

THE MEECH LAKE ACCORD:  
A CONSTITUTIONAL CONUNDRUM

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**THE MEECH LAKE ACCORD:  
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**INTRODUCTION**

The Meech Lake Constitutional Accord entered into between the provincial premiers and the Prime Minister of Canada in the spring of 1987 has generated considerable controversy over both its contents and the negotiating process from which it resulted. It could be argued that the Accord has generated more pride among its supporters and disdain among its detractors than was the case with even the 1982 patriation amendment containing the Charter of Rights and Freedoms.

The controversy in the Trudeau Parliament of 1980-82 centred on process more than substance. This, of course, may have been because amendments were made to the content of the Charter in response to requests advanced during the public hearing period. The process used to gain approval for the Charter of Rights resulted in procedural wrangling in Parliament, the opposition of most of the provinces and a subsequent reference to the Supreme Court of Canada. Last-minute negotiations resulted in significant amendments, however, and thus criticism melted away, except, of course, in Quebec.

By way of contrast, every aspect of the 1987 Constitutional Accord has been the subject of intense criticism by those who oppose its adoption. These criticisms became even more intense when it was realized that no changes were to be allowed to the text.

Commentators condemned the secretive process by which the Accord reached. Critics portrayed the Prime Minister and the Premiers as poker players dividing up the spoils on the large map of Canada, away from public view.

The public hearing process followed by a Special Joint Committee of the Senate and House of Commons was described as a sham because the Committee did not travel, hearings were held in the summer and the government had stated in advance that it would not agree to any changes in the text of the Accord.

The criticisms of process were matched or even exceeded in intensity by the criticisms of the text of the Accord. Briefly, the linguistic duality-distinct society clause is seen either as unnecessary or as creating a whole new range of criteria against which potentially discriminatory legislation passed by the Quebec legislature can be tested and found to be constitutional. Critics also see the clauses on immigration and the spending power as tending to balkanize Canada. The clauses relating to the Supreme Court, Senate and new amending formula are seen as giving too much power to the provinces.

Equally, there are those who praise the Accord as a vitally important constitutional document necessary if Canada is to proceed as a united country into the last decade of the twentieth century and beyond. It is said to fill in the blanks or complete the constitutional work started with patriation in 1982. The secretive process by which it was reached is claimed to be justified because it resulted in an agreement whereby with the linguistic duality-distinct society clause Quebec became a "signatory" to the Constitution. Its supporters argue that the Accord does not transfer power to the provinces at the expense of the central Parliament but gives the provinces a necessary and vital role in the institutions of the central government which most directly affect them. The changes to the amending formula would also give provinces a direct say in matters which most directly affect them.

Disagreement even exists over the origins of the Accord. Some argue that the Accord or clauses of it have appeared in constitutional documents since at least 1971. The Accord is the final attempt to build on these documents. The alternative view holds that there is no prior history to the Meech Lake Accord. Its genesis was the Premiers' Conference in Edmonton at which Quebec's five points were presented. Later, at meetings held at Meech Lake and in the Langevin Block, these points were

expanded with the Accord being the result of two marathon bargaining sessions.

This paper will present the arguments both in favour and against each clause of the Accord. The paper is divided into three parts, each of which discusses the appropriate part of the Accord: distribution of powers, institutions, and people.

## **DISTRIBUTION OF POWERS**

This part of the paper will be divided under five headings: Linguistic Duality-Distinct Society; the Non-Derogation Clause; Shared-Cost Programs; Immigration; and Financial Compensation (under the Amending Formula). As all these subjects have the potential of affecting either directly or indirectly the distribution of powers within the constitution, this part of the paper groups together some of the most controversial clauses of the Accord.

Clause 2 of the Accord would amend the Constitution Act, 1867 to include a new rule of interpretation; i.e., that the constitution would be interpreted so as to recognize linguistic duality as a fundamental characteristic of Canada and Quebec as a distinct society. What does this mean? What does it mean for the rest of Canada? Does this give Quebec, the legislature and/or government the right to encroach on federal powers in order to preserve and promote the distinct identity of Quebec?

Though some argue that clause 2 is really meaningless, the drafters of the Accord thought it necessary to include clause 16 exempting multicultural and aboriginal groups and the legislation which deals with them from the scope of the linguistic duality-distinct society clause. Is this non-derogation clause really necessary and if so does it cover enough groups?

The Accord contains a mechanism for governing the establishment of new shared-cost programs between the provinces and the federal government. While some constitutional experts looked on this section as a step forward because it would entrench in the constitution the recognition of the federal spending power, others especially those

representing the social service sector, were highly critical, because they felt the federal government would give up too much in the way of control over shared-cost programs and that the goals of universality and portability of social programs would be lost; the federal government would be weakened while the provincial roles would be strengthened.

