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Meech Lake and its Constitutional Lessons for Canada

by

Indira Roopnarine

A thesis
submitted to the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements for the degree
of Master of Arts

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Date April 17, 1992

ABSTRACT

On 3 June 1987 Canada's First Ministers reached agreement on a constitutional amendment proposal that was intended to bring Quebec back into the Canadian constitutional family. The Meech Lake Accord, however, was not to be. On 23 June 1991, the time permitted under section 38(2) of the Constitution Act, 1982 expired. The Meech Lake Accord was dead.

The failure of the Meech Lake Accord can be attributed to numerous factors. This thesis focuses on four of these factors. First, Canada's First Ministers failed to appreciate the impact the Charter of Rights and Freedoms had on the manner in which Canadians regarded their Constitution. Empowered by the Charter, they felt that they should be consulted on matters of constitutional change. As they were not consulted, many rejected the Accord.

Second, Canada's First Ministers failed to realize the potential for disaster that the three year time limit entailed. The failure to deal with this time period vigilantly by several First Ministers permitted the occurrence of several fatal events, such as changes in political leadership and the withdrawal of support for the Accord.

Third, the placement of provisions requiring the support of Parliament and 2/3 of the provinces having at least 50% of the population with provisions requiring unanimous support for passage was erroneous. This error was further complicated by the adoption of the time limit applicable to 2/3-50 amending formula for the entire package.

Fourth, the lack of political leadership contributed significantly to the failure of the Meech Lake Accord. This charge is especially applicable to the Prime Minister of Canada.

If future constitutional negotiations are to avoid some of the mistakes apparent during this round, the four approaches mentioned above should not be ignored. A more democratic, intelligent and cautious approach is necessary.

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There are a great number of people to whom I must express my thanks. To my thesis supervisor, J. Peter Meekison, your insight and guidance were second to none. To my parents, Bas and Ramdai Roopnarine, my sister Marlene and my brother Rudy, I could not have completed this thesis without your patience and support. To my dear friends Joseph E. F. Jackson and Mia Shragge, for your support and assistance, I am eternally grateful.

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CHAPTER ONE

MEECH LAKE, THE CONSTITUTION AND CANADA: AN INTRODUCTION

> **Canada is a grand and beautiful country, too little known and understood by its people. It possesses natural riches beyond the dreams of most other countries in the world, and freedom prospers here better than in most places. Nevertheless, Canada is passing through a period of travail which is more than a crisis of development; it is a crisis of existence itself.**
>
> **Task Force on Canadian Unity**[1]

Over a dozen years have passed since these words were written by members of The Task Force on Canadian Unity. They are appropriate today since Canada is once again, or possibly still, going through a crisis of existence. On 22 August 1990, the government of Alberta announced the establishment of a Constitutional Task Force to "investigate Alberta's and Canada's future constitutional development."[2] On 4 September 1990, the government of Quebec announced the establishment of the Belanger-Campeau Commission on the Political and Constitutional Future of Quebec. In introducing the bill to create this constitutional commission, Québec Intergovernmental Affairs Minister, Gil Rémillard said "[w]e told them the accord's failure could have serious consequences. We warned them...there will be no surprises."[3] On 1 November 1990, the government of Canada established the Citizens' Forum on Canada's Future. Other provincial governments in Canada established similar investigatory bodies. What created such concern for Canada's future? This predicament can be attributed

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[1]Jean-Luc Pépin and John Robarts, **The Task Force on Canadian Unity, A Future Together: Observations and Recommendations** (Ottawa: Supply and Services Canada, 1979), 7.

[2]**Report from the Alberta Legislature**, 31 August 1990, 3.

[3]"Keep strong ties with Canada, Bourassa urges," **Globe and Mail**, 5 Sept. 1990, A2.

to a constitutional amendment effort, the Meech[4] Lake Accord, which ended in bitter failure. This, it should be noted, was only the second amendment attempt since the Constitution Act, 1982[5] was proclaimed.[6]

Prior to examining the details behind this failed attempt to amend the Canadian Constitution, it is necessary to examine the constitution itself. What is the purpose of a constitution? What should be contained within it? Under what conditions should it be changed?

The Purpose of the Constitution

Richard Simeon presents the following as the purpose of the Canadian Constitution:

> The Constitution is not seen merely as a framework for governing, nor as a solution to a set of problems which must be solved. Rather, it must somehow capture and encapsulate the "essence of Canada." It must be a symbolic representation of what we are as a people; it is to be a marker of one's place in the Canadian political order. If one's group, or conception, is written into the Constitution, one is a legitimate part of the Canadian community; if not, one is

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[4]The lake at which the Accord was struck is correctly spelled 'Meach' Lake. The correct spelling was frequently used during the Joint Committee proceedings between 4 August and 2 September 1987.

[5]Prior to 17 April 1982, most amendments to the Constitution of Canada required the approval of the British Parliament. This was because the legislation creating the Canadian Constitution, the BNA Act, 1867 (also referred to as the Constitution Act, 1867) was an Act of the U.K. Parliament. Although the Statute of Westminster of 1931 eliminated all authority of the British Parliament in Canada, at the request of the Canadian government, the former retained the authority to amend the Canadian Constitution. In 1982, the Canada Act was passed in the British Parliament. The requirement of seeking Britain's approval to change the Canadian Constitution was terminated. Among other things, the Constitution Act, 1982 provided Canadians with a series of formulas to change their own Constitution.

[6]The first amendment attempt since the proclamation of the Constitution Act, 1982 dealt with Canada's aboriginal peoples and was proclaimed in 1984. The fourth and final First Ministers' Conference on Aboriginal Constitutional issues was held on 26-27 March 1987. See Canadian Intergovernmental Conference Secretariat, **First Ministers' Conference on Aboriginal Constitutional Matters**, (Ottawa: Information Canada, 1987). Another constitutional amendment between Newfoundland and the federal government [Constitution Amendment, 1987 (Newfoundland Act)] was made under section 43 of the Constitution Act, 1982 and was proclaimed on 22 December 1987. See **Canada Gazette, Part II,** 20 January 1988, SI/88-11, 886-887.

> marginalized, and somehow excluded from the political world. A Constitution, or sets of amendments to it, is therefore to be judged in terms of whether one sees oneself, one's own conception of what Canada is in some abstract sense, mirrored in the text. If not, it must be rejected.[7]

This purpose, he correctly asserts, must be rejected. It "places an enormous burden on constitutionalism, one which carries with it a great many dangers."[8] Even if such a scenario were possible, he adds, it would be undesirable. Simeon insists that expectations and claims placed on the Constitution should be less demanding.[9]

A less demanding and perhaps more realistic purpose statement has been proposed by A.W. Johnson. According to Johnson:

> The purpose of a Constitution is to proclaim and define nationhood. It is to proclaim and define the rights and freedoms of the citizens of the nation, and to establish a system of governance which will contribute to the flourishing of the nation, its citizens and its "identities". Lying behind these constitutional provisions is the manifest objective of affirming and strengthening the bonds of nationhood.[10]

In accord with Johnson, J. Peter Meekison asserts that constitutions, in general, contain five common characteristics:

(1) They set out the structure or machinery of government including the legislative, executive, and judicial functions.

(2) In a federal country, they set out the legislative authority of each order of government and some notion of the relationship between them.

(3) There may be certain special clauses which limit or clarify government authority, such as the intergovernmental immunity of taxation or the notion of a free market.

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[7]Richard Simeon, "Meech Lake and Visions of Canada," in **Competing Constitutional Visions: The Meech Lake Accord,** eds. K.E. Swinton and C.J. Rogerson (Toronto: The Carswell Co. Ltd., 1988), 295.

[8]Simeon, 295.

[9]Simeon, 295.

[10]A.W. Johnson, "The Meech Lake Accord and the Bonds of Nationhood," in **Competing Constitutional Visions: The Meech Lake Accord**, eds. K.E. Swinton and C.J. Rogerson (Toronto: The Carswell Co. Ltd., 1988), 145.

(4) In addition, there may or may not be a bill of rights which outlines the relationship between the state and the individual.

(5) Finally, an amending formula. It is not unreasonable to expect a constitution to have a means by which its provisions can be changed.[11]

The Canadian Constitution established in 1867, did establish a system of governance for the nation. A federal system of government was adopted by the Fathers of Confederation to unite the colonies of British North America (Canada, Nova Scotia and New Brunswick). This system is described by K.C. Wheare as one in which:

> the powers of government for a community are divided substantially according to the principle that there is a single independent authority for the whole area in respect of some matters and that there are independent regional authorities for other matters, each set of authorities being co-ordinate with and not subordinate to the others within its own prescribed sphere.[12]

Wheare, in an examination of the Constitution Act, 1867, was compelled to consider the possibility that the system of governance adopted by the Fathers of Confederation could not be called a federal system because the two levels of governments did not have co-equal status. Section 90 of the said Act allowed for the reservation and disallowance of provincial legislation by the federal level of government, thereby eliminating the co-equal status of the provinces.[13] Wheare, however, after examining the actual workings of the government in Canada, was satisfied that Canada was indeed a federation. These powers of reservation and disallowance, he concludes, were infrequently used.[14]

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[11]J. Peter Meekison, "Federalism and the constitution - Some personal reflections," in **Salute to Scholarship: Essays Presented at the Official Opening of Athabasca University**, ed. Michael Owen (Athabasca University, 1986), 7.

[12]K.C. Wheare, "Some Prerequisites of Federal Government," in **Canadian Federalism: Myth or Reality,** 2d ed., ed. J. Peter Meekison (Toronto: Methuen Publications, 1971), 3.

[13]Michael Stein, "Federal Political Systems and Federal Societies," in **Canadian Federalism: Myth or Reality** 2d ed., ed. J Peter Meekison (Toronto: Methuen Publications, 1971), 30.

[14]Stein, 31. For an examination of the prerequisites of federal government, see K.C. Wheare, "Some Prerequisites of Federal Government," 3-19.

While the Constitution Act, 1867 outlined a parliamentary system of government and the division of powers between the two levels of government, it did not include a Charter of Rights. While rights with respect to denominational schools and the use of the English and French languages were provided for, this was a result of the "deal" made by the Fathers of Confederation to accommodate the parties of the future federation rather than a conscious effort to identify the rights and freedoms of the citizens of Canada.[15] Reginald Whitaker, in a reflection of democracy and the Canadian constitution, asserts that ordinary Canadians may not be very interested in their constitution, but the constitution itself is not very interested in Canadians -- the people.[16] He claims that:

> The constitution of Canada has been, from 1867 onward, an arrangement between elites, particularly between political elites. Constitutions are normally arrangements between people and their governments. The American constitution, for example, begins: "We, the people, in order to form a more perfect union...," and then goes on to regulate the relations between people and the governments they were instituting.... The British North America Act of 1867 was...almost entirely innocent of any recognition of the people as the object of the constitutional exercise.[17]

The Constitution Act, 1867 also did not contain an amending formula. Meekison points out that the absence of an amending formula led to the development of a series of conventions that were used to change the constitution. Three steps were involved: first, federal-provincial consultation; second, approval by the Canadian Parliament through the adoption of joint resolutions; and third, legislation proclaimed by the Parliament of the United Kingdom.[18]

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[15]Canada, **A Consolidation of The Constitution Acts 1867 to 1982** (Ottawa: Supply and Services Canada, 1989), 32-33. See sections 93 and 133 of the Constitution Act, 1867 which deal with education and language use respectively.

[16]Reg Whitaker, "Democracy and the Canadian Constitution," in **And No One Cheered: Federalism, Democracy and The Constitution Act**, eds. Keith Banting and Richard Simeon (Toronto: Methuen Publications, 1983), 240. For an examination of why the Constitution Act, 1867 did not include values, rights and freedoms for Canadians, see Alan C. Cairns, "The Living Canadian Constitution," **Queen's Quarterly** 77, No. 4 (Winter 1970): 483-498.

[17]Whitaker, 240.

[18]Meekison (1986), 9.

Former Prime Minister Pierre Elliot Trudeau, in part, felt very strongly about the absence of a defined relationship between the state and its citizens. In addition, he felt strongly about the need for an amending formula, as did his predecessors since 1927, whereby Canadians could change their own Constitution without resort to the United Kingdom. Trudeau envisioned a new Canadian constitution. In 1978, he asserted that:

> The present Constitution needs a fundamental recasting. It needs to be rethought and reformulated in terms that are meaningful to Canadians now. For this reason we call for a new Constitution: one that is a new whole, even though it may utilize some of the same parts...But we insist on a new perspective which will embrace all the constituent parts in a whole that is at the same time distinctively Canadian and functionally contemporary...Canada needs a new Constitution now...."[19]

Factors Leading to Demands For Constitutional Change

What leads to demands for constitutional change? Meekison points out that in a federation, certain responsibilities are conferred upon the national government while others are conferred upon provincial governments. No division of powers, he argues, is perfect nor applicable to all time. "A distribution acceptable at one time may appear archaic or inappropriate at another time."[20] As a country develops, certain factors or conditions may render it necessary to change the constitution to more accurately represent political, economic and social realities.

An examination of the historical development of Canada reveals a number of factors that have contributed to demands for constitutional change. First, desperate economic conditions, during and after the world-wide depression of 1929, led to a formal amendment to the division of powers. In this instance, the provincial governments did not have the financial resources required to assist the enormous number of unemployed residents. In 1940,

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[19]Pierre Elliot Trudeau, **A Time For Action: Toward the Renewal of the Canadian Federation**, (Ottawa: Supply and Services Canada, 1978), 19.

[20]Meekison (1986), 5.

responsibility for Unemployment Insurance was officially transferred from provincial to federal jurisdiction.[21] Second, the rise of Québec nationalism has resulted in increased demands from Québec governments for substantive changes to the Constitution. Such demands include a special recognition of Québec within the federation, a role in the appointment of Supreme Court judges, and so on. The majority of demands for constitutional reform from Québec have been tied to the preservation of provincial autonomy and the French language and culture. Third, the growth of provincial governments has led to increased demands for greater control over economic resources in areas such as indirect taxation, resource ownership, off-shore resources and so on. As the demands for services increased, governments turned to the division of powers to maximize the use of powers granted to them in the BNA Act, 1867. Fourth, federal intervention in areas of exclusive provincial jurisdiction vis-a-vis spending programs have led to provincial demands for limitations on this activity. Finally, the vision and role of certain political leaders, such as Pierre Elliot Trudeau have served to initiate and drive discussions and/or demands for constitutional change.

The Constitution Act, 1982: Ten vs. One

The determination to patriate the Canadian Constitution and to devise an amending formula led Trudeau to initiate a series of negotiations which eventually led to the Constitution Act, 1982. While both of these objectives were achieved, it was without the support of Québec. The convention that constitutional amendments required the support of all ten provinces and the federal government had been broken. Angry and bitter, the government of Québec vowed to refrain from participation in future constitutional negotiations; they would merely be observers at the table. The seriousness of this discord was not enough to persuade political leaders in

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[21]David Kwavnick, **The Tremblay Report** (Toronto: McClelland and Stewart Limited, 1973), 152.

Canada to move immediately toward remedying this regrettable situation. Such efforts came only after the passage of time and the changes in government in both Québec and Ottawa.

Renewed Dialogue

New governments in both Québec and Ottawa re-opened the doors to constitutional dialogue between English and French Canada. As the forces of Québec nationalism entered the 'snooze' mode, discussions to bring about Québec's acceptance of the Constitution Act, 1982, began to take place shortly after the new governments came to office. The result was the Meech Lake Accord.

In August 1986, at a Premiers Meeting in Edmonton, the provincial premiers agreed to set aside their personal constitutional agendas until the Québec problem had been addressed. The next round of constitutional negotiations would be the 'Québec round.' On 30 April 1987, Canada's First Ministers met at Meech Lake, to discuss the conditions that would bring about Québec's acceptance of the Constitution Act, 1982. This acceptance would give political legitimacy to the Act by securing Québec's support for its provisions. It would also ensure Québec's full participation in future constitutional negotiations.[22] The result of this day-long meeting was a consensus reflected in a brief document entitled the "Meech Lake Accord". On 2 June 1987, Canada's First Ministers reconvened at the Langevin Block to address outstanding details in the Accord. After about nineteen hours of negotiations, they emerged early the next morning to proclaim agreement on a more detailed and slightly modified text.[23] On 3 June 1987, Canada's First Ministers signed an agreement to bring Québec back into the Canadian constitutional family as a full participating member.

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[22] Richard Simeon, "Meech Lake and Shifting Conceptions of Canadian Federalism," **Canadian Public Policy**, Vol. XIV Supplement (September 1988): S8-S9.

[23] Simeon, S9.

Under the amending formula established in 1982, Parliament and the ten provincial legislatures would now have to ratify the Accord.[24] The National Assembly in Québec was quick to ratify it. On 23 June 1987, Québec's ratification initiated the three year time limit within which Parliament and the other nine provincial legislatures would have to ratify the Accord. Should the amendment not be secured within the three year time limit, it would die a natural death. As 23 June 1990 passed, unanimous ratification of the Meech Lake Accord was not achieved. What happened? Why did an agreement that was intended to unify the country and certain to pass remain unratified?

The Crisis of Unity

In 1979, the Task Force on Canadian Unity identified French-English dualism, regionalism and the "political agencies which express and mediate them"[25] to be at the heart of the crisis of unity. These elements are present in the current crisis of unity, but the debate has broadened. Richard Simeon astutely points out that the Accord rekindled:

> a broad debate about the fundamentals of Canadian state and society and about the character of Canadian federalism -- about relations between national and provincial political communities, between federal and provincial governments, and between citizen and state.[26]

All of these factors have, in some form or another, contributed to the failure of the Meech Lake Accord. French-English dualism, however, reigns as a paramount issue in the present crisis.

The Task Force on Canadian Unity recognized and reflected the multifaceted nature of the concept of duality in Canada, but the dominant interpretation focused on "the status of

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[24]Simeon, S10.

[25]The Task Force on Canadian Unity, "The Anatomy of Conflict," in **The Confederation Debate: The Constitution in Crisis**, eds. R.D. Olling and M.W. Westmacott (Toronto: Kendall/Hunt Publishing Company, 1980), 2.

[26]Simeon, S10.

Québec and its people in the Canada of tomorrow".[27] The present crisis is the result of an attempt to address this very issue. The significance of the inability of English and French Canada to reach an agreement acceptable to both on this issue cannot be understated. The recognition of Québec as a "distinct society" proved to be problematic for many interest groups, some of Canada's provincial leaders, especially Newfoundland Premier Clyde Wells, and English-speaking Canadians in general.

The failure of many English-speaking Canadians to accept this recognition of Québec led more and more Quebecers to feel rejected by English Canada. Many business organizations within Québec, for example, supported the passage of the Accord when it was first ratified by the Québec National Assembly. As the response from English-Canada first filtered and then poured in, business leaders began to realize that perhaps Québec could not be accommodated within the Canadian federation.[28]

The forces of Québec nationalism, which emerged strongly in the 1960s and 1970s and then subsided after the "no" vote in the Québec referendum of 1980, resurfaced, especially in the months prior to the Meech Lake Accord's 23 June 1990 deadline. The process adopted to pass the Accord, and the criticisms from many segments of the population in both English and French Canada brought the nationalist forces in Québec out of the 'snooze' mode and gave them much ammunition. Rip Van Winkle had awakened. As the criticisms from English Canada became more frequent, the political strength of the separatist Parti Québécois grew exponentially. Only a few years earlier, after the death of René Lévesque, the PQ lost the support of the Québec electorate. This renewed sense of nationalism in Québec emerged with

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[27]See **Task Force on Canadian Unity, A Future Together: Observations and Recommendations** (1979), 22. For a more detailed examination of the multifaceted concept of French-English dualism or 'duality', see pages 22-23.

[28]This view was espoused by the former president of the Quebec City Chamber of Commerce in an interview conducted in August of 1990.

the feeling by many Québecers that the special needs of Québec could not be accommodated within the existing federal system of government.

While French-English duality is at the heart of the present crisis, a number of factors have served to heighten French-English conflict. This thesis will examine some of the factors which ultimately led to the failure of the Meech Lake Accord. In addition, the lessons from this episode of constitutional negotiations for future negotiations will be reviewed. Some of the factors leading to the Accord's failure are as follows. First, the failure of the Meech Lake Accord is due, in part, to the failure of Canada's First Ministers to recognize the changes that had taken place in the relationship between Canadians and their constitution. This failure resulted in the continuation of a process that lacked sufficient public participation. An examination of constitutional change over time reveals that the process varied from time to time. The process used until 1982 ended with the inclusion of an amending formula in the Constitution Act, 1982. Those involved in the Meech Lake negotiations assumed that the process used prior to 1982 was still suitable. They did not give adequate attention to how Canadians viewed constitutional change. Among other things, the Canadian Charter of Rights and Freedoms revolutionized Canada. It legitimized the involvement of Canadians in areas of Constitution making that did not exist before. Many citizens came to see the Charter as a means of ensuring the protection of rights and freedoms guaranteed to Canadians. The empowerment obtained from the Charter led Canadians to feel that the Constitution belonged to them, the citizens of Canada, and thus they demanded a role in its further development.[29] Opponents of the Accord often cited provisions within the Charter when presenting their arguments.

Second, Canada's First Ministers did not devote the necessary attention to the potential calamity that could result from the three year time limit. The clause in the Constitution which

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[29]Alan C. Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake," **Canadian Public Policy**, Vol. XIV Supplement (September 1988): S122.

governs the time limit is section 39(2) of the Constitution Act, 1982 which states that "A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder."[30] In other words, once one legislature approves a resolution to amend the Constitution, the others must ratify the resolution within three years.[31] After three years, if the resolution has not been proclaimed, it lapses.

Three years is a long time. Many attempts could have been made to genuinely secure the passage of the Meech Lake Accord. Instead, Canada's First Ministers allowed a series of events and actions to occur without due attention to their consequences. After consent for the Accord was given by the National Assembly in Québec on 23 June 1987, the governments of three signatories to the Accord, were ousted from office.[32] In addition, critics began to surface in staggering numbers. The introduction of Bill 178 by Québec and the subsequent use of the Charter's notwithstanding clause to exempt this legislation from the guarantees of the Charter infuriated many English-speaking Canadians. Furthermore, after approving the Accord in the House of Assembly, the new government of Newfoundland under Clyde Wells revoked its support.[33] With each occurrence, the Accord seemed to unravel more and more. Finally, the strategy adopted by the Prime Minister to secure passage of the Accord was based on the premise that if the provincial leaders are under tight time constraints, they will cave in and agree to support the Accord. As a result, a final attempt to save the accord was not made until the last possible moment.

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[30]See **A Consolidation of The Constitution Acts 1867 to 1982**, 68-69. It should be noted that Senate approval is not necessary if the resolution has already been rejected by the Senate but is reintroduced and adopted in the house. In fact, this was done with the Meech Lake Accord.

[31]See **A Consolidation of The Constitution Acts 1867 to 1982**, 69.

[32]Robert M. Campbell and Leslie A. Pal, **The Real Worlds of Canadian Politics: Cases in Process and Policy** (Ontario: Broadview Press Ltd., 1989), 296-297.

[33]Campbell and Pal (1989), p. 298.

Third, the First Ministers erred in the development of a single constitutional package which required unanimity. The entire package was placed in a 'straightjacket' when it was decided that the most rigid amending formula, that of unanimous consent, would be used for the passage of all the Accord's provisions. Part V of the Constitution Act, 1982, 'Procedure for Amending Constitution of Canada', provides for two types of amendments: those that require unanimous consent from the Senate, the House of Commons and all ten legislative assemblies (S. 41); and, those that require the consent of the Senate, the House of Commons, and at least two-thirds of the provincial legislative assemblies totalling at least fifty percent of the population of the ten provinces in Canada (S.38). The Meech Lake Accord contained several provisions that could be passed using section 38 and two provisions requiring the use of section 41. Because it was to be passed as a single package and because unanimity amongst the First Ministers had been achieved, the latter principle was accepted without further consideration.

An agreement which, for the most part, could have been passed without unanimous consent, but required unanimity due to provisions altering the composition of the Supreme Court and the amending formula, contained the seeds of its own destruction.[34] Perhaps the Meech Lake Accord should have been divided into two parts. Those items falling under the 2/3-50 formula should have been passed first. Those items requiring unanimous consent could have been passed whenever they received the approval of all legislatures because the three year time limit does not apply to section 41 amendments. This route would have brought about Québec's partial acceptance and English Canada's partial acceptance, thus avoiding a complete rejection of Québec's five demands. Canada's First Ministers should have considered more seriously the ratification process and the possible rejection by a provincial legislature of the Accord and recognized the merits of this two stage process. Either they incorrectly assumed that their legislatures would automatically approve what was agreed to at Langevin or

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[34]See **A Consolidation of The Constitution Acts 1867 to 1982**, 69.

they did not think about the potential for failure at all. Nor did they consider the effect of a change in government on the unanimity requirement.

Finally, the leadership demonstrated by many of Canada's First Ministers in developing and passing the Accord was seriously suspect. In addition to their failure to recognize the impact of the Charter on Canadians and their miscalculations regarding the time limit and the single constitutional package, they failed to sell the merits of the Accord to Canadians. This abdicated responsibility was later assumed by the media. Moreover, the individual actions of several of the First Ministers, including Brian Mulroney, Frank McKenna, Gary Filmon, Robert Bourassa and Clyde Wells, were instrumental in worsening the fate of the Accord. Prime Minister Brian Mulroney will be the focus of this charge as his strategy and negligent behaviour regarding the rules of the Manitoba legislature are examined.

The Meech Lake Accord, in the eyes of its creators, was an attempt to affirm and strengthen the bonds of nationhood. It was designed to contribute to the flourishing of the Canadian nation, its citizens and its identities by ensuring that the nation was on the road to recovery from its deep-rooted malaise of duality. However, it was not to be. Rather than subsiding, the problem of French-English duality intensified.

The next chapter will examine the two forces that have brought French-English duality to a point of crisis: federalism and Québec nationalism. It will be argued that Québec nationalism existed prior to Confederation. This was blunted, to an extent, by the establishment of a federal system of government. For Québec, disputes over the protection of its language and culture continued. The Quiet Revolution of the 1960s brought about a plethora of intellectual activity regarding Québec's place in the Canadian federation. The result was the emergence of forces promoting the separation of Québec from Canada.

Chapter three will examine historical demands for explicit constitutional change in Canada. The point of departure for this examination will be Confederation itself. It will be argued that demands for explicit constitutional change can be divided into four time periods:

1867-1926; 1927-1965; 1968-1982; and 1987-1990. The nature and details surrounding constitutional demands of the third and fourth periods will be the primary focus of this examination. The former will be examined in this chapter while the latter will be dealt with in chapter four.

Chapter four will closely examine the events leading up to the development of the Meech Lake Accord. In addition, the agreement reached by the Canada's First Ministers at Meech Lake and then at the Langevin Block will be presented.

Chapter five will examine two of four factors identified as being instrumental in the failure of the Meech Lake Accord. These are the process and the three year time limit.

Chapter six will examine the remaining two factors identified as being instrumental in the failure of the Accord: the amending formula and political leadership.

Chapter seven will reflect on the lessons that should be learned from this round for future constitutional negotiations in Canada.

CHAPTER TWO

FEDERALISM AND QUEBEC NATIONALISM: A BRIEF OVERVIEW

> **A federal nation is one in which the most politically salient aspects of human differentiation, identification and conflict are related to specific territories.**
>
> **Donald Smiley**[1]

The creation of Canada was a great political achievement[2] and a miracle in itself given the diversity of governments, jurisdictional interests and fears that existed during the immediate pre-Confederation period. Union, however, was driven by a number of events which occurred simultaneously and brought each of the British North American colonies to a point of crisis economically, politically and in terms of security.[3] Political union was seen as a solution common to all of their problems.[4] For example, the period following the 1841 union of Upper and Lower Canada into the Province of Canada was plagued with political instability.[5] In addition, economically, access to the markets of the colonies of British North America would generate prosperity.[6] This access would alleviate many of the Maritime concerns about the threat to their sea-based economy, by steel and steam. Moreover, this would also compensate, in part, for the loss of the imperial preferences in the form of military and commercial support

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[1]D.V. Smiley, **Canada in Question: Federalism in the Eighties, 3d ed.** (Toronto: McGraw-Hill Ryerson Limited, 1980), 1.

[2]Donald Smiley, ed., **The Rowell/Sirois Report/Book I**, With Introduction (Toronto: McClelland and Stewart Limited, 1963), 9.

[3]Smiley (1963), 9.

