A BRIEF OPPOSING THE MEECH LAKE ACCORD

The New Brunswick Ad Hoc Committee on the Constitution*

Preamble

The underlying difficulty we have with the Accord arises from the position taken by all signatories that the Accord must stand (or fall) as is, in its entirety, in spite of the serious and well-founded concerns that such an amendment will significantly alter our national persona. We believe the Accord in its present form will forever change the nature of our federation. We are concerned about the new tendency toward decentralization reflected in the Meech Lake Accord. The tendency in politics as in nature is for energy to disperse, to fly from the centre. The constitutional history of Canada has reflected the desire of Canadians to pull together as a nation. Over the past 100 years, we have constructed a nation wherein the powers allotted to the different levels of government are appropriate for the most effective delivery of services. Nevertheless, the Parliament and hence all the people of Canada have given voice to a shared vision of a society which has a definite sense of community.

The Meech Lake Accord places this union of Canada at risk. Much of the debate the Accord has fostered has been due to its lack of clarity and the resulting skepticism as to its true intent and import. Those who propose amendments to the Accord that would clarify ambiguities, that would protect threatened individual rights, are dismissed as reactionary, anti-Quebec, anti-Canadian and shortsighted.

Linguistic Duality

The amendments within the Accord regarding linguistic duality endanger the carefully constructed trend toward bilingualism in provinces other than Quebec, the country as a whole and in New Brunswick in particular. The ambiguity of ss. 2(1)(a) and (b) could be interpreted by provincial legislatures as a mandate to preserve the predominantly unilingual character of their majorities. As Brian Schwartz in *Fathoming Meech Lake* points out, such a trend toward unilingualism could result in a federal government which is controlled by a tiny elite of bilingual people while the majority of citizens are encouraged to preserve only their own linguistic heritage. Even if such eventualities were not the intent of the first clause of the *Constitution Amendment, 1987*, the above-mentioned ambiguity is

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*Presented February 15, 1989 to the New Brunswick Select Committee on the Constitution. The New Brunswick Ad Hoc Committee on the Constitution was formed in the summer of 1987 by citizens concerned about the *Constitution Amendment, 1987* (the Meech Lake Accord). Throughout the fall of 1987, the Ad Hoc Committee held public forums in Fredericton, Moncton, Saint John and Shippegan. Politicians at the federal and provincial level were lobbied and asked for their position on the Meech Lake Accord. Last April the Ad Hoc Committee held a one-day seminar in Moncton and since then has maintained contact with a province-wide network which has grown from the initial small group. This brief was prepared by C. Anne Crocker, Sherron Hughes, and Gayle MacDonald of the Fredericton chapter.

present in all its frightening free-ranging potential. The time to address such a situation is now, not after the fact; not after national unity has been splintered by a variety of interpretations of this clause.

When dealing with the notion of two types of Canadians, "the recognition that the existence of French-speaking Canadians, centered 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," ss. 2(1)(a), the Accord not only does damage to an already burgeoning bilingualism and attendant improved national relations, it does not deal with an even more important aspect of Canada. That is, continuing to refer to Canada as a linguistic duality is a naive assumption, given the current ethnic breakdown of this country. There are demographic trends to suggest that by the year 2000, a full 40% of this nation will be of ethnic origin other than French or English.

Individual and Equality Rights

Another problem arising from Section 2 is the apparent creation of a hierarchy of rights, with linguistic rights being given ascendence over the equality rights provision of the *Charter of Rights and Freedoms*. Apologists for the Accord assure us that equality rights would not be abrogated by the Accord and point out that under section 16 in the Accord, cultural rights of aboriginal peoples and a general multicultural protection are clearly indicated. But the failure to specifically include sections 15 and 28 of the *Charter of Rights and Freedoms* in Section 16 of the Accord, means that provisions protecting individuals from discrimination on the basis of sex, age, race, national or ethnic origin, physical or mental disability have been excluded; and therefore equality rights within the *Charter* become little more than political promises. A mere five years after the entrenchment of these rights in our *Constitution*, our political leaders appear to be altering the terms of the social contract for which Canadians fought long and hard. Indeed, since the 1985 proclamation of section 15, Canada has been hailed as having the finest document on equality rights by delegations of equality-seeking groups from the United States, Israel and a number of African nations. This model is now in jeopardy. Further, any additional legislative protections that oppressed groups have achieved in the *Charter*, such as affirmative action programmes (s. 15, ss. 2) will also be seriously threatened.