The clauses of the Accord dealing with immigration have not received the same level of scrutiny as have those sections on such matters as linguistic duality or cost-sharing programs. The immigration clauses would actually entrench in the constitution the existing relationship between the central government and Quebec and would allow other provinces to establish similar agreements.

The last heading in this part will discuss the clause of the new amending formula which deals with financial compensation for provinces which opt out of constitutional amendments. The 1982 constitutional amending formula, section 40, gives a province a right to "reasonable compensation" where provincial legislative powers relating to "education or other cultural matters" are transferred from provincial legislatures to Parliament. The Meech Lake Accord would remove this limitation on the right to compensation so that such right would apply to any transfer of provincial legislative powers to the federal parliament. An opting-out province would be entitled to reasonable compensation for the retention of the responsibility that in other provinces had been assumed by the federal government. This, some argue, would again lead to a further balkanization of Canada, since it would become increasingly attractive financially for provinces to opt out of general amending schemes.

#### **A. Linguistic Duality - Distinct Society**

##### Interpretation

2.(1) The Constitution of Canada shall be interpreted in a manner consistent with

(a) the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present

in Quebec, constitutes a fundamental characteristic of Canada; and

(b) The recognition that Quebec constitutes within Canada a distinct society.

#### Role of Parliament and legislatures

(2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed.

#### Role of legislature and Government of Quebec

(3) The role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed.

#### Rights of legislatures and governments preserved

(4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language.(1)

The recognition of Quebec as a distinct society was the first of five points enunciated by Quebec's Minister of Intergovernmental Relations in 1986 as necessary to be met prior to Quebec's coming into the Canadian constitutional fold. In August 1986, the provincial premiers agreed that their first constitutional priority was to work toward the attainment of this goal for Quebec.

There are those who state that this clause would be looked upon by the courts as more than interpretive, and that in fact it would enjoy the status of an operative section of the constitution. There is concern that this clause when compared with others might restrict or possibly broaden rights depending upon the subject matter of the legislation it was being used to interpret.

This clause could have been put in the preamble of the Accord and subsequently the preamble to the Constitution Act, 1867. As a part of the preamble it would have been given little weight by the courts. Alternatively, it could have become a substantive clause of the

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(1) The Constitutional Amendment, 1987, s. 1.

constitution and as such would have greatly increased the legislative powers of the province of Quebec. Its positioning as an interpretive clause creates uncertainty as to its real importance. Does this middle ground imply that the clause may be given enough weight by the courts so as to constitutionalize legislation which would otherwise have been unconstitutional? It is as much a dilemma for the courts as for the politicians.

Critics do not question the necessity for having this clause. They do, however, question its inclusion as an interpretive section because the weight which the courts will give it is unclear.

A number of those who favour its inclusion and generally support the Accord claim that clause 2 does little more than recognize an existing demographic and sociological fact. Others on the same side, for instance Premier Bourrassa of Quebec, take the more extreme view that the clause will add to the scope of legislative ability of the province of Quebec and that this is a good thing.

Those who oppose the Accord argue that the meaning of the terms "fundamental characteristic," "linguistic duality" and "distinct society" have no legal meaning and therefore this is a dangerous clause. It must give to the government of Quebec powers that would be possessed by Quebec and Quebec alone and which might in fact override entrenched Charter rights.

This argument was given further fuel by the judgment of Madam Justice Bertha Wilson of the Supreme Court of Canada in the Ontario Separate School Funding Reference Case (Bill 30)<sup>(1)</sup> when she stated that certain parts of the constitution are virtually inviolate and cannot be affected by the Charter of Rights and Freedoms.

What does this clause mean? How would it be applied? What force would the courts give to it? Would it become a source of legislative power or simply remain as a description of a demographic and sociological fact? These are the questions which commentators ask and perhaps only the courts may answer.

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(1) Reference re an Act to Amend the Education Act (Ontario) (1987), 40 D.L.R. (4th) 18.

## B. Clause 16: The Non-Derogation Clause

16. Nothing in section 2 of the Constitution Act, 1867 affects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982 or class 24 of section 91 of the Constitution Act, 1867.<sup>(1)</sup>

It has been explained that this clause was added on the road between Meech Lake and the Langevin Block out of caution. Under it Canada's multicultural groups and native peoples, both identifiable groups with a cultural aspect, are mentioned and protected from any potential negative effects flowing from clause 2 of the Accord.

This clause of the Accord creates more mischief than it solves. The groups mentioned do not feel that they are given adequate protection. For example, the groups representing the aboriginal peoples at the parliamentary hearings expressed the wish to be mentioned in clause 2 of the Accord rather than in a non-derogation clause. They believe there are no people more distinct in Canada than themselves. This argument applies as well to the multicultural groups who also want their distinctiveness mentioned in section 2.