[4]Smiley (1963), 9.

[5]P.B. Waite, ed., **The Confederation Debates in the Provinces of Canada/1865**, With Introduction (Toronto: McClelland and Stewart Limited, 1963), 21-22.

[6]Waite, 36.

from Great Britain and the revocation of trading privileges by the United States.[7] In terms of security, a united nation as opposed to a collection of British North American colonies could deter the imperialistic tendencies of the United States.[8]

Federalism: A Solution

What kind of union, however, would allow for the preservation of existing political and cultural institutions in the various colonies? A federal system of government was seen by the Fathers of Confederation as the solution to the diverse interests of the various parties to the union.

On 1 July 1867, Canada, Nova Scotia and New Brunswick joined to create the nation of Canada under a federal system of government with four provinces. The opening of the first Canadian Parliament took place on 7 November 1867. Thereafter, political energies were focused on the development of the new nation. Other British North American colonies soon joined Canada: Manitoba in 1870; British Columbia in 1871 and Prince Edward Island in 1873. Alberta and Saskatchewan were established in 1905.[9]

Québec Nationalism: Defined

What is Québec Nationalism? Richard Jones (1972), in an examination of self image and the nationalist, explains that:

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[7]Smiley (1963), 9.

[8]Waite, 20.

[9]Canada, **Report of the Royal Commission on Dominion-Provincial Relations, Book I, Canada: 1867-1939** (Ottawa, Queen's Printer, 1940), 19-66. It should be noted that Newfoundland did not join Confederation until 1949. It should also be noted that the inauguration ceremony officially marking the birth of Alberta took place on 1 September 1905, three days earlier than the inauguration ceremony in Saskatchewan. This three day difference allowed Prime Minister Sir Wilfred Laurier and Governor General Earl Grey to take part in both ceremonies.

> The French Canadian of our day considers himself, consciously or unconsciously, to be part of a colonized minority. It is this particular image that is the source of his nationalism. A minority which seeks to preserve its distinctiveness is always nationalistic. At least, this is the only alternative to extinction through assimilation.[10]

Alexander Brady states that nationalism is usually defined in terms of "that intense feeling of community in a people derived from their historical experiences which differentiates them from other and neighbouring peoples."[11] He adds that nationalists live by an awareness of a common history and by a purpose to determine their own future.[12]

Nationalism: Québec's Struggle Against Assimilation

While nationalism in Québec gained much ground in the 1960s, it has always been part of the French Canadian existence in Canada. The protection of the institutions and culture of French Canadians was a primary concern for those representing Francophones during the Confederation Debates. The fact that they were in the minority in the Province of Canada was always a source of concern. P.B. Waite affirms that in this respect, Confederation under a federal system of government appealed to Premier Taché because:

> ...Lower Canada would thereby preserve its autonomy together with all the institutions it held so dear, and over which they could exercise the watchfulness and surveillance necessary to preserve them unimpaired.[13]

The Hon. Sir Narcisse Fortunat Belleau was also confident that Confederation would guarantee to Lower Canada, exclusive jurisdiction with respect to its institutions, laws, religion,

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[10]Richard Jones, **Community in Crisis: French-Canadian Nationalism in Perspective** (Toronto: McClelland and Stewart Limited, 1972), 11.

[11]Alexander Brady, "The Meaning of Canadian Nationalism," in **The Canadian Political Tradition: Basic Readings**, eds. R.S. Blair and J.T. Mcleod (Scarborough: Nelson, 1989), 141.

[12]Brady, 141.

[13]Waite, 22.

manufactures and autonomy.[14] There was also opposition in French Canada to Confederation. For example, Joseph Xavier Perrault vehemently argued against it. As recorded by Waite, Perrault asserted that Confederation was not expedient; that it was hostile to French Canadians. As examples of such hostilities, Perrault pointed to the increasing dominance of the English race, the antagonism between the two races and the continual struggles that French Canadians had to endure to resist the exclusiveness and aggression of the English in Canada. Perrault added that through heroic resistance and a combination of positive circumstances, French Canadians had succeeded in securing their political rights contained in the constitution of the Province of Canada.[15] Furthermore, he asserted that "The scheme of Confederation has no other object than to deprive us of the most precious of those rights, by substituting for them, a political organization which is eminently hostile to us...."[16]

Sir John A. Macdonald was also cognizant of the sensitive nature of the French Canadian position. In his presentation as to the alternatives available to break the political dead-lock in the Province of Canada, John A. Macdonald proclaimed that representation by population, a solution strongly opposed by Lower Canada, could not be a viable solution because it would give Upper Canada the majority of seats in the Legislative Assembly.[17] According to Waite, Macdonald asserted that this outcome would:

> have left the Lower Province with a sullen feeling of injury and injustice. The Lower Canadians would not have worked cheerfully under such a change of system, but would have ceased to be what they are now - a nationality, with representatives in Parliament, governed by general principles, and dividing according to their political opinions - and would have been in great danger of becoming a faction, forgetful of national obligations, and only actuated by a desire to defend their own sectional interests, their own laws, and their own institutions.[18]

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[14]Waite, 29.

[15]Waite, 128.

[16]Waite, 128.

[17]Waite, 40.

[18]Waite, 40.

It should be noted that the French-Canadian representatives only marginally supported Confederation. On March 11, 1865 the vote for or against Confederation was taken. Of the 48 French-Canadian members present, 27 voted for while 21 voted against. As a whole, however, the vote on Confederation was 91 for and 33 against.[19]

Of the ensuing Dominion-provincial conflict over jurisdiction, a number of events point to the realization by French Canadians that the guarantees made to them at Confederation were suspect. The racial and religious differences that plagued the Province of Canada were not eliminated by Confederation. Two provinces were created (Ontario and Québec) by the Fathers of Confederation specifically to allow for the free expression of these racial and religious differences in separate spheres. It was hoped that through this separation, such past antagonisms would not be a factor in the deliberations of the federal councils with respect to matters of interest common to all.

While the years immediately following Confederation can be described as a honeymoon period between the two ethnic groups,[20] this was soon to be interrupted by racial and religious conflict in 1870 and 1885 in the valleys of the Red and the Saskatchewan rivers. The leader of the rebellions, Louis Riel, fled to the United States after the 1870 uprising in which an Orangeman from Ontario was killed. Upon his return to Canada in 1885, he regrouped his Indian and Métis forces and led another rebellion. Riel became a positive symbol for anti-Protestant Catholics in Québec, who were agitated by the overwhelming number of English-speaking settlers moving into French-speaking and Catholic communities in Manitoba. In contrast, he was seen as an antagonist by anti-Catholic Protestants in Ontario.

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[19]Waite, xviii.

[20]Richard J. Van Loon and Michael S. Wittington, **The Canadian Political System: Environment, Structure and Process, 4th ed.** (Toronto: McGraw-Hill Ryerson, 1987), 74.

Riel and some of his supporters were captured and sentenced to death. The charge was treason.[21] Mass rallies were staged in both provinces. The Montreal newspaper *La Presse* characterized the events by stating: "Henceforward, there are no more Liberals nor Conservatives nor Castors. There are only PATRIOTS and TRAITORS."[22] Riel was seen as a patriot who should be granted a pardon by Québec and as a traitor by who should be executed by Ontario.[23] The actions taken by the Dominion government were supported by dominant groups in Ontario but were condemned by dominant groups in Québec. The execution of Louis Riel outraged French Canadians. Resentment against the Federal Government swept the province of Québec.[24]

Five years later, another blow to French Canadian equality in Confederation was delivered by Manitoba. Among other things, the Manitoba Act of 1870 guaranteed the existence of two official languages and public funding for Catholic schools in the province. In 1890, French was abolished as an official language by the Manitoba government. In addition, public funds for Catholic schools were terminated. The Catholic clergy inside and outside of Québec felt that the action by the Manitoba government was illegal and unconstitutional.[25] In fact, most criticisms of the new law came from those who were French, Roman Catholic and from Québec.

Manitoba Catholics demanded that the federal government use its powers under section 93 of the British North America Act to disallow the provincial legislation. In addition,

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[21]Van Loon and Wittington, 74.

[22]Van Loon and Wittington, 74-75.

[23]Van Loon and Wittington, 75.

[24]Canada, **Report of the Royal Commission on Dominion-Provincial Relations, Book I, Canada: 1867-1939**, 54.

[25]Susan Mann Trofimenkoff, **The Dream of Nation: A Social and Intellectual History of Quebec** (Toronto: Gage Educational Publishing Company, 1983), 159.

they appealed to the courts to declare the legislation *ultra vires.* Moreover, they requested that the federal government intervene and restore the education rights of Catholics in the province of Manitoba. The courts declared that the legislation was not *ultra vires* but affirmed the ability of the federal government to use its power to disallow it. The federal Conservative government's attempt to pass a bill to invalidate the legislation was interrupted by an election. The school issue played a large role in the subsequent campaign. The Conservatives lost the election. In 1897, the Liberal government under Laurier and the Manitoba government settled the issue through negotiations, but the substance of the legislation remained virtually unchanged.[26]

World War I coincided with the separate school issue in Ontario. Prior to the War, Ontario had limited the use of French as a language of instruction and as a subject taught in schools, much to the dismay of the French-speaking Canadians in Ontario. In 1916, the constitutional validity of this action by the government of Ontario was upheld. Further legislation was enacted in Ontario restricting the use of the French language that very same year. Bitterness over this bilingual school question grew and once again revealed the interests and feelings which divided the French-speaking and English-speaking people of Canada. In addition, it emphasized the difficulty of tolerance and accommodation between the two language groups; a problem that contributed to the political deadlock in the Province of Canada.

Through the efforts of Sir Wilfred Laurier, a resolution denouncing the action of the Ontario Legislature was introduced.[27] Both the Conservatives and the Liberals in Québec voted for the resolution. The Liberals from the West voted against it. Laurier, with much difficulty, held the Ontario Liberals in line. What is important from this event is not whether or not the resolution was passed, but that it was able to bring back an old racial issue despite the

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[26]Van Loon and Wittington, 76.

[27]This resolution was officially introduced by Mr. Lapointe.

national emergency brought about by the War. This division was also apparent in the main political parties; a breakdown of the principle of cooperation of the two linguistic groups within each party had begun. One of the major parties seemed to be getting its support predominantly from only one of the two language groups. The other major party had the same experience. Its support came from those who did not support the former.

The actions of Ontario deeply roused French-speaking Canadians. Ontario threatened one of their most vital interests - their language. This led many to bitterly oppose Canada's war effort. French-speaking Canadians felt that the real interests of Canada were being sacrificed for British Imperialism by the English-speaking leaders of the Dominion. English Canada pointed to French-Canadian nationalist propaganda as the reason for the lower levels of enlistments in Québec.[28] As expressed by the Commissioners of the Royal Commission on Dominion-Provincial Relations (1940):

> These charges of disloyalty, which multiplied rapidly, caused resentment among the French-speaking Canadians who had supported participation in the War and provoked recriminations which, in turn, drew further retort from English-speaking Canadians. It was a vicious circle in which mutual misunderstanding and mutual reproach seemed to be endless. When this stage was reached, it inevitably diminished the support which Québec gave to the supreme objective of the Federal Government. The bilingual issue loosed a chain of consequences which helped to prepare Quebec for united resistance to conscription.[29]

Nationalism: The Problems Defined

Conflict with respect to language and culture did not end with the conscription issue. Québec continually resisted federal interference in areas of provincial jurisdiction in fear of losing control of areas that could directly affect the protection of the French language and

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[28]Canada, **Report of the Royal Commission on Dominion-Provincial Relations, Book I, Canada: 1867-1939**, 95.

[29]Canada, **Report of the Royal Commission on Dominion-Provincial Relations, Book I, Canada: 1867-1939**, 95.

culture in Québec. On 12 February 1953, the Québec government, under Prime Minister[30] Maurice Duplessis, established the Royal Commission of Inquiry on Constitutional Problems (Tremblay Commission).[31] This Commission was Québec's response to the Rowell-Sirois Commission. The latter was established by the federal government in 1937. One of the main recommendations of Rowell-Sirois was that provincial access to direct taxation was not necessary for provincial autonomy. As such, the federal government should have exclusive access to direct taxation.[32]

The immediate objective of the Tremblay Commission was to find support for the premise that the Fathers of Confederation had given the provincial legislatures primary jurisdiction over direct taxation as cited in Section 92(2) of the Canadian Constitution.[33] This section states that the provinces have jurisdiction over "Direct Taxation within the Province in order to the raising of a revenue for Provincial Purposes."[34] Over the years, much controversy had taken place between the provisions of Section 92(2) and Section 91(3); the latter confers upon the Parliament of Canada, the right to raise money "by any Mode or System of Taxation."[35] The end result of the Commission's work was not limited to the terms of

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[30]In Quebec, the leader of the government is referred to as the 'Prime Minister.' To avoid confusion, however, henceforth the leader of Quebec will be referred to as the 'premier.' This will be consistent with the title given to the leaders of other provincial governments in Canada.

[31]Kwavnick, vii. The Commission reported its findings on 1 March, 1954. This Commission is also known as the Tremblay Commission, named after its chairman.

[32]Donald V. Smiley, "The Rowell-Sirois Report, Provincial Autonomy and Post-War Canadian Federalism," in **Canadian Federalism: Myth or Reality, 2d ed.**, ed. J. Peter Meekison (Toronto: Methuen Publications, 1971), 70.

[33]Kwavnick, vii.

[34]See **A Consolidation of The Constitution Acts 1967 to 1982**, 29.

[35]See **A Consolidation of The Constitution Acts 1867 to 1982**, 27.

reference. It was a comprehensive examination of "the philosophical and moral basis of French-Canadian society and a restatement of its **raison d'etre**."[36]

Since the provincial primacy claim to direct taxation could not be proven *de jure*, the Commission turned its attention to historical and sociological arguments. With respect to the former, the Commission espoused the views of the conservative-nationalist school, adopting the 'Compact Theory of Confederation' to define the relationship between levels of government in Canada. Although it is somewhat lengthy, an examination of this theory and some of the findings of the Commission will be useful in identifying the problems with federalism from a Francophone perspective.

The Compact Theory maintains that Confederation came to be as a result of a compact made by the Imperial Parliament and the provinces. In addition, upon entry into the federal union, the corporate identity, previous constitution, and all legislative powers, with the exception of those ceded to the federal parliament, remained within provincial jurisdiction. These powers, it is argued, were not given to the provinces by the federal government. Rather, they are the powers which remain from the previous existence of the provinces. Moreover, the legislative powers of the Parliament of Canada, do not extend beyond those which were given to it at Confederation by the provinces, as outlined in Section 91 of the British North America Act.

Furthermore, all powers of a local or private nature not mentioned in Sections 91 and 92 of the BNA Act, which involve the private or local interest of one or more of the provinces, fall within provincial jurisdiction. All matters that involve the private or local interest of all the provinces, however, belong to the federal parliament. When in doubt as to whether a matter involves one, some or all provinces, the benefit of the doubt should favour the provinces. This should be so because the provincial legislatures retained, at Confederation, all powers not expressively transferred to Parliament. Finally, Parliament does not have superiority over the

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[36]Kwavnick, vii.

provinces. Similarly, no province is superior to another and each is sovereign within its jurisdictional sphere, subject to imperial sovereignty.[37] According to David Kwavnick, the Compact Theory leads to the conclusion that "no changes can be made in the original agreement [the BNA Act] without the unanimous consent of all the parties to that agreement."[38] In addition, he claims that:

> "The Tremblay Commission took the view that the BNA Act is merely a starting point, that the guarantees and conditions set out therein cannot be understood except by reference to the reality to which they were intended to apply and, therefore, all of the essential elements of that reality come within the protection of the compact theory."[39]

According to David Kwavnick, the Commission's arguments were based on the idea that the Fathers of Confederation selected a federal union to guarantee to each of the communities of British North America the ability to continue its development using its own values and perspectives. Exclusive jurisdiction in areas deemed necessary to fulfill this development were given to the provincial governments. As such, direct taxation and other revenues (sale of public lands and timber, licenses and fines),[40] supplemented by federal statutory grants were given to the provinces to ensure the adequate financial resources required for this development. As the years passed, and the scope of government activity increased significantly, direct taxation became the chief source of provincial government revenues. Increased government activities should not have been problematic since they were primarily within the area of social services, and the direct taxes needed to pay for them were also within provincial jurisdiction.[41] The Commission, however, identified the problem in terms of the following:

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[37]Kwavnick, ix-x.

[38]Kwavnick, x.

[39]Kwavnick, xi.

[40]See sections 92(2), 92(5), 92(9) and 92(15) of the Constitution Act, 1867.

[41]Kwavnick, viii.

> the Federal Government had created a vicious circle; using the excuse of war, it had taken the lion's share of direct taxes, to justify these revenues in peacetime it usurped provincial responsibilities and, finally, it uses these heavy responsibilities to justify its continued fiscal dominance.[42]

In restating the main elements of the problem, the Commission maintained that the primary purpose of the Canadian federal state is to permit the two great cultural communities of Canada, French and English, to live and develop according to their own values and perspectives. In addition, it stated that the Province of Québec is solely responsible for French-Canadian culture, whereas the other provinces have the sole responsibility for the Anglo-Canadian culture. Furthermore, the Commission affirmed that while Canada has gone through a significant transformation since its inception in 1867, its cultural elements have remained the same. The problem, therefore, has not changed.

The Commission also asserted that economic stability has become one of the major political goals. With the evolution of ideas with respect to the state's economic and social roles, state intervention in the economy is both admissible and scientifically justified. The Commission agreed that the fiscal inequalities between provinces, as created by industrial concentration, should be remedied as much as possible. They believed, however, that the federal government justified its social and fiscal policy in the name of management of the economy and economic equalization between the provinces, two indispensable agents of economic control. But, the reliance of the federal government on a constitutional interpretation whereby it is endowed with the main powers over the economy, unlimited taxation powers and absolute spending powers has led the federal government to believe that it alone is responsible for the execution of initiatives required for economic control, employment and provincial economic equalization. The federal government, declares the Commission, appears to believe that the pursuit of economic and social goals takes priority over cultural goals and that its objectives take priority over provincial ones. Underlying this approach of the federal

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[42]Kwavnick, viii.

government is an interpretation of the Constitution as unitary and non-federal in nature as well as a technically administrative and non-political notion of the role of the state in social and economic affairs.[43]

The Commission added that there need not be opposition between the state's economic and social goals and its cultural aspirations. In fact, both can be realized in a federal system as long as both levels of government recognize this problem and take the necessary steps to remedy the situation. Since a federal state is composed of two levels of government, each with its own special jurisdiction within a broader framework of constitutional law, autonomy of the two levels of government as well as the coordination of policies are necessary in order for the federation to be as efficacious as possible.

According to the Commission, however, cultural and social policies are extensions of each other. Their inspiration must be the same and they must be entrusted to the government which can best understand and express it through legislation. The Commission added that various kinds of taxes are qualitatively related to the functions of collective life. Taxes should therefore be distributed to the levels of government based on the functions they are responsible for. Moreover, since income taxes directly impact persons and institutions, they should be allocated to the level of government vested with cultural and social responsibility. Taxes on business and the circulation of goods, on the other hand, claims the Commission, because they would remove local and regional barriers, should be vested with the government responsible for the economic situation over the entire territory. Equality of services, although desirable, cannot be considered an absolute. It cannot be a permanent system for the redistribution of funds and it cannot be pursued at the expense of the higher interests of other groups.[44]

The Commissioners of the Tremblay Commission felt that their counterparts on the Rowell-Sirois Commission had held a strange concept of the federal system and in particular

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[43]Kwavnick, 212-213.

[44]Kwavnick, 213-214.

about provincial autonomy. The former claimed that instead of suggesting a sound guarantee for provincial fiscal and financial autonomy, so that the provinces could fulfill their jurisdictional obligations fully independent from the federal government, the latter recommended that even more fiscal powers be concentrated in the hands of the federal government. This solution was consistent with the centralist ideas of John A. Macdonald.[45]

The Quiet Revolution and its Leaders

The approach and findings of this Commission proved to be very influential amongst some intellectuals who provided leadership in the Quiet Revolution in the 1960s. Prior to examining the views of such leaders, a brief description of the Quiet Revolution is necessary. What was the Quiet Revolution? Generally, one can describe it as a period in the early 1960s dominated by much intellectual discussion on the place of Québec within the Canadian federation. According to Edward McWhinney,

> The Quiet Revolution brought in its wake an increasingly critical examination by Quebec of the nature and character of the Canadian constitutional system and of the extent to which it acted as a barrier to realization of French-Canadian demands for national self-determination.[46]

The French Canadian universities and the Québec civil service were paramount in this movement. The reforms of Jean Lesage[47] in 1960 produced for the first time, a civil service with a specialist technocratic and professional character. This highly technocratic and pragmatic elite quickly challenged its federal counterpart in Ottawa-Québec relations.[48] This period of intellectual enlightenment produced a philosophical debate in universities in Québec

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[45]Kwavnick, 140.

[46]Edward McWhinney, **Quebec and the Constitution: 1960-1978** (Toronto: University of Toronto Press, 1979), 37.

[47]From 1960-1966, Jean Lesage served as leader of Quebec.

[48]McWhinney (1979), 37.

and in legal doctrine which centered around the concept of a special constitutional status or an associate status for Québec within the Canadian federation.[49]

According to McWhinney, the most comprehensive and articulate constitutional theorist of the early Quiet Revolution was Jacques-Yvan Morin. When he formulated his constitutional theories, Morin was a federalist. This position led him to suggest changes **within** Confederation. Morin found much merit in the findings of the Tremblay Commission. In particular, he agreed that federalism is the solution to the problem of two collectives, different in origin and culture and each interested in conserving its own identity and co-existing within one nation. The state, therefore, must not simply aim to be efficacious; the state functions and competences should be divided whereby parallel development of the two collectives will prevail. As the home of the French Canadian nation, Québec was vested with the responsibility for the development of the French collective. Its autonomy must be maintained in order to protect Québec's culture. Federal intervention in any domain touching upon culture must be curtailed.[50]

Morin's call for a particular status for Québec involved a modified division of powers whereby Québec would be granted the powers necessary for regional planning, social security, and natural resource development. In addition, he felt that a new international role should be granted to Québec to conclude treaties on matters within provincial jurisdiction and to nominate fifty percent of all Canadian representatives to international organizations.[51]

Another influential figure in the Quiet Revolution was Claude Morin. Unlike Jacques-Yvan Morin, Claude Morin was a strong French Canadian nationalist. This disposition was the result of repeated failure on constitutional negotiations with Ottawa during his role as the key

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[49]McWhinney (1979), 37.

[50]McWhinney (1979), 22.

[51]McWhinney (1979), 23.

provincial bureaucrat dealing with Québec-Ottawa relations in the Lesage government. Morin felt that Ottawa had no intention other than to treat Québec like all other Canadian provinces.[52] The Quiet revolution, then, questioned the role and treatment of Québec within the federal system. During this period, however, the Liberal government of Jean Lesage did not have a formal or coherent position with respect to constitutional change.[53]

René Lévesque, leader of the Parti Québécois and former member of the Québec Liberal Party, reflected the views of a growing number of intellectuals, elected officials and civil servants in the late 1960s when he wrote **An Option for Québec**. Among other things, Lévesque examined the progress that Québec had made since the early 1960s. He then attempted to identify additional tasks that must be accomplished without delay for additional progress. The major stumbling block to progress for Lévesque was the existing federal system. He stated:

> And here we encounter a basic difficulty which has become more and more acute in reecnt [sic] years. It is created by the political regime under which we have lived for over a century.
>
> We are a nation within a country where there are two nations.... Two nations in a single country: this means, as well,that in fact there are **two majorities**, two 'complete societies' quite distinct from each other trying to get along within a common framework....
>
> Now we believe it to be evident that the hundred-year old framework of Canada can hardly have any effect other than to create increasing difficulties between the two parties insofar as their mutual respect and understanding are concerned, as well as impeding the changes and progress so essential to both
>
> It is useless to go back over the balance sheet of the century just past, listing the advantages it undoubtedly has brought us and the obstacles and injustices it even more unquestionably has set in our way.
>
> The important thing for today and for tomorrow is that both sides realize that this regime has had its day, and that it is a matter of urgency either to modify it profoundly or to build a new one. As we are the ones who have put up with its main disadvantages, it is natural that we also should be in the greatest hurry to be rid of it; the more so because it is we who are menaced most dangerously by its current paralysis.[54]

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[52]McWhinney (1979), 24-26.

[53]Smiley (1980), 67.

[54]René Lévesque, **An Option for Quebec** (Montréal: McClelland and Stewart, 1968), 20-21.

Lévesque argued that the way of the future is a sovereign Québec and a new Canadian union. He proposed a system that would permit the two majorities to remove themselves from "an archaic federal framework in which our two very distinct 'personalities' paralyze each other by dint of pretending to have a third personality common to both."[55] This new system would allow for economic co-operation between the two new politically independent states. It would also provide the conditions necessary for the unimpeded maintenance and development of the French language and culture. As the maintenance of the French language and culture would no longer dominate the energies of Québécers, more time could then be spent on other significant problems that exist in Québec.[56]

Nationalism gained a stronghold in Québec during the period when Pierre Elliot Trudeau was Prime Minister. Trudeau not only believed in a strong central government, but also of a Québec that should be treated no differently from the other provinces in Canada. He also believed that this nationalism would be reduced through the introduction of language policies.[57] This was not acceptable to many academics and political leaders in Québec because they felt a certain distinctiveness from the rest of Canada. The Premier of Québec, during the discussions leading up to the Constitution Act, 1982, represented a party (the Parti Québécois) based on nationalist sentiments which had rejected the ideas of those like Trudeau. Although Trudeau patriated the constitution without Québec's consent, one has to wonder, given René Lévesque's political orientation, whether anything could have secured his consent.

To believe, however, that Québec did not support the Constitution Act, 1982 solely because of the political orientation of its premier would misrepresent the true reason for its exclusion. The next chapter will examine demands for explicit constitutional change. Evident

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[55]Lévesque, 30.

[56]Lévesque, 28.

[57]Pierre Elliot Trudeau, **Federalism and the French Canadians** with an introduction by John T. Saywell (Toronto: Macmillan of Canada, 1968), 44-45.

will be the diverging interests of Québec and the federal government in the twenty years leading up to the 1982 patriation. It is difficult to reach agreement after twenty years of disagreement when many of the points of discord are not even part of the new discussions.

CHAPTER THREE

HISTORICAL DEMANDS FOR EXPLICIT CONSTITUTIONAL CHANGE

> **In embarking on a constitutional re-assessment we must not, however, allow ourselves to make the mistake of assuming that a changed constitution is a form of magic that can be a substitute for change in attitude and action....**
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> **Change in our Constitution will not relieve us of the need to make changes in the way we treat and regard other Canadians, in fact, in our daily life. If "the latter killeth but the spirit giveth life", so the legal clauses of the constitution can be only the verbal reflection of new facts of relationship that we are prepared to accept and to apply.**
>
> **The Right Honourable Lester B. Pearson**
> **Prime Minister of Canada, 1968**[1]

Constitutional negotiations in Canada over time have focused on a wide range of economic[2], political and social issues. These issues have centered on the division of powers, but have varied in intent and scope as constitutional negotiations in Canada evolved. The focus of demands for constitutional change have varied during Canadian constitutional history. These demands can be divided into four time periods: 1867-1926; 1927-1965; 1968-1982; and 1987-1990. The period 1867 to 1926 can be characterized as one dominated by unilateral and ad-hoc constitutional change by the national government and one where a simple voice in these changes was demanded by the provinces. The period 1927 to 1965 can be described as one in which Canada's political leaders were preoccupied with the search for an amending formula. The period 1968 to 1982 continued the search for an amending formula. During this period, however, the agenda for change was expanded by escalating provincial proposals for substantive constitutional changes and was pushed in part by the reverberations of the Quiet

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[1]The Right Honourable L.B. Pearson, **Federalism for the Future: A Statement of Policy by the Government of Canada** (Ottawa: Queen's Printer, 1968), 4-6.

[2]Garth Stevenson, **Unfulfilled Union: Canadian Federalism and National Unity** 3rd ed. (Canada: Gage Educational Publishing Company, 1989), 236. Stevenson argues that constitutional controversy has been related to cleavages and conflicts amongst the various sectors of the economy such as large and small provinces, rich and poor provinces, the metropolis and the hinterland and so on.

