NO!!

The Hon. Dr. Eugene Forsey, C.C., F.R.S.C.*

Madam Chairman, Mister Chairman and Members of the Committee:

I am most grateful for this opportunity of appearing before you.

You have a most important task to perform. Your hearings may be almost the last chance to set forth the reasons why the Meech Lake Accord should not be approved without important changes: and the decision of the Legislature of New Brunswick may be almost the last chance of preventing the unanimous approval of the Accord by the provincial Legislatures, which would rivet upon the country a set of drastic constitutional changes which might be nothing less than disastrous; changes upon which the people have never been consulted, and which it would be almost impossible to reverse or even modify. These are strong words. Before I provide the basis for them in the detailed criticism of the Accord which I shall submit to you, there is a preliminary warning. Many of the criticisms have been brushed aside by assurances that they can all be met in a "second round" of constitutional negotiations.

This is an illusion. The "second round" is a myth.

The Accord's defenders say that it is a "seamless garment." Touch so much as one comma and the whole thing disintegrates and the country falls "through hideous ruin and combustion down/To bottomless perdition." So unanimous approval must be given by June 23, 1990. Till then, nothing can be changed. But, their argument proceeds, on June 24, 1990, everything will be wide open. The garment will no longer be seamless. Overnight, the rigidity will disappear. It will not. How can it?

Will Quebec give up anything it has won? Will it give up the "distinct society" and its primacy over everything in the *Constitution* and the *Charter of Rights and Freedoms* except multiculturalism and the aborigines? Will any province give up the new powers they will all have got over cost-shared programs? Will any province give up the power to nominate senators and judges of the Supreme Court of Canada? Will any province give up the absolute veto every one of them will have over nomination of Supreme Court judges by the Territorial Governments, or over the admission of new provinces, or over any change in the number of senators from any province, or the powers of the Senate, or any change to an elected Senate? It should be emphasized that any single province can veto absolutely any change in the provisions on the Supreme Court of Canada, any change in the provisions for creation of new provinces, any change in the method of choosing creation of new provinces, any change in the method of choosing senators. It should also be noted that, under the provision for the annual federal-provincial conference on the *Constitution*, Senate reform and the fisheries must be discussed, but nothing else can even go on the agenda unless it

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is "agreed upon"; in other words, any single province can prevent even the discussion of any subject except Senate reform and the fisheries. This, of course, would include the whole subject of aborigines, any proposal to add to the list of "fundamental characteristics" of Canada, any proposal to touch the "distinct society" of Quebec, any proposal to name other "distinct societies."

The "second round" is smoke and mirrors, a snare and a delusion. If the Accord is to be modified in any respect, it must be modified now. After it has been unanimously approved will be too late.

Initially, almost everyone welcomed the Constitutional Accord which is before you. Very few, however, would contend that it is perfect. Many believe that it presents serious problems. Some believe that, despite imperfections, it must be accepted as it stands, and this for four reasons. First, the imperfections are minor: mere matters of detail. Second, we can leave it to the courts to deal with them. Third, the agreement of the First Ministers settles the whole question. Fourth, if that left any opening for change, Quebec's formal approval has closed the door. From all this, it would follow that examination of the document is really a waste of time, or, as one columnist has put it, "an exercise in frustration." The approval of the Parliament of Canada, and the other nine provincial Legislatures, is a foregone conclusion, just a formality. This is a conclusion which I think ought not to be accepted. It is open to challenge on every one of the four grounds on which it rests. It is fraught with danger to the whole process of constitutional development.

The imperfections in the Accord are not by any means all minor, mere matters of detail. We cannot leave it to the judges to deal with them. It is the responsibility of the legislator to produce a text which tells the judges as clearly as possible what he has in mind, not to present them with ambiguities and obscurities. The Accord thrusts upon the judiciary a task which belongs for Parliament and the Legislatures. It is wholly improper for Parliament and the Legislatures to abdicate their responsibilities. They have no right to say: Open the gates as wide as the sky, and let the judges come riding by."

The agreement of the First Ministers does not settle the whole question. The *Constitutional Act, 1982*, does not say that certain amendments require the approval of the Prime Minister of Canada and at least two-thirds of the First Ministers of provinces with at least half of the population of the ten, or, in certain cases, the approval of the Prime Minister of Canada and the First Ministers of all the provinces. It says Parliament and the Legislatures.

Is there a constitutional convention which, for practical purposes, abrogates these provisions of the supreme law of the land? How can there be? The law provides that the amending process may be spread over three years. Governments can change. Particular governments have been known to change their minds. Mr. Lesage did in 1964. Mr. Bourassa did in 1971. The Manitoba Opposition blocked an amendment on official languages.

The First Ministers are not eleven Moseses, coming down the stairs of the Langevin Block with the Tables of the Law writ in stone. "Minister" means ser-

vant, not master. The First Ministers are the first servants of the Queen, that is, of the people of Canada. If a unanimous decision of the First Ministers can amend the *Constitution*, if the members of the two Houses of Parliament and the Legislatures are just yes-men and yes-women, nodders, whose sole function is to "Votare si," as in Mussolini's plebiscites, whose duty is to "Hear, believe and obey," then we might as well tear up the whole of Part V of the *Constitution Act, 1982*.

Nor should Quebec's approval of the Accord close the door to changes. The *Constitution* belongs to all of us. It is not the property of any province, to be disposed of as that province's Legislature sees fit; and that is especially true, and important, when as in this Accord, many of the amendments apply not just to one province but to all.

The Quebec Legislature's approval of the Accord is obviously of the highest importance. But to say that it settles the whole question is to reduce Parliament and every other provincial Legislature to a cipher, and the people of the other provinces to second-class citizens, if that.

Now for the specific provisions of the Accord.

1. The Two New Principles of Interpretation: Duality, and the Distinct Society

First and foremost, we have, in section 1 (which enacts a new section 2 of the *Constitution Act, 1867*), the introduction of two new principles of interpretation of the *Constitution*: the principle of linguistic duality and the principle of Quebec as a distinct society. Each of these needs careful scrutiny. That linguistic duality is a "fundamental characteristic of Canada," who can question? But that parliament and the provincial legislatures are to "preserve" it, and that the courts are to interpret the *Constitution* "in a manner consistent with" it raises some problems. That Quebec is, sociologically distinct, again, who can question? It is, for one thing, the only province with a French-speaking majority. It is, for another, the only province with a French-type civil law, constitutionally guaranteed. Many features of its community life are very different from what we find in any of the other provinces.

But it can be argued that other provinces also are sociologically distinct. My own native province of Newfoundland, for example, has its own varieties of the English language, with its own massive *Dictionary of Newfoundland English*. It has its own special system of education, constitutionally guaranteed. It is the only province that was ever an independent Dominion, constitutionally the equal of Canada, Australia and New Zealand. Moreover, we could amend our own *Constitution*, which Canada, in those days, could not. We had our own High Commissioner in London and, if we had been rich enough and foolish enough, we could have set up our own diplomatic service. New Brunswick also is sociologically distinct: the only province with a French-speaking minority amounting to nearly a third of the total population, and a French-speaking community which is by no means just a carbon copy of Quebec's.

But the Accord recognizes in Quebec alone a distinct society with what might turn out to be very special and sweeping legal powers, not only in relation to language but also to a large number of other matters covered by sections 3 and 16, which I examine below.

The Accord states that the *whole* of the *Constitution*, and the *whole* of the *Charter of Rights and Freedoms*, except the provisions on multiculturalism and the aborigines "shall be interpreted in a manner consistent with (a) the recognition that the existence of French-speaking Canadians, centred in but not limited to Quebec, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada: and (b) the recognition that Quebec constitutes within Canada a distinct society." The section goes on to say that "Parliament and the provincial legislatures are committed . . . to preserving" the duality, and that "the Legislature and Government of Quebec" have a "role . . . to preserve and promote the distinct identity of Quebec" as a "distinct society." The French text makes the point even clearer. "*Toute* interprétation de la *Constitution*" (except for the provisions on multiculturalism and the aborigines) "doit concorder avec" the two *new* principles.