Others criticize this clause because it contains only two groups to whom section 2 of the Accord would not apply. Criticism came in the main from women's groups because they felt women or at least equality rights should have been included with the other classes set out in section 16. There was a real desire to have a statement somewhere that the 1987 Accord would not affect gender equality rights. That is, gender equality rights should be treated as paramount to the demands of "linguistic duality-distinct society" rule of interpretation.

Few arguments have been advanced in favour of this clause as it is now worded. It accomplishes only limited objectives. It was a constitutional drafting response to lobbying by certain interest groups. Unfortunately for the drafters not all the interest groups were included and even those who were, are not content.

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(1) The Constitution Amendment, 1987, s. 16.

### C. Shared-Cost Programs

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 provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.

(2) Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces.<sup>(1)</sup>

The courts in Canada have stated that one level of government cannot legislate in respect of matters over which the other has exclusive legislative authority. However, use of the so-called spending power does permit one level of government to expend its funds in respect of matters over which the other has exclusive legislative authority. While each level may have such authority, it is usually the federal government which spends moneys in areas of provincial power. It also should be noted that this power is not expressly set out in the Constitution Act, 1867 or subsequent amendments. Therefore, the clause of the Accord which attempts to regulate the use of the federal spending power in areas of exclusive provincial jurisdiction was welcomed by some as firmly entrenching in the constitution in specific terms, a power that had always been regarded in vague terms.

A significant part of this clause would obligate the federal government to provide reasonable compensation to the government of a province "that chooses not to participate in a national shared-cost program" if the province carries on a program or initiative that is "compatible with the national objectives."

As a federation, Canada is known for its social programs whose costs are shared between the levels of government. In the main, these are programs which are totally federally funded but operate within the constitutional boundaries of provincial jurisdiction. This clause of

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(1) The Constitution Amendment, 1987, s. 7.

the Accord, therefore, would finally "regularize" or "constitutionalize" this practice. This section actually applies to a very limited number of programs. Other than day care it is hard to imagine a new national cost-sharing program totally within provincial constitutional boundaries. It is simply too expensive to put many more such programs into place. However, this clause is to be applauded for recognizing and dealing with a lacuna in constitutional law.

Some criticize this clause as being unnecessary, since it only restates the existing law.

Others criticize the wording used to describe the operation of the section. They claim that the clause has the potential to create different types of social programs across the country. This would certainly result in a lack of uniformity of social programs and create portability problems for Canadians.

There is grave uncertainty regarding the meaning of the words "program or initiative" to describe what a province may do in response to a federal "shared-cost program" and the phrase "compatible with the national objectives."

From a practical point of view this clause would make it very difficult to structure a national shared-cost program because there is no time limit placed on when a province may drop out to pursue its own initiatives. The federal government will never know how many provinces are in and how many are out and looking for compensation. Those who oppose the inclusion of this section in the Accord argue that it threatens existing social programs and that new ones will never be created.

#### **D. Immigration**

The 1987 Accord contains a procedure by which constitutional status can be conferred upon certain federal-provincial agreements related to immigration and the temporary admission of aliens. Once a federal-provincial agreement, freely entered into, is blessed by a Proclamation issued by the Governor General under the Great Seal of Canada authorized by resolutions of both the Senate and the House of Commons and the provincial legislature, both levels of government will be firmly bound by the terms they have agreed to except in two circumstances:

- (i) Parliament continues to have paramount legislative authority to set "national standards and objectives" relating to immigration or aliens, including any provision that establishes general classes of immigrants or relates to levels of immigration for Canada or that prescribes classes of individuals who are inadmissible into Canada.
- (ii) The entrenched agreement can be changed by the consent of the parties expressed through elaborate formalities akin to a constitutional amendment.

Pending adoption of the proposed constitutional amendments, Quebec and Canada will continue to cooperate in immigration matters under the terms of the Cullen-Couture Agreement of March 30, 1979, as hereafter described. In the meantime, however, the Political Accord, which is not part of the constitutional amendment itself, provides that the government of Canada will conclude an agreement with the government of Quebec that will

guarantee that Quebec will receive a number of immigrants, including refugees, within the annual total established by the federal government for all of Canada proportionate to its share of the population of Quebec, with a right to exceed that figure by five per cent for demographic reasons,

provide an undertaking by Canada to withdraw services (except citizenship services) for the reception and integration (including linguistic and cultural) of all foreign nationals wishing to settle in Quebec where services are to be provided by Quebec, with such withdrawal to be accompanied by reasonable compensation,

and the Government of Canada and the Government of Quebec will take the necessary steps to give the agreement the force of law under the proposed amendment relating to such agreements.