Revolution. The period 1987 to 1990 can be characterized as the 'Québec round'; an attempt to secure the support of Québec for constitutional changes that had been adopted over its objections in 1982. This examination will deal with the latter part of the 1927 to 1965 period beginning with the Fulton-Favreau amending formula. The period from 1968-1982 will be examined in full. The period characterized as the 'Québec round' will be dealt with in the next chapter.

The Search For an Amending Formula

According to Garth Stevenson, "It was not the practical necessity of amending the BNA Act so much as the progress toward Canadian independence after the First World War that began the long search for an explicit amending formula."[3] Although the search for an amending formula took fifty four years, it was not a subject of continuous or intensive discussion. During the 1927-1965 period, efforts to develop a formula to amend the Constitution occurred five times: 1927, 1935-36, 1950, 1961 and 1964.[4] Concrete progress on the amending formula did not occur until the Federal-Provincial Conference of 1950.[5] A series of discussions in 1950, however, resulted in little progress. Almost a decade passed before constitutional discussions resumed. This time, it was under the leadership of Prime Minister John Diefenbaker.[6]

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[3]Stevenson, 238.

[4]J. Peter Meekison, "The Amending Formula," **Queen's Law Journal**, Vol. 7-8, 1981-83: 101.

[5]Kwavnick, 156-157.

[6]Stevenson, 240.

(a) The Fulton Formula

In July 1960, a Federal-Provincial conference was held to specifically discuss a domestic amending formula.[7] In 1961, the Fulton amending formula was proposed. Under this formula, the whole division of legislative powers would be entrenched. This pleased Ontario and Québec as it was one of their major objectives. In addition, educational and linguistic guarantees would also be entrenched. Moreover, the Senate would be added to the list of constitutional provisions requiring unanimous consent, thus guaranteeing each province a fixed minimum of representation in the House of Commons. Furthermore, most of the other important sections of the Constitution would be amended with the support of seven provinces consisting of at least fifty percent of the population. The Fulton formula also provided for the delegation of powers from one level of government to the other.[8]

In 1961 the CCF government of Saskatchewan rejected the Fulton formula on the same grounds as it rejected Ontario's and Québec's demands for a veto in 1950. Saskatchewan argued that under the formula, the ability of Parliament to deal with national problems would be limited.[9]

(b) The Fulton-Favreau Formula

At the Federal-Provincial conference of October 1964, the Fulton-Favreau[10] formula was presented and accepted. Essentially, the Fulton-Favreau formula provided that no future statute of the Parliament of the United Kingdom would be applicable to Canada. In addition,

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[7]Smiley (1980), 68.

[8]Stevenson, 240-241.

[9]Stevenson, 241.

[10]This formula was named after its two key framers, Davie Fulton and Guy Favreau. Fulton served as Minister of Justice under John Diefenbaker and Favreau was Fulton's successor under Pearson. See McWhinney (1979), 47.

future amendments on the most crucial provisions of the Constitution[11] could only take place with the consent of Parliament and every provincial legislature. Moreover, amendments that would alter the basic structure and functioning of the government would require the support of at least 2/3 of the provinces consisting of at least 50% of the Canadian population.[12] Furthermore, it provided that powers between the two levels of government could be delegated through mutual consent of at least four provinces.[13] The Fulton-Favreau formula differed from the 1949 amendment and the 1961 Fulton formula in that the ability of Parliament to unilaterally abolish the monarchy or alter the method of allocating seats among the provinces in the House of Commons and in the Senate would be terminated.[14] All First Ministers gave their support to this formula. Unanimity was achieved on the Fulton-Favreau formula. By this time, the CCF government in Saskatchewan had been defeated.

The Quiet Revolution

Québec Premier Jean Lesage returned home to a well-organized French Canadian nationalist campaign against the Fulton-Favreau formula. This was not surprising given that it coincided with the peak of the Quiet Revolution. The nationalists argued that the formula would place Québec in a straight-jacket and impede the aspirations of Québec.[15] In 1965, in humiliation, Lesage had to withdraw his support for the Fulton-Favreau formula. In January

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[11]These provisions were "provincial legislative powers, the use of the English and French languages, denominational rights in education, and the provisions of section 51A of the BNA Act determining that a province would always have at least as many members of the House of Commons as Senators." See Smiley (1980), 68.

[12]As pointed out by Smiley, these basic aspects included "provisions related to the Crown and its Canadian representative, the five-year limit on the duration of each House of Commons, the number of members from each province in the Senate, and representation of the provinces proportionate to their respective populations in the House of Commons." See Smiley (1980), 68.

[13]Smiley (1980), 69.

[14]Stevenson, 241.

[15]See McWhinney (1979), 47.

1966, Lesage informed the Prime Minister of Canada, Lester Pearson, that "the government of Québec has decided to delay indefinitely the proposal for constitutional amendment."[16] The reason given for this position was the presence of conflicting interpretations in Québec about the meaning and consequence of the amending procedure. Donald Smiley, however, argues that the more important reason was the political opposition the formula had created in the province, including a challenge from the opposition party, Union Nationale, to call an election based on the issue.[17]

The rejection of this formula by Québec signalled a radical shift in the boundaries of constitutional negotiations in Canada. Québec, the province previously most committed to the compact theory and a rigid constitutional amending formula, was now advocating less rigidity. By the mid-1960s, the conservative approach of the past was replaced by assertions that radical constitutional changes were required to protect Québec's interests.[18] This position signalled that successive constitutional conferences could entail new demands from Québec.

The Quiet Revolution of the 1960s produced, in Québec, a renewed interest in constitutional reform. It served to challenge the Canadian constitutional system.[19] Several results emerged from this Revolution. First, it produced proposals from neo-nationalists in Québec for a number of strategies involving the transfer of power from the federal government to the provincial government in Québec. These proposals still allowed for federal ties with the rest of the country. Second, in the other provinces, many felt that acquiescing to some of the demands of Québec would quiet the nationalists and persuade them to support a new, decentralized federalism. Third, federalists from Québec, led by Pierre Elliot Trudeau, and federalists outside

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[16]Smiley (1980), p. 69, quoted in The Honourable Guy Favreau, **The Amendment of the Constitution of Canada** (Ottawa: Queen's Printer, 1965), chapter 4.

[17]See Smiley (1980), 69.

[18]Stevenson, 241. See also, Smiley (1980), 69.

[19]Smiley (1980), 67.

Québec promoted alternatives to the transfer of powers to Québec. These alternatives included bilingualism, Francophone strength in Ottawa and entrenchment of individual rights in the Constitution. Fourth, other provincial governments followed the example set by Québec by presenting their own demands for constitutional change.[20] According to Stevenson:

> These four sets of forces, and the shifting pattern of conflicts and alliances that resulted from them, produced almost a quarter of a century of conferences, meetings, committees, agendas, proposals, ultimatums, compromises, manifestoes, and general unpleasantness.[21]

It should be noted that the preoccupation of politicians, government officials and academics on this subject was notably greater than that of the general public, both inside Québec and elsewhere in Canada.[22]

Federal-Provincial Conferences on the Constitution: 1968-1971

The next Federal-Provincial Conference on the Constitution took place four years after the 1964 conference. In February 1968, the Federal government tabled a general proposal for a revised constitution. This proposal did not advocate more powers for provincial governments. Rather, it supported a revised Constitution which would entrench individual rights, guarantee equality of status for both the English and French languages, and reform federal institutions such as the Supreme Court and the Senate to better reflect the diversity of Canada.[23] The constitutional vision of Daniel Johnson, the new Premier of Québec, however, was diametrically opposed to that of the federal government. Johnson's opening speech was strongly nationalist in orientation promoting the concept of two nations.[24]

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[20]Stevenson, 242.

[21]Stevenson, 242.

[22]Stevenson, 242.

[23]Stevenson, 245.

[24]Smiley (1980), 73.

Between the period from February 1968 to June 1971, seven First Ministers' Conferences on the Constitution were held. During this time, Québec was represented by three different Premiers. The third Premier, Robert Bourassa, was not only a new Premier, but he represented a different political party than his two predecessors. Clearly, the Québec constitutional position was still evolving.[25] In 1971, it seemed that agreement on constitutional changes was near on a document known as the 'Victoria Charter'. The last of the constitutional conferences that began in 1968 was held in Victoria, B.C..

The Collapse of the Victoria Charter

Canada's First Ministers gathered in Victoria, British Columbia in 1971 to finalize an attempt to amend the Canadian Constitution. At this conference, a 'Canadian Constitutional Charter' was tabled by the Federal government. It dealt with matters related to: political rights; language rights; the provinces and territories in Canada; the Supreme Court of Canada; the courts of Canada; a revised Section 94A; regional disparities; federal-provincial consultation; amendments to the Constitution; and the modernization of the Constitution.[26]

Québec secured a number of guarantees in the Victoria Charter. For example, Article 25 provided that at least three judges to the Supreme Court be appointed from Québec. In Article 26, Québec, along with the other provinces, were given a say in the appointment of Supreme Court judges. Along with Ontario, Québec was given a veto on amendments to the Constitution. This veto was present in the proposed amending formula which stated that from time to time, changes to the Constitution could be made:

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[25]For a closer examination of the proceedings of the these Conferences, see Canadian Intergovernmental Conference Secretariat, **The Constitutional Review: 1968-1971, Secretary's Report** (Ottawa: Information Canada, 1974), 9-41.

[26]For a copy of the Canadian Constitutional Charter (Victoria Charter), see Canadian Intergovernmental Conference Secretariat (1974), 373-396.

> by proclamation issued by the Governor General under the Great Seal of Canada when so authorized by resolutions of the Senate and House of Commons and of the Legislative Assemblies of at least a majority of the Provinces that includes[sic]
>
> (1) Every Province that at any time before the issue of such proclamation had, according to any previous general census, a population of at least twenty-five per cent of the population of Canada;
> (2) at least two of the Atlantic Provinces;
> (3) at least two of the Western Provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Western provinces.[27]

Ontario and Québec were the only two provinces that could fulfill the twenty-five percent population requirement. Consequently, either province would be able to block future constitutional amendments. The Western Premiers also supported this amending formula.[28]

In summary, the Victoria Charter included detailed provisions for reform of the Supreme Court and its constitutional entrenchment; an amending formula for future constitutional amendments requiring the support of Ontario, Québec, two of the four western provinces representing at least 50% of the population of the Western provinces and two of the four Atlantic provinces; concessions to the demands of Québec for greater power over "social policy"; entrenched linguistic rights, and a guarantee that equalization payments would continue to the poorer provinces.

Except for patriation, political rights and language rights, the provisions of the Victoria Charter dealt with new approaches to old issues (eg. regional approach to the amending formula).[29] The Victoria Charter amending formula abolished the convention requiring the support of the federal government and all ten provinces to amend matters of substance.

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[27]See Canadian Intergovernmental Conference Secretariat (1974), 389.

[28]Several years later, the Western Premiers withdrew their support for this amending formula. Alberta did not agree to a veto for Ontario and Quebec. In addition, B.C. wanted a veto of its own. Alberta held the position that "a constitutional amending formula should not permit an amendment that would take away rights, proprietary interests and jurisdiction from any province without the concurrence of that province." See Alberta Federal and Intergovernmental Affairs **Fourth Annual Report to March 31, 1977** (Edmonton, 1978), 63.

[29]McWhinney (1979), 49.

The abandonment of the convention requiring unanimity was particularly noticed by the opposition party, academics and journalists in Québec. The charge that Québec would place itself in a constitutional straight-jacket once again surfaced. These critics felt that Québec must first secure the support of the federal government and the other provinces for its proposals for substantive changes to the federal system. Robert Bourassa was politically embarrassed by these criticisms. At the last minute, he withdrew his preliminary support for the Victoria Charter.[30]

Where did the Victoria Charter go wrong? According to McWhinney:

> Instead of the division of powers questions so crucial to Quebec, the Ottawa package deal for the Victoria Conference of 1971 deliberately chose other subjects: repatriation of the constitution; a formula for constitutional amendment; fundamental rights; linguistic rights; the preamble to the constitution; regional disparities; the mechanisms of federal-provincial relations, the Senate and the judicial power. The only small concession by the federal government on the division of powers was the inclusion of international relations in the agenda.[31]

The 23 June 1971 communiqué from Québec officially rejecting the Victoria Charter stated:

> This decision [the refusal] stems from the necessity to establish clear and precise constitutional texts, thus avoiding transferring to the judicial power a responsibility which belongs, above all, to the political power, that is, to the elected representatives.[32]

Echoes of Lesage's rejection of the Fulton-Favreau formula are clearly present here. This rejection led to another stalemate in constitutional negotiations until 1975.

The Rise of the Parti Québécois

The next round of constitutional negotiations was accompanied by the rise of René Lévesque and the Parti Québécois (PQ). The PQ can be identified as "the most widely supported vehicle

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[30]McWhinney (1979), 49.

[31]McWhinney (1979), 26.

[32]McWhinney (1979), 26, quoted in Claude Morin, **Le pouvoir québécois en négociation** (1972), 153.

of contemporary [Québec] nationalism...."[33] In 1976, the PQ won 71 seats in the National Assembly to defeat the Bourassa government which only managed to secure 26 seats. Particularly important in the PQ's victory was the growth in its support. In 1973, they had 30 percent of the popular vote and six seats. In 1976, they received 41 percent of the popular vote and, as mentioned above, 71 seats. The victory of this separatist party is largely attributed to the failure of the policies of the Bourassa government rather than the overwhelming support for Québec independence. According to Kenneth McRoberts, Bourassa's regime had much difficulty in demonstrating that it could govern effectively. It was plagued by rising unemployment and inflation, allegations of scandal and corruption and a split within the party over language and constitutional issues.[34]

Constitutional Patriation: 1975-1979

Discussions regarding patriation of the B.N.A Act began again in April 1975. The federal government continued to support the amending formula agreed to in Victoria in 1971. Québec, however, was a reluctant participant in these discussions. In a letter to Premier Peter Lougheed in March 1976, Prime Minister Pierre Elliot Trudeau stated that he wanted to patriate the B.N.A. Act and include within it, an amending formula. The question became "what else should be added?" Bourassa wanted concessions on language and culture. Trudeau stated:

> Mr Bourassa indicated, however, that it would be difficult for his government to agree to this [no substantive changes to the B.N.A. Act], unless the action also included "constitutional guarantees" for the French language and culture.[35]

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[33]Francois-Pierre Gingras and Neil Nevitte, "The Evolution of Quebec Nationalism," in **Quebec: State and Society**, ed. Alain C. Gagnon (Toronto: Methuen, 1984), 3.

[34]Kenneth McRoberts, **Quebec: Social Change and Political Crisis**, 3d ed. (Toronto: McClelland and Stewart Inc , 1988), 234-239.

[35]Alberta Federal and Intergovernmental Affairs (1978), 55.

During this next phase of constitutional negotiations, demands for substantive changes overshadowed the quest for an amending formula. In August 1976, all ten provincial leaders gathered in Edmonton for their annual premiers meeting. The end result of this meeting was a long list of constitutional demands. These included increased provincial powers over culture, immigration, communications, and taxation of natural resources. Also included in this list was a demand for a constitutional veto over the power of Parliament to declare certain works and undertakings for the general advantage of Canada.[36] Premier Lougheed of Alberta communicated the position of the provinces to Prime Minister Trudeau. Trudeau criticized the proposals as demanding too much or too little.[37]

By the end of 1976, Alberta and B.C. had also come forward to voice their concern over the Victoria Charter amending formula. British Columbia demanded a veto and that it be recognized as a fifth region in Canada. This meant that its consent should also be required for future constitutional amendments.[38] Alberta did not like the amending formula because it feared that the other western provinces might one day all be ruled by governments, such as the NDP, with a centralist vision. As such, if two of the other provinces consisting of at least 50 percent of the population of the West had governments such as these, their position would prevail at the expense of the decentralist position in Alberta.[39] In addition, since the Victoria Charter, a new government under Peter Lougheed had secured power in Alberta. Central to Lougheed's agenda was province building, an objective sufficiently stifled by the Victoria Charter. These demands from British Columbia and Alberta only served to further complicate the negotiation process.

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[36]Stevenson, 247.

[37]Smiley (1980), 81.

[38]Smiley (1980), 81.

[39]Stevenson, 247.

The concern of the federal government over the limited initiative in the area of constitutional reform was remedied by the victory of the Parti Québécois in November 1976. According to Smiley, "[t]his election resulted,...in more constitutional discussion among other Canadians than at any time in the country's history...."[40]

In June 1978, a constitutional amendment bill was introduced by the federal government, Bill C-60.[41] This Bill divided the Constitution into two parts: those provisions that could be amended by Parliament alone and those amendments that would require involvement of the provinces and the British Parliament. The first part (Phase I) was to be implemented by 1 July 1979. The second part (Phase II) was to be implemented by 1981 to commemorate the fiftieth anniversary of the Statute of Westminster.[42] Bill C-60 did not deal with patriation and an amending formula. It also did not deal with amendments to the distribution of powers between the two levels of government.[43]

Among other things, Bill C-60 proposed a number of changes to federal institutions. These changes included a guarantee to provincial governments of involvement in the selection of Senators and justices to the Supreme Court. Opponents, however, argued in front of a Parliamentary committee that Senate reform must be an act of the British rather than the Canadian Parliament. The government referred the question to the Supreme Court. In 1979 the court ruled that Senate reform must be an act of the British Parliament, despite the 1949 constitutional amendment that granted the Parliament of Canada the power to amend most parts of the Canadian Constitution.[44]

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[40]Smiley (1980), 81.

[41]For a further examination of Bill C-60, see Government of Canada, **The Constitutional Amendment Bill: Text and Explanatory Notes**, June 1978.

[42]Smiley (1980), 81.

[43]Smiley (1980), 82.

[44]Stevenson, 246.

The Re-emergence of Demands for Substantive Change

Meanwhile, in November of 1978, the first constitutional conference since 1971 was held. The agenda included: resources and interprovincial trade; communications; indirect taxation; fisheries and off shore resources; family law; the Supreme Court; the Senate; the Monarchy; equalization; a charter of rights; the spending power; the declaratory power [see S. 92(10) of BNA, 1867]; and the amending formula. Trudeau, approaching the end of his mandate, now appeared willing to make significant concessions on legislative powers. Progress toward agreement was slow. Two provinces which appeared to be most concerned about provincial autonomy, primarily in the resource section, were Québec and Alberta. They rejected the federal government's concessions as insufficient. Other, more cautious provinces, also rejected the concessions arguing that they had gone too far. A proposal containing the 'best efforts' achieved during the discussions, was put together; but for Alberta and Québec, most of its provisions were inadequate.[45]

By March 1979, real consensus had been reached on only two of the thirteen agenda items. These were on the retention of the monarchy and to transfer family law (for no apparent reason) from federal to provincial jurisdiction. As usual, the entrenchment of individual rights aroused profound disagreement. The idea of a charter was initially opposed by most provinces, but by February 1979, the entrenchment of fundamental freedoms, democratic rights, and language rights were acceptable to all except Manitoba, but only within those areas of federal jurisdiction. This agreement was at the same level as that agreed to in the Victoria Charter. Sections 20 and 50 of the BNA Act already entrenched certain democratic rights at the federal level. In addition, violations of fundamental freedoms and language rights most often occurred at the provincial level. For these two reasons, these concessions were no great achievement.

Alberta, British Columbia, Manitoba and Nova Scotia refused to guarantee educational rights to their provincial francophone minorities. These provinces had the support of Québec,

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[45]Stevenson, . .7-248.

as Québec did not want to constitutionally guarantee wide-spread educational rights to its minorities. This was already reflected in the latest language legislation in Québec, Bill 101.[46] Constitutional entrenchment of legal, mobility and equality rights received even less support from the provincial governments.

An even more controversial item was the amending formula. A different preference was espoused by each province. British Columbia, claiming to be the fifth region in Canada, wanted a veto that would place it in the same position as Ontario and Québec. Alberta opposed any formula that would not treat all provinces equally. More specifically, it opposed any formula that gave a veto to some, but not to all the provinces. To resolve this dilemma, Alberta suggested that amendments to the constitution could be made if Parliament and at least seven provinces consisting of at least 50% of the population supported the amendment. Moreover, with respect to amendments reducing provincial power, individual provinces would have the option of opting out of the amendment, thereby rendering the amendment not applicable to the opting out provinces.[47]

To Donald Smiley, the discussions of the 1978-79 period differed from the discussions of the 1968-71 period in two important ways. First, the discussions were less centered on the interests of Québec. According to Smiley:

> It is broadly accurate to state that in the discussions which ended with the Victoria Conference the governments of Canada and of the provinces with English-speaking majorities had little urgency about constitutional reform apart from such reform leading to a new accommodation with Quebec.[48]

Second, there was an agreement that reform of federal institutions was necessary to better reflect regional and provincial interests. During discussions in the earlier period, changes to the

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[46]Stevenson, 248. Also, for a detailed examination of Bill 101, see McWhinney (1979), 68-77.

[47]Roy Romanow, John Whyte, and Howard Leeson, **Canada Notwithstanding: The Making of the Constitution 1976-1982** (Toronto: Carswell/Methuen, 1984), 49.

[48]Smiley (1980), 83.

federal system almost exclusively dealt with reforms in the division of powers between the two levels of government.[49]

Constitutional discussions were of little consequence during the brief reign of the Clark government from 4 June 1979 to 3 March 1980. The Québec Referendum, however, placed constitutional negotiation in the forefront.

The Québec Referendum

On 20 May 1980, the PQ in Québec, in keeping with one of its 1976 campaign promises, held a referendum on the following question:

> Le Gouvernement du Québec a fait connaitre sa proposition d'en arriver, avec le reste du Canada, à une nouvelle entente fondée sur le principe de l'égalité des peuples;
>
> cette entente permettrait au Québec d'acquérir le pouvior eexclusif de faire ses lois, se percevoir ses impots et d'établir ses relations extérieures, ce qui est la souveraineté--et, en meme temps, de maintenir avec le Canada une association économique comportant l'utilisation de la meme mönnaie;
>
> aucun changement de statut politique résultant de ces négociations ne sera réalisé sans l'accord de la population lors d'un autre référendum;
>
> en conséquence, accordez-vous au Gouvernement du Québec le mandat de négocier l'entente proposée entre le Québec et le Canada?
>
> The Government of Québec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations;
>
> this agreement would enable Québec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad--in other words, sovereignty--and at the same time, to maintain with Canada an economic association including a common currency;
>
> no change in political status resulting from these negotiations will be effected without approval by the people through another referendum;

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[49]Smiley (1980), 83.

> on these terms, do you gi · the Government of Québec the mandate to negotiate the proposed agreement between Québec and Canada?[50]

59.6% of eligible voters responded "non". 40.4% responded 'oui'.[51] The "non" vote was seen as a major defeat for the PQ and a major victory for Canadian federalism. This defeat left René Lévesque in a weaker position in the ensuing constitutional negotiations. Pierre Trudeau, on the other hand, was now in a position of strength. In February of 1979, his government had been in office for almost five years without calling an election. Now, his mandate had been renewed by the electorate.

After the return of the Liberals under Trudeau and the Québec referendum, constitutional negotiations resumed. In the 1980 Throne Speech, Trudeau set the tone for the next round when he indicated that it was going to be much tougher. The agenda for constitutional reform, however, was slightly different from the earlier round. Earlier federal concessions with respect to restrictions on the declaratory and spending powers and provincial access to direct taxation were withdrawn. The monarchy was also removed from the agenda. In addition, the federal government now wanted to discuss a 'statement of principles' to be placed in the preamble of a revised Constitution. 'Powers over the economy' was included as an agenda item for the first time, reflecting the growing concern by Ontario and the federal government about economic balkanization across the country, a direct result of province-building endeavors in the West.[52]

The positions of the governments were even more polarized. Québec and Alberta were committed to greater decentralization, while the federal government was interested in increasing its powers. The latter maintained that, in the world, the Canadian federation was the most

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[50]Elliot J. Feldman ed., **The Quebec Referendum: What Happened and What Next? A Dialogue the Day After with Claude Forget and Daniel Latouche, May 21, 1980** (Cambridge: University Consortium for Research on North America, 1980), 6.

[51]Feldman, 7.

[52]Stevenson, 249.

decentralized. Further decentralization, they argued was not necessary nor desirable. While agreement was not reached, most provinces felt that a continuation of the process was essential. On 2 October 1980, Trudeau announced that the next step for his government would be to proceed with patriating the constitution and entrenching a charter of rights. He could no longer wait for provincial agreement.[53]

To unilaterally decide to patriate the constitution and entrench a charter of rights was unprecedented and was considered to be a very bold move on the part of the national government. It had been assumed for a long time, since the constitutional negotiations that had taken place under Mackenzie King, that provincial agreement on the amending formula would be necessary before patriation could be achieved. In fact, Québec's refusal to support the then proposed amending formulas postponed patriation indefinitely in 1965 and 1971. Garth Stevenson queried as to whether or not this would have been the case if a smaller province had not endorsed the formula.[54]

Trudeau had raised the threat to unilaterally patriate the Constitution in 1975. This threat was not taken seriously at the time. The federal government may have felt that the public opinion was moving in a centralist direction. This seemed evident with the defeat of the Clark government and its approach to federalism based on the idea of a 'community of communities'. The pre-eminence of the centralist forces was also apparent with the 'no' vote to sovereignty association in the 1980 Québec referendum. In addition, the separatist government in Québec began to lose in a number of by-elections, thus indicating that perhaps the PQ were on their way out. The opportunity had to be seized while it was available.[55]

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[53]Alberta Federal and Intergovernmental Affairs, **Eighth Annual Report to March 31, 1981** (Edmonton, 1982), 19-20.

[54]Stevenson, 250.

[55]Stevenson, 250.

The federal government's strategy was to ask the British Government to ensure that the British Parliament passed a bill that would terminate Britain's power to amend Canada's Constitution. At the same time, the British Parliament would enact a law entrenching a charter of rights (similar to that discussed in 1980), an amending formula and the principle of equalization. Documentation to this effect was tabled in the House of Commons.[56]

Based on past experience, Trudeau assumed that the British Parliament would cooperate. This assumption, however, was incorrect. Political lobbying by the provincial governments at Westminster proved to be very effective. In addition, the Tory government in Britain shared philosophical ideas with the Tory opposition in Canada.[57]

Ontario and New Brunswick supported this federal package. So did NDP leader Ed Broadbent. Public opinion supported a charter of rights and freedoms despite the fact that Trudeau had broken convention by proceeding without the support of the provincial governments. The federal opposition, the other eight provinces and the major newspapers in Canada were all in opposition to the government's proposals. The strongest opponents were the eight premiers, dubbed by journalists as the "gang of eight".[58] They were described by Edward McWhinney as "an unholy alliance of mutually incompatible personalities, with quite disparate political, social, and economic interests and linked only by a common dislike of Prime Minister Trudeau."[59] According to Stevenson, the real reason behind their disapproval of Trudeau was that he had effectively undermined their objective of trading their support for the patriation package for greater provincial powers. The Anglophone provincial leaders were vehemently opposed to the idea of letting the citizens choose an amending formula through a

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[56]See Alberta Federal and Intergovernmental Affairs (1981), 20.

[57]Stevenson, 250-251.

[58]Stevenson, 251-252.

[59]Edward McWhinney, **Canada and the Constitution 1979-1982: Patriation and the Charter of Rights** (Toronto: University of Toronto Press, 1982), 92.

referendum. In addition, some of them were opposed to a charter of rights and freedoms because they felt that it represented a dangerous move away from the tradition of the supremacy of Parliament.[60]

Citizen Demands vs. Government Demands for Constitutional Change

Between October 1980 and January 1981, a special joint Parliamentary committee considered the government's proposed package. The committee heard testimony and received written submissions from a multiplicity of groups and individuals. Most of the non-governmental delegations focused on the charter of rights and freedoms. The federal government was partially influenced by these testimonials and submissions and subsequently made several improvements to the charter. The changes included: a mechanism whereby the charter could be enforced by the courts; the significant weakening of a preliminary statement designed to limit the scope of the charter; the strengthening of the legal rights provisions; the prohibition of discrimination based on age or mental and physical disability; the extension of minority education rights to include those children whose parents were educated in one of the two official languages, even if another language was their mother tongue; the improvement of equality provisions and the addition of section 28; and the affirmation of existing denominational rights. As a result, the federal government gained greater support for its constitutional proposals despite the fact that its changes were in a direction directly opposite to the demands of the provinces.[61]

Other changes were made to satisfy Saskatchewan, a province that did not come on side with the "gang of eight" until February 1981. Such changes included: a section which expanded and clarified the powers of the provincial governments over natural resources; a more detailed reference to equalization payments; limitations on the use of referenda for the

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[60]Stevenson, 252-253.

