

# Re-Forming Canada? The Meaning of the Meech Lake Accord and the Free Trade Agreement for the Canadian State

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## PREFACE

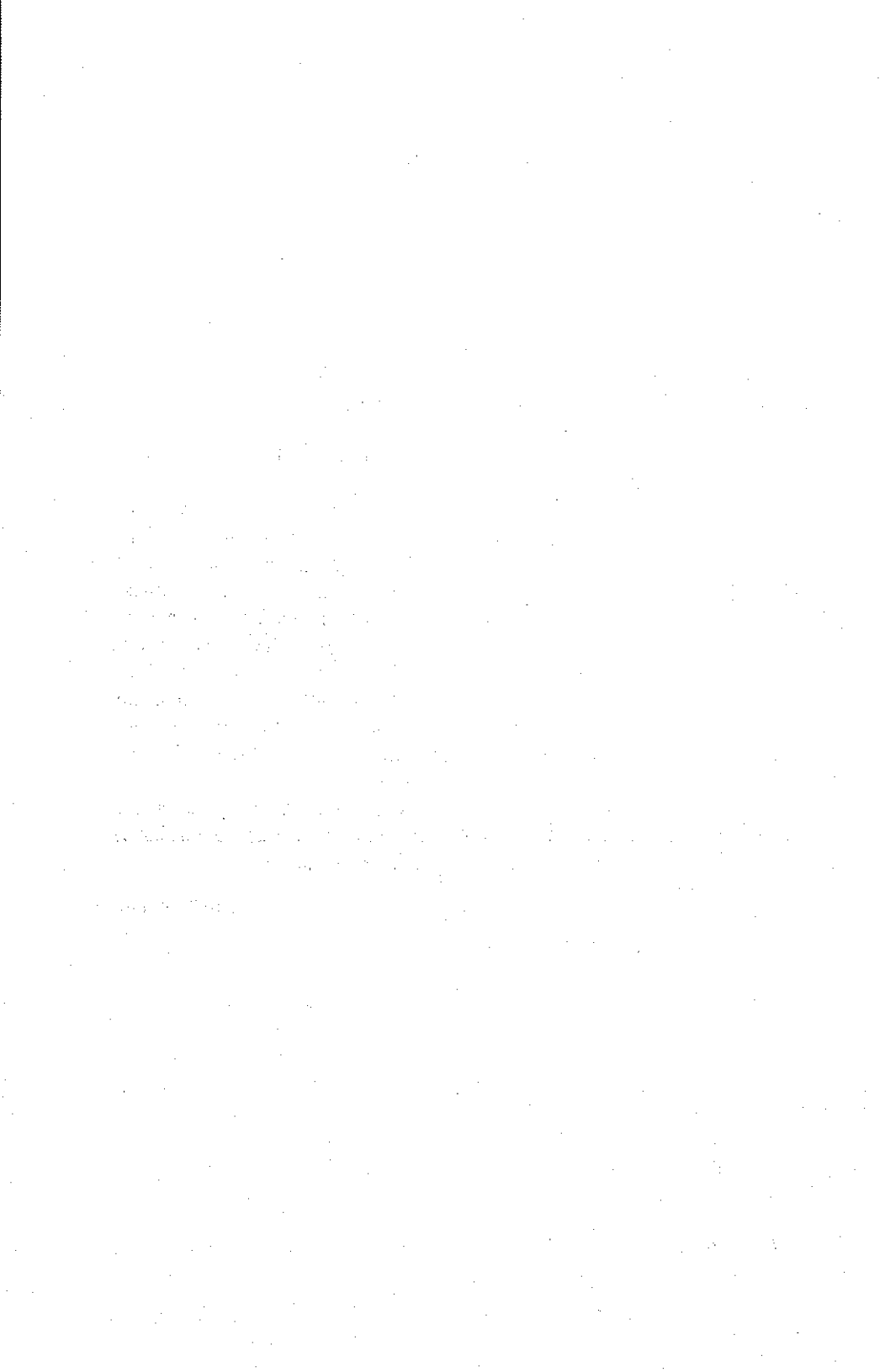
This publication is the editors' report of the first Dean's Conference on Law and Policy, held at Queen's University on 13 February 1988.

This series of conferences has been initiated to permit periodic discussion of current policy issues by groups of academics, politicians, civil servants, practising lawyers and journalists.

There are numerous people that must be thanked for their role in ensuring the smooth running of the conference from which this report developed. First, I would like to thank the law firm of Lang, Michener, Lash and Johnson, and the *Whig-Standard* (Kingston), for their generous financial support. I would also like to thank the members of the student committee for their assistance in organizing the conference: Barry Appleton, organizational coordinator; Ian Peach, communications coordinator; Marti Wilson, conference controller; Ralph Cuervo-Lorens and Sara Gelgor, information coordinators; Jonathan Eaton, logistics manager; and Scott Maidment, public relations manager. As well, the valuable encouragement and suggestions of Richard Simeon deserve the greatest of thanks.

Finally, I would like to thank those people responsible for this publication: the ever-dependable secretarial staff at Queen's Faculty of Law, in particular Vyvien Vella; and, Christopher Kendall for its final editing.

*John D. Whyte*



## INTRODUCTION

If [one] really wishes to distinguish what is essential [about society] from what is not, a [necessary] step is to reject the most perverted of current ideas, to wit, that the course of things must have a single meaning or that events can be contained in a single system, thereby being justifiable in the name of an abstract idea or historical 'trend'. [Another step] is to free one's self completely from the false optimism which underlies the accelerated, but structurally predetermined, motion of contemporary society.

Nicola Chiaromonte, *The Paradox of History*

Chiaromonte's warning is important advice that one ought to keep in mind during periods of social upheaval such as that which Canada experienced in 1987. If history, contrary to Chiaromonte, were truly history we would not need conferences like this. If history truly were a deliberate and self-conscious march towards a better world we would not need conferences like this because we would know who we were and where we were going. However, what we understand from events we only understand vaguely.

Our particular interest in this series of Dean's Conferences on Law and Policy, of which this is the first, is to gain some insight into the activities of social ordering. We have been terribly concerned with understanding the purposes behind social ordering, so that we may better appreciate the democratic impulse that gave rise to the regime we find ourselves in. There has grown an acute desire to have a sense of what policy options are afoot, what policies are chosen, and what those policies actually mean so that the legal regime can interpret them and fulfil its role without the bias with which it is often associated. Because the processes and interpretations are so elastic, it is even more important that we understand the genuine public purposes behind the policies that we are responsible for helping put in place.

It is this relationship between socio-political forces and the formal ordering regime, which has been brought home to us increasingly and emphatically during this century, that legitimizes and makes essential the discussion of the concept of "policy" in our legal education.

1987 has proven to be a very good year for fostering this type of analysis. The pace of social change seems to be quickening. Perhaps this means that alterations in the constitutive order will become commonplace, but from the perspective of our history, 1987 does seem extraordinary. This chance to explore its

meaning is therefore important to those of us whose professional responsibility it is to understand what is happening to our state. The Meech Lake Accord and the Free Trade Agreement are designed, more than anything else, to alter political powers and political arrangements. The possible consequences of these two agreements need to be examined but, by beginning the debate in terms of analyzing what the consequences will be, we miss an important step. We avoid asking exactly how politics will be conducted, and how people with the power to make decisions for one political community or another will actually use the powers they have gained or compensate for the loss of political choices which is a consequence of these agreements.

This type of enquiry into political behavior is, unfortunately, often ignored. This is because we are so imbued with the liberal ideal that we know power cannot be the goal; power in the state is held for the purpose of achieving certain ends that, from one perspective or another, are social goods. Yet by not paying enough attention to the process, we miss the mark on the ultimate question of how society will be changed, because agreements such as Meech Lake and Free Trade can only direct political conduct toward their desired ends. The question, then, becomes: Will those in power act in ways appropriate to those ends or will alterations of actual power lead to conduct that has other consequences?

The agenda for this conference was divided into three parts. This arrangement produced a series of investigations, each directed at a slightly different part of the Canadian social landscape, but all concerned with the impact of Meech Lake and Free Trade on political life. While it is not likely that we can patch all that happened to us in 1987 together into a marvellous and coherent theory of what Canada will become in the 21st century, I hope, and suspect, that we did manage to piece together the basic shape that our country is likely to take.



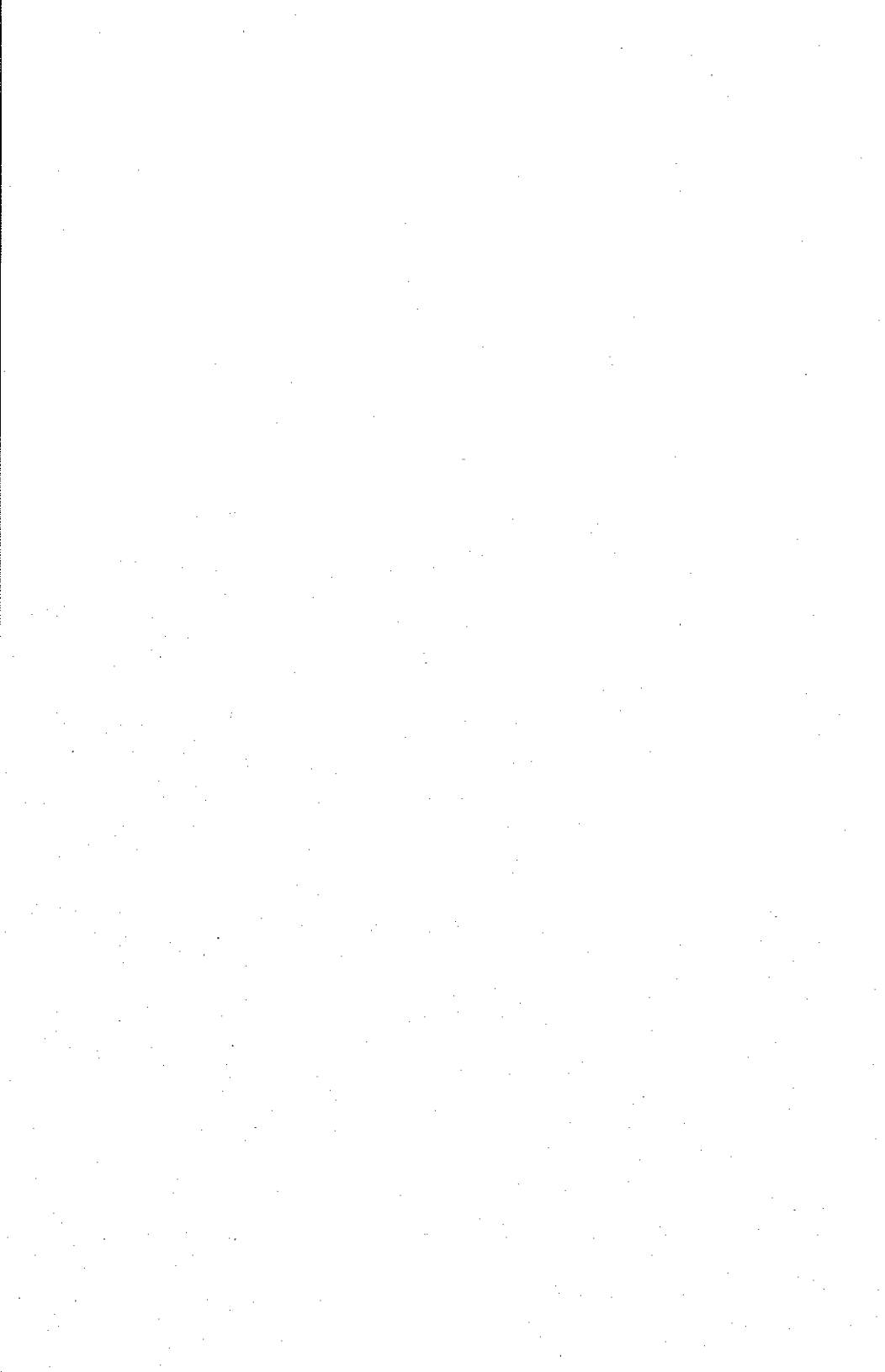
## PART ONE

### *Impact on the Role of Government*

#### Editors' Note

*The first category of analysis chosen for this program is an examination of the impact the agreements will have on the formation of political programs. Of course, the relationship might flow the other way—the agreements may be mere reflections of the constraints imposed on governments by shifts in social values. It may be that Meech Lake is a reflection of the irreducible phenomenon of regionalism in the Canadian political culture and that the Free Trade Agreement reflects the inevitable drift towards national economies being dedicated to specialist roles. In any event, the subject matter under enquiry is whether Meech Lake and Free Trade describe a new sense of governmental possibilities that has taken root in Canada.*

*At first glance the dominant characteristic of this phenomenon is restraint; both agreements seem to reflect or lead to a less ambitious national political program. This may, however, be wrong. Meech Lake could, with its "provincialization" of central institutions, give those institutions the political standing, and hence confidence, to pursue policies that heretofore were thought to be politically unrealistic. Likewise, the Free Trade Agreement could liberate the national government from its constitutional restrictions imposed by judicial decisions under the constitutional rubrics of Peace, Order, and Good Government, Trade and Commerce, and the implementation of international obligations.*



## PARALLELISM IN THE MEECH LAKE ACCORD AND THE FREE TRADE AGREEMENT

*Richard Simeon*<sup>1</sup>

It seems extraordinary that there has not been more linking of these Free Trade and Meech Lake debates. That is why I think today's discussion is so tremendously important. It seems to me that the two topics do raise all sorts of parallel questions and what I would like to do is just to point out a few of those parallels and issues, just to get the discussion going.

There is, for a start, the political process through which these two events were achieved. They are obviously two classic examples of elite accommodation as a decision-making style—two cases in which the results of that elite accommodation are submitted for debate and ratification where the fundamental condition attached is that they have to be accepted or rejected as they stand. They cannot be amended by legislative processes since to do that would unravel a fragile and delicate agreement, in one case between two governments and in the other among eleven. It seems to me that in both cases that puts democrats in a rather difficult bind because they have to deal with the fact that perhaps the costs of failing to approve these deals may be greater than the gains in passing them.

Both of them I think will also have interesting implications which we should explore for the future operation of the democratic political process; Meech Lake because it forces us to reconcile the logic of collaborative intergovernmental decision-making with the logic of responsible party government; and free trade because one of its main effects, for good or ill, is to remove certain issues from the reach of domestic political processes. It seems that one of the really critical questions is how many issues are so removed by the agreement.

Each of them obviously also forces us to ask some fundamental questions about the nature of political community in Canada, in one case, seeking to define the relations among the federal and provincial communities and their governments, and in the other, asking us to define the Canadian community in

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relation to the United States. Again we have to play through all those interactions. Meech Lake further institutionalizes ourselves as a federal country, but Free Trade, it seems to me, calls our attention to what we mean when we talk about our national selves.

Each of them also can be understood as imposing a set of constraints on the scope of the authority of the federal government and, to a certain extent, on the scope of the authority of the provinces as well. Again, I think this is another important issue to debate: which level of government has its powers more constrained by these two agreements? In my view the Free Trade Agreement is far more significant a restraint on governments in general than Meech Lake is, and more of a restraint on the federal government than it is on the provinces. But I think each does have this one element underlying it: a sense of the need to limit and constrain the state in the modern era.

Each is also a response to a fundamental set of forces seeking to shape and define the relationship between the state and society in this country. In one sense one can see Meech Lake as a response to a set of domestic forces and Free Trade as a response to the imperatives of international interdependence, and again these two have to be weighed. Here I think the two begin to pull us in different directions and to pull us in different ways. On the one hand, it seems to me that the forces in the domestic environment to which Meech Lake is a response are on the whole forces which push us towards emphasizing diversity, fragmentation and pluralism in our society, and to dispersal, diffusion and sharing in the organization of political authority. It seems to me Meech Lake represents that tendency, although much of the criticism of it suggested that it was a response to the regional, linguistic and territorial dimensions of our pluralism much more effectively than it was a response to other kinds of pluralism, which have been growing more important.

Basically Meech Lake underlines the complexity of domestic society and of arriving at common positions in a regime of shared authority, in particular one with its emphasis on collaborative federalism. But Free Trade emphasizes Canadian interdependence with the rest of the world, and the imperative that that suggests to many people is the need for greater unity of purpose, of coordination, and the need for us to be able to overcome our internal differences; the need, for example, to be able to speak with a single voice abroad, the need to reduce internal barriers within the country, and so on. That perspective says, for example, that we may pay a price in the world for the lack of an effective federal treaty-making or treaty-implementing power. The extreme position that some people who reason in this way take is similar to that of the reformers of the 1930s who argued that federalism had become an obsolete luxury which could no longer be afforded given all the new roles of the state which were being forced by the depression. So, some people like Mr. Trudeau have argued

that federalism with its fragmented power may be inappropriate as a device to allow Canada to project effectively its interests abroad.

Both Meech Lake and Free Trade, to take another example of the parallels here—and I have Tom Courchene to thank for this insight—can be seen as a backlash against, or a rebound from, the Trudeau era of the first four years of this decade. It may be argued that Meech Lake is the federalist revenge against the centralizing thrust of Mr. Trudeau's federalism and that Free Trade is the mark of a continentalist-oriented revenge against the failures of the nationalist, interventionist industrial policies of that period. In fact, those two threats come together very nicely when Pat Carney says that the great advantage of the Free Trade agreement for her is that it will guarantee to Western Canadians that never again will Ottawa be able to impose a National Energy Program on them.

Finally, both of these agreements have been defended on the grounds that they are solutions to the age-old problem of regional conflict in Canada. Meech Lake is said to be the solution because it of course brings Quebec into the 1982 Constitution, and because it provides cast iron protection for provinces and provincial communities against a centralist majoritarian will being imposed on them. Free Trade is said to enhance national unity by putting the final nail in the coffin of the national policy and all of the regional grievances that it has caused.

In the short-run one might argue that indeed both of these events probably do promote interregional harmony at least to some degree. But I think one of the really important questions for us to debate today is whether the long-run effects of these two are to be in that same direction. It seems to me that one can at least make the argument that both in the long-run are likely to increase domestic fragmentation and certainly to inhibit a strong nation-building policy led by the federal government.

These are just a few of the parallels. It is remarkable that there has not been more linkage between the two in our political debates. I think a large part of the reason for that, of course, is to be found in the politics of the situation. With their commitment to Meech Lake neither the Liberals nor the New Democrats can draw the parallel. So there really is no one on the national political scene who seems ready to take the cudgels to make what seems to me a very logical argument, one that could be combined powerfully politically to say that the two developments represent really a fundamental challenge to a centralist nationalism focused on the federal government. There is no one arguing that one represents the devolution of power from Ottawa to the provinces and the other represents the devolution of power to the United States leaving a weak, limited and attenuated federal government. However, that is one of the vagaries of politics. But the other reason, I think, is that attitudes towards Meech Lake cut across each other and reinforce each other in a number of different ways. There

is a matrix that can be developed by which we can explore the various positions taken with respect to the Meech Lake Accord and the Free Trade Agreement. Under this matrix we can locate the reasoning behind the positions taken, especially with respect to conceptions of Canada, the role of government in Canada, and the perceived relationship between centralization and decentralization, on the one hand, and interventionism and non-interventionism on the other.

Under this matrix there are four possible positions which one might take: for Free Trade and Meech Lake, against Free Trade and Meech Lake, for Free Trade and against Meech Lake, and for Meech Lake and against Free Trade. Each of the positions is, in fact, occupied. The federal government finds itself in position one, in that they support both agreements. It may be that Mr. Mulroney and others in this position see no necessary link between these two. They might argue that they are quite independent actions. That is, that one of them is a response to the domestic political problem of Quebec essentially, and the other a response to an external problem of American protectionism; that one is a political issue and one is an economic issue and that we really should treat them as being in two separate boxes. But it seems to me that for the many who argue for both, the two are tied together by hostility towards an activist, interventionist, national state, both in its nation-building role and in its economic development role, and by a belief that when the national state in Ottawa has acted dramatically in those kinds of ways in recent years, it has either done it unfairly, in the sense that it has been an age of imposing the will of central Canada on the rest of the country, or that it has done it incompetently, in the sense of all the failures of regional development policy. They are therefore coming out of it wishing to very directly constrain the federal government. Here I suppose decentralization and a degree of non-interventionism go together.

As I said, I believe that Free Trade imposes far more of a constraint on future federal action than Meech Lake does. Indeed, it seems to me that if you listen to defenders of Free Trade, one of its chief attractions is that it is a kind of voluntary straight-jacket which will bind the hands of governments in the future, and as I say, though I think this is debatable, one that binds the hands of the federal government more than those of the provinces. I say this because Free Trade represents really a kind of fundamental attack on one of the central historic rationales for a federal government, namely, the building of an east-west economy. Free Trade simply says we are not interested in building an east-west economy and using federal power to achieve it, but there is no such attack on the historic rationale for what provinces do.

On the other hand, the position of being in favour of both agreements has one important inconsistency. Meech Lake may be seen to weaken the hand of the federal government just at the time when international imperatives call on

the federal government to be able to act more decisively abroad and to be able to take measures to counter the regional imbalances that are exacerbated by international forces. This has led to Mr. Mulroney recently asserting a strong federal power to implement the trade deal against provincial opposition, in spite of his acceptance of the logic of Meech Lake and Free Trade.

I suppose the other sort of consistent position is the one that is against both Free Trade and Meech Lake. And I am not going to say much about that; it is obviously a mirror image of the first one, arguing that taken together the two weaken Ottawa from two directions at once, and both undermine the idea of a single unified national community centred on the federal government; both agreements imply a thin and attenuated sense of national unity based on perhaps little more than a view that Canadians can get along best with each other the less they have to do with one another. Both, I think this camp would argue, inhibit the capacity of the federal government to respond to a progressive agenda and to definitions of community which are non-territorial. Here, again, centralization and interventionism go together.

The position of the Liberals, the New Democrats, the Ontario government and others is to be for Meech Lake and against Free Trade. That view I think has to reject the idea of a direct link between the two. It has to argue again that they are both responses to quite different problems. It must argue that Meech Lake is about federal/provincial harmony and about Quebec, and it has to argue as well that Meech Lake is not a fundamental limitation on federal authority, not even symbolically. But this group would argue that Free Trade is just such a fundamental limitation on federal authority, both in the explicit rules it sets out, and perhaps more importantly for the long-run, in the pressures towards harmonization across a whole range of taxing, spending and other policies which it sets up. For this group, and I would place myself within it, Meech Lake promotes national unity, but Free Trade in the long-run is likely to erode national unity by reducing the linkages which tie Canadians together and by reducing the capacity of the federal government to act as the general redistributor or social insurance agent.

The next group, of course, is the group that perhaps New Brunswick Premier Frank MacKenna is in at the moment, and former Liberal Minister Don Johnston is in, which is to be for Free Trade but against Meech Lake. That position too, I think, must sharply distinguish what is going on in the two events. It does so by placing society and economy in two quite separate boxes. Free Trade, for Don Johnston, is really about the economy, about opening international markets, and so on. It is also about constraining governments from doing stupid things, and Free Trade is not in this view felt to have important implications for Canadian autonomy, culture, sovereignty and the like—Those are just simply placed in a different box. These same people would argue that Meech Lake is

all about community identity, autonomy and so on, and they really wear a completely different hat when they are talking about those internal domestic forces than they do when they are talking about the external ones.

I think that is another issue which we very much have to explore: what is the linkage between economy, society and governmental action. These are really just a few random speculations, but I felt that the typology might provide a useful way of organizing some of the debates so that we can see where different people fall along those two dimensions.



