

Refashioning Meech Lake

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INTRODUCTION

IN FEBRUARY, 1988, the Canadian Bar Association Council passed the following resolution¹:

"Whereas constitutional reform involves lasting changes to the basic institutions of government in Canada; and

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On many points, more extensive and detailed arguments and references may be found in the full-length *Fathoming Meech Lake* (Winnipeg: The Legal Research Institute of the University of Manitoba, 1987).

The author was a consultant to the government of Manitoba in connection with certain matters connected with the drafting of the 1987 Constitutional Accord. The following views are strictly those of the author and are not necessarily shared by any government agency.

The author wishes to acknowledge the diligent efforts of his research assistant, Colleen Wilson, in the preparation of this article.

1 The motion was drafted by the author of this article.

Whereas democratic principles require that change of such significance and permanence be accompanied by full and meaningful public consultation, both before and after legal texts are agreed upon; and

Whereas legal and other experts should have the opportunity to evaluate and propose improvements to constitutional texts before they are enacted into law; and

Whereas legislators should have the benefit of the input from members of the public and from legal experts before deciding to endorse the final and binding text of constitutional amendments;

Therefore be it resolved that the Canadian Bar Association call upon legislatures to hold full and meaningful public hearings before deciding upon enacting the amendments in the proposed 1987 Constitution Accord, and to consider in a serious and open-minded way the comments and suggestions received."

It is notorious that the process that resulted in the draft of the Accord was rushed, secret and elitist. The 1987 Constitutional Accord is the product of two closed negotiating sessions among First Ministers. The Prime Minister made every possible effort at the session to limit the access of the negotiators to political and legal advisors. The larger world of the legislatures and public was shut out entirely. The content of Meech Lake follows its form; the power of First Ministers, particularly provincial ones, is jacked up to an unprecedented level. Provincial cabinets – in effect, provincial premiers – are formally authorized to nominate Supreme Court of Canada judges and to make Senate appointments. Spending programs are conceived of as products of executive government, not legislatures. Government through conclave of First Ministers is recognized and entrenched. The amended constitution would call for an annual First Ministers Conference every year on the economy, and on the Constitution.

The process that has followed Meech Lake has been every bit as deplorable. Perhaps more so. Meech Lake was executive autocracy in an un-selfconscious and brazen form; the post-Meech process has largely been executive autocracy dressed up as democratic consultation.

In response to public pressure, the House of Commons and Senate held public hearings on Meech. The list of witnesses was stacked with pro-Meech supporters. Some of the academics enlisted to support Meech were one-sided apologists with close, often paid, connections with the governments in power. Some of them have gone on to receive senior governmental and political appointments. It is about time that serious attention was paid to the issue of the co-optation of Canadian academics by government and special interests. We have every right to expect that academics will be a dependably independent source of informed criticism. We have every right to object to the use of academia as the continuation of politics by other means. If academics are affiliated with political parties or special interest groups, these connections should be clearly acknowledged. An academic is presump-

tively expressing an informed and completely independent position; if he or she is instead acting as an advocate, this should also be expressly acknowledged.

The members of the Joint Committee of the House and Senate conformed to party discipline. The Report that emerged has been justly described in the following terms:

Future generations will look back at the joint committee's Report in anger. They will be angered by the Report's inability to support even its most elementary positions without lapsing into inconsistency, angered by its obscurity, by its denial of plain reality, by the way it verges on outright duplicity. Further generations will not be impressed by the intellectual rigour of Canada's leading constitutional experts. For a nation that so recently achieved full independence, a nation so obsessed by its constitution, a nation where individual rights are so fragile, it is the careless attitude of the political and legal elites that prompts the greatest anger of all.²

The National Assembly of Quebec, to its credit, held public hearings on the 1987 Accord in between the Meech Lake and Langevin Block Meetings. Without further hearings, on June 23, 1987, it became the first provincial Legislature to approve the Accord.

The sequence of events in the other provinces shows either no interest in direct public input, or no respect for it.

Saskatchewan's Legislature passed Meech Lake on September 23, 1987 without public hearings. The New Democratic Party did move amendments – but ended up approving the unamended resolution.

In Alberta, the Progressive Conservatives and New Democratic Party seized on a moment in which the Liberal members were not present in the Legislature to approve the Meech Lake resolution. There were no public hearings.

The conduct of the government of Prince Edward Island with respect to the public hearings was manipulative and unresponsive. The government gave very little notice that the hearings would be held. Virtually every resident who spoke was in favour of amending or rejecting Meech. To legitimate the government's going ahead with Meech anyway, it flew in three "outside" experts – two of whom were dependable apologists for Meech on all fronts.

In British Columbia, there were no public hearings. The New Democratic Party did have the opportunity to move amendments to Meech. It then voted in favour of Meech anyway – notwithstanding the overwhelmingly negative views of its own rank-and-file at an earlier convention.

2 L. Grafstein, "Look Back In Anger: The 1987 Constitutional Accord, Report of the Special Joint Committee of the Senate and the House of Commons", 45 *U. of T. Fac. L. Rev.* 226 at 247.

Ontario held a long, pointless, series of public hearings. Premier Peterson stated long before they were finished that Meech should be passed unamended. The overwhelming balance of opinion from those who appeared before the committee was that Meech should be changed or abandoned. The committee acquiesced in the view from on high, recommended passing Meech unamended, and it was on June 29, 1988.

The Senate of Canada also conducted an extended series of public hearings as well. According to its own Report:

...the vast majority of witnesses were adamant that the Accord ought to be amended prior to its adoption, or, if not amended, that it should not be adopted at all. [p. 28 of Senate Report]

The Senate majority did vote in favour of an amended version of Meech. Unfortunately, the content of the amendments was not in the least influenced by what the Senate was actually told. It approved the same, largely defective, package of federal Liberal amendments that the party had supported before a single voice was heard at the public hearings.

In Nova Scotia, despite demands from the opposition, no public hearings were held. Both the Liberals and New Democratic party moved amendments. After these were defeated, the Liberals voted against the unamended Meech, and the New Democratic party abstained.

No public hearings were held in Newfoundland. The opposition Liberals voted against the unamended version of Meech.

The Legislatures of New Brunswick and Manitoba must still approve the Accord before it comes into force. New Brunswick will hold public hearings. The pressure that will be exerted on provincial politicians will be enormous. The federal government can deploy all sorts of financial leverage against a smaller, have-not province – everything from holding back on regional economic development projects to stalling on federal transfer payments. Canadians will be treated to the sight of the federal government trying to bully smaller provinces into acquiescing in an irrevocable assault on federal authority. It is likely that hard-ball financial pressure will be accompanied by moral blackmail. Hold-out provinces will be accused of jeopardizing Canadian unity.

There can be little doubt, though, that in an unmanipulated public hearing, the people of both Manitoba and New Brunswick will speak strongly in favour of the view that Meech should be either amended or abandoned. The legislatures of both provinces ought then to pass substantially amended versions of Meech. By approving a positive alternative to the current version of the 1987 Constitutional Accord, the

remaining legislatures would avoid being cast as merely “naysayers”. They would signal a willingness to abide some aspects of Meech, and oblige other legislatures to respond to the merits of specific proposals for improvement. If further intergovernmental negotiations ensued, the governments of New Brunswick and Manitoba would have a clear and democratic mandate to back them up³. They could insist that constitutional reform only proceed if it respects individual and minority rights, the principles of political democracy, and a commitment to the nationhood of the people of Canada.

I. MEECH LAKE: A CRITICAL OVERVIEW

A. General Comments

I refrained from commenting publicly on Meech Lake until I had spent seven months, days, evenings and weekends, analyzing the Accord as best I could. The product of that reflection is *Fathoming Meech Lake*⁴. My aim was to judge the Accord fairly and carefully. There was no aim to sketch only lurid “worst case scenarios”, or otherwise put the Accord in the worst possible light. On the contrary, the book consistently tries to demonstrate how the best face can be put on the Accord, should it go through.

And yet my conclusion is that the Accord is liable to do grievous and irreparable harm to the country.

Meech Lake favours division and provincialism at the expense of national unity and shared national purpose.

Meech Lake enhances the powers of government while diminishing the rights of individuals.

Meech Lake expands and glorifies the powers of a tiny elite, the First Ministers; it is contemptuous of elected legislatures and direct appeals to the people of Canada through referenda.

The Introduction to *Fathoming Meech Lake* suggests a number of alternative titles for the book. The arrogant, secretive and elitist nature of the Accord suggested *Collusive Federalism*. The one-sided capitulation to provincialism suggested *Centrifugal Federalism*. The assault on individual rights suggested *Constrictive Federalism*. The

3 It should be remembered that the 1987 Accord consists of political commitments as well as draft legal amendments. Both need fixing up. In a few cases, a supplementary political accord that clarified the meaning of an amendment might be a tolerable, though less than optimal, alternative to changing the actual text. On almost all issues, however, only a change to the draft legal text – before the Accord is enacted – would be a sufficiently clear, authoritative and permanent corrective.

4 B. Schwartz, *Fathoming Meech Lake* (Winnipeg: The University of Manitoba Legal Research Institute, 1987).

rigidity of the Meech Lake amending formula suggested *Coagulative Federalism*. They might all be summed up as *Corrosive Federalism*.

I could have suggested yet further titles. Remember the 1960s slogan of participatory democracy, "all power to the people?" Well, Meech Lake could be summarized by the title *All Power to the Premiers*. Perhaps the book could as well have been called *A House Divided*.

But the book title that most comes to my heart and mind is *A Chronicle of A Death Foretold*. That is the name of a novella by Gabriel Garcia Marquez. His story is about a revenge killing on the Caribbean coast of Columbia. The killers proceed on assumptions of facts that may well be mistaken. To be sure, their morality is based on a code that is absurd. Every step of the way, someone could have stopped the killers – and yet the crime proceeds slowly, inexorably, as though no one had a choice.

The Prime Minister could have stopped Meech Lake, and still could. His political hero, John Diefenbaker, stood up bravely against the notion of "two Canadas". Yet his successor blithely divides Canada along linguistic and provincial lines. The leader of the Opposition, through his influence on provincial premiers, could still stop Meech Lake. He would only have to return to his party's traditional support for bilingualism, minority language rights, national unity, and national social welfare programs. The leader of the New Democratic Party could stop Meech Lake by remembering his party's commitment to social justice, to participatory democracy and to fairness to Canada's aboriginal peoples. Yet all of them, apparently in the quest – for the Liberals and New Democratic parties, an illusory quest – for electoral popularity in Quebec, have failed in their duty to say "yes to Canada".

Any First Minister could stop Meech Lake in its present form. The same men could not have been more arrogant as a group of eleven. In a single day at Meech Lake, without consulting their Cabinets, their advisors, their legislatures, or the people, they dictated the future of Canada for all time. Yet as individuals, how timid they are. Apparently, none could stand alone against the pressure of the other ten. Even now, only one of them needs to put the best interests of his country first, and the death foretold will be a death foregone.

Instead, the contempt for democratic process that marked Meech Lake continues. Five provinces passed Meech without holding public hearings. The House of Commons and Senate did hold a joint hearing – but not a listening. The input was manipulated and the output in the Prince Edward Island hearings committee ignored resident after resident who opposed Meech in its current form. The Ontario committee held extended hearings, but the "fix" was in from the beginning. Premier Peterson openly announced that the critics of Meech would just

have to be "patient" and wait for the post-Meech round of talks. The Committee obediently rejected the overwhelming call for revision or rejection of Meech, and urged passage.

The Prime Minister's tactics at Meech Lake and Langevin bluntly and effectively played upon the weakness of the isolated individual against the pressure of a closed group. The aim was to abstract First Ministers from the criticism of the larger world and the expertise of their own advisors. Sociologists of government decision-making have documented the phenomenon of "group think". It happens among small, isolated and time-pressured groups, especially when the leader advocates from the beginning a favoured outcome. Members of the group tend to suppress dissent, adopt a shared, narrow set of assumptions, fail to consider alternatives – and produce disastrous decisions.⁵

Since the final text of Meech was approved, there has been time for public discussion and criticism. Powerholders have had a chance to reflect. But the tactics of the Mulroney government have continued to be based on peer pressure against potential hold-outs. Senator Murray, the lead federal Minister on Meech, disclosed that the strategy of the federal government was to pile up approval of the most amenable eight legislatures, and then pressure the most resistant. No doubt the legislators and people of Manitoba and New Brunswick will be told that they cannot properly resist the verdict of so many other provincial legislatures. They will be encouraged to accept collective judgment over their own opinions. If Meech is so bad, why did so many other legislatures accept it?

The willingness of an individual to form an independent judgment and act upon it can be a powerful force in politics. Strangely, the absence of that conviction can itself be turned into an ever-more-powerful instrument of political power. Lack of will can be steadily parlayed into an ever-greater instrument of coercion. Ministers at Meech Lake and Langevin do not stand up for a certain vision of Canada; afterwards, they are unwilling to resist their own previous decision; caucus members are unwilling to second-guess or resist the leaders; finally (the proponents of Meech hope), legislators in other provinces will not be able to resist the force of accumulated approval.

