political leaders had proceeded in a more democratic fashion. But the analysis in this paper suggests that there is little basis for supposing that a more democratic process, in itself, would have improved the prospects for success. It is certainly correct that a more open, participatory process would have responded to *some* of the overriding constraints that were present during the Meech round — those related to the need for public participation. But this approach, although certainly inherently desirable, would not have dealt with any of the other contradictory pressures that structured the negotiations. In particular, it would not have provided any mechanism for securing the required unanimous agreement between governments or for overcoming the "single-issue" character of the negotiations. Nor would it have provided a bridging mechanism that would have coordinated the deliberations of individual legislatures following an agreement between governments.

The broader implication of this analysis is that, if the outcome of any future discussions are to be different, a mere change in political leadership will be insufficient. Nor will a more open and democratic approach to constitutional amendment, a change that is self-evidently desirable, lead to a more successful outcome. Nor, indeed, will a mere reworking or "improvement" of the contents of the Meech Lake Accord permit a resolution of these issues. The results will only change when the decision rules and the other structural constraints limiting the process are subject to scrutiny and change. But the likelihood of this happening is, at best, fairly minimal.

The debate over the Meech Lake Accord unleashed deep and important passions about the nature of Canadian society. The Meech Lake debate was above all a struggle for political legitimacy between competing interests and visions of our society. The death of the Accord may have temporarily quelled this symbolic struggle but it has certainly not finally resolved it, as the events of this past summer have demonstrated. Canada now faces the uncertain prospect of having to rediscover its own identity and place in the world at a time when our sense of common purpose seems a distant and near-forgotten memory from some earlier era.

II. AFTER MEECH LAKE: CANADA'S UNCERTAIN CONSTITUTIONAL FUTURE

Canadians are now picking their way through the wreckage of the Meech Lake negotiations, licking their wounds and preparing for a new round of constitutional negotiations. The challenges are formidable. The first challenge, of course, is simply the fallout from the failure of Meech Lake itself. The failure to ratify Meech Lake has contributed to an upsurge of nationalist sentiment in Quebec, with opinion polls indicating that support for sovereignty association is at an all-time high of 60 percent. Outside Quebec, on the other hand, there is a widely-held perception that Quebec receives more than its "fair share" from federalism and there is continuing resentment over Quebec's sign law.²⁷ This suggests that the symbolic struggle that dominated Meech Lake is likely to figure prominently in any future discussions, with claims for "distinct status" confronted with a unwavering commitment to "equality of the provinces." No one has yet found the way to square the circle represented by these competing ideological visions and no one, after Meech Lake, would want to underestimate the challenge that this involves.

At the same time, the decision rules that govern constitutional amendments, rules that have shown themselves to be extremely cumbersome, are unlikely to be changed significantly in the future. Any change in the amending formula requires the unanimous consent of all governments. While certain governments might be willing to entertain changes in the amending formula, it is unrealistic to suppose that *all* governments would be persuaded of the merits of such changes.

The matter is further complicated by the fact that the amending formula has proven itself to be a political anachronism in the Canada of the 1990s. The existing amending formula is premised on the legitimacy of political leaders as opposed to the people themselves determining future constitutional change. The 1982 *Constitution Act* provides a role for governments and for legislatures but no explicit basis for popular participation. But Meech Lake has demonstrated that this approach to constitutional decision-making is no longer tenable. An amending formula premised on executive federalism and elite accommodation is an anachronism in a society that values equality and popular participation in political choices. Yet no one has yet suggested how the process might be made more participatory and transparent without rendering it totally unworkable.

The constitutional issue is complicated by a variety of other non-constitutional factors. The flow of trade in Canada is becoming increasingly north-south, rather than east-west, a trend that is exemplified by the Canada-U.S. Free Trade Agreement. The primacy of north-south trade relationships means that the economic well-being of any one part of the country is no longer dependent on other parts of the country. This makes it more difficult to justify

truly national economic policy and erodes the commitment to regional sharing and redistribution of income along east-west lines.

Internationally, one observes a movement towards the harmonization of economic policy in larger and larger trade blocs coupled with a drive towards decentralization of community and political attachments. The trend towards economic harmonization reflects the globalization of world markets, a trend that diminishes the traditional sovereignty of the nation-state and its capacity to protect domestic consumers and producers from the grinding forces of international competition. In this context, nation-states, such as Canada, with no over-riding cultural, linguistic, racial or linguistic ties can expect their legitimacy and role to come into question. Moreover, this challenge comes at a particularly difficult time for Canada, since the fiscal incapacity of the federal government has already severely diminished its ability to play a positive and unifying national role.

