

# FATHOMING MEECH LAKE\*

Bryan Schwartz\*\*

*The Legal Research Institute of the University of Manitoba funds research, sponsors conferences, and publishes papers. With the generous support of the Manitoba Law Foundation the Institute has commenced several fresh initiatives, including the publication of a new series of monographs and papers. Fathoming Meech Lake is the first monograph of this new series. The Institute is also subsidizing the reprinting of the following excerpts from Fathoming Meech Lake.*

## Foreword\*\*\*

Once again, Professor Schwartz has produced a comprehensive and sparkling treatment of a series of proposals to reform the Canadian Constitution. As in *First Principles*, *Second Thoughts*, in which he analysed the positions taken and the processes used in the attempt to establish a special constitutional and political regime for aboriginal peoples, he has written with the intent to inform, to illuminate, and ultimately, to disturb Canadians.

The need in the nation for this scholarly intention to be acted upon has never been more acute; in this latest effort at constitutional revision, the terms of which are now known as the Meech Lake Accord, the political leaders who signed the Accord have seemingly dedicated themselves to convincing Canadians that analysis and refinement would be wasteful. They have argued that improvement of the text is impossible. They assert that constitutional language cannot be precise; that criticism is disloyal because it undermines what they have chosen to label as "nation-building;" that anxiety about lost rights is wrongheaded because First Ministers do not have it within them to injure important interests; and that political opposition is futile because they are all morally obliged to approve precisely what was agreed between them in Ottawa in the early morning of June 3rd, 1987. In the face of such concerted political activity to effect fundamental transformations to our constitutional order while avoiding debate, the need for the sort of sharp analysis and sharp criticism that Professor Schwartz provides is simply desperate.

The process of giving the Meech Lake Accord legislative ratification is in mid-stream at the point of publication of this study. That process has been hailed by defenders of the First Ministers, and their Accord, as the first truly democratic process for constitutional amendment in Canada's

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\* The following text consists of excerpts (namely, chapters 1, 3 and 8) from Bryan Schwartz, *Fathoming Meech Lake* (Winnipeg: Legal Research Institute of the University of Manitoba, 1987) and is reprinted with permission.

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\*\*\* By John D. Whyte, Dean, Queen's Law School, November, 1987.

history. They say this because, for the first time, the amendment proposals must be approved by the legislative chambers of all the relevant governments in Canada. While this new process does require more public debate of the proposal than has before been required, there could be no context in which genuine discussion has been more precluded. The Joint Parliamentary Committee process that was held during the summer was a staged affair, and at that place, and elsewhere, the constitutional reconciliation of Quebec has been portrayed as such a noble political endeavour that all suggestions that harm is being done to important features of our nation, including bilingualism and the place of the French language outside of Quebec, have simply been denied in the most conclusory fashion. Professor Schwartz provides detailed analyses to show the real possibilities of serious harm.

While *Fathoming Meech Lake* might appear iconoclastic to uncritical proponents of Meech Lake, the analysis is thoroughly rational and responsible. It methodically and professionally applies the sound and accepted techniques of legal and political analysis. The book attempts to show both how judges will interpret the text of the Accord and how political actors will deploy their powers under the Accord. It is hoped that the points painstakingly presented in this book will engender a deeper response than the vacuous observation that the effect of legal language is always hard to predict and that we shall have to see what the judges make of the provisions. Law, like economics, is a worldly sort of endeavour, and in deciding whether the right legal regime has been chosen for us, we must attempt to predict, in light of what we know about social values and political realities, how particular words will influence practical conduct.

Enquiries about the effect of language are, of course, standard for those who seek to rule our lives through the exercise of legislative authority. It is ironic that the text of Meech Lake, which has the potential to reshape our lives every bit as much as the *Canadian Charter of Rights and Freedoms*, has been placed by Canada's political leaders as out of bounds with respect to the normal processes of review and change that were accorded the *Charter* and that is accorded virtually every piece of ordinary legislation enacted in Canada.

That the effect of the 1987 constitutional amendments will be to alter the way that Canadian society is organized and, ultimately, to alter the nature of Canadian society is something that Dr. Schwartz seeks to demonstrate; his work is an exposition of these effects. It stands in contrast to the simple expressions of hopefulness on the part of many of the movers and defenders of the Meech Lake Accord. This unexamined hopefulness can be found, for example, in the scenarios that have been spun about reform of the Senate and reform of the judicial appointing procedure in Canada. These optimistic visions ignore political and legal imperatives created by the Accord and, hence, mislead us about what it will actually mean for our governmental processes.

It is important that we understand the meaning of Meech Lake in terms of fundamental political values in Canada. One fundamental impact of Meech Lake is reflected in the opposition of women's rights groups to the Accord. That opposition was driven in part by the realiza-

tion that a new form of politics—the politics of social interests that had been spawned by the *Charter of Rights*—would be crippled by the new provisions. When the *Charter of Rights* came into force in 1982, and the new equality provisions came into force in 1985, incentives for political mobilization along new lines and according to new divisions were created. The political agenda on behalf of women's rights, for example, insofar as it became pursuable in the courts under the *Charter of Rights*, leads to two positive effects. First, since the *Charter* is national, the political force behind the claim could be national, and in numbers there is strength—and comfort and hope. Second, it alleviated the need to acquire electoral dominance. Those whose social goals can be pursued through the *Charter* need not capitulate on recognizing the unpopularity of their claims.

After Meech Lake, and in particular the undertaking in the agreement to repeat forever the same process of First Ministers' constitutional conferences, the proper conclusion seems to be that federal-provincial politics, a politics that favours interest groups that are locally powerful, is to be the major form of politics for Canada's future. Not only is the old way of living as a nation to be back, but its specific agenda seems to be to undo precisely those constitutional protections that have made a new form of politics possible. Meech Lake itself would jeopardize substantive constitutional guarantees, including minority language rights and perhaps gender equality. It would provincialize the Supreme Court of Canada, a principle focus of the new form of politics.

The politics of cross-Canada social interests has been undercut by other features of the Accord. Witness the provincialization of the Senate which only recently has presented itself as available to take stands against the policies of the government and on the side of the dispossessed—the sick, and the refugees from political oppression. Witness the provincialization of the nation's capacity to generate national responses to social problems through the use of the spending power. We must recognize that the Accord discourages and diffuses the political energies of interest groups who might otherwise unite and mobilize on a nation-wide basis to produce a more equal and humane society.

Perhaps the Prime Minister and premiers understand exactly what the permanent annual constitutional conferences will mean to the new politics of social interests. The habit of constitutional alteration among eleven first ministers for their mutual benefit is likely to erode, more surely than even the use of the "notwithstanding" clause in the *Charter*, the benefits of constitutionalism in Canada. Constitutional constraints on those in power will be a more controllable inconvenience.

## I. Introduction

This study is an attempt to provide an independent and in depth assessment of the 1987 Constitutional Accord.

One aim is to contribute to the ongoing debate on whether the 1987 Accord should be adopted, abandoned or amended. Briefs by advocacy

organizations and speeches by active politicians are legitimate and important elements in the debate. It is hoped, though, that academics can provide a special contribution by providing criticism that is undistorted by partisan affiliation. . . .

The other principal aim of this study is to make a head start on the interpretive debate that will follow if the 1987 Accord, or parts of it, become the supreme law of Canada. Even if the Accord does go ahead, in whole or in part, it would be hoped that this study would serve as a useful commentary on how it can, and should be, interpreted. The two aims of this study should be mutually beneficial. The temptation at the "should-we-do-it" stage is to exaggerate the merits or demerits; to emphasize worst or best case scenarios. Looking ahead to the "we-did-it, what-does-it-mean?" stage forces an analyst to assess realistically how the Accord is most likely to be interpreted and to argue rationally for the most appropriate interpretation. Conversely, having conscientiously explored the implications of the current wording, an analyst is in a better position to assess how the Accord should be improved.

Creative minds have suggested a variety of titles for this study. . . . Ultimately *Fathoming Meech Lake* was selected. A fathom chain is dropped into a body of water to measure its depth. What it tells is not distorted by wishful thinking or fear. In some ways, an exemplary model for constitutional analysis. Not in all ways, though. Fathom chains don't care one way or another about whether the ship can make it through the shoals, or whether the risk is worth taking. That is a matter for human judgment. In this study, I have ventured mine. I would hope that some of you might be persuaded to come to similar conclusions; and that the rest will find the analysis sufficiently thorough and objective to be of some assistance.

## II. The Process

The "merits" of the 1987 Accord cannot be discussed without reference to the unworthiness of the process. The haste, secrecy and elitism of the process up until June 3, the date of the signing of the Langevin Block text, make it essential that governments listen respectfully and receptively to criticism and proposed improvements. Furthermore, much of the proposed 1987 Accord is concerned with constitutional reform processes and we must be concerned with the precedent set by the 1987 Accord for the conduct of further constitutional reform. Particularly disturbing in this regard is the proposal in the 1987 Accord to entrench an indefinite series of annual First Ministers' Conferences on the Constitution. In itself, the idea is highly objectionable. It is liable to lead to the trivializing of the Constitution through constant tampering; it invites excessive decentralization, as it is politically and legally much easier to take power from the centre; it leads to the unhealthy and permanent intertwining of ordinary politics with constitutional politics. If the deplorable process leading to the 1987 Accord is to be the model for the future, the damage to the nation and the discredit to democracy will be especially grave.

Constitutional reform should proceed in a manner that is deliberate, open and democratic. The 1987 constitutional process has violated all of these standards. First ministers proceeded with reckless haste. They conducted their meetings in private and have kept the drafts secret. They failed to adequately consult their cabinets, their caucuses, their legislatures—and the people.

The process that led to the formulation of the 1987 Accord did not permit, let alone encourage, democratic scrutiny, criticism and input. From start to finish, the drafts were kept secret. Why? It is often glibly asserted that “negotiations work best in private.” But exactly what would be the harm of periodically releasing competing drafts and suggestions to the public? The text of the legal draft was leaked to the Quebec newspapers a few days before the Langevin Block meeting. Negotiations hardly collapsed as a result. Politicians and bureaucrats are naturally attracted to the sense of self-importance and privilege that comes from being “on the inside.” The public should resist their secretive and elitist inclinations. When a bill goes to Committee, there is ample opportunity for the public to study succeeding drafts and amendments. When the *Constitution Act, 1982* was being devised, many changes were produced through the actions of the Special Joint Committee of the House and Senate pursuant to submissions from interested groups. Post-Patriation constitutional reform should be based on full and prior consultation with a public that has been informed of the options and their implications.

Even if it were appropriate for a tiny elite of first ministers and advisors to devise secretly the supreme law of the land, they would be bound to think about what they were doing. Each participant would be obliged to dedicate much time and effort to the study and analysis of a proposal. Possible refinements would be devised; further discussion would take place and the process would be repeated until a stable and well-considered formulation was adopted. In constitutional drafting there is no sharp separation of “principle” and “legal wording.” The formulation of particular legal language permits a more precise and thorough exploration of the policy implications of a general proposal. There should have been a number of federal-provincial meetings then, with adequate opportunity for research, reflection and reformulation.

The 1987 Accord in no way permitted adequate reflection and consideration. Premier Peterson’s defence of the process at the signing ceremony ignored the vague and shifting terms of discussion over the several years that preceded the Langevin Block meeting. The Premier claimed that discussion of “this” began with Premier Bourassa’s election platform in 1984, (Canada, Canadian Intergovernmental Conference Secretariat, *First Ministers’ Conference on the Constitution: Verbatim Transcript* (Ottawa, 1987) at 34). What is “this?” Some of Quebec’s constitutional objectives were indeed raised, and in some detail, by the working paper “Mastering our Future” (Quebec Liberal Party’s Policy Commission, February 1985). The document contains only a vague statement, however, of the desirability of recognizing that Quebec is a distinct society. It discusses amending formula changes in terms of a Quebec veto, not “opting-out” for all provinces. There is no reference at all, of course, to mat-

ters that necessarily became prominent two years later, including the appointment of senators and the entrenching of annual First Ministers' Conferences on the Constitution and on the economy. In any event, it takes ten others to tango, and "Mastering our Future" was not an immediate best seller in the rest of Canada. (As a matter of fact, I found it practically impossible to obtain a copy of the document even six weeks after the Langevin Block meeting).

Quebec stated its "five conditions" at the Mont Gabriel conference in May of 1986, and they were accepted as an agenda for the current stage of constitutional reform by a Premiers' Conference held in Edmonton in August of 1986. But an agenda is not a set of definite proposals. Reasonably precise and concrete proposals are required before an adequate discussion can take place. Premier Peterson claimed that "we have been discussing this, wrestling with this, for the last year, both among officials and among ourselves." Again, what is "this?" Certainly not the Langevin Block text. Not even the Meech Lake text, or anything close to it. Sure, there were preliminary discussions among some provincial bureaucrats. Representatives of the attorneys general were not invited, lest a little lawyerly knowledge wreck the building of consensus. (It is easier to be agreeable if you don't see the dangers). What those bureaucrats discussed, we may infer, was more than a hop, step and jump away from the Meech Lake communiqué. The latter contained many essentially new approaches to Quebec's conditions (e.g. "opting-out" with compensation for all provinces) and many important items (e.g. the annual First Ministers' Conference on the Constitution) which were not even among Quebec's five proposals. The nature and, to a large extent, the existence of these discussions were not disclosed to the Canadian public. The only players, evidently, are senior technocrats and politicians; the Canadian public is merely the audience for the post-game highlight show.

In the month between the Meech Lake meeting and the Langevin Block text there were very significant changes in the language; changes that went well beyond merely "elaborating" Meech Lake language; changes which were debated intensely by first ministers at the Langevin Block meeting. The Prime Minister has admitted that these changes amounted to significant improvements, (B. Mulroney, "Behind Closed Doors" *Maclean's* June 15, 1987, 15). Yet these alterations took place without the benefit of informed and extensive public debate and were confined to the only two clauses that first ministers mooted in any depth at the Langevin Block meeting—the "distinct society" clause and the spending power clause. The current draft of the 1987 Accord could have been much wiser in content and more precise in expression had first ministers taken the time to do the job properly. Or do the proponents of the process admit that the only way to obtain signatures was to minimize understanding and debate among the signatories? Do they concede that the deal could not withstand sober first thought? A package that truly responds to the necessities of the time should be able to withstand the comprehension of those who formulate it.

Quite apart from democratic objections to the process, the cavalier haste with which the 1987 text was produced requires first ministers to

meet again to consider improvements that have been suggested in public hearings. They have a special responsibility to consider refinements in the aspects of the Accord that were not discussed at the Langevin Block meeting.

Those who believe in responsible government and participatory democracy have every reason to be outraged by the autocratic approach to constitutional reform adopted by first ministers. It is an affront to cabinet democracy for first ministers to agree to anything as significant as constitutional reform without consulting their cabinets. It is demeaning to the role of the legislature for elected members to have no opportunity to debate the merits of an accord until after the first minister has presented them with a *fait accompli*. It is contemptuous of the right of the people to be consulted for most first ministers to eschew public hearings and, for all but the Premier of Quebec, to postpone public input until after the formulation of a practically final draft.

Attorneys general are a rarity in Canadian politics, inasmuch as they must be professionally qualified—they must be members of the bar—in the area of their jurisdiction. First ministers succumbed to the federal strategy of excluding, as far as possible, attorneys general from the formulation process. In the aboriginal peoples' constitutional reform process, meetings of attorneys general set the stage for meetings of first ministers. In the 1987 process, first ministers acquiesced in the almost total exclusion of attorneys general. Knowledge could not be allowed to impede progress. The attorneys general were not consulted at the Meech Lake meeting, although they were allowed to decorate the adjacent rooms and buildings. At the Langevin Block meeting, premiers occasionally were allowed out of their secret conclave to consult the attorneys general and their officials, but the latter groups were generally kept away from the "grown-ups" table.

The "process" amounted to a cabal of first ministers. It is not surprising that the real winners of the process were not so much the provinces as the premiers. The premiers have agreed with the Prime Minister that provincial cabinets—in effect, premiers—can nominate senators. That premiers, in effect, can nominate Supreme Court of Canada judges. That premiers should meet with the Prime Minister each year to discuss the economy. That premiers should meet with the Prime Minister each year to consider changes to the Constitution. It is not necessary or desirable that premiers assume such extensive importance in national life. Provincial and regional interests can be represented at the national level by other institutions and officials. It is ironic that the potential role of a reformed Senate has been significantly preempted. The premiers have been transferred powers that might have been vested in elected senators by a reformed Constitution.

The deliberation that went into formulating the 1987 Accord is in gross disproportion to the painstaking care that will go into interpreting it. When a single phrase of the Constitution is to be interpreted by the Supreme Court of Canada, the Court generally will add its own extensive deliberations to the years of analysis and discussion in the courtrooms and chambers below. Lawyers and judges will spend countless hours

demonstrating how subtleties of grammar and vocabulary reveal the subtle "intentions" of the framers for their draft. Many of the minute interpretive clues emphasized by lawyers and judges in fact will be the consequence of accident and inadvertence. The broad language will be found to have many implications that the framers themselves did not have the time, technical assistance or sense of responsibility to consider.

The Confederation package of 1867 was preceded by three years of public discussion initiated by a comprehensive draft submitted to the Charlottetown Conference of 1864. Yet if ever there was a time when a tiny elite was qualified to draft a constitution, it would have been then. Cabinet ministers commonly were expert in their portfolios. They did not have large bureaucracies to "brief" them on technicalities, or political staffs to write their speeches and otherwise manipulate their public image. A John A. Macdonald could and, with great ability, would write his own speeches, memoranda and draft texts with respect to constitutional matters. Nowadays, senior political officials tend to be strongest at "generalist" pursuits—managing, advertising and selling. In the television era, the slogan is the favoured method of communication. It is a symptom of the times that first ministers could blithely agree to a series of crudely stated propositions at Meech Lake and expect the "technical details" to be worked out in short order by the bureaucrats.

Lest the November deal of 1981—the First Ministers' Conference that led to the patriation of the Constitution—be cited as a precedent for rushed and secret agreement by first ministers, it ought to be remembered that all the elements of the deal had been proposed and subjected to public discussion. The *Charter* in particular had been much influenced by public submissions to the Special Joint Committee on the Constitution. The November 1981 deal that led to patriation amounted to the shuffling and assembling of known elements. Even after the November 1981 agreement among first ministers, further public discussion and criticism resulted in yet further improvements.

In its 1978 background paper (Canada, Government of Canada, *The Canadian Constitution and Constitutional Amendment* (Ottawa: Minister of Supply and Services, 1978)) and again in its patriation proposal of 2 October 1980, the government of Prime Minister Trudeau proposed that a national referendum be available as an alternative route to approving constitutional amendments; R. Romanow, J. Whyte & H. Leeson, *Canada...Notwithstanding* (Toronto: Carswell/Methuen, 1984) at 271. Prime Minister Trudeau declared in his closing remarks at the November 1981 Constitutional Conference, "[t]he Constitution will only truly belong to the nation when the people have the opportunity to endorse it through constitutional amendment." The usual procedure for amending the American Constitution—an initiating resolution supported by two-thirds of Congress and supporting votes by the legislatures or special conventions in three-quarters of the states—generally has proved to be an adequately responsive and democratic mechanism. The United States has never developed the equivalent of the first ministers' conclave and would never accept the sort of secrecy and autocracy involved in the 1987 Canadian process. Even Great Britain has resorted to non-binding referenda



when radical constitutional reform has been involved—such as its entry into the European Economic Community. We in Canada not only have rejected direct appeals to the people through referenda, but have moved increasingly in the direction of permitting a tiny group of politicians—few of whom are technically knowledgeable, few of whom can be counted on to look beyond their own partisan political advantage—to dictate the constitutional future of the country.

Constitutional reform is serious and largely irrevocable. Entrenched provisions limit the freedom of action of future elected officials to shape institutions and produce decisions that they believe appropriate to their time. A package that limits the democratic choices of today ought to be done in the most democratic way possible. We owe it to posterity to ensure that constitutional politics rise above the ordinary. We should remember that the Constitution ultimately belongs to the people of Canada. The elected politicians of the day generally are not elected on a platform that includes constitutional issues; they have their usual short term partisan objectives; they have their own biases and self-interest that may preclude their adequately responding to the needs of the nation. Politicians are thus obliged to consult fully with the public. They ought to encourage people to think beyond the ordinary stuff of politics and express their vision of the nation's future. Virtually irrevocable change to the Constitution should be the consequence of broad national agreement based on informed public debate.

The conclusions to be drawn:

(a) First ministers are bound to meet again to consider improvements to the Langevin Block text that result from the deliberation and participation of members of the public;

(b) Future constitutional reform should be conducted in a manner that is adequately deliberate, open and democratic. Indeed, the political accord that accompanies the draft amendments ought to provide as much. It might be said, for example, that "Senate reform and all future amendment should be conducted in a manner that, to every reasonable extent, invites and encourages informed cabinet, legislative and public participation in the formulation of amendments." On Senate reform, for example, governments and legislative committees should invite public submissions on the objectives that governments should pursue. Governments should issue statements on their policy objectives going into inter-governmental discussions. As proposals and drafts are developed, they should be shared with cabinets, legislatures and the public, and first ministers should be receptive and responsive to the feedback they receive. The era of openness and consultation in constitutional reform ought to begin now.

### III. The Quebec Clause

The Constitution will recognize Quebec as constituting a "distinct society" within Canada. The insertion of the phrase is of more than sym-

bolic importance. The "Quebec clause" purports to tell us how the entire Constitution of Canada should be interpreted. I have heard "experts" attempt to quell anxieties by contending that the "distinct society" directive only applies to "ambiguous" areas of the Constitution and that clauses with a clear meaning will not be affected. Some consolation. Virtually every clause of the Constitution of Canada is ambiguous. For example, s. 91(2) of the *Constitution Act, 1867* plainly vests Parliament with authority over "the regulation of trade and commerce." In one of the very first judicial interpretations of the *Constitution Act, 1867* the Privy Council declared that "trade and commerce" really meant only international, interprovincial and perhaps "general" trade and commerce. To take a more modern example, and one more to the point, s. 23 of the *Constitution Act, 1982* seems to give minority language parents certain rights to send their children to minority language classes and schools. In a remarkable piece of judicial activism, *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1, 10 D.L.R. (4th) 491, the Ontario Court of Appeal held that the guarantee impliedly included rights to at least some separate political and management structures; B. Schwartz, "The Other Section 23" (1986) 15 M.L.J. 347.

It should also be remembered that the "Quebec clause" is just as much a directive to legislatures and governments as it is to courts. Even if the courts develop a fairly innocuous interpretation of the clause, legislatures may not. They may use the "two Canadians" or "distinct society" clauses as devices to justify, or even as the genuine inspiration for, actions that are small-minded or oppressive.

One of the strengths of the Canadian Constitution has been that it has avoided the express statement of an overriding philosophy or ideology. Instead, the Constitution seeks to establish practical political institutions that are compatible with differing visions of the country. Different political movements are free to try to win power for a while and implement, to some extent, their own vision of the country—without their being charged with betraying the Constitution, and without precluding their successors from working toward a different vision. The obscurity and ambiguity of the "Quebec clause" is not an adequate substitute for common ground. Politicians and judges will attribute a definite meaning to the clause. We cannot now say which interpretation will prevail, but we do know that a resolution in any one direction will leave others with a sense that the Constitution has rejected their fundamental beliefs.

The "Quebec clause" has been defended as merely reflecting "reality." But we do not routinely entrench "reality" in the Constitution. Most of the population of Ontario may be Protestant, but we would not dare entrench in the Constitution a commitment that the demography remain that way. Yet the "Quebec clause" endorses the preservation or promotion of certain societal values.

Exactly what values, of course, is a matter for debate. And someday, I fear, a matter for remorse. The rhetoric of the "Quebec clause" is vague and hedged by a number of legalistic qualifications. There was no intrinsic need for the insertion of such equivocal and portentous rhetoric

in the Constitution. The concerns of Quebec could, and should, have been clarified and dealt with by a number of reasonably specific and precise amendments. Such an approach would, it seems, have been consistent with the comprehensive position paper of the Quebec Liberal Party in 1980, (*La Commission constitutionnelle du Parti libéral du Québec, Une nouvelle fédération canadienne* (Montreal, 1980)). The paper called for "l'octroi au Québec de garanties propres à faciliter la protection et l'affirmation de sa personnalité distincte. Ces garanties ne devront pas se confiner étroitement au seul champ de la politique culturelle" (at 22). The passage seems to contemplate or, at least, allow for a number of provisions, not a single abstract statement that Quebec is a "distinct society." If Quebec is concerned with preserving its civil law system, then allowing it to appoint three judges to the Supreme Court is one way of protecting the province's special traditions. Indeed, the 1987 package contains many such guarantees. On the specific question of language, there should have been a searching debate on exactly what status and authority the provincial government of Quebec was seeking. The National Assembly could have been recognized as having authority to encourage the ongoing vitality of the French language in Quebec, consistent with minority rights and without prejudice to the appropriateness of encouraging bilingualism among all Canadians. Instead, there will be entrenched a clause that is indeterminate in scope as well as in content; a gob of rhetoric that is neither good English nor good French; a bizarre combination of sweeping ideology and legal technicality.

### **Section 2(1)(a) and "a Fundamental Characteristic of Canada."**

The different sections of the "Quebec clause" (and the limitations on it contained in s. 16 of the draft *Constitution Act, 1987*) are intertwined and cross-referenced. As logical a place as any to begin, then, is the first paragraph:

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

The clause should be compared with the original Meech Lake language:

1. The Constitution of Canada shall be interpreted in a manner consistent with the recognition that the existence of French-speaking Canada, centred in but not limited to Quebec, and English-speaking Canada, concentrated outside of Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada.

The "two Canadas" language of Meech Lake had the disturbing implication that Canada was supposed to consist of two separate collectivities, one French-speaking, the other English-speaking. "Deux nations" spread across the Canadian map is no more appealing a vision than that of "une nation" confined to Quebec and "une autre nation" to

the rest of Canada. Three objectionable implications of the "two Canadas" language were:

(a) the entrenchment of two solitudes. The clause might have been construed, for example, as bolstering the claims of those who wanted *français* schools outside of Quebec to exclude children who wanted to learn French, but who did not belong to the traditional French language community.

(b) ongoing dualism (we all speak one language or another) was to have been mandated at the expense of enhanced bilingualism (some of us can speak both official languages). It is not possible for Canada to exist as a fully functioning democracy, let alone a united nation, if full participation in the life of the national government is confined to a tiny elite of bilingual people. It is desirable that every voter, let alone every federal political official, be able to comprehend the language spoken by most, or a very large part, of the country. There should be an appreciation of the advantages for personal growth and development of knowing a second language—especially when it happens to be a world language with a rich literary and cultural history. Governments should be encouraged to provide opportunities for their citizens to learn the other official language. The "two Canadas" clause (and the associated role to "preserve" the two Canadas) actually might have discouraged governments from taking positive steps to promote bilingualism.

(c) the implication that Canada consisted of two founding nations, the English and the French. True enough, the draft text referred to "English-speaking" and "French-speaking" (or in French, "anglophone" and "francophone") but it certainly was possible to understand the reference to language as a convenient tag to identify a group with a larger complex of cultural unity. The draft language thus threatened the status and dignity of native Canadians (who also consider themselves a founding people) and of the many Canadians (like me) who trace their heritage to immigrants from lands other than England and France.

The foregoing concerns provided a context for a proposal by the government of Manitoba (contained in a joint working draft, dated 30 May 1987, that the press obtained and disclosed prior to the Langevin Block meeting):

Nothing in this section diminishes the appropriateness of governmental measures to promote understanding, tolerance, co-operation and association among Canadians.

While the proposal was not adopted, the Langevin Block meeting did produce some very significant modifications to the opening paragraph of the "Quebec clause":

(a) The reference to "two Canadas" was dropped and replaced by a reference to the existence of English-speaking and French-speaking Canadians. The implication that there are two distinct collectivities thus is diminished. There now seems to be only one Canada whose constituent units are individuals and not two communities.

Section 2(4) probably was agreed upon for two primary reasons: to reassure Quebec that ss. 2(1)(a) and 2(2) did not actually combine to

diminish Quebec's current ability to discriminate against English, and to ensure that the "distinct society" clause did not seriously upset the federal-provincial division of powers. But a significant effect of clause (4) is to protect the ability of provinces to develop co-operative and integrative language policies, rather than dealing with minority language communities as enclaves. In particular, s. 2(1)(a) cannot now be used to bolster the legal case of those who want to read into s. 23 of the *Charter* the requirement that minority language communities have separate school boards.

(b) The dualist nuance remains. The clause recognizes English-speakers and French-speakers, but not English-and-French-speakers. Section 2(2) recognizes the role of legislatures in "preserving" the linguistic characters of their provinces. The combination of s. 2(1)(a) and 2(2) might be read as actually hostile to the promotion of bilingualism. Is a legislature in an English-speaking province betraying its "role" if it attempts, through French immersion programs, to nurture the development of a largely bilingual population? Is the Quebec legislature abandoning its role if it attempts to encourage greater knowledge of English among children born into French language families?

Section 2(4), the non-derogation clause, ensures that no one can go to court to prevent a legislature from providing opportunities for enhanced bilingualism. But constitutional directives remain legally binding even if not enforceable in the courts; and they can, in practice, seriously influence politics and policy. Have we actually directed legislatures to refrain from promoting bilingualism? Have we entrenched ignorance?

Subtle and refined arguments can be marshalled for the view that sections 2(1)(a) and 2(2) do not inhibit the promotion of bilingualism:

(i) Subsection (a) refers to English-speaking and French-speaking Canadians as "a" fundamental characteristic of Canada. The indefinite article allows the possibility that there are other characteristics, including the existence of bilingual Canadians;

(ii) The duty to "preserve" the fundamental characteristic of Canada applies to Parliament and the government of Canada as well as to the provinces. But the federal level of government is officially bilingual (s. 20 of the *Constitution Act, 1982*). At the time s. 20 of the *Constitution Act, 1982* was entrenched, the federal government already had a policy of encouraging public officials to acquire a mastery of both official languages and of subsidizing second language education for students across Canada. Thus bilingualism at the federal level has not been understood as a matter of merely providing a cadre of translators for unilingual people, but of overcoming language differences through education. It is inconceivable that the Parliament of Canada is supposed to "preserve" dual unilingualism, thus the word "preserve" in s. 2(2) of the "Quebec clause" could not possibly mean "maintain dual unilingualism." Instead, "preserve" must mean protect the rights of both anglophones and francophones to use their native language, rather than preserve both in a state of mutual ignorance;

(iii) The province of New Brunswick is officially bilingual under sections 16, 17(2), 19(2) and 20(2) of the *Constitution Act, 1982*. It would be ridiculous for a province that is bilingual at the official level to discourage the attainment of bilingualism by its population. Members of the public retain the right to communicate with New Brunswick governmental institutions in their language of choice, but surely there should be the maximum opportunity to participate in public life by being able to respond to the public in both languages. The same conclusion is reached as in (ii): "preserve" in s. 2(2) of the "Quebec clause" means "protect the ability of native speakers of English and French to operate in their language if they choose to do so;" but it remains appropriate for government and legislatures to encourage the attainment of bilingualism.