## TEARS ARE NOT ENOUGH

*Roderick A. Macdonald*<sup>1</sup>

I evoke this indigenous response to the Ethiopian famine not as a lament for the passing of Canada, but rather as an allegory for a view of the nature of politics and the function of government which the two agreements we are here to evaluate—Meech Lake and Free Trade—appear to ignore. All lawyers concede, I assume, that governments are at least legal institutions; the politics of government being a politics of constitutional law. But, what is less often acknowledged is that, for most non-lawyers, governments are also social institutions; the politics of government then also being a politics of constitutive practice. I believe that in Canada (and in its ancestor, British North America) governments not only have been understood, but also actually have functioned as the latter. Under the Meech Lake and Free Trade Accords, I fear, they risk becoming only the former.

Writing for the January issue of *The Canadian Forum*, my colleague David Howes tries to get at the same theme through a study in cultural anthropology.<sup>2</sup> He asks his readers to consider the phrase: "as American as..." Most of us, he suggests, would have little difficulty in supplying the missing word or words. He then challenges us to complete the phrase "as Canadian as ..." In proposing the self-deprecating response "as it is possible to be under the circumstances", Howes argues that whatever sense Canadians may possess of their identity as Canadians, that sense is contingent and fragmented. He concludes that it is the complexity of having a polymorphous national identity which constitutes the fundamental reason why it is easier to be an American than it is to be a Canadian.

To avoid any misunderstanding about my intention in mentioning Howes' work, let me immediately open a parenthesis to explain what I mean by national identity. What we are is typically only a reflection of what we choose to remember about ourselves. At the individual level this act of remembrance is captured by the concept of self; to believe in the continuity of oneself is to rewrite one's personal history as an inexorable progression to the present.

1 Dean, Faculty of Law, McGill University.

2 Howes, David; "Collective Conscience" (1988) 67 *Canadian Forum* 11.

Groups and associations, including post-enlightenment political associations, also seek self-definition; for example, to be a people is to have had a history but never to have had a "past".

In the late 20th century, the concept of identity has assumed an even larger place in human affairs. Indeed, psychologists have even succeeded in convincing us that "scientific" or "rational" notions such as self-knowledge, self-actualization and integration should be substituted for the "magical" or "irrational" ideas of nemesis, fate and predestination in the average individual's lexicon of personal continuity. Where political associations are concerned, however, social psychologists have failed to convert the masses. The general public is, as yet, reluctant to abandon their icons of nation, race and distinct society in favour of the conceptual schema of Emile Durkheim and Talcott Parsons.

The point, of course, is that national identity—like personal identity—is posited (and then analysed) for rhetorical rather than epistemological reasons. This is also the case with political ideology and constitutional artifact. Just as Howes reminds us of our cultural diversity, social theorists recur to Canada's heterodox ideological underpinnings. For some, this heterodoxy is captured in the claim that Canadian politics is not cast in the classical liberal-democratic mould. Thus, Seymour Martin Lipset has written: "The dominant traditions in Canada are statist and communitarian, Tory and socialist, and hierarchically ecclesiastical, Catholic, and Anglican; the American Creed is anti-statist and individualistic, classically liberal or libertarian, and voluntary, egalitarian and congregational, Protestant sectarian."<sup>3</sup>

Yet, writing as an American caught up in the quest for hegemonic national traits which identify all that is "un-American", Lipset misses Howes' fundamental insight. Canadians, other than certain Quebec nationalists anxious to invent a "nous autres", typically do not employ the expression "un-Canadian" to de-legitimize the political views or programmes of their opponents. In order for an idea or a perspective to be un-something, there must be, as in the United States, a dominant ideology; where the expression "un-something" rings false, ideological hegemony is likely to be absent.

I have argued elsewhere that ideological heterodoxy is a feature of Canadian political culture, and that this heterodoxy is reflected in approaches to the role of governments and the instruments of public policy that they are encouraged to deploy. Let me briefly reiterate the argument. Most Canadians conceive of the political state as a fundamental social institution, not unlike the church, the family, the local community, a trade union, a professional association, or a social club. Government, therefore, has an obligation to act affirmatively to

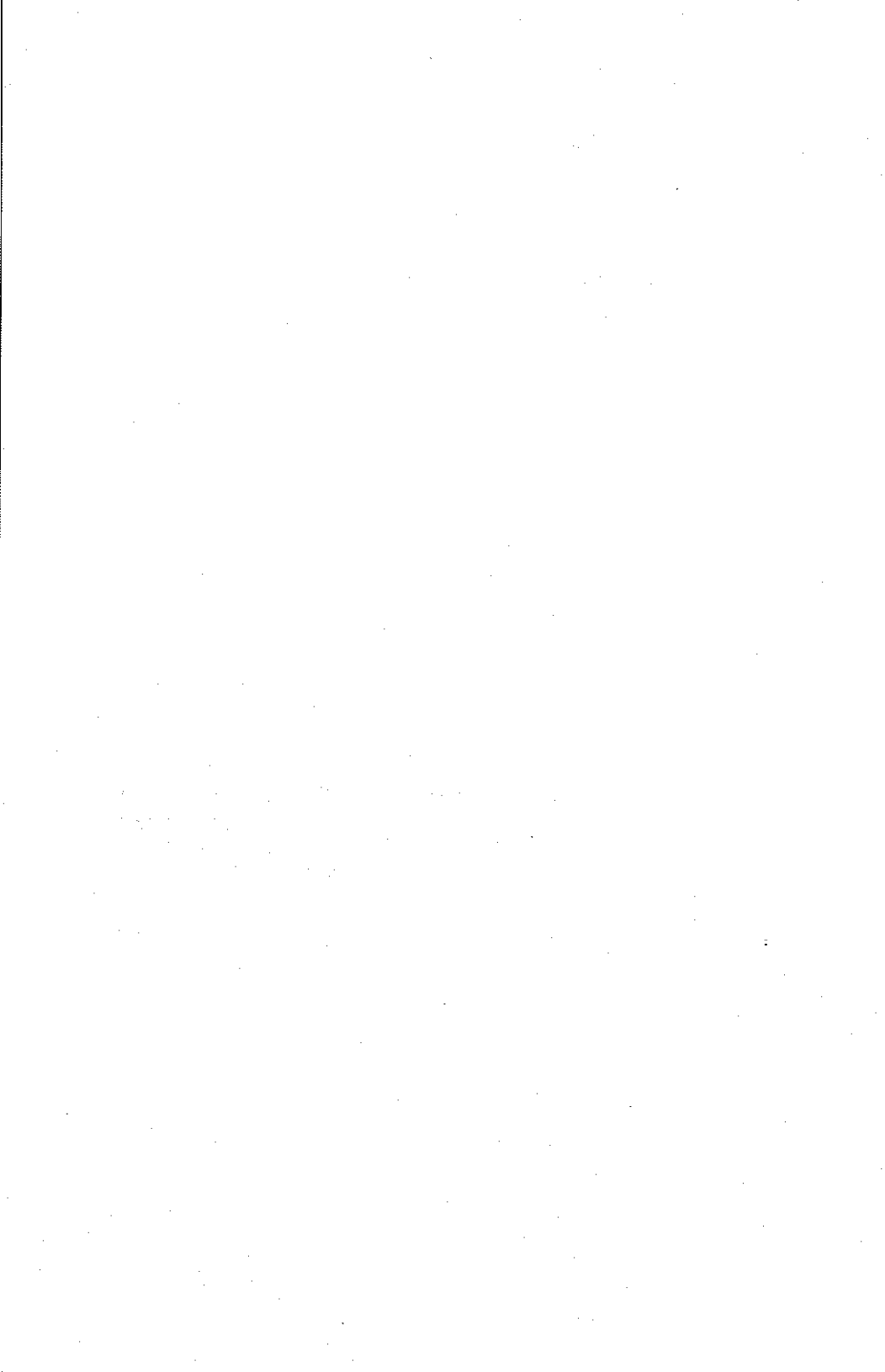
3 S.M. Lipset, *Consensus and Conflict: Essays in Political Sociology* (New Brunswick: Transaction Books, 1985).

## PART TWO

### *The Impact on the Structure and Operation of Canadian Federalism*

#### Editors' Note

*The second enquiry relates to the operation of intergovernmental relations in Canada. By virtue of new roles for provinces in the Meech Lake Accord and the new vitality given to federal-provincial co-ordination by the Free Trade Agreement, the relationship between the central level and the provinces has been intensified. Will this lead to innovation in the ways of co-ordination, leading to the better realization of national policies? Or, will it lead to confrontation and stalemate—the holding to ransom of the national government by provinces determined to seize out every gram of advantage that might be obtained from the giving of consent?*



identify, to deliberate about, and to respond to social need. Several public or para-public mediating and non-voluntary institutions—from hospitals to universities, from cultural groups to marketing boards—complement Parliament in structuring political deliberation.

However, a government acting as social institution does not respond to individuals as fungible commodities. Much Canadian governmental activity has been designed expressly to oust classical market notions, such as property as sovereignty, freedom of contract and fault-based liability, (along with their corresponding legal enforcement institutions—adversarial adjudication by courts) from a wide range of social interactions. State-administered medical and auto insurance, no-fault worker's compensation, a conciliation model of collective bargaining, mediational landlord-tenant schemes, and equity-dispensing small claims courts are only the most visible of recent attempts to promote the rationality of politics over the arbitrariness of law.

The feature of Canadian political life which typifies this heterodoxy is the elaborate set of conventions governing group representation which inform our public institutions. Every national organization, from the Olympic Organizing Committee to the Supreme Court of Canada, from the federal Cabinet to the Board of Bell Canada, attempts to achieve a balance of French and English, men and women, regional representation, ethnic origin and religious adherence. My point is that the rhetoric of political democracy in Canada has not been a liberal rhetoric. Canadians typically do not argue for "rights" on the basis of non-differentiation; rather, we argue for "representation" on the basis of difference. Obviously I am not claiming that things have been, and now are, wonderful for racial, religious and linguistic minorities, for the poor, and for women. But I do claim that the recognition and acceptance of difference in discourse about the good has proved a better guarantor of an enlarged moral community than has the assimilation and isolation which follows a denial of discourse based on difference.

Let me offer one example. The criticism leveled at the 1920s Senate "Persons Reference"<sup>4</sup> is not at the case itself but rather at the fact that the question whether women would be Senators was still open at such a late date. We forget that in Canada more women had served, from (in most jurisdictions) a much earlier date, in major political institutions than in the U.S. (where, theoretically, equal access had long been guaranteed). In my view the absence of liberal ideological hegemony has meant that Canadian society's most fundamental questions have, until quite recently, been perceived as political, not legal. They are on the agenda of political deliberation because they are held to be too

4 [1928] S.C.R. 276.

important for law, and because, once a decision is reached, that decision is accepted as redefining discourse and action. It follows that the urge to legalize basic policy choices flows from impoverished political debate. Politics is, on this reading, a value, not a liability.

Having set the stage with this plea for political virtue, let me now offer a personal assessment of the effect of Meech Lake and Free Trade on the role and function of contemporary government. I believe that, for all their superficial contradictions, both agreements are being played out as variations on a single theme: the primacy of the right over the good; the pursuit of liberal homogeneity over republican and tory heterodoxy; and the displacement of political institutions for pursuing common ends by legal institutions for inventing claims of right. One implication of this shift for our understanding of the role of government is deserving of note. When a society becomes dominated by the legal principle, its members become preoccupied with formalized rules of duty, entitlement and jurisdiction: whether it is good or just to act is subsumed in the questions "Is it legal?" and "Do I have the power?" Concomitantly, a shift to the legal principle usually produces an abundance of strict procedural requirements for allocating benefits and burdens: deliberation, discretion and judgment are devalued, and adjudicative due process leading to peremptory ejaculations such as "Watch Me" proliferates.

Those who yearn for social relationships emerging from deliberation and bonded in shared substantive commitments will find little solace in the two accords. For if the experience of the past few years has had any lessons, surely chief among them is the limited capacity of the Canadian legal establishment to understand the political dimensions of our recent constitutional endeavours. When conceived solely as a legal institution the state has no role in promoting the pursuit of shared commitments. Only when also conceived as a social institution can the state marshal instruments of public policy in pursuit of a common good other than legalism.

Some commentators believe that Meech Lake and Free Trade are perfect reflections of late 20th century political wisdom. This conventional view has it that the nation state is both too big and too small: too big to act effectively in nurturing small communities; too small to compete in an international economy. Meech Lake, it is thought, addresses the first concern; Free Trade the second.

Is Canada really too big? Certainly P.E.I. is a more homogeneous socio-political unit than Canada. But is Ontario? What do people in Sudbury share with those in St. Thomas? or St. Eugene with Emo? or Port Colborne with Ottawa? or anywhere else with Toronto? The same may be said of Quebec, B.C. and Alberta. Furthermore, the evidence trotted out to support the claim that smaller political units are more likely to experiment with new political options is only valid to a point. True, Saskatchewan did develop medicare, but Alberta

disenfranchised Hutterites; true also that New Brunswick did become officially bilingual, but Manitoba abolished bilingualism. The greater homogeneity of small communities carries costs, precisely the costs that federal structures and forced negotiation are intended to minimize.

Under Meech Lake, Quebec is recognized as a distinct society and various positive duties of government in the protection of such distinctiveness are elaborated by sections 2(2) and 2(3).<sup>5</sup> When read with section 148, which recognizes the politics of Constitutional Conferences, and with the cooperative politics of Senatorial and Supreme court appointments,<sup>6</sup> these sections can readily be seen as an acknowledgement of government's traditional role in Canada. For this reason, I am not troubled by those aspects of Meech Lake which make explicit the positive role of government. I do, however, have deep reservations about the manner in which that role is likely to be executed. Unless the differentiation and embrace of difference required of national institutions is replicated at the provincial level, one risks an ideological hegemony grounded in liberal premises. A discourse of virtue demands that even distinct societies acknowledge the distinctiveness of their constituent sub-societies.

Is Canada too small? The argument here is that national governments pursuing purely national policies are not powerful enough to enforce these policies in a world economy. Let us accept, since it is difficult to do much more than speculate as to the point, that free trade will be economically beneficial for Canada. But economic gain is only a part of what is at stake in deliberations over Free Trade. For however powerful an engine for political and social development economic efficiency may be, political theorists have never adduced it as the sole, let alone the dominant, justification for the political state. Typically, other values, such as justice, fairness, equality and liberty preoccupy philosophers. The choice is not between Free Trade (free markets) and un-free trade (regulated markets). It is between various strategies for achieving political virtue through economic regulation where the market is only one option.

Let me develop this theme further. Unlike those who see in Free Trade a threat to Canadian culture (the CBC, Canadian content regulation in broadcasting, marketing boards, regional subsidization under the unemployment insurance scheme etc.) my concern is not with culture *per se*. I worry as much about allowing culture to censor public policy as I do about allowing the market to censor public policy. Both are only political commodities, not ends in themselves. Rather, my concern is with the false simplicity of "deregulated" Free Trade as a model of governmental activity. "Deregulation" (e.g. removing

5 Government of Canada; *Constitutional Amendment 1987*; (Ottawa: Queen's Printer, 1987).

6 *ibid*, sections 25 and 101C.

pollution controls, loosening safety standards, eliminating cross-subsidization, and decreasing consumer protection) is no more than reregulation so as to generate subsidies for market actors. The real danger of Free Trade is that it will enconsecrate the minimalist model of the state. For once we accept that markets have a primary function in governing human affairs, the nation state as we know it is not only too small, it disappears completely.

My prediction is that Free Trade will lead to the elimination of all specifically targeted social programmes and public policy instruments. The variety of such instruments perfected in Canada—corporate; price, entry and exit controls; subsidy; tax-relief contract; tariff; price support; etc.—will be exposed for what they are: differential economic regimes for different groups of Canadians. Under Free Trade they will be replaced, if at all, by a single, across-the-board, guaranteed annual income, which will reinforce the citizen/state entitlement ethic set into motion by the *Charter*.

What then, to conclude, can be said about the effect of the two agreements on the role and instruments of government? Both Meech Lake and the Free Trade Agreement impoverish Canadian political discourse. Meech Lake gives us the possibility of water-tight compartments of distinct societies—compartments impervious to the impurities of other distinct societies. The Free Trade Agreement makes differentiated government action unlikely.

My title was "Tears are Not Enough" because I believe that public choice about difficult social issues requires more than "laissez-faire" and token regrets. But if we have to come to accept the rhetoric of rights, the lure of homogeneity and the technique of market efficiency, I accept that I should have conjured the American, not the Canadian, response to the Ethiopian famine: "We Are The World."



FEAR AND LOATHING ON THE CONSTITUTIONAL AGENDA:  
MEECH LAKE, FREE TRADE AND  
THE FUTURE OF POLITICS IN CANADA

*Bryan Schwartz*<sup>1</sup>

The link between Free Trade and Meech Lake has been made on those rare occasions when people have escaped party boundaries. One person who has made the link is Ian Waddell, who said that half of Canada was given away at Meech Lake, and the rest at the Free Trade negotiations. Mr. Broadbent's response, which was picked up by reporters, was: "If Waddell think's he's short now, wait 'till I get through with him."

This linkage depends partly on which institution you are talking about. Linkages are very strong in the case of executive authority and legislative authority, and somewhat weaker with respect to third party adjudication by courts and panels. There is an effect though, in that not only are the parallels different on these different branches, but both have the effect of distributing authority differently among the three branches of government: the executive, the courts and legislatures. The transfer of power is away from legislatures strongly in the direction of the executive, and to some extent to the courts as well, but certainly on balance, a "big win" for the executive, and a "big loss" for the legislature. The understanding of the executive in both Meech Lake and Free Trade is that of executive as envoy, executive as diplomat with plenipotentiary powers that goes and negotiates with other governmental units; not, however, executive as leader of the government that presents policies and produces results as a result of open public debate.

There are a number of implications that arise because of this. One of these has to do with the conventional wisdom about negotiations, which is that they take place better in secret. That is because of the posturing and game playing that is necessary in order for negotiations to proceed; because you have to save face, you do not want to get locked in. Therefore it is necessary that all these things take place behind closed doors. The result is no public input before

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negotiation, no public input during, and only rubber-stamping public input afterwards. This was the way both Meech Lake and Free Trade were produced.

People have described this process as elite accommodation, but elite accommodation can be interpreted in several different ways, one of which is that the elite makes accommodations on behalf of the interest groups that they represent. In some ways, though, Meech Lake in particular represents not so much an accommodation among the interests that the elites represent as an accommodation purely among the elites themselves. For example, I have argued in *Fathoming Meech Lake*<sup>2</sup> that you can understand Meech Lake not only as a transfer of power to provinces, but as a transfer of power to premiers. Premiers get to have legitimation for their annual First Ministers Conference on the economy; Premiers may sit as a rolling constitutional conference for the rest of eternity; Premiers in effect may appoint Supreme Court justices; and Premiers in effect may appoint Senators. Technically it is the cabinet which makes these appointments, but in practice it is the premiers.

One of the consequences of having this sort of purely executive conduct is that these processes do not necessarily respond to underlying social forces. It may very much depend on the chemistry, personal ideologies and convictions of the elite themselves, which in some ways are detached from underlying social forces. I do not believe that Meech Lake, for example, responds to underlying social forces so much as to agendas and, to a certain extent, lack of agendas among participants during one particular eight-hour meeting.

Free Trade, too, does not represent a necessary result of social pressures from below to reach particular agreement with the United States, as much as a top down imposition on the political agenda. Not only are these policies a result of executive negotiation, but both Meech Lake and Free Trade contemplate further negotiations. The model of Meech Lake is very much one of policy-making by executive federalism. What might be called "cooperative federalism" might also be "collusive federalism", the process of the executives continuing to get together and hand around important policy issues. The impact on a person's life in the province of Manitoba of federal/provincial fiscal transfer negotiations is probably greater than any single provincial budget. And yet Meech Lake contemplates that more and more decisions of this sort will be made through executive negotiations. Judges will be appointed through negotiations between the federal government and the provinces.<sup>3</sup> There will be First Ministers

2 Schwartz, Bryan; *Fathoming Meech Lake*; (Winnipeg: Legal Research Institute of the University of Manitoba, 1987).

3 Government of Canada; *Constitutional Amendment 1987*; (Ottawa: Queen's Printer, 1987), section 101C.

Conferences on the economy in which spending power will increasingly have to be negotiated.<sup>4</sup> The question therefore, is not just one of executive negotiation resulting in policies, it is of executive negotiation resulting in a mandate for further executive negotiations.

That is not the only model one can construct for dealing with an increasingly interdependent world. The other model that we are most familiar with, which is increasingly being abandoned, is legislative federalism in which there is a direct relationship between the larger unit, which has been constructed to encompass larger territorial interests, and the people. The European Community, for example, originally was very much dominated by an executive federalism model.<sup>5</sup> The European Community law would be made by councils of ministers and councils of heads of government. But the trend more recently is back in a more federal direction of direct election of a European Parliament and giving the European Parliament more power.<sup>6</sup>

That was the approach we took in 1867: not to have a confederal solution in which executives would negotiate on behalf of separate units, but to set up a federal government with a direct relationship to the people of Canada that would speak directly to and on behalf of the people of Canada. By contrast, the model of Meech Lake and Free Trade is very much of executives engaging in negotiations with other executives. This diplomatic model, of course, is perhaps less startling in the context of Free Trade but very startling indeed in the concept of Meech Lake. It is not just Meech Lake that was conducted this way.

The idea that government policy in Canada is not a single political community engaging in open debate with itself, but different units negotiating with each other is not an original sin of Meech Lake. It is increasingly a trend. For example, the five-year process of negotiation over aboriginal self-government was conducted entirely on a diplomatic model. Seventeen governmental units, or in a few cases non-governmental units, engaged in secret negotiations across the table with all the paraphernalia, the symbolism and the flags of international negotiation. In my view it was inappropriate for the domestic policy-making process for them to operate along the lines of an international negotiation, in secret with adversarial stances on a diplomatic model. However, not only does Meech Lake continue that to an intolerable degree, it purports to entrench that as a model for intergovernmental relationships in the future.

4 *ibid*, section 148.

5 see, for example, *EEC Treaty* articles 138 (1) and 145.

6 see, for example, *EEC Treaty* article 138(3) and the *Act Concerning the Election of the Representatives of the Assembly by Direct Universal Suffrage* annexed to Council Decision 76/787.

In my view it would be much better, at least in the domestic context, if we returned to the model of legislative federalism. The executive is not only seen as envoy, but also as Solon the law giver. I rather doubt this story is true, but I remember reading a novel by John Gardner on Xenophon the philosopher. The following story is contained in it. Asked by his polis to lay down a code of law for that community, he gave them a draft and asked only that it not be changed until he got back from a trip which he was about to take. He went on his trip, starved himself to death, and never came back. The executive not only makes policies, the executive makes policies for all time. The executive takes onto itself a burden which until recently we were very reluctant to give even to legislatures; the burden not only to make decisions, but to make permanent and irrevocable decisions.

