

The Immigration Clause in The Meech Lake Accord

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I. INTRODUCTION

THE PURPOSE OF THIS article is to explain the intended and potential workings of the key provisions in the Immigration Clause of the Constitution Act, 1987 and assess their implications for: the division and exercise of jurisdictional authority between the two levels of government, the rights and freedoms of immigrants, executive federalism, and constitutional reform. Before launching into the analysis, a clarification of which Immigration Clause is being analyzed and the factors which produced it is in order.

The Meech Lake Accord negotiations spawned two related, yet distinct, clauses that dealt with immigration. The first, found in the so-called Political Accord, contained, among other things, the much publicized commitment made by all first ministers in April 1987 at Meech Lake that in a revised version of the 1978 Canada-Quebec immigration agreement: Quebec would be guaranteed a percentage of immigrants equal to its proportionate share of the population with the right to exceed that total by five percent; the federal government would withdraw from planning and delivering reception and settlement services in Quebec and compensate the provincial government for the same; and Quebec's authority for the selection of independent immigrants would be expanded to include those the federal government permitted to apply from within Canada, rather than just those who apply from abroad as was the case under the 1978 Cullen-Couture agreement.¹ Although these provisions in that particular

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¹ This was implicitly stated in a relatively ambiguous sentence in the Immigration Clause of the Political Accord to the effect that the next immigration agreement would "incorporate the principles of the 1978 Cullen-Couture agreement abroad and in Canada of independent immigrants ... and on the selection of refugees abroad." Although the 1978 agreement had not explicitly stipulated Quebec's role in the selection of independent immigrants from within Canada the provincial government maintained that the agreement also covered independent immigrants who were allowed to apply from within Canada by the federal government. Subsections 11, 19 & 20 of the 1991 "Canada-Quebec Accord Relating to Immigration and Temporary Admission of Aliens," explicitly

Immigration Clause are important, especially since they were incorporated into the 1991 Canada-Quebec immigration agreement, and some attention is devoted to them here, it is beyond the scope of this article to analyze them in detail.²

The other Immigration Clause, which is the subject of this article, was included in the Constitution Amendment, 1987.³ It was comprised of five major sections, namely 95A to 95E which, had they been ratified, would have been inserted in the *Constitution Act, 1867* immediately after s. 95. The basic purpose of that Immigration Clause was twofold. First, to entrench a mechanism in the constitution for constitutionalizing bilateral federal-provincial immigration agreements and thereby providing them with constitutional protection against arbitrary and unilateral amendment or abrogation, either in whole or in part, by any of the governments that were party to the same.⁴ Second, as this article reveals, to permit two very important practices in the field of immigration which were prohibited under the existing constitutional regime: namely, the delegation of legislative authority between the two levels of government, and overriding the paramountcy of federal legislation provision in s. 95 with respect to the federal-provincial immigration agreements and, by extension, the immigration legislation of the various provinces.

Throughout the constitutional reform debate on the Meech Lake Accord, which lasted from 1987 until 1990, there was a remarkable paucity of attention devoted to the Immigration Clause in the Constitution Amendment, 1987 both in the literature and at public hear-

authorize Quebec to select such immigrants.

² Some attention was devoted to the provisions in the Immigration Clause of the Political Accord by B. Schwartz, *Fathoming Meech Lake* (Winnipeg: Legal Research Institute of Manitoba, 1987) at 132-149; P. Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988) at 24; and O.M. Kruhlak, "Constitutional Reform and Immigration" in R. Gibbins *et al.*, eds, *Meech Lake and Canada: Perspectives from the West* (Edmonton: Academic Printing, 1988) at 201-214.

³ For the text of the proposed amendment, see Schwartz, *ibid.* at 242-244, or Hogg, *ibid.* at 70-72.

⁴ It must be underscored that the concept "constitutionalizing" as used in this article refers to the process by which immigration agreements would have been given an explicit and formal constitutional basis. It does not refer to the "constitutional entrenchment" of agreements which I understand to mean that the agreements would have become part of the constitution. According to the Constitution Amendment, 1987 only the Immigration Clause (*i.e.*, ss 95A to 95E) would have become part of the constitution, not the agreements.

ings.⁵ Little was known of the intended and potential workings of the various sections of that particular clause. The Special Joint Committee tried to justify its cursory analysis of ss 95A to 95E with the puzzling assertion that: "For purposes of this Report it is not necessary to review in detail the intended workings of these sections."⁶ Such an assertion leaves one wondering both what the Committee deemed to be the purposes of its report and why it felt that the various sections of the Immigration Clause did not necessitate a detailed review. Was it because it generated relatively little concern and criticism among any of the major governmental and non-governmental stakeholders? Or was it because it was perceived as a technical clause which simply entailed the means to provide constitutional protection for bilateral federal-provincial immigration agreements and, at least prima facie, did not entail any major implications for matters such as: the alignment of powers, roles, and responsibilities between the federal and provincial governments, the fundamental rights of immigrants, executive federalism, and constitutional amendments?

Contrary to what the Special Joint Committee might have believed, however, the intended and potential workings of the various sections of the Immigration Clause should have been examined in detail in order to assist the public to make more informed judgments on its merits. Despite the fact that the Meech Lake Accord was not ratified, such an examination is still important for at least two reasons. First, the federal government's 1991 constitutional reform proposals together with the recommendation by the Special Joint Committee on a Renewed Canada, better known as the Beaudoin-Dobbie Committee, suggest that the Immigration Clause will probably reappear either intact or in a slightly modified form in future drafts of proposed

⁵ To date the only in-depth critical analysis of the Immigration Clause was provided by Schwartz, *supra*, note 2 at 132–149. A critique of certain sections of the Immigration Clause was provided by the Canadian Ethnocultural Council. See Canadian Ethnocultural Council, "A Dream Deferred: Collective Equality for Canada's Ethnocultural Communities," [A brief presented to the Special Joint Committee on the 1987 Constitutional Accord on August 13, 1987], in M.D. Behiels, ed., *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord*, (Ottawa: University of Ottawa Press, 1989) at 335 [hereinafter "A Dream Deferred"].