So much for subtle and refined—and, I believe, valid—arguments. The fact remains that the plain language of ss. 2(1)(a) and 2(2) allows all too easily for the alternative interpretation—that provincial legislatures are supposed to preserve the predominantly unilingual character of their majorities. Some day an opposition critic of a legislative measure to promote bilingualism may contend:

The Constitution says that we're a mostly English-speaking province and that our role as legislators is to keep it that way.

There are several means whereby the anti-bilingual risks inherent in the current draft of sections 2(1)(a) and 2(2) may be reduced. Two relatively modest, but salutary, revisions would be:

— the word "preserve" in s. 2(1)(a) should be replaced by "protect." The nuance then will be more in favour of respecting rights, rather than defending the status quo. Furthermore, there will be less menace in the currently stark contrast between Quebec's duty to "preserve" the anglophone presence in the province, as opposed to its duty under s. 2(3) to "preserve and promote its distinct identity."

— a s. 17 could be added, providing that "nothing in s. 2 of the *Constitution Act, 1987* affects the appropriateness of governmental measures to encourage and assist Canadians to acquire a knowledge of the other official language."

(c) The "two founding nations" implications of s. 2(1)(a) have largely been eliminated. The elimination of the "two Canadas" language diminishes the implication that there are two nations in Canada, let alone two founding nations. Furthermore, s. 16 of the *Constitution Act, 1987* provides that s. 2 does not affect the aboriginal peoples' sections of the *Constitution Act, 1982* or the multicultural heritage clause of the *Charter*, s. 27, ("this Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians). There may be worry that s. 27 is only an interpretive clause, dependent for its effect on the operation of some other section of the *Charter*; and that any relevance of s. 27 can be eliminated by using the "override" provision of the *Charter* (s. 33) to suspend the operation of

that other section. But s. 27 also has declaratory and symbolic importance. It affirms that Canada does have a multicultural heritage and that its preservation is a good deed. The declaratory and symbolic importance of s. 27 is always available to counter political claims based on a "two founding nations" reading of s. 2(1)(a).

### **Section 2(1)(b) and Quebec as a "Distinct Society."**

The next aspect of the "Quebec clause" that should be examined is s. 2(1)(b), which recognizes Quebec as a "distinct society," and its partner clause, s. 2(3), which recognizes Quebec's role in preserving and promoting its distinct identity. The "distinct society" language undoubtedly was intended by Quebec to assist it in resisting court challenges to provincial language policies that promote or favour the French language. Section 2(1)(a), which recognizes the anglophone "presence" in Quebec, undoubtedly was intended to provide some counterbalance. Where is the new equilibrium likely to lie?

It would be useful to examine recent cases on Quebec language policy and try to assess how they have been affected by the "Quebec clause." It should be kept in mind that the interpretation of the "distinct society" language by the Quebec public and its politicians will be at least as significant as the opinions of judges on the limited issues they will be called upon to decide. Still, the extent to which minority language rights are protected by the judiciary in Quebec will be of both direct practical consequence and will influence attitudes on issues that are entirely within the discretion of governments and legislatures.

The inaugural and principal language legislation of the Parti Québécois was Bill 101. Its proclaimed aim was to "see the quality and the influence of the French language assured, and well as the normal and everyday language of work, instruction, communication, commerce and business." Although limited aspects of Bill 101 have been struck down by the courts over the years, the legislation has, for the most part, remained in force and fulfilled its objectives; R. Cook, *Canada, Quebec, and the Uses of Nationalism* (Toronto: McClelland and Stewart, 1986) at 116. Constitutional reform to recognize Quebec as a "distinct society" within Canada was not necessary to enable Quebec governments to pass strong (not absolutist, but strong) measures to promote or require the use of the French language.

### **The "Distinct Society" Language, Bill 101 and the Right to use English in Quebec Courts.**

Chapter III of Bill 101 purported to make French the sole official language of the courts and legislatures. Section 133 of the *Constitution Act, 1867*, however, requires that the Parliament of Canada and the legislature of Quebec enact statutes in both English and French, and it permits the use of either language in federal and Quebec courts. In *Attorney General of Quebec v. Blaikie* (1979), [1979] 2 SCR 1016, 101 D.L.R. (3d) 394, the Supreme Court of Canada held that the Quebec provisions of s. 133 of the *Constitution Act, 1867* belonged to the "constitution of Canada" rather than to the "constitution of Quebec." Chapter III could

not be sustained, therefore, as an exercise of a province's authority (then under s. 91(1) of the *Constitution Act, 1867*, now recognized in s. 45 of the *Constitution Act, 1982*) to amend its own provincial constitution. Chapter III thus was declared invalid.

Section 133 is very similar in wording to s. 23 of the *Manitoba Act, 1870*, S.C. 1870, c.3, which was the focus of intense controversy in 1983-84 in connection with the *Bilodeau* case; (*Bilodeau v. Attorney General of Manitoba* (1981), [1981] 5 W.W.R. 393, 10 Man. R. (2d) 298 (C.A.)). The Supreme Court of Canada had held, at the same time as its decision in *Blaikie*, that Manitoba could not unilaterally abandon its duties under s. 23; *Attorney General of Manitoba v. Forest* (1979), [1979] 2 S.C.R. 1032, [1980] 2 W.W.R. 758. The *Official Language Act*, S.M. 1890, c.14, which had purported to make Manitoba officially English, was thus invalid. So too were all the unilingual English statutes passed since 1890. The chaotic prospect was raised by Mr. Bilodeau's 1980 challenge to a traffic ticket, on the basis (among other things) that *The Highway Traffic Act*, R.S.M. 1970, c. H-60, that authorized it was in English only—and so entirely invalid. The government of Manitoba attempted to preclude the possibility of having practically all of its laws declared invalid by agreeing with the Société franco-manitobaine and the federal government on a package of constitutional amendments that would have obviated the need to translate some statutes, given time to complete translations of others but, in return, made Manitoba officially bilingual on the New Brunswick model. The government of Manitoba eventually gave up on the plan after it was stalled by a vehement opposition movement. The Supreme Court of Canada was asked to settle the general questions raised by *Bilodeau*. In a judgment whose reasoning strained legal logic, but whose result accorded with common sense, *Reference re Language Rights under Section 23 of the Manitoba Act, 1870, and Section 133 of the Constitution Act, 1867* (1985), [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1, the Supreme Court held that all future English-only statutes enacted by Manitoba would be invalid, but that existing statutes were valid until Manitoba had reasonable time to complete its re-enactment of them.

The guarantees in s. 133 have considerable practical value to Quebec anglophones and are of symbolic importance as well. They are a reminder that the presence of anglophones in Quebec is of long standing and that the English language has been guaranteed for some official purposes since Confederation. The scope of the official bilingualism provided by s. 133 is, however, modest. The right to use English in the courts is guaranteed, but there is no guarantee that the judge will be anglophone or even bilingual; *Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education* (1986), [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406. The duty of the "legislature" to enact laws in both English and French has been confined by *Blaikie* (No. 2), (*Attorney General of Quebec v. Blaikie* (No. 2) (1981), [1981] 1 S.C.R. 312, 123 D.L.R. (3d) 15), to organs of the legislature that are exercising a legislative authority—e.g. a cabinet minister empowered by statute to issue regulations—but not to bodies that derive their legislative authority from the legislature, such as school boards. It is doubtful that s.



133 implies that Quebecers have the sort of rights recognized by s. 20 of the *Constitution Act, 1982*—to receive governmental information and services in the individual's choice of English or French.

Would the "distinct society" language of the "Quebec clause" diminish rights that the anglophone minority currently enjoys under s. 133 of the *Constitution Act, 1867*? Would the *Blaikie* cases be decided differently today? Probably not. Total confidence in a judicial outcome is rarely justified and, with the "Quebec clause," we are dealing with novel and obscure language that eventually will be construed by a Supreme Court of whom three members have been nominated by the government of Quebec. Still, the argument that s. 133 rights have not been seriously undermined is strong.

The "distinct society" language of the "Quebec clause" makes possible the following arguments for the diminution or elimination of anglophone rights under s. 133:

(i) Section 2(1)(b) requires that the entire Constitution be construed in a manner consistent with the recognition that Quebec is a "distinct society." What makes Quebec "distinct" is its francophone majority. Hence, s. 133 of the *Constitution Act, 1867* should be construed in a manner that maximizes the francophone character of Quebec. The recognition of "English-speaking Canadians also present in Quebec" merely requires that the minority not be persecuted or forced out. It does not require that Quebec allow anglophones to use English in the legislature and courts. Even if section 133 used to allow these rights, it should now be given the narrowest possible interpretation.

(ii) Section 2(1)(b) requires a narrow interpretation of anglophone rights under s. 133. But s. 2(2) can stand on its own. It affirms the duty of Quebec to preserve and promote its "distinct identity." Hence, it goes beyond s. 2(1)(b), which permits the narrowing of the scope of s. 133. Section 2(2) allows some rights under s. 133 to be negated directly if doing so will promote the distinct identity of Quebec.

(iii) Section 2(3) requires legislatures to "preserve" the fundamental character of Quebec, defined by s. 2(1)(a), which includes the presence of English-speakers in Quebec. But the duty to "preserve" the anglophone presence is subordinate to the duty to "preserve and promote" the distinct identity of Quebec. None of the other provinces are given the task of promoting their identity. The primary thing that makes Quebec special obviously is its francophone majority. So Quebec is specifically empowered to take measures to promote its francophone character. Section 2(3) is more recent than, and takes precedence over, s. 133. Thus it can negate some of the rights originally guaranteed by s. 133.

The rebuttal to the foregoing seems to be on very solid ground. The case for holding that s. 133 has not been diminished or overridden by the "Quebec clause" might go something like this:

(i) Section 2(1)(a) makes the anglophone presence in Quebec “a fundamental characteristic” of Canada. Section 2(1)(b) makes Quebec a distinct society “within Canada.” Thus the distinct identity of Quebec must include the presence of the anglophone minority. Quebec “preserves” the fundamental characteristic of Canada by continuing to observe the rights entrenched by s. 133 of the *Constitution Act, 1867*. The word “preserve” strongly implies a respect for traditional safeguards.

(ii) The English version of s. 2(3) “affirms” the role of the legislature and government of Quebec. The implication, like that of the word “preserve,” is that longstanding rights are to be protected. “Affirm” has the nuance of validating what has existed, rather than suggesting a sharp departure from the past.

(iii) In *Société des Acadiens*, Mr. Justice Beetz held that language guarantees are the product of delicate historical compromises, rather than abstract philosophizing, and that courts should give these guarantees a fair, but not expansive, reading. The actual case law on s. 133 does seem to give the sections stolid—not expansive, not niggardly—readings. Using the “distinct society” language to narrow the received interpretations of s. 133 would amount to strangling the section, rather than moderating any judicial tendency to blow it out of proportion.

A journey through the “Quebec clause” is liable to leave a judge confused, even queasy. The traveller will see vague rhetoric here, obscure legalisms there, differences between the French and English versions here and there, differences here and there, and unidiomatic and tortured language everywhere. Still, there are 120 years of history and a series of carefully considered Supreme Court of Canada precedents connected with s. 133 of the *Constitution Act, 1867*. It is likely that the judicial protection of minority rights by s. 133 will not be undermined by the “Quebec clause.”

### Quebec as a “Distinct Society” and Constitutional Rights with Respect to Education.

The next area to consider is that of minority language educational rights in Quebec. While s. 93 of the *Constitution Act, 1867* guarantees Protestant denominational school rights in Quebec, it does not guarantee minority language educational rights; (*Tiny Roman Catholic Separate School Trustees v. R.* (1928), [1928] A.C. 363, (*sub nom. Roman Catholic Separate School Trustees for Tiny v. R.*), [1928] 3 D.L.R. 753 (P.C.)). Section 23 of the *Charter* does. The section reads:

#### 23(1) Citizens of Canada

- (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
- (b) who have received their primary school instruction in Canada in English or French and reside in a province where

the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Section 59(2) of the *Constitution Act, 1982* states that s. 23(1)(a) will not apply to Quebec until its legislature or government agrees. The concession to Quebec reflected the efforts of successive Quebec governments to force immigrant children into the French language school system. As a result, a francophone immigrant to Manitoba—say, a Haitian—has the right to have her children receive a public education in French; but an anglophone immigrant to Quebec—say, a Jamaican—has no right to have her children educated in English.

Section 23(1)(b) of the *Charter* does apply to Quebec. It guarantees that a parent who is a Canadian citizen, and who has been educated in English herself somewhere in Canada, can have her children educated in English. Section 23(2) does apply to Quebec. It provides that if one child in a family has been educated in English, his brothers and sisters can go to English language schools as well. The combined effect of ss. 23(1)(b) and 23(2) is a very modest one. They do not protect the rights of francophones in Quebec to send their children to English language schools. They do not protect the rights of immigrants who have been educated outside of Canada to send their children to English language schools. Section 23 of the *Charter* did not represent a restriction on the autonomy of the Quebec legislature that required any "correction." Even Bill 101, (*Charter of the French Language*, S.Q. 1977, c. 5), enacted by the Parti Québécois in its halcyon days, allowed some rights to anglophones. Indeed, the minority rights provisions of Bill 101 largely overlap those of s. 23 of the *Charter*. Under s. 73 of Bill 101, a parent who had been educated in English in Quebec has the right to have his children educated in English. Section 23(1)(b) of the *Charter* is broader in that a parent can

be educated in English anywhere in Canada, rather than just Quebec; but also narrower in that the parent must be a Canadian citizen.

That Quebec efforts at francisation were not significantly inhibited by s. 23(2) is amply demonstrated by the judgment of Chief Justice Deschênes in *Quebec Association of Protestant School Boards v. Attorney General of Quebec (No. 2)* (1982), 140 D.L.R. (3d) 33, 3 C.R.R. 114 (Que.S.C.), aff'd (1983), [1983] C.A. 77, 1 D.L.R. (4th) 573, aff'd (1984), [1984] 2 S.C.R. 66, 10 D.L.R. 321. The Protestant School Board Association asked the Court for a declaration that Bill 101 was unconstitutional to the extent that it denied the protection of sections 23(1)(b) and 23(2) of the *Charter*. The Attorney General of Quebec contended that Bill 101 restrictions on s. 23 rights were saved by s. 1 of the *Charter* which allows that at least some apparent incursions on specific *Charter* rights are "reasonable limits that are demonstrably justified in a free and democratic society."

Chief Justice Deschênes held that the challenged aspects of Bill 101 were not merely "limits" on *Charter* rights, but eliminated them entirely. The Attorney General of Quebec had argued that s. 23 rights are "collective" and belong to the anglophone minority as a whole. The denial of rights to certain anglophone individuals, therefore, merely "limited" the right as far as the real holder of the right—the anglophone minority of Quebec—was concerned. Justice Deschênes responded:

The court is amazed, to use a euphemism, to hear this argument from a government which prides itself in maintaining in America the flame of French civilization with its promotion of spiritual values and its traditional respect for liberty.

In fact, Quebec's argument is based on a totalitarian conception of society to which the court does not subscribe. Human beings are, to us, of paramount importance and nothing should be allowed to diminish the respect due to them. Other societies place the collectivity above the individual. They use the Kolchoze steamroller and see merit only in the collective result even if some individuals are left by the wayside in the process.

This concept of society has never taken root here—even if certain political initiatives seem at times to come dangerously close to it—and this court will not honour it with its approval. Every individual in Canada should enjoy his rights to the full when in Quebec, whether alone or as a member of a group; and if the group numbers 100 persons, the one hundredth has as much right to benefit from all the privileges of citizens as the other ninety-nine. The alleged restriction of a collective right which would deprive the one hundredth member of the group of the rights guaranteed by the *Charter* constitutes, for this one hundredth member, a real denial of his rights. He cannot simply be counted as an accidental loss in a collective operation: our concept of human beings does not accommodate such a theory.

The "two Canadas" language of the Meech Lake communiqué did encourage strongly, in fact, a crude collectivism. The reference to "Eng-

lish-speaking Canada,” rather than to “English-speaking Canadians,” would have been a weapon for a Quebec attorney general fighting for the view that s. 23 rights belong to the anglophone minority as a whole. The switch to the more individual language of the Langevin Block text will help to remind judges and politicians dealing with the Quebec situation that the individual ought to be the basic unit of political thought. On the other hand, the reference to Quebec’s status as a “distinct society” will encourage collectivist reasoning and rhetoric. Politicians may not always keep in mind the reminders in the Langevin Block text that the “distinct society” of Quebec is composed not only of francophones, but of anglophones as well. They may forget that some members of the society, including Canada’s aboriginal peoples, belong to ethnic groups that did not originate in Britain or France. It would have been better had the framers recognized Quebec as a “distinctive province” or a “distinctive part of Canada.” “Society” is liable to be misinterpreted as referring to a somewhat homogeneous collectivity to which individuals should conform.

So far it may look like Chief Justice Deschênes’ judgment was hostile to the forces of francisation in Quebec. Not so. Justice Deschênes held and the Supreme Court, in other cases, has agreed that there are two basic questions to ask about a limit on a *Charter* right:

- how important is the purpose behind the limit?
- is the limit a proportionate way of achieving the purpose?

Chief Justice Deschênes answered the first point as follows:

[After citing the preamble of Bill 101, which states the objectives of assuring the “quality and influence” of French and making it the language of “Gouvernement and the Law, as well as the normal and everyday language of work, instruction, communication, commerce and business”]:

The Legislature went too far in the area of legislation and the courts (*A.-G. Que. v. Blaikie*, supra) but apart from that, the whole structure of Bill 101 has, for the last five years, remained in place and contributed to solidifying the French fact in America.

The court has not the slightest doubt that this involves a legitimate objective which, to use the words of the Charter, “can be demonstrably justified in a free and democratic society.”

Exactly why “solidifying the French fact in America” is a goal that is demonstrably justified in a free and democratic society, Chief Justice Deschênes does not explain. The philosophical issue is perplexing and contentious. The *Charter of Rights* is a text whose positive affirmations are predominantly liberal and individualist. Yet there are many concessions to the history-based rights of different groups; for example, those of aboriginal peoples (s. 25) and religious denominations (s. 29). The Supreme Court of Canada seemed eager to avoid the issues of political philosophy altogether. It upheld Justice Deschênes’ judgment by holding that the framers of s. 23 drafted it as a very specific response to the educational provisions of Bill 101. The intention was to extend minority

rights in definite ways. It was not possible, the Court held, to frustrate that very specific intention by entirely negating certain rights and appealing to the "reasonable limits" clause.

In abstract liberal theory, the preservation and development of traditional cultures is something individuals are free to do, but the state should not favour some cultures at the expense of others; see generally B.A. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980). Pierre Trudeau, writing from the liberal individualist viewpoint in *Federalism and the French Canadians* (Toronto: Macmillan, 1968), spoke (at 202) of a more enlightened future in which "cultural differentiation is submitted to ruthless competition." Several liberal or democratic justifications, however, might be offered for measures, consistent with the protection of minorities, that favour the use of the French language in Quebec:

— it is the preference of most Quebecers to use French, but the economy of Quebec is subject to a large measure of control by English-speaking enterprises. Affirmative measures thus are necessary to enable most Quebecers to advance in business and commerce while operating in French. Francisation measures are therefore justified in liberal terms as necessary to respect the individual choices of Quebecers;

— some Quebecers may take the view that, while the French language and traditional French-Canadian culture are not intrinsically superior to any other, it benefits both Quebecers and Canada to develop Quebec as a predominantly French language society. Canadians generally benefit from maintaining and adding to the richness and diversity of the linguistic and cultural resources of Canada, rather than yielding to the homogenizing effect of modern economic and cultural forces;

— many Quebecers may believe that, by virtue of historical precedence, French-Canadians have the right to maintain a society predominated by French language and culture. Others may believe that the majority has the right to determine the cultural character of the society as a whole and that linguistic and cultural homogeneity are desirable. Even if neither of these views is consistent with certain abstract principles of liberalism, they might represent the deeply held political convictions of the democratic majority. As such, they would warrant some deference under democratic principles.

Most liberal democratic judges would be encouraged, or at least permitted by their philosophical principles, to accept that a Quebec legislature can choose to enact strong measures to support the "quality and influence" of the French language in Quebec. Canadian judges are by no means insensitive to popular sensibilities and no Supreme Court of Canada would risk offending a Quebec majority and inflaming separatist feelings by going overboard in the direction of minority rights in Quebec. The "distinct society" language of the 1987 Accord was not necessary if its aim was to tell the courts that the Quebec legislature has a strong entitlement to pass pro-French language legislation. The Supreme Court of

Canada would, of course, try to balance its deference to the judgment and sentiment of a Quebec majority against the Court's duty to protect individual rights, even against strong majorities. The 1987 Accord itself contains some recognition of the rights of the anglophone minority in Quebec.

So far it has been shown that Chief Justice Deschênes accepted, without hesitation, that the Quebec legislature could pursue a strongly pro-French policy on schools. The confident prediction has been made that the Supreme Court of Canada would have agreed that "solidifying the French fact" counts as a legitimate legislative objective in the face of *Charter* challenges. The remaining question for Justice Deschênes was whether Bill 101's restrictions on the *Charter* rights of anglophones were reasonably necessary to achieve that objective. Justice Deschênes held that they were not. He observed:

From 1871 to 1976 the proportion of the population of Quebec with English as mother tongue steadily declined: from more than 20% to less than 10%...In the past ten years the pre-university school population (that which concerns us here) has diminished by 27.8%. But the decrease in the French sector was only 25.5% whereas it reached 39.3% (100,813 students) in the English sector...The decline has been particularly sudden since Bill 101 came into force...

Even taking into account [s. 23 of the *Charter*.] Mr. Henripin has established that in the year 2001 the proportion of pupils attending English schools will probably not exceed 8.7% of the total school population...We must therefore agree with Mr. Henripin that unless we want to expell [sic] all English-speaking people from Quebec, the Quebec clause is excessively rigorous. Fears for the future security of French-speaking people in Quebec are exaggerated and the Quebec clause is unreasonable.

Chief Justice Deschênes cited one study by an academic expert that estimates the proportion of students attending English schools in Quebec in the year 2001:

|                         | If s. 23 of the<br><i>Charter</i> prevails | If Bill 101's<br>rules prevail |
|-------------------------|--|--------------------------------|
| Good economic situation | 2.7%                                       | 9.4%                           |
| Bad economic situation  | 9.4%                                       | 4.8%                           |

If the estimates are even close to being correct, then s. 23 of the *Charter* might have a significant effect on slowing the decline of the anglophone population in Quebec—but no more than that. There would be a significant frustration of the goals of Bill 101 only to the extent that the latter aimed at wiping out the English presence in Quebec.

Justice Deschênes concluded that the Attorney General of Quebec had the burden of showing the justification for a *prima facie* violation of a *Charter* right and had failed to do so. He added:

If the court absolutely had to settle the debate in an affirmative way, it would be inclined to conclude that the Quebec clause is disproportionate to the intended aim and that it unnecessarily exceeds reasonable limits.

Indeed, it is clear that [the application of s. 23 of the *Charter*] would not in any way reduce the scope of Bill 101 in general. Nor would it have a negative effect in the area of the language of instruction which is still, as a rule, French.

How would the "Quebec clause" of the 1987 Accord affect a "re-match" of the *Protestant School Board* case? It is now open for Quebec governments (or other litigants who find a way to raise the point in court) to enforce the sections of Bill 101 that were declared inoperative. The government would argue that the "distinct society" language of the 1987 Accord changes the interpretation of the *Charter* and the meaning of the "reasonable limits" exception.

It is very likely that the outcome of the *Protestant School Board* case would be the same even with the 1987 Accord in place. Here's why:

(i) The Supreme Court of Canada held that sections 23(1)(b) and 23(2) of the *Charter* were framed as a very specific response to certain sections of Bill 101. Upholding the latter as "reasonable limits" would frustrate the clear and explicit legislative intent. Thus a "reasonable limits" argument could not be made at all. Section 2(1)(b) of the "Quebec clause" of the 1987 Accord directs the courts to construe the Constitution in a manner consistent with the recognition that Quebec is a distinct society. But the rule of construction could not negate directly the plain language of sections 23(b) and 23(2) of the *Charter*. The only effect that s. 2(1)(b) could have on the case therefore would be to affect the interpretation of "reasonable limits" in s. 1 of the *Charter*. But the Supreme Court already has rejected the legitimacy of any "reasonable limits" arguments being raised.

(ii) It might be argued that s. 2(3) of the "Quebec clause" of the 1987 Accord is not merely a rule of construction. (Section 2(3) reads, again: "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"). Section 2(3), it would be argued, is a substantive provision that can go head-to-head against another substantive provision like s. 23 of the *Charter*. But even if s. 2(3) of the 1987 Accord is a substantive provision commensurable with s. 23 of the *Charter*, it is unlikely that the vague direction of the former would take precedence over rights very explicitly given by the latter. The very specific usually takes precedence over the general. Furthermore, the English version of s. 2(3) would "affirm" the role of the legislature of Quebec in promoting the "distinct identity" of Quebec. "Affirm" implies the ratification of that which already exists—which would include limitations such as the constitutional guarantees in s. 23 of the *Charter*. The preferable view of s.



2(3), and the one that courts are most likely to uphold, is that it is not of the same order as a section of the Constitution that gives rights or powers. The affirmation of a "role" is different from giving a right or power. Thus section 2(3) may operate in conjunction with s. 2(1) to direct the interpretation of the scope of the rights and powers that are conferred by other sections of the Constitution. Section 2(3) may also be a directive on how the provincial government of Quebec can, or should, use the powers assigned to it by other sections of the Constitution. But section 2(3) does not operate as a free-standing grant of authority.

(iii) Suppose that the courts reject the arguments in (i) and (ii). Suppose, for example, that a court responds to (i) by holding that the 1987 Accord was intended partly as a "remedy" to the 1982 constitutional package and that the "distinct society" language was specifically intended to strengthen Quebec's hands in *Charter* cases, including those involving s. 23. The fact remains that the "distinct society" language in the 1987 package is counterbalanced by the recognition that there are English-speaking Canadians "present" in Quebec and that s. 2(2) commits all governments and legislatures, including those of Quebec, to "preserve" this "fundamental characteristic of Canada." Chief Justice Deschênes' judgment shows that, even with s. 23, the anglophone presence in Quebec continues to become a smaller proportion of the population. Denying the protection of s. 23 likely would accelerate the decline. The duty to "preserve and promote" the distinct identity of Quebec may assist Quebec in giving strongly preferential treatment to the French language in many respects. The role of "preserving" the presence of English-speaking Canadians in Quebec requires the legislature at least to respect a safeguard as modest, in aim and effect, as ss. 23(b) and 23(2) of the *Charter*.

What would happen if an economic boom in Quebec resulted in an influx of Canadians from other provinces and an increase in the anglophone fraction of the Quebec population? Would Quebec then be entitled to deny access to English-speaking schools? In the *Protestant School Board* case, the Attorney General of Quebec argued that the restriction on s. 23 rights was justified in part because the anglophone school population would decrease only slightly in the Hull area. (At the time the case was argued, only about 15% of the children in the area were going to English language schools). Presumably the Attorney General would have expressed an even more vehement objection had there been a slight increase in this one area of the province. With the "Quebec clause" of the 1987 Accord in place, an attorney general might argue that Quebec is constitutionally mandated to resisting any increase at all in the anglophone proportion of the Quebec population. The presence of English-speaking Canadians, this attorney general could say, must be "preserved"—that is, kept to 1987 levels in proportionate or, worse still, absolute terms—whereas the "distinct" (francophone) identity of Quebec must be "preserved and promoted." The more enlightened view would be

that nothing in the "Quebec clause" rigidly establishes that the francophone proportion of the Quebec population must remain static or increase each and every year. That part of the "distinct identity" of Quebec is the existence of a large and energetic anglophone population. That the anglophone "presence" is revitalized by the infusion of new members from the rest of Canada and abroad. That encouraging the acquisition and practice of bilingualism by anglophones is a legitimate way of promoting the "distinct identity" of Quebec and a better one than denying *Charter* rights to English language schooling. The "Quebec clause" does not expressly refer to the francophones of Quebec as a majority in Quebec, let alone mandate a strict quota system. If the clause did imply a strict adherence to 1987 demographics Quebec nationalists would be much embarrassed, for anglophones could argue that, at the very least, Quebec should take affirmative measures to ensure that the absolute number of anglophone Quebecers does not continue to decrease!

The hypothetical situation posed in 2.36 is very unlikely to happen in any event. The steady trend has been for the anglophone minority in Quebec to decrease. Quebec will use its enhanced authority over immigration from abroad to ensure that there is no significant erosion of the proportion of the Quebec population that is francophone. It should be remembered that anglophone immigrants in Quebec are excluded from the constitutional protection given anglophone immigrants in other parts of Canada by s. 23(1) of the *Charter*.

The "distinct society" clause might also be used by Quebec governments to insist that the phrase "where numbers warrant" in s. 23 be given a more niggardly interpretation in Quebec than elsewhere. Quebec nationalists would point out that it is not unprecedented for anglophones to have fewer rights under s. 23 in Quebec than francophones do in the rest of Canada; Quebec is already exempted from s. 23(1). The force of the anti-anglophone argument could be blunted somewhat by pointing to Quebec's role of "preserving" the anglophone presence in Quebec, and to the fact that the political accord that accompanies the 1987 amendments refers to the "principle of equality of all the provinces." Unfortunately, neither defence is immune from challenge; the role of "preserving" the anglophone presence can be contrasted with the role of "preserving and promoting" the distinct identity of Quebec; the reference in the Accord to the "principle of equality of all the provinces" can be contrasted with the special and explicit references to Quebec in the "Quebec clause." Still, it is doubtful that the courts would allow a Quebec government to use the "distinct society" clause to sustain a constrictive reading of "where numbers warrant" in s. 23 of the *Charter*. The courts should and, it is hoped, would hold that "where numbers warrant" invites considerations of administrative convenience and expense and not the broader issues that can be raised under the "reasonable limits" clause of the *Charter*.

