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# ***Meech Lake : Thoughts and Afterthoughts***

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*The constitutional amendments agreed upon by the Prime Minister and ten provincial premiers in June 1987 must be ratified by all legislatures by June 1990. Since the agreement was signed there have been changes in government in Manitoba, New Brunswick and Newfoundland. In light of the continuing debate we now publish articles representing three different perspectives on this important issue.*

*Senator Arthur Tremblay responds to criticism that the Accord is Quebec oriented. Richard Nerysoo, Speaker of the NWT Legislative Assembly, looks at how the Accord affects the question of provincehood for Canada's northern territories. Professor F.L. Morton, of the University of Calgary, argues that matters of substance aside, the Accord is an excellent example of how **not** to amend a Constitution.*



## ***An Authentically Canadian Deal***

by Senator Arthur Tremblay

**T**he long road that led to Meech Lake first began in Sept-Îles in August 1984, when Brian Mulroney made the following commitment: "The objective I have set for myself and which I repeat here is to convince the National Assembly of Quebec to give its assent to the new Canadian Constitution with honour and enthusiasm." It was the first turning point, and to my mind the most decisive one for the events that followed.

The impact of this invitation to resume the constitutional dialogue between Quebec and Canada was clearly apparent from the reaction of the Quebec Government of the time, in the fall of 1984, when Mr. Mulroney became Prime Minister of Canada. Mr. Lévesque agreed to take what he qualified as a "splendid risk". He started the process that was to lead up to that day in May 1985, when he handed to Mr. Mulroney, and

this is something we too often forget, a document in which he outlined the basis on which talks could be held. It was a detailed document that was certainly an attempt to clear the way to the difficult compromises he would have to make if the talks were to have the slightest chance of succeeding, despite the ideological tendencies of the party he happened to lead. We know what happened subsequently.

In this context, I think we can more readily understand why it was not easy for Mr. Bourassa and his political party to summarize in a few short points the conditions under which Quebec would return to the Canadian constitutional fold. To do so, he had to set aside a number of Quebec's traditional demands for renewal of the federation, especially those that would have involved changes in power sharing, demands that had been expressed during the 20 or so previous years.

Realizing that Quebec first had to get out of the anomalous and intolerable situation that had existed since the patriation of the Constitution in 1982, Mr. Bourassa kept his demands to a strict minimum and made these part of his party's electoral platform. Quebecers gave them a majority, so they had a democratic mandate from the people. That was the second significant event.

The third occurred at the annual conference of provincial premiers held in the summer of 1986 in Edmonton. Following the letter they received from Mr. Mulroney in July, the provincial premiers accepted Mr. Bourassa's proposal to postpone their own claims until later, considering the legitimate prospect of a genuine renewal of the federation. They agreed that initially, to break the deadlock created in 1982, they would have to concentrate on the items identified by the Quebec Government.

So we had Quebec putting the demands so often formulated by previous governments on the back burner and the other governments agreeing to limit the debate to the five points submitted by Quebec, and it was in this context that the talks started and continued with great intensity in the fall of 1986 and the winter of 1987.

In his speech at Sept-Îles, a turning point in the 1984 election campaign, Prime Minister Mulroney had already said clearly and concisely:

I am prepared to examine with the provinces a series of options for reworking the amending formula. However, aware of the importance and complexity of federal-provincial issues, I will not entertain an ambiguous or improvised approach to constitutional initiatives. To proceed otherwise would do more harm than good. Before taking any steps that might again lead to a deadlock, it is necessary to identify the terms and objectives and to have a fighting chance of success.

This prudent approach was obvious when the Prime Minister of Canada had to decide when a constitutional conference could be held. He waited until March 1987. Convinced at the time that on the basis of progress made in previous months, there was a reasonable chance of success, he invited his provincial counterparts to the conference that was held at the end of April at Meech Lake. How many observers really thought at the time that the eleven first minister of Canada would reach an agreement? No journalist or politician had ever seen it happen before. It did happen, however, despite all the risks and doubts, and to everybody's amazement, on April 30, the 11 government leaders agreed to instruct their legal experts to draft, in the form of a constitutional text, the agreement in principle they had reached.

A month later, they were meeting again, at a constitutional conference in the Langevin Building. Those who attended this decisive conference can tell you that drafting the final text was a laborious and arduous task. Various concessions had to be made, but the job was done.

After the long sequence of events I have just described, how could anyone claim that the agreements reached on June 4 were dashed off in a hurry and improvised, or as someone said: At Meech Lake and the Langevin, the first ministers of Canada behaved as though they were in an open bar? I would rather not comment.

To those who live in Quebec, the only province left out of the 1981 Constitutional Accord, the ratification of the Constitution Bill of 1987 is particularly important

All Quebecers see the Accord first as rectifying an historic injustice. However, it would be wrong to believe that the ratification of Meech Lake is strictly a problem for Quebec. Meech Lake is basically a Canadian problem, and if it is not ratified, Canada will be the weaker for it.