While the challenges are very great, and should not be underestimated, there is no basis for supposing that they are necessarily insurmountable. The Meech experience can serve a positive function by indicating where our difficulties are likely to be found and how we might overcome them.

I want to offer 13 generalizations about the future round of discussions on the constitution. I will offer these generalizations in a fairly summary and conclusory fashion, since they flow out of the analysis that has been presented thus far.

1. The chances of securing a formal constitutional amendment under the general amending formula in the Constitution Act, 1982 are virtually nil — at least in the short term.

If the Meech Lake experience has taught us anything, it is the difficulty of obtaining a constitutional amendment under the existing amending formula. Furthermore, the Meech process was undertaken in an atmosphere of relative calm. This initial political tranquility provided a breathing space within which political trade-offs could be made and a comprehensive package put together. The political context in 1990 is obviously a world apart from what it was in 1986; the relative calm of just four years ago has been overwhelmed by a mood of bitterness and rancour resulting from the failure of the Meech round. This sour political mood probably means that any future constitutional negotiations would be even more dominated by symbolism and by attempts to gain redress for past grievances. As Meech itself has demonstrated, any series of negotiations conducted on such a footing are unlikely to succeed.

The fundamental problem in the future round of discussions will be how to accommodate the claims of Quebec for some "particular status" within the federation. It is a certainty that the Quebec Parliamentary Commission will produce recommendations that require some formal recognition of Quebec's

particularity. It is highly unlikely that the rest of Canada will be willing to grant any such formal recognition in the constitution. One message from the Meech round was the unwillingness of the rest of Canada to accept any significant asymmetry between the position of Quebec and that of the other provinces. It is clear that any "asymmetrical" solution — ranging from special status to sovereignty association — will not secure the consent required under the general amending formula. But granting the new powers that Quebec demands to all the provinces — the approach followed at Meech — is unlikely to prove workable either. The demands of Quebec are likely to be so far-reaching that to grant these powers to all the provinces would amount to a dismemberment of the federation.

2. The prospects for success are even further complicated by uncertainty over the nature of the process that will be utilized.

The Meech process may have been unwieldy, but at least there was a generally accepted understanding of the ground-rules governing the negotiations. There is unlikely to be even this minimal common ground in the post-Meech negotiations. Following the failure of Meech, Premier Bourassa announced that the government of Quebec was no longer willing to sit at the constitutional table as one of ten provinces. The Premier declared that in the future Quebec would discuss its proposals on a bilateral basis with the federal government.

If Quebec adheres to this approach, then it will have very significant implications for the ability of the federation to respond to Quebec's new demands. There can be little doubt that Quebec's new constitutional agenda will go significantly beyond what was negotiated at Meech Lake. This will mean that any formal constitutional amendment will certainly require the consent of all other provinces as well as the federal government, under the terms of the *Constitution Act, 1982*. The only institutional forum where the necessary trade-offs can be made in order to obtain the required provincial consent would be a meeting of all first ministers.

A refusal by Quebec to participate in a first ministers' meeting might lead to an attempt to construct an alternative process. This fall-back process might consist of two stages. First, the federal government would undertake bilateral negotiations with Quebec; this would be followed by negotiations with the remaining nine provinces. But this two-stage process is an imperfect and unsatisfactory substitute for a single meeting of all governments and is unlikely to work. There would be no process for forcing the comprehensive trade-offs that would be necessary in order to produce an amendment acceptable to all the provinces. I conclude that an insistence on "bilateral negotiations" between Quebec and Ottawa will preclude, for all practical purposes, any formal constitutional amendment using the general amending formula.

3. There is a very real possibility, perhaps even a probability, that the next round of constitutional negotiations will result at some point in stalemate. A stalemate may result in a unilateral attempt by the province of Quebec to jump outside the existing legal rules.

Any attempt to secure unanimous agreement on a comprehensive constitutional amendment is unlikely to succeed. This means any negotiations that are conducted are likely to result in an impasse. At this point the government of Quebec will have a very difficult and fateful choice to make. This choice is simply whether it is prepared to continue to operate within the confines of the *Constitution Act, 1982*. Faced with a stalemate, Quebec may attempt to jump outside the existing constitutional arrangements through some form of unilateral declaration.