⁶ Canada, Special Joint Committee, *The 1987 Constitutional Accord: Report of the Special Joint Committee of the Senate and the House of Commons* (Ottawa: Queen's Printer for Canada, 1987) at 101.

constitutional amendments.⁷ Second, the Immigration Clause contained some interesting provisions that in the future could prove valuable for designing and giving constitutional protection to bilateral federal-provincial agreements on the alignment of powers, roles, and responsibilities in other fields of jurisdiction. Indeed, the Immigration Clause in the 1987 Constitution Amendment will probably provide both the impetus and the model for such an endeavour as the governmental stakeholders continue to search for the constitutional modalities which will allow for flexible federal-provincial arrangements that are constitutionally sanctioned and protected.⁸ Evidence of this search is found in *A Renewed Canada* which advocated a mechanism for constitutionalizing federal-provincial agreements in various fields of public policy.⁹

II. THE BACKGROUND

THE IMPETUS FOR THE Immigration Clause, as with the other clauses in the 1987 Constitution Amendment, came from the province of Quebec. Shortly after the Cullen-Couture agreement was signed in 1978 successive Parti Québécois and Liberal governments in that province had been pressing both for additional authority in the field

⁷ See Canada (Privy Council Office), *Shaping Canada's Future Together: Proposals* (Hull: Minister of Supply and Services, 1991) at 34 and 57 [hereinafter *Shaping Canada's Future Together*]. The recommendation of the Beaudoin-Dobbie Committee endorsing the inclusion of a mechanism for entrenching immigration agreements in the constitution read as follows: "We support the proposal of the government of Canada to negotiate and give more certainty to the public policy process in relation to the immigration agreements with the provinces. We recommend that these agreements be constitutionally protected from unilateral amendment." Canada, Special Joint Committee on a Renewed Canada, *A Renewed Canada: Report of the Special Joint Committee of the Senate and House of Commons* (Ottawa: Queen's Printer for Canada, 1992), at 80–81 and 118–119 [hereinafter *A Renewed Canada*].

⁸ The constitutionalization of federal-provincial agreements on a bilateral basis as envisioned in the Immigration Clause is a novel procedure in Canada. Although it resembles the constitutional entrenchment of the Natural Resource Transfer Agreements in the *Constitution Act, 1930*, 20–21 Geo. V, c. 26 (U.K.) (formerly *British North America Act, 1930*) which the federal government had concluded with the prairie provinces, there is a difference in that the case of the constitutionalization of immigration agreements, they would not be entrenched in the constitution. For a discussion of the entrenchment of the Natural Resource Transfer Agreements in the *Constitution Act, 1930* and the constitutionalization of immigration agreements pursuant to the Immigration Clause see Schwartz, *supra*, note 2 at 137.

⁹ See *supra*, note 7 at 68–69.

of immigration and the withdrawal by the federal government from providing reception and integration services for immigrants and refugees. In the period leading up to the negotiations on the Meech Lake Accord, the Quebec government indicated that one of its five conditions for signing the constitution was increased, as well as constitutionally sanctioned and protected, authority in the field of immigration.¹⁰ All of the first ministers acceded to both demands in the spring of 1987 when they signed the Meech Lake Accord which contained the basic principles for both of the aforementioned Immigration Clauses. Evidently they did so in a relatively short time and with little disagreement.¹¹ In terms of the mechanism for constitutionally sanctioning and protecting Quebec's authority in the field of immigration as outlined in its bilateral immigration agreements, they agreed to a mechanism for constitutionalizing such agreements.

Quebec's principal reason for seeking to constitutionalize its bilateral immigration agreement was, in the words of the federal minister of federal-provincial relations, "to avoid the possibility of an agreement being overridden unilaterally by the future exercise of federal legislative power."¹² This analysis reveals that the Immigration Clause would not have entirely eliminated the possibility of such an override.

A second and closely related reason for seeking to constitutionalize such agreements, and one which was not publicly acknowledged by federal and provincial officials during the Meech Lake Accord debate, was to clarify and enhance the constitutionality of existing and future provisions in bilateral Canada-Quebec immigration agreements. Evidently, Quebec and federal officials shared a concern regarding the constitutionality of certain provisions in the Cullen-Couture agreement as well as some of the proposed amendments to it specified in the Immigration Clause of the Meech Lake Political Accord. Of particular

¹⁰ See Quebec, *Draft Agreement on the Constitution*, 1985, p. 29; and G. Rémillard, "Address by Mr. Gil Rémillard" in P. Leslie, ed., *Rebuilding the Relationship: Quebec and Its Confederation Partners* (Kingston: Institute of Intergovernmental Relations, 1987) at 43.

¹¹ R.M. Campbell & L.A. Pal, *The Real Worlds of Canadian Politics: Cases in Process and Policy* (Peterborough: Broadview Press, 1989) at 245.

¹² L. Murray, "Address to the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord," on August 4, 1987, in *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord* (Ottawa: Minister of Supply and Services, 1987) 2A:7 [hereinafter *Minutes of Proceedings and Evidence*].

concern were the provisions authorizing Quebec to veto the admission into that province of applicants in the independent class who meet the minimum requirements of the federal selection criteria but not those of the provincial selection criteria.¹³ As shall be explained in greater detail below, the concern was that if those provisions were challenged in the courts they could be deemed unconstitutional on the grounds that they abrogate either the principle of federal paramountcy or the juridical principle which prohibits the delegation of legislative authority. Whether they did so is a moot point.¹⁴ Nevertheless, Quebec and federal officials were sufficiently concerned about the constitutionality of those arrangements that they took measures to enhance the constitutional status of the agreements and the provisions therein. Insofar as they did this to enhance the constitutional status of provisions in the Cullen-Couture agreement, which had been in effect for over a decade, this is another case of the constitution being amended to sanction relatively longstanding extra-constitutional practices.

Quebec's desire to provide bilateral federal-provincial agreements with enhanced constitutional validity and protection did not suddenly emerge in 1987. Such a desire had been expressed since at least the early seventies during Bourassa's first term as Premier. At that time the federal government responded by proposing a constitutional amendment which explicitly sanctioned such agreements. Article 40(1) of a Draft Proclamation for the patriation and amendment of the constitution dated November 10, 1975, recognized the authority of the two levels of government to enter into agreements in various fields including immigration. In a letter to all the Premiers in March 1976, Prime Minister Trudeau explained that art. 40(1) could be used to constitutionally sanction agreements which had already been concluded with respect to immigration during the first part of that decade.¹⁵

¹³ For an overview of the essential features of the selection process in the Cullen-Couture agreement see *supra*, note 6 at 101-103.

¹⁴ See Schwartz, *supra*, note 2 at 141-142; and J. Brossard & Y. de Montigny, "L'immigration : ententes politiques et droit constitutionnel" (1985) 19:3 R.J.T. 305 at 316-321.

¹⁵ See P.E. Trudeau, "A letter to all premiers dated March 31, 1976," in J.P. Meekison, ed., *Canadian Federalism: Myth or Reality*, 3d ed. (Toronto: Methuen, 1977) 140 at 152. The provisions of art. 40(1) indicate that it was primarily the constitutional validity of agreements with Quebec that were uppermost in the mind of the Prime Minister as well as Premier Bourassa at that time:

A decade later a constitutional amendment that sanctioned not only federal-provincial agreements but also the delegation of authority between the two levels of government was advocated by the Royal Commission on Economic Union and Development Prospects for Canada. More specifically, it advocated "... a constitutional amendment permitting Parliament and the provinces to delegate legislative powers to one another by mutual consent and further amendment permitting the two orders of government to enter into agreements binding on their successors."¹⁶ The Commission's recommendation stemmed from its belief that generally "... legal mechanisms such as delegation and intergovernmental agreements may provide a better means of accommodating the specific interests of Quebec than would constitutional amendment."¹⁷ In order to maximize the legitimacy of such agreements, the Commission also recommended that they be subjected to legislative ratification. As this analysis will reveal, both the mechanism and the procedures contained in the Immigration Clause of the Meech Lake Accord for constitutionalizing immigration agreements were quite similar to those advocated by the Commission.