It should be noted that s. 23 speaks only of rights to publicly funded education. It seems to be silent on whether a parent has the liberty to educate a child in the parent's choice of language at the parent's own expense. Looking at the situation without reference to the 1987 Accord,

it may be that the guarantee of freedom of expression in s. 2 of the *Charter*, or of liberty in s. 7 of the *Charter*, protects the ability of parents to have a child privately schooled in the language of the parent's choice: (*Meyer v. Nebraska*, 262 U.S. 390 (1923), 43 Sup. Ct. Rep. 625; *Jones v. Board of Trustees of Edmonton Catholic School District No. 7* (1976). [1977] 2 S.C.R. 872, 70 D.L.R. (3d) 1). The guarantee of freedom of religion in s. 2 of the *Charter* might assist a parent who wished to have a child privately schooled in the sacred or traditional language of a religious group. A "reasonable limitation" on the rights just mentioned likely would be that Quebec could insist that a child emerge from any education with a solid knowledge of French. (It is worth noting that the language provisions of Bill 101 do not extend to private schools).

The "distinct society" language of the 1987 Accord might be used by future Quebec governments to defend the constitutionality of measures that require even private schools to mirror the majority's language and culture. The recognition of multiculturalism embodied in s. 16 of the 1987 Constitutional Accord will help to preserve the viability of contentions that the Constitution protects private schools that do not conform.

The *Charter* protection just mentioned is subject to the provincial "override" allowed by s. 33 of the *Constitution Act, 1982*. It may be, however, that some Quebec efforts to suppress private English instruction, in private schools or otherwise, would be found unconstitutional because of a combination of ss. 16 and 20 of the *Charter* and the division of powers in sections 91 and 92 of the *Constitution Act, 1867*. Section 16 makes both French and English the official languages of Canada. It may be that "Canada" here refers only to the federal level of government or, at most, the federal level of government and matters within its jurisdiction. The last part of s. 16(1) talks about the institutions of the Parliament and government of Canada. While measures taken by the government of Quebec to require children to learn French generally would be constitutional, measures taken to forbid anyone, including francophones, from acquiring a knowledge of English should be considered unconstitutional. A resident of Quebec remains a citizen of Canada with the right to participate fully in the public life of the central government in matters under federal jurisdiction. (It should also be considered that a resident of Quebec has the right—not subject to the s. 33 override—to "pursue the gaining of a livelihood in any province;" *Charter*, s. 6(2)(b). The prohibition of private efforts to acquire a knowledge of the other official language would significantly impair a person's ability to exercise this right effectively. It is doubtful, though, that the courts would invalidate a governmental measure merely because it presents practical difficulties in exercising a right. Still, the reminder that residents of any province are potential residents of any other province may carry some weight with courts and legislators). I do not believe that the "distinct society" language of the 1987 Accord precludes any of the arguments just made. After all, Quebec is said to be a "distinct society *within Canada*."

The analysis above suggests that constitutional rights on the educational front likely will survive the "distinct society" language of the 1987 Accord. But it would be a serious mistake to focus only on what the

courts will do with existing constitutional safeguards. Most government policy-making, be it wise and just or foolish and oppressive, remains within the free discretion of the legislature. As mentioned earlier, there is real cause for concern that provincial legislatures will read the "Quebec clause" as a directive to pursue dualist, rather than bilingual, language policies. Legislatures outside of Quebec may read s. 2(1)(a) as inspiring them to preserve the predominantly English-speaking nature of their provinces, rather than encouraging the acquisition of bilingualism. The Quebec legislature may interpret the affirmation of its role as promotor of the "distinct society" as legitimating its efforts to discourage bilingualism among its francophone majority. It may be believed that Quebec is more "special" and more "apart" if most of its people cannot speak the majority language in the other provinces. The concern just expressed is not fanciful. The fact of the matter is that Bill 101 legally restricts the ability of a francophone in Quebec to attend an English language school. There are no "English immersion" public schools in Quebec. Little time is allotted in Quebec public schools for the teaching of English to francophones. The hostility or indifference of successive Quebec governments to bilingualism among francophones is ironic in view of the fact that the governments themselves have had fluently bilingual francophones at the helm. The same leaders who maintained an intense identification with their French language heritage seemed to regard unilingualism for others as a necessary bulwark against "assimilation." Many members of the upper echelons in Quebec have been sending their children to private schools that teach English well; see R. Wardlaugh, *Language and Nationhood* (Vancouver: New Star Books, 1983) at 102. Since Bill 101 was enacted in 1977, major progress has been made in assuring the use of French in business and education and in securing equal opportunities for francophones. At the same time, a "new class" in Quebec has come to the fore; francophone Quebecers who are confident in their cultural identity, less concerned with collectivist politics and more concerned with individual achievement in business and commerce; see A.G. Gagnon & K.Z. Paltiel, "Toward Maitres chez nous: *The Ascendancy of a Balzacian Bourgeoisie in Quebec*" (1986) 93 *Queen's Quarterly* 731. It can be expected that future Quebec leaders will be inclined to support public school programs that encourage bilingualism among francophones. The "non-derogation" section of the "Quebec clause," s. 2(4), makes it clear that a court could not stop a Quebec legislature from promoting bilingualism. But will the "distinct society" language be used in the political arena as a weapon to discourage measures that favour bilingualism?

Indeed, a more general question must be asked. Will the "distinct society" language become an effective slogan of reaction against any Quebec measures to "deregulate" language and culture in Quebec? Future governments of Quebec might be inclined to conclude that the practical situation of Quebec and francophones no longer requires governmental measures that sharply limit individual freedom and discourage bilingualism. Will the "distinct society" language be used to charge such a government with betraying its constitutional mandate? A government faced with such a charge might insist that the "distinct society" language was inserted to ensure that decisions made by the government of Quebec

are respected by other branches and levels of government; not to inform the Quebec majority of its duties to itself.

There should be a positive affirmation in the 1987 Accord that it still is appropriate for legislatures to choose to provide opportunities for Canadians to acquire a knowledge of the other official language. Bilingualism should, to every possible extent, be presented to Canadians as an opportunity for personal development and a contribution to nation-building; not as a threat. Many Canadians are concerned that bilingual policies lead to discrimination against those who have not had the opportunity or facility to learn the other language. In view of these anxieties, the prudent course is to affirm in the 1987 Accord that providing opportunities (not duties) for Canadians to become bilingual is a legitimate option (not requirement) for federal and provincial governments.

### **The "Distinct Society" Language and Constitutional Rights that Protect Freedom of Commercial Expression.**

Examined so far have been the effects of the "distinct society" language on anglophone rights in Quebec with respect to government and the courts (see s. 133 of the *Constitution Act, 1867*) and education (see s. 23 of the *Charter*). But constitutional rights also have been asserted in other areas, including commercial expression. The Quebec Court of Appeal very recently ruled that the *Charter's* guarantee of freedom of expression protects Quebecers who want to use English as well as French on commercial signs, (*Chaussure Brown's c. Quebec (Procureur Général)* (1986), [1987] R.J.Q. 80, 5 Q.A.C. 119).

The attitude and reasoning of the Court strongly parallel those of Chief Justice Deschênes in the *Protestant School Board* case. The Court of Appeal found a *prima facie* interference with the right of free expression in s. 2 of the *Charter*, just as Justice Deschênes found a *prima facie* interference with minority language educational rights under s. 23 of the *Charter*. The Court of Appeal affirmed without hesitation that it is a legitimate goal for the Quebec legislature to press for the francisation of business and commerce, just as Justice Deschênes had flatly accepted the legitimacy of francisation in the educational sector. The Court of Appeal then concluded, just as Chief Justice Deschênes did, that the suppression of anglophone minority rights is not necessary in order to assure the position of the French language.

It is worth noting that the business operators in *Chaussure Brown's* stated at the outset that they had no intention of challenging the requirement that French be used on signs. There was no challenge at all to the right of the Quebec legislature to choose to require French but not require English.

It is also significant that the anti-English provisions of Bill 101 were struck down as contrary to free expression as guaranteed, not only by the *Canadian Charter of Rights and Freedoms*, but also by the Quebec *Charter of Rights and Freedoms*, R.S.Q. 1986, c. C-12. The Quebec *Charter* originally was enacted in 1975 under a Liberal government; but it was a Parti Québécois government that, in 1982 (S.Q. c. 61, s. 16), amended the statute so that all of its protection, including freedom of expression,

prevails over other legislation. Mr. Justice Bisson also noted in his judgment that the anti-English provisions were not consistent with one of the stated aims of the original versions of Bill 101:

. . . The National Assembly intends in this pursuit to deal fairly and openly with the ethnic minorities, whose valuable contribution to the development of Quebec it readily acknowledges.

Perhaps Mr. Justice Bisson cited the original version of Bill 101 to show that punishing the use of English on signs was contrary to the spirit of the legislation even in its harder, Parti Québécois-inspired form. In 1984, however, there came into force significant revisions to Bill 101 that included a more generous version of the preambular paragraph:

. . . the National Assembly intends to pursue this objective in a spirit of fairness and open-mindedness, *respectful of the institutions of the English-speaking community of Quebec*, and respectful of the ethnic minorities, whose valuable contribution to the development of Quebec it readily acknowledges (emphasis added).

It is impossible to contend, therefore, that the allegedly "imposed" *Charter* was crucial in upsetting the National Assembly's attempt to prescribe punishment for the use of English on signs. According to the judgment of the Quebec Court of Appeal, the prohibition of English is invalid even if judged solely against other enactments of the National Assembly. It should further be recognized that the National Assembly is authorized to override the freedom of expression guarantees in both the Canadian and Quebec charters. The Quebec Court of Appeal's judgment in *Chaussure Brown's* cannot be used by apologists for the "Quebec clause" to show that francisation was significantly or unduly impeded by the free expression guarantees of the *Charter*.

Would the issue in *Chaussure Brown's*—whether a Quebec provincial statute can outlaw bilingual signs—be decided any differently if the "Quebec clause" of the 1987 Constitutional Accord comes into force? The courts ought to reach the same result, and I would bet they would. They might construe the "distinct society" language as support for the legitimacy of efforts by the National Assembly to make French the predominant language of business and commerce in Quebec. (Again, no one contended otherwise in *Chaussure Brown's* and the Quebec Court of Appeal expressly accepted francisation as a legitimate goal). But the anglophone minority can—and should—be regarded as an integral part of Quebec's "distinct identity." Or, at the very least, some weight must also be given to the duty of the Quebec legislature to "preserve" the "presence" of English-speaking Canadians in Quebec. Allowing English but requiring French on signs seems to be an obvious way for the Quebec legislature to harmonize the roles assigned to it by the "Quebec clause."

The anglophone claim to free commercial expression under s. 2 of the *Charter* would also be supported by s. 27 of the *Charter*, the "multicultural heritage" clause. That section says that the *Charter* should be read "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." It can be questioned whether s.

27 should be used to support an expansive interpretation of the rights in the *Charter* that benefit only a certain group. The anglophone claim to free commercial expression, however, would be based on a guarantee that applies to all ethnic and cultural groups, including those whose language is neither English nor French. A court would have to be impressed that s. 27 speaks of the "preservation and *enhancement*" of the multicultural heritage of Canadians. There would not be a sharp contrast with the "the role of the Quebec legislature to preserve and *promote*" the distinct identity of Quebec. A court would also have to respect the insistence in s. 16 of the 1987 Accord that the "Quebec clause" does "not affect" the multicultural heritage clause.

The "non-derogation" section of the "Quebec clause," s. 2(4), guarantees that Parliament has not lost any of its existing authority, including its authority in language matters. Parliament will continue to be able to work towards promoting bilingualism in Quebec in various ways. The spending power can continue to be used to provide direct grants for individuals to study the other official language. The "trade and commerce" and "criminal law" powers can continue to be used to require that most product labels be in both languages; see the *Consumer Products Labelling Act*, S.C. 1970-71-72, c. 41, s. 18; and the bilingual packaging regulations, *Consumer Packaging and Labelling Regulations*, C.R.C., c. 417, s. 6(2); and *Re Dominion Stores* (1985), 54 Nfld. & P.E.I.R. 228 (Nfld.S.C.), upholding the constitutional validity of the Act.

The Canadian and Quebec charters limit the exercise of authority that Quebec has under the federal-provincial division of powers. But what is that starting point, the initial authority of the province, in the case of language? The general answer is affirmed in the companion case to the decision of the Quebec Court of Appeal in *Chaussure Brown's*. In *Devine c. Quebec (Procureur Général)* (1986), [1987] R.J.Q. 50, 5 Q.A.C. 81, the Court of Appeal rejected a challenge to the French-only sign provisions which was based on much more limited grounds than those in *Chaussure Brown's*. The action in *Devine* was brought before the Canadian *Charter* came into force. It was also brought before the *Quebec Charter* was amended to make the freedom of expression guarantee supreme over ordinary legislation. The challengers in *Devine* contended primarily that the Quebec legislature had no authority under the federal-provincial division of powers to prohibit the use of English in signs.

The majority of the Court rejected the argument. It cited case law, including the Supreme Court of Canada's decision in *Jones v. Attorney General of New Brunswick* (1974), [1975] 2 S.C.R. 182, 45 D.L.R. (3d) 583, and academic commentaries to hold that "language" is not a discrete subject matter for the purposes of the federal-provincial division of powers. It is neither "federal" nor "provincial." Parliament or the provinces can regulate language matters connected with other matters that are assigned specifically to Parliament or to the provinces. The majority concluded that provinces have authority over matters that include commercial signs and so could regulate the languages used on them. The dissenting opinion of Mr. Justice Paré denied that the French-only sign law had anything to do with the promoting of any "commerce" purpose

that the legislature might have had. He distinguished the *Mackell* case (*Trustees of the Roman Catholic Separate Schools for the City of Ottawa v. Mackell* (1916), [1917] A.C. 62, (*sub nom. Ottawa Separate School Trustees v. Mackell*) 32 D.L.R. 1), in which the Privy Council upheld the right of Ontario to make English the exclusive language of instruction in Ontario. (Students could be given classes in how to speak French if doing so did not interfere with their acquisition of English). Mr. Justice Paré figured that, however unjust the purpose was, at least the Ontario legislation furthered an educational aim—ensuring that francophone students would acquire a perfect knowledge of English. I find the distinction unpersuasive. The Quebec legislature could fairly be said to be trying to give a French “face” to commerce in Quebec. At the same time, I would reiterate my belief that, in some cases, attempts by a province to suppress the use of the other official language amount to an unconstitutional interference with a person’s status as a Canadian—as a citizen with the right to participate fully in federal public life and in matters within federal jurisdiction. It seems right to concede that the principle just mentioned probably does not apply to a French-only sign law; other than a marginal effect on interprovincial tourism and trade, it is difficult to see how the prohibition on bilingual signs impairs rights and privileges that flow to a Quebecker as a resident of Canada. Mr. Justice Montgomery also dissented in *Devine*. He agreed with Mr. Justice Paré that the French-only sign law was not “in respect of [intraprovincial] trade and commerce,” and added:

If there be any doubt in this matter, and in my mind there is none, I would look at the presumed intention of the Parliament of the United Kingdom in enacting the B.N.A. Act. I find it utterly inconceivable that that Parliament, sitting in England, had the slightest intention of giving to any province the right to ban under the threat of penalty the use of the English language, now one of the two official languages of Canada.

The Supreme Court of Canada very likely would uphold the *Devine* majority view that the National Assembly of Quebec does have authority under s. 92 of the *Constitution Act, 1867* to prohibit the use of English on commercial signs. The precedents seem to weigh strongly on the majority side. Furthermore, the *Canadian Charter* and the *Quebec Charter* are more supple bases for balancing majority aspirations and minority language rights than is the federal-provincial division of powers. The “balancing act” clearly is contemplated by the *Canadian Charter*, whereas all sorts of doctrinal confusion and strain would be involved in protecting minority rights under sections 91 and 92. Furthermore, frustration among Quebec nationalists with the legal shape of federalism in Quebec is bound to be less when a ruling is based on the freedom of expression rules of the charters, which the legislature can override, than on the federal-provincial division of powers which cannot be altered unilaterally. Once again, it should be reiterated that, in cases more severe than commercial sign restrictions, the courts ought to uphold language rights that flow from the federal-provincial division of powers. The “Quebec clause” likely would not make much difference in the outcome. The recognition of the “presence” of English-speakers in Quebec will not sup-



port the attack on the French-only law because the “non-derogation” provision, s. 2(4), provides that nothing in the clause limits the authority of a legislature with respect to language. On the other hand, the recognition that Quebec is a “distinct society” and that it has a duty to “preserve and promote its distinct identity” probably cannot be used as an additional argument in favour of French-only signs. It is arguable and, I think, right that the anglophone presence should be viewed as part of the “distinct identity” of Quebec; it is undeniable that Quebec has a duty to “preserve” the anglophone presence. Thus the “Quebec clause” would only reaffirm what no one contested in *Devine*—that Quebec can require the use of French on signs. It would not have much affect on the likelihood, which happens to be very high, that the Supreme Court would find that the federal-provincial division of authority permits Quebec to require French-only signs.

### Summary.

To summarize the analytical conclusions so far:

— the constitutional safeguards for the English minority in Quebec did not represent significant impediments to the goal of maintaining French as the predominant language of Quebec. The “distinct society” language of the Quebec clause was by no means a necessary “remedy” to any unreasonable restrictions in the *Charter*. The reasoning of the Quebec Court of Appeal in upholding *Charter* challenges has been that francisation is a legitimate goal for Quebec legislation but, on the facts of each case, the suppression of minority rights was not necessary to secure the “quality and influence” of the French language in Quebec;

— the “Quebec clause” should not, and probably will not, significantly undermine the extent to which courts will uphold minority rights in Quebec under s. 133 of the *Constitution Act, 1867* (the right to use English in the legislature and the courts), s. 23 of the *Charter* (minority language educational rights) and s. 2 of the *Charter* (free expression);

— the main adverse effect of the “Quebec clause” on language rights may be seen in the legislatures, rather than in the courts. The “distinct society” language may be a useful rhetorical weapon for Quebecers who favour extensive state regulation of language matters and who oppose the spread of bilingualism among francophones. A more self-confident Quebec government of the future might be inclined to relax the legal controls on language use and encourage more francophones to acquire a knowledge of the other official language. Its more dirigiste and parochial opponents may contend that the Constitution of Canada directs the Quebec legislature to “promote” the distinct (understood as French) identity of Quebec. In the other nine provinces, the “Quebec clause” may be read, even if misread, as mandating a Canada in which most non-Quebeckers speak English, and only English.

### The "Quebec Clause" and Matters Other than Language.

So far the analysis has focussed on the effect that the "distinct society" phraseology might have on language rights and policy. As s. 2(1) of the "Quebec clause" talks about language, and only language, it is fairly certain that the "distinct society" language is concerned largely, indeed primarily, with language issues. I have the vivid memory of a senior bureaucrat, working for a key government, telling me during a break in a drafting session that the "distinct society" phraseology had "nothing to do with language—of course." I regret that I was too dumfounded to ask the official for an elaboration. My guess is that the official was thinking that, since s. 2(1) already addresses language, the "distinct society" clauses must be about other matters such as culture, legal institutions and so on. But that line of reasoning would be ridiculous; it is inconceivable that Quebec would be recognized as having a role to preserve and develop its "distinct identity" in matters of culture, legal institutions and so on—but not language. The fact that a very senior participant could entertain such a remarkable view about the "distinct society" clause is a stark indication of how little opportunity there was for reflection and discussion. It also indicates just how cryptic the phrase "distinct society" is. One obvious question is this: why didn't the framers expressly determine whether the "distinct society" phraseology refers largely or primarily or exclusively to language?

In its working paper "Mastering our Future," the Liberal Party of Quebec claimed that:

It is high time that Quebec be given explicit constitutional recognition as a distinct society, with its own language, culture, history, institutions and way of life; (see "Extracts From *Mastering our Future*" in P. M. Leslie, ed., *Canada: The State of the Federation, 1985* (Kingston: Institute of Intergovernmental Relations, 1985) at 77).

During the May 1987 debate over Meech Lake in the Quebec National Assembly, pressed by the Parti Québécois to seek a definition of "distinct society" that mentioned language, Premier Bourassa responded that any mention of language would encourage the courts to confine "distinct society" to matters of language—to the partial or total exclusion of other important matters. In the officials' meetings a few days before the Langevin Block meeting, and at that meeting itself, the federal government circulated drafts that would have identified the French-speaking majority of Quebec as part of its "distinct identity." In the end, Premier Bourassa abided by his original concern that to state one feature would be to exclude others.

In order to determine what else besides "language" makes Quebec a "distinct society," it might be helpful to figure out what "society" means. Political theory often distinguishes between the "state" and "society;" the "state" is understood as the institutions of government, the latter as referring generally to the way people carry on their lives and interact with each other. A totalitarian state is one in which an attempt is made by the state to impose one pattern of life on all of the people. A liberal state is one which leaves many aspects of human life to be shaped and determined by

the free choice of individuals and the groups and institutions they form quite apart from state intervention. It might be argued that "society" in "distinct society" refers to ways of life apart from the formal structures of government; having a civil law system may be part of the way a state is run, it might be said, but is not a characteristic of a "society." Language and culture are matters of society, the argument would allow, but having a civil law system or a Crown investment corporation is not.

If "society" refers to the ways of life of a certain aggregation of human beings, does a "distinct society" have to have one characteristic way of life? Does the "distinct society" phraseology somehow mandate that the legislature and government of Quebec have a mandate to impose one cultural pattern on all Quebecers?

To respond to the possibilities just raised it is crucial to examine the only other use of the word "society" in the Canadian Constitution. The *Charter* states in s. 1 that its guarantees are subject only "to such reasonable limits prescribed by law as are demonstrably justified in a free and democratic *society*" (emphasis added).

The *Charter's* use of "society" seriously undermines the case for reading "society" as meaning "nation" or "people" or, in any way, "a culturally homogeneous unit."

(i) In considering a *Charter* case, the courts do not simply consider whether a governmental measure is justified by reference to some abstract, hypothetical "society." The courts consider the actual social conditions in the territory connected with the government whose actions are being challenged. Thus "Ontario" can be a society for the purposes of the *Charter* even though it contains many large linguistic and ethnic minorities. If "society" has roughly the same meaning in the "Quebec clause," then it is wrong to suppose that it refers to a linguistically or ethnically homogeneous unit.

(ii) The "societies" contemplated by section 1 of the *Charter* are supposed to be "free and democratic" (according to s. 1 itself), tolerant of ethnic differences (s. 15), supportive of their "multicultural heritage" (s. 27) and, in the case of New Brunswick, officially bilingual (s. 20). The sort of "society" contemplated by the *Charter* certainly is not an homogeneous or totalist one. Quebec continues to be bound by the *Charter*. Moreover, the fact that the framers took the trouble, in s. 16, to say that the "distinct society" clause does not affect the multicultural heritage guarantee in s. 27 of the *Charter* only reaffirms that Quebec's "distinct society" is not necessarily a culturally homogeneous one. The endorsement, in the "Quebec clause" itself, of the ongoing presence of anglophones in Quebec further establishes that "society" in the Quebec clause does not mean an ethnically or culturally unified entity.

(iii) The *Charter* is set in the framework of Canadian federalism. It would be surprising, for example, if a court found that Ontario had violated the guarantee of "equal protection of the

law" in s. 15 of the *Charter* by failing to pay subway workers under its jurisdiction as much as the federal government pays train workers under federal jurisdiction. When a court examines whether provincial legislation is justified in the context of a "free and democratic" society in Ontario, it should look primarily at the impact of provincial laws on social conditions within provincial jurisdiction. "Society," for the purposes of the *Charter*, does not refer to all aspects of life within the territorial boundaries associated with a political unit. To say that Quebec is a "distinct society within Canada" does not necessarily mean that the territory marked "Quebec" on a map is a discrete and sealed-off enclave within the territorial limits of Canada. Quebecers continue to be citizens of Canada with direct political relationships with the other citizens of Canada and with, one would hope, a web of social, economic and cultural affiliations with other Canadians. The Langevin Block meeting amended the Meech Lake communique by inserting a non-derogation clause that protects, among other things, the authority of the federal level of government. It remains deplorable that the word "distinct" will assist those who want to portray Quebec as a fully discrete enclave. It would be much better if the word "distinctive" was used.

The use of "society" in the *Charter* does support the contention that legal and governmental institutions are elements of the "distinct society" in the Quebec clause. The support comes from the fact that s. 1 of the *Charter* does refer to a "free and democratic" society. "Democratic" refers to the nature of government institutions. "Society" in the "Quebec clause" may also encompass, therefore, the governmental and legal institutions that Quebec has developed.

The Constitution of Canada has always recognized and protected Quebec's civil law system. The *Constitution Act, 1867* assigned jurisdiction over "property and civil rights" to the provinces; s. 92(13). The courts from the beginning gave the phrase a very broad construction and, on at least one occasion, cited the protection of the civil law system of Quebec as a reason for doing so; see *Citizens Insurance v. Parsons* (1881), 7 App. Cas. 96, 1 Cart. 265 (P.C.). Section 94 of the *Constitution Act, 1867* authorized the common law provinces to get together with Parliament and establish uniform laws on property and civil rights; but it was not contemplated that Quebec would ever abandon its special system of law and procedures. Section 98 of the *Constitution Act, 1867* gave further special protection to the civil system of Quebec by requiring that the federal government appoint only members of the bar of Quebec to superior courts in that province. The proposed *Constitution Act, 1987* would entrench the practice of appointing three members of the Bar of Quebec to the Supreme Court of Canada. The only legitimate justification for having a guaranteed and, in terms of population, disproportionate quota of Quebec judges on the Court is the necessity of having their expertise on civil law cases originating in the province of Quebec. Indeed, the original Meech Lake communique referred to judges from the "civil bar," not Quebec. My recollection is that the change to "Quebec" was

agreed to at officials' level drafting sessions only because several participants found "any province with a civil law system" a long-winded and circumlocutious way of saying "Quebec." In any event, the "distinct society" clause hardly was necessary to ensure that Quebec is able to continue to develop its distinctive legal system.

Gil Rémillard, the Quebec Minister for Canadian Intergovernmental Affairs, has cited the caisses populaires as the sort of non-linguistic institutions that might be protected by the "distinct society" language; see *Le Quebec et le Lac Meech* (Montreal: Guerin literature, 1987) at 437. The caisses populaires are Quebec financial institutions that are similar to banks, have long historical standing and which have been regulated by the province. It is difficult to see how the "Quebec clause" would make any practical difference in this regard. The Supreme Court of Canada has held that the scope of the federal authority over "banking" is determined largely by the definition of "bank" that Parliament itself uses in its legislation; *Canadian Pioneer Management v. Labour Relations Board of Saskatchewan* (1980), [1980] 1 S.C.R. 433, 107 D.L.R. (3d) 1. The existing *Bank Act*, S.C. 1980-81-82-83, c. 40, does not extend to the caisses populaires and there is no reason to believe that the existing provincial laws in this area are invalid. Section 2(4) of the "Quebec clause" ensures that Parliament's authority to extend its regulation to the caisses populaires has not been diminished.

Just as another example for study: would the "Quebec clause" protect the Quebec public investment corporation, the Caisse de dépôt? There does not appear to be any current constitutional jeopardy to the existence or operation of the Crown corporation, whose mandate is to "create Quebec industrial complexes and to participate in the management and financing of medium-sized and large Quebec firms;" see P. Fournier, "The New Parameters of the Quebec Bourgeoisie" in A. G. Gagnon, ed., *Quebec: State and Society* (Toronto: Methuen, 1984) at 215. The Caisse is subject to various federal laws of general application, of course, but those enacted to far do not seem to have posed any difficulties. Section 2(4) of the proposed *Constitution Act, 1987* guarantees that Parliament would retain its authority to make new laws with respect to Quebec financial institutions. All in all, the question of whether the Caisse de depot is encompassed by the "distinct society" concept seems to be of negligible practical importance. In theory, it is doubtful whether the Caisse ought to be protected by the clause. A public investment fund is not as deeply rooted a Quebec tradition as the caisse populaire, nor is it unique to Quebec. It should be remembered that the political accord that accompanies the proposed *Constitution Act, 1987* refers to "the principle of equality of all the provinces." The "distinct society" clause certainly includes language matters and probably some other traditional and distinctive aspects of Quebec life. But it surely does not extend to purely economic matters. (It might be possible, though, to mount some sort of argument that the Caisse helps in some way to provide more career opportunities that can be filled by French-speakers).

The analyses of the caisses populaires and Caisse de dépôt examples used some ideas that will be germane to any discussion of the impact of

the "distinct society" clause on the federal-provincial division of powers. These ideas will now be explored in more depth.

Section 2(4) provides that:

. . . nothing in [the "Quebec clause"] derogates from the powers, rights or privileges of Parliament or the Government of Canada . . .

The rest of the clause hints at the historical origin of the provision: Quebec's anxiety that sections 2(1)(a) and 2(3)—which affirm the existence of, and the need to preserve, the presence of English-speaking Canadians in Quebec—would somehow limit the pre-existing authority of the National Assembly in language matters. Several other participants took advantage of Quebec's willingness to add non-derogation language by pressing for a non-derogation clause that would protect the authority of Parliament as well, and not only in language matters.

The safeguard of Parliament's position in s. 2(4) can be interpreted so that it prevents any expansion of the scope of Quebec's legislative authority. This "same playing field, new rules" argument would essentially confine the relevance of the "distinct society" sections to defining what the provincial government of Quebec can do with the legislative authority it currently has; for example, the sections may help Quebec to resist changes to language laws that it enacts under the authority it has always enjoyed under the *Constitution Act, 1867*. But Quebec in no way would be able to deal with matters currently beyond the scope of a province. Here is how the argument would go:

(i) Parliament obviously has not lost any of its authority in areas in which it currently enjoys exclusive jurisdiction.

(ii) Although the *Constitution Act, 1867* seems to contemplate that almost all power will be divided into areas of exclusive jurisdiction, the courts have found over the years that many regulatory areas can be handled by both Parliament and the provinces, with Parliament prevailing in case of conflict. Using the "distinct society" sections to expand the areas in which Parliament and Quebec have concurrent authority would diminish the authority of Parliament, even though Parliament would retain paramount authority. The reason is that Parliament cannot always be sure that the subject area will be regulated (and left unregulated) in the manner Parliament has prescribed. Quebec will be able to add its own legal strictures as long as they do not conflict. The only way to prevent Quebec "add-ons" would be for Parliament to specify (or somehow imply)—in advance, or after Quebec acts—that it intends its rules to be exhaustive of governmental intervention in an area. But coping with the impact of Quebec's forays is an additional burden on Parliament.