This, on the face of it, opens up a wide field. But the defenders of the Accord say it does not. It contains no section explicitly taking away any power of Parliament or any provincial Legislature. It contains no section explicitly giving Parliament or any provincial Legislature any new power. On the contrary, the very section that contains the two new principles of interpretation contains a subsection (4) expressly stating that nothing in the section "derogates from the powers, rights, and privileges of Parliament or the Government of Canada, or of the Legislatures or governments of the provinces including any powers, rights or privileges relating to language."

But this saving sub-section is not all it seems. Section 36(1) of the *Constitution Act, 1982*, has a similar proviso; similar but not the same. It says: "Without altering the legislative authority of Parliament or of the provincial Legislatures, or the rights of any of them with respect to the *exercise of their legislative authority*." This plainly bars the courts from instructing Parliament or any Legislature on *how it is to exercise its powers*. Does the saving proviso in the Accord do the same?

It does not. It says nothing about the *exercise* of the legislative authority of Parliament and the Legislatures. Their legislative *power* is protected, but not the way they exercise it. This leaves the way open for the courts to say to Parliament and the Legislatures: "We can't take away any of your powers. We *can* instruct you to exercise them in a certain way. Do it."

One interpretation of the obligation of Parliament and the Legislatures to "preserve" the "fundamental characteristic," and of the courts to interpret the *Constitution* accordingly, is that if Parliament, or a Legislature, is not, in the opinion of the minority, living up to its commitments, the minority can appeal to the courts to tell Parliament, or the Legislature, to enact whatever measures the courts consider necessary to meet the constitutional obligation. The Supreme

Court of Canada did this in the Manitoba language case. The Supreme Court of the United States did it in the matter of redistributing seats in the State Legislatures, and in the case of *Brown* v. *The Board of Education*.

This, of course, assumes that the duality principle really means something. An alternative reading of the text is that it does not. It commits Parliament and the Legislatures to nothing more than preservation of the *status quo ante*; it gives the French-speaking minorities outside Quebec *nothing*, and the English-speaking minority in Quebec *nothing*, beyond what they now have.

Similarly with the "distinct society" principle: it may mean something or it may mean nothing, or at least very little: the distinct society may be bilingual and multicultural. Mr. Bourassa and Mr. Rémillard are convinced that it means a great deal; that combined with section 16, it gives the Government and the Legislature of Quebec power to override everything in the *Charter*, and everything in the *Constitution*, except multiculturalism and the provisions (such as they are) for the aborigines.

The defenders of the Accord have a soothing answer to all this. The duality provision, and the "distinct society" provision make no substantive changes in the *Charter* or the *Constitution*. They are "only" principles of interpretation, which the courts will have to consider, along with other principles, in deciding a particular case. They will "tip the scales" (says Professor Beaudoin, at p. 33 of No. 2 of the *Proceedings of the Special Joint Committee of the Senate and the House of Commons on the Accord*) "to one side or the other in certain cases, in particular under section 1 of the Charter" (not without significance, that!) "or in a grey area of the division of powers."

"Only" principles of interpretation! Principles of interpretation developed by the Judicial Committee of the Imperial Privy Council turned much of the Canadian Constitution upside down. Principles of interpretation developed by the Supreme Court of the United States did the same to the American Constitution, in the opposite direction. Is it beyond the bounds of possibility that *mandatory* principles of interpretation *explicitly* set out in the written Constitution itself, and in *highly ambiguous terms*, may prove no less potent?

Professor Beaudoin himself says: "It is an interpretation rule which has changed Canadian federalism" (quoted by Hon. Donald Johnston, *Hansard*, October 1, 1987, p. 9536). And Mr. Bourassa (quoted on the same page) says: "It has to be pointed out that the *whole Constitution including the Charter* will be interpreted *and enforced* in the light of the clause dealing with the distinct society. *Legislative jurisdiction* is the *target* and this will enable us to strengthen what has been achieved *and make further progress*" (emphasis added). (See also Mr. Trudeau's evidence, No. 14, pp. 136-37 of the *Proceedings* of the Joint Committee.) No wonder he added: "Quebec is winning one of the *greatest political victories of its history*, a victory that is *undeniably recognized* by the majority of *objective observers* as one of the *greatest in two centuries*" (quoted on the next page of Mr. Johnston's speech: emphasis added). (See also Mr. Trudeau's evidence, No. 14, p. 117 of the Joint Committee's *Proceedings*.) "Only" principles of interpretation?

Page 15 of the *Report* gives the whole game away: "all the centralizing forces in the *Constitution Acts* of 1867 and 1982 remain. *Of course, they will now have to be interpreted in the light of the 'linguistic duality/distinct society' clause.*'" It adds, hastily, that the Accord "expressly provides that nothing in that clause 'derogates from the powers, rights and privileges of Parliament *or* the Government of Canada or of the governments or legislatures of the provinces.'" But we have seen how much that is worth. It is worth remembering also that the *Constitution Act, 1867*, said that the enumerated heads of section 91 were put there "for greater certainty, but not so as to restrict the generality of the foregoing terms of this Section" (the power "to make laws for the Peace, Order and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces"), and that the Judicial Committee of the Privy Council proceeded to use those heads for *precisely the forbidden purpose* . . ..

Defenders of the Accord offer a further reassurance to those who fear the possible consequences of the "distinct society" clause: the distinct society will be bilingual and multicultural.

The *Report* (p. 18) quotes Professor Beaudoin: "In my opinion, the Quebec National Assembly has a role within the boundaries that have already been set, not an additional role. It has been told to *promote bilingualism* (emphasis added), "to promote the concept of a distinct society. But this does not change sections 91 and 92. It has to promote these things, but within the scope established by sections 91 and 92; that is what we forget to mention."

This is a most remarkable statement. The Quebec Legislature has *not* been told to "promote" bilingualism. The duality principle, in sharp contradistinction to the distinct society principle, says only "preserve"; which, as already noted, may mean only maintaining the *status quo ante*. The Accord's "forgetting" to "mention" "promote" is no inadvertent lapse of memory.

It is worth noting also Professor Beaudoin on what makes Quebec a distinct society: "Because the language and culture of most of its population is French and because it operates under a French-inspired private law, Quebec is a distinct society" (quoted by Hon. Donald Johnston, *Hansard*, October 1, 1987, p. 9536). Nothing about bilingualism there.

Mr. Yves Fortier says: "Quebec society within Canada is not defined solely by the characteristics of the francophone majority, and clause 2 states this specifically. Quebec's distinct society is composed of English-speaking Canadians, French-speaking Canadians, native people and people from ethnic groups" (p. 33). This also is a most remarkable statement.

(a) The paragraph of the Accord which sets out the duality principle (section 1, sub-section (1)(a) does indeed speak of French-speaking Canadians and English-speaking Canadians. But the sub-section which sets out the distinct society principle (sub-section which sets out the distinct

society principle (sub-section (3)) does *not*. The duality principle applies to *every* province. The distinct society principle applies only to Quebec.

(b) Sub-section (3) does not *mention* native peoples or ethnic groups.