III. IMPLICATIONS FOR THE DIVISION OF JURISDICTIONAL AUTHORITY

IN THE DEBATE ON the Meech Lake Accord there was an undercurrent of concern regarding the implications of the Immigration Clause for the division and exercise of jurisdictional authority between the two levels of government in the field of immigration.¹⁸ More specifically, there was some concern that the Immigration Clause would have derogated from the federal government's authority, or at least that it could have been used to do so, and that in turn this would have attenuated

40(1) In order to ensure greater harmony of action by governments and especially in order to reduce the possibility of action that could adversely affect the preservation and development in Canada of the French language and the culture based on it, the Government of Canada and the Governments of the provinces in any one or more of the Provinces may, within the limits of the powers otherwise accorded to each of them respectively by law, enter into agreements with one another concerning the manner of exercise of such powers, particularly in the field of immigration, communications, and social policy.

¹⁶ Canada, *Royal Commission on the Economic Union and Development Prospects for Canada Report*, vol. 3 (Ottawa: Ministry of Supply and Services, 1985) at 479.

¹⁷ *Ibid.*

¹⁸ *Minutes of Proceedings and Evidence, supra*, note 12 at 7:32.

the federal government's ability to provide a "leadership" role in the field of immigration.¹⁹ The thrust of this analysis is that the Immigration Clause would not have automatically derogated from the federal government's authority and that, insofar as it could have been used to do so, such derogation could have only occurred with the federal government's express or tacit consent.²⁰

The Immigration Clause would not have altered the division of jurisdictional authority under ss 95 or 91(25).²¹ Under s. 95 immigration would have remained an area of concurrent jurisdiction with federal paramountcy. Similarly, under s. 91(25) control of aliens, which implicitly included both their admission and deportation, would have remained an area of exclusive federal jurisdiction.

Furthermore, contrary to some misconceptions created largely by the concessions made to Quebec in the Immigration Clause contained in the Political Accord and which were ultimately included in the 1991 Canada-Quebec immigration agreement, the Immigration Clause in the Constitution Amendment, 1987 did not compel the federal government to concede any authority to any of the provinces, including Quebec. Such misconceptions also emerged from a misunderstanding of s. 95A of the Immigration Clause in the Constitution Amendment, 1987. Although s. 95A obligated the federal government to enter into negotiations with any province that requested "an agreement relating to immigration or the temporary admission of aliens into that province that is appropriate to the needs and circumstances of that province," it did not compel it either to concede any authority to any of the provinces or to conclude such an agreement.²² Under s. 95A provinces would have had no legal recourse if the federal government refused either to include certain provisions therein which they deemed appropriate to their respective "needs and circumstances."²³ Similarly, provinces would have had no legal recourse if the federal govern-

¹⁹ *Supra*, note 6 at 105.

²⁰ This was the position expressed by the constitutional expert W.R. Lederman to the Special Joint Committee on the Meech Lake Accord. See his presentation to the Special Joint Committee in *Minutes of Proceedings and Evidence*, *supra*, note 12 at 7:32-33.

²¹ For a discussion of the implications of those section of the constitution for the jurisdictional authority of the federal and provincial governments see: J. Mercier, "Immigration and Provincial Rights" (1944) 22 Can. Bar Rev. 856; W.R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 McGill L.J. 185; and V.M. Lemieux, "Immigration: A Provincial Concern" (1983) 13 Man. L.J. 111.

²² See *supra*, note 3.

²³ Schwartz, *supra*, note 2 at 135-137.

ment had not treated all of them equally in terms of the substance of their agreements. Indeed, the latter part of s. 95A, which stated that immigration agreements be "appropriate to the needs and circumstances" of the various provinces, implicitly sanctioned asymmetry in the arrangement between the federal government and the various provinces. Consequently, as Schwartz points out, it would have been difficult for provinces to argue either that equality in agreements was warranted because they face the same circumstances, or that "different treatment by the federal government amounted to unfair discrimination, as opposed to responsiveness to genuine differences."²⁴ Negotiations between the federal government and the provinces of Alberta and British Columbia during the past decade reveal that is precisely the federal argument used to rebuff provincial demands either for additional authority, or for at least what they deem to be their jurisdictional authority under s. 95 to plan and manage immigration destined for their respective territories.²⁵ The federal government's private posture in its negotiations with those provinces has not been consonant with its public rhetoric. The federal government's unofficial policy in the past has been, ostensibly, that whatever was granted to Quebec in terms of additional roles and responsibilities would be made available on an equal basis to other provinces. Yet, in practice it has firmly rebuffed demands by those provinces to perform key roles which were considerably more limited in scope than those performed by Quebec.

The inclusion of a provision in the Immigration Clause to the effect that whatever authority is granted to one province would be made available on an equal basis to others, undoubtedly would have had significant implications for the posture that the federal government would have taken vis-à-vis any of the provinces in negotiating bilateral immigration agreements. After all, before authorizing any of the provinces to perform certain roles in planning and managing immigration, it would have had to be prepared to authorize other provinces that wished to perform such roles to do so. Merely espousing the principle of equal treatment of the provinces either as unofficial or official government policy does not limit the scope of the federal

²⁴ *Ibid.* at 135.

²⁵ For a discussion of difficulties encountered by Alberta and British Columbia in concluding agreements with the federal government during the early 1980s see R. Vineberg, "Federal-Provincial Relations In Immigration" (1987) 30 *Can. Pub. Admin.* 299 at 315-316.

government's discretion in dealing with various provinces, but constitutionalizing it would have certainly done so.

Most of the confusion and concern regarding the implications of the Immigration Clause for the federal government's authority in immigration stemmed from s. 95B. Of particular concern was the "notwithstanding clause" in s. 95B(1).²⁶ It stipulated that any provisions in agreements relating to the permanent or temporary admission of aliens could have the force of law notwithstanding either s. 91(25), which granted the federal government exclusive authority over aliens, including their admission; or s. 95 which granted it paramountcy power in the field of immigration.²⁷

This "notwithstanding clause" would have permitted the federal government to do two things which were not permissible under the existing constitutional regime. First, the "notwithstanding s. 91(25)" provision would have permitted the delegation of the federal government's exclusive authority for the admission of immigrants and other aliens under that section of the constitution to any one or more of the provincial governments. Under the existing constitutional regime that would have been prohibited by the juridical principle that legislative authority cannot be delegated directly between governments.²⁸ The delegation of such authority was very important in terms of existing and future federal-provincial arrangements in the field of immigration.

²⁶ The Canadian Ethnocultural Council, for example, recommended in its brief to the Special Joint Committee that: "... s. 95B.(1) ... of the Accord be improved by removing the words 'notwithstanding class 25 of s. 91 or s. 95.'" See "A Dream Deferred," *supra*, note 5 at 341.