Point (i) is incontrovertible. Point (ii) would not necessarily be compelling in every case. The force of the argument—that Quebec does not ever acquire concurrent authority, with federal paramountcy—would seem to depend on just how much of a burden or embarrassment it is for

the federal level of government to cope with expanded activities by Quebec. In many situations, elected officials or the courts may be satisfied that it is not a significant imposition on Parliament to determine that it must signal its intention that the provincial level of government is to butt out entirely. On the other hand, the burden or embarrassment to Parliament of concurrent Quebec authority may sometimes be considerable. The fact that Quebec is stated to be a distinct society "*within Canada*" should, in and of itself, foreclose the possibility of Quebec sending its own ambassadors abroad. But point (ii) would have considerable force in its own right. It would be embarrassing to Canada's dignity and ability to sustain a consistent foreign policy if Quebec were to start generally sending its own ambassadors to international organizations composed of sovereign states. It would be an ongoing source of domestic political tension if the federal government had to keep forbidding Quebec from exercising its inherent right to send ambassadors. The "distinct society" clause might be invoked, though, to affirm the practice of Quebec's sending its own delegations to conferences of francophone countries. Should the federal government have a foreign policy reason for wanting to keep Canadians away, Quebec would have to defer. Given the strong interest and tradition behind Quebec's attendance, however, and that fact that these conferences are a very special case, it would not be too much of an imposition on the federal government to place upon it the burden of having to say "no" if it has any objections.

The 1987 Accord includes not only a package of constitutional amendments, but a political accord that consists of a preamble and four specific commitments. The preamble states:

Whereas first ministers, assembled in Ottawa, have arrived at a unanimous accord on constitutional amendments that would bring about the full and active participation of Quebec in Canada's constitutional evolution, *would recognize the principle of equality of all the provinces*, would provide new arrangements to foster greater harmony and cooperation between the Government of Canada and the governments of the provinces (emphasis added) . . .

The first commitment is that the eleven governments should submit to their legislatures "a resolution...in the form appended hereto." The draft resolution includes not only the texts of the amendments that will be a part of the Constitution of Canada, but a preamble as well. The preamble includes a reiteration of the language just quoted, including the reference to "equality of all the provinces." References to "equality of all the provinces" can be used on behalf of the "same playing field" argument; that is, they can be invoked to resist arguments by Quebec that it has acquired new concurrent authority in fields previously reserved exclusively to federal jurisdiction. The point, quite simply, would be that it is a denial of the principle of "equality of all the provinces" to allow Quebec to have a more expanded field of authority than the other provinces.

A technical issue here is whether it is right to give any legal weight at all to the "equality of all the provinces" references. The political accord is not a constitutional instrument. Indeed, it almost certainly is intended

to be a strictly political, and in no way constitutional, understanding. The preamble to the resolution that Parliament and the legislatures pass will not itself be an amendment to the Constitution; it is merely the introductory part of a motion that will be passed in order to add new words to the Constitution. So the "equality of all the provinces" references can only be used legitimately as an aid in interpreting the "distinct society" clause. What then is the relevance of statements by "framers?" It used to be that the courts would not use legislative debates to interpret either ordinary statutes or constitutional texts. It was believed, among other things, that a statement by a particular member of the legislature is not a reliable guide to its collective intention.

In recent times, however, the rule has been relaxed in the constitutional area, and the Supreme Court of Canada has relied on the Confederation debates in interpreting sections of the *Constitution Act, 1867*; see *Reference re Legislative Authority of Parliament to Alter or Replace Senate* (1979), 102 D.L.R. (3d) 1, (*sub nom. Reference re Legislative Authority of the Parliament of Canada in relation to the Upper House*) [1980] 1 SCR 54; *Attorney General of Canada v. Canadian National Transportation* (1983), [1983] 2 S.C.R. 206, [1984] 1 W.W.R. 193.

In an early and very important case on the interpretation of the *Charter* (*Reference re Section 94(2) of the Motor Vehicle Act* (1985), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536), the Supreme Court of Canada was asked to consider the meaning of the phrase "principles of fundamental justice" which appears in s. 7. The Court was asked to follow the interpretation advanced by Department of Justice bureaucrats who appeared before the Special Joint Committee [of the House of Commons and Senate] that examined the patriation proposal in 1981. The majestic-sounding phrase, those bureaucrats had submitted, was confined to strictly procedural matters. Mr. Justice Lamer of the Supreme Court of Canada responded in his judgment that the evidence was admissible, but of very little weight. The patriation package was the product of a "multiplicity of individuals"—Justice Lamer is vague about which ones would count—and not just a few federal public servants. Furthermore, said Justice Lamer, the meaning of the *Charter* should not be fixed forever by how it was understood in 1981. There should be the possibility of "growth, development and adjustment to changing societal needs." The reasoning of Mr. Justice Lamer does not readily apply to the use of the "political equality" references in the 1987 Accord. Here is why:

- (i) The "multiplicity of intentions" argument does not apply to the proposed 1987 constitutional amendments. The "equality of all the provinces" argument would be endorsed by the House of Commons and Senate and all ten provincial legislatures. It is these deliberative bodies that were vested by the *Constitution Act, 1982* with the legal authority to enact amendments to the Constitution. Modern political practice has allowed a special leadership role to the first ministers. (Section 37 of the *Constitution Act, 1982* actually entrenched a series of First Ministers' Conferences on constitutional reform with respect to aboriginal peoples). But even if the expression of intention by a first



minister carries extra weight, the fact of the matter is that all eleven first ministers formally adopted the "equality of all the provinces" language in the 1987 Constitutional Accord. It is true that various legislators and first ministers may have different conceptions about the precise meaning of the concept. Later interpreters will have to decide that for themselves. The point is that these interpreters will have a legitimate basis for invoking the "equality of all the provinces" concept as a significant factor in their reasoning.

(ii) The "need for flexibility" is also of little applicability. In the *Re Section 94(2)* case the "original intention" supposedly was to restrict sharply the meaning of "principles of fundamental justice"—to confine it to merely procedural matters. The substance/procedure distinction may be unnecessarily rigid. By contrast, in the 1987 Accord, the "equality of all the provinces" references are themselves open to different and evolving interpretations. The references would not create a sharp and immutable boundary on the effect of the "Quebec clause."

The appropriate conclusion, in my opinion, is that the "equality of all the provinces" references are a legitimate and significant guide to the interpretation of the "distinct society" clause.

The principle of "equality of all the provinces" ought to be read as a strong restraint on the extent to which the "distinct society" clause permits Quebec's provincial authorities to operate in new areas. The more the government of Quebec acquires jurisdiction in areas from which other provinces are excluded, the less equal they are. But it is stretching things to see the "equality of all the provinces" principle as an absolute restraint. The principle of equality of the provinces is just one principle, and the 1987 Accord makes it clear that there are some exceptions to it that involve alterations to the federal-provincial division of powers. Quebec will have much more influence than any other province on the membership of the Supreme Court of Canada and will be allowed, "for demographic reasons," to exceed by 5% its pro-rated share of immigrants into Canada. It should be noted that both these examples relate to obviously distinctive aspects of Quebec society—its civil system of private law and its largely francophone population. The examples certainly do not support attempts to use the "distinct society" clause to contend that Quebec has acquired new concurrent authority in areas such as taxation, economic regulation, interprovincial transportation, criminal law and so on.

An alternative attempt to reconcile the principle of "equality of all the provinces" with the recognition that Quebec is a "distinct society" would be this: to interpret the Constitution so as to extend to other provinces whatever jurisdiction Quebec acquires under the "distinct society" sections. This argument may initially look irrational—if the government issues taxi chits to handicapped people, does individual equality mean it should issue taxi chits to fully able people? In fact, reasoning of this sort was largely accepted in formulating the rest of the 1987 constitutional package. Quebec wanted the right to compensation in case it "opted-out" of amendments transferring power to the federal government; agreement

was facilitated by giving the right to all of the provinces. Quebec wanted to be able to constitutionalize immigration agreements between it and the federal government; agreement was facilitated by giving the right to all of the provinces. Quebec wanted a say on Supreme Court appointments; so all the provinces acquired a say (albeit, somewhat different from that accorded Quebec).

An interesting comparison is with Canada's history of favouring "universality" in the social welfare area—including unemployment insurance, old age pensions and medicare. Some Canadians could easily pay their health cost bills out of their own pockets and most Canadians could manage it, albeit with considerable financial discomfort. But many Canadians simply could not afford the cost of treatment. Canada's government-operated medical system is based on the principle that a government insurance scheme should pick up all of the costs for everyone. It is believed, among other things, that universality promotes:

- dignity: extending the benefits to all means that no one will feel demeaned by having to demonstrate need;
- administrative simplicity: the administrative costs of sorting out who is and who is not needy would be high;
- political saleability: political support for the program on the part of the middle classes can be guaranteed by giving them the benefits of the program.

The case for extending Quebec's gains to other provinces is different in many respects. On the "dignity" issue: Mr. Trudeau has always insisted that giving Quebec special powers is actually demeaning to the people of the province and to its government. In *Federalism and the French Canadians*, the argument was stated with what might appear to be the rationality of a geometer: if the central government has especially little say in the lives of Quebecers, Canadians will give Quebecers especially little say in the central government. But was Trudeau in fact being somewhat irrational in believing that the average Canadian would perceive and insist on the symmetry? The leaders of many Canadian organizations seem to be sympathetic to claims for status by Quebec and by native groups, yet they do not acknowledge that more internal autonomy implies a lesser right to participate in the governance of the larger community. I believe, however, that Canadians eventually would react against special status in the way Mr. Trudeau has warned. The "average Canadian" might not argue with Trudeauvian abstraction; but he might say something like "how can that Quebecker be federal Minister for the Department of Communications (or whatever) if she can't implement any of her policies in her own damn province?" In his famous 27 May 1987 letter on Meech Lake, Mr. Trudeau added another consideration cast in terms that were more vehement and personal. Does "special status" not imply that Quebeckers lack the self-confidence and ability to compete and thrive without special concessions?

The provincialist politicians, whether they sit in Ottawa or in Quebec, are also perpetual losers; they don't have the stature or the vision to dominate the Canadian stage, so they need a Quebec ghetto as their lair...

Does not the very nature of immaturity require that "the others" not get the same "trinkets" as we? (P.E. Trudeau, "Nothing left but tears for Trudeau" *The Globe and Mail* (28 May 1987) A7).

Extending new Quebec privileges to other provinces, however, is not necessarily the appropriate remedy to Mr. Trudeau's criticism. Maintaining equality with other provinces may be useful symbolism in some respects; but dividing Canada into ten ghettos is not an improvement on setting aside one.

With regard to "administrative simplicity": "universality" in social programs makes running them easier and cheaper; giving all ten provinces (rather than just Quebec) concurrent authority in areas presently reserved to the federal government makes governing harder and more expensive. The federal government will have to develop, negotiate with a provincial government, and co-ordinate as many as ten different variations on a central theme, rather than implementing one standard policy and one adjusted variation for Quebec.

With regard to "political saleability": there is no question that universalizing concessions to the provincial government of Quebec was at the heart of the Meech Lake "success." (It seems strange to use the word "universalizing" when referring to a process of responding to parochialism). It is not surprising that provincial premiers should be enthusiastic about obtaining more power. It is doubtful that their constituents, if informed and consulted, would have been equally blithe. It is not surprising that provincial premiers should see "provincial equality" as an elementary standard of justice. But is it? Not from the vantage point of a free and equal citizen of Canada. The issue is more complicated. Giving the provincial government of Prince Edward Island a vote on constitutional reform which is equal to that of Ontario means that the political voice of an Islander, channeled through the provincial government, is amplified almost seventy times compared to that of a resident of Ontario. The provincial government of 9.2 million has no more say than that of the government of one hundred and thirty-eight thousand. The amending formula issue belongs to the class of cases where a provincial government is allowed a voice on national institutions. When the issue is "what is the jurisdiction of a provincial government?" the principle of provincial equality does derive support from the principle of individual equality. Equal jurisdiction for each province means that Canadians have a roughly equal ability to participate in a form of local government and a roughly equal ability to say what goes on within the boundaries of another province.

The universalizing approach—"all provinces get Quebec's jurisdictional bonus"—in interpreting the "distinct society" language would not necessarily work to Quebec's advantage. If a jurisdictional bonus to Quebec means a jurisdictional bonus for all the provinces, some interpreters—including the federal government and the Supreme Court of Canada—may be inclined to deny that Quebec itself gets the bonus. Furthermore, foisting an incremental nine partners on the federal level of government in a regulatory area may be costly to its ability to plan and

manage efficiently, and costly to individuals in terms of overregulation and paying for governmental operations. As the taxi analogy shows, the needs of one may be a luxury for others. A jurisdictional bonus that Quebec obtains in order to protect its language, or special legal system, may be entirely, or largely, unnecessary for another province. The "distinct society" language very specifically singles out Quebec as being special, at least in its linguistic character; and the "equality of all the provinces" principle is not expressly mentioned in the "Quebec clause," or anywhere else in the actual constitutional amendments proposed by the 1987 Accord. Thus, in some cases, a plausible argument could be made for restricting a jurisdictional gain to Quebec alone.

To summarize the effects of the "distinct society" clause on the federal-provincial division of powers:

— any expansion of provincial authority is confined by the requirement that it be related to the "distinctness" of Quebec. The "Quebec clause" itself indicates that Quebec is "distinct" in its linguistic character; other sections of the Constitution recognize that it has a civil law system. Little or no expansion of provincial jurisdiction may be necessary to enable Quebec to participate adequately in the definition and development of its "distinctness" in these regards. "Distinct" should not be read as extending to matters—such as economic and financial ones—that are not integral parts of a unique and recognized Quebec tradition;

— any expansion of provincial authority is confined to acquiring concurrent but subordinate authority in areas that presently are reserved exclusively to the federal level of government. The existing authority of the federal level of government is expressly protected by the "Quebec clause." Interpreters of the "Quebec clause" should be judicious in permitting expanded concurrence; it may impair the efficiency and political manageability of federal efforts in an area, and may produce expensive and constricting over-regulation from the public's point of view;

— the recognition in the political accord of the "equality of all the provinces" is a proper and significant interpretive guide to the "distinct society" language. The principle affirms that Quebec does not acquire "special status" across the board; Quebec cannot be allowed jurisdictional gains that seriously disrupt the equality of the provinces. Interpreters can and should honour the "equality of all the provinces" principle by limiting the extent to which the "distinct society" clause expands Quebec's jurisdiction. Occasionally, however, it may be appropriate to find that the Constitution gives all the provinces whatever jurisdiction it is that Quebec "needs."

### Section 16 of the 1987 Accord: The "Quebec Clause" Does Not Adversely Affect Multiculturalism or the Rights of Aboriginal Peoples.

The next stop on the tour is uninviting. Section 16 of the proposed *Constitution Act, 1987* is the only substantive provision of the bunch that will not be installed in any of the existing mansions of the Constitution. The "Quebec clause" itself will be situated in the lobby of the main palace, the *Constitution Act, 1867*; others will be added to one of its familiar chambers upstairs. A few will be stuck in the attic. (Not many of us frequent visitors to the Constitution spend much time in s. 106—which authorizes Parliament to make appropriations out of the Consolidated Revenue Funds—but the new rule on the federal spending power is going to be s. 106A). Some sections are going to find a home in currently vacated parts of the *Constitution Act, 1982*. But only section 16 will be lodged in the *Constitution Act, 1987*, a text that otherwise would be of no independent interest whatsoever. Section 16 is not only situated in a bad neighbourhood. It is an eyesore. It contains absolutely nothing that is immediately comprehensible. The reader has to look up the sections which are cross-referenced before discovering that s. 16 is talking about the meaning of Canadian nationhood; that it is about Quebec's identity as a distinct society, multiculturalism and aboriginal peoples. There actually are several political explanations for the out-of-the-way location and grotty appearance of s. 16. Several provinces were reluctant to make the concession to multiculturalism; having conceded on substance, they prevailed in form. The "Quebec clause," as it appears in the *Constitution Act, 1867*, will look to be unmarred. One provincial government (not Quebec's) considered it so politically incendiary to place words such as "rights of the aboriginal peoples" or "multiculturalism" in the 1987 amendments that it insisted on the use of cross-references to numbered sections of the existing Constitution.

Section 16 belongs to that booming constitutional category, "the non-derogation clause." Some background might be helpful here. The definitive legal history of patriation, by Romanow, Whyte and Leeson, is entitled *Canada...Notwithstanding*. There is poetry in the title; a multiplicity of meaning is suggested by a few words. The title refers to the survival of Canada, indeed, its attainment of complete autonomy despite the ferocious political battles that preceded Patriation. The title also suggests the compromised nature of the constitutional product. (No one seemed to be fully satisfied with the *Constitution Act, 1982*: "And No one Cheered" is the title of a collection of essays on the political history of patriation). The title also evokes the voice of the *Constitution Act, 1982*; there are simple and inspiring statements of high principle, but they are often modified by niggling lawyer talk. There are about half a dozen "notwithstanding" clauses in the *Constitution Act, 1982*; clauses that say "despite what some other clause seems to say, this clause here is the law." But "Canada: No Derogatory Remarks" would have conveyed the style of the Act just as well. There are even more clauses in the *Constitution Act, 1982* that say, in effect, "in case of conflict, that other clause over there takes precedence over what we're saying right here."

"Non-derogation clauses" frequently are an attempt to preclude the operation of the legal principle *expressio unius est exclusio alterius*; that is, "the expression of one thing is to the exclusion of the other." Here's an example of how the principle works. Suppose a sign says "no cigar or pipe smoking permitted here." A reasonable inference is that cigarette smoking is permitted. The authors of the sign would have included cigarettes on the list if they had intended them to be forbidden, wouldn't they? And it is easy to attribute to the authors a rational motive for excluding cigarettes—they tend to be less objectionable to members of the public. (The ability to attribute a rational motive is important; if a sign said "no knives or guns may be brought into this park," it would not be reasonable to infer that bazookas and flamethrowers are permitted).

Now for an example from the *Charter*. Sections 16 to 20 of the *Charter* guarantee certain rights with respect to the use of English and French. There was concern that someone would mistake the list as being exhaustive of all the rights that exist with respect to language. In the 1970's, in the *Thorson* case (*Thorson v. Attorney General of Canada* (1974), [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1), a highly respected jurist had brought an action in his own name to declare the *Official Languages Act*, R.S.C. 1970, c. O-2, unconstitutional, on the basis that s. 133 of the *Constitution Act, 1867* exhaustively stated the extent to which federal institutions were bound to serve the public in both languages. The Supreme Court of Canada actually settled the matter in *Jones v. Attorney General of Canada* (1974), [1975] 2 S.C.R. 182, 45 D.L.R. (3d) 583, in which Mr. Thorson acted as counsel for another litigant. The Supreme Court of Canada expressly rejected the application of the *expressio unius* maxim to s.133. The Court could not, it appears, imagine any good reason the framers might have had for supposing that s. 133 was exhaustive of federal authority with respect to language matters. To preclude a specifically "Thorsonian" claim with respect to sections 16 of *Charter*, the drafters of the *Constitution Act, 1982* added:

s. 16(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

To prevent other kinds of *expressio unius* claims, the drafters went on to add:

s. 21 Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

It is not clear that s. 21 would actually protect a statute like the *Official Languages Act*. Parliament has authority under the various sections of the Constitution to pass statutes dealing with language. In that sense, the *Official Languages Act* would contain rights that exist "by virtue" of certain provisions of the Constitution. More likely, though, s. 21 only refers to rights that are specifically defined or referred to in a section of the Constitution. So s. 21 probably does not cover most statutory or common law rights. Can you then invoke the *expressio unius* principle to conclude that sections 16 to 20 do indeed derogate from statutory or

common law rights? Has the non-derogation clause inadvertently resulted in the derogation of certain rights? Not in this case, because the *Charter* also includes:

s. 26 The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

But the example does illustrate a danger germane to the analysis of section 16 of the 1987 Accord. Because of the *expressio unius* trap, a non-derogation clause can in some ways extend or intensify the impact of a statement that the non-derogation clause was supposed to limit.

The genesis of section 16 is something like this. Manitoba proposed at an officials' level meeting that there be a non-derogation clause that would protect both *Charter* rights and the rights and status of aboriginal peoples. The proposal was not received favourably. One of the main functions of the "distinct society" sections, as I understand Quebec's point of view, is that they would bolster somewhat its ability to defend its legislation against *Charter* challenges. (An attempt has been made earlier in this discussion to show that the *Charter* probably never did amount to a significant obstacle to moderate francisation measures and that the "distinct society" language should not, and likely will not, make much difference to the outcome of court cases). From the liberal-centralist point of view, there was a certain, if small, amount of *expressio unius* risk in the Manitoba proposal. The "distinct society" sections are directions on how to construe the Constitution; if they cannot in any way affect the *Charter*, they must affect something else. About the only other candidate is the federal-provincial division of powers. An interpreter eager to give a certain weight to the "distinct society" clause would end up placing that entire weight on the side of enhanced legislative authority for Quebec.

To continue the story, at the Langevin Block meeting Ontario joined Manitoba in expressing concern over the impact of the "distinct society" clause on minority and individual rights. For a while, Ontario (with Manitoba's support) hung tough in favour of a proposal that the "distinct society" language would not "alter" the legislative authority of Quebec. The latter objected that the net result would be that the "distinct society" sections would end up doing nothing at all. Yet they were supposed to be more than merely symbolic, as s. 2(1)(a) of the "Quebec clause" is undeniably an active direction on how to construe the rest of the Constitution. Eventually a compromise was reached. The federal-provincial balance was protected to some extent by s. 2(4), and the constitutional position of aboriginal and multicultural groups was protected to some extent by s. 16.

Did it make any sense at all to single out aboriginal peoples and multicultural groups for protection? Actually, yes. To begin with, it made sense to protect aboriginal peoples and multiculturalism. The "two Canadas" language of the original Meech Lake communiqué was liable to be interpreted as an endorsement of the "two founding peoples" theory. When that language was deleted at the Langevin Block meeting, there still remained the possibility that some might misconstrue the "distinct society" sections as recognizing only one collectivity in Quebec. That col-

lectivity would be defined primarily in terms of francophones of long Quebec ancestry, although there would be a certain flavouring of anglophones of long Quebec ancestry. The prospect was galling for aboriginal peoples. They regard themselves as forming collectivities with special cultural and political rights. They believe their historical claim is generally of greater antiquity than that of French-speaking Quebeckers. Only months before, at the last constitutionally mandated conference on aboriginal peoples, first ministers had failed to agree on whether and how to entrench a right of aboriginal peoples to self-government. For Quebec native peoples, being constitutionally downgraded would have been a bitter sequel to the failure to proceed forward. For multicultural groups as well, any characterization of Canada or Quebec in terms of old-fashioned "English-French" dualism would have been demeaning.

There actually are some significant advantages to the present structure of s. 16. It addresses one special category of threat—that of reading Canada or Quebec in a way that disregards or demeans the cultural and ethnic diversity that currently is recognized in the Constitution. The response to this special problem cross-cuts different parts of the Constitution; s. 16 shields sections that belong variously to the *Charter*, to Part II of the *Constitution Act, 1982* and to the *Constitution Act, 1867*. These two features—the attempt to address one special kind of problem, and the reference to sections in various parts of the Constitution—diminish the extent to which s. 16 creates an *expressio unius* threat to other rights.

The *expressio unius* threat is this. Someone might look at s. 16 and argue:

Look, the framers of s. 16 said that the "Quebec clause" does not affect rights W, X, Y and Z. By not mentioning any other rights, they must have thought that those other rights were potentially affected.

Because of the way s. 16 is drafted, it is possible to respond:

Not really. First of all, W, X, Y and Z is not a list of four categorically different items that the framers chose from all possible items. On the contrary, W, X, Y and Z all belong to the same bag—the constitutional rights of people who do not belong to the ethnic or cultural majority. It is perfectly reasonable to suppose that the framers addressed themselves to one special problem and simply choose not to regulate other potential problems expressly.

In particular, you can't argue that by mentioning sections 25 and 27 of the *Charter*, the framers acknowledged that *all* other sections of the *Charter* are affected adversely. The structure of s. 16 does not prove that the framers picked and chose among all the sections of the *Charter* and ended up shielding only two of them. It is at least as plausible to infer that the framers addressed themselves to one particular concern—the constitutional position of ethnic and cultural groups which are not among the "two founding peoples"—and dealt with it by mentioning certain constitutional sections, a couple of which happen to be in the *Charter*.



(As a matter of historical fact, the latter picture is essentially correct. As far as I know, at no time did first ministers or officials systematically review the *Charter* and select which sections should be shielded from the effect of the “distinct society” clause. Indeed, they did not even canvass the effect of the “distinct society” clause on key rights such as freedom of expression (s. 2), mobility (s. 6), equality (s. 15), official bilingualism (ss. 16 to 22) or minority language educational rights (s. 23). About the only decisions that were made advertently were that the entire *Charter* would not be shielded, and that the concerns of aboriginal peoples and multicultural groups would be addressed).

It is not a legitimate implication, therefore, that every other section of the *Charter* is affected by the “distinct society” clause. It could be that even when taken in full account—which will usually be by way of factoring into the “reasonable limits” calculation—the “distinct society” language will not have much effect on the outcome of *Charter* cases anyway. But in some cases, the “distinct society” language may be considered as being beside the point. It might be said of s. 23 of the *Charter*, for example, that it is a very specific response to a very specific set of problems, that “reasonable limits” arguments essentially are irrelevant and that there is thus no way that the “distinct society” language can affect its interpretation. (The same conclusion might also be supported by the fact that the recognition of the English-speaking “presence” in the “Quebec clause” can be construed as a reaffirmation of existing constitutional safeguards for linguistic minorities).

Section 16’s mention of some *Charter* rights, but not others, would be damaging if there were a plausible argument that no *Charter* rights can ever possibly be affected by the “distinct society” language. If such an argument were plausible, then s. 16 would jeopardize it; the provision in s. 16 that some *Charter* rights are not affected by the “Quebec clause” might be taken as implying that some other rights are. But it seems quite certain that the “Quebec clause” would, in any event, be construed as capable of influencing the interpretation of the *Charter*. Section 2(1)(a) of the “Quebec clause” directs how the “Constitution of Canada” should be construed. The phrase “Constitution of Canada” is defined (if not exhaustively) by s. 52(2) of the *Constitution Act, 1982*. The first item mentioned is the *Canada Act*, which includes the *Charter*. The “distinct society” language, therefore, ought to be taken into account in interpreting at least some sections of the *Charter*.

A few “ingenious” arguments are possible whereby the “Quebec clause” would—leaving aside s. 16—have no impact whatever on the *Charter*. (“Ingenious” is a word judges apply to an argument immediately before rejecting it. It makes the losing lawyer feel better, and it makes the judge sound open-minded but sensible. Similarly, “learned” is a word appellate judges use only in respect of lower court judges whose judgments are about to be reversed). Some “ingenious” arguments are:

- (i) Section 33 of the *Charter* says that its guarantees can only be overridden by a legislature when that legislature expressly declares that it is doing so. We expect legislatures to be open about, and take full responsibility for, denying Canadians

the benefits of the *Charter*. Shouldn't we expect a similar standard of explicitness when the Constitution itself is amended to affect adversely the *Charter*? The "Quebec clause" nowhere refers to the *Charter*—so it has no effect on it.

(ii) In its 1987 decision on funding for Roman Catholic high schools in Ontario, *Reference re Roman Catholic Separate High School Funding* (1987), 77 N.R. 241, the Supreme Court of Canada had to consider the interaction of a pre-existing section of the Constitution (s. 93 of the *Constitution Act, 1867* which gives legislatures authority over education) and a new section (s. 15 of the *Charter*, which guarantees equality rights). The Court found that s. 93(3) of the *Constitution Act, 1867* clearly contemplated that legislatures could establish new denominational school rights. This authority, according to Madame Justice Wilson, was "immune from Charter review... [i]t was never intended...that the Charter could be used to invalidate other provisions of the constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise." According to Mr. Justice Estey:

It is one thing [to use the Charter] to supervise and on a proper occasion curtail the exercise of a power to legislate; it is quite another thing to say that an entire power to legislate has been removed from the Constitution by the introduction of this judicial power of supervision.

According to both justices, they would have reached the same conclusion even without s. 29 of the *Charter* which expressly states that:

Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

Applying the same sort of reasoning—new constitutional provisions do not diminish existing constitutional rights—can we not say that the "distinct society" clause has no effect on existing rights under the *Charter*?

Unfortunately, these two arguments are vulnerable to the following retorts:

(i) First of all, no *Charter* provisions will be overridden outright by the "distinct society" language. At most, the "Quebec clause" will lead to a narrower interpretation of some provisions. Second, the requirement of explicitness in s. 33 is connected with ordinary legislation. The technical requirements of s. 33 cannot be applied literally to other forms of law-making. Third, even if the "spirit" of s. 33—that is, the notion that the *Charter* applies with full force unless there are clear signals to the contrary—should prevail, the fact of the matter is that the wording of the "Quebec clause" does send a fairly strong signal.

It states flatly that the “constitution of Canada shall be interpreted...” The framers must be deemed to know that the *Charter* is part of the Constitution of Canada.

(ii) The reasoning of the Supreme Court of Canada in the *Ontario Roman Catholic Schools* case is based on an “all-or-nothing” view of the effects of the new provision on the existing one. Madame Justice Wilson rejects the notion of “invalidating” an existing legislative authority; Mr. Justice Estey rejects “removing it.” (By the way, I think their “all-or-nothing” reasoning was inappropriate. They could have held that denominational school rights could be expanded beyond 1867 (or maybe 1982) levels only in a manner consistent with the *Charter*—e.g. under a plan that treated all religions equally). Now, the “all-or-nothing” approach might be valid when considering the interaction of certain provisions of the *Charter* with the “distinct society” clause. In the *Protestant Schools* case, for example, Chief Justice Deschenes held that it could not be a “reasonable limit” on s. 23 rights to deny them entirely to some people. Were the issue to be re-litigated, with the “distinct society” language now being used to colour the interpretation of “reasonable limits,” exactly the same conclusion might be reached. On the other hand, in some cases, it might be a tenable argument that the “distinct society” language is being used merely to attenuate slightly the strength of a *Charter* guarantee. *Charter* guarantees are generally subject to “reasonable limits” to begin with; if the “distinct society” language slightly expands those limits, the Attorney General of Quebec might insist, it is still not negating the right in whole or in part.