With respect to Meech Lake, the decisions themselves with respect to the distribution of power are largely irreversible, for legal and practical reasons. For example, if you have made a mistake about the extent to which the spending power has been disbursed it would be very difficult to get it back in any event because the practical politics of premiers surrendering power is not likely. But it is going to be even more difficult to reverse the substantive dispositions of Meech Lake because Meech Lake changes the rules about how you change dispositions.<sup>7</sup> It is now extremely difficult to amend the Constitution. Before Meech Lake, it would have been hard enough to get the spending power altered; if a mistake were made now any province could opt out of an amendment with respect to the spending power.<sup>8</sup> If we said "whoops there go national social programs", any province that wanted to resist a reversal of that through constitutional amendment could opt out with compensation—you could even opt out with compensation of an amendment correcting opting out with compensation. Therefore, for legal as well as factual reasons, the dispositions in Meech Lake are permanent and irreversible. I find it very frustrating to hear the rhetoric of "We'll fix this stuff up in the second round." As I said in my book that is kind of like pleading guilty at trial and saying we will fix it up on the appeal. Anything that happens in Meech Lake happens for good: it is not going to be reversed, for both practical and legal reasons.

What do Meech Lake and Free Trade do about courts, about third party adjudication? Meech Lake gives a lot of powers to the court in some ways that are underappreciated and some ways that are overemphasized. What is underappreciated is the extent to which Meech Lake sets up incredibly vague norms on fundamentally important issues such as the federal spending power. The

7 *supra*, note 2, section 41.

8 Government of Canada; *Constitutional Amendment 1987*; (Ottawa: Queen's Printer, 1987), section 106A.

small matter of how we dispose of tens of billions of dollars every year and define ourselves as a national community is disposed of in about 20 words, each of which is ambiguous, including the word "the".

Some people say "oh well, the courts will have to work that out," and there is a wonderful phrase in the report of the Special Joint Committee on Meech Lake in which the committee assures us that the courts will be able to apply the law in the circumstances. Strangely, I find this less than reassuring or at least less than substantive. So to some extent, insofar as "the Supremes" have the final word on the issues that are assigned to them, more power is given to the courts.

On the other hand, one of the problems with Meech Lake is that there is too much emphasis on what the courts will say. This is not just a problem with respect to Meech Lake, it is a problem with respect to the Charter, and with respect to constitutional law in general. We lawyers, and the general public, too, tend to overemphasize the extent to which courts define and interpret the law. We tend to think that just because the courts have the final word on some things, they have the only word or the most important word or the primary word, but they do not. Even with judicial review, most decisions are made first and last by legislatures or executives, and they have the role and the responsibility of interpreting the law and applying it. Many times the decision will not get to judicial review, and even if it does the interpretation of these norms by the executives and legislatures are a very important influence on them. However, a lot of the directives in Meech Lake are not directives that can be interpreted by courts: they are directives to legislatures or to the executive. If you say to Quebec "Go out and promote your distinct identity," to some extent the constraints on that will be defined in court, but first and foremost and last as well as first, that is something the Quebec legislature will have to interpret. The political interpretation of messages like that by the Quebec legislature will be far more important in this case than what the courts say. In Meech Lake, then, there is a considerable willingness to give power to the courts, but in some sense, I think, we tend to overestimate that as much as I underestimate it.

Free Trade, and I said this in the beginning of my remarks, is different from Meech Lake with respect to the institution of courts: there is much less trust in third party adjudication in the Free Trade Agreement. This is not particularly surprising, one would think, in the sense that one would expect less trust of giving up sovereignty in the international context than in the domestic context. Ordinarily that should not be surprising, although of course Meech Lake with its internationalist model of the Canadian community might make that not quite as trivial as it might seem. Under Free Trade, as I understand it, the role that is given to third party adjudication is considerably less than it is in Meech Lake. With respect to only a very limited number of issues is there mandatory binding

arbitration regarding safeguards.<sup>9</sup> With respect to most issues, binding arbitration is only with consent.<sup>10</sup> Most disputes would be solved by a political body of a Free Trade Commission composed of political ministers.<sup>11</sup> Even when there is a role for the court it is mostly just a review function, a very trivial review function, and in fact I think quite a dangerously trivial review function. Apparently, if the United States or Canada misapplies its own laws there is a review function to see whether in fact a domestic tribunal has fouled up the interpretation of its rules and standards.<sup>12</sup>

Indeed, this is a very modest function for two reasons. First of all, the standard is review and not appeal. In other words, the standard is "Did you foul up badly?", not "Did you get it right?" Secondly, no review is made of the underlying legitimacy of the laws that are being applied. Therefore, what we could get out of a Free Trade review process is a determination that, yes, indeed, the American trade commission accurately applied the incredibly harsh provisions of the U.S. trade law. That is worse than nothing; it is actually bad because it has the effect of legitimating those decisions. Americans can say "Wait a minute, what are you complaining about? We went to a third party adjudicator and it affirmed the decision". Explaining to the public the difference between review and appeal and the difference between saying there was not a corrupt decision and considering the underlying merits, is not going to be easy. The bottom line is that the decisions may be affirmed by a third party. I think that the effect of third party adjudication, which in this case is weak to the point of being invisible, is actually counterproductive; it is worse than not having anything at all. Unlike Meech Lake, when considering a sensitive issue like subsidies, the determination is to strive, if at all possible, to work the conflicts out politically in the future. Thus there is more reluctance in Free Trade than in Meech Lake, it seems to me, to accept outside third party adjudication.

What about legislatures? With respect to social welfare, the moral is that it should not be regulated by the legislature. That is over-generalized to some extent, but certainly there is some truth in it. Both Meech Lake and Free Trade are very much in an anti-regulatory free market model—Meech Lake in the sense that it works against the possibility of national social welfare programs, and Free Trade in the sense that in many ways it is hostile to regulation. Free

9 Department of External Affairs; *Canada-United States Free Trade Agreement*; (Ottawa: Queen's Printer, 1987), article 1806 (1)(a).

10 *ibid.*, article 1806(1)(b).

11 *ibid.*, article 1802.

12 *ibid.*, article 1904(2).

Trade, for example is hostile to the idea that Canada can maintain complete control of its energy supply.<sup>13</sup> It is kind of funny: the government's explanation of the Free Trade Agreement says that we are not promising to sell anything, which is true, for as long as Canadians stop buying oil, the Americans have no right to oil. However, I do not see that as a particularly realistic scenario. Our ability to control direct foreign investment is now severely limited.<sup>14</sup>

Certainly, it would not be as difficult to reverse Free Trade as it would be to reverse Meech Lake. That is, with Free Trade one may denounce the treaty and get out of it even if it purports to last forever, although there is a provision for escape.<sup>15</sup> On the other hand, factually speaking, once we are in a Free Trade situation, and the longer we are in it, the harder it will be to extract ourselves. Once, for example, the relaxation of direct foreign investment has taken place, it will be much harder to become detached from the American economy. We cannot wait until there is an even greater control and greater dependency on the United States and then turn around and say to them that we are ripping up the agreement. So, while legally speaking, it will not be impossible to extract ourselves, once the agreement is in place, it will be difficult for us to get out of it, and the longer we are in, the more difficult it will become for us to escape.

Both Meech Lake and Free Trade, on the other hand, do acknowledge and do concede a role for government in promoting culture. It is rather interesting that this is noted so frequently. Meech Lake is remarked upon, for example, in that it tells the Quebec legislature to go out and promote the distinct society of Quebec. This message is primarily, I think, cultural and linguistic rather than economic—at least I have argued that that is the way the clause is most likely to be interpreted.

So there is here an understanding that the role of legislatures and governments is to deal with culture. It is an unusual model in political science, for the state to assume a passive role with respect to economic matters while remaining active with respect to cultural matters. I am not quite sure whether there is a lot of precedent for this in political theory. Usually the interventionist model is a little more coherent. This model contemplates that governments deal with culture but not the underlying forces that create culture.

Free Trade, too, creates some special exceptions for culture. How well it does that I do not fully understand and I cannot predict. I am not so sure that it protects us in all respects with respect to cultural subsidies. Perhaps some of you understand the technical details better than I in this respect. But there

13 *ibid*, article 904.

14 *ibid*. See generally Chapter 16.

15 *ibid*, article 2106.

certainly is a whole chapter there saying that culture is special and is more exempt from the Free Trade world than are other things, so at least the intent there is to create some special protection for culture.<sup>16</sup> Is this to say that you can tell legislatures to go out and promote culture while ignoring or weakening their control over social welfare and economic regulations? Is this realistic, is it even possible? It is certainly an anti-Marxist model in the sense that it supposes that there is an autonomy of culture from underlying social forces like the economy and that you can deal with culture separately from the other things that are going on in your national life. No doubt, to some extent that is true. To some extent, I think, culture does work in its own way detached from underlying social forces. Unfortunately, in some ways it does not, and the idea that you can really maintain Canadian culture while you are losing Canadian control over issues which form the underlying basis of the culture, such as social welfare programs, is simply not realistic. In other words, the preservation of culture as a sop to those who believe in national community seems to me more of a throw-away than something that is seriously going to protect the idea of Canada as one united political community.

As I hope this review indicates, there is a lot more linking Meech Lake and Free Trade together than people normally wish to mention. Both agreements drastically alter the power relationships of our institutions of government, the executive, the legislature and the judiciary, as well as between the levels of government, as is more commonly noted. These relationships, too, must be discussed and debated if we are not to enter blindly onto a path which we may eventually discover is not the one we really wanted to take.

16 *ibid*, article 2005.



## DISCUSSION

### JOHN WHYTE

The conception of Canada put forward by Rod Macdonald is attractive. It is based on scepticism about how well liberalism fits within our history and how well liberalism serves our present condition. The suggestion is that it is mistaken to resort to political instruments that honour claims of right and individual autonomy when our past political tradition consists of advancing particular conceptions of a just Canadian society. Macdonald's description is of a world in which protracted adjudication replaces the formation of shared commitments. It is also a world of minimal economic regulation (if Macdonald were to focus on the likelihood of the Free Trade Agreement producing harmonization of regulation instead of deregulation he could make the same point: the displacement of particular conception of social good by a common global conception which is driven by the norm of efficient production).

The question that is raised by his analysis is how it fits with the liberal critique of Meech Lake and the Free Trade Agreement. In particular, one wonders if an attack on these two agreements based on the rejection of liberalism as an appropriate ethic for Canadian political development is troublesome for Bryan Schwartz, a dedicated liberal theorist.<sup>1</sup> How is it that Schwartz, who is so far away from Macdonald at the level of political theory, is able to join him on the political assessment of the constitutional and trade agreements?

### BRYAN SCHWARTZ

First and foremost my interpretation of liberalism is different from Macdonald's and second my interpretation of Toryism is different. I will start off with the way I understand liberalism. It is true that one can understand a liberalism in which not only is individualism tolerated but set as an ideal, and it is possible to understand a liberalism which is homogenizing through the force of mass culture. However my understanding of what the liberal ideal is is a model of

1 See, e.g., B. Schwartz, *First Principles, Second Thought, Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal Institute for Research on Public Policy, 1986), in particular c.1 "Individuals Groups and Canadian Statecraft".

tolerance, in which, among other things, all forms of pluralism, including those which are based squarely on free association in a group, whether you are Roman Catholic, Hutterite, Jewish, or whatever, are tolerated. It does not seem to me that liberalism is intrinsically hostile to all sorts of diverse forms of life. To me what liberalism stands for is a radical commitment to tolerance for diverse forms of life. The form of liberalism that I tried to defend in *First Principles*, *Second Thoughts*, my book on aboriginal peoples, is liberal individualism; seeing the individual as the fundamental unit, a unit which can then freely form into a group and one which gives rights that are not dependent on the arbitrary history of your group. My problem with some forms of Canadian Toryism is that they discriminate among different groups based on accidents of history. If you can sign up to a group which just happened to be around in 1867 (and not only around in 1867, but winning), like major denominational school groups who happen to have the establishment rights of 1867, then you have more rights than if you are a group that came along later like Jehovah's Witnesses.

To me the way to proceed in Canada would be to use liberalism's accommodation for diversity to try and respond to group claims in ways that do justice to all groups independently of their special history. It seems to me that Meech Lake moves, and Macdonald towards the end of his remarks acknowledged this, in the direction of parochialism, but a parochialism that is very worrisome. In Quebec, and I think this is what his remarks are about, you have a distinct society. That is fine. We are all in favour of a Quebec that is predominately French; our problem is that some of us do not want a Quebec that is exclusively French and that is not adequately tolerant of the anglophone minority there. We would like an interpretation of Quebec's distinctiveness which includes Quebec's own pluralism and recognizes that the anglophone minority is very much an integral part of Quebec's distinctive character.

One of the scandals of Meech Lake is obliviousness to the fact that the interpretation of Quebec's distinct society by the Government of Quebec is completely opposite to that which the government of Canada purports it to be.

In the Report of the Special Joint Committee there is a passage in which Lowell Murray says "We all know what Quebec's distinct society is—there is a francophone majority and an anglophone minority". The very next passage in the Special Joint Committee's Report reports on a brief from La Fédération des femmes du Québec that says we want to protect our institutions, our ways of life, our arts and literature and our language. This is in the singular; they do not mean both languages. Bill 101 refers to French as the distinctive language of Quebec. This idea that Quebec is going to understand Quebec's distinctiveness in pluralist terms is a delusion and is downright dishonest because we know that that is not the interpretation that the majority in Quebec will put on it. In fact, the majority in Quebec has made it clear on occasion that it accepts the

opposite interpretation; that Quebec's distinctiveness is defined by its franco-phone character only.

I want to add one more remark about this just to bring into focus the sort of strategy that I would like to see for accommodating diversity. The Inuit of the North, for whom I have worked for five years on the aboriginal process, have always chosen to try and accommodate their claims to specialness in a way that is nonsegregationist. That is, they want to set up, for example in Northern Quebec, a community that is predominately Inuit but in which everyone has equal rights. They would not segregate themselves into an Inuit reserve and Inuit ghetto, it would be a regional government with equal representation for all, in which they happen to be a majority. That was also their model of political development in the North. They were going to create Nunavut, a political unit in the North, which would eventually achieve provincehood, which would be overwhelmingly Inuit but in which everyone would have equal rights. That is something that I strongly support.

I am extremely dismayed to see the brazen, discriminatory, slap in the face that this sort of arrangement received in Meech Lake.

With some things in Meech Lake you can say: "Well it might work out, but it all depends on what happens". I am not happy when people say that because I think politics is about making realistic assessments, not just telling happy stories. With respect to the North, we do not have to wait to see what happens, we know what has happened. What has happened is that every other province got in here with the consent of only one other level of government. In 1982 the amending arrangement was changed to require the consent of seven provinces and now in Meech Lake the requirement is again raised to 10 provinces. That is aimed squarely, directly and undeniably at the North. It is aimed at people like the Inuit who eventually want to achieve provincehood. What it does is tell the Inuit, among other things, that they can forget about achieving self realization in the liberal context and achieving a province like the others which happens to be an Inuit majority. They may now turn to more exclusivist, parochial and homogenizing versions in which they will follow the reserve model, negotiate land claims, and set up their own governments, because they have been told, after an extraordinarily noble endeavour in the direction of achieving a self-realization in a liberal context, to get lost. I think the provision on the North in Meech Lake is unconscionable and I do not see how a government that purports to believe in democracy and the equal protection of the law can support a provision which is so discriminatory.

**PATRICK MONAHAN**

I would just like to make some general comments. One is directed to something that Bryan Schwartz mentioned in his paper, which is the error of exaggerating the impact of the courts. I would like to extend this claim to warn against exaggerating the impact of the courts under both the Meech Lake Accord and the Free Trade Agreement. For example, with respect to Meech Lake, Schwartz points to the spending power provision and says it may be that it does not in fact transfer a great deal of power to the courts because the courts may not be required to adjudicate on the basis of this particular provision. I think the way to explain this is to note that although the spending power provision is uncertain, it represents a net gain in our certainty because the previous situation was that there was no constitutional provision whatsoever dealing with spending power. If anything, we have moved towards a position of more certainty. Of course, it may be that the incentives to litigate increase so that it would be more likely that a matter would result in litigation. In that sense it may increase the possibility of judicial intervention. But it is wrong to suggest that, because the spending power provisions are vague and uncertain, there will therefore be more power to the courts. Another point about the spending power provision is that it only applies to future programs. In other words it grandfathers, if you will, everything that we are now doing. If you look at the Free Trade Agreement, you notice the same thing. You notice throughout the Free Trade Agreement the so-called grandfathering of existing social programs. Rod Macdonald at one point in his remarks talked about the Free Trade agreement and a minimalist model of the state, but when we talk about the impact of these agreements and when you look at what the agreements actually say, we see that everything we do now will continue to be done or at least, be allowed. The drafters of these documents did not want to include what we are now doing. They set up sets of rules for the future; that is what we did with the spending power provision in the Meech Lake Accord, and that is what we have largely done in the Free Trade Agreement. In other words, this points to an incremental model of politics.

Another point that I would like to make with respect to potential exaggerations is the exaggeration of the linkages between these two. I am surprised that no one has really mentioned the Charter. We are talking about the Meech Lake Accord and the impact of the link between the Meech Lake and Free Trade Agreements but nobody has mentioned the Charter. My view, picking up from what Rod Macdonald has said, is that, in fact, there are very great linkages between the Charter and Free Trade in terms of the vision of government, in terms of the vision of the role of the state, and in terms of the vision of the role of individuals. I agree with Macdonald that the vision of Free Trade is as an economic constitution and an international constitution, restricting govern-

ment. The Charter is the constitution restricting what domestic policies we can enact, and both of these documents reflect a hostility to positive government, to positive intervention in the market place or in political life generally and an attempt to restrain what government can do. That is the model of government we have been given.

What does Meech Lake represent? Meech Lake represents exactly the opposite. It seems to me that it represents a view of the positive role of the state—a value of community as opposed to individuals. Section 2 of the Meech Lake Accord talks about the role of government in promoting distinct identities and distinct societies. The immigration provisions in the Meech Lake Accord are premised on the idea that positive state intervention is a good thing because it will permit the molding of political communities. In other words, while Bryan Schwartz talked about a return to legislative federalism, it seems to me that what Meech Lake may represent is a dying breed of executive federalism which we have always had in this country. The Charter and Free Trade may well be the new breed. What I am suggesting is that when we look back on this twenty years from now, when people look at the 1980s and what the significance of these things is, do you think people will draw far more parallels between the Charter and Free Trade? On the other hand, Meech Lake, may be seen as the dying gasp of the past which 20 or 30 years from now will have become discredited.

#### **RICHARD SIMEON**

My view is that the primary characteristic of Meech Lake is to underline, in the sense of constitutionalizing (and, perhaps, reinforcing) existing characteristics of federalism. In other words I do not see Meech Lake as revolutionary in that sense at all. Executive federalism and quasi-diplomatic relationships have been central features of our system for a long time. Meech Lake simply gives constitutional recognition to that. If you look at Section 106 of the Meech Lake Accord, it simply states pretty much what we have accepted as the nature of the spending power ever since the debates with Quebec about university funding in the 1940s. In that sense I do not see how Meech Lake creates a whole new model of federalism. I think the criticism that people make of it is that it reinforces a method of federalism which many people object to because it is a model of executive domination.

I think there is a clear tension within the collaborative federalism logic of Meech Lake. It comes up of course in the question of implementing the Free Trade Agreement and what is the role of the provinces in that process; that is, do they have a veto. Much of the negotiation of the Free Trade Agreement, with

the regular meetings of the first ministers, and mirror committees of the officials and ministers and so on, again followed that kind of collaborative model that Prime Minister Mulroney has put forward. One can sense the change if one notes that the Minister of Industry in Ontario, during the time of the negotiation of the Auto Pact pointed out that the Auto Pact was negotiated by the federal government with virtually no involvement by the province. The federal government basically sent the provinces a letter which said, "By the way, we've negotiated this agreement." It is a measure of how far we have come in a collaborative direction that it would have been inconceivable to have negotiated the Free Trade Agreement in that way.

On the one hand, we have been caught up in collaborative federalism as we have negotiated the Free Trade Agreement while on the other hand, the debate about whether or not the provinces have a veto shows one of the difficulties with that collaborative federalism when you try to make external agreements. As I mentioned, Prime Minister Mulroney had argued a federal ability to implement the Agreement even over provincial jurisdiction. This seems to me to be at odds with the logic behind what he has been espoused under the collaborative federalism model of Meech Lake. I think this underlines a genuine continuing tension. There is, in fact, nothing particularly strange about the processes used to negotiate each of these agreements; the real problem that the provinces have is the inconsistency between the collaborative federalism institutionalized in the Meech Lake Accord and the limited federal unilateralism, at work in the formation of the Free Trade Agreement.

### **BRYAN SCHWARTZ**

The way that Meech Lake has been dealt with in the media and the public reminds me of *The Return of Martin Guerre*, the epilogue of which was "Everyone died". There is a lack of structure and analysis to the debate over constitutional negotiation. This failure to attend to questions of process has led to statements such as: "Quebec is being brought back into Confederation". Well, Quebec was never out of Confederation. We have failed to conduct an examination of what the 1982 package actually did in Quebec. What awful things did it do? It gave Quebec a guaranteed right to equalization payments. What was the redress for that? In the 1987 round there is a weakening of the federal spending power. Well, that is certainly making it up.

Another example: In the past it has been mentioned how awful it would be if three provinces wanted, for whatever motives and whatever reasons, to exclude the North from achieving self-government. It does not sound so awful to me. What I think is awful is for one province to hi-jack the Northern quest

for self-government for whatever reasons—ideological misapprehension or pure selfishness—and have a tyranny of the minority in which a province can tell the North and the rest of us that want to give self-government to the North that we cannot have it. Giving vetoes to people is not a question of just preventing majoritarian domination. It is a way of giving power to a minority over everybody else, and power in a way that is totally preservative of the status quo.

A further example. We locked in the powers in section 92. Did we lock in the powers in 91? No! We made it extremely easy to continue to decentralize and reinforce that tyranny of the minority. There will be a First Ministers' conference every year with premiers happy to pursue the acquisition of federal authority and with all the political and legal advantages in their favour. Meech Lake proves that the provinces are happy to take jurisdiction, even if it is sometimes against their interests. The weakening of the federal spending power is not in the interest of the smaller provinces and the less rich provinces. On the other hand, it just takes one weak or opportunistic Prime Minister to say, "But I want the story to end with agreement reached". Once given, the power is gone forever. Not only is it politically impossible to reverse the tide, it is legally practically impossible because any province can opt out with compensation. So, there is a ratchet. The ratchet is in favour of further decentralization regardless of the underlying needs of Canadians and regardless of their political aspirations.

This ratchet effect has been repeatedly glossed over in the attempts by government officials to justify the short-sighted political accommodation which the government undertook. I wonder if the governments have ever even concerned themselves with the question of what Canada is supposed to be.

## RICHARD SIMEON

I just wanted to make an observation about the process. There is nothing easier to criticise than the process when one does not like the result. It is very easy to say "Well, of course the process should be more open, less secret, and there should be more consultation," and so on. However, one should not just assume that the more we consult, the more it is that we will uncover or create a consensus. We need to enquire about the role of political leadership, of politicians, in this process. At some point, leaders must decide.

In constitutional processes we also need to strike balances. In a pluralist system, consultation processes pick up the interest of each of the particular groups. They are not asked to balance. That is a role we ask of politicians. How and where we do that, it seems to me, is very important, and while I agree that

there is an awful lot in Meech Lake which might be seen as political selfishness, it seems to me that it is unfair to suggest that Premier Bourassa, when he argued for his five conditions for getting Quebec to sign the Constitution is not in some fundamental sense responding to that society and whatever interest it might have. We need to look at the reasoning of the other premises as well. It seems to me if you look at the thrust of Meech Lake, which was to restore Quebec to Confederation, no politician was about to get defeated because Quebec was not in the Constitution. Presumably that was precisely looking ahead to what the long run consequences of leaving Quebec out of the Constitution were.