Meech Lake, in its present form, exhibits no belief that Canadians as a whole form a political community capable of shared purpose. It does not believe that Canadians have the right to reshape their constitutional destiny, notwithstanding the objections of a provincial government. Meech Lake does not believe that national social welfare programs are a legitimate expression of shared caring and concern. Meech

5 See I.L. Janis, *Victims of Groupthink* (New York: Yale University Press, 1972).

Lake does not believe that the political institutions of Canada, including the Senate, should be directly chosen by the people of Canada and speak on behalf of them all.

The legislators of Manitoba and New Brunswick will have certain advantages that First Ministers at Meech did not. They will have ample time for study and deliberation. They will have the support of their own electorates for insisting that Meech be revised or abandoned. Across Canada, public support for Meech has plummeted since its signing; the first provinces to insist on improvements will be lauded, as well as criticized, in the rest of the country. Unlike First Ministers at Meech and Langevin, the legislators of Manitoba and New Brunswick will be able to formulate and approve a comprehensive package of amendments to Meech. They can transform the debate into a battle of wills over a "yes-no" decision into a discussion of the specific merits of their amendments.

The proponents of Meech then have a choice. First Ministers can proceed to further negotiations, in an attempt to work out a consensus that does better justice to the cause of democratic process, minority rights and shared national purpose. Or they can give up. If pro-Meech first Ministers walk away, they will be every bit as responsible for the "failure of Meech" as the reformers. If there is a return for further discussions, perhaps there will be a compromise that does justice to Canada's future.

B. The Usual Apologies For Meech Lake

Let us examine some of the favourite slogans of the apologists for Meech Lake:

1. *"You can't expect perfection".*

Nor do the critics of Meech Lake. We merely expect that constitutional reform will not do serious and irreparable damage to the nation.

Like many critics, I am prepared to suggest constructive improvements which would make it tolerable – even though it would still differ significantly from my own constitutional ideals.

2. *"We agree that it is seriously flawed, but we'll pass it now, and fix it up later".*

This line is either dishonest or plain stupid. The changes that Meech Lake makes will be irreversible.

It was easy to get Premiers to agree at Meech Lake. The provinces were getting more power, and the Premiers in particular acquired more

power. Meech did nothing to enhance the rights of individuals or strengthen the national government.

To correct errors in Meech will be impossible. Here is why:

- The existing rules on constitutional amendment strongly protect the existing rights of provinces. Meech would protect those rights even more. Thus, to undo any of the major elements of Meech, Premiers would have to agree unanimously on virtually any correction to Meech Lake.

Unanimity would be clearly required under the constitution to correct Meech excesses with respect to Senate reform, Supreme Court appointments, minority language rights, and the amending formula.

As a practical matter, unanimity would also be required to correct Meech excesses with respect to the federal spending power. Suppose that Meech has the effect of destroying the federal government's ability to establish cross-Canada social programs. Suppose that by some miracle, seven, eight, even nine Premiers want to redress the imbalance. They could, arguably, pass an amendment under the old "7/50" formula. But any provincial government that did not agree could simply "opt out" the amendment; *Constitution Act, 1982*, s. 38(2). Quebec, for example, could simply "opt out", and retain its "Meech" right to opt-out of programs with compensation.

- Unanimity is always difficult to achieve, but will be impossible to achieve when it requires ten premiers to give power back to the federal government or to the people;

- The only thing that would induce premiers to give back certain powers would be to "pay them" with the transfer of other powers. Meech Lake, however, surrenders almost all of the legitimate "bargaining chips" that the federal government had.

3. *"Quebec was left out of the Constitution in 1982".*

This line bespeaks an abject denial of Canadian nationhood, and a specious reading of history. The facts are that:

(i) The Supreme Court of Canada ruled that Quebec had neither a legal nor conventional veto over the Patriation package;

(ii) The federal government speaks for Quebecers, and not just their provincial governments.

(iii) The federal government that brought about Patriation and the *Charter* in 1982 was led by a Quebecer, had about a dozen Quebecers in the Cabinet, and had the support of a caucus that was mostly from Quebec.

Provincial politicians speak for Quebeckers, and their failure to consent is regrettable and significant; but Parliament speaks for Quebeckers as well, and Prime Minister Mulroney's allegation that the people of Quebec were left "isolated and rejected" is an outrageous overstatement;

(iv) Quebec was led in 1982 by a separatist government, which was not about to accept a package that implied that Canada does work.

The Liberal opposition in Quebec did not endorse the Patriation either. Why should they have? They were able to obtain all the enhanced powers that the package gave Quebec, while retaining a "grievance" they could use to lever out additional concession;

(v) Quebec's provincial government received all the benefits of the 1982 package.

Included among these were an enhancement of its authority over natural resources, a guarantee of equalization of payments, and a constitutional veto over certain matters and the right to opt-out, or opt-out with compensation, in other matters. The federal government obtained no enhanced powers whatever. (Have we ever heard a Quebec politician doubt the legitimacy of receiving any of these benefits?);

(vi) Quebec's provincial government was subject to fewer of the burdens of the 1982 package than any other province.

Quebec was exempted from s. 23(a) of the minority language rights package, which all other provinces are bound by. As a result, Quebec anglophones have fewer constitutional rights to education than francophones in the rest of Canada;

(vii) Quebec was treated very fairly on the merits of the 1982 package – even when measured against the standards of the Parti Quebecois!

Mr. Levesque was able to complain of only three things about the 1982 package:

Objection one: It included mobility rights.

In fact: the mobility rights provisions were strongly qualified by concessions to provincial rights. They certainly do not go much beyond the mobility rights that were already guaranteed by the 1867 constitution. No political unit that purports to be a nation should apologize for a mild recognition that its citizens have free internal movement.

Objection two: it guaranteed minority language rights for anglophones.

In fact: Quebec was subjected to fewer language guarantees than any other province. The rights that were guaranteed only extended, to a small degree, the rights that were acknowledged by the Parti Quebecois'

own version of Bill 101. And Courts in Quebec have since had no hesitation whatever in finding that the extra protection afforded by the Constitution does not significantly impair the goal of "solidifying the French fact" in Quebec.

Objection three: it did not allow Quebec compensation when it opted-out of any amendment transferring power to the federal government.

In fact: the amending formulae in the 1982 package are extremely close to those that Premier Levesque supported as a member of the "gang of eight". It gives Quebec a veto in most language matters. It gives Quebec the right to "opt out" with compensation out of amendments affecting its language and culture. Premier Levesque's only complaint could be that Quebec was not guaranteed compensation if it opted-out of transfers of powers that did not concern language or culture. And why should Quebec, or any other province, be "compensated" for resisting the considered judgment of the overwhelming majority of Canadians in matters that are, say, purely economic?

Premier Levesque did not ask for a complete "veto" over Senate reform, the Supreme Court of Canada, or the admission of new provinces. Later on, Premier Bourassa would accuse the late separatist Premier of "bungling" in this regard, and added a veto to Quebec's "five conditions" for "signing the constitution";

(viii) Quebec's five "conditions" for "signing the constitution" were in large part unrelated to any inhibition on Quebec's powers that was produced by the 1982 Constitution.

The 1982 package enhanced Quebec's fiscal position vis-a-vis the federal government. It guaranteed "equalization payments" to have-not provinces. The "redress" in the 1987 package is to further constrain the federal spending power! Apparently, the compensation for winning one concession from the federal government is to win another.

Apart from the minuscule, perhaps nil, effect of the "mobility rights" clause, the 1982 package did not diminish Quebec's authority over immigration;

Premier Bourassa's demand for a veto over Senate reform was a fresh demand that Premier Levesque himself did not make;

The 1982 Constitution did not deny Quebec's distinctive linguistic or legal heritage. Indeed, Quebec, and Quebec only, was granted a special exemption from the minority language rights part of the *Charter*. Quebec's legislature is authorized to override large parts of the *Charter*, and thus far in interpreting the *Charter*, the courts have had no difficulty in recognizing and acknowledging the special linguistic make-up of Quebec.

The 1982 package granted Quebec and other provinces major concessions in the division of powers area. Parliament made no gains, only concessions. Yet the "distinct society" and Supreme Court parts of the 1987 package may be used to significantly enhance Quebec's powers even further.

(ix) As Premier Bourassa has himself acknowledged, Meech Lake gave Quebec more on Supreme Court of Canada and Immigration than Quebec initially asked for.

The Supreme Court provisions go well beyond Mr. Bourassa's demand for "guaranteed consultation". They give Quebec far more say over Supreme Court appointments than any other province, and far more say to the provinces collectively than to the federal government.

The immigration provisions, in an abject denial of Canadian nationhood, promise that Canada will "withdraw" from providing services for immigrants to Quebec – and "compensate" Quebec for taking over these services!

(x) Some of the most damaging provisions of Meech Lake were not among any of Quebec's "five conditions":

Quebec never asked for the right to nominate Senators. Yet the provincialization and legitimation of an unelected, unregionally representative Senate, may be one of the most destructive long term effects of Meech Lake;

The annual First Ministers' conference on the Constitution may amount to an endless one-way ratchet in favour of decentralization. Politically and technically, it is infinitely easier to strip power from the national government than transfer new powers to it. It only takes one weak or opportunistic Prime Minister, on one occasion, to give away a power – and it is gone forever. On the other hand, a power can only be cleanly transferred to the federal government with the consent of all ten provinces.

The "annual conference" provision further legitimizes a constitutional reform process that is based on backroom dealing by a tiny elite at the expense of consultation and decision by cabinets, legislatures and the public.

The entrenchment of the annual First Ministers' conferences on the economy was another "throw-in" at Meech Lake. It may be interpreted by politicians, and even the Courts, as an indication that the economy is to be run by committee. Yet the weakening of other federal powers under Meech Lake, and the consequences of free trade, make it more important than ever that the federal government's leadership in economic matters be recognized.

4. "Meech Lake has to be read together with the 1982 package. Meech Lake provides a provincialist balance to Mr. Trudeau's centralist package."

Here, in fact is the score:

The 1982 "Patriation" package strengthened provincial powers and individual rights. The former was the "price" the federal government had to pay for the "latter". Hence, Mr. Trudeau's famous lament about "fish for rights". The 1982 package strengthened provincial authority over natural resources, equalization payments, and constitutional amendment. It gave absolutely no new power to Parliament. The only "centralizing" feature was that the *Charter*, with its ultimate interpreter, the Supreme Court of Canada, was established as a new focus for cross-Canadian loyalty. The federal government gained absolutely no new powers.

The 1987 "Meech Lake" package will strengthen the powers of provincial governments. It will weaken individual rights and the power of the national level government.

To sum up:

1982 was a "win" for individual rights and provincial powers. No new powers were acquired by Parliament;

1987 was a rout for provincial powers, and against individual rights, the powers of the national government, and the sovereignty of the people.

5. "Meech Lake will bring stability to federal-provincial relations".

The fact that the provincial government of Quebec did not "sign" the Patriation package was never a source of popular discontent in Quebec. Immediately before Meech Lake, the political editor of *Le Devoir* said on a network television show that in Quebec "nobody cares". Mr. Trudeau has recalled at the time of Patriation, the people of Quebec simply "yawned" and got on with their business.

The legitimacy of the 1982 package was clearly on the rise at the time of Meech Lake. The National Assembly had stopped stamping its legislation as "notwithstanding the *Charter*", and Mr. Remillard in fact acknowledged the *Charter* as being, on the whole, "a document of which we as Quebecers and Canadians can be proud".⁶

The separatist elements in Quebec do not regard it in the least as a satisfactory resolution of nationalist claims. Mr. Parizeau has made it absolutely clear that he will take what powers he can and Meech Lake as a stepping stone towards sovereignty.

6 P.M. Leslie, ed., *Rebuilding the Relationship: Quebec and its Confederation Partners* (Kingston: Institute of Intergovernmental Relations, 1987) at 41.

Meech Lake gives every encouragement to separatists by articulating that the role of the Quebec legislature is to "promote the distinct identity" of Quebec. (The qualification that this "identity" is "within Canada" will make little practical difference to the manner in which this mandate is exploited in the political rhetoric and practice of Quebec).

Even federalists in Quebec are not through with making demands. Mr. Bourassa has told the National Assembly that he will press for further concessions in the "second round".

The entrenchment of an infinite series of constitutional conferences encourages an endless series of demands by Quebec and the other provinces.

The gift to the provinces of the appointment power with respect to the Senate is a constitutional time bomb. These senators may regard themselves as far more legitimate than the current, federal appointees. They will be able to say that they have appointed in exactly the same fashion as Supreme Court of Canada judges. Their primary loyalties may be to provincial interests or political parties, and they may eventually obstruct, in an undemocratic or regionalist manner, the will of the House of Commons. Prime Minister Trudeau summed it up neatly when he warned of the provinces' running Parliament by "remote control".