While it seems impossible to establish that the *Charter* is entirely unaffected by the “Quebec clause,” the arguments just presented do support the view that the *Charter* is undiminished for the most part. The “Quebec clause” certainly does not purport to repeal the *Charter*, and we should not assume that existing provisions of the Constitution yield meekly to newcomers. Sometimes the old-timers continue undiminished; at the very least, they must be considered along side the newcomers and be accorded their proper respect.

The analysis has followed many twists and turns lately, so a summary might be helpful:

— it is very likely that the courts will hold that the “Quebec clause” does have the potential of influencing the interpretation of some sections of the *Charter*. This conclusion would be reached quite apart from s. 16 of the *Charter*.

— section 16 does not imply that every other section of the *Charter* is affected. The mention of sections 25 and 27 can be explained as a response to one special problem (the protection of people who do not belong to the “two founding” nations); there is no justification for concluding that the framers intended every other section to be vulnerable.

### Possible Additions to the List of Rights Shielded from the "Quebec Clause" by Section 16 of the 1987 Accord.

Ideally—or at least according to my ideals—the 1987 Accord would be drafted to ensure that the "Quebec clause" does not diminish in any way the protection of the *Charter*. At the Langevin Block meeting, it was not possible to guarantee complete immunity for all of the guarantees in the *Charter*. Section 16 eliminates the danger on one front. Would it be right and prudent to try to add to the list of rights shielded in section 16? Should we add s. 2 (freedom of expression), s. 6 (mobility), s. 7 (life, liberty and security of the person), s. 15 (equality) or s. 23 (minority language rights)?

It might seem that every item added to the "protected" list is one step closer to the ideal—the complete shielding of *Charter* rights from the "Quebec clause." But it won't necessarily work out that way. The *expressio unius* problem might actually make it counterproductive to produce an incomplete list of "protected" rights. A court might look at it and think:

The framers carefully considered which rights are affected and which rights are not. If a right does not make it onto the "protected" list, it must be because the framers thought that the "distinct society" language might or does affect it.

The creation of a "protected" list that excluded s. 23, for example, might undermine the case—and a plausible case it is—that the "distinct society" language does not diminish the force of s. 23 in the least. Granted, the exclusion of s. 23 would not prove definitively that s. 23 is affected adversely. But it would certainly encourage an interpreter to reach that conclusion.

The drafting technique that would avoid the *expressio unius* snare of the "protected list" is "for greater certainty, but without prejudice to the sections of the *Charter* that are not mentioned" on the list. But the "without prejudice" formula might not be effective in practice. Even though instructed technically that the "protected list" does not inferentially prejudice items left off, a human interpreter is still liable to attribute some significance to the exclusion.

In considering whether to add additional items to the "protected list" in s. 16, it must be remembered that Quebec is most likely to agree to additions that will not make much difference. The *expressio unius* risk of expanding the list, therefore, is unlikely to be counterbalanced by substantive gains.

It also should be remembered that the protection of s. 27 may have a very welcome "ripple" effect. Section 27 is a rule on how to interpret the rest of the *Charter*. The fact that section 27 is shielded, therefore, will be of assistance when other rights are invoked—for example, freedom of expression (s. 2), and individual equality (s. 15).

If the entire *Charter* cannot be shielded, then the most desirable additions to the itemized list would be s. 2 (free expression), s. 6 (mobility rights), s. 15 (individual equality) and s. 23 (minority language educa-

tional rights). If all four of these could be protected, the effect would be practically as good as shielding the entire *Charter*. The significance of protecting each one will now be examined.

*Section 2 (freedom of expression)*: As discussed earlier, in *Chausure Brown's* the Quebec Court of Appeal held that "freedom of expression" in the *Charter* protected not only the message but the language used to convey it. (As a philosophical matter, I doubt that the meaning of a message can be totally abstracted from the particular language used to convey it). The Court further held that "freedom of expression" included commercial expression and that it was contrary to the *Charter* for the National Assembly to prohibit the use of English on signs. The case illustrates that s. 2 can be a powerful and wide-ranging tool for the protection of linguistic minorities. The recognition of the "English-speaking presence" in the "Quebec clause" makes it doubtful that the "distinct society" sections will alter significantly the protection that s. 2 gives to the use of English. The "multicultural heritage" provision of the *Charter*, s. 27, bolsters the protection that s. 2 gives to the use of languages other than English and, according to s. 16 of the 1987 Constitutional Accord, s. 27 is not affected by the "Quebec clause" at all. Section 2 was subject to the "override" provision in s. 33 of the *Charter* and still is subject to that provision. So there is reason to believe that section 2 will continue to do its same good deeds in the courts, regardless of the "Quebec clause." Still, the outcome in the courts is open to doubt, and there is cause for anxiety as well about how Quebec legislatures will interpret their role. An explicit reaffirmation of section 2 in the 1987 political accord would provide welcome reassurance.

*Section 6 (mobility rights)*: There may be some cause for concern here, on both the political and judicial fronts. Section 6 guarantees the rights of Canadians to move to another province or pursue the gaining of a livelihood there. On account of the "distinct society" sections, and by virtue of Quebec's enhanced authority over (international) immigration, politicians and judges may believe that it is nonetheless lawful and proper for Quebec to exert greater control over movement between Quebec and other provinces. Here is one scenario. Quebec uses its authority over immigration to maintain the predominantly francophone character of its population. The province discovers that its efforts are foiled by intra-Canadian migrations. Anglophone Canadians come to Quebec; francophone Canadians go the rest of Canada; recent immigrants to Quebec move on to other provinces as well. Could Quebec enact laws to keep out other Canadians? Could it exact financial penalties from longstanding Quebecers who move to other provinces? Could it demand repayment of the resettling and education services it has provided to immigrants who leave before a specific number of years?

The "distinct society" and "immigration" sections might encourage interpreters of section 6 to give a broader reading to the provisions of the *Charter* that limit mobility rights. Section 6(3) provides that they are not infringed by "laws or practices of general application" that do not discriminate "primarily" on the basis of provincial residency. Furthermore, a law that is a *prima facie* violation of s. 6 can, it seems, be validated by

section 1—that is, by demonstrating that the law is a “reasonable limit” on mobility rights that is “demonstrably justified in a free and democratic society.” The words “it seems” are used because some judicial opinions have held that, owing to the special nature of a particular section of the *Charter*, “reasonable limits” arguments are not possible. In the *Protestant Schools* case, the Supreme Court of Canada held that s. 23 of the *Charter* was a very specific attempt to overrule certain provisions of Bill 101, and that it would subvert that intention to allow Quebec to defend those very provisions as “reasonable limits.” In *Re Section 94(2) of the Motor Vehicles Act*, Madame Justice Wilson suggested that a law that is contrary to s. 7 of the *Charter*—that denies life, liberty or security of the person in a manner that is “contrary to the principles of fundamental justice”—cannot be rescued by s. 1. According to Madame Justice Wilson, a law that denies “the principles of fundamental justice” cannot possibly be a “reasonable limit.”

In general, courts ought to construe s. 6(3) narrowly, and they should strongly resist the use of the “reasonable limits” clause, s. 1, to support violations of section 6. Ordinarily, respect for democracy requires that judges give some deference to the judgment of legislatures. But when a provincial legislature discriminates against “outsiders,” it is not subject to democratic accountability and pressure from those it discriminates against. If the Manitoba government keeps Albertans out of Manitoba, they can’t vote against the government at the next election; see generally, J.H. Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980). The framers of the *Charter* were wise to exclude s. 6 from the list of sections that are subject to legislative override under s. 33. The courts should realize that the structure of federal democracies makes mobility rights especially vulnerable, and act vigorously to protect them.

The “distinct society” sections should not be used to expand any “reasonable limits” that s. 1 of the *Charter* puts on the mobility rights guaranteed by s. 6. Section 2(1)(b) of the “Quebec clause” states that Quebec is “within Canada a distinct society.” Mr. Justice Rand stated in *Winner v. S.M.T. (Eastern) and Attorney General of Canada* (1951), [1951] S.C.R. 887, (*sub nom. Winner v. S.M.T. (Eastern) and Attorney General of New Brunswick*) [1951] 4 D.L.R. 529 at 557:

The first and fundamental accomplishment of the constitutional Act was the creation of a single political organization of subjects of His Majesty within the geographical area of the Dominion, the basic postulate of which was the institution of a Canadian citizenship. Citizenship is membership in a state; and in the citizen inhere those rights and duties, the correlatives of allegiance and protection, which are basic to that status.

...a province cannot, by depriving a Canadian of the means of working, force him to leave it; it cannot divest him of his right or capacity to remain and to engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action.

....It follows, *a fortiori*, that a province cannot prevent a Canadian from entering it except, conceivably, in temporary circum-

stances, for some local reason as, for example, health. With such a prohibitory power, the country could be converted into a number of enclaves and the "union" which the original Provinces sought and obtained disrupted. In a like position is a subject of a friendly foreign country; for practical purposes he enjoys all the rights of a citizen.

Such, then, is the national status embodying certain inherent or constitutive characters, of members of the Canadian public, and it can be modified, defeated or destroyed, as for instance by outlawry, only in Parliament.

A Quebec nationalist might respond that the word "distinct" does have a nuance of "apart from," that the "distinct society" clause can change the constitutional status quo and that Quebec now is, to some extent, an enclave. The rebuttal might go as follows:

— the "Quebec clause" is not cast in terms of constitutional revolution, but much more in terms of recognizing a state of affairs that already exists. Section 2(1)(a) speaks of existing characteristics of Canada; section 2(1)(b) speaks of the "recognition" that Quebec is within Canada a distinct society. Section 2(3) speaks of "affirming" the role of the Quebec legislature. Furthermore, the "Quebec clause"—or at least section 2(1)—is explicitly presented as a rule about how to interpret the rest of the Constitution. The existing Constitution may be seen in a slightly different light, but the basic shapes and colours remain unchanged. There is no basis, therefore, for believing that the "Quebec clause" has upset the meaning of "the first and fundamental accomplishment of Confederation" or its "basic postulate;"

— section 2(1)(a) of the "Quebec clause" acknowledges that there are French-speaking Canadians outside of Quebec and English-speaking Canadians inside Quebec. Thus one "fundamental characteristic of Canada" is a demographic fact that cuts across provincial boundaries. Section 2(1)(a) thus subverts the "enclave" theory of Quebec;

— section 2(4) of the "Quebec clause" states that the clause does not derogate from the "powers, rights or privileges of Parliament or the Government of Canada." Section 2(4) thus should be understood as affirming that the fundamental characteristics of Canada have not been subverted. Canada remains "one political organization," not a loose affiliation of quasi-separate provinces.

The immigration provisions of the 1987 Accord might be invoked in support of greater control by Quebec over internal movement within Canada; it would be argued that they demonstrate that the "spirit" of the agreement is to give Quebec more control over population movement in general. The rebuttal might be:

— Canadian constitutional history does not see "border control" as one concept. The *Constitution Act, 1867* gave provinces con-

current authority with Parliament over immigration—with federal paramountcy in case of conflict. Yet Mr. Justice Rand found the right of Canadian citizens to free internal movement to be axiomatic, and the framers of the *Constitution Act, 1982* explicitly entrenched “mobility rights” for Canadian citizens and permanent residents;

— the immigration part of the 1987 Accord expressly provides (in section 95B(3)) that immigration agreements are subject to the *Charter*. “Mobility rights” are a part of the *Charter*—indeed, a part of the *Charter* that is not subject to provincial “override” under s. 33. Rather than undermining the mobility provisions of the *Charter*, then, the immigration part reaffirms mobility rights.

While powerful legal arguments can be made that the “distinct society” sections do not undermine the mobility rights recognized in s. 6 of the *Charter*, there can be no certain assurance. A court might be impressed with the separatist sound of the word “distinct.” But the risk looks to be small. A more serious cause for concern is the future of mobility interests that are not encompassed by s. 6. There are many barriers to the free movement of people, information and investment across provincial boundaries that are precluded by s. 6. A Quebec government of the future might be encouraged by the “distinct society” clause to build or retain such barriers. The express reaffirmation of s. 6 would not make much difference in the courts, but might have a salutary symbolic effect.

*Section 15 (individual equality)*: Section 15 of the *Charter* guarantees to every individual:

..the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Does a law that requires the use of one language discriminate in favour of those who speak it and against those who do not? The sparse, non-*Charter* case law raises doubt that it does. In the *Gens de L’Air* case (*Association des Gens de L’Air du Quebec v. Lang* (1978), [1978] 2 F.C. 371, 89 D.L.R. (3d) 495), the Federal Court of Appeal stated that “the principle of equality before the law...it must not be forgotten, ensures equality of persons, not of languages.” The *Gens de L’Air* case was decided under the *Canadian Bill of Rights*, which guarantees “equality before the law”—but which does not contain a “reasonable limits” clause. Later on, the Supreme Court of Canada would discover that there are implied limitations on the guarantees in the *Canadian Bill of Rights*. At the time of the *Gens de L’Air* case, however, the Court might have been anxious to avoid finding even a *prima facie* denial of equality. The Court might well have been concerned that the necessary consequence of a *prima facie* finding of equality would be the invalidity of the statute; that in the absence of a “reasonable limits” clause or equivalent, a court could not find that a certain amount of inequality was justified by overall considerations of prudence and fairness.



In the *Devine* case, Mr. Justice Bisson, speaking for a majority of the Quebec Court of Appeal, denied that the French-only sign rule in Bill 101 was contrary to the equality guarantee in s. 10 of the Quebec *Charter of Human Rights and Freedoms*. He quoted the opinion of Mr. Justice Pratte in the *Gens de L'Air* case in support of his conclusion that the prohibition did not "directly" discriminate. He then considered the possibility that even though the language law was neutral on its face, its effects might be harsher on some individuals (non-francophones) than on others. The developing law on human rights legislation suggested to Bisson that there might be a duty on the part of the Quebec government to "reasonably accommodate" those who do not speak French. Mr. Justice Bisson cited the many exemptions Bill 101 allows with respect to the French-only sign rule and concluded that those challenging the legislation obviously wanted more than "an accommodation."

It should be remembered that, in *Chaussure Brown's*, the same Quebec Court of Appeal panel did hold—in a judgment delivered on the same day—that the French-only sign law was contrary to the guarantee of free expression in the Quebec *Charter*. The Quebec legislature had treated the two sections very differently—it was only in January of 1986 that the "free expression" guarantee finally acquired the same supremacy over other Quebec laws as the equality guarantee. The Quebec Court of Appeal may well have considered it important to put the right to use a language in one distinct compartment. By doing so, it may have felt it was reflecting the understanding of the National Assembly—or at least enabling the National Assembly to have a clear sense of what it would be doing the next time it amended the Quebec *Charter*.

My own view is that individual equality does, as an abstract matter, imply that everyone has the same right to use their own preferred language. In most real-life cases, it is very easy to provide justifications for a limitation on this right by a real-life political community. Official preference for some common official language or languages can generally be supported by prosaic considerations of efficiency or convenience, or by the necessity of maintaining channels of discourse for the members of one democratic political community. Various sections of the Canadian Constitution support the use of English or French or both as official languages. If s. 15 of the *Charter* is held to protect language-use rights, official language policies will hardly be subject to wholesale annihilation. But in some cases—like the prohibition on the use of English in signs—the courts may be justified in intervening. It might turn out that the Supreme Court of Canada, like the Quebec Court of Appeal, will prefer to assign certain language use issues to the category of "free expression" (s. 2). On the other hand, the Supreme Court of Canada might wish to exclude commercial speech from the protection of s. 2 and rely on s. 15 to protect certain language-use rights. It is difficult to predict which shell will end up covering the pea; it depends largely on the general interpretive strategy the Court will want to take with respect to these two sections. Ideally, then, the 1987 Accord would ensure that the protection of s. 15, as well as s. 2, is not diminished by the "Quebec clause."

There are some legitimate reasons for wanting to add s. 15 to the "protected list," the foremost of which would be concerns about the effect of the "distinct society" language on minority language use and multiculturalism in Quebec. Some other anxieties, however, would be unwarranted. There is no practical danger that the "distinct society" language will encourage excessively collectivist political attitudes in matters apart from language and culture. It is obvious enough that the "distinct society" clause primarily is directed to language or language-related matters and, even in these respects, there are express safeguards for linguistic and cultural minorities. On economic and lifestyle issues, Quebec is not radically different from the rest of Canada. The recent trend in Quebec has been to move away from governmental intervention in the economy; see Gagnon and Paltiel, "*Toward Maitres chez nous.*" Denis Arcand's celebrated film, "*The Decline of the American Empire,*" has been interpreted (justifiably) as a regretful satire on the disengagement of Quebec intellectuals from public issues, and their absorption in personal pursuits, after the defeat of the Quebec referendum. The rhetoric of the "distinct society" sections is hardly going to blow Quebecers to the left side of the collectivist-individualist spectrum on issues apart from language and culture.

Section 15 contains a list of prohibited grounds of discrimination. Some interpreters of the "Quebec clause" might be inclined to interpret the "distinct-ness" of Quebec partly in terms of the ethnicity and religion of its majority. The express protection that s. 16 extends to the "multicultural heritage" clause of the *Charter*, s. 27, makes it clear in law that the National Assembly has not gained any extra authority under the "Quebec clause" to discriminate on the basis of "race, national or ethnic origin, colour [or] religion." There is no rational basis—in the text of the "Quebec clause" or in relevant Quebec history—for supposing that the "distinct-ness" of Quebec is intrinsically related to any of the other prohibited grounds of discrimination. As far as I know, in the past few decades Quebec's record on the treatment of women, the elderly and the handicapped has been as good as that of any jurisdiction in Canada. Indeed, the *Quebec Charter of Rights* indicates a strong commitment by the Quebec legislature to assuring just treatment for these groups.

Should we be concerned that Quebec governments might adopt, and the courts sustain, measures that discriminate against women as a means of promoting the "distinct society?" The risk is very small. Women are a majority of the electorate in Quebec and the supporters of women's equality probably an even larger majority. Even if promoting a higher birthrate among Quebecers has something to do with "promoting" the distinct society, it is hard to imagine that Quebec politicians would pursue measures that discriminate against women. Instead, they would pursue alternatives such as expanding the rights of women with respect to pregnancy leave, and expanding benefits to parents generally—including access to day care and tax breaks. Even if a government did enact measures that discriminated against women in purpose or effect, the courts would have to be impressed with the fact that the Canadian Constitution sets out numerous, explicit signals that discrimination against women is unacceptable. Section 15 of the *Charter*, which guarantees equality rights, explic-

itly includes "sex" as a prohibited ground of discrimination. Section 28 proclaims that:

Notwithstanding anything in this Act, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

One of the very first amendments to the *Constitution Act, 1982* was section 35(4):

Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Thus the rights of another kind of traditional group in Canada have been explicitly qualified by the sexual equality norm. Given the fact that the "distinct-ness" of Quebec society intrinsically has nothing to do with sexual discrimination and that the Constitution is already so emphatic about sexual equality, the juridical threat to women's rights must be considered minimal.

It is understandable and legitimate that women's rights organizations would want absolute safeguards against any adverse impact from the "Quebec clause." *Ceteris paribus*, it would be better if these safeguards were achieved. It is important, however, that we keep the concerns in some perspective. It should be remembered that the "Quebec clause" is concerned expressly with linguistic matters and that there are serious risks that courts and, even more likely, legislatures will use it to downgrade the rights of linguistic minorities and the cause of bilingual education. Much of the political energy directed to improving the 1987 Constitutional Accord should be directed towards alleviating these dangers. There should be caution not to address the relatively limited risks to sexual equality in a way that exacerbates the risks to other constitutional values. For example, the addition of *only* s. 28 of the *Charter* to s. 16 of the 1987 Accord—the list of rights protected from the "Quebec clause"—actually might put other *Charter* rights in a more precarious position than ever.

*Section 23 (minority language educational rights)*: As discussed earlier, it is unlikely that the "Quebec clause" will undermine in any way the guarantees of minority language educational rights contained in s. 23 of the *Charter*. Adding s. 23 to the "protected list," of course, would preclude any attack on these rights through the combined effect of the "reasonable limits" and "distinct society" clauses. As s. 23 does deal expressly with minority language rights, however, it would be dangerous—for *expressio unius* reasons—to leave it off any expanded list of rights that are protected from the "Quebec clause."

There is no real cause for concern over the effect of the "distinct society" clause on the "legal rights" sections, 7 to 14, of the *Charter*. The "principles of fundamental justice" mentioned in s. 7 are surely going to be unbowed by the "distinct society" clauses. (See the *Société des Acadiens* case). The right to the use of an interpreter, guaranteed by s. 14 of the *Charter*, is plain enough in language and compelling enough in

justice that it will not be affected. The rest of the sections do not have that much to do with language. It may be recalled here that s. 133 of the *Constitution Act, 1867*, which guarantees English language rights in the Quebec courts, remains on the books—and very likely will be unaffected by the “distinct society” clause. Thus sections 7 to 14 of the *Charter* should not be considered priority items when considering additions to the s. 16 list of items protected from the “distinct society” clause.

The conclusions of the foregoing analysis:

- ideally, the entire *Charter* would be shielded from the effects of the “distinct society” clause;
- the items that presently are protected by s. 16 of the 1987 Constitutional Accord—multiculturalism and the position of aboriginal peoples—ought to be. Their mention does not create a significant *expressio unius* risk to other rights. That is, protecting them addresses one special concern—the position of ethnic and cultural values that are different from those of the “two founding peoples”—and does not imply that the framers of the 1987 Accord considered all of the sections of the *Charter* and purposefully refrained from adding them to the “protected list” in s. 16;
- adding further *Charter* items to the s. 16 “protected list” might create *expressio unius* jeopardy to items left off;
- the nearest thing to shielding the entire *Charter* would be to protect sections 2 (freedom of expression), 6 (mobility rights), 15 (equality) and 23 (minority language educational rights) by adding them to the list. There would be risks in adding one or more, but not all, of these items.

### Position of Francophones Outside of Quebec.

Section 2(2) affirms the role of Parliament and provincial legislatures to “preserve” the “fundamental characteristic of Canada” mentioned in s. 2(1). In sharp contrast, section 2(3) refers to the role of the Quebec legislature to “preserve and promote” the “distinct identity of Quebec.” Why the difference? It is liable to be interpreted in a couple of different ways:

- governments outside of Quebec might infer that they are obliged merely to maintain the presence of French-speakers, as opposed to taking active steps to encourage the growth and vitality of minority language communities. The contrast between “preserve” and “preserve and promote” encourages the perception that Quebec is the real “homeland” of francophones and those outside of it are of secondary significance;
- some nationalist Quebec governments might interpret the “distinctness” of Quebec as consisting only of its francophone majority. They might then take the contrast between sections 2(2) and 2(3) as a justification for doing little more than extending minimal toleration to the anglophone minority, as opposed to encouraging its social and cultural development.

At the Langevin Block meeting, one of the provinces pushed to add "promote" to section 2(2), but met with strong resistance. My understanding is that some predominantly English-speaking provinces were worried that they might be creating new legal rights on the part of French-speakers under their jurisdiction. If the concern was to avoid the creation of court-enforceable "official bilingualism" in their provinces, the insertion of s. 2(4) at the Langevin Block meeting should have dispelled it. Section 2(4) guarantees that nothing in the "Quebec clause" diminishes the rights and powers of legislatures. If "promote" were inserted in section 2(2), it would be a solemn directive to take active measures to help out French-speakers—but not one that could be litigated. The final say on the interpretation and implementation of the directive would rest with provincial governments themselves. Any doubt on this score should be put to rest by a review of the decision of the Supreme Court of Canada in the *Société des Acadiens* case. The issue there was whether the declaration, in s. 16(2), that French and English are the "official languages" of New Brunswick was to be interpreted and implemented by the provincial legislature and not the courts.

Given the fact that legislatures would be free to interpret and apply any duty to "promote" the fact of the francophone presence in their jurisdiction, fear of judicial intervention affords the provinces no excuse at all for not agreeing to such an insertion. All that is required is a little generosity of spirit.

The provinces already are committed constitutionally under s. 23 of the *Charter* to providing minority language educational opportunities. Post-secondary education in minority languages would go well beyond the constitutional minimum and should count as "promoting" the francophone presence. So would operating an immigration policy that encourages the replenishment and growth of minority language communities. So would encouraging knowledge of the second language among the general population; bilingual persons are more likely to support the activities of French language speakers and even actively participate in them. (To take a small example: a minority language theatre company in an English community is obviously going to do better if its productions can be understood by a larger public). Many provinces have multicultural programs of some sort in the spirit of s. 27 of the *Charter* (which recognizes the value of preserving and enhancing "the multicultural heritage of Canadians"). Insofar as these programs benefit minority language speakers, among others, a province has gone a long way to "promoting" the francophone presence.

The clumsy wording of the "Quebec clause" unfortunately creates a drawback to inserting "promote" in s. 2(2). A politician in an English-speaking province would be liable to interpret the net result as follows:

The Constitution recognizes that most people in my province speak English and some others speak French. It does not refer to bilingualism. The way to "promote" this characteristic is to encourage dualism in the province, rather than bilingualism.

All in all, it would be better to add "promote" to s. 2(2) and take the risk of the misinterpretation just portrayed. It would be far better.

however, to replace the present wording of s. 2(2) with something along the following lines:

The federal and provincial levels of government are committed to protecting and assisting minority language speakers, and to providing opportunities for Canadians to acquire a knowledge of the other official language.

### Promoting the "Distinct Identity" of Quebec.

Section 2(4) of the "Quebec clause" refers to the role of the Quebec legislature in promoting the distinct "identity" of Quebec referred to in s. 2(1)(b). The word "identity," like "distinct," carries the risk of conveying the sense that Quebec has a certain personality as an entity apart from the rest of Canada. Granted, the English version of s. 2(1)(b) makes it clear that Quebec is a distinct society "within Canada." The French version of "within" is "au sein du," an expression that conveys even more strongly the sense that Quebec is an integrated part of the larger political community of Canada, rather than merely being geographically situated within its boundaries. The word "identity" appears nowhere else in the "Quebec clause;" nor does its French equivalent, "identité." The French version is "caractère," which fits in with the use of "caractéristique fondamentale" in s. 2(3). At the officials' level meeting between Meech Lake and the Langevin Block meeting, there were some suggestions that the word "identity" be replaced. Obviously they failed. A more deliberate and less secretive approach to Meech Lake would have avoided the insertion of such gratuitous, confusing and troublesome features. Once first ministers agreed to the Meech Lake communique, every word favourable to a province was regarded as a "just-about-vested" right.

"Promote" is another word which might contribute to divisiveness. A possible implication of the affirmation that the National Assembly should "promote the distinct identity" of Quebec is that it should work towards making Quebec more and more distinct. "Develop" would have conveyed the sense of nurturing and adapting to new circumstances. (By the way, the "multicultural heritage" clause of the *Constitution Act, 1867* refers to the "preservation and *enhancement*" of the multicultural heritage of Canadians. What is the difference between "preserve and promote" and "preserve and enhance?").

As mentioned earlier in this discussion, the most important effect of the "distinct society" clause is not necessarily on the judicial interpretation of the Constitution. The way it is understood and exploited by political actors may be far more consequential. Quebec has had governments that were openly committed to the dissolution of the Canadian federation. It is entirely legitimate to ask—as has Mr. Donald Johnston, the Member of Parliament for St. Henri-Westmount—how a separatist or fervently nationalist government will interpret the duty to "promote the distinct identity of Quebec." Political rhetoric does not tend to include footnotes and legalistic qualifications. One can imagine a speech at a nationalist rally in Quebec that would insist boldly that the National Assembly "a le role de promouvoir le caractere distincte du Quebec." It is ludicrous to suppose that there would follow, even *sotto voce* "vise à l'alinéa (1)(b) de l'act constitutionnelle, 1867."

Will Quebec politicians use the rhetoric of promoting a "distinct identity" of Quebec to resist attempts to allow for the freer use of English and other languages? To oppose attempts to promote greater bilingualism among francophones? To insist that Quebec must "opt-out" of national shared-cost programs? If the latter possibility seems far-fetched, consider the following statement by a former Premier of Quebec, Mr. Daniel Johnson:

For a province, shared-cost programs can be regarded as financial aid with more or less annoying conditions attached. For a nation like ours, their effect is to free its sources of taxation and take away full control over areas of an activity which are rightfully its own. Joint programs therefore are generally incompatible with the basic aims pursued by the French Canadian nation; see D. Johnson, "The Inseparability of Cultural and Financial Autonomy in a Federation" in A.J. Robinson and J. Cutt, eds., *Public Finance in Canada: Selected Readings* (Toronto: Methuen, 1968) 113 at 114.

Slogans are powerful. In the past twenty years, federal party leadership contests and general elections have had at their core such catch-phrases as "deux nations" and "Canada is a community of communities." In the current debate, defenders of Meech Lake have used such catch-phrases as (the misleading) "Quebec is going to sign the Constitution" and "we are saying yes to Quebec." The difference of a single word in a slogan can change thousands and thousands of words in the conversations, speeches, judicial opinions, journalistic accounts and academic meditations that follow. It matters whether we talk about "free trade" or "freer trade," about "sovereignty" or "sovereignty-association," about "aboriginal self-government" or "aboriginal self-determination."

Canadian unity and co-operation would be far better served by a version of s. 2(4) that read something like this:

It is hereby affirmed that the government of Quebec has a role in preserving and developing the character of Quebec as a distinctive part of the Canadian federation.

#### IV. Spending Power

The "Quebec clause" purports to define a fundamental characteristic of Canada. The "national shared-cost program" clause may prove equally important to the future of Canadian self-definition. The ability and willingness of the federal government to spend money in areas where its regulatory authority is limited has been a vital part of the building of the Canadian political community. The federal spending power has helped Canadians to participate in a larger political community—and to define that community as one that cares about the health, education and social welfare of all its people; one that cares about the equal dignity of its individuals and the equal prosperity of its regions. The use of the spend-

ing power has helped to overcome some of the rigidity in Canada's constitutional structure without destroying the shelter it provides for local loyalties and preferences.

To be sure, the federal spending power can be misused. It can be used to impose an excessive uniformity, one which stifles the spirit of experimentation and creativity in local governments, and renders them unresponsive to the special demands and circumstances of their people. It can be used to extend the scope of federal porkbarrelling to otherwise forbidden fields.

The inappropriate or abusive use of the federal spending power can be resisted politically. Indeed, the provinces have often been very successful at insisting on administrative and policy restraint when the federal government spends in areas that are partly or wholly within provincial jurisdiction. Mistakes or excesses can be corrected in light of experience. The 1987 Constitutional Accord would irreversibly impose legal limits on certain uses of the federal spending power. Whatever power the federal government loses is gone for good—and, it may turn out, for very bad. The meaning and scope of the "national shared-cost program" clause is a question of first importance to the survival of Canada as a coherent political community.