[61]Stevenson, 253.

purpose of amending the constitution; and a stipulation that the initiation of constitutional amendments could come from the provinces. The amending formula requirement that provinces from a region must have the support of at least 50 percent of the population was made more flexible and less of an impediment to the smaller provinces in each region such as Saskatchewan and PEI.[62]

In April 1981, an announcement from the "gang of eight" was made indicating that they had agreed to support the Alberta amending formula proposed two years earlier. Under this amending formula, amendments to the Constitution, for the most part, could be made with the agreement of seven of the provinces consisting of at least fifty percent of the population. Any province, however, could opt out if it felt that the amendment reduced provincial powers. In addition, under this formula, a short list of amendments would require unanimous support. These included changes to the amending formula itself, the use of the two official languages, the monarchy and so on. Responding to the request of Québec, the "gang of eight's" proposal included a provision whereby any province which opted out of an amendment that would have been accompanied by federal spending would receive financial compensation equivalent to the amount that would have been spent in the province. At the time of its announcement, this consensus was deemed to be a futile exercise, but an announcement by the Supreme Court of Canada reversed this assessment.[63]

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[62]The provinces that did not support the constitutional package lobbied, at Westminster against it. Their efforts were not entirely in vain. They argued that the British tradition of parliamentary supremacy was contrary to the idea of a charter of rights and freedoms. A public servant lobbying on behalf of one of the Western provinces said that some of the British parliamentarians did not appear to be too knowledgeable about the issues. They thought the patriation was a francophone conspiracy against Canadians of British origin. In fact, they were surprised to find that Quebec was a member of the "gang of eight." In January 1981, the Foreign Affairs Committee of the House of Commons (U.K.) released its report which argued that Westminster was not obligated to accept the request of the Canadian government. See Stevenson, 253-254

[63]Stevenson, 254.

The Supreme Court Ruling on Unilateral Patriation

In the latter part of 1980, the governments of Newfoundland, Manitoba and Québec submitted references to their provincial courts of appeal on the constitutionality of the patriation initiative by the federal government. The federal position was upheld in the Manitoba and Québec courts. It was rejected, however, by all judges on the Newfoundland court. All cases were subsequently appealed to the Supreme Court of Canada. Several months later, on 28 September 1981, the court handed down its decision. The legality of the federal government's unilateral patriation was affirmed. Only two justices dissented. The majority of the judges also ruled that the federal government's rejection of the convention requiring provincial support on major constitutional changes rendered the federal government's proposal "unconstitutional" when interpreted in the conventional tradition.[64]

The gang of eight claimed that their position had been supported by the court's ruling. The NDP called for a further round of federal-provincial negotiations, thereby reversing its initial position of support for the federal government.[65]

Agreement in 1981

Trudeau subsequently agreed to meet with the provincial First Ministers in early November 1981. On 2 November 1981, the First Ministers met to discuss changes to the government's strategy. Three days later, they emerged to announce that an agreement had been reached. First, the Alberta amending formula was accepted by the federal government. One aspect, however, was removed: the provision on fiscal compensation. Second, the federal government agreed to modify the mobility rights provision so that discrimination in favour of provincial residents may occur when the unemployment rate in the province is higher than the

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[64]See A.-G. Man. v. A.-G. Can.; A.-G. Can. v. A.-G. Nfld.; A.-G. Que. v. A.-G. Can.; A.-G. Can. v. A.-G. Que. [1981] 1 S.C.R. 753.

[65]Romanow, Whyte and Leeson, 188-189.

national average, such as that in Newfoundland. Third, the federal government agreed to include a notwithstanding clause in the Charter which would allow Parliament or provincial legislatures to override, for five year periods, several provisions in the Charter. These were fundamental freedoms, legal rights and equality rights. In return for these changes, all provinces except Québec agreed to back the federal government's constitutional package.[66]

To achieve full legitimacy for the constitutional package, further modifications were made in an attempt to secure Québec's support. First, the provision for financial compensation for provinces which opt out of amendments was restored, but only if the amendment dealt with the transfer of powers over education and culture. Second, Québec would not be bound by the provision requiring it to offer education in English to children of English-speaking Canadian citizens educated outside Canada. Québec would still be required, however, to provide English language education to the children of Canadian citizens who were educated in English in Canada. This compromise was not enough for the Parti Québécois.[67]

Native peoples and women's groups lobbied intensely in opposition to the new agreement. Of interest is the fact that these groups were supported by both opposition parties, even though the parties had insisted on the negotiations that resulted in the new agreement. The former wanted the restoration of the provision affirming their aboriginal and treaty rights; the latter were concerned about the ability of the notwithstanding clause to override the equality clause under section 28 which declares that the rights guaranteed in the Charter applies to both men and women. As a result of intense lobbying, the native rights clause was modified to provide for constitutional protection of existing rights. This modification was made to respect the wishes of Alberta. All provinces but Québec agreed to this modification. All were in

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[66]Romanow, Whyte and Leeson, 209.

[67]Romanow, Whyte and Leeson, 210-211.

agreement when it was proposed that Section 28 of the Charter should not be subject to the notwithstanding clause.[68]

The revised constitutional package was passed in Parliament and was subsequently adopted by the British Parliament in March 1982. Thereafter, it was known as the Constitution Act, 1982. Canada had finally Constitution. After fifty four years of negotiations, Canada finally had an amendi In addition, Canada now had a 'Charter of Rights and Freedoms': a provisi that ly recognized for the first time, the rights of the citizens of the country. This was a great acc mplishment indeed. Or was it? The next chapter will examine the consequences of patriation without the support of Québec.

[68]Stevenson, 256-257.

CHAPTER FOUR

AND NO ONE CHEERED: REMEDYING THE 1982 MISFIRE

> **Behind closed doors, first at Meech Lake and then at the Langevin Block, the eleven first ministers sealed a deal that not even they, at the outset, thought possible. In the process, they exposed some private demons.**
>
> **Andrew Cohen**[1]

Although Ottawa was not legally required to secure the assent of Québec to patriate the Constitution the 1981 Supreme Court decision highlighted the importance of the convention of securing the support of all the provinces. Politically, the implications of not securing Québec's support were significant. The demands for substantive changes to the Constitution grew out of the Quiet Revolution of the 1960s in Québec. Until 1980, many within and outside Québec assumed that major constitutional changes would not take place without the support of the government of Québec.[2] This isolation brought humiliation to Québec. After all, Québec had cooperated as a valued member of the "gang of eight". Liberal Justice Minister Jean Chrétien understood the significance of such isolation and had hoped that Manitoba would not give its support to the 5 November 1981 compromise so that Québec would not be the only province left out.[3] The amending formula, mobility rights, and minority language education rights were officially given by the government of Québec as the most objectionable aspects of the compromise. With respect to the amending formula, Québec's objection was not the absence of a veto, but with the restrictions placed on fiscal compensation to the provinces opting out of constitutional amendments that would transfer powers to Parliament. Québec wanted fiscal compensation for all instances in which it might choose to opt out. The

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[1]Andrew Cohen, "That Bastard Trudeau," **Saturday Night**, June 1990, 38.

[2]Stevenson, 258.

[3]Stevenson, 259.

compromise only provided for fiscal compensation in the areas of education and culture.[4] In the end, something that Québec believed would never happen did take place. On 17 April 1982, the Canadian Constitution was patriated without its support. While many Canadians saw the Charter of Rights and Freedoms as a great victory for individual rights, for others there was little reason to celebrate. The tragedy of this outcome has been highlighted by many. Donald Smiley asserts that:

> The short-run political impact on Quebec of the constitutional developments between the "consensus" of November 5 and the proclamation of the Constitution Act on April 17 has been to compromise national unity.[5]

Smiley concludes that "there is little cause for national self-congratulation in the Constitution Act, 1982 and the procedures by which it became a part of the constitution."[6] Smiley recognized the gains brought about by the Act, including the ability of Canadians to amend their own Constitution, greater protection of legal and democratic rights and the placement of the procedures of constitutional amendment from the realm of convention to that of law. He warned, however, that these gains are outweighed by the damage done to the political, legal and constitutional order in Canada. It amounts to a betrayal of the commitments of renewed federalism made to the Québec electorate after the 'no' vote in the 1980 referendum. One cannot deny Smiley's assertion that this betrayal has further jeopardized the relationship between Québec and the Canadian community.[7]

Also reflecting on the implications of the Constitution Act, 1982 Daniel Latouche notes:

> For twenty years, Canadians and Québécois were engaged in a challenging political dialogue, their first such encounter. Throughout the process, the

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[4]Stevenson, 259.

[5]Donald Smiley, "A Dangerous Deed: The Constitution Act, 1982," in **And No One Cheered: Federalism, Democracy and The Constitution Act**, eds. Kieth Banting and Richard Simeon (Toronto: Methuen Publications, 1983), 77.

[6]Smiley (1983), 93.

[7]Smiley (1983), 93.

> exasperation always ran high: "What does Quebec want?" "What is English Canada?" But already we remember these questions with nostalgia. To have come so far, and to get so close!....
>
> Now we know. There will be no "New Canada."
> Perhaps it was doomed to failure from the start. At last we are told, we can invest our replenished energies and collective imagination in solving the so-called "real" problems we neglected for so long: unemployment, inflation, re-industrialization. But when one looks at the results achieved in the constitutional realm, maybe we should leave these problems well enough alone.[8]

Although not immediately remedied, the exclusion of Québec from the 1982 patriation was not forgotten. It was not until new political leaders were installed in Ottawa and in Québec that concrete measures to remedy this regrettable end were proposed.

The Impetus for Change

On 4 September 1984, a Conservative government under the leadership of Brian Mulroney was elected at the national level. This government pledged its commitment to reconciling the constitutional question with Québec.[9] In addition, in the 2 December 1985 provincial election in Québec, the Parti Québécois was defeated by the Liberals. The new Premier, Robert Bourassa, was seen by many as a federalist; he was willing to work within the federal system to resolve the constitutional grievances of Québec.[10] In fact, in February 1985, a Quebec Liberal party position paper, **Mastering our Future**, listed five conditions under which the Constitution Act, 1982 would be accepted by a Liberal government in Québec. These were:

explicit recognition of Québec as a 'distinct society'

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[8]Daniel Latouche, "The Constitutional Misfire of 1982," in **And No One Cheered: Federalism, Democracy and The Constitution Act**, eds. Keith Banting and Richard Simeon (Toronto: Methuen Publications, 1983), 96.

[9]Simeon, S9.

[10]Simeon, S9.

increased powers over immigration;

a role in the appointment of judges to the Supreme Court of Canada

limitation of the federal government's spending power; and

a full veto on all constitutional change.[11]

At an academic conference at Mont Gabriel on 9 May 1986, Gil Rémillard, Minister of Intergovernmental Affairs, formally presented the above points as the Québec governments's five conditions for giving its assent to the Constitution Act, 1982,[12] thereby returning to the constitutional table as a full participating member. Rémillard warned, however, that:

> ...it is not only up to Quebec to act....Our federal partners must not sit back idly; we expect concrete action on their part, action that is likely to steer the talks in the right direction. The ball is not only in Quebec's court, but also in the court of Ottawa and the other provinces.[13]

While Ottawa's reception was initially cool to the Québec demands, on 4 July 1986, Prime Minister Brian Mulroney declared that it was time to renew constitutional negotiations. For the month of July, Bourassa attempted to start the ball rolling by sending a team of officials to sell the five conditions presented at Mont Gabriel to the provinces. The veto for Québec, and the 'distinct society' clause received a cool reception from some of the Premiers.[14]

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[11]See Canada, **The 1987 Constitutional Accord: The Report of the Special Joint Committee of the Senate and the House of Commons** (Ottawa: Queen's Printer, 1984), 5.

[12] These conditions were outlined in a speech delivered at Mont Gabriel entitled "Nothing Less Than Quebec's Dignity is at Stake in Future Constitutional Discussions." This conference was organized by the Ecole nationale d'administration publique, the Institute of Intergovernmental Relations of Queen's University and the Quebec newspaper, Le Devoir.

[13]"Quebec minister outlines conditions for successful talks on Constitution," **Globe and Mail**, 10 May 1986, A5.

[14]Campbell and Pal (1989), 240.

Toward Québec's Rightful Place

On 10-12 August 1986, at the 27th Annual Premier's Conference in Edmonton, Bourassa asked the Premiers to include Québec's status in Confederation as one of the agenda items. The Premiers of Alberta, Saskatchewan and Manitoba wanted the meeting to focus on the economy and agricultural issues. They conceded, however, when faced with Québec's threat to refrain from participating in any constitutional discussions that did not deal first and foremost with the grievances of Québec. The Premiers also realized that constitutional change in areas of importance to them was not possible without the participation of Québec.[15] Moreover, prior to the meeting, Prime Minister Brian Mulroney had written to each of the Premiers and asked them to put aside their own constitutional agendas and focus their efforts on constitutional amendments that would secure Québec's signature to the Constitution Act, 1982.

On 12 August 1986, "The Edmonton Declaration" was released by the Premiers. It proposed a two-stage process for constitutional reform. The declaration stated:

> The premiers unanimously agreed that their top constitutional priority is to embark immediately upon a Federal-Provincial process, using Quebec's five proposals as a basis for discussion, to bring about Quebec's full and active participation in the Canadian federation.
>
> There was a consensus among the Premiers that they would pursue further constitutional discussions on other matters raised by provinces, including Senate reform, fisheries, and property rights.[16]

No timetable or other specifics were mentioned. Bourassa, however, during an informal luncheon at the Edmonton conference, proposed an improved amending formula whereby constitutional amendments would require the support of seven provinces with at least 75% of the population. This formula effectively allowed for a Québec veto. According to Bourassa, this

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[15]Campbell and Pal (1989), 240-241.

[16]Alberta Federal and Intergovernmental Affairs, **Fourteenth Annual Report to March 31, 1987** (Edmonton, 1989), 55.

formula was 'more Canadian' because first and foremost, Canada is a country of regions.[17] There was no support, however, for this proposal. Once the declaration was released, Bourassa announced: "It's a good day for Canada."[18] Québec had secured support for its constitutional agenda. The premiers agreed to deal with Québec's five proposals before pursuing their own provincial agendas.

Despite its support for the declaration, the federal government ruled out formal negotiations on this subject until 1987. They felt that the process should not be rushed. The upcoming November First Ministers' Conference was therefore ruled out as a possible occasion to discuss the Edmonton declaration.[19] Senator Lowell Murray claimed:

> We cannot afford as a country to fail a third time....We should have good indications that Quebec, the federal government, and the other provinces will be able to come to an agreement before we begin formal negotiations.[20]

In the following weeks, the Québec Intergovernmental Affairs Minister went on a follow-up tour to the provincial capitals. His federal counterpart, Senator Lowell Murray and the secretary to the cabinet for federal-provincial relations, Norman Spector also toured the provincial capitals.[21] On 1 October 1986, in the Throne Speech, the federal government reiterated its message to Québec that its five demands were acceptable. It was stated that:

> The Canadian Charter of Rights and Freedoms and the Constitution remain incomplete without the assent of Quebec. My Ministers have begun consultations with the provinces on this important subject. Should there appear reasonable prospects for agreement, formal negotiations will proceed in the expectation that Quebec will take its rightful place as a full partner in the Canadian Constitution.[22]

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[17]Campbell and Pal (1989), 241.

[18]"Premiers set for discussions on Quebec and Constitution," **Globe and Mail**, 13 August 1986, A2.

[19]Campbell and Pal (1989), 241.

[20]See "Premiers set for discussion on Quebec and Constitution," A2.

[21]Campbell and Pal (1989), 241.

[22]See House of Commons, **Debates**, Vol. 1, 1 October 1986, 11-12.

In late March 1987, the fourth and final First Ministers' Conference on native self-government was to take place. On 12 March 1987, Bourassa announced that he would not attend.[23] The lethargic pace of the discussions on Québec's five demands and the clear lack of results brought about this boycott. This refusal revealed the seriousness of Québec's continued non-participation. There were numerous constitutional matters that could not be dealt with without Québec's participation.[24]

On 17 March 1987, the federal government announced that it was ready to discuss Québec's five demands. A First Ministers' Conference would be held on 30 April 1987 at Meech Lake. The optimism of Premier Bourassa about the future meeting was short-lived. Premier Getty of Alberta announced that he could not agree to any deal that would confer upon Québec a special status. He stated:

> We wish to make very clear that there can be no special status for any province....It is our fundamental position that Canada must be made up of ten provinces with equal status in all respects....There cannot be provinces with special status. There cannot be A and B provinces....This is not a barginable position.[25]

A week later, Québec announced that it would boycott all future constitutional conferences until its five conditions were met.

In preparation for the Meech Lake conference, Senator Murray was asked by Prime Minister Mulroney to write to each provincial government outlining Ottawa's position on Québec's five demands. The premiers were again contacted during the ten days prior to the conference. A formal meeting was subsequently held where each provincial leader outlined his position. British Columbia, Alberta, Manitoba and Nova Scotia were each opposed to one or

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[23]Levesque did not participate in the earlier conferences either. He attended, but as an observer. In addition, Quebec did not give its support to the 1983 amendment on Aboriginals.

[24]Campbell and Pal (1989), 242-243.

[25]"PM invites 10 premiers to discuss Quebec constitutional proposals," **Globe and Mail**, 18 March 1987, A3.

two of the five conditions. The opting out demand and the veto were particularly problematic.[26] National aboriginal leaders were angered with the approach adopted by the federal government. Four wrote the Prime Minister and demanded a role at Meech Lake. In the letter, George Erasmus, leader of Canada's status Indians stated: "It is incredible that Brian Mulroney and the premiers can contemplate such major amendments to Canada's Constitution without us, especially when most of the agenda items affect us."[27]

Meech Lake: The Discussions

The First Ministers arrived at Meech Lake on 30 April 1987. The meeting had been portrayed as a preliminary gathering at which the views of the participants would be explored.[28] In fact, according to Roland Penner, attorney general of Manitoba, it was not really a big deal. "A letter came from Prime Minister Mulroney," he remembered. "Come down to Meech Lake, I just want to talk to you said the spider to the fly."[29] With the exception of Alberta and Québec none of the governments had declared their formal positions prior to the meeting. The mood was anything but buoyant and optimistic. Mulroney and Bourassa, however, in keeping with their election promises, were intent on reaching an agreement.[30]

In a meeting room in the second storey of Wilson House,[31] the First Ministers met in a closed door session for about ten hours. The Conference officially began at noon. Each of Québec's five conditions were discussed, item by item. In order to create momentum for

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[26]Campbell and Pal (1989), 243-244.

[27]"Native chiefs demand role at meeting on Quebec," **Globe and Mail**, 25 April 1987, A2.

[28]Campbell and Pal (1989), 244.

[29]Cohen (June 1990), 38.

[30]Campbell and Pal (1989), 244.

[31]This is a building at Meech Lake often used for cabinet meetings.

discussing the more controversial items, the least controversial ones were discussed first. Although the talks did not start well, agreement was reached relatively quickly on three of Québec's five conditions.

They first began discussions on Québec's Supreme Court proposal. Québec wanted the long-standing custom that three of the nine seats on Canada's highest court be reserved for justices from Québec to be entrenched in the Constitution. After two hours of musing about the expansion of the court to give one justice from each province a seat, they agreed to Québec's condition.[32] The condition with respect to immigration was agreed to fairly quickly. Before supper, the federal spending on shared cost programs condition was resolved. Then, they examined and reached agreement on the Québec demand for a veto over constitutional amendments. When the discussions reached the 'distinct society' issue, many of the provinces were not in favour of conferring a special status to Québec. The discussion then turned from the unresolved 'distinct society' issue to Senate reform.[33] Senate reform was not one of the five Québec conditions. It was placed on the agenda after Alberta Premier Don Getty arrived at Meech Lake with the demand that annual federal-provincial constitutional conferences be established to discuss Senate reform. Getty made it clear that the Meech Lake deal would be rejected if Senate reform was not advanced. Discussion on this topic punctuated much of the ten-hour meeting. At one point, Mulroney suggested the abolition of the Senate. This bombshell was not taken seriously at first.[34] Peckford, who supported this idea, recalls Mulroney saying:

> Look, if we're going to get into a big debate on this, I am prepared to go out of here tonight and make a statement that the Senate will be abolished. How's that? Now,

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[32]Cohen (June 1990), 40.

[33]Campbell and Pal (1989), 245.

[34]Cohen (June 1990), 42.

> you're all here pissing on the Senate, you're all saying that it's no good. Let's do something about it.[35]

Strong advocates of Senate reform, such as Getty, did not want an abolished Senate. They feared that such a move might kill any chances of reforming it to look something like a House of the Provinces. Getty, as a way of determining the Prime Minister's sincerity on the issue, suggested that they take an approach similar to that adopted for the Supreme Court. They could allow the provinces to provide lists of candidates from which the federal government would choose.[36]

Upon agreement on Senate reform, the First Ministers revisited and reached an agreement on the 'distinct society' issue. At one point, Vander Zalm questioned the 'distinct society clause. He questioned how much more power it would give "the French." His colleagues feared that he would oppose it if he received advice from Victoria. When Vander Zalm decided to leave the room to call Victoria for some advice, Mulroney said "Do that, Bill, but I want you to know that this is absolutely key to making this go."[37] Not only did Vander Zalm not leave the room, but he turned to Mulroney and said "If you are telling me you need this, Prime Minister, I'm prepared to accept it."[38] An accord to bring Québec back into the Canadian Constitutional family had been reached by 9:45 that evening.[39]

Meech Lake: The Deal

The agreement reached on 30 April 1987 was really an agreement in principle consisting of six rather informally stated elements. The first five covered the conditions set out

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[35]Cohen (June 1990), 42.

[36]Cohen (June 1990), 42

[37]Cohen (June 1990), 43.

[38]Cohen (June 1990), 43.

[39]Campbell and Pal (1989), 245.

by Québec. The sixth dealt with the subsequent round of constitutional negotiations, the entrenchment of the annual First Ministers' Conference on the economy and a provision for interim appointments to the Senate.[40] The wording of the 'distinct society' and spending power provisions was not fully supported by all the premiers. When the terms of the accord known as the 'Meech Lake Communiqué were presented, this absence of full support on the two said provisions caused some anxiety among Anglophone Canadians.[41] The task of translating the text into constitutional language rested with the federal government. Once translated, the text would be formally approved at a First Minister's Conference to be held within weeks.[42]

The communiqué dealt first with 'Québec's distinct society'. It stated that constitutional interpretation in Canada should be consistent with

> the recognition that the existence of French-speaking Canada, centred in but not limited to Quebec, and English-speaking Canada, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada... [43]

In addition, the Constitution should be interpreted recognizing that within Canada, Québec is a distinct society. Moreover, the responsibility of all governments in Canada should be to preserve the abovementioned fundamental characteristic while the role of the Québec government is to 'preserve and promote' Québec's distinct identity.[44]

The second section of the communiqué dealt with 'immigration'. It called for constitutional entrenchment of the requirement that the federal government negotiate immigration agreements consistent with the needs and circumstances of any province that

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[40]Campbell and Pal (1989), 245.

[41]Stevenson, 260.

[42]Peter W. Hogg, **Meech Lake Constitutional Accord Annotated** (Toronto: The Carswell Company Limited, 1988), 56.

[43]Hogg, 56

[44]Hogg, 56.

requests such an agreement. Once the agreement has been reached, it could be entrenched in the Constitution if the province so wishes. Within each agreement, federal immigration standards and objectives would have to be met. Also included were the details of an immigration agreement reached between Québec and the federal government which incorporated the principles of the 1978 Cullen-Couture agreement,[45] and established several guarantees to Québec with respect to the number of immigrants entering Québec as well as reception and integration services. With respect to the latter, the federal government would withdraw from such services and provide reasonable compensation so that Québec could provide these services.[46]

The third section dealt with was the 'Supreme Court of Canada'. It simply entrenched the current practice, provided for by statute, that at least three of the justices appointed to the Supreme Court of Canada be from the system of civil law.[47] In addition, the federal government agreed that when a vacancy arises, the name of the person appointed shall come from a list of candidates put forward by the provinces. This list, however, is subject to federal approval.[48]

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[45]A voluntary immigration agreement was reached between federal and Quebec Immigration Ministers, Bud Cullen and Jacques Couture in February 1978. The two Ministers agreed to establish an Ottawa-Quebec immigration committee which would regulate immigration levels into Quebec and select immigrants based on the province's needs. See Campbell and Pal (1989), 245.

[46]Hogg, 58.

[47]In Quebec, the system of civil law is used whereas in the rest of Canada, the system of common law is used.

[48]The federal government presently has the sole legal authority to appoint justices to the Supreme Court of Canada.

The fourth section dealt with the federal 'spending power.'[49] It stipulated that reasonable compensation by the federal government would be given to any province that opted out of future national shared-cost programs that fell in areas of exclusive provincial jurisdiction. The compensation, however, would only be granted if the province established, or if necessary, modified existing programs to meet national objectives.[50]

The fifth section focused on the amending formula. It stated that the present general amending formula under section 38 of the Constitution Act, 1982 should be maintained.[51] It also guaranteed reasonable compensation should a province choose to opt out of a constitutional amendment transferring provincial powers to Parliament. Because governments cannot opt out of the amendments to subjects under section 42 of the Constitution Act, 1982, the consent of Parliament and all of the provinces was needed to amend this section.[52] The logic behind these five sections was that of provincial equality, a point found in the preamble of the Accord. While Québec was given its requested five conditions, so were all the other provinces. In other words, what Québec was granted to secure its support of the Constitution Act, 1982, the others also received. Some may argue that the other provinces did not get the

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[49]Through a number of provisions in the Constitution Act, 1867, the Parliament of Canada has the authority to spend money it raises through borrowing, taxation and so on. While this power is not explicitly stated, it is inferred from its powers contained within section 106 (appropriation of federal funds to serve the public), section 91(3) [to raise money through taxation], section 91(1A) [to legislate in relation to 'public debt and property'] and from its general power in the introduction to section 91, to make laws for the peace order and good government of Canada. See Hogg, 38.

[50]Hogg, 58-59.

[51]The general amending formula requires the consent of the House of Commons, the Senate, and at least two-thirds of the provinces which together represent at least fifty percent of the population. The two-thirds requirement amounts to at least seven of the provinces. See **A Consolidation of the Constitution Acts 1867 to 1982**, 68-69.

[52]Hogg, 60.

'distinct society' status but if the agreement is read carefully, it will be discovered that the provinces have the right to preserve the 'fundamental characteristic of Canada.'[53]

Finally, the sixth section dealt with a 'second round'. This required that a First Ministers' Conference on the Constitution be held at least once a year and that the next conference should be held within one year of the proclamation of the Meech Lake Accord but no later than the end of December 1988. The agenda items of these meetings including Senate reform, fisheries and other agreed upon matters were to be entrenched in the Constitution. The annual First Ministers' Conference on the Economy and the agreement that until the Senate is reformed, the federal government will appoint Senators from candidate lists provided by the provinces where the vacancies occur, subject to federal approval, was also to be entrenched.[54]

Approximately one month later, on 2 June 1987, the First Ministers met at the Langevin Block across from Parliament to examine the legal text of the original statement of principles. During the month, an all-party consensus to support the Accord was reached at the federal level. Short of the media, few mechanisms existed whereby the Meech Lake Accord could be criticized. On the other hand, some of the provincial leaders faced considerable political pressure. The nationalists in Québec criticized Bourassa stating that Québec did not fare well on the 'distinct society' and spending power clauses. This criticism was made at an open committee hearing, the only one allowed by the provincial premiers. Interest groups in Manitoba and Ontario subjected Pawley and Peterson to political pressure as well. They argued that the national government had been weakened and that this would render it unable to develop social programs.[55]

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[53]Campbell and Pal (1989), 250.

[54]Hogg, 60.

[55]It is also noteworthy to mention that although native groups and the territories criticized the agreement, they lacked a means of political intervention. They had no real ability at this point to influence the outcome. See Campbell and Pal (1989), 262.