The intolerable level of ambiguity with respect to the "distinct society" clause will lead to long and bitter struggles over their meaning, and inevitable disappointment for one side or the other. If the Quebec nationalists prevail on their interpretation of these clauses, the consequences will be devastating to minority language rights and national unity. If they lose - then they will cry "betrayal", and demand a fresh spate of concessions.

6. *"We have to satisfy Quebec's demands, so we can deal with other problems, like Senate reform and aboriginal peoples."*

Contrary to the pro-Meechers, the aboriginal process did not "fail" because of Quebec's "non-participation".

At the 1983, 1984 and 1985 First Ministers Conferences on aboriginal issues, Premier Levesque attended and spoke. Like his successor, Mr. Bourassa, he was not prepared to approve any amendment until Quebec's own demands were met. But three substantive amendments did emerge from the 1983 Conference. The next year, there was nothing even close to an agreement. At the 1985 Conference, opposition by two aboriginal organizations foreclosed the possibility of a deal.

At the final conference in 1987, Premier Bourassa made quite a show of not attending. The obvious aim was to underscore that Que-

bec's participation was a necessary element in a successful process. Did the federal government aim for a failure, in order to prove his point? I don't know, but I do know that not only four provinces, but four aboriginal groups rejected the final federal proposal. Quebec's presence would not have altered the aboriginal peoples' attitude in the slightest. In fact, Quebec's position on the role of provinces in negotiating self-government agreements would surely have been the same as the other provinces – and just as unacceptable to aboriginal peoples.

Meech Lake contains an ongoing agenda for constitutional reform that makes no mention of aboriginal peoples. The inclusion of Senate reform and fisheries jurisdiction on the agenda recognizes other issues as having a higher priority. Some provinces will resist any discussion of aboriginal issues until Senate reform is achieved – and it probably never will be. In the unlikely case that even that seven provinces do support an aboriginal settlement, Meech Lake would give any dissenting provinces the right to obtain compensation if they "opt-out" of it.

One of the items on the aboriginal agenda was to repeal the 1982 amendment that, for the first time, gave existing provinces a voice in the admission of new provinces. The consent of seven provinces, with half the population, was required. Less than two months after the last aboriginal conference, the Meech Lake Premiers turned around and actually made the situation *even worse*. Meech Lake would give every province a veto over the admission of new provinces. Quebec, which may very well have territorial aspirations over the Northwest Territories (particularly with respect to the islands in Hudson's Bay and James Bay), is now in a better position than ever to frustrate the aspirations of the aboriginal peoples of the North.

Aboriginal organizations have persistently and vigorously protested against Meech Lake in its current version. So much for the blarney that Meech is a boon for them.

The provincial government of Manitoba has advanced the self-deluding claim that the signing of Meech will help the cause of Senate reform. But Quebec and Ontario would have to make substantial concessions for any reform to occur that would be satisfactory to Western Canadians. Meech Lake ensures that Quebec has no reason to budge in the slightest. It obtains not only its own wish list, but several items it never requested. The federal government has nothing left to offer Quebec in return for movement on Senate reform. In the meantime, Meech gives Quebec a veto. Since Meech gives the Premier of Quebec the authority to nominate almost a quarter of the Senate, he has greater reason than ever to favour the existing set-up. The status quo, by the way, not only gives Quebec and Ontario control over half of the Senate – it actually under represents Western Canadians. (More on this *infra*).

Meech Lake clearly obstructs the path to constitutional reform for aboriginal peoples, Northern Canadians and Western Canadians. Indeed, by giving up practically all of the federal government's bargaining chips, and giving the premiers vetoes and compensation for "opting-out", Meech Lake blocks the path for almost all kinds of constitutional reform. It will be harder than ever to obtain amendments that strengthen the national government, build the economic union, and secure the rights of individuals and minorities.

Meech Lake does facilitate amendments in a couple of cases. It makes it easier to give more power to the provinces and to First Ministers. As Meech guarantees an infinite series of First Ministers' conferences on constitutional reform, it amounts to a ever-increasing concentration of power in the hands of First Ministers. There will be every opportunity in the future to deform the Constitution.

C. Clause By Clause Review Of Meech Lake

What follows is a clause-by-clause review of Meech Lake. The aim is to identify defects and suggest reforms. With a comprehensive package of reforms, Meech Lake could be rendered acceptable. Even then, it would not be ideal. The starting point of Meech is to one-sidedly favour provincialism and executive power over more popular democracy, individual and minority rights, and strong national government. Even a revised Meech Lake would not fully overcome the imbalances of the current version. But it could be something that all sides could live with.

1. *The Distinct Society Clause*

a) Critique

The present version:

- recognizes "dualism", the side-by-side existence of unilingual communities, but not bilingualism – the acquisition of both official languages;
- recognizes support for minority language speakers as a constitutional value that is clearly and unequivocally secondary. Minority presences are merely to be "preserved", whereas Quebec's distinct society is to be "preserved and promoted";
- uses the word "distinct", which implies separate and apart, rather than "distinctive", which implies specialness;
- calls on Quebec to "promote its distinct identity", a formulation which favours Quebec apartness at the expense of national unity;
- may be used to diminish the existing constitutional rights of anglophones in Quebec.

Even if anglophones do not suffer in the Courts under the "distinct society" clause, most of their rights and interests depend on recognition by politicians, not courts. Quebec politicians have already stated or implied that the "distinct identity" of Quebec is, as far as language is concerned, the French language only. Anglophones are not regarded as an integral part of the "distinct society", but as a relic to be preserved. The relegation of the anglophones to second-class status may be a grievous blow to an already beleaguered community. Yet the anglophones of Quebec are the hinge that holds the country together. An all-French language Quebec and an all-English rest of Canada will soon part ways. Repression of the anglophones in Quebec encourages repression of francophones in the rest of the country. A strong, vital and respected anglophone community in Quebec, by contrast, will be a strong supporter of federalism and bilingualism, an example to the rest of the country on how linguistic minorities should be treated. It is vital that the rights of this community be respected, and that, for political purposes, it be recognized as an integral part of Quebec's distinctive character.

Apologists for Meech Lake have been ignorant or willfully blind to the advocates of the "French only" interpretation of Quebec's "distinct identity".⁷ These apologists apparently do not know or care that Bill 101 refers to French as the "distinctive language of Quebec". Meech would "affirm" the role of the National Assembly in promoting the "distinct identity" of Quebec. Do the apologists for Meech agree that repressive language legislation should be validated by the Constitution of Canada?

Premier Bourassa has made it clear that the anglophones of Quebec are not part of its "distinct identity". In a speech to the National Assembly on June 18, 1987, he stated:

The French language is a fundamental characteristic of our uniqueness, but there are other aspects, such as our culture and our institutions, whether political, economic or judicial. As we have often said, we did not want a laboriously spelled out definition, for the simple reason that it would confine and hamper the National Assembly in promoting this uniqueness. It must be noted that Quebec's distinct identity will be protected and promoted by the National Assembly, and its duality preserved by our legislators.⁸

Apologists for Meech Lake have even less excuse for naivete after the June 7, 1988 letter of Mr. Gil Remillard, Minister of Intergovernmental Relations. Addressed to Mr. Lucien Bouchard, the Secretary of State, it

⁷ *Fathoming Meech Lake*, *supra*, note 4 at 228.

⁸ Translation by Donald Johnston, ed., *With a Bang, Not a Whimper: Pierre Trudeau Speaks Out* (Toronto: Stoddart Publishing Co. Ltd., 1988). The book is a collection of observations by Mr. Trudeau on Meech Lake.

complains about the possible "effects" of Parliament's proposed Official Languages Act on Quebec. Mr. Remillard thinks it is "positive" that the bill should enhance the ability of francophones outside of Quebec to operate in French. On the other hand, Mr. Remillard rejects attempts to support the English-language minority in Quebec without the permission of the provincial government. "You are aware of the importance we attach to the full, consistent enforcement of the *Charter of the French Language*" he writes, and continues:

We also believe that our position is fully consistent with the Constitutional Accord that we recently signed. First, the French language is one of the two sides of Canada's linguistic duality, and by protecting that Language in Quebec, we are clearly protecting the linguistic duality itself. Second, the French language is a fundamental aspect of Quebec's distinct identity. When our governments formally recognized the distinct identity of Quebec society in June, 1987, they undoubtedly wanted to reaffirm the National Assembly's role of protecting and promoting all the essential, fundamental features of that identity. It is a role Quebec fully intends to assume.

Mr. Remillard makes no mention of protecting the linguistic duality of Quebec itself. He does not acknowledge the anglophone minority as part of Quebec's "distinct identity". The only "fundamental aspect of Quebec's distinct identity" referred to is French. Mr. Remillard reminds us that Meech "reaffirms" Bill 101. As everyone should know, Bill 101 characterizes French, and only French, the "distinctive" language of Quebec.

Did the federal level of government respond by insisting that the anglophone minority is an integral part of Quebec's "distinct society"? Not at all. Mr. Lucien Bouchard responded by making agreement with Quebec a precondition for federal interventions on behalf of the English-speaking minority. No English-speaking province would be given a similar veto with respect to the advancement of their French-language minority. According to Mr. Bouchard, Meech Lake "breaks the legal symmetry" between the rights of the anglophone minority in Quebec and those of the francophone minority in other provinces.⁹

b) Suggested Revisions

Part II suggests a comprehensive redraft of the "Quebec clause". The proposed Redraft would:

- eliminate the implication that Canada is to be forever divided into two linguistic blocs, and add a recognition that governments

⁹ See "Anglos Here Don't Count as Much", D. Macpherson, *Montreal Gazette* at B3, June 9, 1988; "PM Seems to Condone Repression of English Here", W. Johnson, *Montreal Gazette* at B3, June 14, 1988.

should give Canadians opportunities to acquire a knowledge of the other official language;

- eliminate the implication that the position of linguistic minorities in Canada is a second-class constitutional concern;
- recognize that all of the provinces are distinctive, and not only Quebec;
- recognize that the federal government has a role in contribution to the development of the distinctive character of the different provinces;
- recognize that Canada is a nation, not merely a collection of provincial communities;
- recognize that provinces have a role in nation-building
- give "up-front" recognition to multiculturalism, rather than relegating it to a "footnote";
- give "up-front" recognition to aboriginal peoples, rather than relegating them to a "footnote"
- protect the individual and minority rights that already exist under the Constitution of Canada.

2. *Senate Provisions*

a) Critique

The Senate provisions of Meech are a formula for disaster. They would make it harder than ever to reform the Senate, while giving to provincial governments the power to nominate Senators. A possible consequence will be that an unelected, unreformed Senate (in which British Columbia and Alberta are actually under-represented by population!) will become an aggressive competitor to the House of Commons. "Meech Lake" senators may regard the appointment process as giving them real legitimacy as a defender of the interests of provinces and the parties.

First Ministers have not only grabbed the power to appoint Senators, but have pre-empted and usurped powers that a reformed Senate should have – such as confirming Supreme Court appointments.

Senate reform should take place in a systematic, premeditated fashion. It should require senators to be elected. It should give extra representation to less populous parts of the country, and perhaps to parties that are under-represented as a result of the winner-take-all constituency system in the House of Commons. It should ensure that the Senate has a useful function, but not one that leads to the obstruction of the House of Commons.

It is grotesquely irresponsible for First Ministers to play games with an institution which has formal legal powers that are virtually the equal of the House of Commons.

b) Suggested Revisions

The section of Meech Lake instating a unanimity rule for Senate reform should be removed.

Even more urgently, the "interim" procedure for the appointment of Senators – under which provincial governments acquire exclusive control over nominations – should be eliminated.

In Part II of this paper, it will be contended that ratifying Meech Lake will effectively kill any chances for a triple-E Senate. The two central provinces will each acquire a veto, and the federal government will have surrendered any bargaining chips it had to induce them to make concessions. The small provinces should insist that the principle of the triple-E Senate should be recognized in Meech Lake itself.

3. *Supreme Court Appointments*

a) Critique

In a grand gesture of stupidity and spinelessness, the federal government gave away drastically more on this issue than even Quebec asked. It gave Quebec far more influence than the other provinces, and the provinces collectively far more influence than the federal government, on appointments to the Court.