²⁷ Section 91(25) explicitly covers the naturalization and, implicitly at least, also the deportation of aliens. The "notwithstanding clause" in the Immigration Clause did not specify whether agreements could include provisions regarding deportation. Hence, it would have remained for the governments and the courts to determine whether it was implied. Similarly, the Immigration Clause did not mention the role of the federal and Quebec governments in the naturalization of immigrants. There was nothing in the Immigration Clause to suggest that either the federal or Quebec governments contemplated including provisions in constitutionalized agreements that would have devolved any authority to the province over naturalization of aliens.

²⁸ The interdelegation of legislative authority principle would only be abrogated in the case of s. 91(25) which entails areas of exclusive federal jurisdiction. It is not an issue in the case of s. 95 which entails an area of concurrent jurisdiction. For a discussion of the interdelegation of legislative authority principle see P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 295-308; and N.D. Bankes, C.D. Hunt & O.J. Sound, "Energy and Natural Resources: The Canadian Constitutional Framework," in Mark Krasnick, Research Coordinator, *Case Studies in the Division of Powers* (Toronto: University of Toronto Press, 1986) at 94-96.

In Quebec's case, for example, the notwithstanding s. 91(25) provision would have served to clarify and enhance the constitutionality of certain provisions in the Cullen-Couture agreement as well as those that were envisioned in the Immigration Clause of the Political Accord. For example, it would have eliminated any constitutional obstacles that might have existed to giving Quebec a veto in the selection of certain categories of independent immigrants either abroad or within Canada on the grounds that it was somehow tantamount to admission or control of aliens which under s. 91(25) is a federal responsibility.²⁹ It would have also cleared any potential constitutional obstacles to giving Quebec the exclusive right to provide integration and reception services for all foreign nationals, as was envisioned in the Immigration Clause in the Political Accord (and was ultimately included in the 1991 Canada-Quebec immigration agreement), on the grounds that this, too, might have entailed some delegation of the federal government's exclusive authority regarding aliens under s. 91(25).³⁰ Ultimately, it would have also cleared the way for the federal government to delegate to an agency of the Quebec government, or any of the other provinces, regulatory authority for the admission and deportation of immigrants. If the Immigration Clause had been ratified, therefore, the federal government could not have continued to reject a province's demand for the authority over the admission of immigrants destined to its territory simply on the grounds that the constitution did not permit the delegation of such authority. While this would have still left the federal government vulnerable to political pressure by any of the provinces that demanded such authority, constitutionally it would still have had the right to reject such demands.

²⁹ The notable exception to Quebec's paramourcy in the selection of independent immigrants is assisted relatives. Under s. IIIB of the Cullen-Couture agreement the federal government had final say in the selection of assisted relatives who satisfy the national selection standards but not Quebec's provincial selection standards. Applicants who did not meet the requirements under Quebec's selection criteria but met the requirements of the federal criteria could not be admitted directly into Quebec, but they could be admitted by the federal government into other provinces. Once in Canada, however, the mobility rights provision in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, s. 6 [hereinafter *Charter*] ensures that persons granted a visa cannot be prevented from settling in Quebec if they so desire. None of this has changed under the terms of the 1991 Canada-Quebec immigration agreement.

³⁰ Schwartz, *supra*, note 2 at 142.

Second, the “notwithstanding s. 95” provision in the Immigration Clause would have permitted the two levels of government to override the federal paramountcy provision in that section of the constitution. More specifically, it would have permitted them to override it in order to include provisions in federal-provincial agreements which were repugnant to an Act of Parliament. By extension, pursuant to such agreements, the provinces would have been able to enact legislation which was repugnant to an Act of Parliament. Under the constitutional regime then in place that was not permissible, because according to s. 95, provincial legislation is valid only “so far and so long as it is not repugnant to an Act of Parliament.”³¹

One of the important aspects of the “notwithstanding s. 95” provision in the Immigration Clause is that it would have facilitated the flexible application of the federal paramountcy power vis-à-vis the agreements and legislation of various provinces. An Act of Parliament would no longer have had to be paramount uniformly both across provinces and across all facets of immigration covered by that statute: it could have been paramount on a selective basis. Thus, for example, if the federal government wished to accede to the demands of a province that wanted to enact legislation pertaining to a certain facet of immigration which was repugnant to an Act of Parliament, Ottawa would not have had to either amend its legislation or completely withdraw it, as it would have to do under the existing constitutional regime. Instead, it could simply have included a provision in a bilateral and constitutionally sanctioned agreement which in effect would have overridden the paramountcy of an Act of Parliament in the case of that particular province for that particular facet of immigration.

Although, as the foregoing suggests, the governments would have been able to override the paramountcy of federal legislation provision in s. 95, it must be underscored that they could only have done so with respect to certain types of provisions in an Act of Parliament. Section 95B(2) of the Immigration Clause stipulated that they could not override any provision of the Immigration Clause which set national standards and objectives. To wit:

... an agreement ... shall have effect only so long and so far as it is not repugnant to any provision of an Act of the Parliament of Canada that sets national standards and objectives relating to immigration or aliens, including any provision that establishes

³¹ The significant juridical principle that emerged from the renowned Nakane and Okazake case [*Re Nakane* (1908), 8 W.L.R. 19, 13 B.C.R. 37 (C.A.)] in relation to the repugnancy provision in s. 95 is that provincial legislation must be “in furtherance or in aid of the federal legislation.” See Brossard & de Montigny, *supra*, note 14 at 309.

general classes of immigrants or relates to levels of immigration for Canada or that prescribes classes of immigrants who are inadmissible into Canada.³²

The phrase "national standards and objectives" constituted the crucial boundary line between the types of provisions in an Act of Parliament to which agreements could and could not be repugnant. Although the wording of s. 95B(2) left considerable room for interpretation both by the governments and the courts on precisely what constituted national standards and objectives, as well as to whether a particular provision in an agreement was in fact repugnant to an Act of Parliament, the paramountcy of important provisions in federal statutes was clearly affirmed.

Concerns that by specifying the type of provisions in federal statutes which would have paramountcy over immigration agreements (namely those that set national standards and objectives) s. 95B(2) could have compromised the ability of the federal government to exercise federal leadership in the field of immigration were unwarranted. The federal paramountcy provision in s. 95B(2) was relatively unrestrictive and sufficiently broad to permit the federal government to ensure that very little, if anything, of what was included in an agreement would fall outside the scope of federal legislation that set national standards and objectives. In fact, the extent to which anything in an agreement would fall outside the scope of such legislation would, of course, have depended on the nature and scope of standards and objectives set by the federal government in its legislation. This is essentially the same conclusion reached by the Special Joint Committee on the 1987 Constitutional Accord. In its report it noted that:

The variety of matters that could be characterized as "national standards and objectives" ... appears to be sufficiently broad to assure a continuation of federal leadership in matters affecting immigration and the temporary admission of aliens provided, of course, Parliament chooses to exercise its legislative authority in this respect.³³

Section 95B(2) permitted the federal government to maintain its leadership role in immigration alluded to in the above quotation in at least two major ways. First, either prior to, or even after, constitutionalizing agreements it could have enacted legislation setting national standards and objectives which, in effect, would have circumscribed the scope of constitutionally valid provisions that could be included in

³² *Supra*, note 6 at 16.