At the Langevin Block, the First Ministers had intended to quickly approve and sign the final text of the Meech Lake Accord. In fact, the meeting was scheduled to begin at ten o'clock and the signing ceremony was scheduled for two o'clock. The First Ministers, however, did not emerge until some nineteen hours later at 5:30 a.m. on 3 June 1987. What was intended to be a simple approval of the April 30 agreement turned into a re-examination of some of the particulars agreed to at Meech Lake.[56] The spending power and the 'distinct society' clause dominated the discussion at the outset as Manitoba and Ontario were not satisfied with the existing provisions. Especially concerned about the spending power provision, Pawley argued that the ability of provinces to opt out of federal programmes and set up their own, with compensation, meant that new national programs would not be forthcoming. As a New Democrat, Pawley was concerned about the fate of national programs such as medicare. He maintained that the spending power provision was too vague. It did not, for example, specify who would determine the objectives. Pawley did not want to leave any room for doubt.[57]

In fear that Québec could override the individual rights of women, aboriginal people and multicultural Canadians by invoking the collective rights of the distinct 'society clause', Peterson wanted a more precise definition. This position was largely influenced by pressure exerted by women's groups in Ontario as well as the fact that Peterson had intended to call an election within six months and did not want to alienate his constituents. Like Pawley, Peterson did not want to leave any room or doubt. Peterson was faced, however, with a dilemma. If the clause was clarified, it would be problematic to others at the table. On the other hand, if it remained ambiguous, different interpretations of the clause could emerge. It would be up to the courts to decide. One of Canada's leading constitutional experts, Peter Hogg, was one of Peterson's advisors Hogg felt that the 'distinct society' clause would give Québec only a few real powers. Other advisors to Peterson such as Ian Scott, Ontario's attorney general, questioned Bourassa

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[56]Cohen (June 1990), 44.

[57]Cohen (June 1990), 44-45.

as to which would have preeminence--collective rights under distinct society or individual rights in areas such as linguistic rights for the English minority in Québec.[58] Bourassa, irritated but polite and restrained in his reply said, "And what is the interest of an elected Ontario politician in the language dispute in Québec?"[59]

In the end, Québec did not accept any dilution of the existing clause. Pawley and Peterson also refused to budge from their positions. According to Andrew Cohen,

> ...Mulroney had virtually abdicated as guardian of the federal interest. He had become a conciliator. "He kept asking if we had a deal," said one premier, afterwards. "'Well, John, do we have a deal? Well Brian, do we have a deal?' It was as if he didn't care that much as long as he got one."[60]

At approximately 3:00 a.m., the tensest moment during the meeting, Peterson still could not concede. In frustration, he threw his arms up and shook his head. According to Cohen, Peterson

> looked at Bourassa across the table and said, "I'm sorry, Robert. I just can't go along with the wording." Bourassa looked down and murmured: "there's no reason to say you're sorry."....Bourassa tried to console Peterson. His eyes moist, he whispered: "You're not the problem, David...I know who the problem is. It's that bastard...Trudeau." An eerie silence descended. Mulroney called a recess.[61]

This stalemate came to an end when Mulroney called for a final vote. After an affirmative response had been given by the premiers of Québec, Alberta, Saskatchewan, Nova Scotia, Newfoundland, New Brunswick, PEI and British Columbia, Pawley said that he was unhappy with the deal but would support it and take it back to the people of Manitoba to decide through public hearings, as required by the rules of the Manitoba legislature. Pawley warned: "I'm signing this, but you should know my reservations. If those public hearings give me additional

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[58]Cohen (June 1990), 44-45.

[59]Cohen (June 1990), 45.

[60]Cohen (June 1990), 46.

[61]Cohen (June 1990), 46.

concerns, I'll be back at the table. They will not be a rubber stamp."[62] Mulroney then turned to Peterson and said "Well, David, do we have a deal?"[63] After a long silence followed by a five minute speech restating his reservations, Peterson threw up his pencil, said "I'm in, Prime Minister" and slumped in his chair.[64] Six and a half hours after they emerged, the noon official signing ceremony took place.

The Langevin meeting produced seven changes to the original principles agreed to at Meech Lake. The most significant was to the 'distinct society' clause. The narrative describing the 'character' of Canada changed from "French-speaking Canada" and "English-speaking Canada" in the Meech Lake Accord to "French-speaking Canadians" and "English-speaking Canadians" in the Langevin agreement. Apparently, the former implied the existence of two Canadas while the latter implied the existence of one.[65] In addition, a new section was added. Section 2(4) preserved the rights of Parliament and the provincial legislatures, especially in the area of language rights, so that they would not be affected by the 'distinct society' clause. This change was made to guarantee the status quo in the division of powers to the two levels of government; a guarantee that nothing had changed and therefore each would continue to have authority over language policy.[66]

Significant changes were also made to the spending power provision. In a key political compromise, Robert Bourassa gave his support for a change in the description of the principles set out at Meech Lake while Howard Pawley backed off on his opposition to this provision. The Meech Lake Accord provided for financial compensation to provinces that chose to opt out of national programs and initiate their own "compatible with national objectives." At Langevin, the

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[62]Cohen (June 1990), 46.

[63]Cohen (June 1990), 46.

[64]Cohen (June 1990), 46.

[65]Campbell and Pal (1989), 264.

[66]Campbell and Pal (1989), 264.

word 'the' was added to the original text to read "compatible with **the** national objectives." This compromise appeared to quell the apprehensions of those such as Pawley who felt that the Meech Lake wording was too vague. In addition, the Langevin clause specifically refers to "shared-cost programs established by the Government of Canada" whereas the Meech Lake clause made no reference to the establishment of anything by the national government. These changes clarified the spending power enormously and affirmed to a larger extent, the role of the federal spending power in the establishment of shared-cost programs in areas of federal jurisdiction.[67] In exchange for this concession made by Bourassa, a new provision was added to the spending power section. The new clause, section 106A(2) stated that the spending power section did not expand the jurisdiction of the two levels of government. This assured Bourassa that the federal spending power would be restricted.[68]

A new clause, section 95B(3), was added to the immigration provisions established at Meech Lake. The concern that an immigration agreement would have the "force of law" and weaken the Charter of Rights was addressed with the inclusion of a clause insisting that the Charter applies to such agreements.[69]

A minor change was also made to the Supreme Court proposal from Meech Lake. A new section (101D) was added to ensure and extend judicial independence. The sections dealing with the amending formula and the "second round" did not undergo any changes. Two principles not contained in the Meech Lake Accord were added to the Langevin agreement. In response to concerns raised at the meeting about the threat posed by the 'distinct society' clause to the Charter, a section was added to protect certain Charter rights regarding multiculturalism and Canada's aboriginal peoples. It provided that "Nothing in section 2 of the

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[67]Campbell and Pal (1989), 264.

[68]Campbell and Pal (1989), 265.

[69]Campbell and Pal (1989), 265.

Constitution Act, 186[illegible] ffects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982 or class 24 of section 91 of the Constitution Act, 1867." [illegible]other statement was added in response to concerns by Alberta Premier Donald Getty about the 'distinct society' clause. The statement that the Constitution "would recognize the principle of equality of all of the provinces" was included in the preamble of the 1987 Accord and in the motion for a resolution to amend the Constitution.[70] At the signing ceremony on 3 June 1987, Mulroney declared, "Today we welcome Québec back to the Canadian constitutional family."[71] Bourassa added, "Canada is one of the greatest countries in the world.[72]

The next step was for the First Ministers to take the Meech Lake-Langevin Accord back to their legislative assemblies and secure its support. Chapter five will examine what happened.

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[70]Campbell and Pal (1989), 265.

[71]"Accord welcomes back Quebec," **Globe and Mail**, 4 June 1987, A1.

[72]See "Accord welcomes back Quebec," A1.

CHAPTER FIVE

FACTORS INSTRUMENTAL IN THE FAILURE OF THE MEECH LAKE ACCORD: THE PROCESS AND THE THREE YEAR TIME LIMIT

> **I thought, and many people thought, that within a matter of months after the signing all provinces would have ratified it. Nobody anticipated that governments would change, signatures would be repudiated, and all of a sudden a simple, straightforward document of unity would become a catch-all for everybody's wishes as governments changed across the country.**
>
> Brian Mulroney
> Prime Minister of Canada[1]

Canada's First Ministers returned to their respective capitals after agreeing to seek ratification of the Accord as soon as possible. The deal that had been reached had to be accepted or rejected. There would be no room for amendments. It was that simple. There was little reason, however, to be worried about the Accord's passage. Robert Bourassa was the first to achieve ratification. After an emergency debate in the National Assembly, Québec ratified the Accord on 23 June 1987. This activated the three year time limit within which the Accord had to be passed, as stipulated in section 39(2) of the Constitution Act 1982. Other governments also initiated the ratification process within their legislative spheres. Ratification by the other parties to the Accord in chronological order were as follows: 20 September 1987 by Saskatchewan; 7 December 1987 by Alberta; 13 May 1988 by Prince Edward Island; 25 May 1988 by Nova Scotia; 22 June 1988 by the House of Commons (for the second time); 29 June 1988 by Ontario and British Columbia; and 7 July 1988 by Newfoundland.[2] By 23 June 1990, only eight provincial governments and the federal government had ratified the Accord.

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[1]Andrew Cohen, **A Deal Undone: The Making and Breaking of the Meech Lake Accord** (Vancouver: Douglas and McIntyre, 1990), 183.

[2]On 6 April 1990, Newfoundland rescinded its support for the Accord. See Robert M. Campbell and Leslie A. Pal, **The Real Worlds of Canadian Politics: Cases in Process and Policy**, 2d. ed. (Peterborough: Broadview Press Limited, 1991), 147-149.

Although this represented 94% of the population,[3] without unanimous consent, the Meech Lake Accord died. Alan Cairns lucidly described the failure of the Accord in which:

> the end result was a humiliating defeat for the federal government, a massive and outraged rejection of the process on all sides, an unsought boost to the alienation of the Québécois, and enhanced support for the Quebec **indépendantistes** whose goal Meech Lake had been intended to stymie.[4]

What happened? Why did an agreement that was certain to be ratified fail? No single reason can be identified. The events that unfolded indicate that the root of the problem was the agreement itself and the manner in which it was developed. This was supplemented by the way in which political leaders dealt with the Accord and how Canadians reacted to it. In the following pages, it will be argued that a multitude of factors led to the failure of the Meech Lake Accord and that no single individual or event can shoulder this burden.

First, it will be argued that the process adopted to develop and ratify the Accord was seriously flawed. Canada's First Ministers failed to recognize the degree to which the Charter of Rights and Freedoms had changed the perceptions of Canadians regarding the Constitution. The rights and freedoms contained in the Charter protected citizens from the actions of governments. As Canadians came to realize this, they were no longer content to allow governments to change the Constitution without their input. In a way, they came to see the Constitution as belonging to the "citizens" of Canada, not the government. The Meech Lake Accord did not allow for direct input by Canadians until after it had been finalized. Attempts to obtain public input after the fact angered many because they were repeatedly told that any change to the Accord would effectively kill it and be interpreted as a rejection of Québec. Furthermore, once the agreement was reached, the process adopted to obtain public input allowed for influence by well-organized interest groups and individuals to promote their personal

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[3]Office of the Prime Minister, **Notes for an Address to the Nation by Prime Minister Brian Mulroney**, Ottawa, 23 June, 1990, 2.

[4]Alan C. Cairns, **Disruptions: Constitutional Struggles, from the Charter to Meech Lake**, ed. Douglas Williams (Toronto: McClelland & Stewart Inc., 1991), 226.

agendas instead of the interests of the country as a whole. These attempts to appease the public after charges of elitism and secrecy only served to spread the opposition to the Accord.

Second, it will be argued that the perceived three year time limit was not handled with the necessary caution by Canada's First Ministers, thus contributing to the failure of the Accord. Several key political events as well as the changes in public opinion during this time period made passage of the Accord impossible.

Third, Canada's First Ministers should not have placed constitutional amendments that could be passed with the general amending formula in the same package as amendments that required unanimity. The end result was the requirement of unanimity to pass all the amendments, despite the fact that under the Constitution Act, 1982 most could have been passed with the support of Parliament, two-thirds of the provinces with at least fifty percent of the population.

Fourth, the political leadership required to develop and pass the Accord from most of Canada's First Ministers was noticeably absent. Political leaders failed to explain effectively the objective and content of the Accord to Canadians in simple and non-threatening terms. They had no co-ordinated action plan to explain the merits of the Accord. Many Canadians relied on the media, however incomplete and biased, for their information. This abdication of responsibility by Canada's First Ministers led to much misperception and confusion about the Accord. Political leadership was also noticeably absent when some leaders placed their own political future above that of the country. Others misread political signals and acted irresponsibly. Attempts to save the Accord were often too little and too late and failed to seriously consider the length of time and commitment required by the dissenting legislatures to pass the Accord. The first two factors leading to the failure of the Accord will be dealt with in this chapter. The last two factors will be dealt with in the next chapter.

The Charter, Citizens and the Meech Lake Process

The Meech Lake Accord was developed by Canada's First Ministers without direct consultation with the citizens of Canada. At the time, this did not appear to be unusual because constitutional matters have always been dealt with by governments, usually at First Minister's Conferences. In addition, political representatives, on behalf of citizens, participated in legislative debates prior to passage of the Accord in each jurisdiction. However, according to Allan Tupper:

> This process of intergovernmental negotiation, normally described as " executive federalism", has often been assailed as detrimental to the quality of Canadian democracy....But during the Meech Lake debate a new and powerful indictment was levelled at executive federalism when a range of interests challenged the capacity and willingness of the First Ministers to represent their constitutional demands.[5]

What brought about this indictment against executive federalism? Many accurately point to the Canadian Charter of Rights and Freedoms.[6] For example, according to Alan Cairns:

> The Charter brought new groups into the constitutional order or, as in the case of aboriginals, enhanced a pre-existing constitutional status. It bypassed governments and spoke directly to Canadians by defining them as bearers of rights, as well as by according specific constitutional recognition to women, aboriginals, official-language minority populations, ethnic groups through the vehicle of multiculturalism, and to those social categories explicitly listed in the equality rights section of the Charter. The Charter has thus reduced the relative status of governments and strengthened that of the citizens who receive constitutional encouragement to think of themselves as constitutional actors.[7]

By the end of 1987, many of the groups empowered by the Charter were coming forward to criticize the Accord. These included women, aboriginals, multicultural groups, minority language rights groups, and other interest groups. Although Premiers Bourassa, Pawley and Peterson were already feeling political pressure from these groups between the Meech Lake

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[5]Allan Tupper, "Meech Lake and Democratic Politics: Some Observations," **Constitutional Forum** 2, no. 2, (Winter 1991): 27.

[6]See Cairns (1991), 109. Also see Cohen (1990), 271.

[7]Cairns (1991), 109.

and Langevin meetings, criticisms became more pronounced as attempts to ratify the Accord began.

Canada's First Ministers had gathered at Meech Lake to discuss the five conditions that would bring Québec back into the Canadian Constitutional family. In August 1986, the Premiers agreed to put their own constitutional agendas aside and focus on securing Québec's support for the Constitution Act, 1982. Many knew that progress in areas of interest to them were not possible without the participation of Québec. It was to be "the Québec round." The ...nt was not to deal with every constitutional issue that plagued the federation; rather it was ...o deal with the constitutional deadlock which emerged after 1982. Few will deny that other important constitutional issues such as institutional reform were still outstanding. The objective of this round, however, was to deal with Québec's concerns; not Senate reform, not aboriginal issues, not Charter rights and freedoms and so on. A necessary conclusion could therefore be that it was not necessary to have these matters discussed at the negotiating table during this round. With each pursuing its own agenda, agreement on the Québec issue would have been next to impossible.

At Meech Lake, however, the focus was expanded. Shortly before the meeting began, Alberta indicated that it intended to scuttle the deal if it did not win a concession on Senate reform. Peckford and Hatfield indicated that they needed concessions on fisheries and entrenchment of property rights respectively.[8] In addition, during the negotiations, the principle of equality of the provinces was followed. In other words, whatever was granted to Québec was also granted to all the other provinces. The only exception was the "distinct society" clause. The "Québec round" thus became the "provincial round." As such, the governments were represented at the negotiating table, but citizens (Charter groups) were not.

After the 2 June 1987 meeting at the Langevin Block, a number of public input initiatives were established. On 11 June 1987 the Senate referred the entire Accord to a

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[8]Cohen (1990), 9-10.

committee. Subsequent public hearings were held. On 4 August 1987, a special joint Senate and House of Commons committee began hearings on the Accord. On 13 August, the Senate established a task force on the subject of the Accord and the north.[9] On 2 February 1988, 25 April 1988, 25 January 1989 and 6 April 1989, public hearings began in Ontario, PEI, New Brunswick, and Manitoba respectively.[10] Among others, those well-organized groups with specific Charter interests were very vocal at these hearings. Groups empowered by the Charter claimed the process used to develop the Accord was closed. They felt that their interests were not represented because their representatives were not at the table.[11] They also claimed that the Accord had a direct negative bearing on them. Women, aboriginals and multicultural groups were three of the more vocal groups.

Statements from women activists and groups were very critical of the process used to develop the Accord. According to activist Rosemary McCarney, "Eleven men met in the middle of the night while their limousines waited outside, with the engines running."[12] "The equality rights of women and minorities have been forgotten in the accord" claimed the Women's Legal Education and Action Fund.[13] Unlike the 1981 process where women's groups, such as the Advisory Council on the Status of Women, were instrumental in the inclusion of Section 28 of the Charter, they were completely left out of this process.[14] Women's groups also echoed other criticisms of the Accord. They were concerned about the impact of the "distinct society" clause on the Charter. Its ambiguity made them question whether rights guaranteed in the

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[9]See Senate **Task Force on the Meech Lake Constitutional Accord and on the Yukon and the North West Territories**, February 1988.

[10]Campbell and Pal (1991), 147-149.

[11]Cairns (1991), 251.

[12]Campbell and Pal (1991), 93.

[13]Campbell and Pal (1990), 93.

[14]See Romanow, Whyte and Leeson, 253-256.

Charter could be overridden or altered by the "distinct society" clause. They were further alarmed by the different interpretations granted to the 'distinct society' clause by the First Ministers. Some, such as Getty and Mulroney saw it as purely symbolic; that it conferred no new or special legislative powers to Québec. "It doesn't mean Québec is privileged or gains any special powers," claimed Mulroney.[15] Bourassa, on the other hand, saw it as something more than symbolic. He stated:

> The entire constitution, including the Charter, will be interpreted and applied in the light of this article on the distinct society. The exercise of legislative authority is included and this will permit us to consolidate our gains and take new ground.[16]

Women's groups argued that if the Accord did not affect equality and other rights under the Charter, it should be so stated in the Accord.[17] It should be noted that women's groups in Québec did not share this fear of women outside Québec. They did not feel that the 'distinct society' clause threatened the equality rights of women. Some even charged that women outside Québec were actually attacking the 'distinct society' clause because they wanted a homogenous country, but were afraid to come out and say so.[18]

As with women's groups, Canada's aboriginal peoples were angered by their exclusion from the process and the 'distinct society' clause. At the outset, Natives feared that the adoption of the Accord would postpone discussions on their right to self-government

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[15]**CBC National/Journal Inquiry: Is Canada Drifting Apart?**, 23 May 1990. This was a two hour television special which examined many questions surrounding national unity and the Meech Lake Accord.

[16]**CBC National/Journal Inquiry: Is Canada Drifting Apart?**, 23 May 1990. Translated from French.

[17]Lynn Smith, "The Distinct Society Clause in the Meech Lake Accord: Could it Affect Equality Rights for Women," in **Competing Constitutional Visions: The Meech Lake Accord**, eds. K.E. Swinton & C.J. Rogerson (Toronto: The Carswell Co. Ltd., 1988), 36-37.

[18]Pierre Fournier, **A Meech Lake Post-Mortem: Is Quebec Sovereignty Inevitable?** (Montreal & Kingston: McGill-Queen's University Press, 1991), 50.

indefinitely.[19] Some Native chiefs felt that the Accord implied that there were no other distinct societies in Canada. As far as they were concerned, Natives were a distinct society.[20] According to critics, "...the distinct society provision will diminish constitutional tolerance for effective expressions of aboriginal sovereignty, and distort constitutional acknowledgments of aboriginal rights."[21] Natives also felt that their longstanding demands for the creation of new provinces out of the Yukon and the North West Territories would be more difficult under the new unanimity requirement of the Accord.[22] They were also angered by the Accord because it revealed the political will to accommodate Québec, but not Aboriginal Canadians. Their immediate anger stemmed from the failure of four constitutional First Ministers' Conferences designed to define aboriginal rights. These conferences were constitutionally entrenched in the Constitution Act of 1982 through a 1984 amendment. The last of these conferences ended in failure in March 1987, approximately one month before the meeting at Meech Lake.[23] In keeping with its promise in the aftermath of the Constitution Act, 1982 to refrain from participation in future constitutional negotiations, Québec did not participate in these discussions.[24] The federal government felt that it had protected Aboriginal rights under clause 16 of the Meech Lake Accord.[25] As one critic exclaimed:

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[19]Fournier, 50.

[20]Fournier, 51.

[21]J. Edward Chamberlin, "Aboriginal Rights and the Meech Lake Accord" in **Competing Constitutional Visions: The Meech Lake Accord**, eds. K.E. Swinton and C.J. Rogerson (Toronto: The Carswell Co. Ltd., 1988), 14.

[22]Fournier, 51.

[23]See Canadian Intergovernmental Conference Secretariat (1987), 250.

[24]Cohen (1990), 67. Representatives from Quebec did attend these conferences, but only as observers. In 1987, Gil Rémillard and Raymond Savoie attended. See Canadian Intergovernmental Conference Secretariat, Appendix B, 2.

[25]Canada, **Strengthening the Canadian Federation: The Constitution Amendment, 1987**, August 1987, 3.

> At the very least, the federal and provincial first ministers must commit their governments to the proposition that bringing aboriginal people into the constitution now has the same priority that for the past three years was given to bringing Québec back into the Constitution....the distinct society provision is an impediment to doing this....[26]

Multicultural groups were also critical of the process and the entire interpretation clause of the Accord which states that:

> 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.[27]

For them, the uncertainty of the impact of the "distinct society" clause on the rights of multicultural groups and aboriginals was troubling.[28] These groups claimed that the Accord allowed linguistic duality and Québec's distinct nature to subordinate multiculturalism. Many were opposed to the Accord's definition of the fundamental characteristic of Canada in linguistic terms. They also feared that Québec would limit multiculturalism within that province to benefit the French language and culture.[29] Some, such as the Canadian Ethnographic Council went further and demanded that multiculturalism be given the same status as bilingualism.[30] The above criticisms were articulated to the various committees and task forces set up to study the Accord. For example, at the hearings of the special joint Parliamentary committee, linguistic minority and women's groups raised concerns about the impact of the "distinct society clause on the Charter. They wondered whether or not it would expand Québec's power over the Charter. In addition, they felt that the exclusiveness of the "distinct society" clause should be

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[26]Chamberlin, 18-19.

[27]Hogg, 68.

[28]Cohen (1990), 121.

[29]Fournier, 50.

[30]Campbell and Pal (1991), 93.

altered to include the aboriginal and multicultural realities of Canada. Critics also attacked the government's neglect of issues important to aboriginals. At a minimum, they argued that aboriginals should have been guaranteed a position on the constitutional agenda.[31]

These concerns were reflected in the recommendations of the various legislative committees . Among other things, the Senate committee on the Accord and the North recommended that a continuing item on the constitutional agenda should be aboriginal issues. In addition, it recommended that a "distinct society" status should also be conferred on aboriginal people.[32] The Manitoba Task Force on Meech Lake also reflected the criticisms of these Charter groups. For example, it recommended that clause 1 of the Meech Lake Accord be amended to represent the complete character of Canada, not just the French and English fact. The Task Force recommended the addition of:

> (a) the existence of Canada as a federal state with a distinct national identity;
>
> (b) the existence of the aboriginal peoples as a distinct and fundamental part of Canada;....
>
> (e) the existence of Canada's multicultural heritage comprising many origins, creeds and cultures....[33]

The Task Force also recommended that clause 16 of the Meech Lake Accord be amended from:

> Nothing in section 2 of the Constitution Act, 1867 affects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982 or class 24 of sections 91 of the Constitution Act, 1867[34]

to:

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[31]Campbell and Pal (1991), 94.

[32]Campbell and Pal (1991), 98.

[33]Manitoba Task Force on Meech Lake, **Report on the 1987 Constitutional Accord**, 21 October 1989, 72-73.

[34]Hogg, 82.

> Nothing in section 2 of the Constitution Act, 1867 affects the **Canadian Charter of Rights and Freedoms**, section 35 of the Constitution Act, 1982 or class 24 of the section 91 of the Constitution Act, 1867.[35]

Again, the above concerns were reflected in the recommendations of the New Brunswick Select Committee of the Legislature on the Meech Lake Accord. On the issue of the Accord and the supremacy of the Charter, the report stated that: "A major issue for presenters was the need to define clearly and specifically the Charter's supremacy in the Constitution."[36]

Half of the provinces proceeded with ratification without direct input from their publics. These were Saskatchewan, Alberta, Nova Scotia, British Columbia, Newfoundland and Québec.[37] The Premier of Saskatchewan, Grant Devine, said 'We didn't see the need for them...We were in favour of it. The opposition was in favour of it. People could call their members about it."[38] Provinces that did hold public hearings after 3 June 1987 were Ontario, Prince Edward Island, New Brunswick and Manitoba.[39] Pressure for public hearings on the Accord led Prime Minister Mulroney on 12 June 1987 to propose the establishment of the abovementioned special joint Committee of the Senate and House of Commons.[40] Where opportunities were available, representatives from primarily two groups lined up to criticize the Accord. These were organized interest groups, such as those above, on the one hand and

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[35]Manitoba Task Force on Meech Lake, 73.

[36]New Brunswick Select Committee on the 1987 Constitutional Accord, **Final Report on the 1987 Constitutional Accord**, October 1989, 42.

[37]It should be noted that Quebec did hold public hearings after the meeting at Meech Lake. These hearings began on 12 May 1987. Quebec was the only province to hold hearings before the final draft of the Accord was developed in June. See Campbell and Pal (1991), 88.

[38]Cohen (1990), pp. 186-87.

[39]Campbell and Pal (1991), 100-101, 148-149. Also see Cohen (1990), 202.

[40]Campbell and Pal (1991), 92, 147.

constitutional experts and academics on the other.[41] The Parliamentary Committee set the stage for what was to become an endless stream of criticisms of the Meech Lake Accord. One of the main criticisms, however, was of the Committee itself.

The position of the federal government was that the Accord was flawless. As far as they were concerned, the package had to accepted or rejected as a whole. According to Senator Lowell Murray:

> In seeking to reconcile Quebec's concerns while meeting the shared objectives of all eleven governments, the Accord is a seamless web and an integrated whole. It represents a finely balanced package - the product of negotiation and compromise.[42]

Senator Murray made it clear to members of the Committee that the Accord could only be changed if it contained "egregious errors."[43] Murray warned the Committee that the Accord "should not be lightly tampered with"[44] and asked them to keep in mind that any changes would have to be agreeable to all eleven First Ministers.[45]

On 21 September 1987, as predicted, the Committee issued its final report in support of the Accord without changes. According to the Committee, it was not a question of whether another solution could have been reached at Meech Lake and Langevin or whether other constitutional issues could have been addressed. Their task was to determine whether the Accord should be adopted.[46] Their conclusion was that the accord represented "a reasonable

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[41]Campbell and Pal (1991), 93.

[42]See Senate and House of Commons, **Special Joint Committee on the 1987 Constitutional Accord**, numbers 1-7, 2:10.

[43]Campbell and Pal (1991), 93.

[44]See Senate and House of Commons, 2:10.

[45]Cohen (1990), 186.

[46]Campbell and Pal (1991), 96.

and workable package of constitutional reforms."[47] Although critics of the Accord were asked to come forward, the federal government had little, if any, intention of making changes to the Accord. In the end, this only created more anger.

The establishment of committees and task forces to obtain input from Canadians on the Accord can be seen as maintaining democratic traditions. One must ask, however: "does the existence of a process for input allow for full or equal participation?" The obvious answer must be 'no'. The numerous hearings held were dominated by constitutional experts, academics and organized interest groups. While it would be incorrect to say that ordinary Canadians did not participate, it is indeed correct to conclude that the majority did not.