Quebec only asked for guaranteed consultation on appointments. The federal government dreamed up a self-abnegating scheme whereby Quebec would submit nominees, from which the federal government would choose. Obviously, there is way more power in narrowing the choice to a couple of favourites, than in being confined to selecting among a short list foisted upon you by someone else. (Would you rather be guaranteed that the library will give you one of your three favourite books, or be stuck with reading one of three volumes that the librarian chooses for you?) The federal government may eventually be faced with a selection of two or three jurists chosen by the Parti Quebecois. If the federal government does not like any of the choices given it, it will face vehement denunciation by Quebec governments for basing its objections on "ideological grounds", rather than the technical merit of the nominees.

b) Suggested Revisions

Premier Bourassa, and every other Premier at the time, agreed to the selection system in the Victoria Charter. It would make appointments on agreement between federal and provincial officials, and provide for a neutral tie-breaking mechanism. The system in the Victoria Charter was a much more balanced one.

4. *Constitutional Conferences*

a) Critique

The guarantee of an infinite series constitutional conferences is one of the most gratuitous and dangerous sections of Meech Lake. It invites endless tampering with the Constitution. It threatens to legitimate the irresponsible and anti-democratic process used at Meech Lake. It encourages the continual erosion of federal authority and concentration of power in the hands of First Ministers.¹⁰

b) Suggested Revisions

Insert a "sunset" clause. After three (at most, five) years, the constitutional requirement and mandate to meet would cease.

The provision for conferences should also be coupled with the following amendment:

First Ministers recognize the sovereignty of the people of Canada, and are committed to promoting informed cabinet, legislative and public participation in the formulation and ratification of constitutional amendments.

5. *National Shared Cost Programs*

a) Critique

National shared-cost programs are a way of building a sense of shared purpose and belonging. They enable the federal government to encourage a sense of participation in a larger enterprise that cares for the welfare of all Canadians. It is vital that the national government be able to actively and visibly contribute to programs that affect the day-to-day lives of Canadians in a positive way.

National shared-cost programs enable less prosperous provinces to provide social services that might otherwise be beyond reach. They protect provinces that provide a higher level of social services from being undercut by lower-service, lower-tax competitors.

During the Free Trade negotiations, there seemed to be a consensus that social programs are one of the defining dimensions of Canada. It is to the credit of this nation that its identity, in large measure, has been built through programs that express care and concern for ordinary Canadians.

The provinces have been amply able to protect themselves by political means from excessively rigid or intrusive national standards. For example: while the federal government pays half the costs of post-secondary education, it has imposed no conditions on the provinces at

¹⁰ See *supra*, Point (x) of "Quebec was left out of the Constitution in 1982" ("Some of the most damaging provisions were not among any of Quebec's five conditions".)

all. Any province that vehemently objects to a particular program is politically and legally free to opt-out of a program altogether.

A "grandfather" clause in Meech Lake shields existing programs from its application. It is unfortunate, in a sense, that this clause exists; it shields politicians from having to immediately face the consequence of their precipitous assault on the federal spending power. A danger of constitutional reform is that its consequences may take place only in the long term, whereas politicians tend to think in terms of the next poll or election. Meech Lake is a grim case in point. In any event, the "grandfather clause" does not protect new national shared-cost programs. It is open to serious question whether it even protects revisions to existing programs.

Meech Lake nowhere defines "national shared-cost program". There is no standard usage of the term. The only clear application is to a program like the Canada Assistance Plan. Under CAP the federal government, according to a national formula, picks up roughly half of provincial welfare costs.

But what about the national health care system? The federal contribution is determined by a formula. It does not rise or fall with actual provincial expenditures. What about Regional Economic Development? The federal contributions are determined by a series of federal-provincial agreements, not by a national formula. The definition in Meech is extremely vague. Provincial governments could try to use it against an intolerably broad range of federal initiatives.

The spending power clause of Meech Lake may mean that provinces can "opt-out" of national shared-cost programs, claim the money they would ordinarily have received from the federal government, and divert it in a direction that veers away from the national one. The "distinct society" clause of Meech Lake will be cited by Quebec governments as a mandate to do exactly that. Other provinces may do so as well. Some provincialists suffer from the delusion that the federal government will happily ante-up money for the provinces to spend as they choose. On the contrary, if the federal government cannot express and effect a sense of national community and purpose through shared-cost programs, it will simply cease to provide them. The material damage to the have-not provinces, and the spiritual damage to the Canadian community, will be profound.

b) Suggested Revisions

Compensation should only be given to "opted-out" provinces that proceed along the lines established by a national-shared cost program. The current words "compatible" and "objectives" are too ambiguous and weak. Section 106A should be reworded as follows:

s. 106A 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 *Parliament* after the coming into force of this section in an area of exclusive provincial jurisdiction if the province carries on a *program* that *accords* with the *minimum national standards*

The suggested revision also substitutes "program" for the unclear and weakening "program or initiative"; and it substitutes "Parliament" for "Government of Canada". The First Ministers' self-serving enthusiasm for executive power apparently made them forget that the control of the House of Commons over government spending is one of the most ancient and important of our constitutional safeguards.

Bringing clarity and balance to the consequences of "opting out" is the most pressing need in revising s. 106A. For this purpose, only a few simple wording changes are needed. These made, s. 106A would be far less menacing. It would be less urgent that the constitution spell out the scope of its application. On the other hand, if s. 106A remains a blunt instrument, we should at least know where it is liable to strike. Any definition of s. 106A should exclude:

- direct federal subsidies (or tax expenditures) to individuals and organizations;
- schemes in which the goals and amount of federal spending is negotiated with each provincial government, rather than being dictated by a national formula. Example: regional economic development.

The definition should, at most, encompass programs that:

- are available to every provincial government with respect to the same item of government expenditure;
- contemplate that the federal and provincial government will each pay a share of that item;
- use a national formula to determine the amount of the federal share.

6. The Amending Formula

a) Critique

"Government of the governments, for the governments, by the governments." That is the underlying philosophy of Meech Lake, and the amending formula provision is symptomatic. It remains deplorable that in 1987, opposition from Premiers denied the people of Canada the opportunity to speak to constitutional reform through referenda. Meech Lake has no sense whatsoever that the people of Canada want a sovereign political community that can determine its own destiny.

The basic concern for Meech Lake is protecting the vested power of governments. Governments now acquire expanded authority to "opt-out" of constitutional amendments and claim compensation for doing so. On crucial matters such as Senate reform and the Supreme Court of Canada, provincial governments acquire a veto. No matter what the overwhelming majority of Canadians want, a single government can dictate that the constitutional status quo must remain. The tyranny of the minority is favoured at the expense of the overwhelming majority.

A particularly despicable provision of Meech Lake is that it gives every single province a veto over the admission of a new province. The provisions are squarely aimed at the North. No province has ever required more than the consent of a single government (either the federal government or Great Britain) to gain admittance to Confederation. Some current provinces might not belong to Canada if they had faced a provincial veto. The 1982 package for the first time stipulated that 7 provinces must agree to the admission of a new province. Aboriginal peoples participated in constitutional reform talks for five years, and one of their agenda items was to "roll back" the requirement to the consent of the federal government. They failed. The aboriginal talks ended in March, 1987. The very next month, with no representation from aboriginal peoples or the elected governments of the North, First Ministers changed the rule to unanimity. The Prime Minister flatly refused the request of territorial governments to speak at the Langevin meeting. The treatment of the North by Meech is discriminatory, colonialist, hypocritical, anti-democratic and anti-aboriginal.

b) Suggested Revisions

The provision giving existing provinces a veto over the admission of new provinces should be removed.

The amending formula concerning Senate reform should remain as it is. (Please see *supra*, under "Senate Reform"). The sovereignty of the people in constitutional matters should be recognized, and the requirement for public consultation entrenched. (Please see *supra*, under "Constitutional Conferences"). A constitutional conference should be scheduled to establish the procedures and powers of constitutional referendums.

7. *The Annual Conference on the Economy*

a) Critique

There is nothing to prevent First Ministers from discussing whatever they want whenever they choose. On the other hand, a First Minister who has to be constitutionally compelled to attend a conference is not likely to be an active or co-operative participant. The inclusion of

the annual economic summit clause demonstrates Meech Lake's arrogance about binding the political future and its indifference towards the trivialization of constitutional expression. The economic summit clause may actually have some adverse legal consequences. The Courts might construe it as an indication that the economy is to be run by committee, rather than allowing the federal government the strong leadership role in economic matters intended by the *Constitution Act, 1867*.

b) Suggested Revisions

While the clause is far from the most serious defect in Meech Lake, it is unnecessary, potentially injurious, and should be deleted.

8. Immigration

a) Suggested Revisions

These provisions are analyzed in detail in chapter VI of *Fathoming Meech Lake*. Some necessary revisions are:

- the "distinct society" clause must be amended to make it clear that the anglophones are an integral part of Quebec distinct society. Otherwise, the immigration provisions may be used to disproportionately discriminate against anglophone immigration;

- It is dubious whether any province can justifiably claim a perpetual right to form a certain proportion of the Canadian population. If an amended Meech Lake Accord makes any movement in this direction, it should be confined to allowing Quebec a certain "target share" of immigrants – not a guaranteed quota. The latter might result in the unwarranted restriction of immigration to other provinces, or the distortion of immigration standards;

- it is typical of the abject denial of nationhood by Meech Lake that it promises Quebec that the federal government will "withdraw" from providing immigration services for immigration to Quebec – but "compensate" Quebec for providing them. Here we have an epitome of the "chequebook" version of Quebec nationalism: "we'll run our own affairs in Quebec, and send Ottawa the bills". These shameful and ridiculous provisions should be struck from Meech Lake;

- it should be made clear that Quebec's being specifically allotted a "target share" of immigrants is exceptional, and there is to be no general practice or principle of confining the less populous provinces to their "proportionate" share of immigrants.

II. DRAFT AMENDMENTS TO MEECH LAKE

PART I CRITICIZED MEECH and offered a number of suggestions for amendments. On a couple of especially complex and controverted issues, this section offers more detailed redrafts.

A. Detailed Redrafts

1. *The Quebec clause*

The following is a proposed reworking of the "Quebec clause" of Meech Lake.

2 (1) The Constitution of Canada shall be interpreted in a manner consistent with the recognition that:

(a) 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 federal and provincial levels of government have a role in preserving and developing this characteristic. They also have a role in providing Canadians with opportunities to acquire a knowledge of the other official language.

(b) Each of the provinces of Canada is a distinctive part of the Canadian nation;

(i) Among the distinctive characteristics of Quebec, which has a French-speaking majority and English-speaking minority, is its linguistic and cultural heritage;

(ii) Among the distinctive characteristics of New Brunswick is the presence of the New Brunswick Acadians.

(2) The federal and provincial governments, within their areas of jurisdiction, have a role in preserving and developing the distinctive character of the provinces and in building the Canadian identity.

(3) The aboriginal peoples of Canada are a distinctive and fundamental part of the Canadian nation, and nothing in this section affects the rights mentioned in section 25 or 35 of the Constitution Act, 1982.

(4) The multicultural heritage of Canada is a fundamental characteristic of Canada, and nothing in this section affects section 27 of the Constitution Act, 1982.

(5) Nothing in this section derogates from the powers, rights or privileges of federal or provincial levels of government, including any powers, rights or privileges relating to language. At the same time, it is recognized that the Canadian Charter of Rights and Freedoms is an important contribution to the Canadian identity.

(6) Nothing in this section in any way diminishes the protection of individuals and minorities afforded by any provision of the Constitution of Canada.

a) Comments

The aim is to offer constructive suggestions for the improvement of the existing Meech Lake language. Concepts and phraseology that is already contained in the Meech Lake Accord is, where tolerable, preserved.

i) Preamble versus rule of interpretation

The Government of Quebec did not demand originally that the recognition of the "distinct society" be a rule of interpretation for the entire Constitution. As on many other points, the Quebec government emerged from the negotiations with far more than basic satisfaction of its conditions. Quebec's negotiators asked that the "Quebec clause" appear as a direction for interpreting the entire constitution – and the federal negotiators, with their usual will-to-powerlessness, quickly capitulated. A rule of interpretation is a stronger directive than a preamble. The "Quebec clause", in its present form, is all the more liable to undermine anglophone rights in Quebec.

It must be conceded, however, that even a preamble can be used to change the interpretation of a Constitution.¹¹ The divisive and oppressive potential of Meech Lake is not "solved" just by putting in the preamble. The "rule of interpretation" cloak for the "Quebec clause" just makes a bad situation even worse. It increases risks that would exist even if the clause were merely in the preamble.