Any such new agreement will come into effect, we are told, only if the constitutional amendments are made and the new agreement is approved by the Senate and House of Commons (and the Quebec Legislative Assembly) and entrenched under the new formula.

The 1987 Constitutional Accord, in paragraph 3, provides that the Accord should not be construed so as to prevent the negotiation of similar agreements with other provinces.<sup>(1)</sup>

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(1) Report of the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord, p. 97-98.

A greater provincial role in immigration was one of the five points desired by Quebec as a condition of its reconciliation to the constitution.

Two parts of the Meech Lake Accord deal with the issue of immigration. In the constitutional amendment itself, there is a procedure by which constitutional status can be conferred upon certain federal-provincial agreements dealing with immigration and the temporary admission of aliens. The political accord which accompanies, but is not part of the constitutional amendment provides that Quebec and Canada will conclude an agreement guaranteeing Quebec a certain number of immigrants on a proportional basis. This agreement will also provide an undertaking by Canada to withdraw services for the reception and integration of all foreign nationals wishing to settle in Quebec where such services are to be provided by Quebec. The withdrawal of these services is to be accompanied by the payment of compensation to Quebec.

The sections of the Accord dealing with immigration were the subject of two major criticisms. It was felt that it was wrong to give the provinces this high level of input into the immigration process and it was equally wrong to have agreements setting a level of immigration with respect to numbers coming into Quebec. This would have a continuing adverse affect on immigration to the less populous provinces.

Those who support the inclusion of these clauses see them as recognizing a valid provincial role in the immigration and settlement process. The mobility rights guaranteed under the Charter will assure the movement of immigrants once they have been admitted into Canada.

Most provinces now have some type of immigration agreement with the federal government and this clause would basically recognize this reality.

### **E. Financial Compensation under the Amending Formula**

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

The right to financial compensation for provinces unaffected by amendments resulting from the transfer of legislative powers from the provinces to the federal government under the constitution would be broadened by the Accord. The 1982 constitutional amendment contains a formula in which the principle of compensation was accepted for transfers in relation to education or other cultural matters. Under the Accord, the principle of compensation would apply to any such transfer.

This continuation of the 1982 amending formula has been criticized as another aspect of the Accord which further balkanizes the Canadian federation. Those who make this claim feel that in order for Canada to function properly all provinces must exercise identical powers and provide identical programs.

Others argue that this part of a proposed new amending formula is one of the few areas in the Accord which if utilized could strengthen the central parliament. They see this as a definite benefit flowing from the Accord.

However, the ultimate effect of the amendment is fairly simple. A province that opts out of the transfer of jurisdiction to Ottawa and continues to carry the cost of the program itself gets some share of the federal dollars that are being made available to fund a particular area of activity.

It is difficult to determine if the utilization of such a clause would have a sizeable impact on Canadian federalism.

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(1) The Constitutional Amendment, 1987, s. 9.

## THE INSTITUTIONS

This part of the paper attempts to illustrate the effect the Accord may have on the institutions of the central government. It also discusses the overall effect that changes proposed by the Accord to the amending formula may have on the future of the Canadian federation.

The legislative area may be affected by changes in the method of selecting Senators. The future of the Senate and the concept of Senate reform will be the subject of constitutional discussion and review.

The executive may be affected because under the Meech Lake Accord there would be a mandatory requirement to hold First Ministers' conferences at least twice a year. One conference would deal with constitutional matters while the other would focus on the economy. This institutionalizes or constitutionalizes the concept of executive federalism in Canada, a matter which has been the subject of intense debate at least since the Confederation of Tomorrow Conference hosted by Premier John Robarts in 1967.

The judiciary may be affected by a number of clauses of the Accord but again, as with the Senate, the main focus is upon the changes proposed to the method of selecting judges for the Supreme Court of Canada.

The amending formula for Canada's recently patriated constitution would change under the Accord. The general amending formula, two-thirds of the provinces representing more than fifty percent of the population, would be changed in some significant areas to require unanimity for changes to be made to the constitution. These areas of the constitution concern the Senate, the House of Commons, the Supreme Court of Canada, the extension of the boundaries of existing provinces, and the establishment of new provinces.

### A. Legislature: The Senate

Names to be submitted

25.(1) Where a vacancy occurs in the Senate, the government of the province to which the vacancy relates may, in relation to that vacancy, submit to the Queen's Privy Council for Canada the names of persons who may be summoned to the Senate.