Those affected most by this negative direction will be women, people of colour, aboriginal peoples, religious minorities and the differently abled. Even if we accept the proposition that permission to discriminate was not the intention of the Prime Minister and the First Ministers in the design of the Accord, it is certainly a likely possibility if the Accord is ratified.

We simply do not agree that all other considerations in this Accord, including protection for linguistic duality in Section 2 and provisions for multicultural protection in section 16 will give adequate protection for groups enumerated in sections 15 and 28 of the *Charter*. There are absolutely no legislative guarantees stating that the *Charter's* equality provisions will not be overridden and anything less

is tantamount to overriding individual rights and liberties--a great risk for a government to take in a liberal democracy.

Immigration

The Accord, in its statement of intent, requires the Government of Canada to "conclude an agreement with the Government of Quebec."

This agreement incorporates the Cullen-Couture Agreement which relates to the selection of immigrants and refugees abroad, guarantees the share of immigrants that Quebec shall receive (such share being greater than its proportionate share of the Canadian population) and transfers the reception and integration services, except citizenship services, from the federal government to Quebec, with reasonable compensation.

The Amendment contained in the Accord entrenches in the *Constitution* the requirement for the federal government to negotiate at the request of any provincial government, an agreement on immigration that "is appropriate to the needs and circumstances of that province." Such agreements would have effect only in so far as they are not repugnant to legislation which sets national standards and objectives relating to immigration or aliens. However, we do not yet know what these standards and objectives will be.

The guarantee of a percentage of the number of immigrants is viewed as a means by which Quebec could overcome its declining birth rate and population loss due to interprovincial migration. Quebec wishes to encourage more French speaking immigrants who will be more likely to remain in Quebec. One wonders though how the other provinces will use their "negotiated agreements"?

Until the Accord, immigration has been a shared area of jurisdiction with federal paramountcy. The present proposals would give all provinces, not just Quebec, more control over the admission of immigrants. Further, the Accord could prevent the federal government from exercising its paramountcy in the national interest. Any of these scenarios are possible . . . which are likely, we just don't know.

An overriding concern with the amendments made by the Accord is the possibility of the encouragement of immigrants to identify with a particular province rather than with Canada, and the creation of a patchwork of policies which result in confusion and potential discrimination.

Senate and Supreme Court Appointments

The Accord provides for provincial control over appointments to the Senate and Supreme Court of Canada.

The federal government currently has the authority to fill vacancies in the Senate subject to qualifications in consultation with the relevant jurisdiction. Pending Senate reform and related constitutional amendments, the Accord pro-

vides a statement of intent that vacancies shall be filled exclusively from lists provided by the appropriate province. The same appointment process would apply if the Accord is ratified.

The concerns regarding the change in the appointment process center on the unlikelihood of reform due to the unanimity required by the Accord. It is most likely that provinces would hesitate to relinquish their control over this new-found power base. The power of the Senate, which would be provincially controlled, over the Parliament of Canada, is undemocratic when provincially appointed senators can significantly interfere with the will of the House of Commons and its elected representatives. There is also a fear that provincially appointed senators would focus on provincial positions rather than adopt a more national outlook.

In a similar fashion, the Supreme Court of Canada judges would also be appointed from lists provided by the provinces. Instead of making the appointments less political, this process makes them more so. The selection process would tend to focus on candidates who have provincial political ties and loyalties as opposed to a national perspective. It is essential that the Court remain national in its perspective. The Accord's selection process places this in jeopardy.

The selection process for both the Senate and Supreme Court of Canada does not deal with any mechanism to appoint members if the lists provided by the provinces yield no individual who is acceptable to the federal government. This could result in deadlocks in the appointment of senators and judges to our highest court and hence some vacancies could remain unfilled.

The North and Native Peoples

The new amending formula in the Accord requires the unanimous agreement of eleven governments (ten provinces and the federal government) in order for either the Yukon or the N.W.T. to become provinces. This has severe consequences for the North for a number of reasons:

(1) The North was not included in the initial discussions that led to the Meech Lake Accord.

(2) Unanimous consent by ten provinces to grant provincial status to another is highly unlikely.

The aboriginal and first peoples of this nation have been done a great disservice by this Accord in the following ways:

(1) They are in danger of losing equality rights to gain a rather ambiguous protection provided in section 16.

(2) They have been ignored as both a historical and linguistic group in the opening statements of the Accord, which summarize the history of the nation.

(3) Once again, land claims by first peoples living in those territories have not been addressed by the federal government.