³³ *Ibid.* at 105.

such agreements. Second, it could have enacted such legislation even after agreements were constitutionalized that would have rendered either some or all of the provisions in such agreements repugnant to it and therefore inoperative.³⁴ After all, there was nothing in the Immigration Clause to suggest either that the federal government could not enact such legislation after an agreement had been concluded or, equally important, that existing agreements were immune from federal legislation enacted after they came into force. The importance of this from the federal government's standpoint was cogently expressed by Hogg:

The reservation of federal power over national standards and objectives means that the federal Parliament is not disabled from establishing new national immigration policies in response to changes in demographic needs, political values, and international obligations. Federal leadership in a matter of vital national concern would be stultified if a new immigration policy could only be implemented by the formal amendment of federal-provincial agreements that reflected older policy.³⁵

Only political imperatives could have prevented the federal government from enacting and enforcing immigration legislation setting national standards and objectives either before or after agreements were entrenched. Such imperatives, of course, are by no means insignificant, particularly where a politically powerful province such as Quebec is concerned. This may well explain why Quebec accepted s. 95B(2) which, constitutionally at least, would still have left its agreements highly vulnerable to the whims of the federal government. In any case, the point remains that although the proposed Immigration Clause would have provided agreements with a shield against the federal government's legislative power, the shield would have not been complete.³⁶ Indeed, given that constitutionally sanctioned agreements would have not been immune from federal statutes that set national standards and objectives enacted after they were concluded, the shield would have been far from complete.

None of the foregoing is to suggest that the ability of the federal government to set and maintain national standards and objectives would have been an uncomplicated matter. Indeed, experience in other policy fields with the formulation, interpretation, and enforcement of such standards and objectives suggests that not only can it be compli-

³⁴ Schwartz, *supra*, note 2 at 140.

³⁵ Hogg, *supra*, note 2 at 24.

³⁶ *Ibid.* at 23.

cated, but also controversial. In the case of the Immigration Clause in the Constitutional Amendment, 1987, complications and controversy could have emerged from the start not only in agreeing on the meaning of the phrase national standards and objectives which was "not exhaustively defined, and ... far from clear," but also in agreeing on the precise meaning of the objectives contained in s. 3 of Canada's *Immigration Act, 1976* which are relatively general and open to different interpretations.³⁷

In Quebec's case the issue of national standards and objectives might have been further complicated by the Distinct Society clause in the Constitution Amendment, 1987. Even in retrospect it is impossible to ascertain what implications, if any, that particular clause would have had for the application of national standards and objectives to constitutionally sanctioned agreements between Canada and Quebec and, by extension, to Quebec's policy and program initiatives in immigration. It is doubtful, however, that it would have permitted Canada and Quebec to include provisions in their bilateral agreements which were repugnant to the standards and objectives in an Act of Parliament. The explicit provision in the Immigration Clause prohibiting such repugnancy would probably have overridden anything implicit in the Distinct Society clause which might have allowed it. Nevertheless, it must be underscored that even if that had been found to be permissible under the constitution, ultimately the federal government would still have had to give its consent for such provisions to be included in bilateral Canada-Quebec agreements. Insofar as the Distinct Society clause might have been a factor at all, it is more likely to have affected the relationship between national standards and objectives on the one hand, and Quebec's immigration policies and programs on the other, than the provisions in the bilateral immigration agreements per se. This might have given Quebec greater leeway than other provinces in designing policies and programs that qualified

³⁷ S.C. 1976-77, c. 52. Hogg, *supra*, note 2 at 24. One possible area of confusion is what constitutes standards. Federal "admission standards" with respect to health and criminal record of the applicant would have fallen into this category. But what about the federal government's "selection standards" (referred as such in the Cullen-Couture agreement) which are established pursuant to the *Immigration Act*? If so, what would render provincial selection standards repugnant to the federal selections standards? Would they have had to be identical in terms of criteria and the point value given to each criteria? For example, if the federal government and Quebec government did not award the same value for fluency in each of the two official languages, would that amount to repugnancy? These are moot points which were never addressed.

as compatible with national standards and objectives.³⁸ Whether it would have done so, remains a moot point because the legal implications of the Distinct Society clause in the Constitution Amendment, 1987 were never fully clarified.

In sum, the Immigration Clause did not derogate from the federal government's constitutional authority in the field of immigration. Derogation of its authority could only have occurred if the federal government consented to it. The federal government would have been able to safeguard its authority in three ways: first, through the nature of agreements it concluded with the provinces; second, the nature of legislation setting national standards and objectives that it enacted; and third, the extent to which it was either willing to enforce such standards and objectives, or was constrained to do so by the courts.

To reiterate, the Immigration Clause merely gave the two levels of government the means by which they could delegate some of the federal government's authority under s. 91(25) to provincial governments, and the means to override the repugnancy provision in s. 95 with respect to federal-provincial agreements and, by extension, also with respect to provincial legislation. Those who opposed giving the governments such "means" for fear that it might have led to the decentralization of authority, either on a symmetrical or asymmetrical basis, and ultimately to the balkanization of immigration policy in Canada, should have borne in mind that considerable decentralization could also occur under the existing constitutional framework, although admittedly perhaps not with quite the same ease and flexibility. After all, the federal government could vacate the field of immigration, either in whole or in part, thereby letting the provinces exercise their authority under s. 95 in formulating and implementing their respective immigration policies and programs in an unfettered fashion. At most, given its authority under s. 91(25), the federal government would only be required to "rubber stamp" admission visas for immigrants selected by the various provinces. Even in this respect, however, the provinces could be given a key role. The federal govern-

³⁸ T.J. Courchene made the same point with respect to the implications of the Distinct Society Clause for Quebec provincial programs that would qualify as meeting national objectives for purposes of compensation under the spending power provisions in the Constitution Amendment, 1987. See T.J. Courchene, "Meech Lake and Socio-Economic Policy" (1988) 14 Can. Pub. Pol. S63 at S78. For a discussion of the implications of the Distinct Society Clause on various other matters see Schwartz, *supra*, note 2 at 8-76. In particular see pp 66-67 where Schwartz discusses the possibility of a Quebec provincial government invoking the Distinct Society Clause to restrict the mobility of individuals within Canada.

ment could simply set the general standards for admission (e.g., good health and no record of criminal activity) but delegate the function of administering those standards either to a federal-provincial agency or even a provincial agency.³⁹ While the provinces could not flagrantly abrogate the federal admission standards, they would certainly enjoy considerable latitude in administering and enforcing them.

Clearly, with or without the Immigration Clause, the two levels of government have considerable scope in terms of how they exercise their respective jurisdictional authority in the field of immigration. How they choose to exercise it was, is, and will remain, largely a function of political interests and imperatives both in the presence or absence of the Immigration Clause that was included in the Constitution Amendment, 1987.