There would no doubt be an attempt to challenge the legality of such a unilateral declaration by certain interests in English Canada. But the ultimate validity of such a declaration would not depend on the pronouncements of courts or judges. The historical experience with secession indicates that only force of arms can prevent a state from seceding. I think it can safely be assumed that the rest of Canada is not prepared to undertake any such adventurism in Quebec's case.

4. Any resort to such a unilateral declaration by Quebec would have very serious negative consequences, both for Quebec as well as the rest of Canada.

It is clear that any break in legal continuity would be profoundly destabilizing. There would be a period of legal and political uncertainty as various contending governments and interests struggled to assert the primacy of their preferred legal regime. In turn, this uncertainty would undermine the confidence of foreign and domestic investors as well as the external holders of the national debt, giving rise to a whole series of second-order economic effects. The precise costs associated with such a period of instability are impossible to quantify in advance but they are certain to be very high and very damaging, producing a significant drop in the average Canadian's standard of living.

5. The likely outcome of a unilateral declaration by Quebec is outright independence: Sovereignty association between Quebec and Canada is simply not a viable option.

Any negotiations over "association" would only occur after Quebec had asserted its legal independence through a unilateral declaration. Given the bitterness and linguistic tension that any such declaration would produce, there would be little political stomach on either side for meaningful negotiations over common political institutions. The fundamental problem would remain the lack of any agreed understanding of Quebec's role in Canada. Sovereignty associa-

tion is essentially "particular status" writ large, a concept that has proven politically unacceptable outside the province of Quebec.

A second, equally significant roadblock is that sovereignty association requires the existence of two separate legal entities; the province of Quebec on the one hand and the "rest of Canada" on the other. But there is no political or legal entity representing the "rest of Canada": neither the other provincial governments, nor the federal government, has any legal or political mandate to speak for the nine provinces outside Quebec. Thus, before negotiating sovereignty association with Quebec, the "rest of Canada" must first agree on its own political structure. It is far from certain that any negotiations would even get beyond this initial stage; there is no guarantee that the remaining nine provinces would be capable of reconstituting a new political union, for reasons outlined below.

6. There is a very strong possibility that the remaining nine provinces would not be able to construct an enduring political arrangement in the absence of Quebec.

In the immediate aftermath of a unilateral declaration by Quebec, there would no doubt be very strong public sentiment in favour of building a new political arrangement involving all of the remaining nine provinces. But even if such an arrangement could be constructed in the short-term, it would be unstable and liable to break apart. The fundamental problem would be the economic and political dominance of Ontario, which would possess approximately half of the population and generate over 50 percent of the economic activity of the new state. The dominance of Ontario would create an imbalance that would be difficult to accommodate in the political institutions of the new federation. Moreover, the negotiations over the new federation would be dominated by the provincial governments, which would each assert a veto over the shape of the new political system. It is probable that the result would be an even more decentralized federation with limited powers for the federal government and a weakened commitment to interregional transfers. It is difficult to see what the concrete, practical advantages of such a form of government would be to the various parts of the new federation. Even if it could be created in the short term, it is unlikely to prove an enduring form of political association.

7. Thus the most probable result of a unilateral declaration by Quebec would be independence for Quebec, coupled by relatively weak and short-term political connections between the remaining nine provinces.

It should be emphasized that any scenario resulting from a break in legal continuity is likely to be extremely fluid and subject to radical change in relatively short periods of time. It is unlikely, for example, that any decentralized arrangement between nine provinces would prove to be enduring; one would likely see almost immediate attempts to create wholly new

arrangements involving regional groupings of provinces. In fact, in the wake of the failure of Meech, there has already been vague talk of new "regional blocs" emerging in both the west and in Atlantic Canada.

These discussions would assume a central place on the political agenda in the absence of Quebec.

8. This suggests that an important imperative for all parties in the coming round of constitutional discussions is to avoid a break in legal continuity.

The analysis thus far suggests that a break in legal continuity will set in motion a chain of events that no one can control and that will produce serious costs for everyone. This means that all parties have an interest in avoiding a break with legal continuity and searching for ways to find accommodations within the existing legal regime. One way to achieve this objective is to begin to de-emphasize formal constitutional amendments involving the general amending formula. Given the extremely low possibility of success under this formula, coupled with the high costs of failure, it would seem important to identify and to explore any other alternatives that might exist.

