# *How Not to Amend the Constitution*

by F.L. Morton

The Constitution Act, 1982 "repatriated" the Constitution by giving Canadians the power to amend the Constitution unilaterally, without reference to Great Britain. It sets forth two general amending formulas. The Meech Lake Accord follows neither. (There is also a third amending formula (s.43) for amendments that apply to only one or several provinces)[1].

Every discussion and every legislative vote since the details of the Meech Lake Accord were agreed to by the eleven first ministers in June, 1987, have assumed that the Accord had to be ratified within a three year time limit or die. This apparently unanimous understanding was recently challenged by Gordon Robertson, former Secretary to the Privy Council and senior policy advisor to the Pearson and Trudeau governments. Mr. Robertson has argued that there is no three year time limit on the ratification of the Meech Lake Accord.[2] Mr. Robertson contends that the heretofore accepted view rests on a misinterpretation of the amendment provisions of the Constitution. Robertson's position, if correct, would have immediate and significant consequences for the Meech Lake Accord and thus Canadian politics more generally. The "removal" of the three year time limit would give the flagging Accord a new lease on life. Indeed, it would extend indefinitely the opportunity to ratify the Accord, thus eliminating the political crisis predicted by many if Meech were to fail in June, 1990.

Mr. Robertson has summarized his position as follows. The three year time limit imposed by section 39 of the Constitution applies only to amendments made pursuant to the section 38 formula—seven provinces with fifty percent of the population. The Meech Lake amendment "package" is not and could not be ratified under the "7/50 rule" because it contains two amendments that touch upon matters specified in section 41 of the Constitution — the composition of the Supreme Court of Canada and changes to the amending formula. Section 41 requires amendments on these matters to have the unanimous consent of all provinces. Section 41 amendments do not have any time limits.

For Mr. Robertson, it follows that since the Meech Lake Accord can only be ratified under the unanimity rule of Section 41, it does not have any time limit. To settle this issue Mr. Robertson advocates referring it to the Supreme Court of Canada. If his analysis is correct, Mr. Robertson concludes, the Supreme Court will save Meech Lake from "death by the clock", and a constitutional crisis will have been avoided.

To uncover the flaw in Mr. Robertson's logic, one must separate out what Meech Lake has blended together: two separate amending formulas. The problem arises because the eleven first ministers combined in one constitutional "package" a collection of amendments, some of which fall under the section 38 rules ("7/50" with a 3 year limit) and some under the rule s. 41 rules (unanimity with no time limit). If the first ministers had had the foresight to separate their amendments into two distinct proposals — a section 38 package and a section 41 package — there would be no controversy about time limits. (The section 38 package would have one; the section 41 package would not). Unfortunately, this is not the case. The result is confusion: Which amending rules govern the Meech Lake Accord?

Mr. Robertson's solution is to subsume the section 38 amendments under the section 41 requirements — unanimity, and no time limit. He reasons — correctly — that if the section 38 "7/50 rule" were to apply to the whole package, the section 41 amendments would be made more easily than intended. Indeed, since the "7/50 rule" has already been met within the three year time limit, the Accord would be a *fait accompli*. Thus a "package" containing both kinds of amendments must follow the s.41 rule of unanimity.

> Since the Accord is a package, it must be approved by the procedure necessary for whatever part or parts of the package requires the highest level of approval. That "highest level" is unanimity of the legislatures of all the provinces. Constitutional changes that require unanimity must be made pursuant to Section 41 and this is what is being done.

Mr. Robertson's argument is plausible but not persuasive. Another solution is to import the three year time limit of section 38 into the section 41 procedure. The result is a procedure that requires unanimity (per s.41) and imposes a three year time limit (per s. 38). This is truly "the highest level of approval," to use Mr. Robertson's own phrase, and it is the option the first minister (and the rest of Canada) thought they were choosing in the Spring of 1987. It is certainly as plausible as the Robertson option, and for the same reasons. While there are irrefutable reasons for preferring the unanimity requirement of section 41 to the "7/50 rule" of section 38, there is not any obvious reason for jettisoning the three year time limit. True, this makes it more difficult to gain approval for the Accord, but this may be its virtue not its vice.

The Meech Lake Accord proposes a mind-numbing array of amendments to Canada's constitution. Cumulatively, these amendments contain a very distinctive—and it turns out, controversial—vision of Canada's future. Surely when constitutional changes of this magnitude and extent are contemplated, it makes sense to require the highest degree of political consensus to effect these changes. This is accomplished by combining the most stringent aspects of both amending procedures, and it is not at all surprising that it is the option the eleven first

ministers agreed to when they drafted Meech Lake. Fundamental constitutional change should not be lightly undertaken.