(c) The duality principle, on Mr. Fortier's showing, would make *every* province a distinct society. *Quebec would differ from the others only in varying degrees*; markedly from Newfoundland, Nova Scotia, Prince Edward Island and British Columbia (where the French-speaking minorities are small, and have no specific constitutional guarantees); slightly less markedly from Saskatchewan and Alberta (where the French-speaking minorities are small, and may have some specific constitutional guarantees);[1] less markedly from Manitoba (where the French-speaking minority, though not very large, has very specific constitutional protection); considerably from Ontario (where the large French-speaking minority has no specific constitutional protection, but statutory rights of some magnitude); not so materially from New Brunswick (where it forms about a third of the population and enjoys very strong constitutional guarantees).

If Mr. Fortier is right, why have subsection (3) at all, except perhaps for that additional word "promote"? Does that word give the whole game away? . . .

Above all, note Mr. Bourassa (quoted by Mrs. Finestone, M.P., *Hansard*, October 5, 1987, p. 9685): "The French language constitutes one fundamental characteristic of our uniqueness but it has other aspects such as our cultural, our political, economic and legal institutions. As we have so often said, we did not want to define all these aspects because we wanted to avoid reducing the National Assembly's role in promoting Quebec's uniqueness." Not so much as a hint here of bilingualism, biculturalism, multiculturalism, the aborigines; but more than a hint that the phrase "distinct society" was intended to cover a very wide field.

All the attempts to show that the "distinct society" means very little ring hollow upon examination. If it really means so little, what is it doing there at all? Why was Quebec so insistent on its inclusion? Why are Mr. Bourassa and Mr. Rémillard trumpeting so vociferously about all the wonderful new powers it will give them? As Mr. Trudeau said (p. 33 of the *Report*): "Read the speeches. Read Mr. Rémillard. It is just ridden with this stuff: now we will be able to occupy the grey areas; now we will be able, even in foreign affairs, even in the area of banking, even in the area of telecommunications, to get and exercise more powers."

2. The Accord and the Charter of Rights and Freedoms

Chapter VI of the *Report of the Special Joint Committee* deals with this. At p. 60, it says: "We recognize that the conclusion that legislation enacted in fulfillment of the roles described in section 2(2) and (3)" (linguistic duality and the dis-

[1] *R. v. Mercure*, [1988] 1 S.C.R. 234.

tinct society) "is amenable to Charter review does not dispose of the issue whether the 'linguistic duality/distinct society' clause could come into conflict with *Charter* rights," and goes on to consider the effect of section 16.

At p. 61, it adds: "Section 16 is itself an interpretative clause designed to preserve certain constitutional values *in the face of*" (emphasis mine) "the 'distinct society' and 'linguistic duality' interpretive clauses. Its function is thus to 'interpret the interpreter' and, as several witnesses commented, the *Constitution* seems to be increasingly entangled with numerous interpretative rules that only serve to confuse matters." It does indeed; but it does not seem to have struck the Committee that this is scarcely an argument for adding to the entanglement. Nor does the Committee seem to have realized that if the exceptions in section 16 are "designed to preserve certain constitutional values in the face of the 'distinct society' and 'linguistic duality' interpretative clauses," the rest of the section *leaves all the other "constitutional values" without that protection*.

The *Report* proceeds (p. 61): "It must be acknowledged at the outset that various distinguished constitutional experts appearing before the Joint Committee had great difficulty in providing a legal rationalization as to why certain sections (of the *Constitution* and the *Charter*) are included in section 16 and why others are left out." No wonder!

The *Report* (pp. 61-2) goes on to offer Senator Murray's answer: "Multicultural heritage, or that reference to the *Charter*, is itself an interpretative clause" (what has that to do with its inclusion?) "and the various references to aboriginal peoples relate to collective rights . . . , not individual rights" (so does the clause on minority educational rights; but it is *not* included). "It was for this reason that those two matters, our multicultural heritage and native peoples, both identifiable groups with a cultural aspect, were mentioned" (and are the French-speaking people outside Quebec, and the English-speaking people in Quebec not "identifiable groups with a cultural aspect"? ". . . out of an abundance of caution. Frankly, we do not think the interpretative clause respecting the distinct society or the linguistic duality of Canada could conceivably detract or diminish from [*sic*] those other recognitions in the *Constitution*. But because multiculturalism and native peoples related to groups with a cultural aspect, it was thought appropriate to put in that non-derogation clause."

But *why* only "groups with a cultural aspect"? Even then, why leave out the rights of the English-speaking minority in Quebec, or the French-speaking minority outside Quebec? Presumably because they are adequately protected by the duality principle. But are they?

"The Joint Committee accepts the advice that the 'linguistic duality' clause is a constitutional step in the right direction for the French-speaking minorities outside Quebec" (is it a step in *any* direction?) "and that in law the 'distinct society' clause is *unlikely* to erode in any *significant* way the existing entrenched constitutional rights of the English-speaking minority within Quebec" (p. 51). This is another invitation to take a leap in the dark.

Why couldn't the "abundance of caution" have applied to the whole Charter?

The *Report*, rightly, devotes considerable space to the contention of various women's organizations that the "abundance of caution" ought to have meant the inclusion in section 16 of the equality rights of women, or, as the *Report* puts it, "gender equality."

It thought not, for six reasons.

First, the women's organizations in Quebec saw no danger. Encouraging, but hardly conclusive.

Second, the dangers the other women's organizations suggested they themselves said would arise not from "an impact" on section 15 of the *Charter* but from the "reasonable limits" in section 1 of the *Charter*. But "constitutional experts" told the Committee that the Quebec Government could already argue that Quebec linguistic duality, and distinctiveness, justify apparent invasions of *Charter* rights: "Adding an explicit rule of interpretation could give added force to arguments based on these factors" (p. 65). "Added force" indeed!

Third, the Chief Justice of the Supreme Court of Canada has ruled that any measures limiting *Charter* rights must be

> carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. Secondly, the means, even if rationally connected to the objective . . . should impair 'as little as possible' the right or freedom in question. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance.' Even if an objective is of sufficient importance and the first two elements of the proportionality test are satisfied, it is still possible that because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purpose it is intended to serve. The more severe the deleterious effects, the more important the objective must be if the measure is to be reasonably and demonstrably justified in a free and democratic society. (pp 65-66).

No doubt this is all true. But it still leaves open the possibility that the two *new* principles of interpretation, *which were not part of the Constitution when the Chief Justice wrote*, might "tip the scales" against "gender equality." It still asks us to take a leap in the dark, trusting to the courts to provide an adequate safety net.

The judgment of the Supreme Court of Canada in the *MacDonald* v. *City of Montreal*, [1986] 27 D.L.R. (4d) at 321 is not reassuring. In that case, the appellant argued that the *Constitution Act, 1867*, section 133, entitled him to receive a summons for speeding in English: "Either of those Languages" (English and French) "may be used by any Person in any Pleading or Process in or issuing

from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec." To the lay mind, this was put into the Act to protect the right of the ordinary citizen to have court documents in the language he understood. The Supreme Court decided, Madame Justice Wilson dissenting, that in effect it protected the right of the *courts* to use whichever language *they* chose!

In the *Radio Broadcasting* case, the Judicial Committee of the Privy Council wound up its judgment by saying: "It is a matter for congratulation that the result arrived at seems consonant with common sense." The Supreme Court, in the *MacDonald* case, could scarcely have offered itself the same congratulation. But of course it had very high authority for its decision (though it did not cite it): the judgment of the Lord Chancellor in *Iolanthe*, that when the fairy law said, "If a fairy marry a mortal, she shall die," it meant, "If a fairy do not marry a mortal, she shall die."

Fourth, "the 'linguistic duality/distinct society' rule . . . will be read together, along with other constitutional values, in any *Charter* analysis by the Court under Section 1. Professor Lederman put it this way: 'the distinctiveness of the *society of French-speaking Canadians in Quebec*'" (not quite Professor Beaudoin or Mr. Fortier on what "distinct society" means), "'the importance of aboriginal rights, the importance of multicultural rights, are assured by these provisions, that they will be in the mix, when Charter I considerations are being weighed. *But how it will come out is in the hands of the judges*'" (p. 66, emphasis added). Precisely. But is that where it ought to be?