The North, as a result of the Accord, has now no voice in its political future. By denying the North entry into the negotiations, the eleven governments have quite effectively severed the tax-paying citizens living in the Territories, who consider themselves Canadians, from any political link with the rest of the country. In a democracy that proclaims representation by population, the question of representation in negotiations on a constitutional amendment for a segment of that same population is not a moot point. Essentially, what has been created in the Accord is a type of "second-class" Canadian--literally speaking, anyone who lives and works in the North. This action is unjustifiable in a democracy.

In the original negotiations of 1982, land claims were excluded from the constitutional negotiations. We now have, in 1987, history repeating itself in the Accord. This problem will not go away. Governments using political tactics to avoid this issue are losing time. The people of the North have indicated recently they have waited long enough. There is no negotiating if one party simply ignores another; this amounts to an autocracy. Without either input or bargaining capacity, the North and its constituent populations are relegated to a powerless constitutional position. If this was the intent of the eleven governments, it has been achieved. If this was not the intent, then immediate steps to include the North could rectify a false impression.

There are no specific provisions to ensure that aboriginal peoples are protected by the equality rights provision of the *Charter.* Indeed it would seem that equality rights may not be considered at all if confused with other aboriginal rights, such as land claims. The right not to be discriminated against should be clearly indicated in the Accord, and treated separately from the aboriginal rights surrounding land claims.

Native peoples have acted in good faith, and have acted according to treaties which they originally signed with the colonial and national governments. It is a great irony to note that if treaties with nations other than the first peoples were violated in the present political and social climate, this would be considered as an act of war. However, it would appear that the violation of treaties with the aboriginal peoples is simply considered political expedience by the eleven governments concerned. If this was not the intention of those designing Meech Lake, then the way to ameliorate this glaring oversight is to include negotiations on land claims. Anything less than this action is a violation of original treaties, normally legally binding, with the first peoples. The land in question was originally theirs. For governments to continue to assert the primacy of English and French claims to the land is to reinforce a colonialist rule that we thought we had abolished forever with the patriation of our *Constitution* in 1982.

Opting Out

Canadians have hitherto been unique in their quest to assure that all citizens are able to share in our collective wealth through a variety of social programs developed and funded entirely or in part by the federal government. Where these programs fall within areas of exclusive provincial jurisdiction, they are administered by each province, but the standards and criteria are set and monitored nationally. This has assured at least some consistency across the country in the level of services available.

Section 7 of the Accord provides that all future cost-shared programs developed at the federal level in areas within provincial jurisdiction be subject to opting out by any province, and the "Government of Canada shall provide reasonable compensation to the government of [that] province," provided "the province carries on a program or initiative that is compatible with the national objectives." This clause seriously inhibits the power of the federal government to promote access to services on a nation-wide basis in those areas where jurisdiction resides with the provinces. Hitherto, the federal government has used its spending powers to redistribute wealth in order to promote social justice and regional economic stability. Surely, Canadians do not wish to sacrifice this sense of national community, particularly those who live in provinces disadvantaged by higher production and transportation costs and hence a smaller tax base. Yet the unclear wording of Section 7, the use of such a vague, imprecise phrase as "compatible with national objectives," terms like "program" and "initiative" leave us apprehensive that universality of access to such national programs will soon become a concept of the past.

What is the incentive for any future federal government, in response to a clearly perceived need for a national program, to develop standards and criteria which require a significant investment of tax dollars and administrative resources, if there is no guarantee that the provinces which choose to opt out will adhere to those standards in some meaningful and accountable fashion? Will Canadians in Ontario or Saskatchewan or New Brunswick or P.E.I. be offered a lower level of service in order that their provincial governments be able to divert funds to other areas? While we have been assured that programs presently in place remain unaffected by Section 7, it is unclear what will transpire with programs such as the Canada Assistance Plan and Medicare, each of which is funded according to a different formula. What happens when the terms of these programs are renegotiated? Do they then become new programs, subject to the opting out provision?

While it is not our wish to interfere with the traditional areas of jurisdiction held by the two levels of government, neither do we wish to leave the welfare of individual Canadians to the vicissitudes of short term political agendas. It is our firm conviction that if Section 7 is to be retained it must be re-worded to protect our interests. We must guarantee that any province which chooses to opt out of shared cost programs and obtain compensation shall put in place a program whose objectives are substantially the same and whose standards are equally demanding as those of the national program.

Amending Formula

The Accord provides for a change in the general amending formula of the 1982 *Constitution* which required the consent of seven provinces with 50% of the population. At that time it was stated that no one province could veto constitutional amendments under the general amendment formula.