To this point this article has focused on the implications of certain provisions in the Immigration Clause on the division of authority between the two levels of government. The subsequent sections focus on other provisions in that clause for the rights and freedoms of immigrants, executive federalism, and constitutional reform.

IV. IMPLICATIONS FOR THE RIGHTS AND FREEDOMS OF IMMIGRANTS

BOTH DURING THE NEGOTIATIONS and the public debate on the Meech Lake Accord, there has been an undercurrent of concern regarding the implications of the Immigration Clause for the rights and freedoms of immigrants.⁴⁰ The consensus was that the Immigration Clause neither enhanced nor abrogated those rights and freedoms. Rather, s. 95B(3) simply affirmed the paramountcy of the *Charter* "in respect to anything done by the Parliament of Canada, or the legislature or government of a province, pursuant to any such agreement." Evidently, this particular provision was included because the constitution is not clear on whether the *Charter* applies to constitutionally sanctioned agreements as it does to ordinary legislation.⁴¹ Although the Immigration Clause affirmed the paramountcy of the *Charter* over constitutionally sanctioned immigration agreements, it must be noted that rights and freedoms in ss 2 and 7-15, remain vulnerable in light of the notwithstanding clause in s. 33 of the *Charter* which can be

³⁹ For a concise discussion on the interdelegation of administrative and regulatory powers see Bankes, Hunt & Sound, *supra*, note 28 at 96.

⁴⁰ See "A Dream Deferred," *supra*, note 5 at 345-348.

⁴¹ Schwartz, *supra*, note 2 at 138.

employed both by federal and provincial governments. Hence, governments still have considerable scope in determining which rights and freedoms immigrants shall enjoy either in all or some of the provinces. The only rights which apply to immigrants that do not fall within the scope of the notwithstanding clause are mobility rights. Minority language educational rights under s. 23(1) are only extended to Canadian citizens, albeit in a highly circumscribed fashion.⁴² Persons who are not Canadian citizens, such as new immigrants, refugees, and temporary workers, do not enjoy such rights. Hence, they can be required to educate their children in the official language specified by the provincial government, as is presently the case in Quebec under the *Charter of the French Language* (Bill 101).⁴³ Thus, despite the affirmation of the *Charter's* paramourcy over agreements, many of the rights and freedoms of immigrants remain vulnerable to the whims of federal and provincial governments. Section 95B(3) in the Immigration Clause would not have changed that constitutional reality.

V. IMPLICATIONS FOR EXECUTIVE FEDERALISM

WHAT WOULD HAVE BEEN the implications of the Immigration Clause for executive federalism in the field of immigration? This question stems from the requirement in ss 95C and 95D for legislative ratification in constitutionalizing (i.e., the process for rendering them constitutionally valid) and amending federal-provincial agreements. This requirement gave the federal and provincial legislatures a formal role in the formulation and amendment of such agreements. Under the existing system the federal and provincial executives can, and generally have, bypassed their respective legislatures in processing such agreements.

Section 95C(1) stipulated that the constitutionalization of federal-provincial immigration agreements had to be sanctioned by resolutions of Parliament and the legislative assembly of the province that is party to such agreements. Although governments could not have bypassed legislative ratification in constitutionalizing agreements, they might have been able to do so when amending them, provided their respective legislatures gave their consent by including a special

⁴² For an interesting discussion of language and minority educational rights in Quebec both under the existing constitutional framework and if the Distinct Society Clause of the Meech Lake Accord had been ratified see *ibid.* at 14-38.

⁴³ R.S.Q. 1977, c. C-11.

provision to that effect in the agreement. Section 95C(2) stated that amendments to constitutionalized agreements required ratification by Parliament and the provincial legislature which were party to the agreement, "or in such other manner as is set out in the agreement."⁴⁴ If the Immigration Clause had been ratified and agreements had been constitutionalized, it would have been interesting to see: (i) which, if any, governments would have been permitted to bypass the need for legislative ratification in amending agreements; (ii) if the federal government adopted a uniform policy vis-à-vis all provinces regarding legislative ratification, or whether it would have complied with the wishes of each province; and (iii) what "other means" the two levels of government would have utilized for amending agreements if they rejected the option of legislative ratification at both the federal and provincial level.

The two other means of amendment, apart from legislative ratification, that might have been employed both at the federal and provincial level are: first, approval by Order in Council without any legislative ratification whatsoever at either level; and second, approval by Order in Council at one level and legislative ratification at the other.⁴⁵ Given the tradition of executive federalism in Canada, it is more likely that the first option would have been adopted. If the views of the Canadian Ethnocultural Council as echoed by the Special Joint Committee are any indication, however, proposals for amendments to agreements by Order in Council at the federal level would have not passed uncontested. The Canadian Ethnocultural Council expressed its concern with that particular provision in its brief to the Special Joint Committee and recommended that "... s. 95C(1)(b) ... of the Accord be removed, to ensure that federal-provincial agreements on immigration will be approved by Parliament."⁴⁶ The Special Joint Committee, in turn, indicated its preference for legislative ratification in the following terms: "Given the proposed constitutional status of immigration agreements, it is in our view appropriate that the adop-

⁴⁴ *Supra*, note 6 at 16.

⁴⁵ E. Forsey, "Submission to the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord" in *Minutes of Proceedings and Evidence*, *supra*, note 12 at 2A:83. Amendment of agreements by public referenda in the provinces that are parties to an agreement was also a possibility. However, it is unlikely that it would have received much consideration or support among the governmental elites. Canadian political culture does not seem to value constitutional reform via public referenda to the same extent as the Swiss and Australian political cultures.

⁴⁶ "A Dream Deferred," *supra*, note 5 at 342.

tion of amendments should be subject to procedural restrictions analogous to those that apply to amendments to the Constitution itself.⁴⁷ The Committee's view was quite sound in this respect; after all, certain amendments to a constitutionalized agreement could have been even more significant, than the original provisions.

The decision to include the requirement for legislative ratification did not stem from some emerging philosophy regarding the desirability of legislative scrutiny of executive agreements, but from the fact that the constitutionalization of agreements is tantamount to a constitutional amendment. Although executives would probably have had to be much more sensitive than in the past to the wishes of their respective legislatures in negotiating agreements, particularly in minority government situations, it is doubtful that, given the principle of party discipline, the requirement for legislative ratification in constitutionalizing and amending agreements would have attenuated significantly the traditional dominance enjoyed by the executives in determining the substance of such agreements.

VI. IMPLICATIONS FOR CONSTITUTIONAL REFORM

THE IMMIGRATION CLAUSE ENTAILED one of the most contentious conventions in the modern history of Canadian constitutional reform, namely a provincial veto over constitutional amendments. Section 95E required that an amendment to ss 95A to 95E had to meet two conditions. First, pursuant to s. 38(1) of the *Constitution Act, 1982*, it had to be endorsed by resolutions of Parliament and seven provinces with at least fifty percent of the population. Second, it had to be endorsed by resolutions of all provinces that had a constitutionalized agreement. This gave each province with a constitutionalized agreement a veto. Theoretically, as few as zero and as many as ten provinces could obtain such a veto.