To come before these 'input bodies', a great deal of research, thought and preparation is required. Although concerned, most Canadians did not take the time to do this. In addition, although individuals may take the time necessary to prepare and submit a brief, there is no guarantee that they will be chosen by the Committee to appear. For example, five thousand individuals and groups may submit briefs on the issue of aboriginal rights, but one or a few will be chosen to present. A process dominated by organized interest groups and individuals is far from ideal and democratic. Absent from the concerns of these groups and individuals is often an examination of the bigger picture. Bogged down by their own narrow interests, they fail to truly appreciate the implications of their words. Although the process adopted to develop the Accord was seriously flawed, many of these groups and individuals failed to accurately weigh the implications of the failure of the Accord: the rejection of Québec and the potential break up of the country. Obviously they did not believe the warnings or were willing to pay this price to ensure that their ideas and visions of Canada were reflected in the Constitution without delay. Future constitutional deadlock was not a concern. Nor was the fact that future attempts to

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[47]**The 1987 Constitutional Accord: The Report of the Special Joint Committee of the Senate and the House of Commons** (Ottawa: Queen's Printer, 1987), 141.

accommodate Québec would have to be more generous. Québec could not accept less than Meech Lake because of the strong nationalist forces in the province.

The Meech Lake Accord was not just another set of constitutional amendments; it was highly symbolic. To Québec, its failure meant a complete rejection by English Canada. This was not in fact correct; English Canadians objected to aspects of the Accord that affected all provinces, however, political perceptions, once concocted, are very powerful and defiant of reason. Most critics were aware of this. Critics may have had valid arguments related to their area(s) of concern, but was the potential break-up of the country worth the pursuit? As the messages of narrowly focused groups permeated the public sphere, criticism of the Accord became widespread. Eventually, the general public was speaking out against the Accord, often without an understanding of the history of the struggle of Francophones against assimilation or of the Accord itself. In June 1988, 54% of Canadians supported the Accord. By September 1989, this figure had decreased to 35%. In Québec, the September 1989 figure was 52%, while it was only 12% in Manitoba. December 1989 was accompanied by a further decrease to 31%.[48] By April 1990, only 24% of Canadians were in favour of the Accord; 59% were not. The conservative nature of this last figure is revealed when a closer examination of opposition to the Accord is undertaken. For example, 74%, 74%, 73%, 66%, 65%, and 64% were against the Accord in Saskatchewan, Manitoba, British Columbia, Ontario, the Maritimes and Alberta respectively.[49]

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[48]Allen Gregg and Michael Posner, **The Big Picture: What Canadians Think About Almost Everything** (Toronto: MacFarlane Walter and Ross, 1990), 44-46.

[49]Fournier, 68.

Three Years: Make It or Break It

Sections 39(1) and 39(2) of the Constitution Act, 1982 govern the time limits within which ratification of proposed constitutional amendments must take place. The former states that:

> A proclamation shall not be issued under subsection 38(1) [the general amending formula] before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

According to Meekison, this section was designed so that "there can be no surprises, or things being rammed through - unless everybody is in agreement."[50] The latter section states that, "A proclamation shall not be issued under section 38(1) [the general amending formula] after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder." In other words, once one of the parties required to proclaim the resolution does so, all other required parties must also proclaim the resolution within three years. After three years, if the resolution has not been proclaimed by all parties, it lapses.

The framers of the time limit felt that three years was a reasonable amount of time to secure support for an amendment while avoiding the simultaneous presence and perhaps confusion of numerous constitutional amendment proposals.[51] This time limit, however, like many other provisions of the Constitution, must be regarded with caution. It can give political leaders the perception that they have lots of time to secure support for amendments. This perception allows for leaders to wait for an ideal time to attempt to secure passage of the amendment. The problem, however, is that if there is no ideal opportunity before the leader calls an election, and he/she loses that election, the unravelling of the deal is likely to occur unless the new leader is supportive of the amendment. In the case of the Meech Lake Accord,

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[50]J. Peter Meekison, "Problems with the 1982 Amending Formula," in **Toolkits and Building Blocks: Constructing a New Canada**, eds. Richard Simeon and Mary Janigan (Ottawa: Renouf Publishing Company Limited, 1991), 88.

[51]Meekison (1991), 88.

the time limit was not handled with the necessary caution by Canada's First Ministers, thus contributing to the failure of the Accord. Several key political events took place that subsequently permitted the rise of opponents of the Accord. In addition, little was done to counter the rising opposition of the Accord as the days, months and years passed.

The months immediately following the Meech Lake-Langevin Accord were ones of enthusiasm. Canadians were more interested in the peace the Accord engendered between English and French Canada than in its actual contents. In fact, few Canadians understood the details of the agreement and few cared. Critics of the Accord were present, but were few in numbers and initially regarded as defeatists with a backward vision of constitution-making and nation-building. Eventually, their numbers grew and their views triggered much doubt about the provisions of the Accord.[52] Their growth and effectiveness was aided by several political events. According to David Milne, "...the most damaging event was surely the sudden subsequent change in the roster of first Ministers."[53] Political changeovers, however, were not the only damaging events. Actions by political leaders such as Robert Bourassa also served as turning points for the Accord.

(a) The Defeat of Richard Hatfield

On 13 October 1987, four and a half months after the Accord was signed, Richard Hatfield, the New Brunswick signatory to the Accord, was ousted from office. He was replaced by Liberal Frank McKenna, an ardent opponent of the Accord. McKenna presented his campaign as a referendum on the Accord. He promised that if elected, he would bring about changes to it.[54]

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[52]Cohen (1990), 118.

[53]David Milne, **The Canadian Constitution: From Patriation to Meech Lake** (Toronto: James Lorimer & Company, 1989), 205.

[54]Cohen (1990), 187.

According to McKenna, women's rights would be weakened and minority language rights outside Québec would be limited by the Accord. In addition, it would impair the ability of the federal government to introduce new national social programs. Moreover, he felt that Senate reform would be impossible under the Accord's revised amending formula which would require unanimous support for such changes. Despite his opposition, McKenna promised to consult the people of New Brunswick before taking any concrete action accept or reject the Accord.[55]

Richard Hatfield's failure to recognize the Liberal threat to his leadership and to the Accord is apparent. Canada's First Ministers departed from Ottawa in on 3 June 1987 with the solemn agreement to quickly seek ratification of the Accord. Section 1 of the 1987 Constitutional Accord stated:

> The Prime Minister of Canada will lay or cause to be laid before the Senate and House of Commons, and the first ministers of the provinces will lay or cause to be laid before their legislative assemblies, as soon as possible, a resolution, in the form appended hereto, to authorize a proclamation to be issued by the Governor General under the Great Seal of Canada to amend the Constitution of Canada.[56]

Instead of reconvening his legislature and attempting to ratify the Accord, Hatfield called an election, thus breaking his promise to ratify the Accord quickly. Hatfield did not seriously recognize the impact a change in government could have on the Accord. If he truly appreciated the consequences, it is difficult to understand why did he not attempt to pass it before he called the election. Perhaps he thought he would win. Perhaps he did not take McKenna's anti-Meech Lake position seriously. Whatever the reason, Hatfield's electoral defeat marked the beginning of the end of the Meech Lake Accord.[57]

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[55]Cohen (1990), 188.

[56]Canada, **1987 Constitutional Accord**, June 3, 1987, 1.

[57]Cohen (1990), 187.

The Prime Minister and the other First Ministers were equally naive regarding Hatfield's election. They should have known about Hatfield's election plans and the likely outcome. They should have acted swiftly to ensure that the Accord was passed in New Brunswick prior to the election.

(b) The Defeat of Howard Pawley

The Manitoba signatory to the Accord, Howard Pawley, was also ousted from office. On 26 April 1988, he was replaced by Conservative Gary Filmon. Filmon, however, was only able to secure a minority government. His party had won only 25 of the 59 seats in the Manitoba legislature. The Liberals secured 20 seats and became the official opposition under leader Sharon Carstairs, a close friend of McKenna's. The NDP, the former governing party, only managed to hold on to 12 seats.

Initially, Filmon's Conservatives were committed to supporting their federal counterparts in Ottawa on the Accord. The Liberals, however, promised to defeat the Accord. "Meech Lake is dead," declared Carstairs one day after the Manitoba election.[58] Filmon, sensitive to the deep discontent for the Accord in Manitoba, feared that despite his ability to ratify the Accord in the Manitoba legislature, he might lose public support across the province. The Manitoba public was still reeling from the federal government's decision in October of 1986 to give the CF-18 contract to Québec. In addition, the Free Trade deal with the United States, signed on 2 January 1988, was anticipated to be harmful to the economy in Manitoba. These two factors as well as the fact that without the support of the NDP, a vote on the Accord could bring down his government. He waited eight months before introducing a motion to ratify the agreement. It was only after much persuasion from his Conservative counterparts in Ottawa that Filmon decided to introduce a motion in the legislature to ratify the Accord. Finally, on 16 December 1988, he gave his unconditional support for the Accord as he introduced a resolution to pass

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[58]Cohen (1990), 191.

the Accord in the Manitoba legislature. Days later, in response to a political move by Bourassa, he withdrew the resolution. The support that Filmon had secured from the NDP to pass the Accord disappeared with Bourassa's announcement that he intended to use section 33 of the Charter to exempt the commercial sign provision of Bill 101, thereby prohibiting the use of English on outdoor commercial signs.

Like Hatfield, Pawley's failure to live up to the agreement he made in June 1987 to ratify the Accord as 'soon as possible' thus became another turning point for the Accord. His defeat plunged Manitoba into a very delicate political situation whereby the ability of the government to maintain power depended on its pursuit of non-controversial policies and its ability to secure the support of one of the two opposition parties. Meech Lake was a political hot potato. Filmon did not have the political strength to carry Meech Lake alone without suffering considerably at the polls. He had to continuously balance the national question and his political future. Publicly, he chose the latter.[59]

(c) Bourassa's Blow to the Accord

On 15 December 1988, the Supreme Court of Canada brought down its ruling on the sign provisions (sections 58 and 69) of Bill 101, a law passed by the Parti Québécois in 1977.[60] This Bill stipulated that all commercial signs had to be in French only. After being challenged in the lower courts and found unconstitutional, it was appealed to the Supreme Court of Canada. One of Bourassa's campaign promises in 1985 was to permit bilingual signs. He did not, however, intervene to withdraw the 1977 law when he came to office, despite the

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[59]Cohen (1990), 191-192.

[60]See **Charte de la langue francaise au Québec** (National Assembly, assented to 26 August 1977).

fact that only 12% of Québecers wanted unilingual French signs.[61] He claimed that he wanted to wait until the Québec court's ruling.[62]

When the Québec Court of Appeal struck down the law in December 1986, Bourassa again did nothing to ensure bilingual signs. Instead, he appealed to the Supreme Court of Canada. On 15 December 1988, the Supreme Court struck down the law. While French-only signs were rejected, the Court did rule that Québec could legislate against English-only signs. Moreover, it ruled that the predominance of the French part of the bilingual sign could be legislated. By this time, however, support for French-only signs had significantly grown. In Québec, the reluctance of English-Canada to pass the Accord was fueling the flames of French-Canadian nationalism. On 17 December 1988, succumbing to the public opinion in Québec, Bourassa rejected the court's compromise and announced that he would proceed with Bill 178; a bill that would maintain French-only signs outside but would permit English signs inside as long as French is also on the sign and the French is predominant. Bourassa said that he would use the notwithstanding clause of the Charter (section 33) to exempt the legislation from the rights guaranteed under the Charter. This infuriated many English-speaking Canadians. Bourassa's decision especially caused an uproar Manitoba where only two days earlier, Filmon had tabled the Meech Lake resolution. The next day, he withdrew the Meech Lake resolution from the Manitoba legislature.[63] Pointing to the damage that Bourassa's decision had caused to the Accord, Premier David Peterson of Ontario stated, "The notwithstanding clause was a stake through the heart of Meech Lake."[64] In March 1989, when Canadians were asked what effect they thought Bill 178 would have on the approval of the

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[61]See **Ford v. Quebec (Attorney General)** (1988), 54 D.L.R. (4th) 577, [1988] 2 S.C.R. 712, 90 N.R. 84.

[62]Cohen (1990), 195.

[63]Cohen (1990), 195-197.

[64]Cohen (1990), 197.

Meech Lake Accord, 23% said that it would "hurt a great deal" while 32% said that it would "hurt somewhat".[65]

(d) The Defeat of Brian Peckford

On 20 April 1989, another signatory to the Accord was ousted from office. Newfoundland's Brian Peckford was replaced by Liberal Clyde Wells, a supporter of a strong central government and equality of the provinces. By this time, the Accord was already in serious trouble. Wells made matters worse. Since Newfoundland had already ratified the Accord,[66] he threatened to rescind the province's support.[67] The federal government responded to his threat with a counter-threat. They warned that they would rescind several financial arrangements between Ottawa and Newfoundland. Unshaken, in October 1989, Wells tabled a list of conditions that had to be met before Newfoundland would continue to support the Accord. He called for the removal of the "distinct society" clause from the body of the Constitution to the preamble where no special powers would be conferred upon Québec. In addition, he insisted that a clause declaring the supremacy of the Charter over the "distinct society" clause be included in the Accord. Moreover, he wanted the identification of aboriginal people and multiculturalism as distinct and fundamental characteristics of Canada in the preamble. Furthermore, he called for an elected Senate which would be granted a special constitutional veto over language and cultural amendments. Finally, he wanted a clause stipulating that opting out of national programs would only be permitted if the program was not intended to offset regional disparities.[68] Underlying these demands were Wells' convictions

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[65]Gregg and Posner, 28.

[66]Newfoundland ratified the Accord on 7 July 1988. See Cohen (1990), 287.

[67]"'Play ball on Meech' Ottawa warns Wells," **The Toronto Star**, 22 April 1989, A1.

[68]Campbell and Pal (1991), 106.

that a strong central government must be maintained and that the Accord granted too much power to the provinces.[69]

(e) The Last-Ditch Attempt to Save the Accord

On 2 June 1990, Canada's First Ministers gathered at the Museum of Civilization for what was described as a "dinner", not a First Minister's Conference. This dinner evolved into a week-long marathon negotiating session. Finally, on 9 June 1990, the First Ministers emerged to declare that they had reached an agreement that would ensure the passage of the Meech Lake Accord. First, the **1990 Constitutional Agreement** provided for the immediate passage of the Meech Lake Accord. Second, once the Accord was passed, a commission would be established to commence hearings on an elected, more equitable and effective Senate. The commission would report to Parliament and the provincial and territorial legislative assemblies prior to a First Ministers' Conference on the Senate, to be held in British Columbia before the end of 1990. Following the passage of the Accord, the First Ministers would pursue comprehensive Senate reform consistent with these objectives by 1 July 1995. If by this date no agreement is reached, the Constitution will be amended to reflect the following representation: 18 for Ontario and 8 for Nova Scotia, New Brunswick, British Columbia, Alberta, Saskatchewan, Manitoba, and Newfoundland. The representation for the remaining provinces/territories remained unchanged. Third, a list of "further Constitutional Amendments" were identified. These were: sex equality rights in the Charter; the role of the territories; language issues; constitutional issues of concern to Aboriginals. Fourth, an agenda for future constitutional discussions was presented and included: the creation of new provinces, constitutional recognitions, and constitutional reviews. Fifth, a legal opinion on the impact of the distinct society clause was included. This opinion stated:

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[69]"Leaders' power assailed," **Globe and Mail**, 23 August 1989, A3.

> the Canadian Charter of Rights and Freedoms will be interpreted in a manner consistent with the duality/distinct society clause of the proposed Constitution Amendment, 1987 (Meech Lake Accord), but the rights and freedoms guaranteed thereunder are not infringed or denied by the application of the clause and continue to be guaranteed subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, and the duality/distinct society clause amy be considered, in particular, in the application of section 1 of the Charter.

Only two weeks remained until the deadline with the 9 June 1990 agreement. Two weeks, however, was not sufficient to ensure the acceptance of the new agreement in the Manitoba legislature. Without two days notice, unanimous consent is required to suspend the house's regular business and deal with matters of "urgent and pressing necessity."[70] In addition, the Manitoba rules required the adherence to a number of procedural steps which required more than two weeks for compliance.[71]

On 12 June 1990, Premier Gary Filmon asked the Manitoba legislature for their unanimous consent to bypass the two-day notice required to introduce the Accord. He received support from every MLA except Elijah Harper, a Cree Indian and former chief of the Red Sucker Lake band in Manitoba. Harper stated:

> It's about time that aboriginal people be recognized....We need to let Canadians know that we have been shoved aside. We're saying that aboriginal issues should be put on the priority list.[72]

Harper also pointed to a blunder made by the Filmon government in failing to place the Meech Lake motion on the "Order Paper" which resulted in a ruling by the Speaker on the 14 of June that the Accord was "improperly before the House."[73] This meant that the hearings on the Accord could not start until the night of June 18th. Even if Newfoundland Premier Clyde Wells was on side, in Manitoba, it was impossible to complete the hearings before the 23 June 1990

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[70]See Province of Manitoba, **Rules, Orders and Forms of the Proceedings of the Legislative Assembly of Manitoba** (Winnipeg: 1987), 35.

[71]For a more detailed presentation of the procedural rules, see Province of Manitoba, 25.

[72]"Native MLA blocks debate on Meech," **Globe and Mail**, 13 June 1990, A1.

[73]"Manitoba MLA throws Meech into jeopardy," **Globe and Mail**, 15 June 1991, A1.

deadline. Even Meekison has said that in hindsight "...if a meeting among the governments is thought necessary, it ought to be held sooner, rather than later. It should certainly not be held at the end of the three-year deadline."[74]

The potential impact of the three-year time limit was not adequately considered by Canada's First Ministers or at least by the Prime Minister. The removal of three signatories to the Accord accompanied by inadequate attention to the rules of the Manitoba legislature and increasing public criticism, especially those of Canada's aboriginal peoples, allowed for the unravelling of the Accord. Rather than recognizing this fact, Prime Minister Mulroney pointed his finger at the three year time limit. On 23 June 1990, in an address to the nation, he stated:

> That we did not succeed is, at least partly, also the failure of the constitutional amending procedures. Under the 1982 procedures, the Premiers and I were required to re-open negotiations and reproduce unanimity every time a new provincial leader was elected who chose not to honour the undertaking of his predecessor. Or, in the case of Newfoundland, when a new Premier was elected who chose to rescind the approval of the previous legislature.[75]

The Prime Minister had earlier pointed to the flaws of section 39(2) of the Constitution Act, 1982 during a speech to the Newfoundland House of Assembly on 21 June 1990. He stated:

> We have never been through a three-year delay before, because it is the first time it has ever been applied. I think we all agreed that we are going to have to revisit that one; it is hopeless to have that kind of delay placed upon constitutional change.[76]

Not surprisingly, he pointed no fingers at the actions of Hatfield, Pawley, Peckford, or himself.

The three years within which the First Ministers had to pass the Accord did contribute to the failure of the Accord, but only insomuch as Canada's First Ministers allowed it to do so. A cautious approach to the time limit might have prevented subsequent events from having a devastating impact on the Accord. The difficulty was that they gave no thought to the process

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[74]Richard Simeon and Mary Janigan, eds., **Toolkits and Building Blocks: Constructing a New Canada** (Toronto: C.D. Howe Institute, 1991), 89.

[75]See Office of the Prime Minister (23 June 1990), 2.

[76]**Newfoundland Hansard**, Vol XLI No. 56(A), 21 June 1990, 34.

of ratification and they continued to follow the old ways of amending the Constitution. As a result, they allowed for the occurrence of several unexpected and politically devastating events. Deficient in terms of foresight, Canada's First Ministers permitted the unimpeded occurrence of the abovementioned events, thus contributing to the unravelling of the Meech Lake Accord and sealing its fate.

This chapter has dealt with two factors contributing to the failure of the Meech Lake Accord: the process and the three year time limit. The next chapter will deal with two additional factors: the amending formula and political leadership.

CHAPTER SIX

FACTORS INSTRUMENTAL IN THE FAILURE OF THE MEECH LAKE ACCORD: THE AMENDING FORMULA AND POLITICAL LEADERSHIP

To lament is to cry out at the death or at the dying of something loved...Political laments are not usual in the age of progress, because most people think that society always moves forward to better things. Lamentation is not an indulgence in despair or cynicism. In a lament for a child's death, there is not only pain and regret, but also celebration of passed good.

I cannot but remember such things were
That were most precious to me.

George Grant[1]

The 1982 Amending Formula

After fifty-four years in search of formula to amend the Canadian Constitution, the Constitution Act, 1982 established a means of amending the Constitution. There are actually six amending formulas, as outlined in sections 38, 41, 43, 44, 45 and 47 of the Constitution Act, 1982.[2] The provisions of the Meech Lake Accord bear directly to two sections. The first is section 38, which states that the Constitution may be amended with the support of the Senate, the House of Commons and at least two-thirds of the provinces consisting of at least fifty percent of the population. This is commonly referred to as the "general amending formula" or the "2/3-50 rule." The second is section 41, which states that unanimous consent is required for a limited number of constitutional amendments. Only five subjects currently fall under the unanimous consent rule. These are amendments to:

(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

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[1]George Grant, **Lament For A Nation: The Defeat of Canadian Nationalism,** Carleton Library Series, No. 50 (Ottawa: Carleton University Press, 1986), 2-3.

[2]J. Peter Meekison, "The Amending Formula," **Queen's Law Journal**, 7-8, (1981-83): 108-109.

(c) subject to section 43, the use of the English or the French language;

(d) the composition of the Supreme Court of Canada; and

(e) an amendment to this Part.

The Meech Lake Accord dealt with several subjects that could be passed using the general amending formula and two subjects that required unanimous consent. The latter was required because the Accord included amendments to the amending formula. In addition to the five mentioned above, the Accord incorporated the provisions of section 42 of the amending formula in with those requiring unanimity (s. 41). These are:

(a) the powers of the Senate and the method of selecting Senators;

(b) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;...

(e) The principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;...

(h) the extension of existing provinces into the territories;

(i) notwithstanding any other law or practice, the establishment of new provinces....[3]

In addition, an amendment to section 40 of the Constitution Act, 1982 extended reasonable compensation to any province to which any transfer of provincial legislative powers to Parliament does not apply. In the Constitution Act, 1982, compensation was limited to "education and other cultural matters." Unanimity was also required for the passage of the provisions changing the composition of the Supreme Court. The remainder of the subjects dealt with in the Meech Lake Accord could have been passed using the 2/3-50 formula. Since the First Ministers had achieved unanimity on the provisions of the Meech Lake-Langevin Accord, they assumed that they would also achieve unanimous ratification by their legislatures. There was no apparent reason for them to adopt a two-stage ratification process. A single-step process was also insisted upon by Bourassa. The agreement was a single package and must

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[3]Hogg, 43-44.

therefore be passed as a single package. As a result, the unanimity requirement was followed. This unanimity "straight-jacket" meant that it was not possible to proclaim the provisions developed to bring Québec back into the Canadian Constitutional family that did not require unanimous consent. It was a take it or leave it scenario.

From the outset, there should have been a recognition that constitutional amendments requiring unanimous consent and those that can be passed under the general formula should be separated. Those provisions that could be passed using the general amending formula could have been in the first part and those provisions that required unanimity in the second part. Instead of passing the Accord as a one-part package, it should have been passed as a two-part package. Although Bourassa insisted on one package, because the possibility of passing it as a two-part package was not discussed, it is not accurate to say that it could not be done. If enough pressure had been placed on Bourassa, who knows what he might have done. This approach could have avoided a complete rejection of the demands of Québec. The perception that English Canada had completely rejected Québec could have been avoided or at least diminished. The problem, however, was that once the ratification process began, there was no turning back. A two-part process could have worked only if it had been agreed upon prior to the final agreement on 3 June 1987. In addition, a two-part process would have avoided the imposition of the unanimity rule on amendments to the Constitution that can be attained using the 2/3-50 amending procedure. If the intent of section 41 was to require unanimous consent for provisions other than those already under it, it would have been so stated.

The unanimity principle was followed to pass the Accord because the First Ministers had achieved unanimity at Langevin. The Accord was passed under section 38 of the Constitution Act, 1982 as a single resolution. While the Constitution Act, 1982 does stipulate that amendments made under the general amending formula are subject to the three year limit, there is no time limit for amendments passed under section 41. Canada's First Minister's erred

in permitting the will of Bourassa to prevail at the expense of subjecting amendments that were not restricted by a time limit to the three year time limit. According to Ronald Martland, Justice of the Supreme Court of Canada from 1958 to 1982 and Gordon Robertson, Secretary to the Cabinet for Federal-Provincial relations and senior constitutional advisor to both Trudeau and Pearson, ratification of the Accord was not subject to any time limit. According to Robertson:

> ...the time limit in Section 39(2) refers specifically to Section 38. The amending procedure for the Meech Lake Accord has not been taken under Section 38 and could not be....It is Section 41, not Section 38, that deals with amendments requiring unanimous consent. There is no time limit for an amendment made under Section 41.[4]

Meekison, constitutional advisor to Alberta at Meech Lake and Langevin, disagrees with Robertson's argument. The former claims that Meech Lake was not passed under section 41. It was passed as a single resolution and therein lies the problem. It was a political decision to pass the Accord under the requirement of unanimity, not a stipulation of the amending formula under which the Accord was passed. It is conceivable that the Accord would have been passed if time had not run out. In fact, on Friday 22 June 1990, Senator Lowell Murray told Newfoundland Premier Clyde Wells that if his province ratified the Accord, the government of Canada would ask the Supreme Court to rule on the possibility of changing the deadline from 23 June to 23 September, the date the second province, Saskatchewan ratified the Accord.[5] This was a highly suspicious proposal, perhaps an act of desperation on the part of the federal government, and only angered Wells who had been firmly and consistently told that the deadline was immovable. The insistence by Bourassa that a single resolution be adopted to pass the Accord was the cause of subjecting section 38 amendments to the unanimity principle and section 41 amendments to the three year time limit. The failure of First Ministers to curtail this demand then becomes the cause of this constitutional impropriety.

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[4]Gordon Robertson,"Meech Lake----The myth of the time limit," **IRPP Newsletter** (Supplement), 11 (May/June 1989), 2.

[5]Cohen (1990), 265.

Political Leadership

In the months and weeks prior to the death of the Meech Lake Accord, Canadians lashed out against their political leaders who they claimed were responsible for the predicament the country was in. While the First Ministers should not shoulder all of the blame for the failure of the Accord, the leadership they provided during the three year debate leaves much room for criticism. On 3 June 1987, they formally affirmed their support for the Accord at a noon signing ceremony. By virtue of their positions as leaders of elected governments across the country, the unenviable responsibility of nation-building fell on their shoulders. The challenge at hand was to meet the five conditions set out by Québec in order to secure its support for the Constitution Act, 1982. When a deal was reached, it appeared as though the challenge had been met successfully. Against the odds, they forged an agreement through a spirit of cooperation and compromise. Their work was almost done. Securing the support of their legislative assemblies was not anticipated to be difficult.

Did Canada's political leaders serve Canadians well? The events following the development of the Accord point to a resounding "no". Before, during and after the development of the Meech Lake Accord, Canada's First Ministers did not demonstrate effective leadership and know-how. While some were more successful than others, they were all party to several major leadership errors with respect to the Accord.

As mentioned above, the First Ministers failed to appreciate the impact of the Charter on Canadians. Political leaders in general did not appreciate this impact, as was evidenced by the support that the three federal parties and most provincial gave to the Accord. Many groups and citizens came to feel that the Constitution belonged to them. Failure to consult them between the Meech Lake and Langevin meetings was a serious mistake. The only Premier to do so was Bourassa. The other First Ministers assumed that past practices regarding constitutional amendments still applied. In the past, little was done to receive input from the public or inform them of the complete details of the agreement because it was felt that the

complexity of the amendment inhibited interest and understanding. In addition, once the deal was reached, public consultations were held, but the public was essentially told that no matter what, they could not change the Accord. Moreover, the First Ministers failed to realize the potential impact of their actions on the time limit.

The Canadian public knew that a great accommodation was made at Meech Lake, but they knew little about the details. The First Ministers did not see a need to explain to Canadians the details or merits of the Accord.[6] As such, there existed no coordinated action plan to promote the Accord as an agreement that could strengthen the bonds of nationhood and render separatist forces in Québec impotent. Each First Minister was to use his own discretion when securing support for the Accord within his jurisdiction. The absence of a coordinated promotional plan was a grave error. This error was compounded when the First Ministers continued to do little to persuade Canadians of the merits of the Accord in the face of increasing criticisms. Some even contradicted each other regarding the interpretation of certain parts of the Accord. For example, as mentioned earlier, Bourassa and Mulroney presented differing views on the meaning of the 'distinct society' clause. That they interpreted it differently was a major weakness and served to raise doubts with the public. The First Ministers, undeniably aware of the limitations of media reports, should have developed their own Meech Lake promotional plan. In 1988, the Federal government, obviously aware of the danger posed to public opinion by the media, spent millions promoting the Free Trade Agreement.[7] Other than vague statements such as Brian Mulroney's: "Today we welcome Québec back to the Canadian constitutional family,"[8] little was said to explain the details of the Accord to

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[6]Richard Simeon, "Why Did the Meech Lake Accord Fail?",in **Canada: The State of the Federation 1990**, eds. Ronald L. Watts and Douglas M. Brown (Kingston: Institute of Intergovernmental Relations, 1990), 26.