### The Legal Status Quo.

To begin with, some technical comments on what the federal spending power actually is. The federal government does not need to rely on a "spending power" to dispose of money in areas where it has full authority to regulate. The federal government can spend money on fisheries because s. 91(12) of the *Constitution Act, 1867* makes "fisheries" a head of federal legislative jurisdiction. The "spending power" becomes an issue only when the regulatory authority of Parliament is unclear, shared or absent.

The legal source of the spending power is not agreed upon by the experts. My (tentative) view is that its primary basis should be considered to be section 91(1A) of the *Constitution Act, 1867* which states that the federal government has authority over "the public debt and property." It has been suggested, (see E.A. Driedger, "The Spending Power" (1981) 7 Queen's L.J. 124), that the source is actually s. 106 of the *Constitution Act, 1867* which states that:

Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

It seems to me that s. 106 is intended merely to clarify the nature of the Consolidated Revenue Fund, and that it is extravagant to suppose that "for the public service" means anything Parliament chooses—regardless of the division of powers in the rest of the Constitution. Locating the federal spending power in section 91(1A) invites a balancing act. The power is acknowledged as a definite basis for federal action and one that can operate, to some extent, in areas that otherwise would be within exclusive provincial competence. On the other hand, like any head of



power in section 91, interpreters have to read s. 91(1A) side-by-side with the list in section 92, the main list of provincial powers. At some point, the incursion into areas of provincial jurisdiction has to be adjudged an invasion.

Such a balanced view would be consistent with one of the few pronouncements on the spending power that a court of last resort for Canada has made:

That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied...[But] it by no means follows that any legislation which disposes of [a fund] is necessarily within Dominion competence.

It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to...encroach upon the classes of subjects which are reserved to Provincial competence, (*Attorney General for Canada v. Attorney General for Ontario* (1937), [1937] A.C. 355 at 366, (*sub nom. A.-G. Can. v. A.-G. Ont.* (Reference re *Employment and Social Insurance Act, 1935*)), [1937] 1 D.L.R. 684 (P.C.)).

By making gifts with strings attached, the federal government has a strong lever for influencing behaviour. Some commentators have held that there are no court-enforceable limits on the onerousness or detail of the conditions that can be attached to federal grants. Professor Hogg has written:

It seems to me that the better view of the law is that the federal Parliament may spend or lend its funds to any government, or institution, or individual it chooses, for any purpose it chooses; and that it may attach to any grant or loan any conditions it chooses, including conditions it could not directly legislate. There is a distinction, in my view, between compulsory regulation, which can obviously be accomplished only by legislation enacted within the limits of legislative power, and spending or lending or contracting, which either imposes no obligations on the recipient (as in the case of family allowances) or obligations which are voluntarily assumed by the recipient (as in the case of a conditional grant, a loan or a commercial contract). There is no compelling reason to confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects (P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 126).

My own view is less categorical. It seems to me that the courts ought to be prepared to step in if the practical effect of federal spending were,

in effect, to take over policy-making and management in an area that is solely within the regulatory authority of a province. The practical subversion of federalism and the usurpation of the power of a democratically elected provincial government, would be "compelling reasons" for intervention. That said, I would emphasize that:

- the scope of the federal spending power involves complex questions of economic and fiscal policy in which the courts have limited expertise, and in which they should be restrained about intervening;
- the provinces have proved themselves amply capable of defending their jurisdiction by political means;
- the spending power plays a very useful role in permitting federalism to adapt to changing circumstances and popular expectations, and any error should be on the side of retaining that flexibility;
- the federal government has general authority over taxation. A well-recognized and accepted use of that authority is to redistribute wealth with a view to achieving greater social justice. The spending power can legitimately be used for such purposes. Grants are a more visible and accountable avenue for fiscal transfers and should not be discouraged in favour of "tax expenditures;"
- many and varied are federal claims to legislative authority that can obviate the claim that the spending power is being used to intrude in an area of purely provincial jurisdiction.

The courts should only intervene against the use of the federal spending power where the intrusion is major and other federal claims to authority are practically non-existent. They should have a strong preference for letting the political actors work things out for themselves. The complexity of the issues, and the highly varied uses of the federal spending authority, should encourage courts to work out any restrictive doctrines slowly and cautiously.

Some of the defenders of the 1987 Constitutional Accord have defended the national shared-cost program clause, s. 106A, as a backhanded triumph for the federal government. It acknowledges for the first time, they say, that the federal government can spend money in areas of provincial jurisdiction. Whether the clause actually does so will be discussed later. For now, it should be observed that whatever limitations exist, there is no serious reason to doubt that the federal government at present has substantial authority to spend in areas of provincial jurisdiction. The authority of the federal government to make direct grants to individuals was upheld in *Angers v. Minister of National Revenue* (1957), [1957] Ex. C.R. 83, [1957] C.T.C. 99, and is a logical corollary of its authority to make tax expenditures. As Mr. Justice Dickson said in *Di Iorio v. The Warden of the Common Jail of the City of Montreal* (1976), [1978] 1 S.C.R. 152 at 206, 73 D.L.R. (3d) 491:

It seems late in the day to strip the provinces of jurisdiction in respect of criminal justice which they have exercised without

challenge for well over one hundred years. That is not to say that jurisdiction in the strict sense can come through consent or laches; however, history and governmental attitudes can be helpful guides to interpretation.

National shared-cost or conditional grant programs of various sorts have been in place for more than half a century and are the foundation of the welfare, health and post-secondary education systems in Canada. Have federal and provincial governments been proceeding on mistaken assumptions for all these decades? When challenged in court last year, the constitutionality of these programs was upheld; see *Winterhaven Stables v. Attorney General of Canada* (1986), 71 A.R. 1, 29 D.L.R. (4th) 394 (Q.B.).

While there is room for uncertainty about how the Supreme Court of Canada would decide a challenge to the *Canada Health Act*, S.C. 1984, c. 6, there is good reason to be confident that its essential elements would be upheld. The federal government has attached certain conditions to the receipt of block funding for health care costs—including a ban on extra-billing. The responsibility for administering the health insurance system and medical care system generally remains with the provinces. The federal government does not attempt to tell provinces how to train and certify health care professionals, how much they should be paid or whether fees should be on a fixed annual scale, fee-for-service, hourly rates, or any other basis.

The crucial limitation on federal payments is that everyone should be protected by a provincial health insurance scheme and that no one should be liable to be billed by doctors over and above that amount; see the *Canada Health Act*. Experience has taught that extra-billing leads to the denial of equal access to medical services by the poor. A commitment to the principle that wealth does not buy a place in our health care system is the sort of decision about social justice that a national government should be able to make. Perhaps the policy is somewhat misguided; maybe some alternative involving user fees would keep scarce resources safe in a way that ultimately would be to the net benefit of the poor. Maybe the provinces should have some opportunity to experiment with enlightened alternatives. The same sort of arguments can be, and have been, made about the extent to which the income tax system should be progressive and whether medical costs should be, to some extent, exempt from taxation. But just as the federal government ought to have the authority to express basic principles of social justice through the tax system, so it should be able to do so in a block funding program. Furthermore, the federal government has a legitimate interest in seeing that its funding is not unfairly exploited. A medical professional should not be able to charge more than the market would normally bear, knowing that most of a bill will be passed on to governments.

A province that has a fair and workable alternative to “extra-billing” is well-positioned to resist politically. The only “penalty” it must pay is the loss of federal funding to the extent of extra-billing. Otherwise, the inflow of federal money is unimpaired. A provincial government that is prepared to protest federal imposition should be able to manage for at

least a few years. If it has a better alternative, popular opinion will work in favour of the alteration of federal policies.

All in all, the federal spending power was not in pressing need of affirmation, and certainly is not assisted much by the sort of backhanded acknowledgment that s. 106A might provide. An appreciation of the complexity of the spending power issue and of the need for flexibility would recommend several courses of action. The wisest would be to continue to work out the matter on a primarily political basis and count on the courts to stem any clear excesses. If constitutional amendment was necessary, the best approach would be to:

- define specifically the particular use or uses of the spending power to which it applies;
- define with reasonable clarity what the general principles are in that area;
- in doing so, pay as much attention to affirming the extent, as well as to defining the limits, of the federal spending power.

The 1987 Constitutional Accord is not satisfactory in any of the stated respects. There is no adequate definition of what a “national shared-cost program” actually is. The principle that applies is not stated with adequate clarity. The stress is more on limiting federal authority than on affirming the authority that does exist.

#### **Programs to Which s. 106A Applies.**

The emerging case law on the *Charter* is full of grand statements about taking a “purposive approach” to the guarantee of rights it contains; see *Hunter v. Southam* (1984), [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641; and *R. v. Big M Drug Mart* (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321; contrast with the *Société des Acadiens* case.

Section 106A could be a disaster if the courts take a “purposive approach” to its meaning, rather than viewing it as the product of a political compromise with a definite and non-expandable field of operations. The field in which s. 106A directly operates should be construed fairly, not generously, and the section ought not to be used as an inspiration for interpreting away other federal fiscal powers.

Here is an illustration of how s. 106A could be misused as an interpretive tool—in fact, a scalpel—on other federal fiscal powers. Suppose a populous province announces its intention to “opt-out” of a national shared-cost spending program and to claim compensation. The federal government announces that it will administer the program by direct grants to individuals. When the direct grant program is challenged in court, it is argued that:

- (i) Section 106A indicates that new federal intrusions in areas of provincial jurisdiction should be viewed as legally permissible only if there are legal safeguards in place—such as a provincial right to “opt-out” with compensation.
- (ii) The legal maxim “you cannot do indirectly what you cannot do directly” should be applied. The federal government

should not be able to evade the restrictions of s. 106A merely by changing the channels of funding.

(iii) Direct grants to individuals tend to be more evasive of provincial control of an area than are shared-cost programs. The latter tend to leave the administration of the program to the province. Furthermore, they leave the province free to squelch federal efforts altogether—by simply refusing to accept the proffered money. *A fortiori* logic should be applied. (An *a fortiori* argument goes like this—if rule R applies because factor F is present, then rule R certainly applies when F is even more intensely present. If you aren't allowed to smoke cigarettes in an elevator because smoke is disturbing to other passengers then, *a fortiori*, you aren't allowed to smoke pipes or cigars). If you can't invade provincial jurisdiction via the shared-cost program route, *a fortiori*, you cannot do so via direct grants and tax expenditures.

All of the arguments just made ought to be flatly rejected. Section 106A ought to be read as stating a specific rule that applies only to the specific case of national shared-cost spending programs in areas of exclusive provincial jurisdiction. There is no warrant for extending its direct operation to any of the other federal fiscal powers. There is no warrant for using it as an interpretive tool that indirectly weakens other uses of the federal fiscal powers. The justification for this strict interpretive approach can be summarized as follows:

— the field of operation for s. 106A is not defined in a way that invites unlimited expansion. A series of limiting terms are used—"national," "shared-cost," and "exclusive provincial jurisdiction." Interpreters of s. 106A are bound to give meaning to each and every one of these specific terms. Section 106A is defined so that it does not apply to *all* federal spending in areas of exclusive provincial jurisdiction; or to *all* shared-cost programs, or to *all* programs that affect provincial jurisdiction. Given the limits of the direct operation of s. 106A, it would be inappropriate to attribute to the section a powerful influence on the interpretation of other federal fiscal powers;

— the field of operation has its own peculiar features. The characteristics of "national shared-cost programs in areas of provincial jurisdiction" are a very complex ensemble. It is methodologically specious to suppose that there is a simple, linear measuring scale—such as "intrusiveness in areas of provincial jurisdiction"—and that all other programs can be assessed as more or less intrusive;

— the fact that the field of operation of s. 106A is defined with such detail—and confined to future programs—indicates that s. 106A does not embody an abstract principle, like certain sections of the *Charter of Rights*. On the contrary, they indicate that a political compromise has been reached. Mr. Justice Beetz's reasoning in the *Société des Acadiens* case therefore is applicable.

With this general approach stated, I will attempt a rebuttal of the argument, presented in paragraph 8.18, that s. 106A somehow implies that the federal government cannot establish direct grant programs:

(i) The insertion of s. 106A by no means justifies the view that federal fiscal powers can only extend to areas of provincial jurisdiction when a safeguard like s. 106A is in place. The framers of s. 106A themselves confined that safeguard to a very specific federal fiscal power—national shared-cost spending programs. Where the framers themselves put definite limits on the ambit of s. 106A, the courts have no right to take it upon themselves to extend, directly or indirectly, the scope of its operation.

(ii) The social and intergovernmental effects of a direct grant program are different from those of a national shared-cost program. The federal government would not be accomplishing indirectly what it cannot do directly. With a direct grant, the federal government assumes sole financial and political responsibility for the program. The province is not put in the position of having to be responsible, both politically and financially, for a program whose conditions are dictated by the federal government. The federal program may have an influence on how individuals and institutions interact with provincial programs, but at least the lines of governmental and financial accountability are clear. A shared-cost program tends to distort provincial spending priorities, as the province is encouraged to spend in areas where it will receive matching federal funding. A direct grant program does not directly “lever” money out of provincial treasuries. A shared-cost program requires that the general provincial government make special bureaucratic arrangements to handle the receipt or redistribution of federal funds. A direct grant program involves the general government at only the federal level.

(iii) For similar reasons, direct spending programs cannot be seen as plainly more “intrusive” and, therefore, even less “permissible” than national shared cost programs.

What are the boundaries within which s. 106A directly operates? The analytical agenda will be to examine each aspect of the definition of national shared-cost program, and attempt to assess the interpretive possibilities. While close attention should be paid to each and every qualifier, it should be recognized that they all help to define one category of federal spending activity. The analysis of each individual qualifier, therefore, frequently will rely upon the overall portrait.

In determining what the overall portrait is, it would be helpful if certain existing national shared-cost programs could be used as a basis for reference. By distinguishing between existing national shared-cost programs and those created in the future, s. 106A invites the use of some 1987 programs as a basis for reference. A perfectly rational way to proceed would appear to be this—identify the “national shared-cost programs in areas of exclusive provincial jurisdiction” that existed in 1987; figure out what the common elements are; from that, attempt to deter-

mine the underlying purpose of s. 106A and assess hypothetical programs in light of that underlying purpose. I must report, with a sense of intense frustration, that this procedure is not certain or reliable. The most commonly cited example of a national shared-cost program during the public discussion surrounding Meech Lake was federal funding for medicare—and it is not at all clear that it should be classified as a “shared-cost” program, as opposed to a “block funding” program. It is necessary to be very cautious and tentative, therefore, in using the existing programs as a guide.

**“National.”**

Section 106A refers to “national” shared-cost programs. By far the largest national federal-provincial programs, and the ones most often referred to in the public discussion surrounding Meech Lake, share these features:

- apply to all provinces;
- employ a formula to determine how much is allocated to each province, rather than leaving the matter to discretionary political judgment.

The *Canada Assistance Plan*, R.S.C. 1970, c. C-1, commits the federal government to absorbing half of the actual welfare costs sustained by all provincial governments during a year. It therefore easily satisfied both criteria.

The Canadian medicare system very often is raised as an example of an existing national shared-cost program. Whether it is “shared-cost” or not, it certainly operates on the basis of a national formula. The basic level of funding is determined by the formula in a 1977 federal statute on Established Programs Financing (EPF). The formal title of the statute is *The Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Educational and Health Contributions Act, 1977*, S.C. 1976-77, c. 10. According to the latest federal inventory of federal-provincial programs:

Each province or territory’s total Insured Health Service entitlement is equal to the national average per capita federal contribution for hospital insurance and medical care in the base year (1975-76), escalated by the rate of growth of the Canadian economy and multiplied by the population of that province or territory; (See Canada, Government of Canada, Federal-Provincial Relations Office, *Federal-Provincial Programs and Activities: A Descriptive Inventory* (Ottawa: Minister of Supply and Services, 1987) at 114).

The *Canada Health Act*, mentioned earlier in this discussion, reduces the basic entitlement in each province by another formula—the amount of extra-billing that has taken place in a given year.

The 1977 EPF statute provides a similar formula for determining federal contributions to post-secondary education.

The next step is to determine whether several problematic kinds of federal activity would amount to a “national program.”

**(A) Regional programs.**

It seems obvious that a province would not have the right to "opt-out" with compensation of a program that was confined to a certain part of the country—say a western economic diversification scheme that applied to only British Columbia, Alberta, Saskatchewan and Manitoba. A sufficient legal argument seems to be that a "regional" program cannot possibly be a "national one," and that is that. The distinction certainly is not arbitrary. The fact that a program is regional implies that the federal government has taken some trouble to adapt it to local circumstances; the same may not always hold with a national program. With a national program, unless there are arrangements for compensation, the taxpayers of a solitary "opted-out" province can end up subsidizing the rest of the country; with a regional program, any "opted-out" province would necessarily join the ranks of many others. A 1969 federal working paper (Canada, Prime Minister's Office, *Federal-Provincial Grants and the Spending Power of Parliament* (Ottawa: Queen's Printer, 1969) at 48-50) suggested a possible "opting-out" scheme for national conditional grant programs—but expressly denied that "opting-out" should be available for regional programs:

...regional schemes by their nature usually require the participation of all provinces affected in order to be viable, and because the taxpayers in the other parts of Canada would be required to contribute toward such schemes without either programme benefits or compensatory personal grants, no personal grants in lieu of programme grants would be paid in provinces which were invited to participate in a regional plan but whose governments decided against doing so.

**(B) Schemes in which the federal government is authorized to spend money in all provinces, but the actual amount depends on a discretionary political judgment that takes into account local circumstances.**

Discussions of s. 106A often have turned to whether it would prevent the establishment of a national shared-cost program to provide day care for very young children. Suppose the federal government said the following:

We're not going to set up a shared-cost program, as we did with medicare, because we can't afford it, because some of the provinces may "opt-out" and claim compensation and because we think there should be plenty of room for local experimentation and preferences. Instead, we'll authorize the Minister of Health and Welfare to enter into bilateral agreements with each of the provinces. The maximum federal funding will be fixed, but apart from that the Minister generally will be free to work out funding levels and conditions with her counterpart in each of the provincial governments.

The model would be the current Economic and Regional Development program of the federal government. With each of the ten provinces it has entered into bilateral development agreements that state general



aims, and then subsidiary agreements whereby it joins with the province in funding a variety of specific projects.

Would the hypothetical day care scheme be a national shared-cost program within the meaning of s. 106A? The argument in the affirmative might go like this:

- (i) the plan would be "national" because every province is eligible;
- (ii) it would amount to one "national program" because it would be administered by one minister with respect to one policy area using one pot of money;
- (iii) an "opted-out" province could claim compensation based on the contribution its taxpayers are making towards a program from which they receive no benefit; or on the average per capita payment to provinces that do participate.

While these arguments do have some plausibility, my view is that the argument for the negative is much stronger. It might go something like this:

- (i) the plan would not be "national" because it would work differently in every province;
- (ii) for the same reason, it would not amount to one program;
- (iii) the equities and intergovernmental effects are substantially different from those of the standard national shared-cost program. The differences include the following:
  - under the proposed day care plan, the federal government would be required to develop a policy that takes into account the special circumstances of each province and the wishes of its government;
  - the assessment of "reasonable compensation" would be speculative. There is no way of knowing how much federal money would flow into the province if a bilateral agreement were signed. There is no per capita allotment to each province; funding levels depend on the extent of local need and the willingness of provincial governments to share in the costs.

Suppose that the federal government abandons the current practice of entering into regional industrial expansion agreements and tries something else for a while. Ten years later, it returns to bilateral agreements. Would a province be able to "opt-out" and claim compensation under s. 106A? In my view, it would not. For one thing, the federal activity would not be in "an area of exclusive provincial jurisdiction." The federal government has at least some legislative authority over almost all of the projects involved in regional economic development. For another thing, the federal activity would not be something that is "established" after s. 106A comes into force. It would be "re-established" or "revived and revised."

More on these points later. The point most germane to the immediate discussion is that the federal activity would not amount to operating one national shared-cost program. If current Regional Industrial Expansion practice is followed, the case is even easier in this regard than the day care hypothetical. Regional Industrial Expansion subsidiary agreements cover widely variant economic sectors and involve a number of different federal ministers. Regional Industrial Expansion is not one national cost-sharing program, but an aggregation of programs that involve different economic areas, federal ministers and cost-sharing formulae.

### "Shared Cost."

My impression is that the medicare system has been the most oft-cited example of the sort of program that the 1987 Accord is supposed to address. *Mastering our Future*, the 1985 publication of the Quebec Liberal Party's Policy Commission, cited the *Canada Health Act* as the sort of program that caused Quebec concern about the federal spending power. The spending power section of Mr. Rémillard's Mont Gabriel speech mentioned pending federal legislation to revise the Established Program Financing system—which applies to health and post-secondary education. In this light, it is rather surprising to learn that there is some doubt about whether EPF programs are "shared-cost."

As mentioned earlier, the *Canada Assistance Plan* is an example—perhaps the only clear example—of a national shared-cost spending program. The federal program pays 50% of the actual cost of welfare assistance by provinces and municipalities. EPF funding, it may be recalled, is not based on actual current costs. It is based on the national average per capita expenditure for health in the base year 1975-76, "escalated by the growth of the Canadian economy and multiplied by the population of that province or territory." EPF may thus be considered a form of block funding.

As a well-known, official and public reference work, the 1986-1987 FPRO inventory of federal-provincial programs (*Federal-Provincial Programs and Activities*) seems like a promising source of information about the meaning of technical terms. In fact, the inventory just adds to the confusion. There is nowhere any explicit definition of terms. The terms "cost-sharing" and "shared-cost" are both used, with no explanation as to whether there is a semantic difference. The actual usage of terms by the inventory is baffling:

— there is an annex entitled "List of the Various Federal-Provincial Activities Categorized According to Type of Program or Activity." The third category is "Conditional Grants and Payments in Respect of Shared-Cost Programs and Activities." EPF is not included. It is listed under the first category, "Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act, 1977, as Amended in 1984." The failure to list EPF programs in the third category is some evidence that they should be considered "block funding" or "transfer payment" programs;

— when it is presented as a Department of Finance program. Established Program Funding is explained in the following terms:

The Established Programs Financing arrangements specify the method of financing federal contributions to Insured Health Services, Extended Health Care Services and Post-Secondary Education. In essence, the pre-1977 cost-sharing formulae for these programs have been replaced by a formula under which federal contributions are determined independently of program costs in the provinces; (*Federal-Provincial Programs and Activities* at 114).

The passage is ambiguous, but it certainly is possible to interpret it as containing this implication—a “cost-sharing” program is one in which the federal government absorbs a certain percentage of actual government expenditures, and that EPF is not a “cost-sharing” program;

- on the other hand, when the health care parts of EPF funding are presented as National Health and Welfare programs, the inventory states:

The federal government contributes to provincial health care programs on a cost-sharing basis. The formulae for calculating the transfer payments are contained in the Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act, administered by the Department of Finance; (*Federal-Provincial Programs and Activities* at 169).

Some significance should be attributed to the fact that s. 106A refers to “shared-cost” programs (or, in French, programs “cofinancés”), as opposed to “conditional grant” or “conditional transfer” programs. Section 106A would not apply, for example, to a program whereby the federal government offered to pay 100% of the cost of building and operating an entirely new kind of program.

It is not clear whether s. 106A would apply to a program in which the federal government proposes to pay a certain amount towards items of provincial expenditure, regardless of how much the province itself contributes. A province receives the same EPF funding for post-secondary education, regardless of how much it actually spends in a year. There is no built-in incentive for the province to spend money towards a purpose selected by the federal government. To put it another way, there is no use of federal funds to “lever” money out of the provinces. As noted in the previous paragraph, s. 106A does not apply to any and all attempts by the federal government to use conditional transfers of money to influence the behaviour of provincial governments. I think it is fair, although not mandatory, to read “shared-cost” and “cofinancing” as implying that s. 106A is concerned with pressures on provincial treasuries, not just provincial policies. A program like EPF funding for post-secondary education, therefore, ought to be considered as coming outside of the scope of s. 106A.

Does the term "national shared-cost program" apply to current federal-provincial arrangements for funding health care? With respect to "Insured Health Services" (basic medical insurance costs), I think the answer is yes. The basic funding level, as mentioned earlier, is determined in the same way as EPF transfers for post-secondary education. Under the *Canada Health Act*, however, the federal government has the authority to reduce the amount of the transfers if a provincial health care scheme does not meet five criteria, including the requirement that there be insured health services for every resident of the province; see the *Canada Health Act*, s. 15. In practice, then, a province must spend a very large amount of money in order to be fully entitled to federal transfers. Thus the *Canada Health Act* does put pressure on provincial treasuries as well as on policies. A further, albeit marginal, consideration that favours the inclusion of "Insured Health Services" in s. 106A is that medicare appears to have been the most oft-cited example of a "national shared-cost program" in the public discussions that surrounded Meech Lake.

On the other hand, federal funding for "Extended Health Care" (e.g., adult residential care for the physically and mentally handicapped) is not affected by the *Canada Health Act*. The provinces continue to receive a per capita grant that is independent of actual costs. On the same reasoning as in paragraph 8.39, I would conclude that this federal program is not "shared-cost."

So much for my conclusions about the application of s. 106A to EPF programs. While I hope they have a reasonable grounding in the language and historical context of s. 106A, my sense is that both less inclusive and more inclusive interpretations would also be legitimate.

It is right and important that "shared-cost" and "cofinancé" be construed as referring to an undertaking by the federal government to share in the same expenses as the provincial government. For example, if the federal government establishes a program whereby it grants money for research in a particular area, it is not establishing a "shared-cost" program merely because some (or even all) of the research work might take place in provincially operated and funded universities. The major existing national federal-provincial programs—the *Canada Assistance Plan* EPF transfers—all involve the federal government contributing to the same line on the accounting sheet as the provincial government. Programs such as research grants are not listed at all in the FPRO's inventory of federal-provincial programs, let alone under the rubric "shared-cost" programs.

What about simultaneous subsidies? Suppose the federal government gave a per capita cash grant of \$1000 to every day care centre in the country. Further suppose that all day care centres in Canada happen to be receiving subsidies of one sort or another from a province. Would the federal program be "shared-cost" or "cofinancé" because the beneficiaries are actually receiving money for the same general expenses from both orders of government? I would think not, because there is no built-in connection between federal spending and provincial spending. The federal subsidies would go on even if one province or another withdrew its own support. It might be objected that EPF funding by the federal gov-

ernment does not depend on whether a province kicks in additional money of its own. But even if EPF programs are “national shared-cost programs,” they are based on rough estimates of actual costs to provincial governments. Furthermore, they involve direct government-to-government transfers and the concomitant blurring of the lines of fiscal and political responsibility. Simultaneous subsidies do not. In my view, then, s. 106A would not apply to the \$1,000 hypothetical case. The drafting of s. 106A, however, does not adequately ensure that a court would agree.

### “Exclusive” Provincial Jurisdiction.

Section 106A only applies to programs that are in areas of “exclusive” provincial jurisdiction. What does “exclusive” mean? A provincialist might contend that the word means next to nothing; he might put the case as follows:

Read the *Constitution Act, 1867*. Section 92 is the main list of provincial powers. It begins as follows:

In each province, the legislature may *exclusively* make laws in relation to...

Sections 92A(1) (provincial authority over natural resources) and 93 (education) similarly use the word “exclusive.”

Section 95 gives Parliament and the provinces concurrent authority over agriculture and immigration; the word “exclusive” is not used for either level of government. Similarly, section 92A(2) gives the provinces “non-exclusive” authority over the export to another province or territory of non-renewable natural resources and forestry products, and section 92A(4) does the same for the taxation of certain resource-based activities. (Section 94A authorizes Parliament to make laws with respect to “old age pensions,” provided they do not conflict with any provincial laws with respect to pensions. The section does not, in itself, name a head of provincial authority).

The intention of the framers in using the word “exclusive,” then, was merely to refer to the heads of power in sections 92, 92A(1) and 93, as opposed to sections 95, 92A(2) and (4). Had the framers simply said “provincial jurisdiction,” it might have been thought that the federal government had somehow lost the authority to spend with respect to agriculture and immigration, and certain natural resource-based matters, as well.

By using the word “exclusive” in distributing federal as well as provincial powers—except for those of agriculture and immigration—the framers of the *Constitution Act, 1867* intended to set up clearly distinct areas of governmental operation. Over the years, the courts found that it is not so simple. They developed the “double aspect” doctrine; they have said that the same subject matter might be dealt with by the federal government from one point of view and by the provincial government from another. For example, the federal government can deal with cer-

tain insider trading as part of its general authority and of its enumerated jurisdiction over "the regulation of trade and commerce" (s. 91(2)); a provincial government could regulate the same activity under its authority over "property and civil rights" (s. 92(13)); *Multiple Access v. McCutcheon*. The courts thus have established that there are many areas of concurrent jurisdiction. It turns out, then, that the federal government can often regulate with respect to matters that are assigned "exclusively" to the provinces. One of the purposes of s. 106A is to prevent the federal government from distorting provincial spending priorities by offering to split the costs of a program. That rationale applies regardless of whether the federal government also has jurisdiction. So "exclusive" in s. 106A should not be given its plain, ordinary meaning. "Exclusive" should be understood as a jargon word, a "term of art." It should be read as protecting the provinces in each of the areas enumerated in sections 92, 92A(1) and 93 of the *Constitution Act, 1867* regardless of whether the federal government turns out to have concurrent authority in some of these areas.

If the argument just made were right, it would dangerously inflate the effect of s. 106A. Fortunately, the rebuttal seems to be much stronger:

(i) The argument supposes that the framers of s. 106A were using the technical language of the *Constitution Act, 1867*. But they obviously were not. The power-distributing sections of that Act, sections 91, 92 and so on, do not refer to "areas of jurisdiction;" they refer to "matters coming with the classes of subjects" that it goes on to list. The framers instead were using the jargon that the courts and commentators have used in interpreting the *Constitution Act, 1867*. In that jargon, "exclusive" can be used quite correctly to emphasize that an area of jurisdiction is not "concurrent."