The rationale for granting a veto only to provinces with constitutionalized agreements was that they stood to risk more from amendments to ss 95A to 95E than provinces without such agreements. The veto would have permitted them to block any amendments to these sections which could have adversely affected not only the substantive provisions in their agreements, but also the process by which such agreements were amended and new ones entrenched.

When assessed against the equality of the provinces principle, granting a veto only to those with constitutionalized agreements was

⁴⁷ *Supra*, note 6 at 105.

not particularly problematic. After all, in principle at least, each province had an equal opportunity to obtain such a veto by constitutionalizing an agreement. Whether the veto should have been granted only to provinces with constitutionalized agreements or to none of the provinces is an interesting question which should be given more attention if it reemerges in future constitutional amendments.

The realization that the veto over amendments to ss 95A to 95E would have been useful both as a defensive measure to block any proposed amendments to those sections which they deemed undesirable, and as a bargaining chip at some juncture in the constitutional amendment process in the future, undoubtedly would have provided the impetus for all provinces to attempt to constitutionalize an agreement. Indeed, under such circumstances, for some provinces the value of simply having a constitutionalized agreement probably would have outweighed considerations regarding its content. Hence, it would have been surprising, some might even say irresponsible, if any provincial government had not sought to constitutionalize an agreement, however vacuous, in order to obtain a veto. In this respect it would have been interesting to have seen the reaction both of provinces such as Ontario, British Columbia, and Manitoba who at that time had still not concluded formal comprehensive bilateral immigration agreements with the federal government; as well as that of the other provinces with such executive bilateral agreements albeit ones that were not constitutionalized.⁴⁸ In a similar vein it will also be interesting to see their reaction if a mechanism for constitutionalizing such agreements is entrenched in the constitution in the future.

If any of the provinces had obtained a veto over amendments to ss 95A to 95E, it would have been possible for each of them to block an amendment advocated both by all other provinces and the federal government. Whether any of them would have done so, of course, would have been contingent on a host of factors including the nature of the proposed amendment. Provincial vetoes over constitutional amendments are by no means unprecedented. Under ss 41 and 43 of the constitution provinces have vetoes only with respect to constitutional provisions that are central to the structure of the federation, the

⁴⁸ Manitoba has engaged in some preliminary negotiations for a comprehensive immigration agreement with the federal government on several occasions, but has still not concluded such an agreement. British Columbia has been actively negotiating an agreement since the Immigration Clause was endorsed by all the premiers in 1987 but to date no agreement has been signed. Alberta and Saskatchewan have been preparing for negotiations to revise their respective agreement during that same period.

composition of national governmental institutions, and the use of the official languages.⁴⁹ Extending vetoes to provinces over amendments to ss 95A to 95E obviously constituted a departure from the type of subject matter over which provincial vetoes have traditionally been accorded under the constitution.

This raises the question why federal and provincial officials who negotiated the Immigration Clause were willing to grant provinces a veto in this instance. Appeasing Quebec was undoubtedly the major factor. The decision to grant a veto only to provinces with constitutionalized agreements was a compromise between the federal government's preference for no provincial veto, Quebec's traditional preference for being the only province with one, and the belief of other provinces that if there is to be a provincial veto, it should be extended to all provinces.

For Quebec the veto had not only an instrumental value, but also an important symbolic value that satisfied autonomist sentiments in that province. Even in Quebec's case, however, the instrumental value of the veto was highly diminished since it was equally available to any one or more of the other provinces, as could have happened under the Immigration Clause. Thus, while Quebec would have been able to block any amendments to ss 95A to 95E advocated by all of the other provincial governments and the federal government, any of the other provinces with such a veto would have also been able to block amendments advocated by Quebec. Quebec reluctantly consented to this arrangement despite its expressed preference that it be the only province with a veto over certain constitutional amendments.

VII. SUMMARY AND CONCLUSIONS

THE CENTRAL AIM OF this article has been to explain the intended and potential workings of certain key provisions contained in the Immigration Clause of the Constitution Amendment, 1987, which throughout the Meech Lake debate were not adequately explained by any of the governments either in their publications or public statements. The objective in this concluding section is to: summarize the major findings; comment on the implications of the failure to ratify the

⁴⁹ Under the *Constitution Act, 1982* the provinces have a veto over amendments to those sections of the constitution dealing with the office of the head of state, the minimum number of representatives from each province in the House of Commons, the composition of the Supreme Court, the use of the English and French languages, and changes to their respective boundaries.

Immigration Clause; comment on the feasibility of introducing a more general clause for entrenching agreements for fields of jurisdiction other than immigration; and comment on the failure of governments to provide detailed explanations of the intended and potential workings of that clause during the constitutional reform debate.

The major findings regarding the intended and potential workings of the Immigration Clause can be summarized as follows. First, the Immigration Clause would not have altered the division of jurisdictional authority between the federal and provincial governments in the field of immigration as stipulated in the *Constitution Act, 1867*. Instead, it would have provided the federal and provincial governments with constitutionally sanctioned means to enter into agreements that would have allowed them to divide and exercise the jurisdictional authority pertaining to immigrants and aliens in a much more flexible fashion than was possible under the existing constitutional arrangements. Second, the Immigration Clause would not have affected the rights and freedoms of immigrants. Third, it would have enhanced the capacity of Parliament and the provincial legislatures to review and ratify federal-provincial immigration agreements. Finally, it would have granted provinces with a constitutionalized agreement a veto over amendments to the proposed ss 95A to 95E of the constitution.

To reiterate, the Immigration Clause in the Constitution Amendment, 1987 had two purposes: to provide a mechanism for constitutionalizing federal-provincial immigration agreements, thereby clarifying and enhancing the constitutionality of various provisions therein; and to permit two very important practices in the field of immigration which were prohibited under the existing constitutional regime: namely, the delegation of legislative authority between the two levels of government, and overriding both the paramountcy of federal legislation provision in s. 95 as well as the exclusive federal authority for admission and control of aliens under s. 91 with respect to the federal-provincial immigration agreements and, by extension, the immigration legislation of the various provinces. Failure to ratify the 1987 Constitution Amendment left the Canada-Quebec bilateral immigration agreement vulnerable both to legal challenges by applicants destined for Quebec who might question the constitutionality of the alignment of roles and responsibilities between the federal and Quebec immigration legislation as it applies to their particular case (especially independent immigrants who qualify under Canada's immigration selection criteria, but not Quebec's, and are therefore refused a visa), and also to the whims of the federal and

provincial governments who might be tempted not to honour the terms and conditions of the agreement. Failure to ratify the Immigration Clause in that proposed constitutional amendment may have also limited the type of arrangements which the federal and Quebec governments were able to include in the 1991 bilateral immigration agreement. It remains to be seen what provisions will be included in the next constitutional amendment package to address the federal and Quebec governments' shared concerns regarding the constitutional recognition and protection of bilateral immigration agreements and the alignment of powers, roles and responsibilities which they embody. This is particularly important in light of certain provisions in the 1991 Immigration Agreement which incorporated most, if not all, of the key provisions of the 1978 Cullen-Couture agreement as well as several new provisions.⁵⁰ Among the most significant provisions are those that: guarantee Quebec a percentage of immigrants that is proportionate to its share of the population with the right to exceed that by up to five per cent (ss 6 & 7); oblige Quebec to accept an annual level of refugees that is proportionate to its share of immigrants (s. 8); authorize Quebec to apply its selection criteria in selecting certain applicants for permanent resident status both in the independent immigrant class and the assisted relative category that the federal government allows to apply from within Canada (s. 11); authorize Quebec to apply the federal selection criteria in evaluating applicants in the family class, and to apply federal criteria as well as provincial criteria in evaluating applicants in the assisted relative category (ss 14 & 15); and authorize Quebec to supplant the federal government in providing various reception and integration services to immigrants and refugees destined for Quebec (ss 24-29).⁵¹