[7]Supply and Services Canada, **The Canada-U.S. Free Trade Agreement -- Trade: Securing Canada's Future** (Ottawa, 1988).

[8]"Accord welcomes back Quebec," **Globe and Mail**, 4 June 1987, A1.

Canadians by political leaders. If documentation explaining the Accord was prepared for public consumption, little was done to inform the public that such information was available. Public hearings were held in some jurisdictions, but participants were expected to take the initiative to learn the details of the Accord, a task most Canadians simply would not do.

The failure of the First Ministers to explain and defend the Accord left information dissemination in the hands of the media. According to John Crispo of the Faculty of Management at the University of Toronto, the media looked for the "hyenas and jackals. The people who negotiated this deal let the hyenas and jackals dominate the airwaves."[9] The result was incomplete and distorted information, often creating greater confusion and resentment than understanding.

(a) Meech Lake and the Media

Analyzing the media's coverage of the rise and fall of the Meech Lake Accord is in itself a major undertaking. Its discussion here is intended as a brief overview. While there are significant differences in the approaches used by television, radio and the print media to convey information, they must all assume some responsibility for the misunderstanding and confusion experienced by Canadians regarding the events surrounding the Meech Lake Accord. For example, television coverage presented few details of the Accord. The media focused on events as they unfolded rather than providing complete information on the agreement. David Taras, in his study of the CBC's coverage of the Accord from 30 April to 5 June 1987 concluded that "the professional requirements of a powerful news organization, the CBC, were paramount in shaping its coverage of the Accord."[10] The untidy and abstract complexity of the Accord were not the attributes valued by broadcasting decision-makers. The format used to

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[9]Simeon and Janigan, 75.

[10]Davis Taras, "Television and Public Policy: The CBC's Coverage of the Meech Lake Accord," **Canadian Public Policy**, XV:3 (1989): 323.

structure the stories, the 'news formula', prevented the CBC from effectively dealing with the complete developments regarding the Accord.[11] Based on this formula, television reporters look for certain elements in a story. For example, they search for stories that are happening or about to happen. They also search for stories with a dramatic element and the presence of conflict. In an effort not to offend viewers, at least two sides of the story, however disproportionate, are almost always shown. Taras claims that stories are routinely dropped if representatives for the other sides of the story cannot be found. These restrictions limit what aspect of the story is chosen to be aired.[12]

According to Taras, "Coverage was scattered, vague and incoherent."[13] In his examination of the CBC's coverage, Taras found that during the meeting at Meech Lake, the network focused on the theme of attempts by Canada's First Ministers to bring Québec back into the Canadian Constitution. In another report, the CBC reported that Québec had set five conditions as the price of its re-entry. Only one of these conditions, the veto over future constitutional amendments, was mentioned. The impression was that English Canada was frantically trying to meet the 'impossible' demands of Québec. It is not surprising that some Canadians did not react positively to the Accord. The background that led to this meeting was not part of the report. Taras charges that:

> The report signified that routine reporting techniques, including highly abbreviated and brutally short descriptions of issues and events, were to be used in covering this latest constitutional round.[14]

Local broadcasters were also irresponsible in reporting the facts. Distortion is an understatement when the incident in Brockville, Ontario is examined. A handful of people cheered the trampling of the Québec flag. Although they did not represent the views of the

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[11]Taras, 323.

[12]Taras, 326.

[13]Taras, 323-324.

[14]Taras, 328.

majority of Canadians, footage of the incident was repeatedly broadcasted in Québec. The message appeared clear. This was what English-Canada thought about Québec. The misperception caused by this sensationalized event is indicative of how the media can distort events and give them more or less significance than they deserve. Canadian historian, Jack Granatstein astutely points out:

> That image, that powerful image of someone trampling on the Quebec flag, obviously sticks in the minds of many Quebecers, but that's a media creation showing one crackpot doing something foolish. Why that should become the whole reaction of English-Canada seems to me to be a, [sic] almost a travesty of how the media should report this country, how the Quebec media should report this country.[15]

A Québec high-school student commented that "When you see people in Ontario who step on the Québec flag, it really hurt us."[16] Although the print media, much to its credit, has more organizational flexibility to present the details surrounding particular events, they are not free from charges of bias and misinformation. For example, the 8 June 1990 headline in the Edmonton Sun read, "Unity Crumbles: Meech Talks Stall Over 'Distinct Society' Clause." This sensationalistic headline may have grabbed the attention of potential readers, but it was far from accurate. At 9:30 p.m. on 7 June 1990, the fifth day of discussions by Canada's First Ministers in hopes of salvaging the Accord, Bourassa issued a press release. It stated:

> The Premier of Quebec, Robert Bourassa, informed his colleagues during the meeting that he will henceforth abstain from all discussions relating directly or indirectly to the clause in the Meech Lake Accord recognizing Quebec as a distinct society.[17]

The talks had not stalled. Bourassa may not have been present in the room, but the talks continued. This action was not surprising given the political pressure Bourassa was facing from nationalists in Québec whose numbers were rapidly increasing. His participation in such discussions could have caused Québecers to reject the Accord. The attempts to save the

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[15]**CBC National/Journal Inquiry: Is Canada Drifting Apart?**, 23 May 1990.

[16]**CBC National/Journal Inquiry: Is Canada Drifting Apart?**

[17]"Bourassa won't discuss distinct society," **Globe and Mail**, 8 June 1990, A1.

Accord would have been futile if the party it was designed to accommodate, Québec, did not want it.

The above examples are but three illustrations from countless reports on the Meech Lake Accord. Reporters who focused exclusively on the sensationalistic aspects of the Accord typically generated and perpetuated misinformation and bias. A coordinated action plan to sell the merits of the Accord could have presented a more complete picture and countered some of the sensationalism, misinformation and bias that entered the homes of most Canadians on a daily basis via the media.

(b) The Prime Minister of Canada

Coordinated leadership was not the only area in which the First Ministers failed. The individual behaviour of some only served to make matters worse. Brian Mulroney, Frank McKenna, Gary Filmon, Robert Bourassa and Clyde Wells were significant contributors to the worsening state of affairs regarding the Accord. What they interpreted as leadership can only be described as insensitive and inward-looking politically calculative approaches to nation-building. Richard Simeon justly claims that, "they were manipulating the constitution largely in their own or their institutional self-interest: that is, that Meech Lake responded to governmental rather than citizen concerns."[18] The Prime Minister of Canada, the one most were looking to for direction and the one whose actions were most disappointing, will be the focus of this charge.

As a labour lawyer, Brian Mulroney had much experience in conflict resolution. A place at the labour negotiating table, however, is not the same as a place at the constitutional table. The difference becomes greater when you hold the position of Prime Minister. The examples pointing to Mulroney's erroneous leadership are plentiful and begin with the process the federal government developed to accommodate Québec's five demands.

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[18]Simeon, 26-27.

As mentioned in chapter four, according to former Manitoba Attorney General Roland Penner, the discussion to be held at Meech Lake was supposed to be 'chat' rather than a meeting to develop an agreement. It can be argued that it did not occur to provincial premiers to consult their publics prior to going to Meech Lake because they did not expect to be involved in hammering out a near complete deal on that day. Once they were at Meech Lake, however, the supposed 'chat' turned out to be a serious exercise on accommodating the five conditions of Québec. The federal government's strategy was flawed from the beginning because it had no intention of leaving Meech Lake without a deal. At Meech Lake, the premiers were separated from their advisors. They seldom left the meeting room to seek advice from their advisors in fear of missing out on the discussion that continued while they were out of the room. The First Ministers met on the second floor of Wilson House while their advisors remained downstairs. Without the presence of advisors, it would be easier to get a deal. Officials were permitted to send notes to their Premier whereby the Premier could come out of the room, but this rarely happened because the Premiers did not want to miss out on the discussions. Penner recounts that he was stopped by a security guard as he tried to go upstairs to intercept Pawley as he headed toward the bathroom. Penner was asked: "Where do you think you're going?" and turned away.

Some could argue that the premiers could have rejected the process set up by the federal government, but once they were all there, it is conceivable that no premier would want to be seen as uncommitted to bringing Québec back into the constitutional family. It was a gamble they took and won. This must have been anticipated by the federal strategists.

The First Ministers set the next meeting date for 2 June 1987 without considering the need for public input. Some may argue that the consensus reached at Meech Lake was fragile and would not have withstood public criticism, but as it turned out, it would have been better to reject the deal then and send the First Ministers back to the drawing board rather than allow it to evolve into a symbol whereby its rejection would symbolize a rejection of Québec. It is true

that the Prime Minister and his federal strategists had not appreciated the change in efficacy felt by Canadians with respect to their constitution, a direct result of the Charter, but neither did the premiers. They accepted a process that had been used in the past without question. During the 3 June 1987 meeting, it still did not occur to them that they should consult the public prior to saying this is the final agreement.

When criticisms began to grow, especially from newly elected leaders, Mulroney said very little. When Clyde Wells became leader of Newfoundland, there was no discussion between him and the federal government on the Accord for six months. The latter did not want to give the impression that they were willing to negotiate.[19] "We did not want to give him the impression we were prepared to accommodate any change," admitted a senior federal official.[20] Rather than working with dissenters, Mulroney chose to isolate them in hopes that they would come around. For example, little was done to bring New Brunswick leader Frank McKenna on side until McKenna himself introduced a companion resolution in March 1990 in hopes of securing the passage of an amended Accord. McKenna did eventually throw his support behind the Accord during the week of negotiations in June 1990. While this approach can be seen as one of the positive aspects of the three year time limit, the continued defiance of opponents can render this time flexibility as counterproductive. For example, in the case of Clyde Wells, this only strengthened his resolve to challenge the Accord.

Mulroney's apparent concession to opposition demands for public input resulted in the establishment of a special select Parliamentary committee. Mulroney's narrow and ill-conceived commitment to public input was soon revealed, however, when Senator Murray advised the committee that the Accord should not be changed unless it contained 'egregious errors.' His attempt to appease critics left out of the development process of the Accord only provided a stage for growing criticisms. It did little to quell their discontent.

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[19]Cohen (1990), 206.

[20]Cohen (1990), 206.

The Prime Minister did very little as support for the Accord weakened. As McKenna, Filmon, and Wells captured national attention with their criticisms of the Accord, little action was taken by the Mulroney government to counter their domination of the public's attention. In December 1988 when Bourassa declared that he would use the notwithstanding clause to exempt the French-only sign law from the Charter, Mulroney's reaction was weak. He merely expressed that he was disappointed because Bill 178 offended the Charter. In an attempt not to anger Québecers, who supported Bourassa, he angered many English-speaking Canadians who felt that he placed the interests of Québec above that of the rest of Canada.[21]

By the summer of 1989, Mulroney still thought that it was too soon to start the first skirmish over the Accord, so he waited.[22] It was not until 22 March 1990 that he displayed to Canadians some form of leadership in resolving the Meech Lake impasse. This was prompted by the details of a companion resolution revealed one day earlier by Frank McKenna and designed to meet many of the concerns of the dissenting provinces. Mulroney, on national television, announced that McKenna's proposal would be studied by a special committee.[23] On 18 May, the Committee tabled its unanimous report with twenty-three recommendations,[24] many which were proposed by McKenna's companion resolution, that could be adopted without re-opening the Accord. Recommendation number fourteen stated: "Your Committee recommends that a Companion Resolution process that adds, without subtracting, to the provisions of the Meech Lake Accord has the best prospect of solving the current constitutional

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[21]Cohen (1990), 200.

[22]See Office of the Prime Minister, **Notes for an Address to the Nation by the Right Honourable Brian Mulroney Prime Minister of Canada on the Meech Lake Accord**, Ottawa, 22 March 1990, 3.

[23]Cohen (1990), 226.

[24]See House of Commons, **Report of the Special Committee to Study the Proposed Companion Resolution to the Meech Lake Accord, May 1990**, 5-13.

impasse."[25] These recommendations angered Québec leaders. Lucien Bouchard, Mulroney's Environment Minister, resigned in protest to the 21 May report.[26] To Bouchard, Mulroney said: "Lucien, you may have just killed Meech Lake."[27]

With only about three weeks remaining until the deadline, Mulroney invited the First Ministers to Ottawa for an eleventh-hour meeting to save the Accord. At the end of May, anxious provincial premiers were calling for a conference to discuss the Accord. David Peterson threatened that if the Prime Minister did not call a first ministers conference, he would host one himself in Toronto.[28] On Sunday 3 June 1990, the First Ministers met for supper at the Museum of Civilization in Hull. The federal government made it clear that it was not a First Minister's conference. This way, if the meeting failed, claims that an actual First Minister's conference had failed could not be made. This would have been seen as symbolically devastating. To this point, Mulroney had not recognized mistakes in his strategy. According to one of Mulroney's confidants: "He feels that retroactive analysis is not for prime ministers."[29]

Many wondered why Mulroney had left the decision to call the meeting so long. Mulroney revealed that calling an eleventh-hour meeting was part of a plan developed well before the release of the Charest Report and the resignation of Lucien Bouchard. In an interview with the **Globe and Mail** published on 12 June 1990, Mulroney said that after consulting his aides at a meeting on 11 May 1991, he decided to delay calling a meeting until

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[25]House of Commons, 9.

[26]Cohen (1990), 229-230.

[27]Cohen (1990), 230.

[28]Cohen (1990), 232.

[29]"PM continues deadline talks as Meech clock ticks down," **Globe and Mail**, 2 June 1990, A2.

the eleventh hour to maximize the pressure on the Premiers as 23 June loomed near.[30] More specifically, he said:

> I told them when it would be...I told them a month ago when we were going to start meeting. It's like an election campaign, you've got to count backwards. You've got to pick your date and work backwards from it...'That's the day I'm going to roll all the dice.'[31]

Mulroney either picked the wrong date or assumed too much about the commitment of the dissenting premiers to pass the Accord. The 9 June 1990 agreement left the dissenting premiers with two weeks to pass the Accord. Both Manitoba and Nova Scotia have detailed rules in place governing the passage of legislation in their legislatures. Since Nova Scotia already supported the Accord, the two week time limit became a problem only for Manitoba. The remaining time was not sufficient to ensure the acceptance of the new agreement. In the Manitoba Legislature, without two days notice, unanimous consent is required to suspend the house's regular business and immediately deal with matters of "urgent and pressing necessity".[32] In addition, the rules of this house required the adherence of a number of other procedural steps that may have taken weeks to comply with.[33] This was greater than the number of days remaining before the death of the Accord. This latter aspect became irrelevant, as unanimous consent to suspend the house's regular business was not given. The federal government claimed that Filmon could have bypassed these rules but they failed to appreciate the fact that when Filmon was the opposition leader, he insisted on the inclusion of these rules. He is seen as the person responsible for the presence of these rules. He could hardly change them to push this major constitutional amendment through. If the Prime Minister counted on

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[30]"PM's slip won't help Meech deal," **Edmonton Journal**, 13 June 1990, A1.

[31]Cohen (1990), 232.

[32]Province of Manitoba, 35.

[33]For a more detailed presentation of the procedural rules mentioned above, see Province of Manitoba, 25.

Filmon to set aside the rules he worked hard to install, the former was guilty of yet another mistake.

The strategy used by Mulroney to get Wells on side with the other supporters of the Accord was also flawed. The week of meetings in early June focused on isolating and pressuring Wells until he agreed to support the Accord. Some felt that the tactics used by the Prime Minister during this week of negotiations amounted to a hostage-like treatment of Wells. According to **Globe and Mail** columnist, Robert Sheppard:

> The negotiating strategy Prime Minister Brian Mulroney has adopted includes an amalgam of techniques, labour negotiators have suggested. But it also seems that Mr. Mulroney is trying to recreate here a Canadian version of the Stockholm Syndrome whereby hostages tend to adopt a sympathetic attitude toward their captors.[34]

In the end, against his better judgment, Wells agreed to take the Accord and the new parallel accord back to the Newfoundland and ask the legislature to decide. Wells' signature on the 9 June 1990 parallel accord represented only conditional support because he did not agree to sell vigorously the new agreement to the Newfoundland legislature. While the document had the signature of all First Ministers, beside the signature of Wells was an asterisk with the statement:

> The Premier of Newfoundland endorses now the undertaking in Part I of this document and further undertakes to endorse fully this agreement if the Constitution Act, 1987 is given legislative or public approval following the consultation provided for in Part I.[35]

On 22 June 1990, after Wells said a vote in Newfoundland would be pointless because it would be against the Accord, Senator Lowell Murray announced the federal government would ask the Supreme Court to determine whether the deadline could be extended until 23 September 1990, the date Saskatchewan ratified the Accord. This would only be done, however, if Newfoundland held a vote. This angered Wells. On 10 June 1990, he announced that he intended to ask the provincial premiers for an extension of the 23 June 1990 deadline

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[34]"Canada's Stockholm Syndrome," **Globe and Mail**, 9 June 1990, D1.

[35]See Canada, "First Ministers' Meeting on the Constitution, Final Communique," 9 June 1990, 6.

so that a referendum could be held in Newfoundland.[36] After discussions with Mulroney, Liberal leadership hopefuls Sheila Copps and Jean Chrétien and others, Wells abandoned his idea of the referendum.[37] That the federal government was now willing to pursue an extension of the deadline left Wells feeling betrayed and manipulated.

Many additional examples of strategic errors can be identified as evidence of Mulroney's failure to provide effective leadership. This failed leadership was cemented by Mulroney's visible absence from the contemptuous view of Canadians on 22 June 1990, the day which it became apparent that there was no hope of saving the Accord. In the dying days of the Accord, Senator Murray continued to be the federal spokesperson while many wondered where their Prime Minister was. It was not until the next day that Mulroney went on national television to lament the death of the Accord. His erroneous approach continued. Failing to relent from blaming others for the problems associated with the Accord, he stated:

> ...yesterday evening, the last remaining hope that the Accord would be ratified was dashed when the House of Assembly of Newfoundland and Labrador adjourned without a vote. This action means that the current round of constitutional reform has come to an end.[38]

It should be noted that some defended Mulroney by claiming that the opposition from English-Canada made the Accord's passage impossible.[39] Others claim that the "focus on leadership style and personal failings does not go far towards an explanation of the collapse of Meech Lake."[40] That other contributing factors have been forwarded in this chapter attests to these assertions, but based on the evidence above, one cannot deny that political leadership did play a role in the failure of the Accord.

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[36]" Wells seeks extension of Meech deadline," **Globe and Mail**, 11 June 1990, A1.

[37]"Will hold free vote on Meech, Wells says," **Globe and Mail**, 12 June 1990, A2.

[38]Office of the Prime Minister, (23 June 1990), 1.

[39]Fournier, 66.

[40]Simeon, 27.

The determinants of the failure of the Meech Lake Accord will no doubt be debated as long as constitutional reform is pursued in Canada. Recognizing that there were other contributing factors, the failure of the Accord was primarily due to: 1) the lack of direct public input prior to final agreement by Canada's First Ministers, 2) the three year time limit, 3) the placement of constitutional amendments requiring 2/3-50 and unanimity support to pass in one package, and 4) the lack of political leadership, especially by the Prime Minister. The next chapter will identify the constitutional lessons for Canada that can be identified from this round of negotiations.

CHAPTER SEVEN

MEECH LAKE AND ITS CONSTITUTIONAL LESSONS FOR CANADA

> **The political context in 1990 is obviously a world apart from what it was in 1986; the relative calm of just four years ago has been overwhelmed by a mood of bitterness and rancour resulting from the failure of the Meech round. This sour political mood probably means that any future constitutional negotiations would be even more dominated by symbolism and [sic] by attempts to gain redress for past grievances. As Meech itself has demonstrated, any series of negotiations conducted on such a footing are unlikely to succeed.**
>
> **Patrick Monahan**[1]

Much emotional energy was exhausted by Canadians in the weeks and days before 23 June 1990. The Meech Lake Accord dominated news coverage across the country. This was not surprising in light of the fact that many Canadians feared that the country would be in turmoil if the Accord did not pass. Some feared that the country would break-up; a Canada without Québec. Others, such as Premier Buchanan of Nova Scotia, hinted that some of the remaining parts of Canada might join the United States.[2]

This suggestion caught the attention of Canada's neighbours to the south and made headlines in the **New York Times** and the **Washington Post**. "Crossfire", a current affairs program on the U.S. based *Cable News Network* (CNN) dedicated its 27 April 1990 program to the separation issue in Canada. True to the abbreviated presentation style of the news media, the issue was introduced by co-host Mike Kinsley as follows:

> ...Canada, friendly neighbor to the north, Molson's Ale, the Toronto Blue Jays, and the Canadian Mounted Police. But things aren't so friendly in Canada right now. In fact, the country is on the verge of breaking in two....It's the best real estate opportunity we've had since we bought Alaska from the Russians.[3]

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[1]Patrick Monahan, **After Meech Lake: An Insider's View** (Kingston: Institute of Intergovernmental Relations, 1990), 30.

[2]"Buchanan hints at union with U.S.," **Calgary Herald**, 19 April 1990, C1.

[3]**Official Transcripts of CNN Crossfire**, "Canadian Rebels: Independence for Quebec?", 27 April 1990, 2.

Financial reports prepared by Merill Lynch and the Bank of Montreal indicated that Québec could financially survive a break-up. The value of the Canadian dollar fluctuated as major events with respect to the Accord unfolded. For example, it declined a full cent with the resignation of Lucien Bouchard and continued to fluctuate as 23 June loomed near.[4]

On 22 June 1990, the federal government officially announced that the Meech Lake Accord was dead. On national television, Senator Lowell Murray explained that the government of Manitoba had done its best to pass the Accord but this same effort had not been undertaken by Premier Wells of Newfoundland. Murray stated: "Premier Wells' decision to break his commitment and not hold the vote tonight has dashed the one remaining hope to have Meech Lake succeed."[5]

For many, the disappointment was great. The three year struggle to bring Québec back into the Canadian constitutional family had failed. For others, there was relief; relief that a flawed constitutional amendment did not become part of the Canadian Constitution. Many were still reeling from a predicament they blamed on the lack of leadership by their politicians. The storm created by opponents shortly after the development of the Accord turned into a full blown hurricane. The eye of the hurricane, Québec, did not hurdle insults or shed tears. They simply accepted the perceived message the rest of Canada was sending them - that they were not wanted.

Powerless to change what had happened, many Canadians knew that henceforth, the process of constitutional change in Canada would have to be different. The Accord had opened up the "pandora's box" for constitution-making. Many lessons from this round would have to be applied to future attempts at constitutional reform if the political leaders wanted to maintain political legitimacy.

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[4]"Dollar falls to 84.15 cents on panic over Meech Lake," **Globe and Mail**, 23 May 1990, B1.

[5]CBC Newsworld, 22 June 1990.

What constitutional lessons has the Meech Lake Accord provided for Canada? What mistakes should be avoided the next time around? While numerous suggestions have been forwarded, the present focus will in four areas. First and foremost is public input/participation. Canadians must be consulted before any final agreement is made on constitutional amendments. Political leaders must, however, maintain a significant role at the constitutional table. They must maintain final responsibility for determining the content of proposed constitutional amendments. Second political leaders must recognize the potential for the occurrence of events harmful to amendments subject to the three year time limit. Formal responsibilities should be assigned to each First Minister to ensure everything possible is done to pass the amendment within this time limit. Third, constitutional amendments requiring passage by differing amending formulas should not be placed in the same constitutional package to be passed as a whole, as was the case with the Meech Lake Accord. Consequently, those amendments requiring unanimous consent will not be subject to the three year time limit. Similarly, those items that can be passed with the 2/3-50 method will not be subject to unanimity. Fourth, the behavior of political leaders in constitution-making must change. The development of coordinated and effective strategies to communicate the merits of the proposed amendments and defend them against criticisms should be a must in any future constitutional amendment. In addition, effective and cooperative political leadership, not the hurling of insults and political calculations to maximize electoral support, will be demanded from Canadians in the future.

Public Participation/Input

As mentioned in chapter five, Alan Cairns maintains that Meech Lake failed because of inadequate and outdated constitutional theory. Canada's First Ministers assumed that the process used in the past, executive federalism, was still sufficient. They failed to:

> appreciate that memories of the public role in the constitutional process in 1980-81, the 1982 Charter, the various aboriginal constitutional clauses, and the bitterness of

> aboriginals about the failure of the four aboriginal constitutional conferences had decisively changed the relationship of many Canadians to what they had come to think of as their constitution....The governments that met at Meech Lake...do not appear to have understood the greatly enhanced psychological role of the constitution that followed in the wake of 1982, especially of the Charter.[6]

As illustrated by the Meech Lake Accord, the public felt left out of the constitutional amendment process by a select group of people who claimed to be representing them. As the Charter has served to give Canadians a certain degree of political efficacy when it comes to changing the Constitution, they no longer feel that the Constitution is something handled by the politicians and constitutional experts. They now feel that they too must be consulted. As a result:

> the theory and practice of constitutional change appropriate for the Canadian future must recognize the new social role of the constitution in the era of the Charter. Federalism and parliamentary government remain as fundamental constitutional ordering principles, but they coexist with a Charter that incorporates the citizenry directly into the constitutional order.[7]

It is certain that future attempts of constitutional reform will not be seen as legitimate if they do not involve the public prior the any final agreement. Rampant public participation, however, is as destructive to the legitimacy of constitution-making as is a process focusing on executive federalism.

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[6]Cairns (1991), 246-247.

[7]Cairns (1991), 260.

(a) The Limits to Public Participation/Input

While the aftermath of the Meech Lake Accord confirms the necessity for greater citizen participation through a more open process of constitutional reform, this could prove to be destructive and chaotic if not managed properly. Open participation will significantly increase the number of items on the constitutional agenda. The provinces, the federal government, the territories, political parties, women, aboriginal peoples, multicultural groups, language minority rights groups, the disabled, labour, business, the poor and many others will each have their own constitutional shopping list. While some items will overlap, many will not.

These demands will make cooperation and compromise very difficult and will require greater amounts of time for negotiation. One has to wonder whether negotiation is possible with so many actors at the table. Roger Gibbins has stated that: "Everyone will carry their own causes to the table....One of the ways to encourage the system to break down is to encourage people to participate."[8] In addition, because Constitution-making in the past has not involved widespread public participation, it is also reasonable to expect many members of the public to be uninformed or narrow in their demands for constitutional change. Public participation must therefore be managed very carefully. An opportunity for open and meaningful input must be provided for future constitutional reform initiatives, but not to the point where the entire consultation process tramples on existing "requirements of federalism - with the necessity to make and keep intergovernmental agreements"[9] or where it breaks down completely.

(b) The Vehicles for Public Participation/Input

Some have advocated the use of public hearings as the means of ensuring public input. If carefully planned, this initiative could be open and provide a reasonable opportunity for Canadians to participate. Others have suggested the establishment of a constituent assembly

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[8]Simeon and Janigan, 76.

[9]Simeon and Janigan, 2.

where a "cross-section of Canadians...would try to find a consensus on constitutional change."[10] When one considers that these two suggestions do not account for the special interests of Québec, their limited value for the immediate future is realized.

Public hearings in Québec will likely yield some different, yet important, demands than those from the English-speaking provinces. How will these disparate constitutional demands be accommodated? In addition, the government of Québec has vowed not to participate in any future constitutional negotiations other than on a bilateral basis with Ottawa, unless its demands are met. For this reason, its participation in a constituent assembly would be unlikely. As evident in the Meech Lake debate, many of the citizens and political leaders of the English-speaking provinces, will reject any process that does not deal with every province in the same manner.

A combination of public hearings and effective political leadership could serve as a legitimate process for future constitutional reform. At a minimum, a multi-step process will have to be adopted. This should first involve provincial and national public hearings to identify provincial and national interests. Next, based on these public hearings, governments should develop and present their constitutional positions. These positions should then be sent back to their respective publics for further input. Political leaders should be in a position to explain the reasons for their choices. If necessary, after reaction from the public, these positions may be modified.

Once such modifications are made (if necessary), these lists should be presented, discussed and negotiated at a series of First Minister's Conferences, each to be held at least two days apart. This will avoid marathon sessions involving weary First Ministers. Once a consensus is reached, the agreement should be taken back to Parliament and the legislatures for ratification. While this process departs from those of the past, anything less in the short-

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[10] "Unity and prosperity promised," **Edmonton Journal**, 14 May 1991, A1.

term will generate greater feelings of distrust for political leaders and undermine the entire system of representative democracy.