On the other hand, if the "Quebec clause" itself were redrafted to make it an acceptably clear and balanced statement of Canadian values, it would probably be tolerable to leave it in the form of a rule of interpretation. So the opening phrase of Meech Lake has been preserved in the proposed redraft.

ii) Dualism (Canada as two linguistic blocs) versus voluntary bilingualism

Section 1(a) has been reworded to eliminate its anti-bilingual implications. It is recognized that the aim of governments is not "dualist" – that is, preserving "two solitudes" – but also to enhance understanding and communication among Canadians by providing them with opportunities to acquire a knowledge of the other official language. There is no direction that government services and so on must be in both languages. Section 2(4) of the Redraft, like Meech Lake itself, assures government that their existing powers with respect to languages are not diminished; so there is no cause for fear that the Courts

11 For e.g., in *Reference re Language Rights Under s. 23 of the Manitoba Act, 1870 and Section 133 of the Constitution Act, 1867*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1, the Supreme Court of Canada made much of the "rule of law" preamble in the *Charter*.

would somehow use the "educational opportunity" language to foist duties on unwilling governments.

iii) Recognizing the language minorities in Quebec and the rest of Canada

Section 2(1) of the Redraft, like section (4), uses the language "preserve and develop". This avoids several deplorable aspects of the current version of Meech. The Redraft makes it clear that the preservation of minorities is not a second-rate constitutional goal – an inferior objective compared to the obligation to "preserve and promote" Quebec's "distinct identity". The "preserve" versus "preserve and promote" distinction in Meech encourages the view that the anglophone minority is not an integral part of the "distinct identity" of Quebec. So does s. 2(3) of the "Quebec clause". Bill 101 already refers to French as the "distinctive language of Quebec", and the "Quebec clause" of Meech "affirms" the role of the legislature and government of Quebec in promoting Quebec's "distinct identity."

iv) All of the provinces are distinctive, not only Quebec

Section 2(1)(b) of the Redraft recognizes that all of the provinces have distinctive characteristics. Meech Lake Accord, in its present form, does not. "What are the rest of us? chopped liver?" The question has been articulated, in exactly those terms, by such people as Mr. Izzy Asper and Mr. John Amagoalik, a senior leader of the Inuit people. The *Report of the Special Joint Committee of the House of Commons and Senate*, with its usual tone of fatuous re-assurance, informs us that "no doubt ...other communities within Canada might also be defined as 'distinct societies', and the fact that they are not referred to in section 2 does not mean that these other characteristics or other cultural groups have been rejected or given second-class status."¹² When the constitution singles out one province as a "distinct society", it certainly does encourage the understanding that Quebec is more of a community apart, and more "special", than any other community in the country. As Mr. Trudeau has stated, the Meech Lake Accord puts Quebec on the "fast track to sovereignty association".

v) Canada is a nation and not merely a group of provincial communities

The reference to "Canadian nation" in the Redraft evokes a sense that there is a larger community of which Quebec is a part; it is not dis-

¹² "The 1987 Constitutional Accord", *The Report of the Special Joint Committee of the Senate and the House of Commons* (Ottawa: The Queen's Printer, 1987) at 40.

crete and isolated. Meech Lake encourages the sense that Quebecers are socially and emotionally affiliated with Quebec society, and share only legal bonds with other Canadians.

The Redraft uses the phrase "distinctive", rather than "distinct". The latter term implies separation and apartness. It is not a mere quibble. Note that the Liberal Amendments to Meech (in the *Report* of the Special Joint Committee of the House and Senate) refer to aboriginal peoples as "distinctive characteristic" of Canada. When the words "distinct" and "distinctive" are both used in the same section, the reader must assume there is a real difference in meaning.

The proposals just made are entirely consistent with the language of the Task Force on Canadian Unity.¹³ This group's recommendations were too provincialist and too "dualist" to be acceptable to then Prime Minister Trudeau. For example, the *Report* valued provincial sovereignty over language matters far more than it respected the principle of minority rights. Many of the authors of the *Report* are presently touting Meech Lake. Madame Solange Chaput-Rolande, a member of the Committee, has been an emotional defender of Meech. Mr. Reed Scowen, Executive Director of the *Report*, has defended Meech in his newspaper columns in the *Montreal Gazette*. Professor Ronald Watts has been part of a band of academics at Queen's whose members have been zealous apologists for Meech. The ex-"Task Force" alumni ought to reread their own report. Even by their own standards – which are strongly provincialist – Meech lacks balance. The authors of the Task Force on Canadian Unity *Report* say that "enhancing diversity" is a broad objective of nation-building. But they also say that "enhancement of the Canadian dimension" is a broad objective.

Indeed, the Task Force on Canadian Unity reported that:

Balance is of critical importance in all free societies. It is doubly so in a federal and culturally plural state; balance between "province-building" and "nation building", between the construction of a distinct society in Quebec and its membership and participation in Canada as a whole, between the will of the majority and the needs of the minority, between the claims of the indigenous peoples of Canada and the interests of other citizens.

The present version of Meech does not strike a balance between "province building" and "nation building". If the Task Force *Report* can acknowledge that Canada is a nation, then the Meech Lake Accord certainly can. It strengthens the hand of majorities while it weakens the rights of minorities. What Meech Lake does to the North is directly

13 *Report of the Task Force on Canadian Unity* (Ottawa: Canadian Government Publication Centre, Supply and Services Canada, 1979) [Chairs: Pepin and Roberts].

destructive of the interests of the aboriginal peoples of Canada. There is no balance in Meech. The Redraft attempts to rectify some of Meech's over-steering in the direction of provincialism, and particularly, Quebec nationalism.

Is it radical to suppose that all of the provinces are distinctive? Not according to the authors of the *Report of the Task Force on Canadian Unity*. Recommendation 29(1) states that:

A new constitution should recognize two major principles with respect to distribution of powers and to central institutions:

- (i) the equality of status of the central and the provincial orders of government;
- (ii) the distinctive character of individual provinces.

The political accord, signed by all eleven First Ministers at the that accompanies the Meech Lake amendments explicitly endorses the principle of the "equality of provinces". Why should the constitution then not acknowledge the distinctiveness of each of them?

vi) Quebec is a part of Canada with distinctive characteristics but not a community apart

Is it appropriate to speak of Quebec's "distinctiveness" rather than "distinctness"? The *Report of the Task Force on Canada Unity* does so; for example, recommendation 28(ii) says the Constitution of Canada should:

recognize the historic partnership between English and French-speaking Canadians, and the distinctiveness of Quebec.

The Task Force *Report* does at times refer to Quebec as "distinct society", but its use of "distinctive" as well indicates that the authors should have no objection to the less separatist alternative.

vii) The English-speakers of Quebec should be an integral part of a dynamic society

Section 2(1)(b)(i) of the Redraft would make it clear that the anglophones of Quebec are part of its distinct identity. The phrasing of Meech, including the "preserve/promote" distinction, to Quebecers who regard anglophones as a relic that is, at best, tolerable, as opposed to an integral part of a dynamic society.

Section 2(1)(b)(i) uses the "among" wording to make it clear that the linguistic and cultural aspects of Quebec are not exhaustive of its special characteristics. Premier Bourassa has stated a preference for not offering any definition of "distinct society" on the grounds that

providing particulars limits the scope of the section. The word "among" addresses that objection.

vii) Recognizing the New Brunswick Acadians

Section 2(1)(b)(ii) is an attempt to respond to Premier McKenna's eagerness to attain constitutional recognition for the Acadians of New Brunswick.

viii) The federal level of government has a role in promoting Quebec culture

Section 2(2) responds to a telling objection to Meech that was articulated by former Prime Minister Trudeau in his appearance before the Senate. It is that in the present version of Meech, the Legislature and Government of Quebec are recognized as having a role in contributing to the building of the distinctive character of Quebec. Mr. Trudeau pointed out that national institutions such as the Canadian Broadcasting Corporation and the National Film Board have made a major contribution to Quebec culture.¹⁴

ix) Provinces have a role in nation-building

Section 2(2) also makes it clear that provinces have a role in contributing to nation building. Quebec's government is given power with respect to national institutions such as the Supreme Court of Canada and the Senate of Canada. At the same, Meech Lake flatly tells the Quebec government and legislature that their role is to "promote the distinct identity of Quebec". It is nation-destroying to simultaneously promote a one-sidedly provincialist conception of Quebec and at the same time give its government drastically enhanced powers over the life of Canada as a whole. The redrafted Section 2(2) redresses the imbalance.

x) Aboriginal peoples should be expressly recognized up front, rather than relegated to a "footnote"

Section 2(3) of the Redraft would respond to the concerns of aboriginal peoples that there are being slighted by way the Quebec clause. Aboriginal peoples would achieve explicit recognition in the definition of Canadian nationhood. The present version of Meech, in s. 16, merely shields aboriginal peoples from the destructive impact of the distinct society clause.

14 Debates of the Senate, March 30, 1988 at 2991.

xi) Multiculturalism should be expressly recognized up front, rather than relegated to a "footnote"

Section 2(4) of the Redraft would similarly give enhanced recognition of Canadian multiculturalism.

xii) Preserving the authority of Parliament and the provincial legislatures

Section 2(5) is conservative of the existing position of Meech. The positive impact of 2(5) is that it shields the existing powers of the federal government. The disadvantage is that it limits the ability of individuals and minorities to use the language of Meech to limit the authorities of governments. This disadvantage is not without its consolations. One is that the Quebec government has insisted on such a statement, so including it should make it more palatable. Another consolation is that by reassuring governments that they, rather than the Courts, will interpret the political commitments in the "Quebec clause", they will be more likely to make those commitments in the first place.

xiii) Protecting individual and minority rights under the Constitution

Section 2(6) ensures that individual and minority rights are not diminished by the "Quebec clause". The government of Quebec will certainly object to this feature, as it wants to use the "distinct society" language as an interpretive aid that will limit the scope of the *Charter*. If the other changes suggested by the Redraft were made, including the express recognition of the anglophones of Quebec as part of its distinctive character, then the non-diminution clause would not be absolutely necessary. The recognition of the importance of the *Charter* would help to ensure that judges would not use the "distinct society" language to diminish rights in any substantial way.

2. Senate Reform

The initial reaction of the *Winnipeg Free Press* to Meech Lake was positive. An editorial shortly after the Meech Lake meeting was entitled "No call for second thoughts" (May 7, 1987).¹⁵ The title was not without its ironies.

A few years ago, the Institute for Research on Public Policy published my study of constitutional reform with respect to aboriginal peoples. It was entitled *First Principles, Second Thoughts*. The title has

¹⁵ In fairness to the *Free Press*, the body of the editorial dealt with the Meech Lake provisions on the spending power, rather than Senate Reform.

many meanings. One of them is that constitutional reform tends to consist of this:

- *first*, the secretive, backroom and hasty generation of constitutional principles;
- *second*, after some text is flung together, and put into force, some attempt is made to figure what it actually means and whether it is a good idea.

The Senate is sometimes called "the Place for Sober Second Thoughts". A later *Free Press* editorial revealed some sober second thoughts about the Place for Sober Second Thoughts. Just four days later, a lead editorial stated the Senate provisions of Meech "...insinuate[s] a provincial fifth column into the very heart of the federal government" (May 11, 1987). A later lead editorial identified the Senate provisions for Meech as "sufficient justification for Western Canadians to deny their support to the Accord" (May 26, 1988).

The *Free Press'* revised position was dead on. The Senate provisions of Meech Lake hazards severe damage to the democratic functioning of Parliament and its ability to express national purpose. Meech Lake is liable to create a Senate that is still unelected, and by far more obstructionist and provincialist. Meech Lake almost certainly precludes the achievement by Westerners of their cherished goal of a Senate that counterbalances the domination of federal politics by Ontario and Quebec.

The government of Manitoba, in its throne speech, proclaimed that the approval of Meech Lake would facilitate Senate reform.¹⁶ This contention is absurd. On the contrary, Meech Lake is a dream come true for Ontario and Quebec. They each grab a veto over any future Senate reform. They continue to dominate the Parliament of Canada, whose consent is also needed for Senate reform. The provincial Premiers of Ontario and Quebec get control over the nomination of practically half of the Senate. They win the numbers game, forever. The Senators they send to Ottawa are likely to be more provincialist in outlook, and far more aggressive in asserting their authority, than the current Senators. The provincial governments might stage elections to determine their nominees; but that would only further legitimate a Senate in which the numbers are stacked in favour of the populous central provinces.

16 Debates and Proceedings (*Hansard*), 1st Sess. of the 34th Manitoba Legislature, July 21, 1988.

Which two provinces have traditionally been the most vigorous proponents of the Triple-E Senate? British Columbia and Alberta. What did they get out of Meech Lake? A veto for Quebec and Ontario over Senate reform, added prestige and legitimacy for a Senate that is still dominated by those two provinces. They have virtually guaranteed that there will not be Senate reform. And which two provinces are most under-represented in the current Senate? British Columbia and Alberta.

	Unreformed (and if Meech proceeds, Unreformable) Senate	Rep-by-Pop Senate (equal representation for individual Canadians)	Triple-E Senate (equal representation for people of each province).
BC	6	12	10
Alberta	6	10	10
Manitoba	6	4	10
Sask	6	4	10
Total Western Canada	24	30	40
Ontario	24	37	10
Quebec	24	27	10
Total Ontario and Quebec	48	64	20

For the purposes of this tabulation, the Triple-E Senate is assumed to have 4 territorial seats, and thus have the same total number of seats – 104 – seats as the current Senate. It should be obvious that Ontario and Quebec control almost half of the Senate seats.

