MORE THAN SMALL CHANGE: THE MEANING OF MEECH LAKE FOR THE CANADIAN POLITY

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Introduction

In the course of the process of obtaining approval from the House of Commons, Senate and provincial legislatures for the Constitutional Accord, 1987, it has often been observed that we cannot predict with certainty the meaning that courts will give to a constitutional text. The observation could be extended - it is difficult to predict the impact of constitutional change on any governmental practices or, for that matter, social practices. However, the correctness of making modest claims for our powers of discernment should not absolve legislators from exploring, with as much rigour as possible, the meaning of those phrases that have actually been proposed. In constitutional drafting (as in letterwriting, or any other form of literary composition) we choose each word carefully knowing that the bundle of nuances attached to a word conveys particular meaning; one word chosen in the stead of others suggests the adoption of some purposes and the exclusion of others. In constitutional documents words are powerful instruments of empowerment, protection and limitation and those who create the documents themselves gain power through the power of words.

However, legislators who normally understand that the choosing of words by which public policies are put in place is as vital an element of legislative responsibility as is the choice of policies that are to be promoted, have shown a disinclination to accept the same burden in crafting the appropriate text in the current round of constitutional reform based on the Meech Lake Accord. In short, there has been a horrifying reluctance to take responsibility for the words (or the phrases and ideas) of the proposals. The indeterminacy of some of the provisions, in terms of both language and intention, instead of being a matter for normal legislative concern has become a comfort; but finding comfort in not knowing precisely what is being constituted seems perverse.

By examining the legal meaning of the 1987 Constitutional Accord one can begin to understand why the ambiguities of the text and the lack of clear purpose behind many of the provisions have been taken as positive virtues. First, these features of the Accord absolve legislators from responsibility for what might result once the Accord is in place. Second, these ambiguities blunt criticism of the Accord. Those who fear that profound and unfortunate changes to our political order will be effected by the Accord can no more point to certain results than those who argue that it will be either benign or insignificant. That the proposed constitutional reforms will alter legislative and executive powers (as well as constitutional limitations on those powers) in a way that will undermine important

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national values is a claim that is based on a reading of the text that is possible, but not inevitable.

The analyses presented in this submission are pessimistic and suggest unfortunate consequences for Canada. They could be overstated. What cannot be overstated, however, is that a campaign of blind and misleading assurances about the innocuousness of the Accord does not represent a responsible constitution-making process; it is simply designed to displace criticism and analysis.

The submission is divided into three parts. The first relates to the processes of negotiating and ratification of the Meech Lake Accord. The second is a brief critical survey of the Accord's leading features and the third part deals with the provision of the Accord giving interpretative direction to the whole of the *Constitution*--the provision that that will become section 2 of the *Constitution Act, 1867*.

The Meech Lake Process

Canadians are not insensitive to the importance of constitution making. The bread and butter issues of jobs, health care and the security of bank deposits are not, it appears, all that Canadians electors want to focus on. The way in which our nation will run and the social values that will shape political choices are also matters about which Canadians want a voice. One senses that one of the chief sources of discontent over the Meech Lake reform proposals was the process by which it was formed and approved. For instance, until recently there has been the virtual absence of an organized, party-based political opposition to the proposals that emerged in late spring 1987.

Canadians sensed that important changes were being effected in relation to federal legislative and executive powers and in the constitutional regime for the protection of fundamental rights and they sensed that these changes were not for the betterment of Canada. Yet there was no political champion to question, probe and analyze the terms of the Accord. The political leaders who signed the Accord, as well as the opposition leaders in most jurisdictions of Canada, dedicated themselves to the task of convincing Canadians that analysis and refinement of the Accord would be wasteful.