Fifth, Professor Hogg thinks it "unlikely that the duality and distinct society clauses would be interpreted as permitting governments to discriminate directly or indirectly against women" (p. 67). The *Report* adds that "representatives of some women's groups" found this "insufficient." Fancy that!

Sixth, "reaching into section 15 of the *Charter*, to add gender equality rights to the 'protected' list while leaving all other *Charter* rights 'unprotected' would be even more arbitrary. What about religious discrimination? Freedom of expression? Religious freedom? Racial discrimination?" (p. 144). What indeed!

But the *Report* rejects the idea of exempting the "whole of the Charter from the effect of the distinct society clause, including clause 1 of the *Charter*." It quotes Mr. Fortier as saying that that "would mean the death of the Meech Lake Accord, period" (p. 67), a conclusion it apparently endorses. This is surely a devastating reply to the contentions that the distinct society clause does not really mean much.

3. The Accord and The Constitution Act, 1867

So much for the effect on the *Charter*. But there is also the effect on other parts of the *Constitution*, notably the powers of Parliament set out in sections 91, 92(10), 93, 94 and 95.

It is a formidable list. Presumably, the courts would give short shrift to any attempt to set up a separate Quebec army, or banking system, or customs tariff, or weights and measures on the plea that these were necessary to the "distinct society." But what about marriage and divorce? Broadcasting? Copyright? Patents? Telephones? Railways? Interprovincial and International highway transport? Atomic energy? Naturalization and citizenship? Parliament's paramount power over agriculture? Unemployment insurance? Remedial Orders and Remedial Acts under section 93 of the *Constitution Act, 1867*?

What about the criminal law? The Padlock Law was struck down by the Supreme Court of Canada on the ground that it invaded the exclusive federal field of criminal law. But section 16 of the Accord might wipe that out.

It maybe argued that no Quebec Government would be so foolish or so nasty as to raise such matters. But constitutional provisions ought not to be based on any assumption that Governments and Legislatures can be trusted never to be foolish or nasty. It is precisely because they cannot be that we have constitutions and charters of rights and freedoms.

4. The Spending Power

The points I have just discussed deal mainly with the effects of the Accord on Quebec. Important as these are, they do not directly impinge on the whole country. The spending power does.

The first thing to note is that one of Quebec's five demands was for "Limitations" on this power. (*Report* of the Joint Committee, p. 5.) Does the Accord provide them? Clearly, Quebec thinks so. Clearly also, the Report thinks they are really very minor. Are they?

For any future shared-cost programmes in areas of exclusive provincial jurisdiction, provinces can choose at present. If they choose not to participate, they get money from the federal treasury, or equivalent tax points *only* if they conform to *certain standards* set by *Act of the Parliament of Canada*. Under the Accord, section 7, if the provinces choose not to participate in a programme "established by the *Government of Canada*" (not, as in the section on immigration and aliens, an "*Act* of the *Parliament of Canada* that sets national *standards* and objectives") they get "reasonable compensation" if they carry on a "program or *initiative* that *compatible* with the *national objectives*."

What is meant by "initiatives?" What is meant by "compatible?" What is meant by "the national objectives?" Who sets the "national objectives?" The *Government* of Canada, not Parliament. "Compatible with objectives" set by the executive Government is not at all the same thing as "not *repugnant* to any provision of an *Act of the Parliament of Canada* that sets national standards and objectives" (the new section 95B (2)). The "national objectives" of section 7 would be set by a pronouncement of the Government: a White Paper, a speech by the Prime Minister or the Minister most directly concerned; and the courts might rule that the provincial programme or "initiative" (whatever that means) was eligible for compensation if it did not actually fly in the face of the Government pronouncement. If, for example, the federal Government, in a flourish of rhetorical trumpets, announced a national day-care programme, the courts might rule that a handful of provincial pilot-projects was "compatible with the national objectives." Or there might be a provincial programme that was not universally available, or that involved extra billing, and the courts might say: "Well, it's day-care, and it doesn't contradict the White Paper or the Prime Minister's speech;" and parliament would have to pony up. *Parliament would, again, be subordinated to the courts, and provinces might be able to raid the federal treasury for support of mere tokenism.*

Professor Beaudoin assured the Joint Committee that the concepts impugned were already known to the law (p. 74). But the *Report* points out (p. 75) that "these terms have not, in any real sense, been judicially interpreted."

Senator Murray "suggested that the terms 'objectives,' 'standards,' 'conditions' and 'criteria' are more or less interchangeable"; but the *Report* (same page) notes that the proposed section 95B(2) "refers to both 'standards' and 'objectives,' which suggests that these concepts are intended to be different." It adds: "That 'objectives,' 'conditions' and 'criteria' are not likely interchangeable is also suggested by the *Canada Health Act*," and quotes the relevant provisions of that Act. [Comments and citations on objectives/standards deleted.]

But the Committee remains completely unfazed: "Without a doubt, the provincial governments have gained a constitutional right to opt-out of new programs with reasonable compensation" (yes, and compensation for *what*?). "But the right, we believe, is justified since the programs envisaged by the proposed section 106A will be in areas of exclusive provincial jurisdiction. If governments take their obligations seriously" (but what if they don't?), "Canadians in various parts of the country will be guaranteed the right to programs which may differ in their particulars, but which all strive to achieve the same goal" (p. 77); just like Mr. Reagan and our own Government on acid rain.

What it all adds up to is: "Don't worry! Everything will be all right. Trust us. Trust the Governments. Trust the courts. No Government will ever do any-

thing really foolish or nasty. No court will ever make a destructive judgment forced upon it by a constitutional text." In other words, we shall be in heaven, where constitutions (and, of course, charters) are superfluous. . . .

5. Immigration

One of Quebec's five demands was for "a greater provincial" (Quebec) "role in immigration," and the Joint Committee's *Report* (p. 106) says the immigration provisions of the Accord "represent a reasonable and workable solution to" that demand. The Accord, section 3, adds to the *Constitution Act, 1867*, sections (95A-95E), and a special provision for incorporating into the *Constitution* the principles of the Cullen-Couture agreement on immigration for Quebec.

The Joint Committee's *Report* recognizes (pp. 97-98) that in fact the new provisions *add* to Quebec's power under that agreement. (A Government press release, in May, "Quebec, the Constitution and Constitutional Change: the Federal Commitment and the Meech Lake Agreement," p. 5, had said the Accord provided for "an expanded immigration agreement.") The Joint Committee's Report notes also that any new agreement with Quebec will come into effect when "the new agreement is approved by the Senate and the House of Commons (and the Quebec Legislative Assembly) and *entrenched* under the *new formula* (pp. 97-98). Quebec will get *more* power, and it will be *entrenched*.

It points out, however, that the Cullen-Couture agreement, and similar agreements with other provinces, were never submitted to Parliament (p. 103), and emphasizes that "If the federal government makes a foolish agreement it can be turned down by the Senate or the House of Commons where public pressure may be brought to bear" (p. 103). Experience with the Meech Lake Accord itself tells us how much that may mean. Any "expanded agreement" with Quebec is pretty certain to become another "seamless web," another sacred Scripture, another Ark of the Covenant, on which neither House may lay an impious hand.

(a) The new agreement embodying Quebec's new powers will cover "the selection abroad and in Canada of independent immigrants, visitors for medical treatment, students and temporary workers, the selection of refugees abroad and economic criteria for family reunification and assisted relatives." The federal authorities will "withdraw services (except citizenship services) for the reception and integration (including linguistic and cultural) of all foreign nationals wishing to settle in Quebec where services are to be provided by Quebec, with such withdrawal to be accompanied by reasonable compensation." (The compensation would, of course, be paid by Canada to Quebec, and its amount, in case of dispute as to what was reasonable, would presumably be settled by the courts).