Some of the aforementioned provisions give additional cause for concern to the federal and Quebec governments over the constitutionality of the alignment of their respective powers, roles and responsibilities in the field of immigration. Undoubtedly, in one way or another, they will have to address those concerns in the future. The

⁵⁰ See the "Canada-Quebec Accord Relating to Immigration and Temporary Admission of Aliens" signed on February 5, 1991 which went into force on April 1, 1991.

⁵¹ Presently there is no federal selection criteria for family class members. Family class members need to meet only the federal admission criteria regarding matters such as health and criminal activity. The federal point system is not applied in evaluating applications of members in that class. In including that provision in the 1991 immigration agreement the federal and Quebec governments seemed to be anticipating the establishment of selection criteria for family class members in the future.

federal government's 1991 constitutional proposals suggest as much. In a section of those proposals devoted to immigration the federal government reiterated its commitment to reintroduce the Immigration Clause, or at least something comparable to it, in the following terms:

The government of Canada must maintain responsibility for providing citizenship and citizenship services, and for establishing the total number of immigrants and national standards and objectives related to immigration. *Within this framework, the Government of Canada is prepared to negotiate with all provinces bilateral agreements appropriate to the circumstances of each.* An agreement which respects both federal and provincial interests has already been concluded with Quebec, and negotiations are under way with other provincial governments. In addition, to ensure greater security for these agreements, *the Government of Canada proposes to constitutionalize the agreement with the province of Quebec, and any other agreements that are negotiated.*⁵²

That document reiterated the federal government's intention to retain control of national policy and objectives, and to negotiate agreements with any of the provinces in the following terms:

While recognizing the federal role in setting Canadian policy and national objectives with respect to immigration, the Government of Canada is prepared to negotiate with any province agreements appropriate to the circumstances of that province and to constitutionalize those agreements.⁵³

Given their experience in various sets of negotiations during the past decade, some of the other provinces may not be prepared to accept the federal government's assurances that it is really "prepared to negotiate with any province agreements appropriate to the circumstances of that province." The exasperating experience of provinces such as Alberta and British Columbia to constrain the federal government to conclude agreements which they deemed appropriate for them will undoubtedly lead them to request much more definite constitutional guarantees that their demands on the nature and scope of immigration agreements will be met.⁵⁴ It will be interesting to see whether any of them demand an equality of the provinces provision in the next version of the Immigration Clause to the effect that whatever arrangements the federal government enters into with any one of the provinces must be made equally available to all. Such a provision would leave it largely to the provincial governments, rather than the

⁵² Emphasis in original. See *Shaping Canada's Future Together*, *supra*, note 7 at 34.

⁵³ *Ibid.* at 57.

⁵⁴ See *supra*, note 25 at 315-316.

federal government, to determine the nature and extent of asymmetry in terms of the division of powers, roles, and responsibilities established pursuant to bilateral agreements. In this respect, it will also be interesting to see the federal government's response to such a demand from any one or more of the provinces.

One of the unanswered questions regarding the presence of the Immigration Clause in the Meech Lake Accord is why the federal and provincial governments did not develop a generic entrenchment mechanism (such as the one proposed by Trudeau in the mid-seventies, by the Macdonald Royal Commission in the mid-eighties, and most recently by the Beaudoin-Dobbie Special Committee in the early-nineties), that would have permitted the federal and provincial governments to constitutionalize important federal-provincial agreements in fields of jurisdiction other than immigration.⁵⁵

The obvious answer seems to be that Quebec was most interested in, and concerned with the constitutional sanction and protection of the immigration agreements. Surely, however, even Quebec had a stake in the constitutional protection of its other agreements. Hence, the question, which unfortunately cannot be answered here, remains: Why the preoccupation with the constitutionality of immigration agreements as opposed to other types of agreements? Is it desirable and feasible to develop a generic entrenchment mechanism that would allow the federal and provincial governments to constitutionalize agreements in other fields of jurisdiction? This particular question has been raised by the Beaudoin-Dobbie Committee. It will be interesting to see how it is answered in the next round of the continuing constitutional reform debate.

One of the most troubling aspects of the Meech Lake constitutional reform process, and most of those that preceded it, was a failure by the governments to provide the public with detailed information on the intended and potential workings of the proposed constitutional amendments. Their failure to do so raises some fundamental public policy questions regarding the nature and volume of information that governments should be making available when they undertake constitutional reform. Should it be left to those outside government, including the staff and members of parliamentary committees, to divine the intended and potential workings of key provisions in a constitutional amendment as they have had to do not only with certain sections of the Immigration Clause, but also other key sections of the

⁵⁵ See Trudeau, *supra*, note 15 at 152; Canada, *supra*, note 16 at 479; and *A Renewed Canada*, *supra*, note 7 at 68-69.

Constitution Amendment, 1987? Or, should governments be making available to the public, as well as to all legislators, much more detailed documents explaining such matters? How governments answer these questions may well determine how often they hear the poignant query: "Whose constitution is it?" evoked by the disenchantment over the lack of opportunity for effective public participation during the Meech Lake constitutional reform exercise.⁵⁶ The Special Joint Committee that reviewed the proposed Constitution Amendment, 1987 noted that although the provisions in the Immigration Clause "represent an important new step in federal-provincial relations in immigration ... they excited little comment at our hearings."⁵⁷ One cannot help wondering the extent to which the dearth of public comment was a function of the paucity of information on the intended and potential workings of the Immigration Clause. One also cannot help wondering why governments would not want to make such information readily available.⁵⁸ Are they engaged in some grand exercise in consociationalism whereby the federal and provincial governmental elites are withholding such information to protect us from ourselves?

⁵⁶ A.C. Cairns, "A Limited Constitutional Vision of Meech Lake" in K.E. Swinton & C.J. Rogerson, eds, *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) 247.

⁵⁷ *Supra*, note 6 at 105.

⁵⁸ Schwartz, *supra*, note 2 raises essentially the same question at page 1 where in commenting on the secrecy surrounding the documents used in federal-provincial negotiations he asks: "Exactly what would be the harm of periodically releasing competing drafts and suggestions to the public?"