Incredibly, the Premiers of British Columbia and Alberta have further entrenched a situation in which Western Canada is seriously under-represented in the Senate. British Columbia and Alberta are the provinces that are most severely disadvantaged. Yet the objective of Triple-E Senate reform is to counterbalance the political domination of

Canada by the two most populous provinces. The aim is to give extra representation to the less populous provinces.

Meech Lake reinforces and exacerbates the political domination of Canada by the two most populous provinces.

The population strength of Quebec in the House of Commons is directly promoted by the Meech Lake Accord. This is not a side-effect; it is part of the explicit aims of the current government of Quebec. In their policy paper, *Mastering the Future*, the Liberal Party of Quebec explained its immigration demands in the following terms:

Population growth and demography, both within the province and in Canada as a whole, are questions of paramount importance for French-speaking Quebec's cultural security. Inside the provinces, Quebecers want to be assured that the demographic balance will be maintained in such a way that Quebec's unique French character will be permanently preserved. *At the same time, they are anxious to maintain their present percentage share of the overall Canadian population, a crucial factor of their political influence within the federation.* (emphasis added)¹⁷

A triple-E Senate requires the central provinces to make concessions. Once Quebec has everything it asks for, why should it yield an inch of political authority to the rest of the country? On the contrary, the Quebec government has been told by Meech Lake that its role is to promote the distinct identity of Quebec. Making concessions in the interests of building a more democratic, united and cohesive Canada could be seen as a dereliction of duty. In any event, Quebec provincial politicians don't need Meech Lake to inspire them to press their interests. The current Meech provisions might be replaced by the following:

The Constitution Act, 1867, shall be amended by adding the following section:

25. (1) The federal and provincial levels of government are committed to Senate reform, by way of amendment to the Constitution of Canada, based on the following principles:

- (a) Senators should be elected by the people;
- (b) The people of each province will elect the same number of Senators, and each Senator will have equal voting rights in the Senate. The people of the Territories will also have some representation in the Senate.
- (c) The Senate shall have substantial authority, although not necessarily equal to that of the House of Commons.

(2) The federal and provincial levels of government are committed to holding a First Ministers' Conference each year that is directed towards the achievement of Senate

17 Extracts from *Mastering Our Future in Canada: The State of the Federation*, P.M. Leslie, ed. (Kingston: Institute of Intergovernmental Relations, 1985) at 77.

reform. They are committed to having an amendment come into force no later than July 1, 1991.

(3) If an amendment has not come into force by that Deadline discussions shall continue, but the Senate will cease to exist. Any legislation or resolutions currently requiring the approval of the Senate and House of Commons will require the consent only of the House of Commons.

(4) It is recognized that the immigration provisions of this Accord may result in maintaining or enhancing the electoral strength in the House of Commons of representatives of the currently most populous provinces. Accordingly, the immigration provisions of this accord will not become operable until the reform of the Senate is achieved.

Apologists for Meech Lake have suggested that giving provinces like Alberta or British Columbia a veto over Senate reform enhances their chances of getting a Senate that fits their specifications. The argument is thoroughly misleading. It supposes that Alberta would be faced with a bunch of other provinces ganging up and pushing through Senate reform that is not exactly to the liking of Alberta. In reality, eight provinces stand to gain or enhance their authority under a triple-E Senate; Alberta will, and indeed, already has found allies among the provincial Premiers on the triple-E issue. There is no real chance that seven provinces, including a western one, would gang up against Alberta, and push through a plan that is seriously unsatisfactory from the Albertan point of view. The real problem is that Meech Lake ensures that there will not be anything like a triple-E Senate – or any other reasonable plan for the reform of the Senate. Meech Lake ensures that the political dominance of Ontario and Quebec will be maintained or increased.

Why would Quebec agree to a triple-E Senate once all of Quebec's demands are satisfied? It is simply stupid to suppose that "good faith" will ensure that everything is satisfactorily settled. Quebec governments do not regard it as being in "bad faith" to vigorously promote the interests of the province. Indeed, Meech Lake tells Quebec's legislature that its role is to preserve and promote the distinct identity of Quebec. Meech Lake accepts Quebec demands for increased political power over Canada as a whole (e.g., Senate appointments and Supreme Court of Canada appointments). Quebec governments do not mind standing alone; Premier Bourassa walked away from the Victoria Charter in 1971, after it had his own tentative support and that of all of the other provinces and of the federal government. The Quebec government alone opposed the deal that led to the Patriation of the Constitution.

Critics of Meech Lake should be careful not to exaggerate the practical implications of its defects. The Accord is so one-sidedly provincialist

in its vision of Canada and elitist in its view of Canadian politics that a balanced appraisal of its consequences amounts to an indictment. Thus it should be cautioned that Senate reform faced very serious obstacles even before Meech. It would be politically difficult to proceed without Quebec, and to a considerable (if lesser) extent, Ontario. The federal government would retain a veto over constitutional reform, and would be reluctant to side against either of the two biggest voting units in Canada – the two central provinces. Still, “reluctant” does not mean “immovable”. The federal government had long been reluctant to unilaterally patriate the constitution, but the threat of its doing so resulted in a deal that finally broke a constitutional deadlock that had lasted over fifty years. Furthermore, prior to Meech Lake, the federal government still had some bargaining chips to give Quebec in return for concessions on Senate reform. After Meech, there is a Senate still dominated by Ontario and Quebec, still under-representing western Canada, but possibly more powerful than ever before. Quebec and Ontario have a veto over any changes, and the federal government has tossed away all of its bargaining chips.

The Legislature, government and Premier of Manitoba should obtained a revised package deal that includes a revised Meech Lake and a reformed Senate. The technical options for passing such a resolution include:

- having Parliament and all the legislatures pass the expanded package in one resolution;
- having Parliament and the legislatures pass the current version of Meech Lake, but at the same time, have all of them pass a resolution revising Meech Lake and providing for Senate reform.¹⁸

It might be argued that the technical details of Senate reform would require a considerable period of time to work out. But a constitutional amendment does not necessarily require much detail. The Meech Lake amendment on the Supreme Court of Canada delegates most of the detailing of the Court’s procedures to the Parliament of Canada. Only the most basic principles concerning the Court are spelled out in the Constitution. The same could be done with the Senate; for example:

The Constitution Act, 1867 shall be amended by repealing sections 21 to 23, and 25 to 35, and adding the following sections:

¹⁸ A Legislature like Manitoba’s or New Brunswick’s would be foolish to approve a “Meech + Amendments” package until *after* Parliament and the Legislature have already approved Meech also approve the Amendments. Otherwise, the others could remain passive on the Amendments, and Meech would come into force.

25. The existing Senate of Canada is continued, but as of April 17, 1991, shall be elected, equally representative of the people of the provinces, and effective in accordance with sections 26 to 28.

26. The people of each province shall elect the same number of Senators. The people of each territory shall elect half that number. Each Senator shall have equal voting rights.

27. (1) Acts and resolutions of Parliament shall continue to require the approval of the Senate and House of Commons. The Senate can initiate legislation except money bills. (2) There is an exception to the requirement for Senate approval. If the Senate does not approve a legislative proposal within 180 days of its passage by the House of Commons, the Queen may still consent to the legislation if it is re-enacted by the House of Commons.

28. On April 17, 1992, all of the existing seats in the Senate will be deemed vacant. The people of each province shall elect ten senators, the people of each territory five. Voting will be on a province- or territory-wide basis. The particular rules for elections shall be determined initially, and from time to time, by Parliament. The exception in 26(2) shall not apply to the specification of Senate election rules.

29. The term of office of each Senator is four years. If there is a vacancy, the replacement Senator shall complete the original term of office.

30. Section 27 to 29 may be amended by a proclamation of the Governor-in-Council only: (1) in accordance with the amending formula in s. 38 of the Constitution Act, 1982; or (2) where authorized by a resolution of the Senate and House of Commons.

The exception in section 27(2) does not apply to subsection 30(2).

The proposed section would allow for reasonable flexibility in the future. The rules for the election of Senators would be determined by Parliament, and could be changed in light of experience. The provisions for the authority and term of office could be altered in one of two ways. The usual amending formula could be used; it allows for the override of objections by the Senate itself. An alternative amending formula would be the approval of the House of Commons and Senate. The approval by the reformed Senate itself for a change would provide strong assurances that the House of Commons was not unduly restricting the authority of the Senate, or distorting its function of providing extra representation for the less populous parts of Canada. There is nothing drastically novel about the proposal to allow Parliament to alter the internal constitution of the House of Commons and Senate. Section 44 of the *Constitution Act, 1982*, states that:

Subject to section 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

The current exceptions to Parliament's unilateral authority to alter the Constitution of Canada with respect to the Senate include:

- s. 42(1)(b) the powers of the Senate and the method of electing Senators.
- s. 42(1)(c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators.

The proposed section 30 of the Redraft would expand Parliament's unilateral authority somewhat. It should be noted again, however, that the reformed Senate would be in a position to defend itself from unwarranted constriction by the House of Commons. Hence the "effective" aspect of the triple-E Senate would be well-safeguarded. The continuing political domination of Ontario and Quebec in the House of Commons would ensure, on the other hand, that the Senate was not made entirely too "effective". The Senate should not be made so powerful that it can deadlock Parliament indefinitely. The Senate should not be structured so as to permit less populous parts of Canada to dominate the most populous parts.

The proposals just made are intended primarily to indicate how triple-E-ish Senate reform could be coupled with Meech Lake. They are certainly not intended to indicate the author's final and irrevocable views on precisely how Senate elections should be run, what the term of office for Senators should be, and so on. I should, however, indicate my reasons for believing that a triple-E-ish Senate should be created, but that it should not be fully equal to the House of Commons in authority.

The *Canadian Charter of Rights and Freedoms* and other substantive constitutional provisions protect minorities and individuals from majority oppression. There are some substantive guarantees that protect less populous provinces; for example, the guarantee of equalization payments in s. 36 of the *Constitution Act, 1982*, and the right of provinces to opt-out, sometimes with compensation, from constitutional amendments they disfavour. These substantive guarantees have not been enough to ensure the less populous provinces of fair treatment by the national level of government.

One response to the reality, or perception, of central domination of national institutions is for Canadians to seek to enfeeble those national institutions and transfer authority to provincial governments. The result is to diminish the opportunities for Canadians to participate in the larger enterprise of building a large and diverse nation, as opposed to retreating into enclaves. A further result is to diminish altogether the political effectiveness of Canadians. The power of ten units, operating autonomously in a large world, is not as much as if they join together for common purposes.

Another response that Canadians might choose is to allow provincial governments to participate more and more in national politics. Meech Lake is very much in this mold. But the result is elitist, secretive and undeliberative government. Intergovernmental negotiation becomes the model of decision-making, with the sort of secrecy, posturing, and haste seen at Meech Lake.

The best response to the alienation of "outer Canadians" is to strengthen their voice in the national institutions of Canada. The links between the people and the national institutions should be direct and democratic.

At the same time, balance is called for. The House of Commons is based on the principle of the political equality of all Canadians. It is a principle that we must respect, even if we must provide some counterweights to it. It would not be right for the Senate to become an instrument for the "tyranny of the minority" of Canadians. It would certainly be imprudent to set up a system of government in which prolonged deadlock is liable to occur. The system of responsible government, with the cabinet answering primarily to the rep-by-pop chamber, should be largely preserved. Accordingly, the House of Commons should continue to be the first among two equal chambers.

The Senate should have the authority to initiate legislation, and at least postpone the implementation of legislation by the House of Commons. We can expect that the House of Commons would not easily or frequently disregard entirely the negative response of an elected and representative – that is, a legitimate – Senate. But the House of Commons should continue to be able to break deadlocks. It should continue to have primarily control over budgetary matters.

While the House of Commons would continue to be a place for governments and parties, the Senate might be a place for more independent-minded politicians. The current state of public life in Canada is demoralizing. The system of party discipline discourages many independent-minded and plain-spoken men and women from entering public life. Public discourse often consists of distorted and vehement advocacy on all sides, and the elimination of more subtle, balanced and original discussion. A depressing case in point is the close-minded and manipulative behaviour of many members of the Special Joint Committee of Parliament that "studied" Meech Lake, and the almost complete absence of debate in the House itself. Its members should be focussing primarily on the merits of legislation and the future of Canada, rather than local constituency problems. The Senate ought to be a place where individuals are elected on their individual merit, and not party affiliation. It should be a place for free, independent-minded, and vig-

orous debate. It would then do more than bring more national cohesion to our politics. It would ennoble them.