This covers a great deal of ground. If it is to be made part of the *Constitu-*

tion, it needs very careful scrutiny by people familiar with immigration law. This is the more necessary because *similar agreements are to be open to every province*.

(b) There may be solid reasons, and in my opinion there are, for giving Quebec special powers in this matter, though if they are to become part of the *Constitution* they may need a fresh look. But it does not follow that the same powers should be given to all provinces. If they are, it might produce, under the proposed sections 95A-95E, such a fragmentation of the power over immigration (and perhaps *aliens*) as would shrink Parliament's power in the matter to very small proportions.

(c) An agreement with a province that is proclaimed after approval by Parliament and the provincial Legislature overrides, *pro tanto*, section 91, head 25 (naturalization and *aliens*) of the *Constitution Act, 1867*, and the *paramountcy of national legislation* under section 95 (Section 95B(1)).

This is qualified by a provision (sub-section (2) of the proposed section 95B) that preserves Parliament's power to set, *by Act of Parliament*, "national standards and objectives relating to immigration *or aliens*, including any provision that establishes general classes of immigrants or relates to levels of immigration for Canada or that prescribes classes of individuals who are "inadmissible to Canada."

(d) The "national standards" are to apply to aliens as well as immigrants, but the agreement with any province may give the province power over "the temporary admission of aliens." How much does this leave of Parliament's present *exclusive* power over naturalization and aliens?

(e) An amendment to an agreement that has secured force of law may be made by proclamation after approval by Parliament and the provincial Legislature concerned, *or* "in such other manner as is set out in the agreement." What does this mean? By a federal Order-in-Council? By a provincial Order-in-Council? Or what? Why is this alternative method of amendment, which excludes Parliament and the Legislature, inserted, and what does it mean?

(f) The new section 95E appears to add a condition to the general amending formula (and so to require approval by all the provincial legislatures) in relation to any amendment to the new provisions on immigration and aliens. The seven-province formula would apply, but only if the Legislatures of *all* the provinces that have agreements approve. What if only six provinces have agreements?

(g) The new agreement with Quebec, written into the *Constitution*, would "guarantee that Quebec will receive a number of immigrants, including refugees, within the annual total established by the federal government for all of Canada

proportionate to its share of the population of Canada, with the right to exceed that figure by five per cent for demographic reasons."

Quebec's proportion of the total population is in the neighborhood of 25 per cent. Suppose the federal Government sets the total immigration for a given year at 100,000. This means Quebec is *guaranteed* at least 25,000 immigrants, or 30,000 if it chooses. How can anyone *guarantee* that 25,000 or 30,000 will land at a Quebec port of entry, or that if they do land there they will stay (especially as the proposed section 95B, sub-section (3), expressly provides mobility rights shall apply)?

Suppose that only 18,000 immigrants come to Quebec (this being, I understand, the average number who have actually come to the province over a number of years). Would there be an attempt to argue that the total must be adjusted downwards so that 18,000 is 30 per cent; that is, that the national total must be cut from 100,000 to 60,000, and the quota for the rest of the country from 70,000 to 42,000?

. . . . . .

6. The Senate

At present, under any constitutional amendment relating to the method of selecting Senators, the powers of the Senate, the number of Senators from each Province, and the residence qualifications of Senators, fall under the seven-province amending formula. Section 9 of the Accord brings them all under the unanimous consent formula.

The chances of any amendment being adopted even under the seven-province formula are virtually nil. Ontario and Quebec will never accept any reduction in the number of Senators from either province; nor will the Atlantic provinces accept any reduction in their quotas. The House of Commons will never accept any change that gives the Senate more real power; the reformers will never accept any change that does not.

Under the unanimous consent formula, the chances of change are microscopic. The provinces are, by the new section 50, sub-section (2)(a), guaranteed a perpetual right to *propose* such changes, but this is "vacant chaff, well-meant for grain"; perhaps not even well meant.

There are, of course, various changes which could be made by ordinary legislation, or even by the Senate itself. The Lamontagne sub-committee of the Senate Committee on Legal and Constitutional Affairs recommended them in 1980. But apart from those, the only Senate reform we have the remotest chance

of getting within the lifetime of any person now living is contained in section 2 of the Accord, the new section 25 of the *Constitution Act, 1867*.

This is supposed to be a temporary or interim provision, to serve only till the glorious day when a totally new Senate emerges from discussion in the Conference on First Ministers, and approval by parliament and all the provincial Legislatures makes all things senatorial new. But this is the stuff that dreams are made of.

It becomes important, therefore, to see just what the new section 25 of the *Constitution Act, 1867*, says, and what flows from it. It says that henceforth, when a vacancy occurs in the Senate, the Government of the province concerned "may" submit to the Queen's Privy Council for Canada the names of persons who may be summoned to the Senate;" and "until" the glorious day of total Senate reform dawns, the vacancy "shall" be filled by a person chosen from the provincial list and "acceptable to the Queen's Privy Council for Canada." What happens if a province submits no names?

This is, I think, a purely academic question. Can anyone imagine a provincial Government refusing this delicious piece of patronage, and fail-safe patronage at that, since the Premier can always tell any person on the list who fails to get appointed that it is all the fault of those blankety-blank people at Ottawa?

As Senators die, reach the age limit, resign, or are appointed to other positions, the Senate will suffer a sea-change. Not immediately, but over the years, we shall see first a Senate with a majority of members picked by the provincial Governments, and at length a Senate all of whose members will have been picked by the provincial Governments. True, the federal Government will have had a veto on the nominees, which should enable it to knock out hatchet-men (hatchet-women) and duds. But the members will feel beholden rather to the provincial Government than to the federal.

The transformed Senate will have all the legal powers of the present Senate, notably the power to reject, absolutely, any bill whatsoever. But it will have a political clout the present Senate cannot even dream of. Its members will take seriously their job of representing provincial and regional interests, and if that makes trouble for the federal Government, or annoys the House of Commons, what of it? Isn't it time the West and the Atlantic provinces should be able to block the overwhelming power of central Canada, with its perpetual majority in the House of Commons? The Western plus Atlantic Senators would have only a small majority; only in cases of real gravity or extraordinary urgency could they frustrate the will of the elected House. And there would be a Senate far more representative of the varying shades of opinion in the country, and far less likely to be dominated by an overwhelming majority of one party.

But there would be, in the long run, a shift of power from the elected House of Commons to the appointed Senate. And while the Government would normally have a majority in the House of Commons, in the new, Accord-style, Senate, it very well might not.

The *Report* of the Joint Committee endorses the idea of the Canadian Committee for a "Triple E" Senate: "Ultimately, the federal government could precipitate long-term pressure for Senate reform simply by refusing to appoint any new Senators" (p. 95). . . . Can anyone imagine the Premiers refusing to nominate or the federal Government refusing to appoint? The welkin would ring with cries of breach of faith.

This proposal might be supposed to have reached the summit of fatuity. But in the last three of its four "conclusions" to the chapter (p. 95) the Committee mounts to a new pinnacle: "(b) meaningful Senate reform must be pursued by the First Ministers on a priority basis in order to justify their claim that the temporary appointment procedure will indeed be temporary" (Just one premier can make sure it is *not* temporary); "(c) the 'temporary' appointment procedure does not prevent Senate reform and, in fact, may enhance the possibilities of reform through the new options available to the provinces such as direct popular election of provincial nominees" (any provincial Premier could indeed embrace the self-denying ordinance of handing over his power of nomination to the electors; how many will?); "(d) the veto powers now available to all provinces will assure provinces such as Alberta, who feel strongly about Senate reform, that they cannot be forced to accept a Senate reform package that does not live up to their expectation" (quite; they cannot be forced to accept an *un*satisfactory package; but neither can they force other provinces to accept a satisfactory one; and, once again, just *one* province refusing to budge can knock out any proposal for change).