When we think about the process here, one of the things that is going on is not only a variety of kinds of disagreements on substance but also a changing of perspective on what we think of as legitimate democratic procedures. Our standards are either changing or getting higher. We are getting less willing to accept the results of cabinet government and I think that there is a kind of change in what we consider to be appropriate norms. After all, this process is being at least as open, in some important respects more open, than any previous constitutional exercises that we have engaged in. That is not to entirely defend the process. I share many concerns about it, but we need to think very carefully about how we see a political process and not simply say it should be more open and less secretive.



DISTINCT SOCIETY VS. DISTINCT IDENTITY:  
SECTION 2 OF THE MEECH LAKE ACCORD IN CONTEXT

*Colin Irving*<sup>1</sup>

As you know, I am a mere practising advocate and always, on those rare occasions when I am invited, approach my subject with some trepidation when there are legal thinkers in the room. The distinction between the practising lawyers and legal thinkers was quite well illustrated by Lord Haldane (who of course, reformed both rules) in his autobiography.<sup>2</sup> Although the context was different, he described a scene in 1908 when he had been made Minister of State for War and was having his first meeting with the Generals on the War Council, having previously announced he was going to create a new army. Of course, as you all know he was a great scholar and poet, and he described the scene; there was a group of generals who came into the room and finally somebody asked him, "Mr. Minister, what kind of new army is it that you have in mind? And he said "I replied, 'an Hegelian army.'" He said the conversation then fell off, which is something I have found has happened quite often in the past when I have tried to speak to people who really are thinkers on subjects of public law.

With that proviso stated, I will nonetheless attempt to shed some light on what I see the role of Meech Lake's "distinct society" clause to be. I would suggest, and I share this view with others, that it is dangerous and misleading to look for too much philosophical or intellectual underpinning for Meech Lake. I would suggest in fact that it has about the same philosophical and intellectual underpinning as the decision to award a defence contract. It is quite clear that the purpose of Meech Lake was to meet a series of demands by the Province of Quebec, I think it is very important to remember their origins and a bit of history; it is amazing how quickly it tends to be forgotten. There was the Charter in 1982, but even before that there was Bill 101 in 1976. Meech Lake, it seems to me, is the product in part of both of those documents.

1 Lawyer, McMaster, Meighen, Montreal.

2 Haldane, Richard Burdon, 1st Viscount; *Richard Burdon Haldane, an Autobiography*; (London: Hodder and Stoughton, 1929).

One should note the opening of the preamble to Bill 101:

Whereas the French language, the *distinctive* language of the people that is in the majority French speaking, is the instrument by which that people has articulated its *identity*.<sup>3</sup>

Remember those words. You will see that they come back again in Meech Lake. Quebec has already legislated to promote and preserve its distinct identity. The distinct society of section 2(1) includes, it is said, the existence of the English in Quebec but it is not that which Quebec is to promote and it is not in the same section.<sup>4</sup> When it comes to the power of the provincial government to promote and preserve, it is the distinct identity of Quebec which is spoken of, not the distinct society.<sup>5</sup> Mr. Bourassa has made it quite clear, in plain terms, that the promotion of the distinct identity of Quebec relates only to the promotion of the French language and culture and is an entirely different thing from that rather grudging recognition in the first subsection of the interpretation clause<sup>6</sup> that the English exist in Quebec.

Seen in that light, Section 2 of Meech Lake was intended from the point of view of Quebec to legitimize what had already been done. You will notice, it says that the role of Quebec to promote and preserve the French language is affirmed.<sup>7</sup> That is, language of recognition of something already existing. I might say that the French version is quite different. The French language version of Meech Lake seems to be creating a new legislative jurisdiction while the English language version is merely language of affirmation.<sup>8</sup> Any understanding of Meech Lake, I would suggest, depends upon looking at that history; Bill 101, the events of 1982, and the demand by Quebec for certain concessions in order to "come back into the Constitution".

At the risk of lowering the tone a little let me remind you that under Bill 101, it is an offence for which you may be fined, or sent to prison, to display a commercial sign in English.<sup>9</sup> Under that law it is an offence for which you may lose your job—you might lose your job for six months if you "permit or tolerate a child being educated in English who does not qualify".<sup>10</sup> Those are amongst the measures which are quite clearly intended to promote the French language.

3 *Revised Statutes of Quebec*, Chapter C-11.

4 Government of Canada; *Constitutional Amendment 1987*; (Ottawa: Queen's Printer, 1987), section 2(3).

5 *ibid.*

6 *ibid.*

7 *ibid.*

8 *ibid.*

9 *supra*, note 2, section 58.

10 *ibid.*, section 78.1.

I make no apology for saying that I approach Meech Lake as an English-Quebecker with the very deep concern that wittingly or unwittingly, that very kind of promotion and protection has now been solemnly affirmed as valid. Mr. Bourassa most certainly thinks it has and he has said so.

That brings me to the second point I wanted to make by way of preliminary comment. The Meech Lake Accord, as I see it, is not an Accord at all. The parties have not agreed. They have agreed on language, yes. They have agreed that the Constitution will be amended by inserting the words which you find in section 2, and I should point out that these are not the same in English and in French anyway,<sup>11</sup> but they do not agree on what they mean. On the one hand Mr. Bourassa has advised the National Assembly that Section 2, and particularly for some reason which escapes me, the 4th subsection, means that there is no longer even, and I am quoting, "a one per cent chance that any court in the future can interfere at all with any measure taken by Quebec to promote the French language"—now remember that that must be put in the context of the measures already taken. On the other hand, Senator Murray has said, "this is nothing more than an interpretation section. If there is some doubt about the meaning of the Constitution, section 2 can be invoked." Now either one may be right, but what is clear is they do not agree. They cannot both be correct.

I shall turn more specifically to the question of what change there will be in the role of judicial enforcement of the Constitution. As a first step, I think the Supreme Court is about to acquire the novel role of telling us what the Constitution is, for it is already clear that the people who have purported to agree on it do not agree on it. This is a process of simply handing a very hot political potato to the Supreme Court of Canada. I know that others will say that Constitutions are always vague and the role of the Courts is to interpret difficulties, but I would suggest that it is absolutely unprecedented to go ahead with a process of constitutional amendment when we already know that the words used mean different things to different authors of those very words.

Under this new role for the Supreme Court of Canada, it will have to supply the agreement which the parties to Meech Lake failed to reach by interpreting the words which they did agree to use and come down on one side or the other. That is a process which will undermine the role of the Court and will inevitably lead to a very serious Constitutional problem.

11 *supra*, note 7.

The Court can only decide one way or the other. The issue is, quite simply, does the right of Quebec to promote its distinct identity override the Charter? That will be tested in the context of the legislation regulating commercial signs. The Supreme Court is going to have to say it does or it does not.<sup>12</sup> If the Charter is supreme, the political result may be disastrous. Quebec will say again that they have been betrayed. Mr. Bourassa has come back from Ottawa with a document in hand and said, "Here is what I got, this is the greatest victory we have ever won." If the Supreme Court decides, and I think it might, that the Charter nevertheless overrides Quebec's rights under Section 2, he will appear to have been betrayed and a political crisis (which is unnecessary) will have been created at that time. If the opposite is the result then we will have created a constitution in Canada which legitimizes laws such as those which I mentioned above. Is it really acceptable that it should be an offence in Canada for which you can go to prison to display a sign in one of the languages of this nation?

On another level, and this again will depend on whose view of Meech Lake is correct, we may have created a two tiered Constitution. We undoubtedly will have created a situation in which any legislation involving Charter rights will have to be tested against Quebec as a distinct society and not against Canada as a whole. That is not such a serious matter. The cases involving the Charter coming from Quebec have so far tended to look at Section 1 of the Charter in terms of Quebec's situation alone. I am thinking of the Protestant schools case.<sup>13</sup> All of the evidence in that case related to the situation in Quebec alone. Nobody suggested that there should be any look at a broader social context in order to test Quebec's contention that the limitations in Bill 101 should take precedence over the Canadian Charter and thereby be validated under Section 1 of the Charter. The same is true of the Signs case.<sup>14</sup> The test has focused on Quebec alone. Quebec is already looked at as a distinct society. However, when you look at the language of Section 2 and read Section 1 of the Charter which permits limitations which may be demonstrably justified in a free and

12 It has been suggested, in the wake of the Supreme Court's decision on the signs legislation and the subsequent introduction of Bill 178 before the Quebec National Assembly, that had the Meech Lake Accord been in place, the Quebec government would not have had to use section 33 of the Charter of Rights to override the Court's decision.

13 *Quebec Association of Protestant School Boards v. Attorney General for Quebec* [1985] C.S. 872, (1985) 21 D.L.R. (4th) 36 (C.S. Que.).

14 *Attorney General for Quebec v. Brown's Shoes Ltd.*, Supreme Court of Canada, December 15, 1988 (unreported).

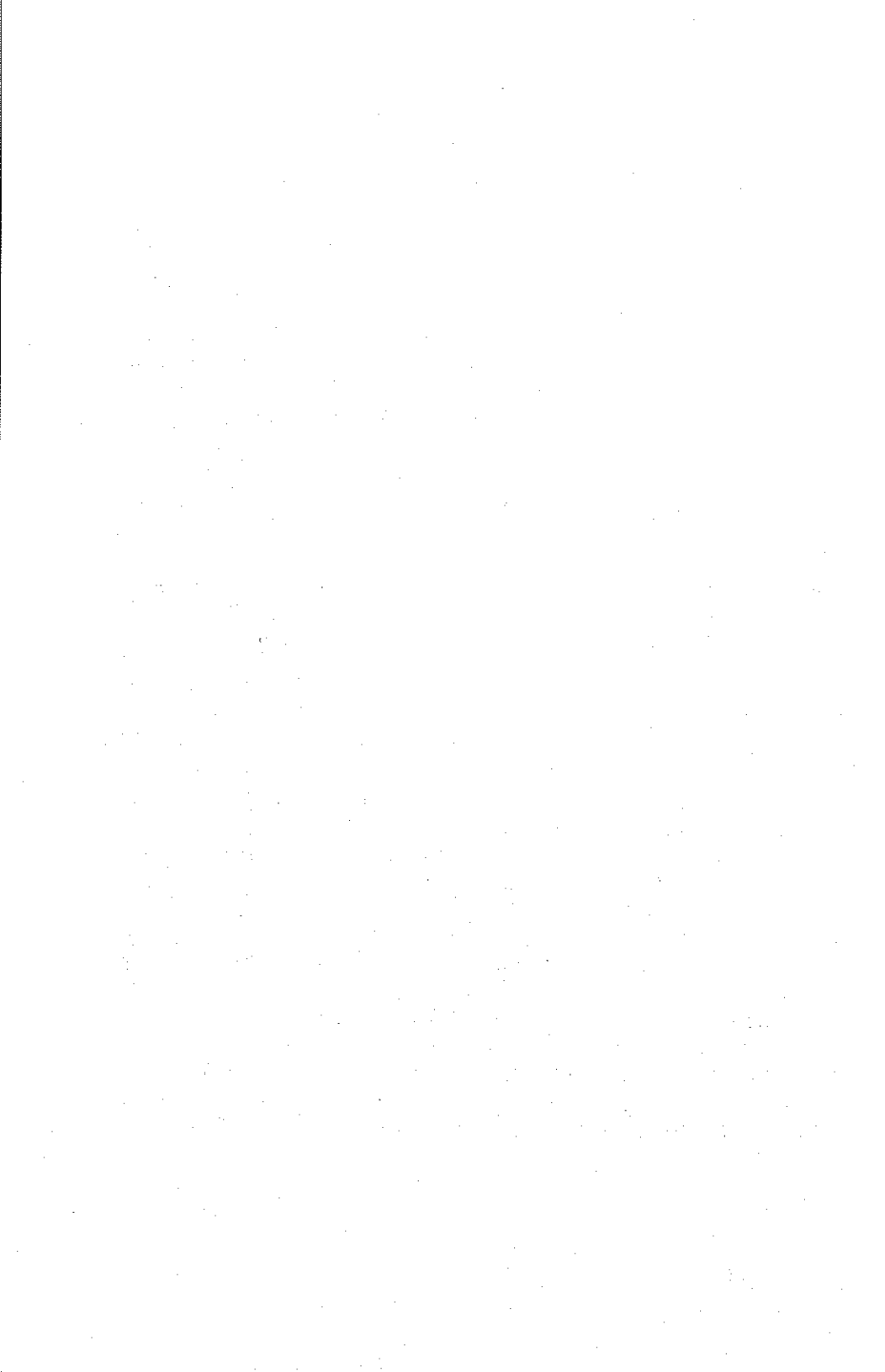
democratic society it is quite clear that Quebec, as a distinct society, is the society that will be looked at. That, then, is another possible change.

There is a third possible one, it seems to me, although I find it somewhat more doubtful. The language of Section 2, excluding the interpretation part, talks about the role of the legislatures to preserve the fundamental characteristics of Canada and in the case of Quebec to promote and preserve.<sup>15</sup> That language may be taken to create a legislative jurisdiction where none now exists, notwithstanding subparagraph 4. However, my own view is that this case could not be properly supported. Where it may have an impact is on the peace, order, and good government provisions of Section 91 of the *Constitution Act, 1867*. The federal jurisdiction for the peace, order, and good government of Canada includes, amongst other things, whatever is not to be found elsewhere. One can foresee that an argument will be made to limit the scope of this clause. This is likely from Quebec and perhaps from others who seek to legitimize provincial legislative jurisdiction in areas which are not otherwise covered, and which can be brought in one way or another within the concept of promoting distinct identity. In conclusion, then, Meech Lake will lead to greater emphasis on the role of judicial enforcement over intergovernmental action.

The next question is: "Will there be a change to the role of the legislative and executive branches?" The answer to that, I think, is also clearly yes. But on this I fear I can only repeat much of what has been said before. Let me just summarize it briefly. We have created a new process, a purely executive process. When you combine the Meech Lake process and the concept of parliamentary government as we now understand it, you have a situation in which the Constitution is dealt with purely at the executive level. With the parliamentary system, the executive can enforce its will. That has been perpetuated. Even many of those who support the actual content of the Meech Lake Accord have, in the past, been critical of that process. Thus, I think will have a permanent effect on the role of the legislative and executive branches. It has already been said that the executive wins and the legislature loses. I think that is the case.

The impact of the alterations to the governmental system in Canada caused by the Meech Lake Accord are obviously sweeping, though just how serious we still cannot predict. Notwithstanding this, the Mulroney government gave this aspect of Meech Lake little attention. Instead he has engaged in an exercise of political opportunism of a highly dangerous sort.

15 *supra*, note 2.



# THE MISSING LINK: MEECH LAKE, FREE TRADE AND POWERS OF SOCIAL ORDERING

*Barry Appleton*<sup>1</sup>

While they were promulgated through different processes and different negotiating dynamics, the timing and content of the Meech Lake Accord and the Free Trade Agreement have bound them together inextricably. Because they are such different documents, it has been difficult to establish the links between the social order that Canadians will subscribe to under Meech Lake and the economic order of the Free Trade Agreement. The missing link between Meech Lake and Free Trade is that both will irreparably change the constitutive ordering within the Canadian federation. Federalism, the process by which governmental jurisdiction in Canada has been split, will be altered by the impact that both Free Trade and Meech Lake will have upon the tools which shape its balance.

Though the foundations of federalism are grounded upon the constitution, its superstructure has been built upon the process of federal-provincial consultation. The strains of keeping to the *pro forma* constitutional requirements imposed by an old order and meeting the needs of the modern order have resulted in the process of co-operative federalism. Through co-operative federalism, the federal government has taken on a far greater role in the shaping of national policies than it would have been allowed under the black letter of sections 91 and 92. The powers of the federal government have been used flexibly to address national objectives within provincial jurisdiction. Thus the development of the federal powers over the normative ordering of Canada did not develop as a process to destroy federalism but as a method to assist its development. An examination of the current position of these general powers will give an indication of the current position of federalism and of the potential impact of the Meech Lake Accord and the Free Trade Agreement.

1 At the time of presentation Mr. Appleton was a second year student in the Faculty of Law at Queen's University.

## THE SPENDING POWER

The most pervasive and commonly used of the general powers available to the federal government is the spending power. This power is in reality a hybrid creation of the federal government's ability to raise taxes by virtue of s. 91 (3) and to borrow money by s. 91(1A). Once revenue is raised, the federal government is able to spend its monies as it sees fit.

From Confederation, the federal spending power was assumed to be a basic power of the central government. The power of untrammelled spending has been a causative force of Canadian federalism. In 1985, the federal government spent \$20.2 billion in cash grants to the Canadian provinces and \$6.9 billion in tax transfers.<sup>2</sup> The extent to which the spending power has shaped the economic and social order in Canada has been immense.

It is understandable that the broadness of the spending power has been seen to be a threat to federalism. The Privy Council recognized this and narrowed the scope of the power in the *Unemployment Insurance* case.<sup>3</sup> This case focused on whether the federal government could create a national system of unemployment insurance through spending its own money. The majority of the Supreme Court of Canada held that unemployment insurance was in provincial jurisdiction since it related to labour within the province. The Privy Council upheld the position of the Supreme Court. Lord Atkin stated:

...Assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence... even though it deals with Dominion property, [it] may [not] yet be so framed as to invade civil rights within the Province.... To hold otherwise would afford the Dominion an easy passage into the Provincial domain.<sup>4</sup>

Thus the Privy Council set out a suggested limit upon the spending power. Federal monies were not to cause the *de facto* regulation of areas outside of the jurisdiction of the federal government. The Privy Council was able to restrain the spending power of the federal government in this case, but in 1940, section 2A of the *British North America Act*, which specifically gave control over unemployment insurance to the federal government, was passed. This practice

2 Frank Carter, "How to Tame the Spending Power" *Policy Options*, October 1986 p.3.

3 *Attorney General for Canada v. Attorney General for Ontario*. [1937] A.C. 355.

4 *per* Lord Atkin, pp. 366-367.



illustrates that the limits placed upon the spending power by the Privy Council have had very little effect on its use.

In practice the spending power has become the most powerful tool that the federal government has had at its disposal to affect the social order in Canada.<sup>5</sup> It has often allowed the federal government to demand concessions from the provinces. In *C.M.H.C. v. Co-operative College Residence*, the Ontario Court of Appeal was faced with the issues of linked federal payments to the provinces.<sup>6</sup> In his examination of the federal prerogative to spend money, Mr. Justice Howland stated:

[The federal government] can spend money which it has raised through a proper exercise of its taxing power. It can impose conditions on the disposition of such funds while they are still in its hands.<sup>7</sup>

In a very recent case, *Winterhaven Stables Ltd. v. Attorney General of Canada*, the Alberta Court of Appeal was engaged in a very detailed examination of the constitutional basis of the federal spending power.<sup>8</sup> The court found that the federal government could impose conditions on the money it grants to provinces to the extent it wished provided that the federal government does not actually regulate the activity which is under provincial jurisdiction. Mr. Justice Medhurst stated that:

While the federal legislation does influence and affect matters under provincial jurisdiction, they are, in my view, law dealing with the proper disbursement of federal public funds.<sup>9</sup>

The spending power has long been considered by the provinces as problematic to the balance of federalism. The ability of the spending power to tip the balance towards the federal government has been seen to give the federal level of government an unfair tool. Gil Rémillard, the Quebec Minister of Intergovernmental Affairs, has stated:

At present there is no exclusively provincial area of jurisdiction that is not susceptible in either a direct or indirect way to being affected by the federal

- 5 E.A. Drieger discussed the impact of this power in "The Spending Power" (1981) 7 *Queen's Law Journal* 124.
- 6 *Central Mortgage & Housing Corp. v. Co-operative College Residences Inc.* (1975), 71 D.L.R. (3d) 183.
- 7 p. 210.
- 8 (1986) 29 D.L.R. (4th) 394 (Alta Q.B.).
- 9 p. 416.

spending power. The spending power has become a "Sword of Damocles" hanging menacingly over any province wanting to plan its social, cultural or economic development. This situation has become intolerable.<sup>10</sup>

There is little doubt that after the federal-provincial disputes over extra-billing to doctors and federal funding to provinces under the *Canada Health Act*, Rémillard's comments reflect the position of other provinces as well.

The *Constitutional Amendment, 1987*, has specifically addressed the spending power issue. The proposed clause 106A of the accord clearly defines the federal spending power. The new clause states:

106A. (1)The government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive jurisdiction, if the province carries on a program or initiative that is compatible with the national objective.<sup>11</sup>

The very definition of the spending power sets out a limitation on it. The federal government may no longer not spend money on a province which does not follow the federal terms, should that province provide a program or initiative that is compatible with the national objective. The federal government may still utilize the spending power to establish broad consensual changes in the social ordering of Canada, but it cannot use its general authority to spend money to direct the operation of provincial activities. Arrangements which force a course of action on a reluctant province which desired federal money are no longer within the jurisdiction of the federal government. As a result, the use of the spending power as a force to shape Canadian federalism has become largely inert.

## PEACE, ORDER AND GOOD GOVERNMENT

Section 91 of the Constitution Act, 1867 contains a general power for the federal government to maintain the Peace, Order and Good Government of the state. This little used power has the ability to allow the federal government to free itself of the process of federalism when it sees fit to do so.

10 *Rebuilding the Relationship: Quebec and its Confederation Partners*. Peter Leslie (ed.) (Kingston: Institute of Intergovernmental Relations, Queen's University, 1987) p.43.

11 *Constitutional Amendment 1987*. s. 106A (1).

There is a fundamental tension prevalent in the majority of the cases dealing with the use of the peace, order and good government power by the federal government.<sup>12</sup> In *Russell v. The Queen*,<sup>13</sup> Sir Montague Smith stressed the need to look at the internal unity of the *B.N.A. Act* when attempting to ascertain whether an action of either level of government invaded the true jurisdiction of the other. His lordship stated:

Few, if any, laws could be made by Parliament for the peace, order and good government of Canada which did not in some incidental way affect property and civil rights: and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it.<sup>14</sup>

In *Russell v. The Queen*, the Privy Council established a very broad power for the federal government to use when legislating POGG. However, these broad powers were quickly curtailed.

The power of the federal government under POGG has been restricted to matters of general importance to the country as a whole. This position was clearly enunciated by Lord Watson in the *Local Prohibitions* case.<sup>15</sup> The subject matter at issue in this case was the applicability of provincial temperance legislation which conflicted with existing federal legislation establishing a general scheme to allow electors of every county or city the ability to prohibit the sale of alcoholic beverages. There was a clear conflict in this case between the federal desire to establish consistent laws in relation to intoxicants and the provincial desire to maintain its sovereignty over all matters of a local and private nature. The Privy Council found that there was a competency for the federal government to legislate in areas of national importance only where it could be clearly established that the type of activity being legislated was not of a local and private nature but was truly of "national dimensions". Lord Watson found that while the problem of intoxicants was of general applicability in Canada, on the merits there was sufficient scope for the province to legislate. The *Local Prohibitions* case resulted in a narrowing of the general power to only encompass an ability for the federal government to act in areas which were of general importance and which did not affect a clear area of enumerated

12 The general power for peace, order and good Government will be hereinafter referred to as the general power or the POGG power.

13 (1882) 7 App. Cas. 829.

14 p. 839.