Choice of Senators from names submitted

(2) Until an amendment to the Constitution of Canada is made in relation to the Senate pursuant to section 41 of the Constitution Act, 1982, the person summoned to fill a vacancy in the Senate shall be chosen from among persons whose names have been submitted under subsection (1) by the government of the province to which the vacancy relates and must be acceptable to the Queen's Privy Council for Canada.(1)

Under the Accord future changes to the powers or method of selecting Senators could only be done with unanimity. However, provision for discussion of these possible changes would now take place at annual First Ministers' Conferences on the constitution. Also, until Senate reform was accomplished, the political accord which accompanies the proposed constitutional amendment would provide a transitional selection process. This process directly involves the governments of the provinces in putting forward names from which Senators would be picked by the Prime Minister. The two Territories would not be included in this process.

Those who praise this part of the Accord see it as the forerunner to Senate reform. They believe that it is no harder to achieve unanimity than to have seven provinces with fifty percent of the population agree on Senate reform. In fact, it has been argued that as one purpose of the Senate was to represent regional interests, any real change in the Senate's powers or representation should only be made with the approval of all the provinces.

As with most parts of this Accord, those who oppose it are adamant that it does not accomplish what it sets out to do. They believe it is an absolute block to reform. It bolts the door which was shut in 1982. Most of the groups which support the "Triple E" Senate reform concept believe that it will be impossible to obtain approval for reform from both Ontario and Quebec and that therefore, the reform movement is finished.

Others are even more fearful of this clause. They argue that those appointed would owe no allegiance to the Prime Minister who appointed them; their loyalty, if any, would be to the province. This could result in a Senate which acted independently, but had no more

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(1) The Constitutional Amendment, 1987, s. 2.

legitimacy than at present. This could result in the shifting of power gradually from the elected House of Commons to the new transitionally-appointed Senate.

The other major problem with the provisions dealing with the Senate is that they do not apply to the Territories, whose exclusion is justified on the basis that they are not provinces and should not enjoy the same privileges as provinces. Others contend, however, that all provinces and territories should be treated alike as far as Senate appointments are concerned.

## **B. Executive: Constitutional Conferences**

### Conferences on the economy and other matters

148. A conference composed of the Prime Minister and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once a year to discuss the state of the Canadian economy and such other matters as may be appropriate.

### Constitutional conference

50.(1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once each year, commencing in 1988.

### Agenda

(2) The conferences convened under subsection (1) shall have included on their agenda the following matters:

(a) Senate reform, including the role and functions of the Senate, its powers, the method of selecting Senators and representation in the Senate;

(b) roles and responsibilities in relation to fisheries;  
and

(c) such other matters as are agreed upon.<sup>(1)</sup>

Those who support the constitutionalization of First Ministers' conferences point out that the Meech Lake Accord is not the first constitutional document to contain a requirement for holding such conferences; this was also the case in the Constitution Act, 1982, and in the 1983 constitutional amendment, both in relation to aboriginal rights. They also argue that the Accord would not have come about if it had not

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(1) The Constitutional Amendment, 1987, s. 8.

been for the use of First Ministers' conferences. The constitutionalization of this form of negotiation is simply the recognition of an existing constitutional fact. First Ministers conferences have been a constitutional convention in Canada for many years and the Accord recognizes this fact.

Those who oppose these clauses of the Accord do so vehemently, criticizing the Meech Lake process as well as the inclusion of annual First Ministers' conferences in the Accord. It is their belief that the process by which the Accord was reached was fundamentally flawed. The meetings involved only men, excluded representatives of the Territories, and were held in secret. The public was excluded and no record was kept of why concessions were made on matters either included in, or left out of the Accord.

Arguments are also made that constitutional recognition of this form of executive federalism will further reduce the status and influence of our legislatures, which will become relegated to the role of mere rubber stamps.

The Accord also proposes the entrenchment of a constitutional agenda dealing with Senate reform, fisheries, and such other matters as may be agreed upon. It is difficult to know what will happen to these permanent items as the years go by. Will they remain as items to be considered or will they gradually fall by the wayside, to be replaced by more pressing issues? Also, what happens if no progress can be made? Must these matters still be discussed anyway?

Does the phrase "such other matters as are agreed upon" mean that all First Ministers must agree before a new item may be placed on the agenda? If so, the positive aspects of placing First Ministers' conferences in the Constitution could be completely nullified.

### **C. Judicial: The Supreme Court of Canada**

Section 6 of the Constitution Amendment, 1987, if adopted, would result in the following constitutional "changes" to the Supreme Court of Canada.

First, the Supreme Court would be continued as the general court of appeal for Canada.

Second, the Constitution, for the first time, would recognize the make-up of the Court, consisting of a chief justice and eight other justices with at least three judges coming from Quebec.

Third, the Constitution Amendment, 1987 would entrench the appointment process (so that it could not be altered except by a constitutional amendment), and would give the provinces a constitutional voice in the appointment process.

Fourth, when a vacancy occurs on the Supreme Court, it must be filled from the lists supplied by the provinces.