Moreover, nearly everyone would agree that the Western provinces must have a larger proportion of Senate seats than they have now. But it is clear that the West wants a substantially larger proportion of the seats. The famous "Triple E" proposals call for equal representations for all the provinces. Two figures have been suggested: six and ten.

The six would require no change in the numbers from the four Western provinces or from Newfoundland, and would give Prince Edward Island two extra seats. It would raise the share of the four Western provinces from 23 per cent of the total to 37 1/2, and the share of the Atlantic provinces from almost 29 per cent to 37 1/2. But it would cut Quebec's share from 23 per cent to less than ten, and Ontario's likewise. Can anyone imagine either of those provinces consenting to that? But if either of them said no, the thing would be dead as mutton.

Ten seats for every province would give the four Western provinces 38 per cent of the total, the Atlantic provinces the same. But it would cut Quebec's share to less than ten per cent, and Ontario's the same. Can anyone believe that either of those provinces would consent? Yet a veto by either one would kill the proposal dead as a doornail.

But any increase for the four Western provinces that they would accept would have to give them a substantially larger proportion of the total. They will not accept mere tokenism.

The truth is that Meech Lake bangs, bolts and bars the door on any Senate reform that involves constitutional change.

7. The Supreme Court

Section 6 of the Accord amends section 101 of the *Constitution Act, 1867*, by adding five new provisions, 101A--101E.

The *Constitution Act, 1982*, section 42(1)(d), was far from clear. How much of the formerly plenary power of Parliament over the Supreme Court did it leave intact? How much did it transfer to the *Constitution*, changeable only under the seven-province formula? The provisions of section 6 of the Accord, to the layman for once plain and unambiguous, clear this up: an important gain.

The jurisdiction of the Court remains unaltered. This is another important point, and a good one.

The size of the court is left untouched, at nine justices. So is the requirement that at least three must come from the Quebec bar or judiciary.

The method of appointing the justices is drastically changed. This is most certainly an important point. Whether the change is for the better is, to say the least, doubtful.

The federal Government, under the new section 101C(2), can appoint the Chief Justice, from among the members of the Court, without reference to the provinces. A Chief Justice from outside the Court, and all other justices, the federal Government "shall" appoint from lists submitted by the provincial Governments (new section 101C(2)). When the federal Government is appointing a justice from Quebec, it must appoint someone from the list submitted by the Government of Quebec (new section 101C(3)). When the federal government is appointing a justice from any other province it must appoint a person from the list submitted by the Government of that province (new section 101C(4)). The

provincial Governments "may" (not "shall") submit names for appointment (new section 101C(1)). Anyone who is appointed must be "acceptable to the Queen's Privy Council for Canada" (new section 101C(2)).

A provincial Government could refuse to submit names. This is, of course, highly unlikely, partly because, as with appointments to the Senate, it would be a delicious bit of fail-safe patronage, and partly because a separatist Government, Quebec or other, could submit names that, if accepted by the Queen's Privy Council for Canada, would make for great difficulties in the functioning of the Court, especially in constitutional or Charter cases.

What happens if the Queen's Privy Council for Canada refuses to appoint anyone from the provincial Government's list? Does the place remain vacant? *there appears to be no provision for a deadlock*, as there was in the abortive Victoria Charter of 1971. Your Committee may think it worth while to inquire into this matter.

There is no provision for appointment of a justice from the Territories.

The Joint Committee did not feel that the proposed section 101A(1) solved all the problems it might appear to have done:

> It is unclear, for example, whether this provision would preclude Parliament from enacting legislation to abolish all appeals as of right (as is now proposed in Bill C-53), whether it would preclude Parliament from making the court officially bilingual (as is now proposed in Bill C-225), whether Parliament could alter the Supreme Court Act to change the qualifications of those appearing before the Supreme Court, or whether the Supreme Court's power to enact rules of procedure would be affected. It has been suggested that section 101A(1) entrenches all existing features of the Court; the better view, it appears, is that the section only entrenches those aspects that the Supreme Court itself regards as fundamental to its role as the final court of appeal (p. 81).

My very lay, illegal legal opinion is that "the better view" is probably correct. But suppose it isn't? The existing provision of section 42(1)(d) is unclear. The new section 101A(1), the Committee thought, is also unclear. Obviously, the thing to do is clear it up. But no. *Absit omen*! The sacred text must not be touched. So it is left to the long-drawn out, expensive and uncertain process of litigation (for which, here as elsewhere, the Committee seems to have a grand passion), or for that apocalyptic "second round."

Second, the Committee was not disturbed by the failure to provide for a deadlock in the appointment of the Justices. It quotes Mr. Robert Décary: "one must not examine a constitution by looking at all the obstacles in its interpretation, or whether it will be taken to extremes" (but that is *precisely* what we *ought* to do in drafting a *Constitution* or a constitutional amendment). "I do not cross bridges before I come to them" (no; but a constitutional draftsman must look to

see whether there is a bridge to cross, or only a yawning gulf). "There are a great many 'ifs' but, in practice, they do not arise. Our democratic system, with its public opinion, its public pressures, is such that it is unthinkable that governments could not agree on the selection of judges within a reasonable period of time" (p. 84). Is it?

The *Report* quotes Professor Ramsay Cook's "speculation" that a separatist Government in Quebec could put forward candidates with strong anti-federalist views, admits that such candidates "would likely" (!) "be rejected by the federal Government," and that "Without any mechanism to break a deadlock, the Supreme Court would have to operate with less than a full complement of Quebec judges. Among other matters, this could create severe difficulties in the disposition or civil law cases from Quebec" (p. 84).

But, happily, Professor Beaudoin is again at hand with the necessary soothing syrup: "In the United States, they have a double veto. The fact that the Senate rejected 20 presidential nominees did not really create any insurmountable problems. Two elected people usually manage to reach an agreement" (p. 84). (Look at the history of patriation!)

This, of course, reflects Professor Beaudoin's quaint notion (p. 67 of No.2 of the Committee's *Proceedings*) that "in the United States, both orders of government participate through the Senate" in appointments to the Supreme Court. This is a fairy-tale. The state governors and the state legislatures have no more say in the appointment of Supreme Court Judges than I have. The *Senate*, of course, has a very definite say: a veto on the President's nominees. But the Senate is not chosen by the state governors or the state legislatures. It is elected by the *people* of the states. Down to 1913, the Senate *was* appointed by the state legislatures, and they could therefore have been said to have an indirect say in the appointment of the judges of the Supreme Court. But that disappeared 75 years ago. The Committee (p. 84) speaks of "the Senate (representing the States)," but forgets that it represents *not* the state administrations but the state electors. There is no "double veto," with the states nominating and President appointing. There is just the President appointing and the Senate, representing the *people* of the *states*, plural, approving or disapproving. And it is not "two elected people" but one elected person and 100 other elected persons; it is not two *governments*. That one of the two, here, might be a separatist Government the Committee does not even bother to consider.

The Victoria Charter solution to the problem of deadlock, and the Canadian Bar Association's proposals, it rejects; likewise the Chief Justice's power to appoint *ad hoc* judges when there is not a quorum of permanent judges available. "Each of the procedures . . . suffers from the same frailty . . . the tie-breakers proposed have been unelected officials. This flies in the face of the principle that all members of the judiciary, and particularly the judges of the Supreme Court of Canada, should be appointed by persons responsible to the electorate" (p. 85).