15 *Attorney General for Ontario v. Attorney General for Canada* (Local Prohibition case) [1896] A.C. 348.

provincial jurisdiction. Fifty years later, in *A.G. (Ontario) v. Canada Temperance Federation*,<sup>16</sup> the Privy Council once again espoused the national dimensions test. Viscount Simon stated:

... the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole, ... then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislature.<sup>17</sup>

The national dimensions doctrine has been one part of the judicial consideration of the general power. There has also developed a jurisprudence based on national urgency. In the *Board of Commerce* case,<sup>18</sup> Viscount Haldane, speaking for the Privy Council, severely restricted the general POGG power except in times of:

... war or famine, when the peace, order and good Government of the Dominion might be imperilled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by the enumerated heads in either s. 92 or 91 itself.<sup>19</sup>

In other cases, Viscount Haldane suggested that the general power would be very difficult to justify. Two years later in the *Fort Frances* case,<sup>20</sup> he clarified his restriction upon the peaceful use of the POGG power to emergency circumstances. Certainly, this approach was prescient of the cases which the courts found themselves confronted with during the Second World War.<sup>21</sup> During this time, the courts developed a very wide latitude of power for the federal government under its POGG power, to the extent that it appeared that the emergency aspect of the POGG power had eclipsed the national dimensions aspect altogether.

The re-establishment of the national dimensions doctrine was an essential re-invigoration of the peaceful side of the POGG power after World War II. The leading recent case on the general power of Peace, Order and Good Government

16 [1946] A.C. 193.

17 Viscount Simon at p. 205.

18 *In Re The Board of Commerce Act*, [1922] 1 A.C. 191.

19 *per* Viscount Haldane at p. 200.

20 *Fort Frances Pulp and Paper Co. v. Manitoba Free Press* [1923] A.C. 695.

21 Two notable cases from this time are: *Reference Re Validity of Orders in Council in Relation to Persons of the Japanese Race* [1946] S.C.R. 248 and *Reference Re Regulations in Relation to Chemicals* [1943] S.C.R. 1.

is the *Reference Re Anti-Inflation Act*.<sup>22</sup> This case centred upon the ability of the federal government to impose wage and price control legislation as part of its national program to combat inflation. In his judgement in this case, Mr Justice Ritchie stated:

In my opinion, such conditions exist where there can be said to be an urgent and critical situation adversely affecting Canadians and being of such proportions as to transcend the authority vested in the legislatures of the provinces and thus presenting an emergency which can only be effectively dealt with by Parliament in the exercise of the Powers conferred upon it by s. 91 of the *British North America Act, 1867*.<sup>23</sup>

The *Anti-Inflation* decision established that the use of the POGG power could occur in peaceful emergency situations where the problem was urgent and of national importance to the country. The impact of the *Anti-Inflation* case was to limit the general POGG power to only temporary emergency legislation and to subject matters which were not part of an enumerated head of provincial jurisdiction under s. 92.

In a later decision, *Labatt Breweries Ltd. v. A.G. Canada*,<sup>24</sup> Mr. Justice Estey defined his vision of the POGG power. He examined the concept of subject matters which were not part of the enumerated heads of provincial jurisdiction under s.92 and found two divisions of federal authority under this part of the POGG power. The first power is granted for areas not in existence at the time of Confederation and which would not be construed to be a local or private matter.<sup>25</sup> The second would be areas where subject matter goes beyond local concern and must be the concern of the Dominion as a whole. This latter development marks a clear return to the older national dimensions test set out in the *Canada Temperance Federation* case.

In the wake of the *Anti-Inflation* reference and the *Labatt* case, the Peace Order and Good Government power has achieved a new definition. The general power of the Parliament of Canada to legislate for the peace, order and good government of the Dominion has been limited into a very specific power which may well be used during periods of national urgency but in the absence of such urgency is limited. The jurisdictional limitation of the national dimensions doctrine is a very useful one for federalism but it renders the POGG power unusable for achieving federal standards in periods of federal-provincial animosity short of actual warfare.

22 *Reference Re Anti-Inflation Act*. (1976), 68 D.L.R. (3d) 452 (S.C.C.).

23 Mr Justice Ritchie, p. 436-437.

24 [1980] 1 S.C.R. 914.

25 This has been described as the "newness" doctrine. It is really axiomatic from the national dimensions branch of POGG.

## THE TRADE AND COMMERCE POWER

The trade and commerce power is similar to the POGG power in that both are potentially sweeping powers which have been constrained by judicial intervention. The ability of the federal government to exclusively make laws in relation to the "regulation of trade and commerce" was established by s. 91(2) of the *British North America Act*. This sweeping power was defined and limited by the Privy Council in *Citizen's Insurance Co. v. Parsons*.<sup>26</sup> Sir Montague Smith, speaking for their lordships, stated:

Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole dominion.<sup>27</sup>

The national dimensions test established in this case has been maintained in a vast string of subsequent cases.<sup>28</sup>

It is clear that the court has attempted to play its role in the development of the theory of federalism by balancing the pervasiveness of the federal trade and commerce power with that of the provincial property and civil rights power in s. 92(13). There clearly is a conflict at times in the interaction of these two powers. The basic consensus arising from the cases is that the distinction lies between regulation of one industry and regulation of the economy. The former is a provincial power, the latter is a power reserved to the federal government.

Chief Justice Laskin accepted the national dimensions aspect of the *Citizens* test in *MacDonald v. Vapour Canada Ltd.*<sup>29</sup> In this case, Laskin established three criteria: (1) the presence of a national regulatory scheme; (2) the oversight of a regulatory agency (3) a concern with trade in general rather than with an aspect of a particular business.<sup>30</sup> These criteria were built upon by then Mr. Justice Dickson in his concurring judgment in *A.G. Canada v. Canadian National Transportation Ltd.* To the *Vapour* criteria he added two additional items: whether the provinces jointly and severally would be constitutionally

<sup>26</sup> 1881, 7 App. Cas. 96.

<sup>27</sup> p. 109.

<sup>28</sup> *Toronto Electric Commissioners v. Snider* [1925] A.C. 396; *John Deere Plow Co. v. Wharton* [1915] A.C. 330; *In Re The Board of Commerce Act* (1920), 60 S.C.R. 456.

<sup>29</sup> [1977] 2 S.C.R. 134, Esp at p. 165 *et seq.*

<sup>30</sup> p. 165.

incapable of passing such an enactment and whether the failure to include one or more provinces or localities would jeopardize the successful operation of the law in other parts of the country.<sup>31</sup>

In this case, Mr. Justice Dickson suggested that the federal government could legislate the implementation of international trading arrangements under its general power of trade and commerce.<sup>32</sup> He found that there is "a federal competence over economic regulation across and beyond provincial borders".<sup>33</sup> He continued by stating:

A different situation obtains, however, when what is at issue is general legislation aimed at the economy as a single integrated national unit rather than as a collection of separate local enterprises. Such legislation is qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination. The focus of such legislation is on the general, though its results will obviously be manifested in particular local effects any one of which may touch upon "Property and Civil Rights in the Province". Nevertheless, in pith and substance such legislation will be addressed to questions of general interest throughout the Dominion.<sup>34</sup>

He suggests that there is a qualitative difference between international trade and trade within the province. The impact of such a view would be a federal power to override provincial opposition to a federal trade scheme of national proportions, regardless of its impact on the province. On this point, he states:

A scheme aimed at the regulation of competition is in my view an example of the *genre* of legislation that could not practically or constitutionally be enacted by a provincial government. Given the free flow of trade across provincial borders guaranteed by s. 121 of the *Constitution Act, 1867* Canada is, for economic purposes, a single huge marketplace. If competition is to be regulated at all, it must be regulated federally.<sup>35</sup>

The Federal Court of Appeal supported Mr. Justice Dickson's view of the trade and commerce power in *Re BBM Bureau of Measurement and Director of Investigation and Research*.<sup>36</sup> The expansive view of the scope of the trade and commerce power contained in the *C.N. Transportation* and *B.B.M.* cases was cited with approval by Mr. Justice MacGuigan in *A.G. Canada v. Quebec Ready Mix*.<sup>37</sup> As can be seen, there has been a rash of judicial approval for this new

31 *C.N. Transportation* case, p. 268.

32 [1983] 2 S.C.R. 206.

33 *Canadian National Transport* case, p.261.

34 p.267.

35 *per* Dickson J., p. 278.

36 9 D.L.R. (4th) 600 (F.C.A.).

37 (1985), 25 D.L.R. (4th) 373 (F.C.T.D.), MacGuigan's comments are at 395 - 399.

conceptualization of the place of the trade and commerce power in the most recent cases.

Around the world, states are beginning to recognize the new-found importance international trade has to the economic and political well-being of the state. Given this new importance, the case can be made for the granting of the power to the federal government. Certainly when the constitutional division of power is viewed thematically, all aspects of international intercourse were granted to the federal government. Therefore, if the barrier between domestic and international trade has shifted, it is quite possible that the area for justifiable federal competency would also shift.

### THE IMPACT OF THE FREE TRADE AGREEMENT

There are difficulties inherent in the structure of Canadian federalism when it comes to implementing international trade agreements. It seems ironic that while Canadians are preparing for the possibility of free trade with the United States, the concept of free trade has remained elusive within Canada. Section 121 of the Constitution appears to prohibit this phenomenon. While the wording would appear to be rather expansive, the Supreme Court of Canada has interpreted this clause to mean simply that customs duties are *ultra vires* of the provinces.<sup>38</sup> Mr. Justice Rand examined this section and stated:

What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary.<sup>39</sup>

Furthermore, provincial activities can be struck down by the courts if they create tariff-like barriers to inter-provincial or international trade.<sup>40</sup> Of course,

38 *Gold Seal v. Attorney General for Alberta* (1922) 62 D.L.R. 62 (S.C.C.).

39 *Murphy v. Canadian Pacific Railway* [1958] S.C.R. 626, per Rand, J. p. 642. This train of thought can also be seen in *Central Potash Co. v. Saskatchewan*. [1979] 1 S.C.R. 42.

40 Thus, in *A.G. (B.C.) v. McDonald Murphy Lumber* (1930) A.C. 357, a provincial tax on cut timber was found to be equivalent to an export tax and therefore was *ultra vires* of the province's jurisdiction. In another case, *Canadian Industrial Gas and Oil v. Government of Saskatchewan*. [1978] 2 S.C.R. 545, a Saskatchewan mineral revenue tax and royalty surcharge was found to act as an export tax and therefore was *ultra vires* of the provincial legislature.



there does seem to be a conflict here with s. 92A of the *Constitution Act*, 1982 as according to the resource amendment, some actions which prevented free trade but which were concerned with the management of the natural resource could be sustainable.

The use of s. 121 is complementary to the federal trade and commerce power. However, in *Carnation Co. v. Quebec Agricultural Marketing Board* the court found that a Quebec milk regulatory scheme which had a severe effect on inter-provincial trade was *intra vires* of Quebec's legislative control.<sup>41</sup> The basis of this decision was that the goals of the scheme were to stabilize Quebec milk prices; a valid area of provincial jurisdiction. This would seem, to some extent, to undermine section 121.<sup>42</sup>

On the other hand, provincial legislation that directly affects international trade has been found to be *ultra vires* of its jurisdiction. The leading case in this regard is *Central Canada Potash Co. v. Saskatchewan*.<sup>43</sup> Here, the government of Saskatchewan introduced both price stabilization and production quotas on potash, a resource that is almost exclusively exported from the province. The constructive effect of this action was to create a customs duty to foreign countries or to other provinces. This was ruled invalid as an encroachment on the federal international trading power, even though the management and regulation of the industry was within the province's jurisdiction.<sup>44</sup>

The Free Trade Agreement makes the hypothetical case of transforming the dormant general powers into a reality. The process of implementation of the agreement has caused an increase in conflict in federal-provincial relations. The spectrum ranges from federal-provincial amiability, to provincial non-implementation, all the way to the enactment of provincial legislation contrary to the agreement. The full spectrum has been present. Thus, the opportunities for either level of government to engage the tools of federal-provincial combat have increased.

The Free Trade Agreement has caused the debate to move into those categories set out by the courts where the federal government could use its general powers. As there are questions affecting the entire nation as a whole, both the POGG and the Trade and Commerce national dimensions tests would be

41 [1968] S.C.R. 238.

42 The *Carnation* case is different from other related cases as there was no mention or goal to block trade outside of Quebec, even though that was its effect. This would differentiate it from *A-G. (Manitoba) v. Manitoba Egg and Poultry Association* [1971] S.C.R. 689.

43 [1979] 1 S.C.R. 42.

44 Of course, after 1982, s. 92A of the constitution granted provinces absolute authority to manage, conserve, regulate or tax their own non-renewable natural resources. Thus the basis for this case would be decided differently.

fulfilled. The Free Trade agreement is a matter of external affairs and of international trade. In almost all aspects, the agreement is based on matters within federal jurisdiction and therefore it is difficult to create any argument that the agreement is a colourable attempt to usurp provincial powers. Finally, there is an argument that there is some urgency to the implementation of the agreement. The Free Trade Agreement would thus seem to be tailor-made to resurrect the POGG power and to expand the application of the Trade and Commerce power.

The removal of the spending power as the most used of the general powers will result in the inevitable politicization of both POGG and Trade and Commerce powers. This is a dangerous precedent given the unwieldy nature of these powers. As more and more powers become stripped away from the federal level, the more common will the resort to the general powers be.

## CONCLUSION

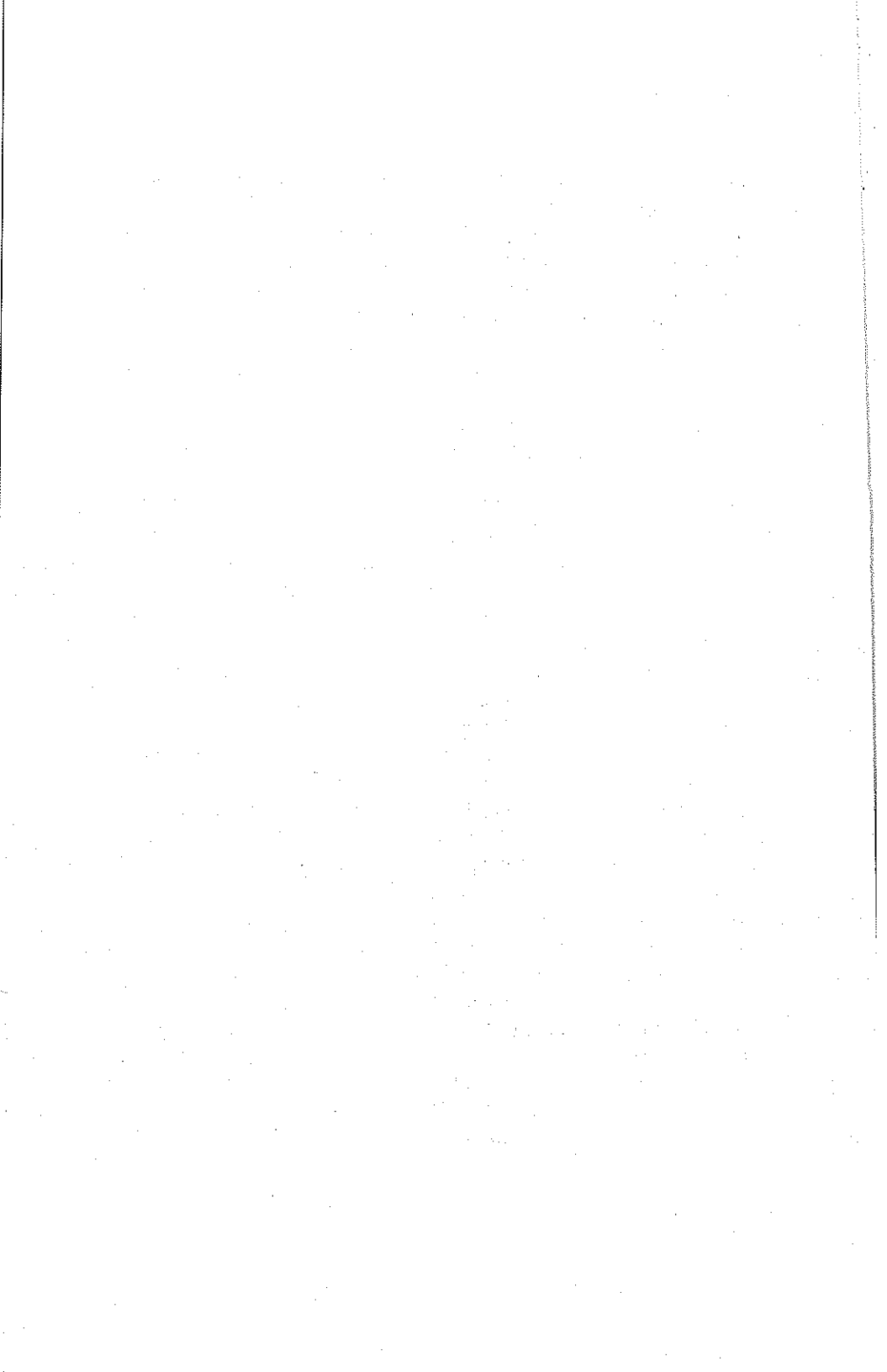
The POGG and the Trade and Commerce powers can act as trumps over otherwise prevalent provincial rights. As such, their untrammelled use presents a threat to the very essence of federalism itself. It is suggested that the use of these powers has in recent times been limited by the availability of an alternative means for the federal government to engage in normative ordering within Canada. This structuring has occurred through the extensive use of the spending power. With the definition of the spending power, there results a constraint on its use as a structure-builder within the framework of federalism.

Thus, one could conceive of the increase in the relative importance of the general powers due to the diminution, in terms of federal worth, of the spending power. The fundamental changes of social ordering inherent in the Free Trade Agreement remove this from a hypothetical plane and establish the actual case. The national values which are represented by the Free Trade Agreement clearly fall within the tests established by the courts for each of the general powers. The subject matter of the Free Trade Agreement, the general regulation of trade in matters of concern throughout the Dominion, fulfils the full test for the legitimate use of the trade and commerce override power.

The trade and commerce test allows the federal government both a negative and a positive power. The federal government would have the ability to prevent provincial legislation contrary to the Free Trade Agreement,<sup>45</sup> but what is more alarming is that the federal government could establish full competence to

45 This could be through the old technique of disallowance or through actual Parliamentary legislation which would "undo" whatever the province did through its legislation.

regulate in the area of international trade as part of its general regulatory powers of trade and commerce over international trade. The limitation of the spending power has created a renewed reason for the federal government to re-activate its general powers to allow it to shape the national normative social order, while the Free Trade Agreement has modified the desire to have the tools reactivated from a matter of academic exigency to one of national urgency.



# MEECH LAKE, THE FREE TRADE AGREEMENT, AND CANADA IN A NEW INTERNATIONAL ENVIRONMENT

*Peter Leslie*<sup>1</sup>

The creation of these two major agreements in such a short space of time has caused a dramatic focusing of attention on just what we perceive "Canada" to be. There seems to be a great deal of anxiety over just what effect these two documents will have on life in our country. I think that these deep seated anxieties have their origins in the fact that people perceive the Free Trade Agreement and the Meech Lake Accord to be related in the sense that both will contribute to the decentralization of the federation in a way that will work serious disadvantages for us in a changed international context. What is behind our thoughts on these questions is that we tend to see the trade agreement with the United States as part of a larger trend, and a particular event that carries that trend further, in which Canada is increasingly constrained by actions taken outside its borders, by large economic enterprises and by foreign governments, particularly the government of the United States. Indeed, I suppose the concern is that the actions of those two entities are in fact, often co-ordinated.

These concerns cause a feeling abroad, which I share, that increasingly we are experiencing in this country external constraints in the field of economic management. Here I refer not only to overall economic policy, monetary and fiscal, but also to a whole set of more finely focused policies, microeconomic policies for regional development, such as policies leading to industrial subsidies of one kind or another, or to any kind of action that may be taken to strengthen particular industries in which we feel that we either have some international advantage, can create it, or indeed, lacking it, need to support if we are to continue to have it at all. We may believe that an industry is important for employment, or for other reasons, and therefore needs to be protected.

Policies in relation to foreign investment and other matters are also subject to constraint by the actions of the United States government and by the action of multi-national corporations. These factors enter into the bargaining process with governments, federal and provincial, in this country. Indeed, I think that

1 Speaking as Director, Institute of Intergovernmental Relations, Queen's University.

it has been correctly perceived that the content of these constraints is not limited to the economic field, which so far is the only one I have referred to, but also extends into the whole field of social policy, and into the condition of workers relative to management. This sense of discomfort arising from the constraints that flow from economic integration is only increased by our entering into the Free Trade Agreement.

Then we get to Meech Lake. The corollary, I think, to the observations and feelings about these longer term trends to which the trade agreement contributes is that it is all the more important in this situation that governments be able to act and act decisively. It is particularly important that the federal government should be able to play a decisive role in policy formation and, as it were, strengthen the spine of provincial governments to maintain maximum control within the very real constraints, which flow from the international situation, on economic and social policy. In short, Ottawa should, as much as possible, hold the most important levers of policy formation in both of these major areas. The significance of Meech Lake is the feeling that that agreement is counterproductive to the objective of ensuring that you can have decisive federal action and federal initiatives.

That sets the stage for our discussions and for thinking about the linkage between the Meech Lake Accord and the trade agreement. To me it raises at least two major questions: The first is about the overall impact of the trade agreement on Canadian economic independence. I am extremely ambivalent myself on this question. I simply do not know, and this is partly because I am not an expert on the terms of the agreement. It could be that actions taken by foreign governments, and particularly the United States, are taken in a way that is essentially arbitrary. The softwood lumber case may be an example of this problem. In that case we were exposed to a decision-making process which on this side of the border we felt was arbitrary and politically dominated. We needed to find some way of introducing an element of regularity into the application of existing American trade laws. Of course, if it were possible to alter the character of those trade remedy laws in the process, that would be an advantage. That is clearly a stage which we have not reached under the present agreement but essentially what I think is projected for the next five to seven years.<sup>2</sup>

Of course, progress in this area requires that the Free Trade Agreement be taken seriously on the American side and that there be a genuine commitment to reaching agreement on a common subsidies code and so on.

2 Specifically, definitions of dumping and countervailing duties are to be negotiated within the next five to seven years. See Department of External Affairs, *The Canada-United States Free Trade Agreement*, article 1906.

The argument to suggest that the trade agreement augments rather than diminishes our economic independence would be that it begins a process of limiting the arbitrary action of the American government in support of American corporations in ways that have been shown to be damaging to Canadian interests. We may hope that we are going to do this by establishing more clearly what the rules are and how they are to be enforced. We should, at least, know that as long as we are operating within those rules, we do so with relative impunity. I acknowledge that that is not the conventional view of the trade agreement or its significance. Whether those arguments in fact are valid or strong enough to outweigh the concerns about imposing restrictions on our ability to govern our own economy, I am not sure.

What the actual judgment should be I do not know. I suspect it depends very much on what we judge to be the logic of economic integration and how much in any two member grouping of states, the smaller one (one-twelfth the size in terms of overall national product) really retains any significant economic independence. To the extent that we believe that even without the Trade Agreement, Canada is subject to American economic domination, the Trade Agreement could, by establishing both rules and a framework under which we can negotiate new rules, augment Canada's independence. This is an important consideration; I know that there are certainly some people who support the trade agreement precisely because they believe it augments rather than diminishes our economic independence.