*In 1981-82, for the first time in our history, the powers of a province were modified without its consent. The Quebec Government reacted to this state of affairs by refusing to participate in subsequent federal-provincial conferences.*

Did this reaction, which was quite normal and predictable in the circumstances, create a problem that was exclusive to Quebec? Certainly not. The constitutional development of Canada as a whole was in serious jeopardy as a result of the absence of a province that contains one-quarter of the population of this country.

This kind of situation could not go on without causing increasingly irreparable damage to the integrity of the Canadian federation. It was therefore necessary to remedy the situation as soon as satisfactorily as possible. The result was Meech Lake. Does it do so in terms that are strictly concerned with the demands of Quebec?

In this perspective, I think we should take a look at what happened during the negotiations to the various points raised by the Quebec Government.

### **The Amendment Formula**

Let us consider the veto claimed by Quebec, for example. Mr. Rémiillard expressed his position on it this way in May 1986: "We claim a veto right to protect ourselves adequately from any constitutional amendment that would be contrary to Quebec's interests."

To what constitutional amendments did the veto claimed in those terms have to apply, so that it could meet such a generally worded requirement?

Was it really a veto that would apply to "any amendment that was contrary to Quebec's interest"? Was it in effect restoring the Victoria veto to the general amending formula?

In 1985-86, it could not be taken for granted that Quebec had definitely given up on the Victoria veto; Premier Bourassa's preferences were still perhaps along those lines. But the uncertainty on that subject would soon be dispelled; the veto actually called for was more specific and limited to amendments affecting federal institutions, including the Senate.

A key question still had to be resolved: Would Quebec be the only province to have a veto and thus acquire a special status?

An exclusive veto for Quebec would surely contradict a principle already recognized implicitly in the general amending formula since 1981 and explicitly stated in the preamble to the Meech Lake Accord: the principle of the "institutional" equality of the provinces, regardless of the size of their population or territory.

Thus, for the items listed in Section 42 of the 1981 *Constitution Act*, in particular, proportional representation of the provinces in the House of Commons, powers of the Senate, mode of selection of senators, the Supreme Court, creation of new provinces, we have gone from majority rule, to the unanimity rule, thus converting what could have been Quebec's exclusive veto into one shared with all provinces. ...

But let us be more rigorous than those who seem to be put off by the unanimity rule, because of its rigidity. We must make a real choice when amending the Constitution for the subjects at issue: either we maintain the 7/50 rule and the Senate in particular could be reformed without the agreement of Ontario or Quebec or any combination of three provinces with less than 50 per cent of the population or we admit that on such topics, the federal government and all provinces must agree. Is the unity of the country more threatened by unanimity than by a simple majority? It seems to me quite obvious that the opposite is the case.

### The Distinct Society Clause

Whatever happened to that other condition, that Quebec be recognized as a distinct society? In that regard, there has been another change just as significant along the way.

***As far as I know, the fact that Quebec is a distinct society is not being challenged. But there is reluctance to accept the fact that it is the only one among the Canadian provinces.***

It might surprise you to hear a French-speaking Quebecer say that what makes Quebec a distinct and unique society in Canada is not primarily its French identity.

What makes Quebec different and unique as a society, I repeat, as has been recognized for more than two centuries by the British Crown, is its civil code.

What are we referring to when we talk about the civil code? We are referring to what governs a whole range of interpersonal relations in a great number of areas that make up the fabric of a society. If that were the only thing defining Quebec, we would be fully justified in saying that Quebec is a distinct and unique society within Canada.

Of course, as I said, there is also its French-speaking majority. But civil law transcends the linguistic factor and its related culture; it governs all Quebec citizens, be they anglophone or francophone.

The Attorney General of Ontario, Mr. Ian Scott, said so in his own way before the Ontario legislature committee studying the Accord.

Finally, the recognition of the distinctness of Quebec has been the cornerstone of both our political practice and our constitutional law since the *Quebec Act* of 1774. One need only look at the special provisions dealing with the province of Quebec in the *British North America Act* of 1867 to grasp the fundamental way in which the distinctiveness of Quebec has shaped our constitutional tradition.

William Lederman, distinguished constitutionalist and professor emeritus of the Law Faculty, Queen's University, expressed the same views before the Joint Committee of the Senate and the House of Commons on the Meech Lake Accord:

Ever since 1867, the Courts have always recognized that Quebec as a distinct society in many respects. Quebec's unique character has always weighed heavily in all constitutional decisions closely affecting this province. This has always been recognized implicitly. I suggest this would be an opportunity for making explicit while has always been implicit: this reality has always been one of the basic characteristics of the Canadian society, free and democratic.

Although the reality of Quebec's distinct society is beyond question, the 11 first ministers were not satisfied with recognizing it. The negotiations have again widened the perspective of the Canadian entity to such an extent that, once reached, the accord makes a major contribution to the constitutional definition of the Canadian identity.

The first ministers stated: "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."

Indeed, we already were well aware of the fact that the linguistic duality was part of the Canadian reality, but the Constitution did not recognize it as a basic characteristic of the Canadian identity, just as we knew already that Quebec was a

distinct society, something the Constitution had failed to mention.