Not only was it argued that improvement of the text was impossible because constitutional language can never be precise, it was suggested that criticism was disloyal because it undermined what was labelled "nation-building." It was also said that anxiety about lost rights and diminished national interest was misguided because first ministers would not act to the detriment of the nation. Finally, it was suggested that there was a moral obligation to put into operation the agreement that was reached. This last claim usually accompanied a declaration of shame over the First Ministers' leaving Quebec out of the November 1981 Accord that led to the *Constitution Act, 1982*. What was ignored in this claim is that Quebec's explicit stance in the 1981 process was to be a non-participant in any constitutional reform. When an agreement was finally struck, notwithstanding

the apparent attempts of the Premier of Quebec to keep that from happening, his opposition was based on three "defects": the proposed *Constitution Act* contained mobility rights (which were heavily qualified), it contained minority language rights for anglophones (with special exemptions for the province of Quebec) and there was no compensation for opting out of constitutional amendments not related to culture and language (as if a province should be compensated when it prefers not to accept a basic reordering of economic powers) that reflect the overwhelming national preference as espressed at both the federal and provincial levels. These are not compelling grounds of complaint.

It should also be noted that there is a multitude of new provincial rights in the Meech Lake Accord which, in 1981, the Quebec government did not consider vital and which, when left out of that constitutional reform exercise, did not produce claims of betrayal. These are: veto over reform of the Senate, veto over reform of the Supreme Court of Canada, veto over the admission of new provinces, compensation for opting out of federal spending programs, new controls over immigration, a distinct society clause and a role in the appointment of senators and justices of the Supreme Court of Canada.

The concerted attempt to stifle criticism on the basis that the accommodation between Quebec and the rest of Canada is fragile and cannot withstand the rejection of Quebec's political claims disguises what appears to be the real interest that is at work in the campaign to implement Meech Lake. The signers and proponents of Meech Lake yearn for the Accord's implementation because of its more general impact in terms of fundamental Canadian political values. This impact of Meech Lake is reflected in the opposition by women's rights groups to the Accord. That opposition is driven by the realization that a new form of politics, the politics of social interest that was spawned by the *Charter of Rights* would be crippled by the new provisions. When the *Charter of Rights* came into force in 1982, and the new equality provisions came into force in 1985, incentives for political mobilization, along new lines and according to new divisions, were created. The political agenda on behalf of womens rights, for example, insofar as it became pursuable in the courts under the *Charter of Rights* led to two positive effects. First, since the *Charter* is national, the political force behind the claims could also be national, and in numbers there is strength--and comfort and hope. Second it alleviated the need to acquire electoral dominance. Those whose social goals can be pursued through the Charter need not capitulate on recognizing their failure to capture popular support for their claims.

After Meech Lake, and, in particular, in light of the undertaking of the agreement to repeat annually and forever the same process of First Ministers' Constitutional Conferences, the only conclusion seems to be that federal-provincial politics is to be the major form of politics in Canada's future. Not only is the old way of living as a nation to be back but its specific agenda appears to be to undo precisely those constitutional protections that made a new form of politics possible.[1]

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[1]These claims are more fully explored in J. Whyte, "The 1987 Constitutional Accord and Ethnic Accommodation" in K. Swinton and C. Rogerson, *Competing Constitutional Visions: The Meech Lake Accord*. (Toronto: Carswell,

The post-1982 politics of cross-Canada social interests has been further undercut by other features of the Accord. Witness the provincialization of the Senate which has recently presented itself as available to take stands on behalf of the politically dispossessed groups of society. Witness also the provincialization of the nation's capacity to generate national responses to social problems through the use of the spending power. The Accord will discourage and diffuse the political energies of interest groups which might otherwise unite and mobilize on a nationwide basis in order to produce a more equal and humane society. The proponents of Meech Lake--the Prime Minister and the Premiers--understood exactly what the permanent annual constitutional conferences would mean to the new politics of social interests; constitutional alteration among eleven First Ministers for their mutual benefit can effectively erode the benefits of the constitutional order created in 1982.

A Critical Overview of the Accord

The Accord is likely to do irreparable harm to Canada in the following ways.[2]

(1) The spending power as a practical matter will significantly undermine the ability of the federal government to establish national shared-cost programs. The opting out and compensation clauses of the Accord will create a political imperative for some provincial governments not to participate in these programs. The consequence is that the federal government, in wishing to establish a new program, must do so without any assurance that federal expenditures dedicated to certain social objects will be effective in achieving those goals. The resultant disincentive for the federal government to develop new social programs is high. Not only are the day-to-day lives of Canadians improved by the ability of the national government to promote social programs, these programs are important instruments in generating the sense of national community that marks a nation as being coherent and self-confident.