(ii) The argument supposes that the framers of the 1987 Accord intended to go out of their way to preserve the federal power to spend in a few particular areas—agriculture, immigration and certain natural resource-based matters. The federal power to spend in other areas of concurrent jurisdiction supposedly has been undermined. But it is absurd to attribute such an intention to a "reasonable framer" of s. 106A. One of the constitutional amendments in the 1987 Accord limits the federal legislative authority over immigration; one of the sections in the political commitments part of the accord requires the federal government to compensate Quebec for providing services for the reception and integration of immigrants. If there is one area where the federal legislative and spending powers have been limited, it is immigration. That leaves us with the supposition that the framers of s. 106A had some special reason to shield federal spending with respect to agriculture and to certain natural resource-based matters. But there is no reason whatsoever in the public discussion, negotiating history or other provisions of the

1987 Accord to suppose that federal spending in these areas was ever a conscious concern of anyone.

(iii) Federal-provincial spending programs existing at the time of the Meech Lake meeting can be used a basis of reference. The programs which were most—perhaps exclusively—mentioned by public officials and commentators in the context of the spending power have the same jurisdictional features. They involve, at the most general level, matters that are usually accepted as being within exclusive provincial jurisdiction—medical care, education and social welfare agency payments. There are only small pockets of concurrent federal authority in these areas (for example, the health, education and welfare needs of military personnel and Indians), and the national shared-cost spending programs take no special account of these pockets. The historical context of s. 106A thus supports the view that it would not extend to programs—such as those involving economic development—where the federal government does have strong bases of legislative authority.

To summarize so far, an analysis of constitutional jargon and an examination of the historical context of s. 106A support the reading of the provision that is far and away the most obvious—that s. 106A has no application to any area in which the federal government, as well as the province, has a substantial base of legislative authority.

An illuminating exercise is to apply the foregoing conclusion to the 1986-1987 inventory of federal-provincial programs (*Federal-Provincial Programs and Activities*). Section 106A only applies to programs established after it comes into force, of course, so let us imagine that these programs were all totally new. How many would be liable to provincial “opting-out” and claims for compensation? Most of them would clearly flunk the “national” test, because they are not available to all provinces. Most of them would also be in areas that are fully covered by undoubted heads of federal legislative authority—such as agriculture, immigration, criminal law, military training, national parks, navigable rivers, international waters, external affairs and penitentiaries.

### “Areas” of Exclusive Provincial Jurisdiction.

#### (A) Areas of divided jurisdiction.

With some programs in the 1986-1987 inventory, however, it is not clear that federal authority covers the entire “area” in which the program operates. Regional economic development programs with respect to “tourism” are an example. Assuming that the other requirements of s. 106A were met, could a province “opt-out” of a “tourism” program and claim compensation based on *the extent* to which that program operates within exclusive provincial jurisdiction?

Although it is not listed in the 1986-1987 FPRO inventory, natural products marketing is a convenient basis for reflection. The reason is that the division of jurisdiction has been the subject of many judicial deci-

sions. The courts have held that federal authority over agriculture does not extend to natural products marketing and that the division of authority depends on the physical movement of the product. The provincial government has authority over the marketing of an egg that is hatched, sold and poached within the province, whereas the federal government would have authority with respect to a sister egg that meets its fate in the province next door. Federal and provincial governments have overcome this awkward split of authority by jointly delegating authority to a single egg marketing board.

Would a national shared-cost program with respect to egg marketing be partly within an area of provincial jurisdiction? Could a province "opt-out" to the extent that federal money is being spent in the provincial area of intraprovincial egg marketing?

The better course for the courts to follow would be to hold that s. 106A does not apply to any to any program which derives substantial support from the federal part of an area of divided jurisdiction. Considerations in support of this view are:

(i) *the legitimacy of federal spending in areas of divided jurisdiction*: cost-sharing appears to be a reasonable way for the federal government to proceed in areas of divided jurisdiction. To allow provincial "opting-out" with compensation would jeopardize the federal government's ability to set national standards in areas where it definitely does have jurisdiction. It might be objected that the federal government can confine its programs to matters that are strictly within its jurisdiction; as a practical matter, this may be impossible to do.

(ii) *the difficulty of apportioning jurisdiction*: to say that a province has a right to "opt-out" and receive compensation *to the extent* that a program operates within an area of provincial jurisdiction is to invite a question that may be extremely difficult or impossible to answer—to what extent? If the program involves egg marketing, do governments have to calculate the percentage of eggs that are marketed intraprovincially as opposed to internationally? Or is it the percentage of revenue that is relevant? If the program is in the area of tourism, it may be practically impossible to apportion jurisdiction. The federal government has many bases of authority—the interprovincial and international movement of people, foreign exchange, interprovincial and international transport, perhaps job creation, perhaps regional economic development. The boundaries of federal authority, moreover, are situational rather than absolute. Federal legislation that overlaps into provincial authority will be upheld in its entirety if the overlap is "necessarily ancillary" or "reasonably related" to the parts of the legislation that is valid.

(iii) *the arbitrariness of attributing federal spending to provincial jurisdiction*: it is tempting to figure that a certain part of federal spending in an area of divided jurisdiction is going to provincial purposes. But how do we know? It may be just as logical to suppose that every last dime of the federal money is



being spent with a view to promoting ends that are within federal legislative authority.

(iv) *the plain language of s. 106A(1)*: the phraseology is “within an area of exclusive provincial jurisdiction,” not “within an area that is partly within exclusive provincial jurisdiction.”

(v) *the historical context*: the major national shared-cost spending programs—which address health insurance, post-secondary education and welfare payments—are, according to the conventional wisdom, not assisted in a substantial way by a source of federal legislative authority apart from the spending power itself; see paragraph 8.47 (iii).

Even if s. 106A were applicable to areas of divided jurisdiction, practical considerations would limit “opting-out” by provinces. The amount the province would recover might be minuscule, and it might be impossible for the province to use that money to establish an alternative “program or activity” that is “compatible with the national objectives.” For example, suppose that the federal government proposes to spend \$50,000 on a tourism project in New Brunswick, on condition that the province also spends \$50,000. Somehow it is agreed—let us say on the basis of the projected origins of the tourists—that “tourism” is 60% provincial. As mentioned earlier, there is no obvious reason to attribute any of the federal spending to provincial purposes; but let us put the matter on the most pro-provincial basis that is short of absurd, and calculate this way:

Forty percent of the total expenditure—that is, \$40,000—should be attributed to matters within exclusive federal jurisdiction. The feds will spend \$50,000 altogether. Assuming the feds absorb all of the costs that go to federal purposes, that leaves \$10,000 that the feds are spending within “provincial jurisdiction.”

If the province “opts-out,” it can claim compensation only if it carries on an alternative “initiative or program” that is “compatible with national objectives.” If the latter condition has any bite at all, the province will have to come up with a project that lures a certain number of tourists from outside of the province. It may be impossible to do so without kicking in a fair amount of provincial money. In the meantime, the province has foregone the infusion of \$40,000 into its economy.

Let us return to the products marketing example. If the “area” is defined as “products marketing,” then a provincialist has to show that s. 106A applies to the provincial part of a single area of divided jurisdiction. This will be very difficult to do given the phraseology of the text—“in an area of exclusive provincial jurisdiction.” So the provincialist might press the case that “products marketing” is not an “area;” rather, it is the aggregate of two areas—extraprovincial and intraprovincial products marketing. As the latter is an “area” within exclusive jurisdiction, the provincialist might argue, s. 106A does apply to the extent that the program operates within provincial jurisdiction.

The same general considerations apply whether we think of “products marketing” as one area or two, and the cases ought to be decided

the same way—s. 106A does not apply if a program is, to a significant extent, within any area of jurisdiction that is under the control of the federal government. The scope of s. 106A ought not to depend on answering scholastic questions such as “when is an area really a composite of two areas?”

In the *Anti-Inflation* case, the majority of the Supreme Court of Canada made much of the fact that “inflation” is too broad a topic to count as a head of federal jurisdiction that can be derived from the general power of Parliament to make laws for the “peace, order and good government” of Canada. But it is relatively easy to determine that a proposed “area” simply is too wide-ranging; it is more difficult to develop rational criteria for determining whether tolerably sized areas should be sliced and diced into component areas. As particle physicists have learned, the atom—the supposedly ultimate, indivisible unit—turns out to be composed of much smaller particles (such as neutrons and protons) which turn out to be composed of much smaller particles (quarks) which might turn out to be composed of much smaller particles (gluons) and so on. The vexed task of determining the “atomic units” of jurisdiction would be avoided if interpreters were to conclude that s. 106A applies only if a program operates entirely within exclusively provincial jurisdiction.

(B) Programs that are problematically linked to federal heads of power.

With some economic development projects, there is cause for uncertainty about whether the federal government could invoke a substantial head of federal authority apart from the spending power.

The federal government has entered into bilateral forestry development agreements with all ten provinces. According to earlier analysis, the aggregate of these agreements should not be considered as amounting to a “national shared-cost program;” the federal government is required to adapt each agreement to local circumstances, and there is no national formula to determine the level of funding and ratio of cost-sharing for each province. Suppose, though, that the courts hold otherwise. Imagine that the forestry development agreements were being put in place for the first time. Would s. 106A apply to them?

Section 92A of the *Constitution Act, 1982* states that:

92A(1) In each province, the legislature may exclusively make laws in relation to...

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom...

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources...

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection...

In *Canada...Notwithstanding*, Romanow, Whyte and Leeson caution (at 274) that:

The possibility of invasion of the provincial domain of development, conservation, and management of non-renewable resources through the use of the federal peace, order, and good government power and the trade and commerce clause remains unchecked.

So one possibility is that the federal government still retains substantial authority to pass laws that directly regulate forestry. In that case, there clearly would be substantial federal authority, apart from the spending power, to support the cost-shared program.

Here is another possibility. Section 106A only applies to federal programs that are under federal authority only by virtue of the general spending power. It would not apply to financial transfers that are sustainable under some other head of federal spending authority—such as “tax expenditures” pursuant to the taxing power, s. 91(3), the payment of unemployment insurance benefits under the unemployment insurance power, s. 91(2A) and the payment of old age pensions and supplementary benefits under the old age pensions power, s. 94A. All of which suggests another way of looking at the federal forestry program under discussion. It is arguable that “promoting regional and industrial development through subsidies” is an implicit head of federal authority under its general power to make laws for the peace, order and good government of Canada. Section 91 grants a whole range of economic powers to the federal level of government; Through judicial interpretation and, later on, constitutional amendment, the powers of the provinces in certain economic areas have been strengthened. An appropriate balance in the forestry area might be to hold that the federal government continues to have legislative authority to make conditional subsidies, even though it cannot enact legislation that directly regulates the forestry industry. If this approach were followed, s. 106A would not apply to the forestry development program.

Another possibility would be for an interpreter of s. 106A to reason as follows—even if the federal government cannot directly regulate matters of forestry development, we can still say that federal *spending* on forestry is connected strongly enough to a head of federal authority (forest exports, which comes under “trade and commerce” or “peace, order and good government”) to escape s. 106A. In other words, it might be held that an area is not “within exclusive provincial jurisdiction” for the purposes of s. 106A:

- (i) if the federal government can directly regulate the specific activity which the program subsidizes; or
- (ii) if the federal government has spending authority in an area apart from its general spending power; or

(iii) if its spending is strongly and specifically connected with a subject matter over which the federal government does have full legislative authority.

Allowing the third category would not gut s. 106A. It is not as though it would swallow up every program. Federal spending on medicare probably has a positive impact in many areas where the federal government can directly regulate. Maybe direct foreign investment is encouraged because the work force is in good physical condition. The positive effects of medicare on the national economy, however, are side-effects; they are not the motivating purpose behind the program. Federal spending on health insurance may serve a national objective, such as expressing and implementing the concern of the nation as a whole for the health and dignity of its citizens. But the test contemplated by "category (iii)" is whether the federal spending is strongly linked to a subject matter over which the federal government has legislative authority, not whether there is a national goal.

The existence of "category (iii)" may derive some marginal support from the fact that s. 106A(1) refers to "areas of exclusive provincial jurisdiction," whereas s. 106A(2) uses the term "legislative jurisdiction." One explanation for the distinction may be that the drafters of s. 106A(2) thought that the "jurisdiction" of the provinces was, in some nonlegislative sense, being extended—provincial governments were acquiring a right to compensation. But another way of looking at the matter is to understand s. 106A(1) as inviting an inquiry that transcends the legalistic division of legislative powers. Thus, even if a cost-shared program operates in an area that cannot be directly regulated by the federal government, it might be thought of as being in an area where the federal government has "jurisdiction" in a broader sense—namely, that the program is strongly and specifically linked to a head of authority over which the federal government does have full regulatory authority.

While I think interpreters of s. 106A ought to accept "category (iii)" reasons for holding that the section does not apply, there is no guarantee that they will. Cost-shared programs in some major areas of economic development would be in significant constitutional jeopardy as a result of s. 106A, and the fact that these programs are linked to areas of clear federal legislative jurisdiction will not necessarily save them.

**"Established by the Government of Canada."**

Section 106A(1) begins:

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...

The phrase provides some important clues to the limitations on the scope of s. 106A. The section talks about a national shared-cost program that is "established" by the government of Canada. With a program like Regional Industrial Expansion, the amounts and directions of spending are not determined until the federal and provincial governments have

entered into bilateral agreements. It has been argued earlier that Regional Industrial Expansion does not count as a “national (shared-cost) program,” because of its province-by-province, agreement-by-agreement variations. The phrase “established by the government of Canada” provides a further indication that s. 106A was not intended to apply to such spending activities. Does it make sense to say that a program has been “established” by the government of Canada if the only thing in place is this—parliamentary determination of an overall spending limit and authorization for the government of Canada to conclude agreements with each of the provinces? Section 106A ought to be applied to programs under which there is a definite national formula for the province-by-province allocation of funds and definition of the purposes for which they must be spent. It should not be applied when “provincial participation,” in the form of bilateral agreements, is necessary to determining the basic shape of federal spending—to “establishing” the activity—in the first place.

#### **“A Government of a Province that Chooses not to Participate.”**

The implication of “participate” is that a “national shared-cost program” is one in which a province is an active partner in a financial arrangement with the federal government. The term therefore bolsters several contentions made earlier in this discussion—that s. 106A would not apply where:

- the federal and provincial governments happen to be simultaneously funding the same activity; see paragraph 8.45;
- the federal government subsidizes a special project that makes use of facilities that generally are funded by a provincial government; see paragraph 8.43;

#### **National Shared-cost “Programs.”**

Section 106A refers to a provincial “initiative or program,” whereas it speaks only of national shared-cost “programs.” The aim of the drafters was probably to signal in a rough way that the provinces are allowed some flexibility in the activities they may carry on in order to “earn” the right to compensation. The distinction between “program” and “initiative” is not based on an official federal-provincial jargon that pre-dated Meech Lake, and the drafting discussions between the Meech Lake and Langevin Block meetings did not devote any substantial attention to exploring it. A number of distinctions are possible, but none are clear or convincingly illustrated by an example. Perhaps “initiative” implies that more of the actual execution of government-selected goals will be done by the private sector. (Example: the federal government establishes a shared-cost program which contemplates publicly owned day care centres, but a province “opts-out” and subsidizes privately owned operations). Perhaps “initiative” implies that the government will make new use of existing legal and bureaucratic structures, rather than setting up a distinct system to achieve goals that are “compatible with the national objectives.” (Example: a province sets up day care centres in public elementary schools).

It might be noticed that in the two examples of "provincial initiatives" in the previous paragraph, it would not strain the English language to call the provincial activity a "program" in its own right. It might be sensible, therefore, to read "initiative" primarily as a comparative term; an "initiative" is a *provincial* government activity that is *less* "something-or-another" than the *national* government activity to which it is being compared. (It is not clear whether the federal government could escape s. 106A by presenting its own spending activity as an "initiative" in its own right).

**That "is Established After the Coming Into Force of this Section."**

There is an unfortunate side-effect to the "grandfathering" of existing national shared-cost programs. The time horizon of politicians is very short, and the fact that there is no immediate threat to popular national programs means that politicians are far more comfortable with s. 106A than they ought to be. If s. 106A applied to the existing medicare system, first ministers undoubtedly would have bothered to define some of the essential concepts.

The "grandfathering" of existing programs may have been especially lulling, inasmuch as many first ministers probably thought in terms of radically new programs, such as national day care. But what about revisions to existing statutes, such as those governing "Insured Health Services" or the *Canada Assistance Plan*? At what point does a modification in an existing set-up amount to the "establishment" of a new program, as opposed to the modification or revision of an existing one?

One test that might be used would be quantitative and impressionistic. The interpreter simply would ask "are these changes so big that the problem is different in kind?" There is not much that a theorist can say by way of elaborating this approach. It certainly can be criticized. It calls for an arbitrary and unpredictable judgment call, and excessively discourages the federal government from adapting its spending programs in light of experience and with a view to changed circumstances. A new statute might work more efficiently and fairly than the existing one, impose no more onerous conditions on the provinces, and yet allow a province to "opt-out" and claim compensation—simply because it looks "different enough."

A provincialist might argue that the test should be whether the federal government's new arrangements impose substantially more stringent conditions on the provinces. The reasoning might go like this:

— the purpose of "grandfathering" the existing programs is to prevent provinces from pulling the rug out from under the federal government after it entered into these programs on the assumption that "s. 106A opting-out" was not possible. But the federal government made its earlier spending commitments on the assumption that only certain specified conditions would be observed by the provincial governments. It would be reasonable to tell the federal government that it cannot make these conditions more onerous without allowing the provinces to claim the protection of s. 106A.

In my view, the "more onerous" test would not adequately recognize the difficulties for the federal government. Once it has committed itself to a particular program area—like funding post-secondary education or health insurance—political and social expectations are built up around them. It would be difficult, and injurious to the public interest, for the federal government to withdraw rapidly from any area. The conditions that the federal government originally stipulated may no longer be judged adequate in the context of changed economic and social circumstances or political values. The federal government should, therefore, remain free to pass a statute like the *Canada Health Act*—a statute that tightens up on the conditions that provincial governments must observe, in order to preserve and improve the system that is already in place.

Section 106A talks about programs that are "established" in the future; the word implies that the foundations of a new program are to be put in place, not that the existing ones are to be modified or shored up. Accordingly, "program" should be understood in a very broad sense; in the case of "Insured Health Services," as "national medicare" or "federal support for provincial public health insurance plans," rather than "that which is defined by the 1977 "EPF" statute and the *Canada Health Act*." Thus I would recommend that s. 106A be interpreted as being inapplicable to any new statute that operates in the same program area as an existing statute.

### When Can "Opting-out" Occur?

A related, but not identical, issue is this—can a province "opt-out" of a new national shared-cost program at any time? Or only at the time when it is first put in place?

As usual, the language of s. 106A is inconclusive. The "one-chance-only" advocate might point out that s. 106A says "chooses not to participate," rather than "initially chooses not to participate, or later withdraws from." An "opt-out-anytime" advocate might reply that s. 106A says "participate in a program that is established," rather than "participate in a program when it is established." So the issue must be decided on broader policy grounds.

A significant consideration is that it would be unfair to the federal government to allow the following scenario—it consults provinces about whether they would "opt-out" if a new program is established, they say they will not; the program is established, people come to rely upon and support it; several provinces then "opt-out," run their own programs and claim compensation; the federal government has no practical alternative but to do so—the social and political costs of terminating the program would be too high.

A countervailing consideration is that it would be unfortunate if the initial support of a provincial government tied the hands of its successors in office indefinitely. The initial choice of a provincial government would, in effect, be "entrenched."

Another way of looking at the problem is in contractual terms. Suppose that s. 106A does extend to provinces that "opt-out" after a pro-

gram has come into force. Before a program is established, all the provincial governments promise the federal government that, for a certain period of time, they will not "opt-out" or that they will not claim compensation if they do. Should the court hold that the promises are binding? There might be some problem in principle if the federal government insisted that a provincial government could not "opt-out" at all on account of an earlier promise. It is questionable whether a provincial government should be able to commit its successors indefinitely to participation in a governmental program. On the other hand, a commitment not to claim compensation only affects the financial standing of a successor government, as opposed to its legal freedom of action, and it is commonplace for a provincial government to sign a commercial contract that binds succeeding governments.

My guess is that the appropriate interpretation of s. 106A is something like this—generally speaking, considerations of flexibility and democracy support the right of a province to claim s. 106A compensation if it "opts-out" of a program in which it initially chose to participate. When the federal government institutes a new program, however, the federal government can and should obtain undertakings from provincial governments that they will not claim compensation later on under s. 106A. It would be prudent, although perhaps not legally necessary, to restrict the undertakings to a certain number of years duration—or to qualify the undertaking so that it allows a province to terminate after giving a certain period of notice.

### **Conditions for Obtaining Compensation.**

So far, the discussion has focussed on the scope of s. 106A: what programs does it apply to? The next question is this—given that s. 106A applies to a program, what activities of an "opted-out" province entitle it to compensation?

### **Carries on a Program or Activity that is Compatible with "the National Objectives."**

The wording of section 106A stands in plain contrast to that of section 95B(2) in the immigration part of the 1987 Accord. The latter states that a constitutionalized federal-provincial agreement has effect only insofar as it is "not repugnant" to an Act of Parliament that "sets national *standards and objectives*" relating to immigration. In the same accord, the framers use "standards and objectives" in one place and "objectives" in another. What inferences can be drawn from the distinction?

Immigration is an area in which Parliament has express and paramount authority to legislate; *Constitution Act, 1867*, s. 95. Section 106A addresses operations of the federal government in areas in which Parliament has, apart from the "spending power," no authority to regulate. It seems reasonable to suppose that the distinction between "standards and objectives" and "objectives" acknowledges and affirms the difference in the constitutional basis for federal intervention. When the federal government is unable to rely on any head of regulatory authority, it ought to allow the provinces more flexibility.



A provincialist might urge that "objectives" should be understood as including only the most general and abstract aims of a program. The argument might be:

The medicare program was the most commonly cited example of a national shared-cost program during the public discussions surrounding Meech Lake; it was, moreover, the major program that had been amended most recently. We may suppose that the framers of s. 106A were aware of the phraseology of the *Canada Health Act* which includes the following:

3. It is hereby declared that the primary *objective* of Canadian health care policy is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers (emphasis added).

The Act then goes on to define the "*criteria*" that provincial programs must meet in order to achieve the full federal subsidy. The provincial health plan must be:

- (i) publicly administered;
- (ii) comprehensive (it applies to all kinds of insured health services);
- (iii) universal (it covers all residents of the province);
- (iv) portable (it covers people temporarily outside of the province);
- (v) accessible (it provides for insured health services on "uniform terms and conditions and on a basis that does not impede or preclude, either directly or indirectly whether by [user fees] or otherwise, reasonable access to those services; s. 12(1)(a). Also, "reasonable compensation" to medical practitioners and dentists must be provided, in accordance with a "system of payment" devised by the province).

By referring to "objectives" but not "objectives and criteria," the drafters of s. 106A have indicated that the federal government cannot insist on compatibility with "criteria," let alone "standards."

The extremely narrow reading of "objectives" cannot withstand close examination. To begin with, it is not supported by even the *Canada Health Act*. Section 3 of the *Canada Health Act* refers to a "primary objective;" it does not purport to state the only objective of the Act. It is to be expected that the one "primary objective" of the statute would be stated in more general terms than the elements in a longer list of specific objectives. It is entirely possible that some, or even all, of the five "criteria" amount to "objectives" of the Act. It is also entirely possible that the "primary objective" should be interpreted in light of the five criteria and that, properly interpreted, it actually contains two of them—universality and accessibility.

Furthermore, it would be mistaken to focus only on the *Canada Health Act*. The *Immigration Act* is an even more obvious precedent when it comes to considering the meaning of the 1987 Constitutional Accord. There were a number of statutes in force in 1987 that addressed national shared-cost programs, but only one national statute that established the "objectives and standards" for immigration.

The first step is to identify the use of terms such as "standards" and "objectives" in the statute. Section 3 of the *Immigration Act* is entitled "Objectives." It states that the Act should be interpreted and administered "in such a manner as to promote the domestic and international interests of Canada recognizing the need" to do ten listed things including:

- (a) to support the attainment of such demographic *goals* as may be established by the Government of Canada from time to time in respect of the size, rate of growth, structure and geographic distribution of the Canadian population (emphasis added);
- (b) to enrich and strengthen the cultural and social fabric of Canada, taking into account the federal and bilingual character of Canada;
- (f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to *national standards* of admission that do not discriminate on grounds of race, national or ethnic origin, colour, religion or sex (emphasis added).

Sections 4 and 5 of the *Immigration Act* are labelled "*Principles*." They state very basic rules about who does and does not have the right to enter Canada or remain there. Section 6 states that an immigrant may be admitted to Canada if he meets "the selection *standards*" established by the regulations. The latter include a very detailed "point system" for determining the suitability of an applicant; for example, each year of primary and secondary education is worth one additional point.

It should be noted that:

- some of the "objectives" are very specific (e.g. the strict rule against discrimination in s. 3(f));
- several of the "objectives" are cross-referenced to "goals" (s. 3(a)) and "standards" (s. 3(f)). The distinctions between the various terms is not absolute;
- the Act does not suppose that the normative universe is bifurcated into "objectives" and "standards." There are "principles" and "goals" as well;
- the "standards" in the Act are highly specific and detailed.

Insofar as the *Canada Health Act* and the *Immigration Act* can be used as precedents for interpreting the difference between "objectives" and "standards" for the purposes of s. 106A, they do no harm to the position of the national government. On the contrary they indicate, rather reassuringly, that:

— “objectives” in s. 106A cannot be understood as necessarily excluding “principles,” “criteria,” “norms” and so on. Both the *Canada Health Act* and the *Immigration Act* include critters that are labelled neither “objectives” or “standards.” The 1987 Constitutional Accord adopts a very rough, two-part distinction and there is no obvious reason why norms of intermediate generality should be classified as “standards” rather than “objectives;”

— for the purposes of s. 106A, statements of “objectives” can provide direction that is precise and strong. In both statutes, “objectives” may be used in a narrower way than it is in the 1987 Accord. (As just noted, in the latter the normative world is divided into “objectives” and “standards” only; whereas in the statutes, “objectives” is at the extreme end of a spectrum that includes things like “criteria” and “principles”). Yet, even in the statutes, “objectives” can provide definite and specific guidance. The nondiscrimination “objective” of the *Immigration Act*, for example, leaves no doubt that certain kinds of governmental conduct are flatly unacceptable.

For decades now, various federal statutes have expressly allowed for “opting-out;” how does their phraseology compare with the terms of s. 106A? The *Established Programs (Interim Arrangements) Act*, S.C. 1964-65, c. 54, of 1965 allowed provinces to “contract out” of certain cost-shared programs in the health and social welfare areas. The programs would be “wholly administered and financed” by the province, s. 3(1). Instead of taxing residents of the province to pay for the federal share of the program, and then making a conditional grant to the province, the federal government would “abate” its taxes and let the province do all the taxing and redistribution itself. The net effect was more symbolic than substantive, because provinces were allowed more freedom at the administrative and fiscal levels only—there was no leeway in terms of program policy. A “contracting out” province had to promise to “continue to operate the program in accordance with the [federal statute that authorized it] except as to the manner in which the Government of Canada will contribute thereafter in respect of the program and the manner in which accounts are to be submitted.”

With respect to certain other federal programs (involving agriculture, forestry, hospital construction, campground and picnic areas, and roads) the 1965 Act allowed a different kind of “contracting out.” A province could receive a cash payment in lieu of a conditional grant, if it:

11(2) ...[substituted for the federal program] a provincial program that in the opinion of the appropriate Minister [was] a program that would *substantially accord with the objectives of the special program that it replaces* (emphasis added).

The aim was to put the program more fully under the “administrative and financial control” of the province. The only use of this avenue was by Quebec, which contracted out of the federal forestry program; see J.C. Strick, *Canadian Public Financing*, 3rd ed., (Toronto: Holt-Rinehart & Winston, 1985) at 110. I have not been able to find any

information on how the Quebec program actually operated; inasmuch as the aim was to allow for "administrative and financial control," rather than policy freedom, it would be surprising if the provincial program varied significantly. It is interesting that the word "objectives" was used in the context of a statute that allowed a highly constrained form of "contracting out." The precedent provides a bit more reassurance that the word "objectives" in s. 106A is not too laissez faire. As we shall see, the word "compatible" in s. 106A is much more worrisome.

Other federal statutes that allow "opting-out" provide little or no illumination on what "objectives" means in s. 106A. The *Canada Pension Plan*, R.S.C. 1970, c. C-5, s. 3(1), provides for compensation to any province that operates a pension plan with "benefits comparable to those provided [under the federal plan]." The *Canada Student Loans Act*, R.S.C. 1970, c. S-17, s. 12, authorizes compensation to a province that operates its own "student loan plan;" it is unclear from the statute how closely the scheme must resemble the federal one.

As the legislative precedents do not distinguish, precisely or consistently, between "objectives" and "standards," an interpreter might search for some essential distinction between them at the conceptual level. In a Winnipeg Free Press column ("Decentralization triumphs in Meech Lake pact" *The Winnipeg Free Press* (6 May 1987) 7), published shortly after the Meech Lake meeting, Ms. Frances Russell suggested that objectives are goals, and standards are means by which to achieve those goals. This causes concern here that a ban on extra-billing would not count as an "objective" under s. 106A. I rather doubt that the two concepts can be separated sharply at the abstract level, but let us suppose that there is some intrinsic distinction; to refine Ms. Russell's test, let us say that an "objective" must amount to a rational social aspiration in its own right, whereas a "standard" can be arbitrary when viewed in isolation and only comprehensible in terms of a larger purpose. That granted, it still seems that the federal government could incorporate a ban on user fees into a legitimate statement of "objectives" for the purpose of s. 106A. The *Canada Health Act* might state that national health care objectives include the following:

That Canadians should have equal access to medical care regardless of wealth;

or

That there should be no possibility that Canadians will be deterred from seeking medical care, or be denied equal access to medical care, by user fees or by the necessity of demonstrating need.

As suggested above, it is doubtful whether any abstract distinction of the difference between "objectives" or "standards" would clearly account for all possible cases. What if an "objective" is to establish minimum national standards? What if the federal government stipulates that its "objectives" are to assure to each beneficiary of the agreement such-and-such benefits? It should be considered appropriate and legitimate for the federal government to incorporate certain facts and figures into a state-

ment of "objectives." The fact that "standards" is not referred to in s. 106A indicates that the federal government should not insist on provincial compliance with detailed and minute requirements; but it should not force the Parliament to eschew numbers and trade only in words.