9. One such alternative is informal constitutional change involving administrative or intergovernmental agreements.

It is significant that four of the five conditions identified by Quebec in the Meech round might have been achieved through informal, administrative arrangements or through statutory amendments. Quebec's powers over immigration had already been increased through an administrative agreement signed in 1978 by the federal government and Quebec; the claim for increased powers in the field of immigration could have been accommodated through amendments to that agreement. Quebec participation in the selection of three judges on the Supreme Court of Canada might also have been regulated through an agreement of this type, as could limits on federal spending in Quebec. The demand for a "veto" on future constitutional amendments could have been met through the federal government agreeing that its veto would be utilized to protect the fundamental interests of Quebec. Only the demand for recognition as a "distinct society" could not be dealt with through administrative agreement.

There are obviously both advantages and disadvantages to informal changes of this type. The advantages are that administrative agreements do not compel recourse to the cumbersome mechanisms required for formal constitutional change. Administrative agreements also do not give rise to the same symbolism associated with formal constitutional change. Thus the negotiation of an administrative agreement is much less likely to arouse the same degree of comment and controversy in the rest of the country. Of course, the muted symbolism attached to an administrative agreement is in some sense a disadvantage as well as an advantage. The profound symbolism surrounding the failure of Meech Lake suggests that any lasting resolution must necessarily

involve some symbolic component. It is unlikely, therefore, that the Quebec government or the Quebec public would be able to accept a package that did not include some formal constitutional change.

10. The only realistic prospect for accomplishing constitutional change to accommodate Quebec under the existing legal procedures is section 43 of the Constitution Act, 1982.

Under section 43, it is possible for the federal Parliament and a single provincial legislature to enact an amendment without reference to the other provinces. Such an amendment must be limited to constitutional provisions that apply to "one or more, but not all, provinces." This somewhat limits the scope of any possible amendment utilizing this procedure. But it is noteworthy that a clause along the lines of the "distinct society" clause might have been enacted on the basis of the section 43 procedure.

This possibility is reflected in the "Final Communiqué" issued by the First Ministers' Meeting on the Constitution, signed on 9 June 1990. The June 1990 agreement proposed a constitutional amendment that would have recognized that "within New Brunswick, the English linguistic community and the French linguistic community have equality of status and equal rights and privileges."²⁸ The proposed amendment would also have affirmed the "role of the legislature and government of New Brunswick to preserve and promote the equality of status and equal rights and privileges of the province's two official linguistic communities."²⁹ In short, this proposed amendment tracked in fairly precise terms the "distinct society" clause in the Meech Lake Accord, with the exception that the amendment would have specified that it applied within New Brunswick alone. What is significant is that the June 1990 agreement specifically provided that this amendment would be enacted under the section 43 procedure, with only New Brunswick and Canada required to approve resolutions.

11. This suggests that the outcome with the greatest possibility of success is one involving some combination of section 43 of the Constitution Act, 1982 along with informal administrative agreements.

This conclusion is important because it indicates the path that the federal government should follow beginning in the spring of 1991. There should be no attempt to re-open the constitutional dossier on a comprehensive basis at the intergovernmental level. Since such negotiations are certain to fail, they should never be commenced. Instead, discussions between *governments* should proceed on a bilateral and relatively low-key basis; this should be coupled with the initiation of other *non-governmental* processes that might respond to some of the demands for greater public involvement in constitutional change.

12. In terms of non-governmental processes, it will be important to devise flexible mechanisms that will permit broad participation, promote continuing dialogue and avoid stalemate.

There are a variety of mechanisms that might fulfill these requirements. The agreement signed by the first ministers in June 1990 suggested one possible alternative. The first ministers agreed to establish a body composed of legislators from each province to hold national hearings and prepare specific proposals for future Senate Reform. The report of the national commission would not be binding on any government or legislature and any individual legislator would be free to dissent from the findings of the majority.

There are certain important advantages to this approach. The first, and perhaps the most important, is simply that it buys time. The holding of hearings across the country and the preparation of a report takes time. It also provides a forum within which a dialogue can occur and where trade-offs can be made. It is also significant that the deliberations of the commission would not be subject to the unanimity rule. While the commission's report would still have to be approved by all governments and legislatures before an amendment could be enacted, it would have the potential to carry considerable moral weight in those discussions. Finally, a commission provides for public hearings and thus a measure of popular consultation in the formulation of constitutional proposals. This is a direct and meaningful response to the criticisms of the closed-door character of the Meech discussions.