III. A LOOK AT THE AMENDMENTS PROPOSED IN 1987 BY THE FEDERAL OPPOSITION PARTIES

THE FEDERAL LIBERAL PARTY moved identical amendments to Meech on three occasions:

- the first time Meech was passed by the House of Commons and Senate. The amendments were defeated, and a majority in both parties then voted for the unamended Meech;
- when the Senate considered Meech Lake. The Liberal amendments were passed;
- The House of Commons invoked its special authority under s. 47 of the *Constitution Act, 1982*. The House sought to override the lack of Senate assent by re-enacting its original resolution. The Liberal amendments were again defeated, and the majority of Liberals again voted for the unamended Meech.

The federal New Democratic party went through steps (1) and (3) only.

A. The Liberals

Let us look first at the Liberal amendments. They were a hastily cobbled-together compromise by a badly split party. The resolutions are a mixed bag. Some are necessary and well-crafted, but some would actually make matters worse.

The Federal Liberal Redraft, s. 2(1)(c), would recognize aboriginal peoples as a "distinctive and fundamental characteristic of Canada". The aim is valid: to affirm that aboriginal peoples are an integral and special part of the Canadian fabric, and not just a thread on the fringes. The Federal Liberal Redraft retains, however, the "distinct society" terminology. The "distinctive/distinct" contrast is therefore strongly re-enforced. The solution would be to change "distinct society" to "distinctive society" – or better still, "distinctive part of the Canadian federation".

Section 2(d) of the Federal Liberal Redraft seems, on the whole, reasonable. It would be better, though, to refer to the Canadian nation: a larger community in which "societies" and "cultures" are encompassed.

Section 2(e) of the proposed Federal Liberal Redraft has a valid objective, which is even more pressing in the aftermath of the United

States-Canada *Free Trade Agreement*. One legitimate aim of the amendment would be to discourage both federal and provincial governments from establishing barriers to interprovincial trade. The Courts would be encouraged to give life to the economic union provisions of the Constitution – such as the “no tariff” rule in s. 125 of the *Constitution Act, 1867*, and the “mobility rights” in s. 6 of the *Charter*. Canadian Courts, like their American Courts, might construe the federal authority over “interprovincial trade and commerce” as being infringed by protectionist provincial legislation. More subtly, the clause might encourage, and help Courts to sustain, federal legislation aimed at limiting protectionism by provinces. If the US-Canada *Free Trade Agreement* is implemented by the federal level of government, it would be appropriate for Parliament to follow-up by ensuring that intra-Canadian trade is at least as “free” as trade between Canada and the United States.

A concern about s. 2(e) emerges from its being part of a larger package that recognizes various languages and cultures. The reader of the “Quebec clause” might infer that the Canada community is first and foremost an economic union, rather than a nation sharing a common political heritage and destiny, and certain cultural affinities as well. It is important, therefore, that the amendment be accompanied by amendments to the “Quebec clause” that recognize our nationhood in a more general sense.¹⁹

Section 2(2)(a) of the proposed Federal Liberal Redraft is a big step forward. It would eliminate the “preserve/promote” distinction. It would end implication that preserving minority language communities is a second-class constitutional concern compared to “preserving and promoting” the “distinct identity of Quebec”. Section 2(2)(b) of the proposed Federal Liberal Redraft is two big steps back. It says that the “preserve/promote” distinction will be maintained in every province, except those who choose to eliminate the distinction. The net result is to highlight the distinction, and further undermine the position of minority language communities in provinces that do not “opt-in”. It is very certain that Quebec, in particular, will not “opt-in”.

19 Another possible concern is that s. 2(e), combined with the Meech Lake guarantee of annual First Ministers’ Conferences on the economy, may be read as implying that the Canadian economic union should only be developed with the voluntary cooperation of all the provinces. But several federal-provincial conferences to produce agreement on limiting interprovincial barriers to trade have already failed. The *Constitution Act, 1867* recognized the primary role of the federal level of government in economic matters. Consultation and cooperation among governments is certainly to be encouraged, but when necessary, the federal government should be prepared to use its Trade and Commerce and other powers to build free trade within Canada. As argued earlier, the “economic conference” provisions of Meech should be eliminated.

Section 16 of the proposed Liberal Redraft has the aim of protecting the *Canadian Charter of Rights and Freedoms* from the constricting effects of the “distinct society” language. Section 16 says that the “Quebec clause” in Meech would not “derogate” from *Charter* rights. Perhaps there is a subtle technical “trap” in the use of “non-derogation” language. The trap is this: it could be argued that Meech would not “derogate” from rights, but merely produce narrower interpretations of what those rights are in the first place. To put it another way, it could be argued that Meech defines the boundaries of rights, rather than encroaching on them.²⁰

The present wording of s. 16 – which says that Meech Lake does not “affect” certain parts of the Constitution – seems to be a clearer way of expressing the intention of protecting rights. The drafting language of my own Redraft would be “does not in anyway diminish”.²¹

The Liberal amendments with respect to the North seem to be satisfactory. Section 101C(1) of the Federal Liberal Redraft would enable governments of the North to nominate judges for the Supreme Court of Canada. Section 42A of the Federal Liberal Redraft would actually

20 With respect to most *Charter* rights, there is a strong technical answer to the claim that Meech would merely “clarify” the meaning of a right, rather than “derogate” from it. The Preamble of the *Charter* seems to distinguish between rights and “reasonable limits” on those rights. Most of the time, Meech would be invoked to affect the interpretation of the latter – the “reasonable limits” – rather than the right itself. A non-derogation clause could then be interpreted as saying this: Meech Lake does not expand the “reasonable limits” to which *Charter* rights are currently subject. It must be warned, however, that with respect to some *Charter* rights, a limit is contained in the expression of the right itself; for example, s. 8 protects against “unreasonable search and seizure”. Similarly, s. 23 of the *Charter* guarantees public funding for minority language schools “where numbers warrant”. With respect to sections like 23, there is more risk of a Court’s agreeing that Meech Lake is indeed merely “clarifying” (in a restrictive way) the scope of the right, rather than “derogating from it”.

21 Some apologists for Meech Lake have advanced the startling proposition that a general non-derogation clause for *Charter* rights would be inappropriate because it would make Quebec’s position worse than the status quo. They say that the Courts have already recognized that advancing the cause of French in Quebec is a legitimate legislative objective. Wouldn’t a non-derogation clause in Meech prevent Courts from recognizing a value they have already accepted? The argument of the apologists is misleading. Yes, the Courts have accepted that “solidifying the French Fact” is a legitimate legislative objective. But that does not mean that they have adopted the specific formulation and ideology of the “distinct society” clause, let alone the harsh interpretation of the clause that has been adopted by Premier Bourassa. A “non-derogation” clause would ensure that no interpretation of the “Quebec clause” undermines rights that the Courts would otherwise have found to exist. Courts would remain free to take into account facts and values that would exist quite apart from the “Quebec clause” of Meech Lake.

improve on the current constitution; it would enable the federal cabinet to unilaterally admit new provinces, without the consent of any existing provinces. As all existing provinces only had to obtain the consent of the Imperial or federal government, this provision is entirely consistent with Canadian history. It would be better, though, to vest the responsibility in the federal Parliament, not the federal cabinet. There is entirely too much adulation in Meech already for government-by-executive-fiat.

With respect to Senate reform, the Federal Liberal Redraft contains a good idea and a very dumb idea. The good idea is to maintain the 7/50 rule for Senate Reform. The very dumb idea is to provide for the election of Senators to 9-year terms of office. The result would be to fully legitimate the Senate, without either:

- i) reforming the distribution of seats. (Remember, under the current system, the West is actually under-represented in the Senate) or
- ii) defining the powers of the Senate, so as to make it effective without being an instrument for deadlocking Parliament.

It is foolishly counterproductive to establish the first E of Senate reform while leaving the other two E's unreformed. The idea is so dumb, it brings to mind the famous proposal of the Rhino party for implementing reform of road safety rules. It was a gradualist plan to establish driving on the left side of the road. First, the rule would apply to trucks and buses; later on, it would be extended to cars.

With respect to the federal spending power, the Federal Liberal Redraft meets the two most serious defects in the current version. Section 106A(1) of the Federal Liberal Redraft would require, as a condition of obtaining compensation, that a province carry on a program that "meets minimum national standards". The verb "meets" makes it much clearer that compliance with federal norms is required. "Peaceful co-existence" is not enough. The phrase "minimum national standards" suggests that the federal level of government should allow some flexibility, but that it is legally able to insist upon norms that are clear and specific.

With respect to the proposed infinite series of constitutional conferences, the Federal Liberal Redraft is a baby step in the right direction. A five-year limit should have been set on First Ministers' Conferences on the constitution. Section 13(2)(c) of the proposed Federal Liberal Redraft limits only the number of conferences at which the agenda must include fisheries jurisdiction. The Federal Liberal Redraft also adds aboriginal concerns to the agenda. It would be reasonable to schedule in another aboriginal conference for a particular year, but it is

not sensible to add aboriginal issues to the agenda for an infinite series of conferences. For one thing, no item should be discussed forever. For another, a First Ministers Conference on aboriginal issues must include aboriginal organizations; section 37.1 of the *Constitution Act, 1982*, as amended, establishes this principle. The politics, issues and logistics of a process in which aboriginal peoples are involved is far different from one in which they do not participate. In a particular year, it may not be at all practical or productive to schedule a constitutional conference, or preparatory process, that involves both aboriginal and non-aboriginal issues. It may also be impractical to hold an extra conference each year, with its own preparatory process, to deal exclusively with aboriginal issues. The best practical course would be to schedule one more, specifically aboriginal conference, at a reasonable – say, five year – remove from the latest one (which ended, without agreement, in April 1988).

To sum up, there are some positive aspects of the proposed Federal Liberal Redraft. In some respects, however, it is a weak or counterproductive. Reforms of Meech Lake should borrow the best of it, and disregard the rest.

B. The New Democrats

The Federal NDP Redraft is much more limited in scope. It fails to seek many improvements required by the party's own traditions, principles – and party policy. To those of us who have admired many of the principles and programs of the NDP over the years, the performance of the federal NDP on Meech has been a profound disappointment.

The NDP is supposed to believe in "participatory democracy". Yet the Parliamentary wing of the party voted to accept the secretive, elitist backroom deal of Meech, completely unchanged. Yes, qualms were expressed about the process, about Senate reform, and amendments were advanced with respect to native, Northern and women's issues; but in the end, the party voted to accept Meech. It voted to drastically increase the powers of the executive branch of government at the expense of legislatures. It has voted in favour of a deal whereby Senators are nominated by provincial Premiers, instead of being elected. It voted in favour of entrenching an infinite series of first ministers conferences. Even the decision to endorse the anti-democratic provisions of Meech was disturbingly elitist. The federal leadership punished public dissent by its caucus members, and discouraged provincial parties from adopting alternate positions.

The party that has strongly supported the building of national social welfare programs votes in favour of a deal that may well prevent the revision of the existing ones, and the creation of future ones.

The party that supports minority rights participates in putting them at risk.

The federal NDP position has distorted the legal impact and political risks of Meech. The federal leadership has not argued that a higher objective justifies the sacrifice of other values. It has not even acknowledged the risk that other values will be sacrificed. At times, it has claimed benefits where none exist. A leading speaker on the Meech issue, Ms. Pauline Jewett, flatly told the House of Commons that Meech would have prevented Saskatchewan from repealing certain French-language rights in March of 1980.²² In fact, section 2(4) of the Meech Lake Accord explicitly states that the "Quebec clause" does not in diminish the authority of provincial legislatures with respect to language matters.

At other times, the federal NDP has claimed that Meech will enhance the very objectives that Meech most seriously undermines. In the same speech, Ms. Jewett asserted that Meech, by acknowledging the existence of the federal spending power, would actually "strengthen and constitutionalize" the possibility of future programs. What about the provincial right to "opt-out"?

National objectives can be just what you want them to be. They can be as tight as you want to make them... [If the federal government wanted a universal, accessible, and non-profit day care program] it would be pretty difficult for any province that joined in to then spend that money on roads and bridges. That is what they have frequently done in the field of post-secondary education because Mr. Trudeau did not have any national vision on that matter.²³

There is no acknowledgment from Ms. Jewett that the distinction in Meech between "objectives" and "standards" might indeed limit the "tightness" with which federal norms are defined. Nor does she allow that "compatibility" may not mean "compliance".

Ms. Jewett's reference to provinces "joining in" a program conceals a vital question. Why should a province "join-in" when Meech says it can "opt-out" and still grab the federal money? Yes, before the federal government establishes a program, it could try to obtain promises from the provinces that they would run reasonably comparable programs. But if provincial promises are a pre-condition to federal programs, then Quebec and Ontario effectively acquire a veto over them.

Both Ms. Jewett and Mr. Broadbent made much in their speeches of "political will" as the key to establishing a national shared-cost program. They completely ignore the fact that it has taken more than

²² House of Commons Debates (*Hansard*), May 19, 1988 at 15647-48.

²³ *Ibid.*, at 15649.