(2) The provisions relating to the appointment of justices of the Supreme Court of Canada will undoubtedly weaken that institution as an instrument of national cohesion. In the first place the provisions give far more power to the province of Quebec than to any other province and, as a result, decisions of that body are likely to become subject to analysis in terms of the Quebec sector of the court and the rest-of-Canada sector of the court.

It is now commonplace to observe that our constitutional norms are contingent upon context and political value. It would be a pity if the political values

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1988) 263.

[2]These points have been presented more fully in J. Whyte, "Submission to the Special Joint Committee of the Senate and House of Commons on the 1987 Constitutional Accord" (1987) 94 Queen's Quarterly 793,in B. Schwartz, "Meech Lake Accord will do irreparable harm to Canadian nationhood," Winnipeg Free Press, Sunday, April 7, 1988, at 7, and, in much greater detail in B. Schwartz. *Fathoming Meech Lake* (Winnipeg: Law Research Institute, 1987), cc. 3, 4, 6 and 7.

that the Supreme Court of Canada comes to be seen as representing are dominantly political values related to provincialism. Not only would this represent a skewing of the federal tension in this country it would produce a dissonance between the public perception of the Court's character and the role it is required to perform under the *Canadian Charter of Rights and Freedoms*.

(3) The provincial nomination of senators for federal appointment will produce two undesirable consequences. First, it will serve to legitimate the political role of the Senate to a level that goes far beyond our current experience. Furthermore, it will do this in the absence of any infusion of democratic values in the appointment or tenure of senators.

Second, the provisions of Meech Lake relating to the Senate will effectively preclude future Senate reform. The acquisition by Ontario and Quebec of direct control over almost one quarter of the Senate each will not likely be given up--at least, not for a reform proposal premised on the idea of equal representation of all provinces. As a consequence, the Senate, instead of introducing a federal balance into the national parliamentary body, will come to underrepresent some provinces, in particular, British Columbia and Alberta. The harm of this will increase as the Senate becomes more powerful in function but unreformed in structure.

(4) The provisions relating to the amending formula, both with respect to the increased category of matters in respect of which there is a provincial veto and with respect to compensation on opting out of constitutional amendments, will decrease the likelihood of constitutional amendment. One of the vital ways in which a nation expresses its political will is through periodic re-ordering of its constitutional structure. The significant expansion of the matters subject to a universally held provincial veto power--whether formal or indirect, will rob the people of this country of the capacity for reordering and will place constitutional change in thrall to each and every provincial government.

(5) The treatment of the northern territories is unconscionable. The populations of these territories are small and, perhaps, the prospect of provincial status for them is, in the present context, not high. Nevertheless, many of the provinces of Canada were once fledgling and, when their capacity for self government became evident, simple processes where available to confer provincial status on these frontier communities. The northern territories, on the other hand, face the requirement of obtaining unanimous provincial consent for recognition as provinces. Canadians, in forming and implementing Meech Lake, have chosen to disregard the history of imagination, hope and struggle that marked the formation of Canada, and the provinces within it.

The Distinct Society Clause

The provision of the Meech Lake Accord that has the capacity to alter Canada most profoundly is what has come to be known as the distinct society clause. That clause states:

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

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

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

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

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

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

The claim for the radical effect of this provision is premised on two points of analysis. The first is that an interpretative clause such as this one will have a significant impact in interpreting governmental powers and in providing political legitimacy for governmental policies. The second is that the substantive vision that constitutional interpretation is required to reflect is one that is hostile to both bilingualist language policies and minority language rights. That the first proposition is correct is virtually self-evident. The first thing to be noted is that subsection (4) of the interpretative section stating that there will be no derogation from the powers enjoyed by Parliament and the provinces does not render the whole of the rest of the section weak. The impact of the interpretative provision was not likely to have been to effect transfers of legislative authority from one level of government to the other. Rather, section 2's role is to permit the recognition of new constitutional authority for language policies. Therefore, use of this new section to create new areas of concurrency or, what is more likely, to recognize areas of immunity from application of the *Canadian Charter of Rights and Freedoms*, is not negatively affected by subsection (4).