13. The late spring and summer of 1991 constitutes a key turning point in the future round.

The Quebec Parliamentary Commission will report in late March 1991. It is certain that the commission's proposals will come as a considerable shock to the rest of the country. Outside Quebec, there is simply no interest in constitutional discussions at the present time. Nor will this change until March of 1991. Then, once Quebec tables its proposals, there is likely to be an immediate and overwhelmingly negative reaction from other parts of the country. This, in turn, will further radicalize Quebec opinion and reinforce the view that fundamental change is necessary. There is a serious risk of political confrontation and deadlock, with Quebec resorting to some form of unilateral declaration as a means of breaking this deadlock.

The federal government will be faced with a "catch 22" situation. To reopen formally the constitutional dossier would be to court almost certain failure, for the reasons I have outlined. But to refuse to respond to Quebec's agenda would be regarded as a repudiation of its new demands and generate support for a break in legal continuity. The only possible way to manage this situation is to focus, at least initially, on issues of process, postponing to some later time a full consideration of the substantive issues.

The discussions of the past three years have demonstrated to Canadians that no set of political arrangements is permanent or inevitable. The very idea of Canada, which has been simply taken for granted by generations of Canadians, is now being called into question. But if Canada itself is not inevitable, neither is its demise.

It will be important to remember in the months and years ahead that very few of our current problems and challenges are actually constitutional in nature. This may seem somewhat surprising, given the tendency in the past few years to assume that all Canadian problems are constitutional problems demanding constitutional solutions. But the reality is quite different. Responding to the forces of international economic competition, cleaning up the environment or dealing with the continuing problems of poverty and homelessness do not depend upon constitutional change. The current preoccupation with the constitution, and the compulsion to turn every political issue into a constitutional issue, raises a false dilemma. Relatively few of our current and most pressing political problems are constitutional problems. By continually focusing on the constitution, we divert our attention and energy from discovering meaningful solutions.

There seems to be a growing presumption that Canada can only be salvaged from the trash heap of history if our governing institutions are fundamentally restructured. This presumption seems to me to be profoundly misguided and capable of working very great mischief. Our governing institutions have demonstrated themselves to be remarkably flexible and adaptable to changing circumstances over the past 125 years. Notwithstanding the current abomination found in the Senate, there is little reason to believe that any wholesale restructuring of our institutions is necessary to respond to our current challenges. In this connection, it is noteworthy that many of the constitutional demands and discussions of recent years have focused on changes that were largely symbolic — including the demand by Quebec for recognition as a distinct society. One should never underestimate the importance of symbolic issues in Canadian politics. But neither should we resign ourselves to political fragmentation over questions that have little bearing on the everyday working lives of most Canadians. The test for Canadians will be whether we are able to respond to demands for constitutional change by developing creative solutions that permit all groups and individuals to retain membership honourably in the community, while preserving those elements of our institutional framework that have served us well in the past.

It will also be important to attempt continually to expand rather than to limit the range of possible solutions. The greatest danger will arise from the false sense that we have exhausted the range of possible options. This sense is false because there is always a far broader range of possible solutions and alternatives

to a political problem than might initially be apparent. The challenge is not so much finding those solutions as it is summoning up the will to look for them in the first place.

NOTES

1. See, for example, Environics Research, *The Focus Canada Report 1990-1* (Toronto: Environics Research Group, 1990), which found that three-quarters of Canadians thought that the federal government showed regional favouritism; very few people thought their own province was favoured.
2. I served as a constitutional advisor to the premier and to the Attorney General of Ontario from July 1986 until September of 1990. In that capacity I attended the meetings at Meech Lake and the Langevin Block in 1987 as well as the week-long meeting at the Conference Centre in Ottawa in June 1990.
3. R. Gibbins, "A Sense of Unease: The Meech Lake Accord and Constitution-Making in Canada," in R. Gibbins (ed.), *Meech Lake and Canada: Perspectives from the West* (Edmonton: Academic Printing and Publishing, 1988), p. 123.
4. A. Cairns, "Ottawa, the Provinces and Meech Lake" in R. Gibbins (ed.), *Meech Lake and Canada: Perspectives from the West*, p. 109.
5. See *A.G.Man. v. A.G.Can. (sub nom Ref. re Amendment of the Constitution of Canada. Nos.1,2,3)* 125 D.L.R. (3d) 1.
6. There was some debate over whether this three-year time limit was required under the constitution or whether it was simply a "political" requirement. For an argument that the Meech Lake Accord was not subject to any time limit, see: G. Robertson, *A House Divided: Meech Lake, Senate Reform and the Canadian Union* (Halifax: The Institute for Research in Public Policy, 1989).
7. The agreement was signed on 5 November 1981; the Canada Act was enacted by the U.K. Parliament on 25 March 1982 and given Royal Assent on 29 March 1982. Of course, it should be noted that in 1981 only the federal houses and the British Parliament had to ratify the constitutional resolution; this was obviously the primary reason for the much speedier ratification in 1981.
8. Michael Adams and Mary Jane Lennon, "The Public's View of the Canadian Federation" in R.L. Watts and D.M. Brown (eds.), *Canada: The State of the Federation, 1990* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1990), Figure 5.6, p. 107.
9. For example, it was proposed that there should be an explicit statement that the "national objectives" would be defined by the Parliament of Canada rather than by the provinces. This proposal was unacceptable to