“will” for the federal government to establish programs; it has taken federal authority. In 1984, the *Canada Health Act* was amended so as to impose financial penalties on provinces that allowed extra-billing. No province challenged the legal authority of Parliament to exercise its spending power in this way. Private citizens have done so – and lost.²⁴ As a result of the *Canada Health Act*, provinces such as Ontario and Alberta banned extra-billing. Meech creates a real risk that future Parliaments will be unable to revise programs, or create new ones, that bring about a more humane, equal and united society.

Like the Liberal Redraft, the Federal NDP Redraft would allow elected Northern governments to make Supreme Court and Senate nominations. Unlike the Federal Liberal Redraft, it would maintain the status quo (7/50 formula) for the creation of new provinces, rather than restoring the authority of the federal level of government to unilaterally admit new provinces.

The Federal NDP Redraft would, it seems, mandate one, but only one, additional constitutional conference on aboriginal peoples. For reasons discussed earlier, in this respect the modest ambition of the NDP draft seems appropriate.

The Federal NDP Redraft adopts an approach to the protection of *Charter* rights that is either woolly-minded or cynical. In either case, the approach is severely counterproductive. It is explained by its authors in the following terms:

The New Democratic Party members of the Joint Committee do not believe that the linguistic duality/distinct society interpretation clause abrogates, supersedes or overrides sexual equality rights or any other rights guaranteed by the Charter. Senator Lowell Murray, however, stated that no matter how remote or unlikely an adverse effect of the clause would be with respect to aboriginal rights or our multicultural heritage, sections 25 and 27 were included “out of an abundance of caution”. We believe that the same abundance of caution should be applied to sexual equality rights and that it could be applied without jeopardizing the Accord. Further, section 28 has an interpretative function and is therefore consistent with the other Charter provisions contained in s. 16.²⁵

The phrase “abrogates, supersedes or overrides” is extremely ambiguous. The NDP claim might be making one of two very different claims:

24 *Winterhaven Stables v A.G. of Canada* (1986), 71 A.R. 1, 29 D.L.R. (4th) 394 (Q.B.).

25 Federal NDP Redraft at 156.

(i) The NDP might be claiming that the "Quebec clause" does not "adversely affect" Charter rights at all. (The phrase "adverse affect" occurs in the very next sentence).

Yet a major purpose of the Quebec clause, from the point of view of the Quebec government, is to produce narrower interpretations of existing constitutional rights. There is a real risk that the "Quebec clause" will have this negative effect on the rights of minorities in Quebec. Why else could, and did, the Quebec government object to a non-derogation clause that would protect the entire *Charter*? The NDP members seek to have it both ways: to deny that the Accord undermines minority rights in any way, but to agree with Quebec that minority rights must be left at risk.

(ii) The federal NDP members might be saying, in a cute way, that the Quebec clause does not *completely* dominate over any particular section of the *Charter*.

"Abrogate, supersede and override" are strong words. If they mean "completely dominate", then they overstate and trivialize the concern of critics of Meech Lake. The real concern is that the "Quebec clause" may have a seriously adverse effect on the interpretation of *Charter* and other constitutional rights. The real concern is that the "Quebec clause" may "derogate from, undermine and constrict" existing constitutional guarantees.

The "solution" recommended by the federal NDP members makes matters, on balance, much worse. Meech is, objectively, a far greater risk to minority language rights than it is to sexual equality. By singling out sexual equality for protection, the Federal NDP Redraft might imply that these other rights are not protected – and that, in fact, they are adversely affected.

Professor Howard McConnell has written:

The endorsement of the accord by the NDP is virtually unintelligible on ideological grounds. It contradicts almost everything the party stands for. The core the new Constitution, if Meech Lake is entrenched, will embody Maurice Duplessis' main ideas on public law, which the NDP has always rejected with contempt. The only convincing explanation would be that with the rise of the NDP's fortunes in Quebec as reflecting in public opinion polls, and the great popularity of Meech in that province, the party has sacrificed principle to expedience in an all-out effort to attract Quebec voters to its standards.²⁶

26 *The Winnipeg Free Press*, October 7, 1988 at 7.

Mr. Broadbent's pursuit of the nationalist and separatist vote in Quebec was as zealous after the Accord was signed as before. When the Official Languages Commissioner, Mr. Fortier, criticized the "humiliation" of English-speakers under Bill 101, and expressed concern that Meech Lake would have an adverse effect on the "language equilibrium" in the country.²⁷ His statement on Bill 101 was unanimously condemned by the National Assembly. Instead of coming to Mr. Fortier's defence, Mr. Broadbent opined that it was really francophones outside of Quebec who were humiliated.²⁸ During the 1988 election campaign, he stated that it was Quebec's "own business" if it wanted to retain the power, under s.33, to override *Charter* rights.²⁹ He had "no problem" with Quebec's using that power to override minority language rights in order to protect its "distinct society".³⁰ Meanwhile, the pleas of the NDP government in the Yukon were given lip-service; although Mr. Broadbent admitted that the anti-North provisions of Meech were a "profound injustice" and that it made Northern Canadians "second-class citizens in their own country",³¹ he continued to advocate its unamended passage.

While Meech Lake was working its way through provincial legislatures, Mr. Broadbent lobbied hard for the provincial wings to support Meech. The British Columbia wing of the NDP voted overwhelmingly against the NDP position at a policy convention, but most of the caucus voted for Meech unamended. Still, the dissatisfaction of many provincial parties was not entirely stifled. The British Columbia legislative party did move substantial amendments in the legislature. So did the NDP official opposition in Saskatchewan. The Nova Scotia wing of the NDP abstained in the legislature after its amendments were defeated.

27 "Languages Chief Critical of Quebec", *Globe and Mail*, March 23, 1988 at 1. See also "Accord Feared Language Threat", *The Winnipeg Free Press*, November 29, 1988 at 1.

28 *The Winnipeg Sun*, March 30, 1988.

29 Former Secretary-General of the New Democratic Party, Mr. Gerald Caplan, stated after the election that on Quebec, "we went a lot further than made me comfortable." According to a Canadian Press report, "he specifically cited the implicit acceptance of Bill 101, the province's controversial French-only language law, and the explicit acceptance of the constitutional provision which allows Ottawa and all the provinces - in this case, Quebec - to override the *Charter of Rights*. The right positions on Quebec nationalist issues are positions that don't conflict with the party's longtime commitment to civil liberties, to minority rights across the country and to *Charter* freedoms across the country": *The Winnipeg Free Press*, November 29, 1988.

30 *The Montreal Gazette*, October 15, 1988 at C4.

31 *The Globe and Mail*, October 20, 1988 at A10.

With the election over, and the NDP not much further ahead in Quebec, it is to be hoped that the NDP party in Manitoba will hold fast to the traditional values of the party.³² The future in Canada of democratic process, minority rights and national unity depends on it.

IV. CONCLUSION

TOWARDS THE END of *Cancer Ward*, by Alexander Solzhenitsyn, a freed prisoner visits a zoo. The cage where the rhesus monkey used to live is empty. Someone threw tobacco in the eye of the rhesus monkey. "Just like that". The episode is sad in itself. It was intended as a metaphor for Stalin's gratuitously cruel assault on his own people.

What pains as much as anything about Meech Lake is the sheer gratuitousness of the attack on Canadian nationhood. Meech Lake was not a considered response to the aspirations of the people of Canada. It was a sudden, unreflective, self-serving power grab by a tiny elite.

Canada is not so strong that it can easily survive such an assault. This country has always existed through the exercise of political will; its vast geographic expanse, its linguistic, religious and cultural divisions, the influence and attraction of its southern neighbour, have always made the building of the national community a struggle. Yet the existence of these obstacles make Canada all the worthier of affirmation. We have managed to carry on a distinctive contribution to the annals of democratic government. We have maintained a national community while nurturing two languages and many cultures. We have built a national identity that is centred on shared concern for human welfare. We should actively work to maintain and enhance that identity – not accelerate its erosion and ultimate disintegration.

Times change, and circumstances and opinion with it. Canadians have every right to experiment with different political and administrative arrangements. But Meech Lake is not about a swing of the pendulum – towards provincialism, Quebec nationalism and elevated status and power for First Ministers. Pendulums swing back in the other direction. Meech Lake would grab the pendulum bob, jerk it in one direction, and institute a perpetual process for carrying it to even further extremes. What Meech does, it does irrevocably.

32 A few days after this article was completed, the leader of the Manitoba New Democratic Party, Mr. Gary Doer, announced that his party would not support Meech in its present form and that "we will not back down": *The Globe and Mail*, November 24, 1988. Mr. Doer stated that improvements were needed with respect to the spending power clause, admission of Northern provinces, the supremacy of the *Charter of Rights* over the "distinct society" clause, rights of the aboriginal peoples, and preserving the possibility of Senate reform.

Manitobans and their representatives cannot excuse themselves for any failure to form and act upon their own convictions. They are being asked to actively participate in the permanent infliction of Meech Lake. The decision Manitoba makes will be binding not only on itself, but on rest of Canada – now, and forever. Should the Manitoba legislature act to reform Meech it will have the support of the vast majority of its own residents. For all the public criticism that will follow, it will have the gratitude of millions of Canadians across the country – including not a few politicians who earlier submerged their own misgivings about Meech Lake, in the hope that somewhere, sometime, someone would take responsibility for correcting it. The Legislature would earn the respect of its biggest and most silent constituency: the Canadians of the distant years to come.

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Addendum

Since the submission of this article for publication, the National Assembly of Quebec used the “notwithstanding” clause of the *Charter* to override minority language rights that had just been recognized in the Quebec commercial sign cases. Mr. Bourassa stated that he had to use the “notwithstanding” clause because Meech Lake was not yet in force. It is hoped that Canadians will now fully appreciate that leading Quebec politicians interpret Meech as a mandate to pursue policies that are hostile to minority rights. The only responsible alternative is for Canadians and their politicians to insist on rewriting the distinct society clause. Meech purports to “affirm the role of the legislature and Government of Quebec” in promoting the “distinct identity of Quebec”. Ratifying Meech without a change to Quebec language practices could therefore signal that those practices are not only tolerable, but worthy of entrenchment. Meech should not be ratified, therefore, until Quebec relents from its repressive language laws; the text of the “distinct society” clause is changed to protect minority language rights and recognize Canadian nationhood; and all provinces agree to amend s. 33 of the Charter so that the “notwithstanding” clause cannot be used in language cases.

On another late development: while the conventional wisdom has been that Meech must be ratified by June 1990, Professor Robert Grant has contended recently that this is not so; (*Globe and Mail*, Friday, January 13, 1989, p. 7). Points can be made on both sides of this issue.

The rationale for the 1 year minimum clearly does not apply to amendments that require unanimity. The 1 year minimum is to allow provinces a chance to “opt-out” of a forthcoming amendment. There is

no such thing as "opting-out" of an amendment that requires unanimity. (The 1 year minimum does not apply if every province has decided whether it wants to opt-out or not). It is questionable whether the logic of the 3 year maximum applies to amendments requiring unanimity. That logic might be that it would be too easy to get an amendment if all you need is seven provinces, but you have an unlimited time to amass them. That logic might be less compelling if you need all ten provinces. Given the differing considerations between "7/50" and "unanimous" amendments, it is doubtful that the s. 39(2) should be interpreted as implicitly extending to amendments requiring unanimity.

As most of the elements in Meech require unanimous consent, so does the entire resolution. (See my letter "Meech Miscues", *Globe and Mail*, May 25, 1988, p. A7). But does the fact that several Meech elements (including the spending power clause) require only "7/50" support mean that the s. 39(2) rules apply as well? There is a strong argument that it does. Nothing in the constitution expressly authorizes a "7/50" amendment to be proclaimed into force under the authority of the s. 41 "unanimity" provision. Whenever the Meech resolution deals with a "7/50" element, it arguably functions as a s. 38 resolution to which s. 39(2) does apply. If the "three year deadline" expired on these elements, the whole resolution would fall.

On the other hand, the current Meech package does require unanimous approval of a single resolution, so the underlying logic of s. 39(2) is not applicable with its usual force.

Perhaps a decisive consideration in favour of applying s. 39(2) is that the legal legitimacy of a constitutional amendment should not be open to serious doubt. There is no express authority in the Constitution for avoiding the constraints of s. 39(2) by combining s. 38 resolutions with s. 41 resolutions. Adopting a more strict and literal approach to the requirements of Part V contributes to a clear and incontestably legitimate procedural framework in which these decisions of the utmost importance can be made.

It would be disturbing if there were no "three-year" rule, as Meech could remain a sword of Damocles. (Although legislatures could revoke pro-Meech resolutions; s. 46(2)). A possible consolation would be that governments would not feel time-pressured into passing Meech without amendments.

The federal government should commit itself irrevocably to a stand on the "three year" issue. It would be unfair to invoke it now as a pressure tactic, but then turn around and disavow any "deadline" if it is not met.