Finally, the *Report* notes, apparently with approval, "that the introduction of a tie-breaking formula, in the context of the present proposal" (whatever that

means) "would likely be self-defeating. A tie-breaking formula would, it is said, tend to discourage negotiations and compromise on the part of the governments involved in the appointment process. The very possibility of a deadlock is likely to discourage deadlock, whereas the existence of some tie-breaking formula is more likely to encourage, rather than discourage, deadlocks" (p. 85): a delightful flight of fancy.

Incidentally, the *Report* includes a contradiction on the subject of the numbers of judges of the Supreme Court from the various provinces other than Quebec: "by informal allocation . . . 3 to Ontario, 1 to British Columbia, 1 to the Prairies and 1 to Atlantic Canada" (p. 10); but "by informal custom . . . a rough allocation (that is varied from time to time) of 3 judges from Ontario, 2 from the western provinces and 1 from the Atlantic provinces" (p. 81).

8. The Territories

The Territories' main complaint, that the Accord erects a new, and almost impassable, barrier to their ever becoming provinces, I have already dealt with. They have two others.

First, there is no provision in the Accord for the appointment of territorial senators. The *Report* of the Joint Committee says: "We think it likely that the Governor-General can continue to appoint territorial Senators under section 24 of the *Constitution Act* without provincial participation." (How there could be any provincial participation is a mystery.) "This should be clarified" (p. 120). But, again, not now! the matter "should be placed on the agenda of the next First Ministers' Conference in 1988" (p. 121). But if the Accord is a seamless garment, it can't be put on the agenda in 1988 unless the Accord has been ratified by that date; and if all the provinces ratify, it can get in on the "second round" only if every province consents. Why wait? Would Quebec, or any other province, blow its cork if this matter were dealt with now?

On the similar complaint that there is no provision for the territorial governments to nominate qualified judges and lawyers for appointment to the Supreme Court of Canada, the Committee, at p. 86, fortified by the opinions of two eminent Quebec lawyers (Mr. Fortier and Mr. Décary), says: "The only practical way to have qualified northerners considered for appointment . . . is by having their names submitted . . . by the territorial governments. Therefore, the proposed procedure should be amended by the First Ministers at the first opportunity."

Bravo! But again, "Valour will come and go." By p. 120, this has become: "The fact that this is not contemplated in the proposed section 101C is anomalous and we have not heard any reasonable justification for it;" and by p. 121 it should "be placed on the agenda of the next first Ministers' Conference on constitutional matters in 1988." . . .

In the Joint Committee's chapter on the Territories, we are, of course, treated to the same old chestnut about the "limited scope" of the Accord (meet-

ing Quebec's five demands). It is offered also on the effect on the *Charter*, and on the need for more public participation in the amending process. These are matters of the highest importance, and they must be dealt with. But not now! they must wait for that golden dawn of the "second round."

9. Putting the First Ministers' Conference into the Written Constitution

At first blush, this does not seem to be of much practical importance. The Conferences are there. They are not going to go away. They are given no formal new powers. They are firmly entrenched in practice. Is putting them into the written *Constitution* really going to do anything more than give them a certain extra cachet? Including in their agenda, till the questions are settled to everyone's satisfaction, Senate reform and fisheries ensures that Mr. Getty and his supporters, and Mr. Peckford and his, and their respective successors, have a guaranteed annual opportunity to talk about these subjects, and to try to persuade their colleagues to agree *unanimously* to Triple E or some other favourite scheme; or to try to persuade the Prime Minister of Canada and six other Premiers to change the jurisdiction over fisheries. But they can do that anyway, day in and day out, year in and year out, Conference or no Conference.

At first, therefore, I felt inclined to say that this provision of the Accord was not much more than surplus verbiage. Subsequent events have led me to wonder whether I was too innocent. I have heard too many statements, from too many quarters, high and low, suggesting that a constitutional agreement by a First Ministers' Conference is now, by convention, though not by law, the final word, as unchangeable as the law of the Medes and Persians. Acceptance of such a convention would reduce Parliament and the provincial Legislatures, in relation to constitutional amendments, to not much more than echoes. It would be subversive of parliamentary government. It would establish a new supreme, sovereign, omniscient, inerrant, infallible power, before which the function of Parliament and Legislatures would be simply to say: "*Roma locuta est*. The First Ministers have spoken. Let all the earth keep silence before them."

10. The Unanimity Requirement

There can be no question that the Accord would give us an even more rigid written *Constitution* than we have now. The provisions of the *Constitution Act, 1982* introduced a number of rigidities. The amending formulas, for instance, could not be changed except with the unanimous consent of the provincial Legislatures; and section 41 of that Act listed a number of other matters which could be changed only with unanimous consent. The Accord transfers the whole of section 42 of the 1982 Act (which came under the seven provinces with half the population of the ten formula) to section 41, which requires unanimity.

Professor Schwartz of Manitoba has pointed out that a number of features of the Accord itself can be changed only with unanimous consent. The "distinct society" clause "is in relation to the use of the English or French language and thus requires unanimous approval" under section 41(c) of the 1982 Act. The immigration section contains an amendment to the amending formula, and thus comes under section 41(c).

The defenders of the Accord brush aside objectives to the unanimity requirement by saying that unanimity is, in fact, not really hard to get: look at the Accord itself! One swallow does not make a summer, especially if the bird is not really a swallow. Getting unanimous consent to an amendment like the Accord, covering a wide range of subjects, and therefore with ample room for a series of trade-offs, is one thing. Getting unanimous consent for the admission of a single new province, or for an elected Senate is quite another. The Meech Lake case proves nothing.

Even if it did go part way towards proof, look at the long struggle to achieve patriation of the *Constitution*. Look at what happened to the Fulton-Favreau formula. Look at what happened to the Victoria Charter. To argue that getting unanimous consent will be relatively easy is to proclaim "the triumph of hope over experience."

11. Some General Considerations

(a) Ambiguities

A recurrent criticism of the Accord is that it is full of ambiguities, and on important points. The defenders' answer is, first, that all constitutions contain ambiguities; second, that the courts will look after that; third, that the ambiguities of the principles of duality and the distinct society will "reconcile" Quebec, "bring it into the constitutional family."

That all constitutions contain ambiguities may be true. Certainly, no one can draft a judge-proof constitution. Even the American Founding Fathers couldn't. Even John A. Macdonald couldn't.

But it does not follow that ambiguities do not matter; that they should not be avoided, as far as possible; that clarity is a defect, obscurity an immortal garland to be run for, not without dust and heat. The defenders of the Accord have sometimes come close to suggesting that ambiguity is a virtue, even a cardinal virtue, in constitutions; the more ambiguities the merrier; it gives the judges so much more scope. It does indeed, and that is precisely the chief objection to it. It takes decisions on vital matters of politics out of the hands of the people and their representatives, where they belong, and places them in the hand of the judiciary, where they do *not*.

Of course judges have, and always must have, a job interpretation to do. But they should not be asked, or empowered, to take basic *political* decisions. That is the job of Parliament and the Legislatures. The *Constitution* should place it firmly in their hands, and make certain, as far as possible, that it is not wrenched from them. In short, constitutions should be as plain and unambiguous as their framers can make them. A light-hearted, smiling, "Oh! the courts will settle all that!" is a frivolous abdication of responsibility, a surrender of the very citadel of democratic government, a time bomb against national survival.

But didn't we give the judges enormously wider powers by adopting the *Charter*? Yes, but to safeguard democracy and basic rights. It does not follow that we should give them more power still, and over a very different set of problems, for very different purposes.

Finally, the ambiguities of the "distinct society" will bring Quebec into the constitutional family quietly and easily, at minimum cost. The courts will be able to interpret the principle in a variety of ways. If they say it really gives Quebec large new powers, Quebec will be pleased, and no one can complain. If they say the opposite, then the dangers the critics fear will have turned out to be illusory. All this will take some time. But Quebec will be "in," and by its own will. The Canadian disease will have been cured.