Fifth, the qualifications for appointment, the tenure of the justices and the process for fixing the salaries of the Supreme Court justices would be entrenched.

Sixth, constitutional amendments in relation to the Supreme Court of Canada would require the unanimous approval of the provinces and of the House of Commons.<sup>(1)</sup>

The above clauses, like the part of the Accord dealing with constitutional conferences and the Senate have sparked considerable debate. Again, there are right minded, clear thinking Canadians who voice arguments both for and against these sections.

All seem to agree that it is a positive fact that the Supreme Court would be entrenched in the constitution now that the Court's role as umpire in the federal system has been enlarged by the introduction of the Charter.

The clauses of the Accord which are most controversial deal with the appointment of judges and the proposal that at least three of the judges must come from Quebec. However, the distribution of judges among the other provinces or territories is not spelled out.

The Accord also places the provinces front and centre in the selection process for new Justices of the Supreme Court. Lists of nominees to the court might be supplied by the provinces when a vacancy occurred on the Court. Of course, when a vacancy occurred in relation to one of the Quebec seats, only those judges suggested by the province of Quebec would receive consideration for appointment. The process of selection would therefore become a two-stage process: nomination through

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(1) Report of the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord, p. 80.

lists supplied by the provinces, and selection from these lists by the government of Canada.

This has been heralded as a breakthrough for the provinces because they would have an official voice in the selection process. It is argued that this is only right and just because of the umpire role played by the Supreme Court over federal-provincial jurisdiction.

Those opposed feel that this process could result in a Supreme Court with a provincial bias, to which people who qualified for appointment and believed in a strong central government would not be nominated. As the Accord contains no dispute-settling mechanism, it is quite possible that an impasse could be reached where none of those nominated were satisfactory to the federal government.

Some believe that this lack of a dispute settling mechanism is a good thing because it would force the parties involved to act prudently and responsibly. However, there is concern that a separatist government or at least one unwilling to cooperate with the federal government might either submit totally unacceptable names or submit no names at all.

Another perceived weakness is the fact that the territorial governments would not have the right to submit nominees to the federal government.

One could also add that the present composition, the appointment process, and the results of that process in relation to the Supreme Court of Canada do not cause great distress in Canada. The present system functions well and it probably should not be tampered with.

#### **D. Amending Formula: Unanimity**

Certain matters, which are now subject to amendment under the seven-province formula, would become subject to amendment only with the unanimous consent of all governments -- namely, representation in the House of Commons, the powers of the Senate and the method of selecting Senators, representation in the Senate and the residence qualifications of Senators, the Supreme Court of Canada (other than the composition of the Court), the extension of existing provinces into the territories and the establishment of new provinces.(1)

This proposed change in the amending formula is a response to Quebec's demand for a veto over significant constitutional change. However, the Accord broadens the Quebec demand and puts all the provinces on the same constitutional footing in relation to many subjects.

The view of equality of the provinces in relation to certain constitutional matters was established in 1982. However, according to those who oppose these clauses of the Accord, the Accord now seems to apply that principle to a broad range of subjects for no apparent reason. While these critics may find it reasonable to extend the rule of unanimity to certain changes in federal institutions such as the Supreme Court and the Senate, they find it abhorrent to have this unanimity rule apply to the extension of existing provinces into the Territories and to the establishment of new provinces while the Territories are excluded from relevant discussions.

#### **THE PEOPLE**

This part of the paper will deal with the effect of the Accord on individual groups of Canadians. Professor Alan Cairns said in testimony before the Senate Committee of the Whole that with the enactment of the Charter in 1982, the Constitution of Canada became a people's constitution. The dominant theme in Canadian federalism was no longer the division of powers between the provinces and the federal government, it was how individual or collective rights are protected under the constitution

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(1) Report of the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord, p. 123.

and dealt with by the courts. These Charter rights, and especially equality rights, are new and are only now being slowly defined by the courts; therefore, people who belong to the four groups which may be adversely affected by sections of the Accord are jealously protecting these newly acquired rights. The four groups are: women, multicultural groups, aboriginal peoples, and northerners. Of course, those who argue in favour of the Accord, at the very least take the position that the rights of these groups have not been diminished, they may even have been enhanced.

Two sections of the Charter directly affect the status of women. Section 15, the equality rights section lists "sex" as an enumerated heading against which there shall be no discrimination. Section 28 states that the rights and freedoms referred to in the Charter are guaranteed equally to male and female persons. Does anything in the Accord adversely affect or diminish this protected status? Some argue that because the linguistic duality-distinct society clause is placed within the body of the constitution, it, or at least legislation enacted in consequence of it may escape the scrutiny of the Charter.