The second question that comes up in the context that I sketched out is whether the Meech Lake Accord does, in fact, significantly constrain federal power. There are certainly very different interpretations about the overall effect of the Meech Lake Accord. Its significance in giving Quebec more freedom to manoeuvre is being stressed by Quebec politicians, and outside Quebec the opposite line is being put forward. We shall have to see how this plays out over time if the Accord is, in fact, passed. Where I disagree with Colin Irving is that I believe that the typical situation in the formation of a constitutional document is that the people who agree on a form of words do so precisely because there are ambiguities in the words adopted. Each party to the agreement has grounds for thinking that it will not come out of the thing too badly as its real significance is revealed over time. I would certainly say that that was the case with the Quebec resolutions that led to the British North America Act. I think it is probably true of virtually any major constitutional initiative. People do not really know what they mean. They find out over time. This does not mean that meaning is a matter of indifference or is not important. For instance I would note that there is a danger that Quebec is going into Meech Lake feeling that it has achieved a significantly better deal than it has. If it finds out it has not done so well this will generate a great deal of resentment. Quebec will feel that it has

been had in this deal and that would produce unfortunate results. That is a matter that concerns me. However, on balance, I feel that that is less of a concern than saying at this juncture there was no other way that we could have reached an agreement.

With respect to the question whether Meech Lake significantly constrains federal power, we have talked about differing interpretations of the accord in a general sense. Further observations can be made. First I think one must observe, as many people have observed, that the Accord does not, in any explicit way, alter the division of powers except in the field of immigration. That leads me to believe that the effect of the accord will likely be felt in terms of its political fallout—that is to say how federal and provincial governments respectively exercise the powers that they have had all along. Secondly, there are different interpretations of the proposed provision relating to the spending power.

On the first point, how will governments exercise their powers under Meech Lake. I would simply underline the fact that a lot will depend on what people, both in government and in the larger public, feel is legitimate. We know very well that if the federal government is determined to give away its powers, it does not need an agreement to do that. It simply fails to exercise certain powers and provinces will normally increase the scope of their regulation to fill the vacuum. Conversely if the federal government is determined not to let power slip out of its hands, it can take strong initiatives, as we have observed over recent years. There might occur conflict but, in the result, the federal-provincial distribution of effective powers is altered until a new kind of equilibrium position is reached.

With respect to the spending power provisions, my views differ very markedly from those of Barry Appleton. The essence of his argument was that since the spending power is greatly weakened this will force a federal government that wants to be active in policy sense to use other instruments. What else is there at hand but the trade and commerce power and, hence, that power will expand this thesis. I do not believe that the spending power is limited significantly, if at all. Indeed I think it is equally credible to argue that it expands federal power and this is one area in which interpretations of the accord certainly are different both in and outside Quebec. My sense of the provision is that I would feel much greater discomfort trying to defend it before the Quebec National Assembly than before the Parliamentary committee or the Ontario legislative committee looking at Meech Lake because the fears expressed in Quebec about the federal spending power are more to the point. One has in Meech Lake the acknowledgement of the federal spending power, in terms that are not significantly limited, if indeed limited at all.

It seems to me to be appropriate to shift focus in our exploration of the relationship between the Accord and the Trade Agreement and to ask about the



real potential of the federal government in economic policy. It seems to me that the appropriate starting point for that question is to observe where federal policy control now exists and in what respects it is limited. The starting place for such a discussion is to acknowledge that, as it stands now, federal policy control is limited across the whole range of economic policy. The fields of demand management and stabilization policies are essentially on parallel agendas. We have a situation where Ottawa absorbs up to 18 per cent of the gross national product in taxes. The entire public sector absorbs 39 per cent. In other words Ottawa takes a little less than half of tax revenues. And on the expenditure side the federal government spends about 20 per cent out of the entire public sector total of 47 per cent. The point I am emphasizing is that, relative to the provinces and municipalities collectively, Ottawa is the smaller player. If we are talking about demand management policies, the actions of the provinces together with municipalities (and especially together with the actions of provincial crown corporations) are greater than those of the federal government. The federal influence there is limited and the provinces can, if they feel inclined to do so, counteract the effect of federal policy. Ian MacDonald, who was the Chief Economic Advisor in Ontario in 1971, claimed that Ontario did precisely that. He was surprised that it was not more remarked that Ontario was deliberately following a policy that aimed for the opposite effect of federal policy in the area of demand management and economic stabilization.

Moving to the field of regulation, in the matter of foreign trade, transportation services, marketing of farm products and resource commodities, ownership rules with respect to foreign investment, combines legislation, labour relations matters, and so on, you will be aware that both federal and provincial action is important across the whole regulatory field. Both levels of government possess powers of a regulatory character that can be used either to reinforce each other's actions or to counteract them. The conclusion to draw is that if we are looking for policy control, federal control is limited by the fact that the provinces possess very important regulatory levers.

The third category is in the area of services—services to persons and to corporations, skills training, manpower, mobility grants, and various kinds of market assistance as in the field of export development. Here federal and provincial governments have widely overlapping powers and again can exercise them in ways that are either complementary or run counter to each other. Whether one is looking at economic management, at regulation, or at services to persons and corporations, federal policy control in the economic field is limited and provinces can either support federal policies or counteract them.

This leads me to the argument that it is important in economic policy formation in this country to bring provinces on side as much as possible. I believe that in federal-provincial negotiations the federal government and the

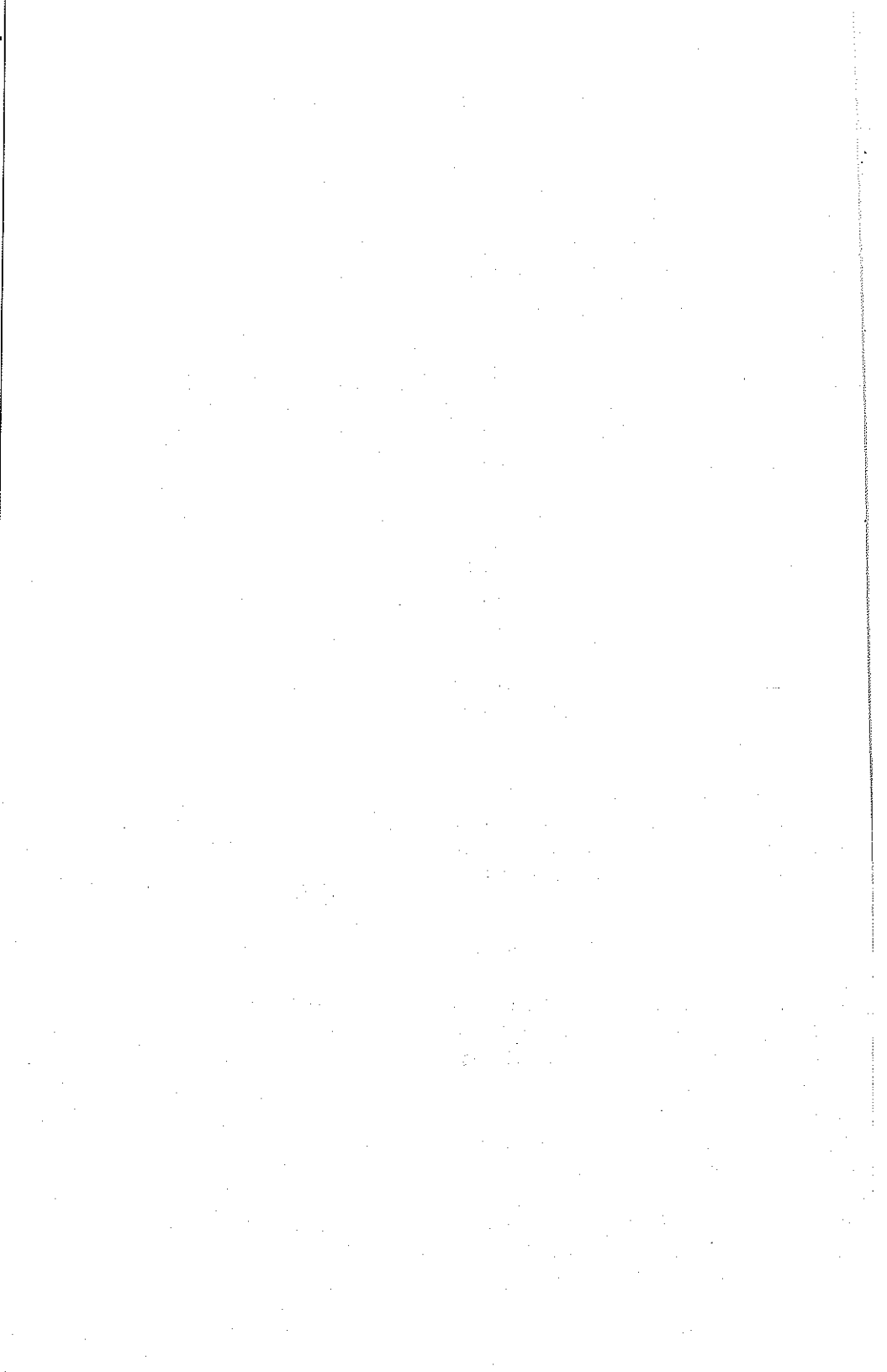
provinces both exercise a good deal of muscle. They may threaten to use their powers in ways that work to the disadvantage of the other order of government, or against its purposes. It is important to reach some kind of an agreement between federal and provincial governments on an overall thrust of economic policy.

In the past, federal economic policy has been regionally discriminatory. We know that arguments over the tariff go back to the nineteenth century. We have seen examples throughout our history. This is probably clearer in the case of energy policies from the mid-70s until the early 80s than in any other context; I would argue that federal policy was more explicitly discriminatory in regional terms at that time than at any previous time. That probably one of the factors that shapes attitudes regionally to the Trade Agreement. That agreement limits, in particular, the action of the federal government in the sense that, not to put too fine a point on it, there can be no more National Energy Program under the Free Trade Agreement. These are the terms explicitly in which Peter Lougheed has been arguing for a trade agreement in Alberta, where he says, "Sure we are giving up certain powers under the trade agreement but we are gaining the assurance that we will not be victimized again".

Part of the political reality of our situation is that it is imperative that we look for forms of economic policy that are not going to divide the country regionally in the way that has happened in the past. We are groping towards mechanisms to make that possible. A particular and promising case is the Meech Lake Accord with the First Ministers conferences on the economy. I am not saying that because you have conferences you are going to have agreement. However, we are setting up the machinery which may be used for reaching federal-provincial consensus on economic policy and I suppose, on social policy. How that works out will depend probably more on the substance of policies than on anything that is actually contained in the Meech Lake Accord. The First Ministers conferences on the economy may be an opening for the potential building up of the vast network of federal-provincial consultative mechanisms and we may obtain some kind of collaborative decision-making process. What we are groping for is a new form of policy-making in which federal and provincial governments can broadly agree. If they do not agree then I think we are basically in the situation that we were pre-Meech—that is to say federal government and provincial governments each have a range of powers. If they use them and use them in a determined way they may be able to counteract or neutralize each other's policies. Given that Meech Lake does not actually transfer powers from one order of government to another except in the area of immigration, Meech Lake does not contribute to conflict. I suspect, and this is another way in which Meech Lake and the Trade Agreement interact, there will now be a new perception of a common interest among regions—that is to say among provin-

cial governments and between provinces as a group and the federal governments about what all we should be doing and conflict will diminish.

The more we are in a situation in which, because of a change in the international and national contexts, regions see themselves as having interests that are in common, the more they may be inclined to use the sort of machinery that we can see in the Meech Lake Accord to work towards common purposes. This is not inevitable but it is one possible line of development. Whether we follow that line will depend, in part, on what we do within Canada, but it will also depend on the evolving international situation, including both the extent of international trade and investment and the rules under which international economic activity occurs.

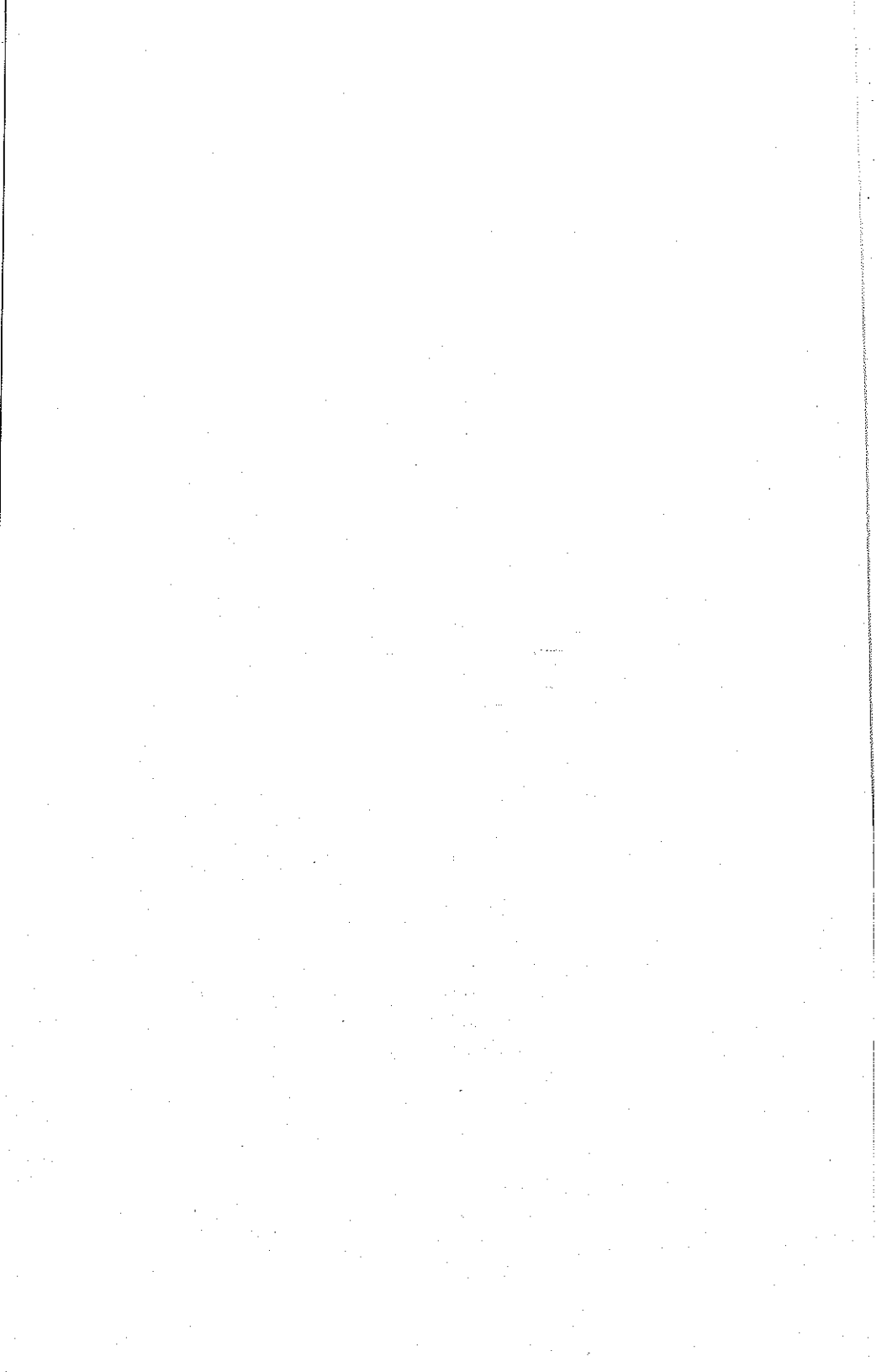


## DISCUSSION

**ERIC MALDOFF**

The key question in this is the effect of both of these agreements, especially in combination, on the relative powers for social ordering of the federal and provincial governments. One aspect of this, with respect to the Meech Lake Agreement is the shape of the new Supreme Court. The court has been pretty much composed of good federalists in the past. It is very difficult to tell what flavour and character the Court will take over time as the new judges are appointed under the new arrangements. One must bear in mind that there is another point on the Quebec agenda and it is this. Supreme Court of Canada judges are now mostly named from the judiciary. The experiment with naming practising lawyers straight from the street to the Supreme Court has been virtually abandoned, for good reason. However the sitting members of the Quebec Court of Appeal and the Quebec Superior Court who form the group from which nominations are to be expected are all named by the federal government without any participation by the province. The next demand will likely be to have the judges of the Court of Appeal and the Superior Court also named by the province. That has been on the agenda for a very long time. In the meantime, there is a possibility of an impasse because the provincial government is unlikely to suggest very many names from the present Quebec Court of Appeal, since they were all named by the federal government in the first place. Mind you, it is impossible to anticipate the degree of goodwill that those responsible will have in the future and I do not want to make unfair accusations against them.

It is certainly possible that, as we have seen in the United States, the court will also become more and more politicized. You cannot be named to the Supreme Court unless the first two nominations fail and unless your view on abortion or pornography or whatever happens to be the correct in the mind of the politicians who ratify appointments. It may be that we are inviting a situation in which a judge from Quebec will be asked the same sorts of questions about his or her view on federal-provincial powers. It invites division of the Court. It seems a dereliction by a federal government which is supposed to speak for the whole country to hand over suddenly that kind of role to the provinces, especially when Quebec did not even ask for it. They would have been quite happy with far less, with simply consultation. I cannot tell what will happen in the future but it certainly invites division in the Court, and the kind of process we have seen in the United States.



## PART THREE

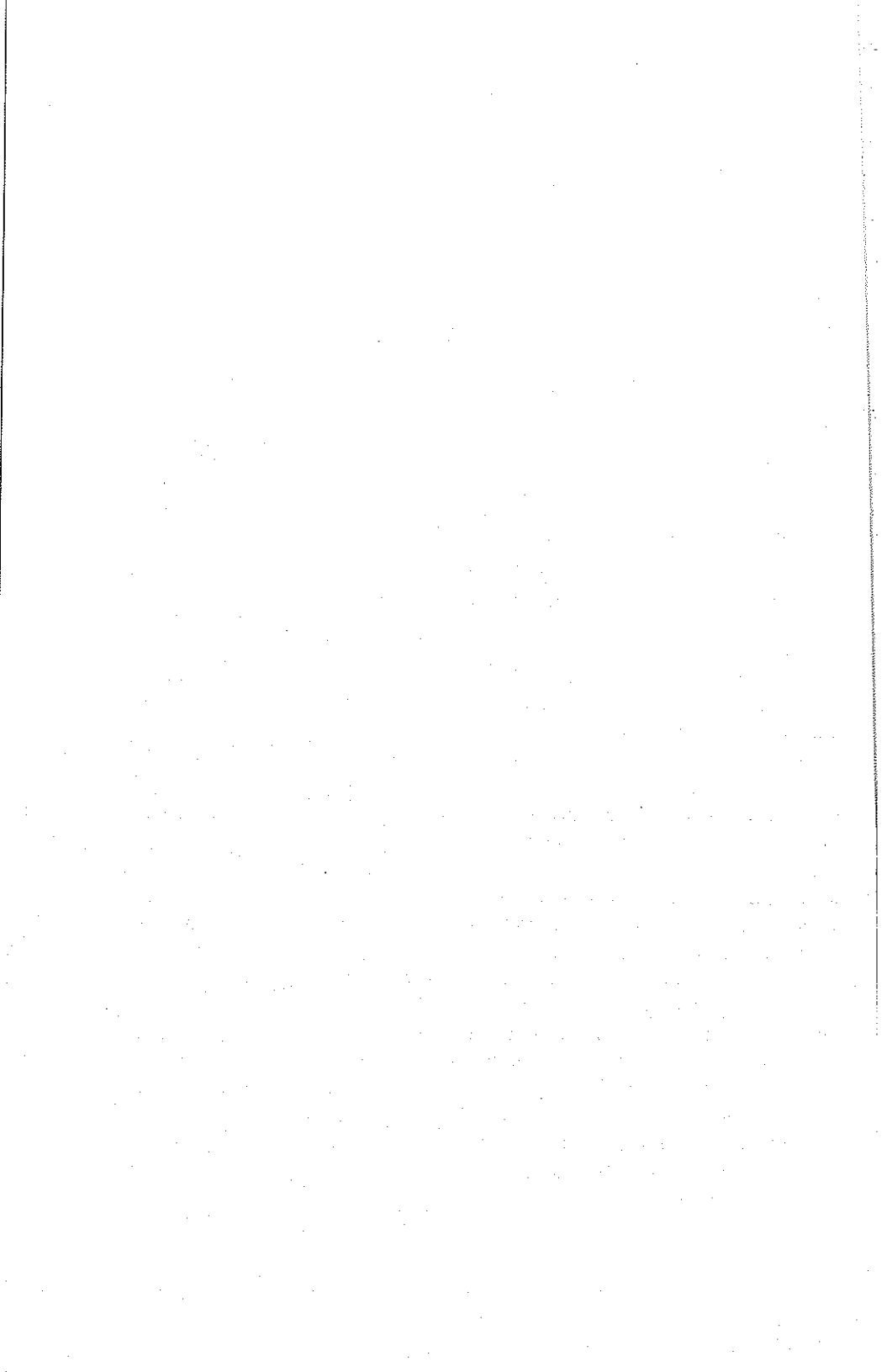
### *The Agreements and Canadian Society*

#### Editors' Note

*Finally, we hope to explore the impact these agreements will have on the formation of political values and political voice. Optimistically, it is possible that under both the Free Trade and Meech Lake agreements the commitment of Canadians to Canada will increase. Meech Lake might produce a new confidence in national government. The Free Trade Agreement might lead to economic patterns that, for the first time, allow the regions fully to exploit their economic advantages and thereby counter the sense that the Canadian government acts mainly as a brake on regional economic development.*

*Adopting a less positive attitude, it might be asked whether these agreements will alter the functioning of democracy in Canada. For instance, will the agreements lead to the centering of political expression in seats of government and remove it from other centres of interest—centres that are created by the mobilization of people along lines of class, gender, race, social interest, etc? Will the focus on policy harmonization that seems to be at the root of the trade agreement lead to harmonization with a less progressive politics—a politics of wealth creation not wealth distribution? And, in turn, will this lead to an increase in social alienation?*

*Hopes and fears for our political future are largely based on our level of confidence about whether ordinary Canadians will be able to engage in political expression and organization. We have not yet analysed how these processes are likely to be affected by the Free Trade Agreement and Meech Lake. It is time to turn to this element of our political science—the role of people in the governance of our nation.*





## THE DISAPPEARANCE OF NATIONAL IDENTITY UNDER MEECH LAKE AND THE FREE TRADE AGREEMENT

*Eric Maldoff*<sup>1</sup>

It is nice to talk about structures and all those wonderful things that lawyers enjoy so much but what makes people is identity, how they organize themselves, and how they handle political action. That is what I think we really have to talk about. Unfortunately that is probably the area of the Free Trade treaty and Meech Lake which has been addressed the least throughout the debate.

Identity is what makes us us, and us is spelled U.S. in Canada. I do not think that that is a coincidence but it may be. The question of what constitutes Canadian identity is a national industry. It has occupied us ever since Confederation and it is an industry that is still going strong. Frankly, I think that when we look at Canadian identity and then start to analyse the combined effect of Meech Lake and Free Trade we are probably in the process of creating the first major new industry as a result of the Free Trade Agreement—the business of determining the meaning of these agreements for Canadian society.

We are talking here about our identity, what we think about, what we care about, what our values are, how we approach solutions, and our expectations, among other things. All that gets wrapped up in what makes us us including the fact that we are very insecure about not being them. But I think frankly there is a sense of a Canadian identity and I think that amongst us if we spent some time talking about it we would be able to identify certain values that make us very proud of ourselves, not in opposition to anybody else but because we function as a society in a different way.

I do not think it is an accident that we have governments that spend a lot of money to help support the people of this country; not support them on a welfare basis but help people through the hardships that we live through in this country. Our identity is wrapped up in the French and English languages including the fact that even the people who think that we should be a unilingual English country are identified by the fact that they involve themselves in this debate. In the United States they do not even discuss that. I think that our identity goes to

1 Lawyer, Martineau, Walker, Montreal and founding President, Alliance Quebec

our expectation of programs. Things like the national health care program are matters of identity for Canadians.