The requirement that the Constitution of Canada be interpreted in a manner consistent with the described social condition places a duty on interpreters to resolve ambiguities in a way which reflects the social reality which is recognized in the section. Since there are virtually no terms in the sections of the *Constitution* allocating powers to the federal and provincial levels or in the *Charter of Rights* that are not ambiguous, the scope of application for this direction is wide. It

should be remembered that the effect of the old *Canadian Bill of Rights* which was considerable when substantive breaches were found, was produced by language which may be no stronger than that found in the new proposed section 2 of the *Constitution Act, 1867*. *The Canadian Bill of Rights* stated that the laws of Canada are to be "construed and applied" so as not to abridge the terms of the *Bill of Rights*. It might be argued that the direction to "interpret" according to certain values is weaker than the direction to "construe and apply" but the difference is slight. In the context of the considerable textual elasticity found in the *Constitution Acts* the new section 2 will not want for points of application.

It should also be noted that the new section 2 will have impact outside the context of court interpretation of constitutional texts. It is as much a direction to legislatures and governments. The substantive vision of Canada contained in the provision is one which Parliament and provincial legislatures are constitutionally obliged to preserve. How legislatures see that mandate will have direct impact on a great number of federal and provincial policies. Political legitimacy will be conferred on those politicians who are able to argue that they are pursuing the mandate of section 2.

What section 2 does is describe a "reality" of Canada and asks that courts and legislatures acquire an understanding of governmental powers that is consistent with that reality. Furthermore, the section orders legislative bodies to preserve that reality and in the case of the legislature and Government of Quebec to promote one aspect of the reality--the aspect that Quebec has a distinct identity.

What exactly that reality is, is caught up in two sub-clauses. The first defines a fundamental characteristic of Canada and the second recognizes Quebec as a distinct society. But what is the actual character of Canada described or the actual character of Quebec that is recognized. There are two versions of the meaning of these sub-clauses. The first is that the bilingual nature of Canadian society is expressed in the section and the other is that Canadian society's fundamental feature is language duality--the presence of two langauge groups. (A concomitant aspect of this latter version is that Quebec has a distinctive language which is French but it also possesses other distinctive cultural features such as its legal system, history, institutions and, perhaps, religion.) Which of the two visions has been normativized in the Constitution is the crucial question. If the former, then the Meech Lake Accord can only contribute to the formation of a national identity and a coherent national political community. If the latter, then we seriously need to worry not only about the place of language minorities in Quebec *and* in the other provinces of Canada, but also about the future of Canada as a democratic political entity and, even, about the future of Canada as a nation.

This latter concern flows from the sense that if Canada falls into strict language dualism or an enclave-based language policy, the sheer electoral power of the English speaking portions of Canada at the federal level will gradually lead to an inhospitable national public environment for francophones. This will lead to disenchantment and dispossession. Political tensions within Canada, which the

Meech Lake Accord has been represented as reducing, could, in fact, be exacerbated by the Accord. The earlier version of the 1987 Constitutional Accord, the version that was actually prepared at Meech Lake, contained a clause that recognized, as a fundamental characteristic of Canada, the existence of French-speaking Canada and English- speaking Canada. This language conveyed the message that there were two separate collectivities within Canada and the maintenance of them as distinct collectivities became a constitutional mandate. The dropping of the "two Canada's" language and the replacement of it with the reference to English-speaking and French-speaking Canadians did much to undermine the concept of Canada being comprised of two separate language collectivities. Nevertheless, as Bryan Schwartz has noted, the Accord's message of language dualism remains.