- Quebec, which was willing only to include a reference to the program being "established by the Parliament of Canada."
10. See, for example, Pierre Trudeau, "Say Goodbye to the Dream of One Canada" in R. Gibbins (ed.), *Meech Lake and Canada: Perspectives from the West*, p. 65
 11. See Royal Commission on the Economic Union and Development Prospects for Canada, *Summary of Conclusions and Recommendations* (Ottawa: Minister of Supply and Services Canada 1985), pp. 53-54.
 12. "Quebec's Turn on Constitution," (Editorial) *Toronto Star* 9 August 1986. See also Peter Leslie, *Rebuilding the Relationship: Quebec and its Confederation Partners* Report of a Conference, Mont Gabriel, Quebec, 9-11 May 1986 (Kingston: Institute of Intergovernmental Relations, Queens University, 1987), p. 6. Reporting a consensus among those who had participated in the 1980-82 round that there should be an attempt to secure Quebec's consent to the constitution.
 13. See Michael Stein, *Canadian Constitutional Renewal 1968-1981: A Case Study in Integrative Bargaining* (Kingston: Institute of Intergovernmental Relations, Queen's University, Research Paper no.27, 1989), p. 8. Stein notes that symbolic intangible goods are difficult to negotiate since they are not readily quantifiable and divisible and thus not susceptible to distributive solutions and bargaining compromise.
 14. See "Federal Statements on the Quebec Constitutional Issue," Office of the Prime Minister, Ottawa, 1987. "Annex" p.1 for reproduction of extracts from speech of 6 August 1984.
 15. For a copy of the text of the speech, see Peter Leslie, *Rebuilding the Relationship: Quebec and its Confederation Partners*, Appendix A, pp. 39-47.
 16. P.E. Trudeau, "Say Goodbye to the Dream of One Canada" in R. Gibbins (ed.), *Meech Lake and Canada: Perspectives from the West*, p. 71. Reprint of an article that originally appeared in the *Toronto Star*, 27 May 1987.
 17. For an elaboration of this perspective, see B. Schwartz, *Fathoming Meech Lake* (Winnipeg: Legal Research Institute, University of Manitoba, 1987), pp. 205-14.
 18. See Alan Cairns, "Political Science, Ethnicity and the Canadian Constitution" in D. Shugarman and R. Whitaker (eds.), *Federalism and Political Community: Essays in Honour of Donald Smiley* (Toronto: Broadview Press, Toronto, 1989) p. 121.
 19. See Raymond Breton, "The Production and Allocation of Symbolic Resources: An Analysis of the Linguistic and Ethnocultural Fields in Canada," *Canadian Review of Sociology and Anthropology*, vol. 21 (1984), p. 123.

20. I will provide such a detailed account in a forthcoming book: "Meech Lake: The Inside Story."
21. See "PM invites 10 Premiers to discuss Quebec constitutional proposals," *Globe and Mail*, 18 March 1987.
22. See P. Leslie, *Rebuilding the Relationship: Quebec and its Confederation Partners*, p. 33.
23. *Ibid.*, pp. 33-34.
24. The most eloquent elaboration of this shift was provided by a series of biting critiques of Meech Lake by Alan Cairns. See Cairns, *supra*, notes 4 and 18.
25. For a summary of public opinion data tracing these evolving attitudes, see Michael Adams and Mary Jane Lennon, "The Public's View of the Canadian Federation" in R.L. Watts and D.M. Brown, (eds.), *Canada: The State of the Federation, 1990*, pp. 97-108.
26. See, for example, the critique of the clause by the Honourable Clyde Wells, "Open Letter from Clyde Wells to the Right Honourable Brian Mulroney," 18 October 1989.
27. See Adams and Lennon, "The Public's View of the Canadian Federation," p. 101.
28. See clause 6, "Final Communiqué," (Ottawa: First Ministers' Meeting on the Constitution, 9 June 1990).
29. *Ibid.*, clause 6.