I enjoy the platform of being an English-speaking Quebecker here before you so that I can just very briefly denounce Meech Lake thoroughly. I think anybody here who supports it has sold me out. And I say that in the most unequivocal way. The price of Meech Lake was the English speaking community of Quebec. I will be glad to go through that analysis with you. But let us have no mistake that when they say in that document that even the Charter is subordinate to Meech Lake, to duality and distinctiveness, they have told the Supreme Court of Canada, knowing full well that there was the signs case going to the Supreme Court and that my rights were on the table, to ease off and pay more attention to what the Government of Quebec determines is necessary to preserve and promote the distinct character and identity of Quebec. If you are aware of how Section 1 has been interpreted you will be aware of the fact that that is a directive to the court and may very well affect the way the Court deals with Charter cases coming out of Quebec.

Quebec was well aware that the English-speaking community of Quebec believes that they are equal in this country, not some impoverished minority, and consequently they were going to rely on the Charter and the equality provisions in it (s. 15) to ensure that they were treated as equals. I apologize to you but also tell you that when I hear arguments that this was the best possible deal and it was absolutely necessary to do this to get Quebec into the Constitution, I am angered. If we agree that duality is a fundamental characteristic of a country as Meech Lake says then I cannot understand how you can sacrifice the English-speaking community which is an essential component of a fundamental characteristic of the country. I would refer you to the joint Senate-House of Commons committee report. The majority report which came out after the hearings this summer responded to the question of English rights in Quebec by saying "the 'distinct society' clause is unlikely to significantly erode the constitutionally entrenched rights of the English speaking community of Quebec."<sup>2</sup> I would suggest to you that if that is the best the majority report could say I think it is a shame on all of you that accept Meech Lake.

Now getting on to Meech Lake and Free Trade: Language is an important issue in Canada as you can see. There are three views of language which have been prevalent over the last while. One is bilingualism. I happen to subscribe to that. It is a notion that there are two official languages in the country which are of equal status and that we should be working to promote that. We should be working to promote and enhance rights, delivery of services, government

2 *Report of the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord* (Ottawa: Queen's Printer, 1987), at 51.

services, access to opportunity, and the ability of Canadians to communicate and participate in public life in either language.

There is another view called duality. Originally duality was introduced as a word to replace bilingualism because everybody hated Trudeau. But duality now actually has a different meaning. Duality is Meech Lake. Duality means essentially a territorial definition of Canada's linguistic features. It is a socio-demographic function and it is set out in section 2 of Meech Lake. It says essentially a French Quebec and an English rest of Canada with sprinklings of the other minority language group in each of the areas—Quebec and the rest of Canada. It does not speak of equality of languages, it speaks of majorities and minorities; it does not speak of rights for all those who think that the English of Quebec or the French outside of Quebec are somehow protected by this.

The third view is that this is an English country. We just saw that view very well expressed by a number of the backbenchers of the Progressive Conservative party over the amendments to the Official Language Act. Those are the basic three views.

As I said, under Trudeau the direction had been towards bilingualism. Section 16, and the section following of the Charter really contemplated equality and a framework that other provinces could opt into; there was an unwritten but clear hope and expectation that over time provinces would opt in. Meech Lake moves away from that. It does not press the issue of equality of languages, but moves instead to the policy of duality and security on a territorial basis.

I would suggest to you that the Trade Agreement will probably bury any hope of the advancement of bilingualism as opposed to duality. This is the case firstly because language is essentially being shifted over to the provinces. Secondly, because the promotion of bilingualism, which would mean doing at the provincial level what is now being done at the federal level, will impose a cost. Cost in a free trade environment means price and on the assumption that, ultimately, someone has to pay the additional price, Canadian provinces will be driven deeper into an uncompetitive position. But we have not structured ourselves under Meech Lake to agree that that would be shared at a national level. What we have said is that we have shifted it to the provinces and that the provinces are now on their own to deal with the free trade environment and the United States. This will hinder minority language rights or the acceptance of two languages. There is a cost—labelling, bilingual services, bilingual documents, all that you have to pay for. Now either we spread that over the entire population or we spread it over a small group. Canada's tradition has been to spread it over as large a group as it could. Free trade I think changes that. Given how little impetus there has been towards bilingualism, and I am using that word advisedly, in the country to date, there is cause for concern. Yet in a free trade environment it will probably be still less.

I am not going to debate whether the Free Trade Agreement is a good one or a bad one. What I will say is that it seems quite evident to me that there are trends going on out there in the world of economics that force Canada to start to come to terms with new realities. Either we are going to do this multilaterally or we are going to do this bilaterally, but in some way we are going to have to become a more competitive country; we are going to have to compete in a world of shrinking economies where barriers are being brought down. Given the proportion of our produce that goes into the United States, we are going to need some way to ensure that our products can get into the United States. Whether you like the agreement or not we have to have the ability to respond to that challenge. There is no doubt that the Trade Agreement represents a major change in the status and perception of Canada as an international player. That goes without saying. But as I say, whether we like it or not we are going to have to do something. The problem with that is that the Trade Agreement is essentially a forward-looking approach to a very major problem that Canada is facing. It is looking to the future. In my view, Meech Lake, is a look to the past. I really question, as we simultaneously go through these two major historic processes, whether anybody sat down and really thought about whether Meech Lake puts us in the position to deal with the real challenge to Canadian sovereignty and to Canadian identity—our ability to deal with international trade and international competition as a nation.

Meech Lake decentralizes; Meech Lake makes decisions more difficult; Meech Lake provincializes national bodies like the Senate. For all those who thought that was a throw-away, just look at what a totally illegitimate Senate has done this year in Canada. When we have provincially appointed people getting up there I suspect that the Senate is going to be even more inclined to flex its muscles. I think that is just going to make national decision making all the more difficult. The point is well taken that there are mechanisms for increased consultation, collaboration, dialogue and all these things under Meech Lake, but the challenge is before us right now to find the means to address that future, not just to have an opportunity that maybe we might agree. With the amending formula we have I do not see how we shall ever change the Senate from its present appointed basis. Perhaps once we are 30 years into living under the Free Trade Agreement, and we realize how badly we are doing, there may be such a consensus in the country that unanimity will be achieved even by the provinces to give up such a wonderful patronage opportunity.

I find it interesting as I look at the Trade Agreement in Canada that there are so many parallels to the Quebec situation of 120 years ago. When nation states were the fashion, Canada decided to get together because an economic union of some sort made sense. Quebec agreed that it should be part of that union and then it spent 120 years struggling to ensure the ability to say that on the one

hand it is part of that union, but its distinctiveness has to be respected. Finally they achieve this in 1987 in Meech Lake; their distinct identity is recognized. That is what they want. (This could have been in the preamble by the way; Quebec would have been just as happy.) It is just that they wanted us to finally tell them that we knew they were different. Now the interesting thing for us is that we get into Free Trade and what have we done in terms of getting the Americans to recognize that we as a country are different, that there is something that we want to preserve? What have we done to put that into the terms? The government has bragged a great deal about the cultural guarantees that we have received. I would draw your attention to those cultural guarantees which are in the agreement.<sup>3</sup> They essentially cover books, films, videos, audio-video music recordings, transmissions, communications, etc. Anybody who thinks that the cultural protections here really recognize Canadian cultural identity, had better read article 2012 very carefully. There is also something else that we should all be aware of. Article 2005 exempts our cultural industries in paragraph 1 but paragraph 2 basically says this: to the extent that we invoke a measure which would be illegal under the trade agreement, except that is not illegal because culture is exempt, the U.S. is still perfectly entitled to take measures of equivalent commercial effect in response. In other words, we can protect our limited cultural protections here, but even for that there is a price. If we want to protect the Canadian film distribution industry, we can go right ahead and have all sorts of restrictive legislation and foreign controls and anything we want. The Americans will sit there with an adding machine saying how much that cost us. Then they will deliver the bill to us. It may hit somebody in Saskatchewan who is producing wheat or somebody in Newfoundland who is selling fish. Of course we have Meech Lake which decentralizes power, so instead of that burden getting shared nationally it will just get absorbed within the province. Where is the will to move as a national entity to cover those kinds of things?

I would just mention one other matter that I find of particular interest. Regionalism is a great value to Canadians; I suppose it is part of our identity also. One of the ways we have tended to reinforce regionalism is through non-tariff barriers. Meech Lake reinforces regionalism. Then we get the Trade Agreement which says that the standard is national treatment. Now what national treatment means is that you cannot discriminate against Americans. You have to treat Americans at least as favourably as you treat the most favoured national of your own country.

3 Department of External Affairs; *The Canada-United States Free Trade Agreement*; article 2012.

The Free Trade Agreement is groundbreaking because it covers services and investment. It is in the area of services and capital investment that Canadian trade protectionism has been most actively played out—mostly at the provincial level through non-tariff barriers. I would bring to your attention articles 1402 and 1602 of the Trade Agreement which deal with investment and services respectively. They define what national treatment means in the case of a measure at the provincial level. What it basically says is that a measure at the provincial level cannot treat an American any worse than the best treated Canadian national would be treated in a particular province. Taking Quebec for example, we could not treat an American any worse than we treat the best treated Quebecker because Quebeckers still are members of Canada. The result of that is that Americans will be able to demand better treatment than other Canadians are able to demand coming into the same province. If you phone the Trade Negotiator's office in Ottawa they will confirm that and say that they are not here to solve constitutional problems; they are dealing with trade problems. The effect of that I leave up to you, but as a matter of policy I do not know how long provinces are going to be able to discriminate against other Canadians while they have to accord national treatment to Americans. If, as a nationally unifying factor, we are going to get rid of non-tariff barriers surely we should not back into it as a matter of lost cases with the Americans. I would think that that is a conscious decision that we should be taking.

As a last point, part of identity is how people feel and think. There is no doubt that we are going to regionalize the country and subsequently create a north-south trading pattern. I think that that is going to weaken Canadian identity for us all. Once we have lost our identity as Canadians we shall certainly be able to spell us U.S.

## MEECH LAKE AS A CONSTRAINT ON THE INDIVIDUAL

*Neil Finkelstein*<sup>1</sup>

Each of these agreements has a significant effect on the ability of social groups to form and engage in political expression. However, in my view the relationship between government and individuals, which is what that topic is, is really far more affected by Meech Lake than the Free Trade Agreement. It has been suggested that Meech Lake simply adds a new dimension to the process. In my opinion that is a great understatement. It fundamentally changes the basic relationships in Canadian federalism; it changes the relationship between the provincial governments and the federal government and it changes the relationship between individuals and government generally. It does that in a number of its provisions and I will bring three of them to your attention.

First is the distinct society clause in section 2. That clause makes it the role of the provincial government to preserve and promote distinctiveness. The language of distinctiveness will undoubtedly impact upon how courts are going to interpret section 1 of the Charter. There is no question about it, that is what it is there for. It is not an argument that one can dismiss; the consequences of its being right are very serious in terms of the protection of individuals vis-à-vis government as it is a direction to the courts to be far more deferential to legislative judgments than the Charter in its current form permits.

The second point which I think is going to have a significant impact upon the relationship between individuals and government is the appointment of judges. The changes give the focus to the province; the province nominates and the federal government chooses from among the provincial nominees. The obvious point and the one that has been made over and over again is that it gives Quebec the ability to deadlock the process. Relating it to free trade you can ask yourself, what if free trade requires a reallocation of jurisdiction to Parliament? What if it requires Parliament to be able to do certain things pursuant to the trade and commerce power, pursuant to the Peace, Order and Good Government power, pursuant to whatever other power? What are the chances of Parliament

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acquiring new powers or reacquiring powers under a regime of provincially nominated judges? I leave that question to you.

I think numbers 1 and 2, the distinct society and the appointment of judges, are very important with respect to individual rights. I think that a court composed of provincial nominees and particularly Quebec-appointed nominees, appointed by the National Assembly, the Assembly whose job it is to preserve and promote a distinct society, is going to take very seriously that interpretative direction in section 2 which says that it is Quebec's job to preserve and promote a distinct society.

The third point that I would like to make is about the spending power. I have been quite surprised to hear that the clause on the spending power really is not much of a change. It has been said earlier that it simply locks in the division of powers. I do not think that that is correct and I do not think that Quebec sees that as correct. They certainly would not have been content with an agreement which simply locked in the division of powers.

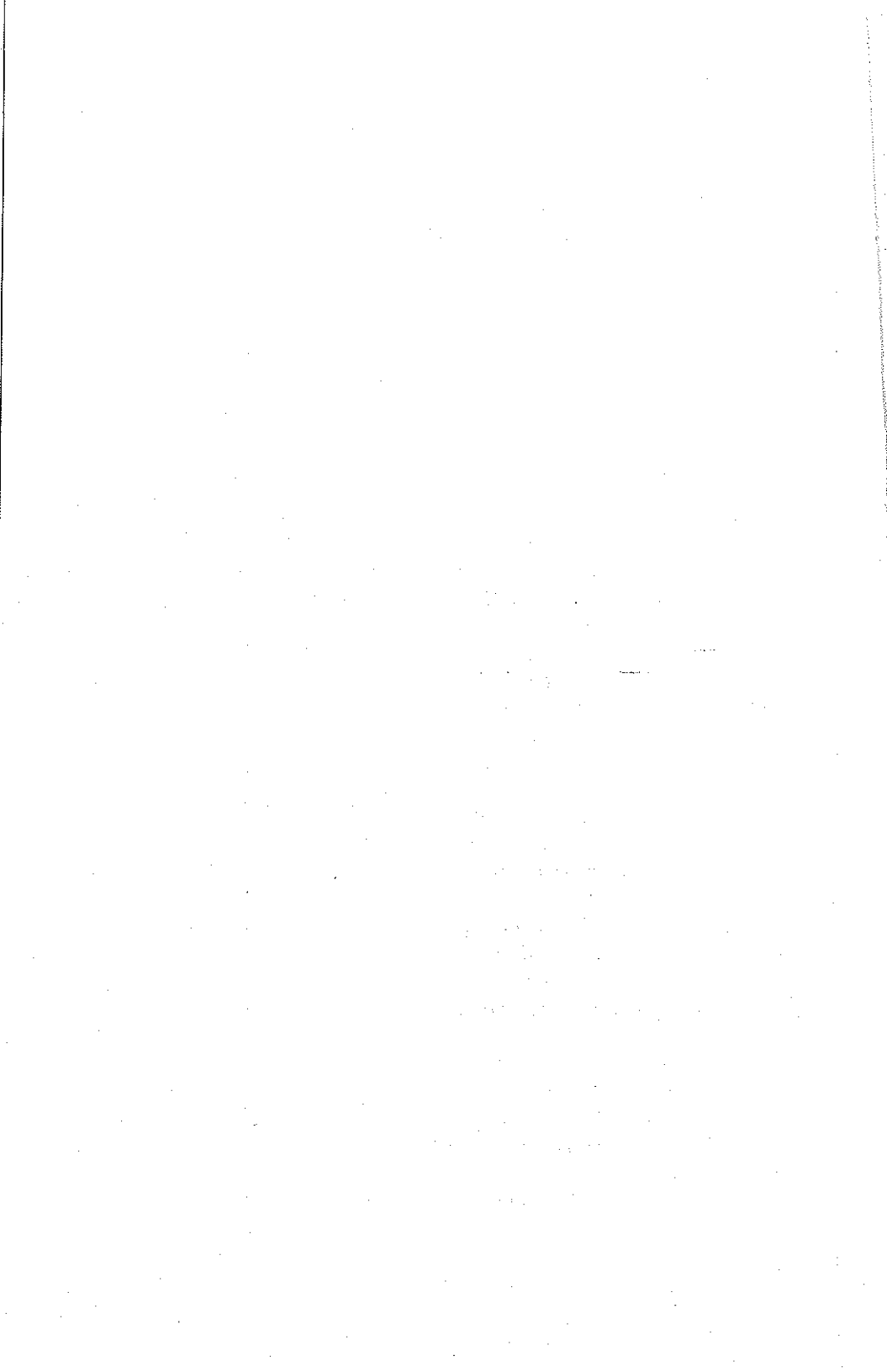
I think when you read the agreement that that is not what you get out of it. It does say for the first time that there is a spending power, but there are two reasons why it is significantly decentralizing. The first is with respect to the spending power. I am not aware of any case which has ever said that Parliament does not have a spending power. So to those who say that we have now enunciated a spending power I say so what, no case has ever said that it was not there. I can find authority in the Peace, Order and Good Government clause and section 91(1)(a) relating to the public debt for the exercise of the spending power.<sup>2</sup> I think what really happens with this amendment is that the compensation clause is going to make it likely that Parliament will exercise its spending power less often because politically Parliament is unlikely to take the heat for raising the taxes if it is simply going to be a funnel for money to the provinces. I do not think that that is going to happen and I do not think that the answer to that is that Parliament will do it directly. The whole point of a cost sharing scheme is that Parliament does not have the money to pay for it directly. It is a cost-sharing scheme and to say that the way around it is for Parliament to bear 100 per cent of the cost is not practical.

When all of the effects of the Meech Lake Accord are combined, you end up constraining the individual in his or her relationship with the legislature, in his or her freedom from government intervention, in the protection of his or her rights if he or she is a member of a minority in a province, in his or her guarantee

2 The leading cases on the federal spending power are *Central Mortgage and Housing Corporation v. Cooperative College Residences Inc.* (1975) 71 D.L.R. (3d) 183 (Ont. C.A.) and *Winterhaven Stables Ltd. v. Attorney General for Canada* (1986) 29 D.L.R. (4th) 394 (Alta. Q.B.).



of impartial adjudication when political issues enter the judicial arena, and in his or her guarantee to universal social welfare programs. This last protection is undermined in two ways; directly by the handcuffing of the spending power and indirectly by the potential for a provincialist Supreme Court of Canada. The combined impact of all of these can be seen to be an undermining of the individual's democratic rights to political expression. Such fundamental constraints for the short-term goal of achieving political accommodation imperil the very existence of Canada as a democratic society.



## THE MEECH LAKE ACCORD AND CANADA'S ABORIGINAL PEOPLE

*Donald J. Purich*<sup>1</sup>

1987 saw the conclusion of two major agreements which will have a profound effect on the nature of Canadian federalism—the Meech Lake Accord and the Free Trade pact. Many Canadians optimistically await their implementation; others are fearful of their long term impact. Opponents ask, have we sold out Canadian sovereignty? Have we reduced the federal state to an impotent shell? One group of Canadians—Canada's estimated 750,000 to 1,000,000 aboriginal people—are especially concerned at the haste with which these agreements, and in particular the Meech Lake Accord, were reached. Aboriginal people have two justifiable concerns about the Meech Lake Accord: first, the fact that it was agreed upon and concluded in the space of approximately two months and second, the impact of its terms on their aspirations.

Aboriginal people ask why Canada's first ministers were able to reach an agreement to accommodate Quebec in a matter of months, but unable to accommodate native aspirations. In contrast to the Meech Lake Accord, they compare the five year, \$50 million series of four constitutional conferences and 20 related ministerial conferences which ended in March 1987 without achieving significant constitutional protection for their main demand—the process of establishing self-government. And for some aboriginal people, like the Métis, the constitutional process was a way of gaining not only self-government, but a land base on which to practice it. Aboriginal leaders accuse the first ministers of lacking the political will to deal with their concerns.

There is merit to their accusation. The governments of Saskatchewan and Alberta were quick to ratify the Meech Lake Accord and the premiers of both provinces have made extraordinary efforts to champion free trade. It was these two provinces which proved to be major stumbling blocks to a constitutional amendment recognizing self-government.

1 Director, University of Saskatchewan Native Law Centre.

While a joint Parliamentary-Senate Committee studying the Meech Lake Accord, in its September 1987 report, rejected the aboriginal complaint, the committee itself demonstrated a lack of understanding as to what had happened in the aboriginal constitutional talks.

The Committee reported:

Accordingly, the Joint Committee does not share the view that the failure of the Constitutional Conferences on Aboriginal Rights can be attributed simply to a failure of political will....There is no comparison, in our view, between the task set for themselves by Canada's aboriginal people—namely, creation of a third order of government and constitutional recognition in an interpretation clause of Quebec's "distinct society". Among other differences, Quebec already has its governmental powers and jurisdictions spelled out in the Constitution Act, 1867.

The committee overlooked one thing. The constitutional conferences were not about the creation of a third order of government—they were about recognizing the right of self-government with the right to be implemented through a negotiating process spelled out in the constitution. In short, had the constitutional talks succeeded nothing would have changed immediately. In the long term, provinces and the federal government would have had to sit down with regional aboriginal groups to determine ways in which they could have been given greater control over affairs affecting their daily lives.

Not only are aboriginal people concerned with the haste with which the Meech Lake Accord was signed, but they are also concerned with what it means to them. They have three main concerns. Those have to do with the possibility that the provinces will have a greater voice over aboriginal affairs, appointments to the Supreme Court and the creation of new provinces.

Section 16 of the Meech Lake Accord purports to address some of the concerns of aboriginal people. It provides:

Nothing in Section 2 of the Constitution Act, 1867, affects Section 25 or 27 of the Canadian Charter of Rights and Freedoms, Section 35 of the Constitution Act, 1982, or Class 24 of Section 91 of the Constitution Act, 1867.

In summary, this section purports to protect aboriginal rights which already exist in the constitution from derogation by section 2 of the Accord, which recognizes Canada's dual linguistic nature and Quebec as a distinct society. This section would also appear to protect the federal responsibility for Indians and lands reserved for them from being in any way lessened by section 2.

But aboriginal leaders feel this is not enough. Shortly after the Accord was signed, National Assembly of First Nations Chief, Georges Erasmus, declared:

While the clause can almost be interpreted as a non-derogation clause, it does not go far enough in protecting our rights...it protects those rights in section 2 of the accord, but says nothing about the rest of the amendment....federal programs

which Indian people rely on can be opted out of by provinces....this could lead to erosion of the trust responsibility the federal government has towards Indians...

The Accord recognizes the right of provinces to opt out of federal shared cost programs. Shared cost programs include education, health, welfare, legal aid and various other social programs. Generally, such programs fall within provincial jurisdiction. The responsibility for such services for Indian and Inuit people, but not Métis, has generally been borne by the federal government, though many legal scholars feel that the provinces also have a responsibility in providing such services to Indian and Inuit people. A great number of Indian people (estimated at 30 to 40 per cent) live off reserve and the federal government has been trying to reduce its responsibility for those Indians.

The scenario that many Indian leaders fear looks like this. At some point in the future Ottawa and the provinces reach an agreement on Indian education. After several years one or two provinces opt out. The province continues with an Indian education program and thereby meets the requirements of the Accord which requires the opting out province to carry on a program that "is compatible with the national objectives", the national objective being to provide educational opportunities for native people. But, under this type of scenario the provincial program could in fact be inferior to that agreed upon originally.

The second concern of aboriginal people has to do with powers provinces are given in appointing Supreme Court of Canada judges. As the Accord now reads, the federal government can only appoint nominees from names supplied by the provinces. Aboriginal people do not view the provinces as their friends in their fight to protect aboriginal rights. As recent examples they point to British Columbia's refusal to recognize aboriginal rights, and to the refusal of B.C., Alberta, Saskatchewan and Newfoundland to recognize self-government during last year's constitutional talks.