> The clause recognizes English-speakers and French-speakers but not English-and-French- speakers. Section 2(2) recognizes the role of legislatures in "preserving" the linguistic characters of their provinces. The combination of sections 2(1)(a) and 2(2) might be read as actually hostile to the promotion of bilingualism. Is a legislature in an English speaking province betraying its "role" if it attempts, through French immersion programs, to nurture the development of a largely bilingual population?[3]

> . . . [T]he plain language of sections 2(1)(a) and 2(2) allows all too easily for the . . . interpretation–that provincial legislatures are supposed to preserve the predominately unilingual character of their majorities. Some day an opposition critic of a legislative measure to promote bilingualism may contend:
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> > The constitution says that we are a mostly English speaking province and that our role as legislators is to keep it that way.[4]

Likewise, the distinct society clause in section 2(1)(b) is not likely to be read as having the intention of promoting either bilingualism or even language dualism within Quebec. The clause was intended, it appears, to assist Quebec in resisting political and court challenges to its existing language policies--policies that promote the use of the French language. It is certainly possible that the provisions of Quebec's Bill 101 with respect to the language of education and with respect to commercial expression will do far better under Meech Lake in the face of constitutional challenges than it would have done if the distinct society clause had not been placed in the Constitution. Again, as Bryan Schwartz has written:

> . . . [T]here is real cause for concern the provincial legislatures will read the Quebec clause as a directive to pursue dualist rather than bilingual language policies. Legislatures outside of Quebec may read section 2(1)(a) as inspiring them to preserve the predominately English speaking nature of their provinces rather than encouraging the acquisition of bilingualism. The Quebec legislature may interpret the affirmation of its role as promoter of the "distinct society" as

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[3] Schwartz, *supra*, note 2 (*Fathoming Meech Lake*) at 12.

[4] *Ibid*, at 13.

> legitimating its efforts to discourage bilingualism among its francophone majority. It may be believed that Quebec is more "special" and more "apart" if most of its people cannot speak the majority language in the other provinces.[5]

It should be noted that the distinctiveness of Quebec's society is not limited to language. As Senator Lowell Murray said to the Joint Parliamentary Committee, Quebec's distinctiveness forty years ago would have been expressed in terms of both language and religion.[6] He was making the point that the clause is general and, therefore, understood in a particular social context. It has the capacity to include changing social characteristics. Such a view of the distinct society clause casts a pall over the normal liberal political values of cultural diversity and tolerance. The corporatist tendency of this section is further enhanced by the use of the word "identity" in section 2(3). That concept connotes the idea of a single personality which Quebec governments are required to preserve and promote. This language, and this metaphor, seem to confer constitutional legitimacy on what, in normal circumstances, we would consider to be oppressive forms of state regulation.

The unilingual and unicultural collectivist impression created by section 2 does not sit well with many of the provisions of the *Canadian Charter of Rights and Freedoms*. Of course, the most obvious victims of this language--the recognition of the rights of aboriginal peoples and the preservation and enhancement of the multicultural heritage of Canadians--have been protected by virtue of section 16 of the Accord. However, there are other elements of the *Charter* which might at some point be effected by this language. These are freedom of expression, mobility rights, equality rights and minority language education rights.

Lest it be thought that all of the foregoing amounts to an attack on the provinces of Canada for lacking any commitment to bilingualism or on the province of Quebec for having no regard for individual rights, I want to make it clear that this analysis of the Meech Lake Accord is driven, in large part, by the abstract realization of the potential for narrow political visions in future years. However, it would be wrong to leave the impression that my only concern is with future governments and not with governments presently in power. The regard for minority language rights that is being expressed in various parts of Canada, including Quebec, at the present time is not reassuring.

If one comes to believe, as I do, that the extension of bilingualism in the public life of all Canada is a precondition for continued national unity, the Meech Lake Accord is likely to impact on our national strength and national coherence as acid rain impacts on our lakes and forests.

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[5] *Ibid.* at 31.

[6] Special Joint Committee of the Senate and of the House of Commons, *Report on the 1987 Constitutional Accord* (Ottawa: Queen's Printer for Canada, 1987) at 41.