The Accord seeks to change this procedure for future constitutional amendments related to institutions such as the Senate and the Supreme Court of Canada; the establishment of new provinces, and the extension of existing provinces into the territories. Upon ratification of the Accord, constitutional amendments related to the above matters will require the unanimous consent of all provinces, the Senate and the House of Commons. Therefore, any chance for meaningful change to our federal institutions, such as the Senate, is highly improbable. If it is possible, we must ask at what cost. Since all provinces would have extensive veto powers over any future amendments, their bargaining leverage would be substantially increased. If Quebec had had the veto in 1949, would Newfoundland have been admitted as a province without conceding Labrador?

The threatened use of the veto by the provinces places them in the position of being able to obtain concessions on unrelated matters. If such concessions are not agreed to by the federal government and the other nine provinces, there is a real potential for paralysis and deadlock in negotiations.

The requirement for unanimity will serve to protect the status quo so that response to change will be slow, if it occurs at all. It will also allow for the possibility that unrelated political and economic positions and concerns of a particular province will control constitutional change. This is potentially undemocratic.

Executive Federalism

Section 13 of the Accord requires that there be annual constitutional conferences of First Ministers beginning in 1988 and continuing for all time unless this provision is altered by further constitutional amendment. For all intents and purposes this creates a third level of government which is significantly removed from electoral accountability. It is not difficult to envision that if First Ministers have a majority in their respective legislatures they can, by enforcing party discipline, ensure ratification of future constitutional amendments, the effect of which may not become clear until some years after the fact. Their behaviour is therefore not truly questionable by an informed electorate.

The requirement that annual constitutional conferences of First Ministers be convened promotes the notion that constitutional tinkering is desirable. It trivializes what should be a long and thoughtful process characterized by openness and a thorough airing of the relevant issues as well as a clear and careful drafting of the text of proposed amendments in unambiguous language.

Process

"Constitutional reform should proceed in a manner that is deliberate, open and democratic. The 1987 constitutional process has violated all these standards. First Ministers proceeded with reckless haste. They conducted their meetings in private and have kept their drafts secret. They failed to adequately consult their cabinets, their caucuses, the legislatures--and the people."[1]

The most troubling aspect of the 1987 Accord is the manner in which it was achieved. A group of eleven persons, of whom perhaps two possessed any direct mandate, met and agreed to a series of amendments to our constitution. This in itself is not without the realm of historical precedent nor would it be considered sinister if the document thus drafted were to be submitted to the legislatures and Parliament of Canada for a true and full debate of the merits of the agreement.

However, we, the people of Canada, have been told that we must accept the Accord or reject it. If we accept it as it is, we must place a measure of trust in our political leaders and legal institutions which has been hitherto unsupportable. The *Constitution Act, 1982* and the *Charter of Rights and Freedoms* were monumental achievements in nation building. In particular, the *Charter* codified and guaranteed the civil and political rights Canadians had come to value and which had been given insufficient force by earlier tradition and custom. As Canadians we are bound to defend these rights.

Yet, if we reject the Accord, we are told, we are thwarting the cultural, political and linguistic aspirations of one sixth of the people of Canada. We are interfering with the process of political growth and change as envisioned by a particular group of First Ministers faced with a particular problem at a particular moment in our history. If these are our only choices, then truly we have no choice, we must reject the 1987 Accord, we must reject it for the following reasons.

Acceptance of the Accord in its present form necessarily indicates approval of the process of Executive Federalism which has spawned it and which will subsequently be entrenched in the *Constitution* in the form of annual constitutional conferences. (See *Constitution Amendment, 1987*, s.13.)

Approval of the Accord in its present form denies Canadians now and for all time the right to fully participate in any debate regarding constitutional reform. The Parliament of Canada and the provincial legislatures will become mere rubber stamps for the constitution-making whims of First Ministers.

The Meech Lake Accord process, and the provisions of Section 13, will forever deprive us of our role in shaping our own Constitution, the one document above all that gives concrete form to our collective vision of Canada. Even if the people understood clearly and believed firmly in all of the other amendments to

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[1]Brian Schwartz, *Fathoming Meech Lake*, (Winnipeg: Legal Research Institute of the University of Manitoba, 1987) at 1.

our *Constitution* contained in the Accord, Section 13 alone should be sufficient to give us pause. In our view, the term "disenfranchised" is not too strong a term to describe the position of Canadians vis à vis constitutional reform if the Accord is ratified.