In the last two decades aboriginal people have looked to the Supreme Court of Canada to protect their rights. They point to a string of decisions supporting the protection of their rights, including *Calder v. Attorney General of British Columbia*<sup>2</sup> (in which the court recognized the existence of aboriginal rights), *Nowegijick v. R.*<sup>3</sup> (which declared that treaties and statutes dealing with Indians should be liberally construed and where there are doubts, those should be resolved in favour of the Indians), and *Guerin v. R.*<sup>4</sup> which imposed a trust duty on the federal government when dealing with Indian lands. If the provinces have a say in nominating Supreme Court judges, aboriginal leaders fear that the court

2 [1973] S.C.R. 313, [1973] 4 W.W.R. 1.

3 [1983] 1 S.C.R. 29, (1983) 46 N.R. 41.

4 [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481.

of last resort may be stacked with individuals who share narrow restrictive views about aboriginal rights.

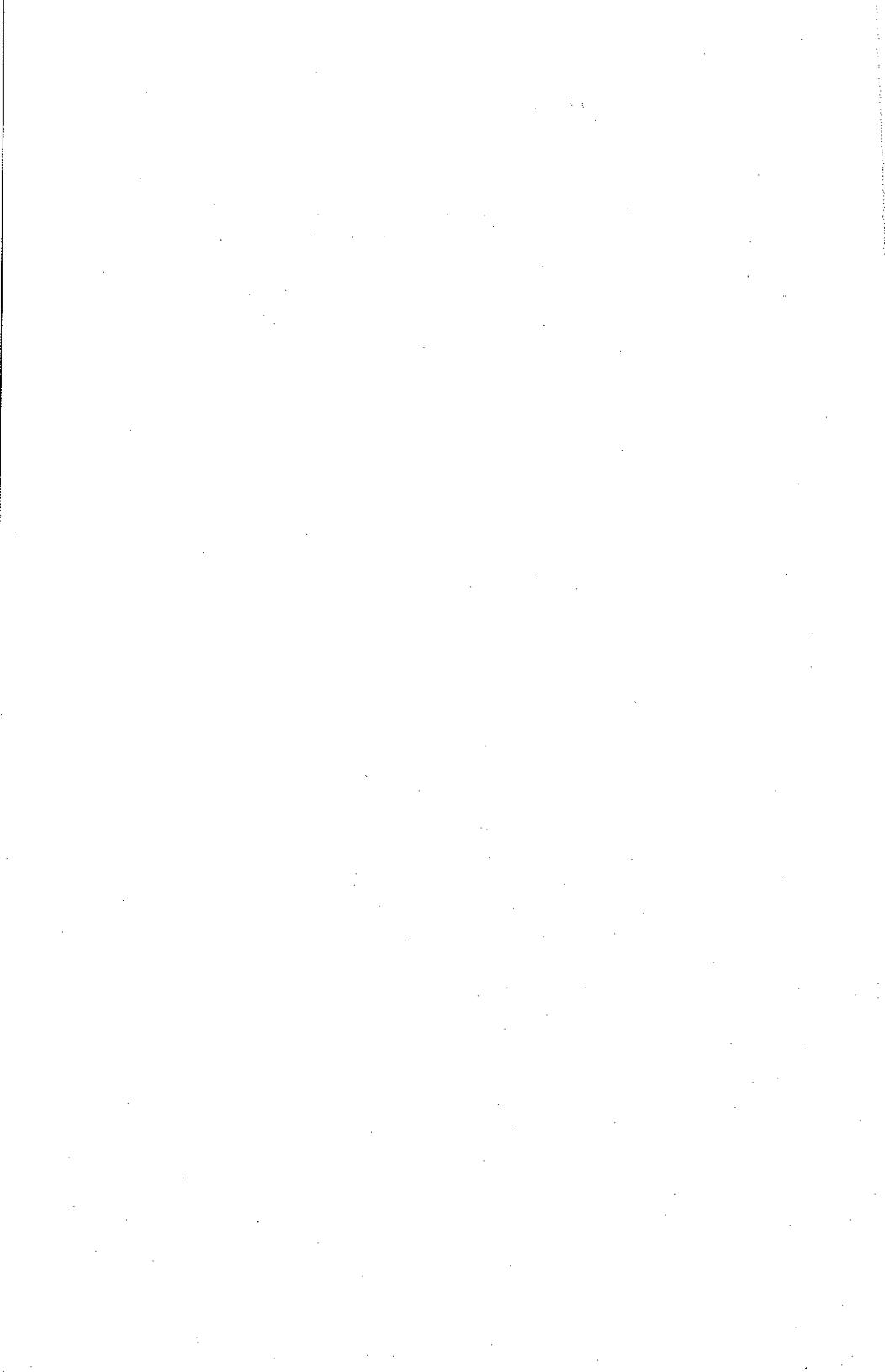
The final concern of aboriginal leaders has to do with the creation of new provinces. The Dene, Métis and Inuit of the North West Territories are involved in negotiations to split the North West Territories into two; an Inuit controlled territory north of the treeline called Nunavut and a southwestern Territory called Denedah. A 1982 plebiscite approved the division in principle. Talks and negotiations are now centred on the boundary and the nature of the government. While the Métis/Dene would not be the majority of the population in Denedah they propose guarantees to protect their rights. In short the aboriginal people see self-government in the north, with the possibility of provincehood at some future point.

Prior to 1982 the federal government could unilaterally create new provinces, as it did in the case of Alberta, Saskatchewan and Manitoba. The 1982 constitution required the consent of at least seven provinces for the creation of new provinces. The Meech Lake Accord would require the consent of all the provinces. Northerners feel unanimous consent for the creation of new provinces in the North may be impossible to obtain because of the constitutionally protected equalization formula, wherein have-not provinces receive transfer payments "to provide reasonably comparable levels of public service at reasonably comparable levels of taxation". The formula is based on per capita tax returns which in the North happen to be higher than the national average. Hence, new northern provinces would not qualify for equalization. But the costs of government, because of distance and sparsity of population, are much higher in the North. As a result, new northern provinces would require equalization. Under the current formula they would not qualify. To do so current provinces would have to agree to special treatment for the North. The likelihood of ten provinces agreeing to the creation of new provinces requiring special economic treatment is unlikely.

The provisions regarding creation of new provinces, along with the fact that the two territories cannot nominate candidates for the Senate and Supreme Court and coupled with the fact that the two territories were excluded from the negotiation process has led them to strongly oppose the Accord. The Yukon and the Northwest Territories have begun a media campaign against the Accord and have also launched court challenges to have the Accord declared unconstitutional.

Aboriginal opposition to the Meech Lake Accord has to be put into perspective. For aboriginal people the Accord, following as it did on the heels of the failed aboriginal summit of March 1987, is yet another instance in Canada's history where native interests have been ignored. To understand their fears one has to remember that since Confederation Canada has at one time or another

made it impossible for Indians to become lawyers or doctors, required Indians on the prairies to have a pass to leave the reserve, outlawed the potlatch in B.C., forcibly relocated the Inuit in the early 1960s from Port Harrison (Inukjuak), Quebec to Resolute Bay and Grise Fjord, North West Territories, and has unilaterally taken land which has been reserved for Indians. The Meech Lake Accord is seen as part of the pattern by federal and provincial authorities to deny aboriginal rights. For native people, the Accord is another nail in the coffin, burying native aspirations.





## DISCUSSION

### MARCUS SNOWDEN

I am disappointed as a Manitoban and as a Canadian to hear Mr. Maldoff lamenting the plight of English-speaking Canadians. I say this in the full knowledge that the source of the trouble for English speaking Canadians is found in the history of central Canada, of both Upper and Lower, now called Ontario and Quebec. I say that in the full knowledge, too, that the corresponding group in Manitoba, the franco-Manitobans, have some parallel problems. I am not prepared to accept Mr. Maldoff's lament because it goes against what the aboriginal peoples were, and are, trying to do, what Quebec has done and what the franco-Manitobans did as well. These groups became political and went to the top from a disadvantaged position. I cannot see that the English in Quebec are in the same league. Their interests are and have been well represented nationally and provincially in the other nine provinces. Yet they scream murder when their arrogant privilege is threatened. If the majority of people in Quebec have had to learn English, i.e. be bilingual, for so long, why when the position is turned about do the English in Quebec hang their hat on egalitarianism, except to preserve their privilege? I have problems with Meech Lake but unilingualism is not one of them.

### BRYAN SCHWARTZ

I am willing to begin by expressing a lament for the anglophone minority in Quebec. It happens to be the hinge that holds the country together. I do not think that it takes a lot of deep political analysis to see an all francophone Quebec as a separate Quebec. Quebecers now have fewer constitutional rights with respect to everything in the Charter than any other group in the country. They are the only group that is systematically excluded from the Charter. When Meech Lake was signed was there any effort to correct that inequality? Of course not. Quebec received its distinct society at the same time as it was permitted to maintain a discriminatory exemption for minority language educational rights. The anglophone minority is probably the most bilingual community in the country. There is a strong symmetry between the position of the anglophones in Quebec and the treatment of minority language groups in the

rest of the country. I live in Manitoba. Eric Maldoff and people from Alliance Quebec were fighting for minority language rights in Quebec because they perceive that symmetry and I know that the prospects for minority language communities in Manitoba is going to be considerably less when they see the eventual extirpation of the anglophone minority in Quebec.

Meech is not just about legal rights; it is also about political messages. To say that Quebec should promote its distinct society when that is being interpreted by the dominant group in Quebec as a move to become more and more francophone is a message not only about everyday life as that is protected by legal rights; it also translates into matters of everyday life such as what happens at McGill University. McGill University does not have any constitutional right to exist. The level of funding is not something that is ever going to be litigated. The level of funding is a political decision made quite apart from the hard legal rights that exist. If the dominant message is the systematic delegitimization of the anglophone minority in Quebec as a relic merely to be tolerated rather than as an integral part of this distinct society, that is going to be felt in everyday things like whether buildings at McGill crumble or whether it continues to be a credible educational institution.

Bilingualism can also be understood in these political terms. We have talked about minority language rights but what about majority language rights? The policy of the Quebec government is to discourage bilingualism among francophones. How does that translate into day to day life for Quebeckers and Canadians when bilingualism is actively being discouraged? Meech Lake, is about dualism; it is not about bilingualism. Bilingualism is very much a day to day fact in Manitoba. Manitoba has the highest percentage of children in French immersion of any place in the country. If you think where you send your child to school is not a day to day decision you are wrong. Now the reason was that there was a perception in Manitoba, notwithstanding the press, that the wave of the future was a bilingual Canada, not two solitudes. A Quebec which is increasingly unilingual is certainly sending the wrong messages in that respect.

Why do we sign the Meech Lake Accord? We are told it is for social peace. We keep being told of the destabilizing situation in Quebec. I would argue the contrary; the empirical record was increasing acceptance of the 1982 package. Quebec stopped stamping its legislation notwithstanding the Charter. Mr. Rémillard gave a speech and said that on the whole the Charter was not such a bad idea after all. What are going to be the consequences? People keep saying, "Oh, notwithstanding your concerns, the spending power will work out OK, distinct society will work out OK." Well, if it works out OK for me it means it is not working out OK for the Parizeaus and the Bourrassas. And what is going to be the social peace in Quebec and the rest of the country when they discover that they did not get what they wanted?

There is something else that should be said about an historical point. We were talking about the North. Now we have had a lot of precedents from the 19th century. One that nobody talks about is Manitoba in 1870 in which there was a popular uprising against elite accommodation, constitutional reform which did not consult the people. It was fought and won by a population that was 91 per cent aboriginal. I wonder how much progress we have made since then in the way we are treating the North.

My last comment has to do with the quality of public life in this country. I do not know how much is resignation and how much is necessary cynicism. I think a lot of other people have described it as equivalent to the CF-18. I know it is fashionable and sophisticated to be cynical and to think that the quality of public life is supposed to be shabby and sleazy and that people are prepared to gamble the soul of a country for partisan political reasons. But is Meech Lake something that a lot of people in Canada still care about? I think that some people feel badly about it in the sense that here is something that really counts. This is not just CF-18's, it is something that goes a lot deeper than that. It is something purporting to define the fundamental characteristics of Canada and it is done in a way that is contemptuous of public input, indifferent to the long-term political consequences and presents a model in which bartering among a tiny political elite is the way of politics, rather than a truly democratic process in which people are listened to and responded to. One of the long-term consequences of Meech Lake is an exacerbation of the already incredibly cynical attitude of Canadians towards public life. In the long run that may have as much consequence for day-to-day life as anything else that is directly attributable to Meech Lake.

#### **MARIE-CLAIRE BELLEAU**

I am speaking on my own behalf and not as a lawyer. I am a French-Canadian. There are two French-Canadians here. I would like to say, first of all, that it takes a lot to come here and tell me that in Quebec we do not encourage bilingualism. When I think of all the people I have met, I can honestly say that English Canadians do not seem to know more French than French Canadians do English. Of course French Canadians do not have any choice. I am not saying that it is a bad thing, I simply think that it is encouraged in Quebec that it is not encouraged anywhere else. When we talk about bilingualism we can talk about a small region, a small portion of the region of Ottawa and maybe a small portion of the city of Montreal but we cannot talk about bilingualism in Canada. Maybe the Meech Lake Accord is saying what the reality is. I wish that the country would be bilingual but I do not think that it is. This whole conference

is just showing us how much French there is in our country. There has not been a single word of French except for what I have just said, in a conference of about 60 people. How can we talk about bilingualism? It seems to me to be something totally out of proportion.

### **ERIC MALDOFF**

Strong language elicits strong reactions. That is probably a good thing because we are talking about important matters. I am glad; I wish this debate had taken place in some of the forums where real decisions had to take place and did take place. There we are getting right down to it now. I understand what you are saying. I am very sensitive to it and I want to start from the point here which gave me some real difficulty. It gave me difficulty because I did not think it was fair. The fact of the matter is that what I was trying to speak to and hoped you understood was a question of what vision of the country we are articulating in the fundamental document of this land. I tried to express that there are different views of our language issue and that the vision that was expressed until 1982 to promote towards the concept of bilingualism; the equality of communities. The presence of the English speaking community in Quebec with its vitality and its dynamism was essential for that view. Quebec is probably the only living example up to the mid-70s or so of the functioning of bilingualism in Canada. One could get government services in both languages, and could live in both languages. People got along, by and large, though there were irritants.

Sixty-four per cent of English-speaking Quebec is bilingual. You cannot produce a similar statistic for any other population in the country. You can even put that in terms of French-speaking Quebecers. How many of them are bilingual? The answer to that is approximately 40 per cent. We should put things into perspective again. We live in a country that has two official languages and therefore your claim is legitimate. Now, whether or not you condemn the fact that some people may choose to live only in their language is up to you. We have to make up our minds about that. In terms of the distinctive society, I am not bringing any criticism about that whatsoever. My comments were directed at the question of the whole Constitution being interpreted in light of that as an obligation on the courts. I would put to you that there are a number of other fundamental values that also come to play as we go about the interpretation of our Constitution. For example, what about our commitment to the equality of Canadians? Or fundamental rights? Or multiculturalism? Should the courts not also be directed to take a mix of all the basic values of our society and deal with them together?

The last point I would venture to make is that bilingualism is not a reality. The question that I put to all of us and the question that should have been debated in Meech Lake is: do we want to entrench what is, and say that we are going to interpret the Constitution in light of that? Will we interpret the future in light of the way things are today? There is something very odd about that. If you live in a dynamic society you do not order your Constitution to be fixed in time or interpreted because of something in time. You saw what happened with the Official Languages Bill amendments that were recently in the House of Commons. They were progressive amendments. Yet what was raised? A hypocritical argument—I would suggest a very hypocritical argument—by people who never gave a damn before, but suddenly became very concerned about Bill 101 and the treatment of the English. Are we to say that it is all right in Quebec to undermine bilingualism, we can undermine the status of the English, we can undermine that community? It will come back to haunt us in the rest of Canada. Why would anybody expand rights? What model do we have to provide franco-Manitobans with health services if not what there is in Quebec? If you start to take away the English hospitals in Quebec I think you are going to have an awfully difficult time convincing Manitoba to provide those services. It goes to what kind of country you want. You can attack me personally but there are values at play here. As a Canadian who considers himself equal and legitimate, I do not appreciate having you tell me that I should take fewer rights. I do not think that is the price of a constitutional negotiation.

#### JOHN WHYTE

I want to pick up on the point that Meech Lake reintroduces politics, in contradistinction to the Charter and the Free Trade Agreement. It certainly does bring politics back into the fore; that is, there is political accommodation between various political leaders. But the question is what kind of political mobilization, what kind of political expression takes place under Meech Lake. I start with the proposition that the kind of political expression, the kind of political mobilization, that is at root democratic, takes place, and, in fact, is enhanced under the Charter, notwithstanding its essential anti-democratic form, at least at those moments it actually cashes out into judicial decisions. The Charter creates political saliency under which people can find themselves and can organize themselves around common interests. It seems to me that the trouble with the Meech Lake agreement is that it somewhat eradicates the opportunities, incentives and causes around which interests can be identified and political mobilization can take place, simply because it is (a) done secretly and (b) done in terms of gross accommodations, that is province to province,

province to federal government, whereas the Charter allows fora to be created so that much more refined interests can be vented. I would take Neil Finkelstein's proposition that, in fact, the Meech Lake agreement has a negative impact on democratic processes and the Charter does not have as dramatic an impact, although I do realize the paradox of that. Regarding the Free Trade Agreement, presumably the long term trend towards harmonization on the side of distributional politics should lessen the incentive for political mobilization and so should have much the same effect that Neil Finkelstein attaches to Meech Lake.

### **ROD MACDONALD**

There was something I wanted to say towards the end of the proceedings, but I feel preempted by Marie Claire Belleau. I had intended to speak at the end of the day in French to remind us all that in fact we are a country where the French language belongs in public discourse. I was particularly distressed by Eric Maldoff's statement, even though we agree on a number of particular issues. I am part of the Anglo minority in Quebec. I was not born in Quebec. I was born on a farm in Ontario. I learned to speak French at an unfortunately very late age, 22 or 23, when I went to school in Ottawa. I moved to Quebec in 1979 and I bought a house in Quebec after the referendum was called and before it was voted on. It has turned out to be a very profitable deal.

I think one of the real treats of the last ten years of living in Quebec has been watching the number of Canadians from outside Quebec who are moving into the province, speaking French, and working in a bilingual environment. I would suggest that those demographers among us who know and who have read the statistics realize that in the year 2020 or thereabouts the population of Quebec will be 50 per cent allophone, 40 per cent francophone and 10 per cent anglophone. The Quebec government is going to have to understand and accommodate allophone and anglophone communities into whatever the distinct society is in order to survive because the distinctiveness of Quebec society will no longer be majority francophone by 2020.

The distinctiveness of Canadian society will be a particular approach to language and bilingualism in this country. I suggest that rather than expressing a lack of confidence in our political institutions in Quebec, we are entering what I would characterize as a period of an invitation to participate, an invitation to discourse. The political community in Quebec over the next 20 to 25 years promises to be one of the most interesting, sensitive, and thoughtful political communities in the world. I very much look forward to participating in it and I do not fear some paradise lost for English-speaking people in Quebec. I wanted

to put that on the table because I think it is important that at least somebody provide a countervail to the traditional anglophone's response to Quebec political development.

### NEIL FINKELSTEIN

I have three points. They are not summaries, they are just responses. First, everybody knows what the process for negotiating Meech Lake was and while some people like it, others do not. I think largely it depends upon how you view the outcome of the agreement. Somebody said earlier that when you do not like a deal you complain about the process. I am not sure, however, that larger public participation would have led to another form of deal.

The second point was John Whyte's, and I agree with him. I think it is true that the Charter does allow for more refined interests to be reflected in the sense that the Meech Lake Accord is a very broad instrument, but not in the sense of the breadth of provisions. It is a very general provision, as one would have to be with a constitution, whereas courts and the Charter allow for individual case-by-case testing and weighing. I do not agree, however that the Charter is anti-democratic. I prefer to characterize it as a balance between majoritarian and minority interests. The courts are different. The Charter is different for example, from an American Bill of Rights, where people are anti-democratic because the courts make decisions. The Charter is much more of a balance than that. First the courts are directed by section 1 to do the weighing. Now it is true that that is still the court's decision but the second level is, if the legislature does not like the weighing done by the courts, in important areas, it can use section 33.

The third point concerns Eric Maldoff's fears: I understood his point, and there were quite a few facets to it, but the basic point was his concern about the direction to the courts in section 2 about how to interpret the Charter. It is his view and mine, that it is a serious watering down of the Charter balance. That is as far as I understood his point to go. I do not think that it is unwarranted, and I think that to some extent it is a reasonable possibility that that is what is going to happen. That is a bad consequence and if it is possible that it could happen, it should be changed.

### ANDREW ROMAN

I wanted to pick up also on some things that Don Purich said because I think it is not only Native people who are losers under these two deals. I think it is

important to note that one of the major thrusts of the current Conservative government, like that in England and like whatever one would like to call the Reagan government, is that these governments seem very producer-oriented and very majoritarian. I think ideologically that is one way of characterizing them.

That means that they are not particularly sensitive to the rights of women, the rights of the handicapped, Natives, the poor, the elderly, or consumers. Natives are just one of the groups who have that difficulty. In that sense then you see supply side economics and the Free Trade deal generally as part of that producer orientation and you can see Meech Lake to some extent as being consistent because it does give the majority in Quebec new powers. I do not know whether Eric Maldoff is right when he says that those will be abused or whether others are right when they say that they will not be abused, or that they will not be used at all, but there is no question that it does give them new powers, however they choose to use them.

When you look at that thrust I think it is clear why it is that the current government has gone that way. What is not so clear is why the opposition has collapsed so rapidly. The New Democratic Party, which used to consider itself the traditional conscience of the country, was very quick to sell out the aboriginal people in the North, generally with the exception of Ian Wadell, who paid a very heavy price for his political dissent. I think the Liberals, too, fear that to be anti-Meech Lake is to be anti-Quebec and for that reason they felt compelled to go along. I think the reason that the whole political coup d'etat by the various leaders was possible both in Meech Lake and in Free Trade, was because there was no effective opposition owing to the fact that the current ideology, the producer-oriented majoritarian ideology, temporarily at least, has become the political ideology. I think it will not be long before the pendulum starts to swing back the other way as it perhaps already has in some of the other countries that we have been lagging behind. It may be two, three or four years before Canada catches up to those other countries and before serious progress can be made on behalf of Native people and some of the others who are not part of the current trend.

### **DON PURICH**

Just a very brief comment about how we get input. I am not sure there is an answer. I think Bryan Schwartz talked about it in terms of the openness of a process. I would like to stress that the aboriginal process was in fact very open. We had televised conferences, many ministerial conferences, a lot of public discussion, and there was no result. I suppose anyone who performs some



administrative functions as John Whyte and Rod Macdonald do, finds sometimes that the best way is to go ahead and do something. I suppose that was the Prime Minister's attitude.

We have talked about the courts and I think certainly the Charter of Rights has increased the role of the courts. I see that because of the Charter and because of the Constitution. I see an agreement being written by the courts on aboriginal rights. We also see a greater role for the courts in Meech Lake. I think the question here, and I suspect in free trade as well, is, are the courts in fact the best forum for resolving these issues? A more important question, if in fact the courts are the forums that are resolving these issues, is how do we in fact decide who should sit on that forum? The Meech Lake Accord in part touches on that but I think it is a very important point and certainly could be a subject of a conference by itself in terms of, if the courts are going to play a more and more important role, how we decide on the composition of that court, and the role it is to play.