This reasoning is based on a recent Supreme Court of Canada decision in the Ontario Separate School Funding reference case. Gender equality, it is therefore argued, must be protected under the Accord. It should be included within the list of matters not affected by the Accord contained in clause 16 of the Accord.

Clause 16 of the Accord, which was added between Meech Lake and the Langevin Block, deals with two groups of people whose rights are not to be detrimentally affected by the Accord: people of multicultural heritage and the aboriginal peoples. Both groups felt that their interests were not protected in the Accord signed at Meech Lake. Clause 16 attempts to resolve this grievance. However, representatives of these groups have made it clear that inclusion in clause 16 is not sufficient. They want their rights advanced, not just protected.

Finally, while some groups may feel that they have been treated detrimentally by acts of commission in the drafting of the Accord, the people of the two northern Territories believe they were the victims of acts of omission. They were simply ignored and their rights were reduced.

They were not included in the formula for selecting Senators or judges for the Supreme Court of Canada. As well, extension of provincial boundaries into the Territories without territorial approval became possible and the road to provincehood, the ultimate goal for the northern territories, would now have to be accomplished with the unanimous consent of all provinces and the federal government.

These four segments of the Canadian population believe their newly acquired rights have been diminished or obliterated by the Accord. The final part of this paper will address these concerns.

#### A. Women

The effect of the "linguistic duality-distinct society" clause on the rights of women has been one of the most discussed problems arising out of the Accord. Experts have given legal opinions on the probable effect of the Charter on legislation passed by the Quebec legislature on the basis that the legislation advanced the distinct society. Even though this clause would be included as an interpretive section within the constitution, it is acknowledged by most observers that it would be referred to at some point as a basis of legislative authority, even if it is not used as a source of legislative power.

In determining the effect of the Accord, one cannot ignore the decision of the Supreme Court of Canada in the Ontario Separate School Funding Reference case.<sup>(1)</sup> This decision, which was handed down shortly after the Langevin meeting, dealt with the effect of the Charter, in particular its equality rights provision, on certain aspects of the Constitution Act, 1867.

The court, upholding the Ontario Separate School Funding legislation, indicated that certain sections of the constitution of Canada are so vital to the Canadian identity that they are not subject to Charter scrutiny. The question then becomes: Would the new section 2 of the Constitution escape Charter scrutiny as well? Certainly one could argue

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(1) Reference re an Act to Amend the Education Act (Ontario) (1988), 40 D.L.R. (4th) 18.

this section describes an existing demographic and sociological fact and therefore should not be reached by the Charter. It could be further argued that this new section is as fundamental to the Canadian identity as those sections which protect language and minority education rights.

Representatives of women's organizations from outside Quebec appearing before various parliamentary and legislative committees have argued that equality rights should be included in the non-derogation clause of the Accord (clause 16). This, they feel would give them some protection as a collectivity, just as that clause attempts to protect the rights of aboriginal people and those of multicultural heritage. Is this really a solution? Is it good constitution making to set down interpretive rules and then exclude a number of groups from their application?

Critics of this clause have found it to be of little value. It attempts to protect two cultural groups from the operation of an interpretive clause in the constitution. It makes little sense to have included these two groups in this clause and furthermore as both groups form a large section of Quebec society, albeit a minority, it is quite likely that at some point they would be at least indirectly affected by legislation related to the linguistic duality-distinct society clause of the Accord.

Hypothetical situations have been suggested where conflict might occur between the gender equality section and the distinct society clause. Situations such as the possibility of denying women access to therapeutic abortions on the basis of religion; refusal to hire women on religion grounds; or a provincial language orientation program aimed at enhancing employment opportunities for French speakers at the expense of affirmative action programs have been suggested.

These suggestions do not raise Charter problems at all. They simply represent valid policy choices for a government. It was not the purpose of the Charter to dictate legislative priorities. Section 1 of the Charter provides that the rights and freedoms set out in the Charter are guaranteed subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The presence of this section makes it possible to bring before a court evidence of social, political or historical factors that might justify what would otherwise be

an infringement of the Charter. Some experts claim that the linguistic duality-distinct society clause may add to the items to be considered under section 1 of the Charter.

The very presence of clause 16 in the Accord makes it difficult to justify the exclusion of gender equality rights from its list of subjects. This, like many other aspects of the Accord will be eventually settled by the courts, which will be entrusted with maintaining a balance between gender equality rights and the demands of the linguistic duality-distinct society rule of interpretation.

### **B. Multicultural Groups**

Those representing the multicultural groups in Canada do not wish to be included in a non-derogation clause in the Accord. They wish the distinctiveness of their various cultures to be recognized under the Accord.

Others, however, feel that mention of multiculturalism in clause 16 of the Accord is sufficient protection and that the purpose of the Accord is only to deal with the reconciliation of Quebec.