### Compatible With "the" National Objectives.

The English version of the Meech Lake communiqué spoke simply of "national objectives." Which national objectives? Defined by who? No definite article was included. No indefinite article was included either. English permits more ambiguity with respect to plural nouns than does French which requires that there be an article—either "les" or "des." (A notable juridical example of this difference is in Security Council Resolution 242, a vitally important resolution on the Arab-Israeli conflict. The English version calls for Israel to return "territories" occupied during the June 1967 war, whereas the French version speaks, in effect, of "les territoires"—which means, in context, all the territories. Israel maintains that diplomats at the time understood that the more ambiguous English version was the authoritative one). The French version of the Meech Lake communiqué did refer to "les objectifs nationaux."

The uncertainty about who defined "national objectives" and how, caused serious concern in some quarters including those of the government of Manitoba. "National objectives" might be understood as meaning something as vague as "peace, order and good government." It might be determined by reference to the general thrust of a series of federal statutes in an area, rather than the latest one. It might be defined with reference to the ensemble of federal and provincial programs in an area. The anxiety was heightened by the fact that the Constitution generally uses "Canada," not "national government," to refer to the federal level of government and that "national" in "national shared-cost programs" could easily be taken to mean "federal-provincial."

Due largely to the exertions of Premier Pawley of Manitoba, participants in the Langevin Block meeting finally agreed to several changes that confirmed a leading role for the federal government. The draft was revised to provide that the government of Canada "establishes" a national shared-cost program. The word "the" makes it clear that the "national objectives" are those of the national shared-cost program that is created by the federal government.

In the absence of an express parliamentary declaration of the purposes of a program, an interpreter of s. 106A would have to infer them from the social context in which the legislation was enacted and the terms and policy of the legislation itself. If Parliament includes an explicit list of "objectives" in the legislation establishing a program, interpreters of s. 106A generally will have to accept it. It should be cautioned, however, that Parliament could not escape the constraints of s. 106A just by placing the tag "objective" on every requirement it wants observed. At some point, an interpreter would be entitled to say that a federal norm is, for the purposes of s. 106A, so detailed and administratively intrusive that it "really" amounts to a standard even though Parliament has chosen to call it an "objective."

### "Compatible" with the National Objectives.

The weaseliest of all the weasel words in the proposed 1987 Constitutional Accord is "compatible." If it means that the provincial program or initiative must incorporate the objectives of the national program then s. 106A might, as interpreted and applied in practice, strike a tolerable balance between national purpose and local diversity. If "compatible" merely means "capable of co-existing" or "non-subversive," then s. 106A is a blatantly one-sided concession to provincialism.

*The Compact Edition of the Oxford English Dictionary* (Oxford: Oxford University Press, 1971) at 489, says that the origins of "compatible" are the Latin words "com"—meaning "with"—and "pati"—meaning "suffering." Indeed, the first definition of the word is "participating in suffering; sympathetic." The etymology of "compatible" suggests that a "compatible" program displays the same social concerns as the federal program, rather than merely not subverting it.

Definition 2 in the Oxford Dictionary is ambivalent. "Compatible" means:

mutually tolerant; capable of being admitted together in the same subject; accordant, consistent, congruous, agreeable.

Under the word "compatible" in *Webster's Dictionary* (P.B. Gove, ed., *Webster's Third New International Dictionary*, 14th ed., (Springfield: G & C Merriam, 1965) at 463), there is a similar definition. "Consonant" is suggested as a synonym. Now the trouble starts. Under "consonant," the dictionary attempts to differentiate the nuances of a variety of terms—consistent, compatible, congruous, congenial and sympathetic. "Consonant," it says, "implies general harmony and stresses lack of factors making for discord and difficulty." "Compatible," it continues, "indicates capacity for existing together without discord or conflict, although not necessarily in positive agreement."

The legal dictionaries are not of much help. A survey of the dictionaries in the University of Manitoba Law Library (which includes in its holdings several civil law or French language ones) discovered about a dozen that don't even have an entry for "compatible." *Black's Law Dictionary* (H.C. Black, ed., *Black's Law Dictionary*, 5th ed., (St. Paul: West Publishing, 1979) at 256, and several others do provide a definition for "compatibility"—but not one that is relevant to present purposes. ("Compatibility," when applied to official functions, means that they can be discharged simultaneously).

There are special reference works whose primary concern is to explain how judicial opinions have interpreted a particular word. "Compatible," however, does not appear in the Canadian Abridgment's guide to Words and Phrases (R.R. Epstein, ed., *The Canadian Abridgement (2nd ed.) Words and Phrases* (Toronto: Carswell, 1984)). The American equivalents surpass that silence only by a mumble. *Words and Phrases (Permanent Edition)*, vol. 8 (St. Paul: West Publishing, 1951) at 272, records that in a patent case (*Moss v. Elliot* (1936), 84 F.2d. 224 at 227, 23 C.C.P.A. (Pat.) 1289) a Federal Court held that "compatible" in a court pleading:

[had its] common meaning, defined as signifying capable of co-existing in harmony; congruous; accordant; consistent; not repugnant.

Twelve years later, another Federal Court discerned that one statute, which said "compatible with the public interest," meant exactly the same thing as another statute that said "consistent with the public interest;" *In re Chicago, R. I. & P. Ry. Co.* (1948), 168 F.2d. 587 at 594.

A computer search of the statutes of Manitoba, Ontario, and Canada yields a number of examples where the word "compatible" is used. *The Report of the Special Joint Committee* (Special Joint Committee of the Senate and of the House of Commons on the 1987 Constitutional Accord, *Final Report* (Ottawa: Queen's Printer, 1987) at 75) observes that:

While the words "compatible" and "initiative" do, on occasion, appear in federal and provincial statutes other witnesses pointed out that, these terms have not, in any real sense, been judicially interpreted. In any event the statutory context would be different from the context of proposed section 106A.

To these comments it might be added that there is no consistent pairing of the English "compatible" and the French word that is spelled the same way. In some federal statutes, the "compatible-compatible" pairing occurs; in others, the combination is "consistent-compatible," in others "not inconsistent-compatible." (For examples, see, respectively, *Export and Import Permits Act*, R.S.C. 1970, c. E-17, s. 8, and *Official Languages Act*, R.S.C. 1970, c. O-2, s. 8(2); *Geneva Conventions Act*, R.S.C. 1970, c. G-3, Art. 100, and *National Library Act*, R.S.C. 1970, c. N-11, s. 7(1); *Loi sur l'inspection de l'électricité*, S.R.C. 1970, c. E-4, s.4, and *Immigration Act*, s. 67).

On some occasions, "compatible" is used to describe the relationship between a situation and the enacting government's own laws and policies. For example, the *Foreign Investment Review Act*, S.C. 1973-74, c. 46 (repealed, S.C. 1984-85-86, c. 20), said, in s. 2(2)(e), that authorizations for foreign acquisitions should have taken into account, among other things, "the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment." The primary emphasis by Parliament was on the level of agreement between the acquisition and the federal government's own policies. The nuance conveyed (to me, at least) is that "compatibility" here implied a higher level of agreement than merely "not subverting or contradicting;" that the relevant inquiry extended to whether the acquisition advanced specifically stated federal aims.

Perhaps some inferences about "compatibility" can be made from rummaging through the 1987 Accord itself. A comparison with the provisions on immigration revealed a distinction between "standards" and "objectives." Is there a counterpart for "compatible?" Actually, yes. The English version of section 95B of the immigration provisions states that constitutionalized immigration agreements must be "not repugnant to" a

statute of Parliament that sets national standards and objectives. The French version of the immigration provisions states that the constitutionalized agreement is only effective "dans le mesure de sa *compatibilité*" with Acts of Parliament that set national standards and objectives.

Moving back a step then, what do "not repugnant to" and "compatibilité" mean in the immigration context? The plain language of s. 95B and the precedent of the Cullen-Couture agreement strongly suggest the following—strict compliance is required within certain parameters defined by the federal government. A federal-provincial arrangement can lead to different selections than a strictly federal one, but Parliament can dictate constraints that must be strictly observed. Section 95B expressly refers to federal norms concerning overall numbers that can be admitted into Canada, and classes of persons who cannot be admitted. The strong impression left by the wording is that a federal-provincial agreement cannot overstep these boundaries even a little.

On the other hand, comparisons with the Cullen-Couture agreement seem to make it clear that "not repugnant" does not mean that the positive selections must be identical. The agreement itself expressly provides that the province of Quebec can urge or, depending on how the agreement is interpreted, insist that Canada admit a person who scores very poorly under the federal system. The current *Immigration Act* does not purport to preempt or exclude federal-provincial arrangements that lead to somewhat different selection decisions than would result from unilateral federal action. (Section 95B would, it seems, allow a future Parliament expressly to require that a certain minimum score be achieved by any immigrant to Canada, regardless of any federal-provincial arrangements to the contrary). "Compatibilité" or "not repugnant" in s. 95B does not have a simple, consistent meaning; the required degree of concord between a federal statute immigration statute and a federal-provincial agreement seems to depend on the particular norms that are being compared.

There is a risk that an interpreter of s. 106A might "reason" thus:

The french word "compatibilité" is paired with the english "not repugnant" in s. 95B. It is also paired (in the adjectival form, "compatible") with the English "compatible" in s. 106A. So the English "compatible" in s. 106A must mean the same thing as "not repugnant." "Not repugnant" is a low degree of concord; it just means "not in conflict with." Thus the English word "compatible" in s. 106A just means "able to co-exist." It does not require provincial programs to incorporate federal norms.

The argument actually proves nothing. Given the premise that "compatible" and "not repugnant" must mean the same thing, it is just as logical to conclude that the "same thing" is the higher degree of concord implied by "compatible." Indeed, as argued in the previous paragraph, "non-repugnant" in s. 95B sometimes does imply a high degree of concord. In any event, the premise is untenable. "Compatible" and "not repugnant" do not necessarily mean the same thing merely because they are both paired with "compatibilité." It would be just as rational to con-



clude that the "compatibilité" has different meanings, depending on which English word it is paired with.

It is a standard and reasonable interpretive technique to try to read a text as through it were the product of an informed and coherent intellect. The comparison of usage between s. 95B and s. 106A seems, however, to yield no reliable conclusions. Given the indecent haste of the process, it would be somewhat ironic if the "not repugnant/compatible" comparison did have a crucial interpretive effect. It would be surprising if many of the first ministers or bureaucrats who participated in the drafting of the 1987 Accord were aware that the opportunity for comparison even existed.

There are some textual considerations which support the "incorporationist" interpretation of "compatible" in s. 106A. ("Incorporationist" here means that the provincial program or initiative must assimilate the objectives of the national program, as opposed to merely not being in conflict with it). Section 106A supposes that a national shared-cost program is "established" by the government of Canada. If all of the provinces can "opt-out" of a national program, and operate a program that is fundamentally different from the federal one, then what has the federal government actually "established?" It should be noted that what is supposed to be established is a shared-cost program, not merely a program to share costs. In other words, the federal government establishes not only financial arrangements, but social policy directives as well.

The negotiating history of s. 95B might provide another nudge in favour of the "incorporationist" (as opposed to "non-subversive") interpretation of "compatible." Along with the "distinct society" clause, the wording of s. 95B was the most controversial issue at the Langevin Block meeting. It is not necessary to refer to, or rely upon, the fact that the struggle actually occurred behind closed doors. The differences between the Meech Lake communiqué and the Langevin block text bespeak serious concern over the wording of s. 95B and several changes in the direction of affirming the policy-setting goal of Parliament. The word "establish" was added and it was made clear that the "national objectives" are those of the national shared-cost program. It seems reasonable to infer that the framers thought that "compatible" had some real force. If the framers thought that "compatible" meant merely "not contradictory to, or subversive of," then their efforts to strengthen the federal role in other respects would have been silly. It would have amounted to weatherproofing a house built on quicksand.

If the federal government had conducted its negotiation of the 1987 Accord with adequate deliberation and institutional self-regard, it surely could have done better than "compatible." Some examples are—"accords with;" "complies with;" "is consistent with;" "is congruous with;" "incorporates" or "respects." Yes, all the alternatives suggested are somewhat vague themselves. But none of them would have been open to as wide a range of interpretation as "compatible;" and, in each case, the centre of the interpretive range would have better served the cause of national purpose and unity.

In *Mastering our Future*, the Quebec Liberal Party had the following to say about national shared-cost programs:

Secondly, we will require that the Constitution more clearly define the nature of the conditions that can be imposed on the provinces regarding shared-cost programs. *In order to be acceptable, these conditions should cover only the broad norms to be respected by the provinces as regards the programs they set up. In no way should they prescribe regulations relative to the administration of such programs* (emphasis added), ("Extracts from *Mastering our future*" in Leslie, ed., *Canada: The State of the Federation* at 79). (P.M. Leslie, ed., *Canada: The State of the Federation* at 79).

Had the last two sentences been incorporated into the Constitution, they would have secured the federal position better than the actual formulation. They would have made it reasonably clear that the federal government requires that basic criteria (such as "universality") can be observed. The word "norm" would have lessened the stark contrast between s. 106A ("objectives") and s. 95B ("national objectives and standards"). The word "regulation" implies detail and it does not seem that the last sentence would preclude broad federal norms such as one requiring public administration of a health insurance scheme.

In fairness to the federal government (which has been far from fair to its critics) it did manage to resist the first "requirement" of *Mastering our Future*—which was that national shared-cost programs be submitted, for the approval of the provinces, to a "procedure similar to the constitutional amending formula." Still, it should be to the lasting discredit of the current federal government that it agreed to the Meech Lake formulation of s. 106A which left the federal government's authority entirely contingent on the interpretation of a few cryptic words. The bizarre and dismaying fact remains that the pro-federalist amendments to s. 106A were secured primarily through the initiative and persistence of a provincial premier (Manitoba's), rather than through that of the federal government.

### **The Non-derogation Clause.**

Between the Meech Lake and Langevin Block meetings, some defenders of Meech Lake claimed that section 106A was a partial triumph for the federal government, in that it formally acknowledged the existence of the federal spending power. Some Quebec nationalists strongly criticized it for the same reason.

The contents of the Meech Lake clause on the spending power did acknowledge some federal spending power in a backhanded way, inasmuch as the clause assumes that at least some federal spending programs can be established in areas of provincial jurisdiction. At the same time, it should be recognized that the legal risk to the federal "spending power" was very small, that the contents of the Meech Lake clause do not directly affirm (as opposed to assume) its existence and that the clause was concerned primarily with limiting the ability of the federal government to attach conditions to spending.

The contents of the Meech Lake clause at most would have confirmed the existence of the spending power with respect to national

shared-cost programs in areas of exclusive provincial jurisdiction. No wider affirmation was involved from the point of view of the contents themselves. The title of the Meech Lake clause, however, was "spending power." The *Skapinker* case (*Law Society of Upper Canada v. Skapinker* (1984), [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161) established that titles and side-notes are legitimate aids to the interpretation of constitutional texts. If Meech Lake had preserved that title, it could have been argued that there was acknowledgment of a general spending power.

True to form, the federal government managed, at the Langevin Block meeting, to concede many of its minimal gains with respect to the legitimation of the spending power. Section 106A is entitled "national shared-cost programs," not "spending power." At Premier Bourassa's initiative, it now includes a "non-derogation" clause. The clause that emerged is one-sidedly pro-provincial. It reads:

s. 106A(2) Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces.

It should be noticed that the section does not say "alter;" it says "extend." It would have been far better (from the federal point of view) to say—"except as expressly provided, nothing in this section alters..." The actual wording leaves open the possibility that s. 106A(2) could be used as an interpretive tool against other uses of the federal spending power. The fact that it applies to both Parliament and the provincial legislatures only looks symmetrical. The section as a whole is talking about programs that operate in areas of exclusive provincial jurisdiction to begin with; how could it possibly expand the legislative powers of a province? The right of a province to receive compensation could not possibly be construed as extending its legislative authority. The only government that could possibly lose anything by the insertion of s. 106A(2) is the federal level of government.

Section 106A(2) does not negate entirely the confirmatory effect of s. 106A(1) on the federal spending power. No matter how the former section is construed, the latter section assumes the validity of at least some national-shared cost programs in areas of exclusive provincial jurisdiction. It should further be noted that s. 106A(1) refers to spending programs established by the "government of Canada"—by the federal executive. Section 106A(2) refers to not diminishing federal *legislative* power. An entirely reasonable interpretation of the contrast seems to be this—section 106A(2) is saying that the acknowledgment of the ability of the federal level of government to spend money in an area does not mean that it can pass legislation that directly regulates it.

At the same time, it should be noted that it is regrettable that federal spending programs are characterized as acts of the federal executive. In practice, national shared-cost programs invariably are authorized by legislation. Section 106 of the *Constitution Act, 1867* refers to the power of Parliament to authorize expenditures from the Consolidated Revenue Fund; section 91(1A) gives Parliament authority over "the public debt and property." The assertion of legislative control over executive taxing and spending was a vital part of the struggle for political democracy in

England. We in Canada are the beneficiaries of the success of that struggle. The *Constitution Act, 1867*, s. 53, entrenches the constitutional principle that money bills can only originate in the most populist of all of federal institutions, the House of Commons. It is a revealing comment on the mind-set of the framers of the 1987 Accord that they identified the federal executive—and not the legislature—as the creator of existing and future national shared-cost programs. The text again and again vests fundamentally important constitutional powers in federal and provincial executives and, in particular, in first ministers.

### Compensation.

How is “reasonable compensation” for “opting-out” provinces to be measured? The standard practice with past federal schemes that allowed “opting-out” has been to ensure that the province has been in the same financial position as if it had not “opted-out.” The federal government ensures that provincial revenues are essentially the same (usually by allowing the province “tax room” in which to raise its own revenues, rather than receive federal transfers); and provincial expenditures have to be essentially the same, because the federal government has not allowed substantial differences in the benefits received by the public; see *Federal-Provincial Programs and Activities* at 115.

The 1969 federal working paper, *Federal Provincial Grants and the Spending Power of Parliament*, argued (at 46-48) that “compensation” should be paid to the taxpayers of a province rather than to the government:

*Payments to the governments rather than to the people of the non-participating provinces* would seem, at first glance, to be a reasonable alternative to the approach here proposed. Upon reflection, however, it is evident that such a suggestion would be inconsistent with the underlying reason for a payment of any kind to non-participating provinces. The basic principle underlying such payments would be this: no provincial government ought to feel obliged to exercise its constitutional powers in a particular way for the reason that a fiscal penalty would be visited upon its people if it took a contrary view. The objective, therefore, clearly must be to keep the *people* of non-participating provinces from paying a penalty: it follows that any payment must logically be made to them.

As discussed in Chapter 6, the 1987 Accord tends to conceptualize Canada in terms of governmental units with vested rights, rather than acknowledging the existence of an overarching political community composed of equal individuals. There is also a powerful and deeply disturbing tendency for the Accord to characterize the executive or simply the first minister, rather than the legislature, as the political voice of a governmental unit. In all of its significant aspects—from characterizing the federal executive as the creator of a spending program, to requiring “compensation” for spending in areas of exclusive provincial jurisdiction, to making provincial executives the beneficiaries of that compensation—s. 106A is consistent with the overall thrust (or should we say “grab?”) of the 1987 Accord.

If section 106A is to do any justice at all to the claims of the national political community, a few elementary interpretive points should be accepted:

- the federal government is not responsible for paying incremental administrative costs for a province that chooses to “opt-out.” Taxpayers in other provinces should not be expected to subsidize extra expenses incurred by a province that chooses to cut out of the national scheme, and “opting-out” should not be made even more attractive than it already is;
- “reasonable compensation” should be paid only *if* a province operates a compatible program, not “to the extent” that it does.

Should a province’s right to compensation be defined with reference to how much the province itself spends? Suppose the federal government establishes a shared-cost program which requires it to pay \$1,000 per child to day care centres that meet certain standards, provided that the province also does so. The province of British Columbia “opts-out,” claiming that it wants day care centres to be operated in a somewhat different fashion. It claims \$1,000 for every child attending British Columbia day care centres, which it will pass on as a subsidy without kicking in money of its own.

There are strong grounds for the view that the federal government would be justified in rejecting the claim. To begin with, it is doubtful that the national objectives of the national program—let us say, increasing access to day care centres operated by qualified people—could be adequately served by a provincial program that dispenses only half the funds. If “compatible” has any bite to it, then the provincial program would not even meet the threshold requirement for any compensation. In any event, it would not be “reasonable” or (the French version of s. 106A) “juste” for British Columbia to be put in a substantially better financial position than a province that stays within the program as defined by Parliament. The principle of “equality of all the provinces” that is recognized in the political part of the 1987 Accord would be flouted. It might be argued in reply that any other province would be free to “opt-out” and claim the federal money, so any province that chooses to accept the federal terms has only its own chumpishness to blame. Such a reply would be unacceptable, because it supposes that it would be within the contemplation of s. 106A that every single province could “opt-out” of the national shared-cost program, grab the federal money and not put in a dime of its own. But s. 106A recognizes a federal authority to “establish” national “shared-cost” programs—an authority that surely cannot be reduced by the provinces into the power to act as the sole underwriter for activities within provincial jurisdiction.

#### **A Last Look at the Canada Health Act.**

The legal analysis of s. 106A is essentially complete now. To wrap it up, it might be useful to return to that justifiably popular question, “how would the *Canada Health Act* fare if it were a new national-shared cost program?” The boggling ambiguity of s. 106A makes it impossible to assert anything with any confidence. There can be no denying that s. 106A

would present a serious risk to the establishment of a national health insurance scheme. *The Report of the Special Joint Committee* predicts that it is "likely" that the five criteria of the Act would qualify as "national objectives." Given the Orphan Annie ("bet your bottom dollar on tomorrow") disposition of the Report as a whole, "likely" should not encourage anyone to sing along. Remember too that the Report is only referring to whether these criteria are "national objectives;" even if they are, the "compatible" norm might be construed as permitting the provinces largely to ignore them.

At the same time, there are considerable legal and linguistic resources on the side of a tolerably balanced interpretation of s. 106A. The Supreme Court of Canada, even if staffed by provincial nominees, can reasonably be expected to try to find some balance in the section. If they adopt the same test as the Liberal Party of Quebec did in *Mastering our Future*—in other words, if they assume that the section does not concede far more than Quebec originally demanded—then the consequences may not be too bad. The legal analysis in this study suggests that a provincial health care scheme would have to conform to the federal criteria of universality, accessibility and comprehensiveness. These fundamental principles of social justice are broad and basic enough to qualify clearly as "national objectives." They are, moreover, concerns that are fitting for a federal level of government, given its powers and duties to promote social justice in other contexts—such as the income tax and equalization systems. "Portability" should pass muster even under a lax interpretation of objectives." The extent to which provincial schemes adequately interlock is a legitimate federal concern—indeed, it may very well be a matter within federal legislative jurisdiction and provincial schemes will not be "compatible" if a Canadian citizen suffers serious prejudice by moving from province to province.

The highest risk is probably to the "public administration" principle. The reference in s. 106A to "initiative or program" could be construed as signalling that private sector administration is permissible. On the other hand, the strengthening of the symbolism attached to direct government involvement in the health of its people can be regarded as a national objective, and it is by no means clear that "initiative" contemplates heavy reliance on the private sector. There is not too much to worry about on this score anyway. In the early days of the national health insurance scheme, there was no requirement of public administration but not a single province failed to choose that route.

There is no "bottom line" here. There is only a betting line. The odds do not clearly favour the eventual demolition of federal authority in the area of national shared-cost programs. The risks are, however, strong enough to warrant serious concern on the part of serious people.

### **Who has the Final Say on the Interpretation of s. 106A?**

Sometimes the Supreme Court of Canada gives the impression that only it can have the final say on the interpretation of the Canadian Constitution. In the *French Language Reference*, it characterized itself as the "guarantor" of the Constitution and dismissed the suggestion that some-

one else (such as a provincial Lieutenant Governor) might be the appropriate watchdog for constitutional propriety. In *Operation Dismantle v. R.* (1985), [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, the Court insisted that, with respect to the *Charter*, there is no such thing as a "political question"—an issue on which other branches of government should have the final say. On the other hand, in the *Société des Acadiens* case the majority of the Supreme Court of Canada insisted that the application of the principle of official bilingualism was something that the New Brunswick legislature would have to work out.

There is a middle ground possible, one with ample legal precedent in other contexts and one that ought to be followed with respect to s. 106A. The Supreme Court of Canada could allow the federal level of government to interpret initially whether a province has a right to compensation, and then review whether the federal interpretation and application of the principle is reasonable—rather than substituting the Court's own opinion of the "right" interpretation. A review (rather than appellate) function is often exercised with respect to administrative tribunals.

The considerations that support this approach are the following:

— the federal government is especially well-suited to determining whether a provincial program is "compatible" with objectives that have been stated by the federal government. The nature of a national shared-cost program cannot adequately be discerned merely by studying the legislation that set it up. It is necessary to appreciate how the program, administered in practice, actually functions and evolves. Judges will not have the same practical understanding of how a complex social welfare program functions;

— the federal government is better situated than any province to determine "compatibility" with national objectives, inasmuch as it created the program and is the government that has the best perspective from which to judge how it is functioning throughout the entire country;

— a sense of federal-provincial balance justifies according some leeway to the federal government. Provinces always have the legal option of disrupting a national shared-cost program simply by refusing to participate. Federal heavy-handedness can be resisted politically by provincial politicians and by members of Parliament from areas where the program is not popular. The question raised by s. 106 is the extent to which provinces are buffered from the financial consequences of doing so. With any of ten provinces in a better position than ever to frustrate a national endeavour, courts need not take a strongly activist approach in order to protect their interests;

— it is true that Canadian courts have routinely decided issues concerning the federal-provincial division of powers. But all, or virtually all, of these have involved disputes that could directly change the legal obligations of a member of the public. Section 106A is concerned strictly with intergovernmental financial arrangements;

— there is no tradition of court intervention in intergovernmental financial disputes. On the contrary, governments have refrained from submitting these questions to the courts. Section 36 of the *Constitution Act, 1982*, which expresses broad economic principles (including the duty of the federal government to make equalization payments), seems to have been drafted with a view to making it nonjusticiable (that is, unenforceable in the courts). The tradition probably is based, among other things, on a perception that courts are not well equipped to deal with complex economic questions and that governments are more comfortable with negotiated, rather than imposed, solutions when so many questions of discretionary political judgment are involved;

— federal-provincial transfers are “politically charged” in several special senses. They cannot be resolved by reference to abstract principle. Much depends upon a government’s sense of spending priorities—a matter of both principle and prudence which is traditionally left to officials who are politically responsible, sensitive to practical concerns and systematic in their perspectives. Much also depends on trade-offs (sometimes secret or tacit) that governments are prepared to make on non-economic issues. Courts should be reluctant to place themselves in the middle of controversies of this sort.

It is entirely possible, however, that the courts will not take a restrained approach to their role in interpreting s. 106A. The fact that s. 36 of the *Constitution Act, 1982* does include what looks like a formula for nonjusticiability might be portrayed as an instructive contrast; see F. Morissette, “Le droit de retrait (“opting out”) avec compensation au Canada et L’article de la Loi Constitutionnelle de 1982” (1984) 15 R.G.D. 221. It might successfully be urged that s. 106A is just one more area of federal-provincial relations in which the courts should impose their own interpretation in case of dispute. Given the ambiguity of s. 106A, the net result would be that first ministers “resolved” Quebec’s demands with respect to the spending power by transferring the management of the issue to nine unelected lawyers. Mind you, they tend to be intelligent, well-informed individuals who listen to other people and even think about things for a while before they make up their minds.

### **Political Realities.**

Some of the enthusiasts of s. 106A seem to suffer from the delusion that the provinces can have it both ways—benefit from the infusion of federal money and freely manage the program in light of their own policy objectives. The reality is that the federal government is more likely to fund the piper if it has some influence on the selection of tune. The reason is not necessarily a cynical one—that federal politicians will not vote for something which will earn them no electoral gratitude. A federal politician whose main concern is to promote a sense of national belonging and social concern is not going to vote to raise taxes so that provincial politicians can do what they want.

No doubt there would be consultation and negotiation before any new national shared-cost program was established. *The Report of the Spe-*



*cial Joint Committee* states that "the federal government will retain most, if not all, of its bargaining chips in such negotiations." Note that the Committee does not say that the federal government will actually have most of the bargaining chips; it says that the federal government will not be in much worse shape than it already is. Who else will have bargaining power? Rich provinces that can afford to operate their own programs and who have no interest in having taxes raised from their residents transferred to those in other provinces—Populous provinces, any of whose non-participation in and of itself is debilitating to the goal of building a sense of national community. It is not surprising that, at the Langevin Block meeting, Manitoba found support among a number of smaller, have-not provinces in its effort to strengthen s. 106A. What is puzzling is that there was not more concern among small, have-not provinces at Meech Lake itself—or since.

*The Report of the Special Joint Committee* quotes Mr. Gordon Robertson, former Clerk of the Privy Council (at 76), as stating "because of economic realities:"

I am skeptical about whether the spending power is going to have the importance or will have the importance in the future it has had in the past.

It is true that we can hardly afford the social welfare system we have established. It is not likely the federal government will establish a major shared-cost program in the near future. That is no reason, however, to view section 106A as mitigated by irrelevancy. For one thing, it may disrupt federal efforts to revise existing shared-cost programs. For another, some shared-cost programs of modest expense could have major benefits. More importantly, what counts is not just the next few years or even decades. Section 106A will be in place indefinitely. Owing to the change in the amending formula, any province that objected to the repeal of s. 106A could "opt-out" of it—with a right to "just compensation." In other words, any single province can prevent a broadly supported correction in the direction of restoring the strength of the federal government.

Who knows what the needs and aspirations of the Canadian public will be ten, twenty, fifty years from now? In the days of the Great Depression, the prospect for a national health insurance system must have seemed dim. Less than twenty years after the Depression ended, the national medicare system was established. The only reason to amend a constitution is precisely because one wants to have a say in what happens ten, twenty, fifty years from now.

Constitutionalists have observed that a strong safeguard against oppression is to require the governors to live under the rules they impose on others; see Ely, *Democracy and Distrust* at 82-87. One of the dangers of constitutional reform is that those (ir)responsible for it may not be politically accountable, or even alive, when the full consequences come to be known. As mentioned earlier, s. 106A is drafted so that there are no immediate consequences at all. Existing programs are shielded.

It might be contended that s. 106A only clogs channels of federal spending activity. Other routes remain as open as ever. There is no assur-

ance, however, that these other routes will always serve as well. "Serve" here does not refer the interest of the federal government only. If the federal government has to resort to the tax expenditure route, the interests of low income Canadians may unfairly be prejudiced. If the government sets up regional programs, rather than national ones, there may be less equity among competing regions and more federal meddling in local affairs. If the federal government makes direct grants to individuals and institutions, there may be less incentive for it to consult the provinces and give them a voice in the policy and administration of the program.