Cured? The ambiguities may turn out to be not a cure but a narcotic, transporting all of us into a rosy euphoria, where Quebec gains much and the nation loses little. But what will happen if the courts, by specific decision, withdraw the narcotic and, on the one hand Quebec discovers it has gained little, or on the other, the nation discovers it has lost much? There may be some "nasty surprises," "de vilaines surprises," to use Mr. Trudeau's words. Quebec, having been "brought in" under the influence and finding it had got little or nothing, might demand new real powers, unambiguous ones, not slippery vagueness; or the nation finding it had lost much, might demand an agonizing reappraisal in the opposite direction. The beatific vision of one happy family might dissolve into fratricidal bickering, or worse.

If the Accord is amended, or rejected, by one or more provinces, is that the end of the attempt to "bring Quebec in?" Quebec rejected the Fulton-Favreau formula. Quebec rejected the Victoria Charter. The Governments tried again. Bill C-60 of 1978 collapsed. Mr. Trudeau tried again. If this Accord fails to be adopted, what is to prevent us from trying again?

(b) "Many Questions, No Answers?"

Some critics of criticisms of the Accord have complained that we ask a great many questions but provide no answers. We provide no answers because in most cases *no one* can know the answers till the Supreme Court of Canada has decided what the words or phrases or sections or sub-sections we criticized do mean. Will those words, or phrases, or sections, or sub-sections, override, for Quebec, the whole *Charter* (except multiculturalism and the aborigines), or only parts of it, and, if so, which parts? Will they, for Quebec, override the whole of the *Constitution* except the provision for Indians and land reserved for the Indians, or only parts, and, if so, which parts? Only the Supreme Court of Canada can answer these questions. But it is perfectly legitimate, even necessary, for anyone, even a non-lawyer, to ask them and point out possible dangers, and the fact that we are being asked to take a series of leaps in the dark on matters of vital importance not only for ourselves but for generations to come.

In other cases, we provide no answers because no one can know how the new Senate will use its new powers till it uses them; or what kind of judges the new

method of appointment will give the Supreme Court of Canada till we get them and see what they do. The proof of the pudding will be in the eating, and the pudding has not yet been even put into the oven. But it is perfectly legitimate, even necessary, to ask questions about the ingredients, or the competence of the chefs.

(c) "Some Basic Constitutional Principles" (as per the Report of the Joint Committee)

Chapter III of the *Report* purports to set out "Some Basic Constitutional Principles."

These contain three statements which are sheer rubbish.

First, Hon. Eric Kierans is quoted as saying (p. 14): "Meech Lake is not new. It is simply the closest that we have come to following the original intent and meaning of the British North America Act since Confederation itself. It reflects more accurately the view of what the original Fathers of Confederation thought they were agreeing to at Confederation." (Some words seem to have got left out here, but the meaning is tolerably clear.) "They never intended that the provinces should be as dependent as they, in fact, became.". . .

Look at the Act of 1867: section 24 (appointment of Senators); section 58 (appointment of Lieutenant-Governors); section 59 (dismissal of Lieutenant-Governors); section 91 (the residual power of "peace, order and good government"), and heads 2 (trade and commerce), 12 (seacoast and inland fisheries), 22 (patents), 23 (copyrights), 25 (naturalization and aliens), 26 (marriage and divorce), 27 (Criminal law); section 92, head 10(c) (works for the general advantage of Canada). Look at the provisions for reservation of provincial bills and disallowance of provincial acts (section 55, 56, 57 and 90). Look at section 93, paragraphs 3 and 4 (power of the Dominion Government to pass Remedial Orders, and of Parliament to pass Remedial Acts, to protect the educational rights of the Protestant and Roman Catholic minorities). Look at section 94 (power of Parliament to make uniform the law of property and civil rights in Ontario, Nova Scotia and New Brunswick). Look at section 95 (Parliament's paramount power over immigration and agriculture). Look at section 96 (power to appoint the judges from County courts up); section 101 (Parliament's power to establish the Supreme Court of Canada); section 132 (Parliament's power to implement treaties). Look at what Macdonald said in the *Confederation Debates* (and he was not expressing an individual opinion; he was speaking for the Government):

> We have given the General Legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures, shall be conferred upon the General Government and Legislature . . . We make the Confederation one government and one people, instead of five governments and peoples, one united province, with the local governments and legislatures subordinate to the General Government and Legislature.

. . . Mr. Kierans went on to further flights of fancy: "That was the first attempt" (at what?). "The attempt failed largely because after all the disallowances, after all the reservation of provincial legislation during the period up until about 1900 [in 1892 in fact] a halt was called" (to what? the subsidies? the reservation? the disallowances?) "The halt was called not by Canadian authorities, but by the Privy Council in London, in which they told the federal government that they had to recognize that they were not there to treat the provinces as non-events, irrelevant" (again, p. 41 of Mr. Kierans' evidence). . . .

After 1892, reservation of provincial bills did indeed become less common (only 15 out of a total of 70), and after 1900, rarer still (only 11). After 1892, however, there were 40 disallowances in the 39 years till the last one, in 1943; after 1900, 28 in 37 years. The three Privy Council decisions on which Mr. Kierans relied (the *Q.C.'s* case, the *Liquidators* case and the *Local Prohibition* case) had nothing whatever to do with reservation or disallowance. The kindest thing that can be said of Mr. Kierans' pseudo-history is that it spatters the target.

The second piece of rubbish is merely consequential: "One could be forgiven, perhaps, for concluding that in 1867 there were as many "original intents" about the desirable shape and structure of Canada as there were Fathers of Confederation" (p. 14). No, one could not, except on the plea of gross ignorance.

The third piece of rubbish is that "the 1987 Accord does not so much 'stand the *Constitution* on its head' as it attempts to put the country back on its feet by restoring a more 'traditional' political balance between central power and provincial power" (p. 16).

This "tradition" is in the same class as that of the legendary American college which, the day after it opened, posted on its bulletin board: "The following are the traditions of the College. They will go into effect tomorrow afternoon."

The pseudo-history, masquerading as a "basic constitutional principle" is, of course, an attempt to meet the criticism that the Accord is highly, and dangerously, decentralizing. (The *Report* admits that it "reflects a more decentralized view of Canada than does the *Constitution Act, 1982* (p. 15).) But of course, if "Meech Lake is simply the closest that we have come to following the original intent and meaning of the British North America Act," then the criticism falls to the ground. The *Constitution Act, 1982*, then becomes a horrid centralizing exception to the "true" *Constitution* excogitated by Mr. Kierans. This sits ill, of course, with the ecstasies of other defenders of the Accord, that it gives us a "new federalism." "You pays your money and takes your choice."

12. Conclusion

Finally, it seems to me that the Accord substantially transforms our *Constitution*. It would produce a massive shift of power from Parliament and the Legislatures to the courts; a very considerable shift from the federal Government and Parliament to the Governments and Legislatures of the provinces, especially

Quebec; in the long run an appreciable shift from the House of Commons to the Senate. It might produce also, in practice, a massive shift from Parliament and the provincial Legislatures to the First Ministers' Conference, now given a new status, a new legitimacy.

Canada is already probably the most decentralized federation in the world. The Accord would make it more decentralized still. Canada has already an extraordinarily rigid *Constitution*. The Accord would make it more rigid still.

Is this what the people of Canada really want? Is this what they really need?

Your Committee, in examining this document, and presumably making recommendations in respect to it, is charged with a task of fundamental importance not for this generation only but for generations to come. For, if Parliament and the provincial Legislatures make an unwise decision now, it will be a labour of Sisyphus to undo it.

Respectfully submitted,

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