Representatives of Canadian ethnocultural organizations dedicated to the preservation of their multicultural heritage have stated their concerns regarding the "linguistic duality-distinct society" clause. As a rule of interpretation they feel it may have negative implications for their individual cultural heritages. They believe that inclusion of this clause would mean the Canadian constitution would no longer reflect Canadian society. Bilingualism as mentioned in this part of the constitution does not embrace all Canadians - but multiculturalism does.

It should be noted that multicultural groups do not object to recognition of linguistic duality or the distinctiveness of Quebec. They are, however, concerned that these statements taken alone may be read as promoting their own assimilation into the two cultures. It is wrong, they believe, to describe Canada in these terms without specific mention of our multicultural heritage.

The counter argument to this is that the Accord does not pretend to be a document offering an all-encompassing definition of

Canada. As stated in the Report of the Joint Committee on the 1987 Constitutional Accord "the adoption of this rule of interpretation will not transform our cultural mosaic into a melting pot."

### **C. Aboriginal People**

All aboriginal groups feel betrayed by both the Meech Lake process and the Accord which resulted. It was only a few weeks prior to the announcement of the success of the Meech Lake meetings that the Aboriginal-First Ministers' Conference on Aboriginal Rights and the Constitution had ended in disarray. The groups felt the fact that the Accord had been reached so quickly on the subject of Quebec's demands revealed hypocrisy of the worst kind.

Aboriginal groups are not satisfied with brief mention in a non-derogation clause in an Accord which may give increased powers to others, at their expense. While not objecting to distinct status for Quebec, the aboriginal people of Canada want their own distinctiveness recognized as well. They also want to move towards constitutionally recognized self-government. This has been the main purpose behind the aboriginal First Ministers' conferences held since 1982. This goal has not been reached and, in fact, is further away than ever because of the fixed agenda of constitutional conferences as provided for in the Accord.

The aboriginal people wish to be included on the list of subjects to be discussed at future First Ministers' conferences. They also wish to ensure that they will be able to participate fully in the making of decisions which affect them. If a portion of Canadian society is to be described as distinct they wish to be included within that description.

It may be argued, however, that, with their inclusion in clause 16, aboriginal people are no worse off than before the Accord. The method of negotiation which preceded the Meech Lake meetings perhaps could be tried with regard to the aboriginal situation. It has been pointed out that it is more difficult to discuss and reach agreement on a complete new order of government in Canada, than to deal with Quebec on five well known and well defined demands. Also, there is nothing in the

Accord to prevent continuous dialogue on aboriginal self-government and its inclusion as an agenda item at future First Ministers' conferences.

#### **D. People of the Northern Territories**

It has been argued that as a group none will suffer more under the Accord than those living in the two northern territories. At least four parts of the Accord would directly and negatively affect such people. Their real anger and frustration with the Accord was accurately reproduced by the Senate Task Force on the North, which visited the north, held hearings, talked to those who live there, and reported its findings to the Senate in a moving document tabled in the Senate in February 1988.

The clauses of the Accord dealing with the Senate, Supreme Court and the amending formula are all implicated. These clauses did not become part of the Accord after long, arduous discussions among the Premiers, Prime Minister and representatives of the north. Northern representatives were not even invited to take part in either the Meech Lake or Langevin Block meetings. This is regarded by the north as an act of betrayal.

Having not been allowed to participate, northerners assumed that the First Ministers' meetings would have no effect upon them in that the meetings were held solely to deal with the reconciliation of Quebec to the constitution.

Northerners were astonished to discover the profound implications for the north resulting from the Accord. The new transitional method of appointment of Senators does not allow for the participation of the Territorial governments. Though the new method for appointing judges to the Supreme Court involves the provinces submitting names to the Minister of Justice, there is no provision for the Territorial governments to submit such lists to the Minister of Justice.

Moreover, the amending formula, if the Accord comes into force would be changed so that the territories could become provinces only with the unanimous approval of all provinces and the federal government. The 1982 formula required that only two thirds of the provinces, containing

fifty percent of the population, need approve. There is also concern in the north resulting from the discussions dealing with the extension of provincial boundaries northward to take some of the land now within the boundaries of the territories. Under the 1982 amendment formula, this could be accomplished within the two-thirds, fifty percent rule but under the Accord such a change would require unanimity. Although this would make the process more difficult, northerners are concerned that the matter was even discussed. They see any changes here as a threat to their territory.

Direct representation of the northern territories at constitutional federal-provincial conferences is also not provided for under the Accord. The people of the territories feel that if they had been directly represented at the Meech Lake meetings, the north would not have been so badly treated. Therefore, they argue that it is imperative they be given some official status and recognition at federal-provincial conferences.

The answer to these grievances is that the territories are not provinces and that until they become so they will not be accorded the same treatment.