Some groups and individuals will want to be involved in every stage of decision making and will not tolerate closed-door negotiations. To expect involvement at every stage is unrealistic. John Crispo of the Faculty of Management at the University of Toronto, claims that: "If people do not recognize that critical parts of any set of negotiations have to take place behind closed doors, I just give up."[11] To expect minimal involvement from political leaders is also unrealistic. Whatever the accepted means of developing future constitutional changes, it cannot be completely removed from the hands of democratically elected political leaders.

Another very important lesson from this round of constitutional negotiations is that it is not acceptable to attempt to address the grievances of one group. Meech Lake was intended to address the grievances of Québec. The end result was criticism from those who felt that they too had legitimate concerns such as Canada's aboriginal peoples. Citizen participation will likely ensure that a process pursuing single track constitutional reform efforts will unlikely take place in the near future. In addition, citizen participation will likely ensure that future definitions and characterizations of Canada will be broader than the "two founding peoples" notion. Aboriginal peoples and Canada's multicultural communities will likely demand that they too are included in every attempt to define Canada. Furthermore, as evidenced in the Meech Lake debate, citizen participation will ensure that political leaders will not be able to develop constitutional amendments that require a monolithic response from all of English or all of French Canada. After the death of the Accord, many Francophone leaders were demanding a position from English Canada. The economic and social diversity of the "English-speaking" provinces guarantees the impossibility of a single position.

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[11]Simeon and Janigan, 75.

The Three Year Time Limit

Second, adequate attention must be paid by Canada's First Ministers to the three years permitted by section 39(2) of the Constitution Act, 1982 to general constitutional amendments. As argued in chapter five, three years is a long time. Many things can happen. In the case of the Meech Lake Accord, three signatories to the Accord were ousted. In addition, political events (Bill 178), and the rejection of the Accord by those who felt they were being unjustly ignored secured the defeat of the Accord. When one examines the intent of section 39(2), it is revealed that this period of time was deemed reasonable in order to prevent constitutional amendments from cluttering the landscape. One must ask: "Does the value of this objective balance or outweigh the potential for the unravelling of constitutional amendments?" In light of Meech Lake, one might be tempted to produce a negative response. As Meekison points out, however, if the agreement fails, "the amending formula [more specifically, the three year time limit] is not at fault. Blame,...should be assigned to the participants who have either changed their minds or been changed themselves through the electoral process."[12] Some of the signatories of the Meech Lake Accord must shoulder some of the blame for its unravelling.

The Meech Lake experience has clearly revealed what could happen if due attention is not paid to the time limit. For example, attempts to save constitutional amendments should not be in the form of eleventh-hour meetings where the opponents are pressured until they give in. 'Stockholm Syndrome' tactics are far from acceptable in a diverse federation such as Canada. Each First Minister must retain the right to represent his/her jurisdictional interests.

Provincial legislative processes, such as those in Nova Scotia and Manitoba, must also be considered seriously. Adequate time must be granted so that these processes can be followed. During the Meech Lake debate, many, including the Prime Minister knew that if granted enough time to follow the rules of the Manitoba legislature, the political leaders of

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[12]Simeon and Janigan, 89.

Manitoba would have ratified the Accord. Ratification, however, could not be had by bypassing these house rules.

The Amending Formula

Third, sections 38 and 41 of the amending formula entrenched in the Constitution Act, 1982 are not to blame for the failure of the Meech Lake Accord. The manner in which they were used, however, can certainly be censured. In future, those constitutional amendments requiring unanimous consent for passage and those requiring the use of the 2/3-50 procedure should not be placed in the same package. An exception to this assertion can be granted if the amendments are divided into like groups to be passed separately. Political leaders should attempt to pass those using the 2/3-50 procedure first and then those requiring unanimity.

This approach will ensure that amendments requiring unanimous consent are not subject to the three year time limit. Similarly, it will ensure that amendments that can be passed using the 2/3-50 procedure will not be subject to the unanimity requirement. Reflecting on the use of the amending formula in the Meech Lake Accord, Peter Meekison, constitutional advisor to the Alberta government admitted: "...perhaps we could have proclaimed the parts of the accord that fell under the two-thirds/50 percent threshold. There was no deadline for the balance since it fell under the unanimity provision."[13] How this unconstitutional perversion was permitted to stand is still baffling.

Although others such as Patrick Monahan would disagree, the lessons of Meech Lake do not necessarily point to the need for changes to the amending formula. Monahan feels that the formula cannot deal effectively with comprehensive amendments where a series of tradeoffs between amendments requiring use of the 2/3-50 formula and the unanimity formula is necessary.[14] Monahan also claims that the amending formula is "premised on executive

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[13]Simeon and Janigan, 89.

[14]Simeon and Janigan, 90.

federalism and elite accommodation."[15] Monahan must consider, however, that since its entrenchment in 1982, only two constitutional amendment attempts have been pursued: in 1983 establishing a series of First Ministers' Conferences for the purposes of defining aboriginal rights; and the Meech Lake Accord. The former was successfully ratified. The latter was not. These two examples hardly provide enough evidence as to the effectiveness of the formula to demand changes.[16] Furthermore, the opportunity for meaningful public participation, if provided, will significantly limit the use of executive federalism and elite accommodation.

Immediate efforts to ensure that Québec does not separate from Canada may have to be addressed using the amending procedure under section 43 of the Constitution Act, 1982. This section provides for constitutional amendments involving Parliament and one or more, but not all of the provinces. Amendments that can be made under this section include "any alteration to boundaries between provinces" and "any amendment to any provision that relates to the use of English or the French language within a province." While the scope of this type of amendment may be limited, it can avoid many of the complications that would exist with the 2/3-50 rule or the unanimity rule. It is noteworthy to mention that a clause similar to the "distinct society" clause could be enacted under this section.[17]

Political Leadership

During the Meech Lake debate, especially towards the end, many blamed political leaders for the predicament Canada was in. They were bewildered as to how, in such a short period of time, the country had come to the verge breaking up. As mentioned in Chapter five, tactics such as those used by Prime Minister Brian Mulroney served to solidify negative sentiments about political leaders. It is therefore not surprising that the result has been a

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[15]Monahan, 29.

[16]Simeon and Janigan, 89.

[17]Monahan, 35.

noticeable decline in the trust of political leaders by the public. A March 1990 poll clearly indicates that the public's trust in politicians has decreased since the early 1980s. In 1990, 57% percent of those polled stated that politicians were unprincipled. In the early 1980s, 63% indicated that they believed that politicians were principled. Moreover, in 1990, 64% said that their views toward politicians were unfavourable. In contrast, in the early 1980s, 51% saw politicians in a favourable light.[18] Although politicians are presently regarded in a less positive light, they must still play a significant role in the process of constitutional reform.

Open participation from the public will result in a very unwieldy process of constitutional reform. The role of political leaders can serve to stimulate and manage this process. Citizens must be educated as to their new role as constitutional actors.[19] Political leaders cannot just respond to public demands. They must take steps, either through educational programs or public debate, to create an ongoing dialogue on constitutional priorities and the implications of such priorities. They must also ensure that the public will be capable of dealing with like problems in the years to come. For example, interest groups involved in future constitutional discussions should be encouraged to demonstrate that they have painstakingly considered all matters relevant to the amendment(s), not just their particular interest. This could be done by asking them to comment on the demands of other groups as well as their own. Although there is much room for misunderstanding of the positions of others, at least there will be some consideration of other points of view. While many criticisms of proposed constitutional amendments may be valid, those based on ignorance and intolerance should be countered and relegated to their appropriate place.

The above approach avoids the simple tallying up of public preference. It advocates the education and enlightenment of the public.[20] Cairns again astutely points out that during

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[18]Gregg and Posner, 54.

[19]Cairns (1991), 261.

[20]Simeon and Janigan, 73.

the Meech Lake debate, provincial governments that did not hold public hearings and/or only had superficial debates in their legislatures prior to passing the Accord, "both exploited and contributed to civic ignorance about a potentially major altercation in Canadian federalism and in the underlying philosophy of Canadianism."[21]

Political leaders must also re-examine their roles and responsibilities in the area of constitutional reform and perhaps even in politics in general. They must ensure that coordinated and effective strategies to communicate the merits of such agreements to the public are developed and implemented. In addition, an adversarial approach, where political parties are challenging each others positions to score political points, may not be the best for sensitive areas of constitutional change. Unless politicians have something meaningful to contribute to the constitutional debate, Canadians will not receive them positively. Meech Lake was greeted by a "tamed" response from the various political parties due to its sensitive nature. No one wanted to appear unaccommodating to Québec. Few opportunities for criticizing the actions of each other after the development of the Accord, however, were missed. Political leaders should also ensure that each provision of the agreement is interpreted in the same manner by all First Ministers. The dual interpretation of the "distinct-society" clause by Bourassa and Mulroney is a prime example of how such disagreements can be fatal to the agreement. Furthermore, in any process of negotiations, political leaders should not present shopping lists that represent the minimum they are willing to accept. In the case of Meech Lake, Bourassa's five demands were presented as a minimum to be accepted or rejected. Many Canadians rejected this approach. They felt as though they were being held hostage by Québec, a tactic inconsistent with the cooperation and compromise that should surround constitutional reform. Finally, First Ministers should take into account the political turnover that may occur during the time permitted to pass the Accord. Provisions that are sure to be

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[21]Cairns (1991), 248.

opposed by potential successors of existing First Ministers should be considered very carefully, and if possible, adjusted to accommodate the potential leader.

Conclusion

The grievances of French-speaking Québec within an English-speaking country and continent are not new. They existed well before Canada became a nation in 1867. The Fathers of Confederation believed that a federal system of government would ensure the preservation of the French language, culture and institutions. The years following Confederation made French Canadians alarmingly aware that unless steps were taken to protect their language and culture, they would soon be forced to assimilate into the English-speaking country. The preservation of the French fact in Canada was the main objective of many prominent politicians in Québec during the 1960s. In 1980, a referendum on sovereignty was held to determine whether Québecers still wanted to remain as part of Canada. They voted "yes".

Two years later, the Canadian Constitution was patriated without the support of Québec. Political leaders in Québec vowed not to participate in any future attempts to amend the Constitution. Five years later, the Meech Lake Accord was developed to once again bring Québec back into the Canadian constitutional family as a full participating member. Its failure brought to the surface many related and unrelated criticisms about constitutional change and the deeply entrenched divisions amongst the many parts of Canada.

The Meech Lake Accord has resulted in many constitutional lessons for Canada. While these lessons are numerous, only a limited number have been identified in the present thesis. They include: 1) the need for public input prior to final agreement by Canada's First Ministers on proposed constitutional amendments; 2) the need for greater care in attempts subject to the three year time limit; 3) the need to prevent proposed amendments that can be passed with the 2/3-50 amending formula from being placed into a package with those requiring unanimity; and 4) the need for political leaders to re-examine and adjust accordingly, their roles and

responsibilities in the delicate area of constitutional reform. All of these lessons will have to be taken into account as strategies to prevent Québec from separating from Canada are developed.

The death of the Accord has left the accommodation of Québec as the primary constitutional issue for the rest of the country. It has also brought the grievances of the aboriginal peoples of Canada to the forefront. While the future of the country is still very much uncertain, Canadians can count on one thing. The process and the many of the "tactics" used to ratify the Meech Lake Accord will not be repeated. While academics are busy examining all aspects of federalism, parliamentary government and representative democracy, and demanding widespread changes, political leaders are scrambling to give the impression that the public is heard[22] and to once again legitimize the process of constitutional reform. Their work, however, is far from done.

[22]This does not mean that the recommendations will be adopted.

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APPENDIX

Constitution Amendment, 1987

Following is the text of the Constitutional Accord approved by the Prime Minister and all provincial Premiers on June 3, 1987, which provided the basis for submitting a resolution to Parliament and the provincial legislatures, seeking approval of the *Constitution Amendment, 1987.**

1987 CONSTITUTIONAL ACCORD

WHEREAS first ministers, assembled in Ottawa, have arrived at a unanimous accord on constitutional amendments that would bring about the full and active participation of Quebec in Canada's constitutional evolution, would recognize the principle of equality of all the provinces, would provide new arrangements to foster greater harmony and cooperation between the Government of Canada and the governments of the provinces and would require that annual first ministers' conferences on the state of the Canadian economy and such other matters as may be appropriate be convened and that annual constitutional conferences composed of first ministers be convened commencing not later than December 31, 1988;

AND WHEREAS first ministers have also reached unanimous agreement on certain additional commitments in relation to some of those amendments;

NOW THEREFORE the Prime Minister of Canada and the first ministers of the provinces commit themselves and the governments they represent to the following:

1. The Prime Minister of Canada will lay or cause to be laid before the Senate and House of Commons, and the first ministers of the provinces will lay or cause to be laid before their legislative assemblies, as soon as possible, a resolution, in the form appended hereto, to authorize a proclamation to be issued by the Governor General under the Great Seal of Canada to amend the Constitution of Canada.

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* While the general principles described in the introductory pages of this booklet are clear from a reading of the text, the proposed amendments include a number of technical provisions and there are frequent references to the *Constitution Acts, 1867 to 1982*. For a detailed understanding, it is therefore necessary to consult the *Constitution Acts, 1867 to 1982*, which can be found in libraries or ordered (Catalogue No. YX1-1/1986E) at a price of $4.25 each ($5.10 outside Canada) from the *Canadian Government Publishing Centre, Supply and Services Canada, Ottawa, Ontario, K1A 0S9*. Cheques and money orders are payable to the Receiver General for Canada.

2. The Government of Canada will, as soon as possible, conclude an agreement with the Government of Quebec that would

(*a*) incorporate the principles of the Cullen-Couture agreement on the selection abroad and in Canada of independent immigrants, visitors for medical treatment, students and temporary workers, and on the selection of refugees abroad and economic criteria for family reunification and assisted relatives,

(*b*) 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, and

(*c*) provide an undertaking by Canada to 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,

and the Government of Canada and the Government of Quebec will take the necessary steps to give the agreement the force of law under the proposed amendment relating to such agreements.

3. Nothing in this Accord should be construed as preventing the negotiation of similar agreements with other provinces relating to immigration and the temporary admission of aliens.

4. Until the proposed amendment relating to appointments to the Senate comes into force, any person summoned to fill a vacancy in the Senate shall be chosen from among persons whose names have been submitted by the government of the province to which the vacancy relates and must be acceptable to the Queen's Privy Council for Canada.

MOTION FOR A RESOLUTION TO AUTHORIZE AN AMENDMENT TO THE CONSTITUTION OF CANADA

WHEREAS the *Constitution Act, 1982* came into force on April 17, 1982, following an agreement between Canada and all the provinces except Quebec:

AND WHEREAS the Government of Quebec has established a set of five proposals for constitutional change and has stated that amendments to give effect to those proposals would enable Quebec to resume a full role in the constitutional councils of Canada;

AND WHEREAS the amendment proposed in the schedule hereto sets out the basis on which Quebec's five constitutional proposals may be met;

AND WHEREAS the amendment proposed in the schedule hereto also recognizes the principle of the equality of all the provinces, provides new arrangements to foster greater harmony and cooperation between the Government of Canada and the governments of the provinces and requires that conferences be convened to consider important constitutional, economic and other issues;

AND WHEREAS certain portions of the amendment proposed in the schedule hereto relate to matters referred to in section 41 of the *Constitution Act, 1982*;

AND WHEREAS section 41 of the *Constitution Act, 1982* provides that an amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and the House of Commons and of the legislative assembly of each province;

NOW THEREFORE the (Senate) (House of Commons) (legislative assembly) resolves that an amendment to the Constitution of Canada be authorized to be made by proclamation issued by Her Excellency the Governor General under the Great Seal of Canada in accordance with the schedule hereto.

SCHEDULE

CONSTITUTION AMENDMENT, 1987

Constitution Act, 1867

1. The *Constitution Act, 1867* is amended by adding thereto, immediately after section 1 thereof, the following section:

Interpretation

"**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.

Role of Parliament and legislatures

(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.

Role of legislature and Government of Quebec

(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.

Rights of legislatures and governments preserved

(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."

2. The said Act is further amended by adding thereto, immediately after section 24 thereof, the following section:

Names to be submitted

"**25.** (1) Where a vacancy occurs in the Senate, the government of the province to which the vacancy relates may, in relation to that vacancy, submit to the Queen's Privy Council for Canada the names of persons who may be summoned to the Senate.

Choice of Senators from names submitted

(2) Until an amendment to the Constitution of Canada is made in relation to the Senate pursuant to section 41 of the *Constitution Act, 1982*, the person summoned to fill a vacancy in the Senate shall be chosen from among persons whose names have been submitted under subsection (1) by

the government of the province to which the vacancy relates and must be acceptable to the Queen's Privy Council for Canada."

3. The said Act is further amended by adding thereto, immediately after section 95 thereof, the following heading and sections:

"Agreements on Immigration and Aliens

Commitment to negotiate

95A. The Government of Canada shall, at the request of the government of any province, negotiate with the government of that province for the purpose of concluding an agreement relating to immigration or the temporary admission of aliens into that province that is appropriate to the needs and circumstances of that province.

Agreements

95B. (1) Any agreement concluded between Canada and a province in relation to immigration or the temporary admission of aliens into that province has the force of law from the time it is declared to do so in accordance with subsection 95C(1) and shall from that time have effect notwithstanding class 25 of section 91 or section 95.

Limitation

(2) An agreement that has the force of law under subsection (1) shall have effect only so long and so far as it is not repugnant to any provision of an Act of the Parliament of Canada that sets national standards and objectives relating to immigration or aliens, including any provision that establishes general classes of immigrants or relates to levels of immigration for Canada or that prescribes classes of individuals who are inadmissible into Canada.

Application of Charter

(3) The *Canadian Charter of Rights and Freedoms* applies in respect of any agreement that has the force of law under subsection (1) and in respect of anything done by the Parliament or Government of Canada, or the legislature or government of a province, pursuant to any such agreement.

Proclamation relating to agreements

95C. (1) A declaration that an agreement referred to in subsection 95B(1) has the force of law may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of the province that is a party to the agreement.

Amendment of agreements

(2) An amendment to an agreement referred to in subsection 95B(1) may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized

(*a*) by resolutions of the Senate and House of Commons and of the legislative assembly of the province that is a party to the agreement; or

(*b*) in such other manner as is set out in the agreement.

Application of sections 46 to 48 of *Constitution Act, 1982*

95D. Sections 46 to 48 of the *Constitution Act, 1982* apply, with such modifications as the circumstances require, in respect of any declaration made pursuant to subsection 95C(1), any amendment to an agreement made pursuant to subsection 95C(2) or any amendment made pursuant to section 95E.

Amendments to sections 95A to 95D or this section

95E. An amendment to sections 95A to 95D or this section may be made in accordance with the procedure set out in subsection 38(1) of the *Constitution Act, 1982*, but only if the amendment is authorized by resolutions of the legislative assemblies of all the provinces that are, at the time of the amendment, parties to an agreement that has the force of law under subsection 95B(1)."

4. The said Act is further amended by adding thereto, immediately preceding section 96 thereof, the following heading:

"General"

5. The said Act is further amended by adding thereto, immediately preceding section 101 thereof, the following heading:

"Courts Established by the Parliament of Canada"

6. The said Act is further amended by adding thereto, immediately after section 101 thereof, the following heading and sections:

"Supreme Court of Canada

Supreme Court continued

101A. (1) The court existing under the name of the Supreme Court of Canada is hereby continued as the general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a superior court of record.

Constitution of court

(2) The Supreme Court of Canada shall consist of a chief justice to be called the Chief Justice of Canada and eight other judges, who shall be appointed by the Governor General in Council by letters patent under the Great Seal.

Who may be appointed judges

101B (1) Any person may be appointed a judge of the Supreme Court of Canada who, after having been admitted to the bar of any province or territory, has, for a total of at least ten years, been a judge of any court in Canada or a member of the bar of any province or territory.

Three judges from Quebec

(2) At least three judges of the Supreme Court of Canada shall be appointed from among persons who, after having been admitted to the bar of Quebec, have, for a total of at least ten years, been judges of any court of Quebec or of any court established by the Parliament of Canada, or members of the bar of Quebec.

Names may be submitted

101C. (1) Where a vacancy occurs in the Supreme Court of Canada, the government of each province may, in relation to that vacancy, submit to the Minister of Justice of Canada the names of any of the persons who have been admitted to the bar of that province and are qualified under section 101B for appointment to that court.

Appointment from names submitted

(2) Where an appointment is made to the Supreme Court of Canada, the Governor General in Council shall, except where the Chief Justice is appointed from among members of the Court, appoint a person whose name has been submitted under subsection (1) and who is acceptable to the Queen's Privy Council for Canada.

Appointment from Quebec

(3) Where an appointment is made in accordance with subsection (2) of any of the three judges necessary to meet the requirement set out in subsection 101B(2), the Governor General in Council shall appoint a person whose name has been submitted by the Government of Quebec.

Appointment from other provinces

(4) Where an appointment is made in accordance with subsection (2) otherwise than as required under subsection (3), the Governor General in Council shall appoint a person whose name has been submitted by the government of a province other than Quebec.

Tenure, salaries, etc., of judges

101D. Sections 99 and 100 apply in respect of the judges of the Supreme Court of Canada.

Relationship to section 101

101E. (1) Sections 101A to 101D shall not be construed as abrogating or derogating from the powers of the Parliament of Canada to make laws under section 101 except to the extent that such laws are inconsistent with those sections.

References to the Supreme Court of Canada

(2) For greater certainty, section 101A shall not be construed as abrogating or derogating from the powers of the Parliament of Canada to make laws relating to the reference of questions of law or fact, or any other matters, to the Supreme Court of Canada."

7. The said Act is further amended by adding thereto, immediately after section 106 thereof, the following section:

Shared-cost program

"**106A.** (1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to

participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.

Legislative power not extended

(2) Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces."

8. The said Act is further amended by adding thereto the following heading and sections:

"XII—CONFERENCES ON THE ECONOMY AND OTHER MATTERS

Conferences on the economy and other matters

148. A conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once each year to discuss the state of the Canadian economy and such other matters as may be appropriate.

XIII—REFERENCES

Reference includes amendments

149. A reference to this Act shall be deemed to include a reference to any amendments thereto."

Constitution Act, 1982

9. Sections 40 to 42 of the *Constitution Act, 1982* are repealed and the following substituted therefor:

Compensation

"**40.** Where an amendment is made under subsection 38(1) that transfers legislative powers from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

Amendment by unanimous consent

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the powers of the Senate and the method of selecting Senators;

(*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(*d*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province was entitled to be represented on April 17, 1982;

(*e*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(*f*) subject to section 43, the use of the English or the French language;

(*g*) the Supreme Court of Canada;

(*h*) the extension of existing provinces into the territories;

(*i*) notwithstanding any other law or practice, the establishment of new provinces; and

(*j*) an amendment to this Part."

10. Section 44 of the said Act is repealed and the following substituted therefor:

Amendments by Parliament

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

11. Subsection 46(1) of the said Act is repealed and the following substituted therefor:

Initiation of amendment procedures

"**46.** (1) The procedures for amendment under sections 38, 41 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province."

12. Subsection 47(1) of the said Act is repealed and the following substituted therefor:

Amendments without Senate resolution

"**47.** (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution."

13. Part VI of the said Act is repealed and the following substituted therefor:

"PART VI

CONSTITUTIONAL CONFERENCES

Constitutional conference

50. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once each year, commencing in 1988.

Agenda

(2) The conferences convened under subsection (1) shall have included on their agenda the following matters:

(*a*) Senate reform, including the role and functions of the Senate, its powers, the method of selecting Senators and representation in the Senate;

(*b*) roles and responsibilities in relation to fisheries; and

(*c*) such other matters as are agreed upon."

14. Subsection 52(2) of the said Act is amended by striking out the word "and" at the end of paragraph (*b*) thereof, by adding the word "and" at the end of paragraph (*c*) thereof and by adding thereto the following paragraph:

"(*d*) any other amendment to the Constitution of Canada."

15. Section 61 of the said Act is repealed and the following substituted therefor:

References

"61. A reference to the *Constitution Act 1982*, or a reference to the *Constitution Acts 1867 to 1982*, shall be deemed to include a reference to any amendments thereto."

General

Multicultural heritage and aboriginal peoples

16. Nothing in section 2 of the *Constitution Act, 1867* affects section 25 or 27 of the *Canadian Charter of Rights and Freedoms*, section 35 of the *Constitution Act, 1982* or class 24 of section 91 of the *Constitution Act, 1867*.

CITATION

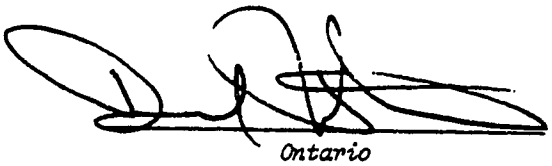
Citation

17. This amendment may be cited as the *Constitution Amendment, 1987*.

Signed at Ottawa,
June 3, 1987

Fait à Ottawa
le 3 juin 1987

Canada



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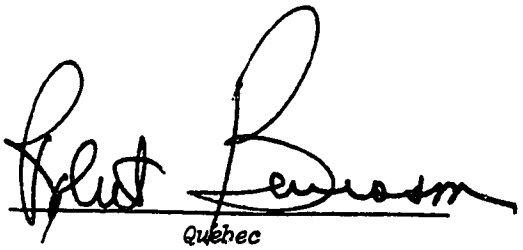

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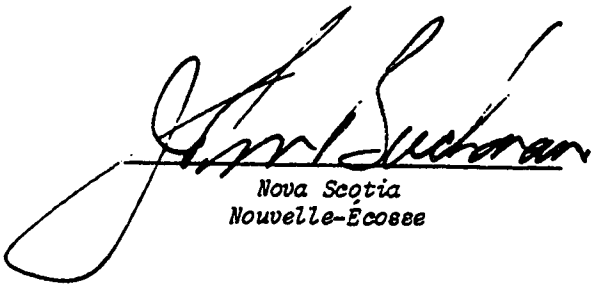

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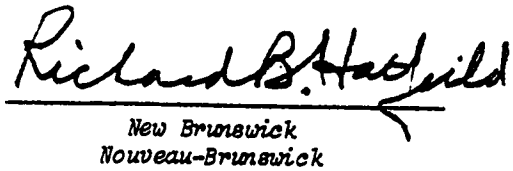

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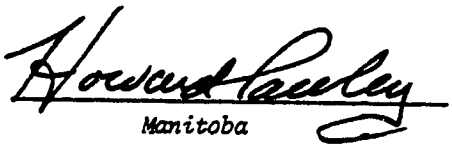

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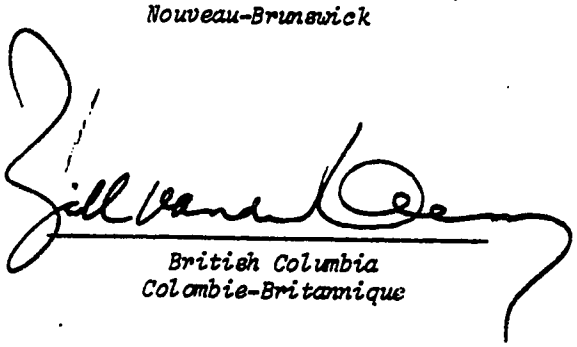

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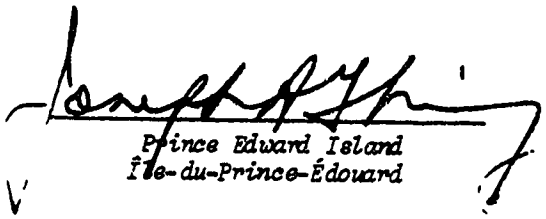

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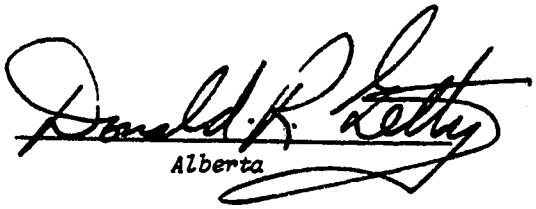

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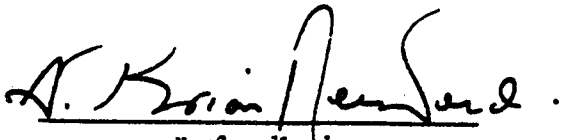

Newfoundland
Terre-Neuve