Mr. Robertson might well respond that our political leaders are not free to create hybrid amending formulas by combining different elements of sections 38 and 41. I would tend to agree. But by this same logic, they are not free to turn section 38 constitutional matters into section 41 issues by lumping them together in a single "package". If the politicians should not be permitted to tack a three year rule onto section 41-type amendments, neither should they delete it from section 38-type amendments.

> ***One conclusion is the intriguing possibility that the Accord itself may be invalid and "unratifiable", because it violates the "manner and form" requirements of the Constitution by lumping together matters that must be treated separately.***

This unfortunate "package" approach to constitutional amendments can be attributed to a combination of arrogance and inexperience. The development of "executive federalism" has led to an attitude among our first minister and their advisors that the constitution is theirs to defend and amend. Prior to 1982, this was pretty much the case. But the *Constitution Act, 1982* "patriated" the Constitution not just by severing the link to Britain but also by replacing the unwritten conventions by an explicit, written amending formula. The Meech Lake Accord suggests that our first ministers have not yet understood this. Perhaps old habits are hard to break, but this does not excuse them from violating the new constitution. By this reading, the "package" approach adopted in Meech Lake may very well render the Accord itself unconstitutional.

A less draconian solution is that when governments combine section 38 and section 41 amendments into a single constitutional "package", they must meet the full requirements of both sections: unanimity and the three year time limit. This approach satisfies all the requirements of both amending formulas. With the June, 1990 deadline approaching, Mr. Robertson's modest proposal would be a welcome lifeboat indeed.

The problem is that it would be much more than a lifeboat. It would be an indefinite extension of Meech Lake into the future, without end! Is it really acceptable that constitutional change as far-reaching as Meech Lake should hang in the balance for five, ten, twenty years, until sometime down the road the governments of New Brunswick and Manitoba either change their mind or are voted out of office? Meech Lake opponents would surely denounce such a scenario as intolerable. Would Meech supporters be any more receptive? Are Premier Bourassa and the people of Quebec willing to wait five, ten, twenty years for an answer? There is a logic behind the practice of setting deadlines for the approval of constitutional amendments. If not a legal logic—such as section 38—then a political logic, such as Meech Lake.

Political logic also precludes another recently rumored solution to the "deadline problem": retrospectively dividing the Accord into two separate packages—section 38 amendments and section 41 amendments. According to this senario, the Prime Minister could then recommend that the former be proclaimed as law, since eight of ten provinces with more than ninety percent of the population have approved them. The section 41 amendments could remain "alive", since they are not subject to any formal time limit.

While this division is probably what should have been done at the outset—in June, 1987—it is much too late to do it now. How many times have Meech critics been told that the Accord is a "seemless webb," to be accepted or rejected intact. For governments suddenly to reverse themselves on this issue would be perceived as a hypocritical and self-serving attempt to win by trickery what they appear to be losing in the political arena. It would further poison the well of public opinion and further divide the country.

The lesson for the future seems clear. At a minimum, future proposals to amend the Constitution must not mix section 38 and section 41 type amendments in a single "package". Serious consideration should be given to adding a time limit to the section 41 amending formual. It's omission was probably an oversight in the first place. More generally, the very concept of a "package" approach to constitutional amendments may no longer be politically acceptable. This type of constitutional deal-making — consumated by eleven first ministers, behind closed doors, and then presented as a *fait accompli*—is a hangover from the pre-Charter era.

The Charter has created the perception that the Constitution is no longer the exclusive preserve of the First Ministers. As the opposition to Meech Lake has so clearly demonstrated, there are now many groups in Canadian society who see themselves as stakeholders in the "new" constitution. These "Charter Canadians," as they have been labelled,[3] are not going to accept exclusion from future constitutional changes. While the initiative for proposing constitutional amendments will still rest with Canada's eleven first ministers, they will have to defend any future changes in a public process that allows all interested parties to participate in a meaningful manner.

## Notes

1. For purposes of economy, when I say "the Constitution," I am referring to the *Constitution Act, 1982* only. The *Constitution Act, 1982* is only one part of the Constitution, properly speaking.

2. See Gordon Robertson, "Meech Lake—The myth of the time limit," in the Supplement to the *IRPP Newsletter*, vol. 11, No. 3, May/June, 1989.

3. See Alan Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake." *Canadian Public Policy* (1988), vol.14; pp. S121-145.