That the Constitution should from now on include both, if only as interpretative clauses, enhances somewhat these facts of observation and transform them from mere sociological realities into real values.

In this sense, the Meech Lake Accord completes the description of our national identity, originating from the 1982 *Constitutional Act* which recognized the basic rights of Canadian citizens, the rights of native people, the multicultural nature of the Canadian society and the importance of equalization payments in the fight against regional disparities.

Interpretative clauses such as those dealing with the linguistic duality or Quebec as a distinct society do not create a new balance of power. In this respect, it is clearly indicated that these clauses do not change anything to the powers of the two levels of Government. But they describe a new way of perceiving Canada as a whole under one hand, and the place of Quebec within this whole on the other.

It is precisely in that respect, in the order of meanings that the Meech Lake Accord brings an undeniable and major contribution to the constitutional definition of the Canadian identity.

In some international situations in particular the matter of the protection and respect of the cultural and political sovereignty of Canada obviously comes to mind. In such situations, the entrenchment in the most fundamental law of the country of the two basic characteristics of Canadian identity, as described in the Meech Lake Accord, gives our identity a status it would not otherwise have and puts a stop to any challenge by foreign countries. Is it reducing or distorting the nature of our federalism than to define it by what other countries consider its unique features?

### **Federal Spending Power**

If Meech Lake is no longer a "Quebec Matter" because it recognizes Quebec's distinct society, could it be so because of the proposed amendment to clause 40 of the 1982 Constitution Act?

You will recall that even at that time this clause provided fair financial compensation to any province who chose the status quo, deciding to keep the legislative powers it already had instead of transferring them to Parliament, if, of course, those powers related to "education or other cultural matters".

The Meech Lake Accord extends that principle to all provincial powers instead of restricting it to powers relating to education or culture.

Does that mean the Canadian federation and national unity are thus placed in jeopardy? Not according to Mr. Trudeau. You will undoubtedly remember that when he appeared before the Senate Committee of the whole in March, 1988, he told us that in 1981 he offered Mr. Lévesque the very same extension

proposed in the 1987 agreement. Mr. Lévesque did not follow up on it, because he probably thought it was not good enough. In any case, neither Section 40 of 1982 nor its Meech Lake version concern Quebec but rather all provinces empowered to avail themselves of the financial compensation that is provided. Once again, Meech Lake is not a "Quebec matter" only but a "Canadian matter".

There is no mention of Quebec either in Section 7 pertaining to federal spending power in an area of exclusive provincial jurisdiction.

In the mind of some opponents, that would be the most menacing provision because it threatens to weaken the federal Government, indeed prevent it from playing its role of a true "national" government when the general interest of Canadians would call for its intervention, even in an area of provincial jurisdiction.

To the contrary, for the first time, with Meech Lake, the Constitution would recognize federal Government's power to establish new "national" programs to be financed jointly with the provinces in areas where they have exclusive legislative jurisdiction.

But of course, concerns are not focused on this "clarification", to say the least, that Meech Lake brings on matters where the federal spending power can apply. They focus rather on the opportunity given to provinces which would themselves implement a program compatible with the objectives of a "national" program, to get directly as fair financial compensation the money the federal Government itself would spend otherwise in those provinces for that program. More particularly, there is no objection to the very idea of fair financial compensation; the objection is to the fact that it is subject to no stricter conditions than compatibility with national objectives of the program.

Some would like those conditions to comply with norms, standards or what else?

This is where precisely the very question of substance should be asked. How far would the Canadian Government be prepared to go without exceeding its legislative jurisdiction and thereby expressly trampling on the power sharing clause of the Constitution? Meech Lake opponents should have the courage to say whether they are ready to change the existing sharing of powers and transfer to the Canadian Government certain matters that are strictly provincial.

Those who signed the Meech Lake Accord were not ready to go that far because they were agreed, as a first step, to go no further than what was required for Quebec to patriate in turn. And this is why they went to the trouble of stating that that clause in no way widens the legislative jurisdiction of either level of government, federal or provincial.

The compromise reached was not limited however to the Quebec proposal concerning the spending power. Again they widened the perspective to Canada as a whole.

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## Immigration and Other Matters

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The same thing can be said as far as the exercise of federal and provincial jurisdiction in the area of immigration is concerned.

This is a case of a joint jurisdiction under Section 95 of the Constitution Act, 1867; but federal legislation has pre-eminence over provincial legislation. Various agreements were reached in the past to co-ordinate the actions of both levels of government, and Quebec requested that the experience established as far as it was concerned be enshrined in the Constitution. Discussions led to the same conclusion as in other cases—all provinces, rather than Quebec alone, could enshrine any agreement they might reach with the Canadian Government in the area of immigration.

We cannot avoid the same conclusion when reading Sections 2 and 6 of the agreements, which provide that provinces will share in the appointment of Senators and Supreme Court justices.

***There is no specific reference to Quebec in the provision concerning the appointment of Senators. It applies to every province.***

In the case of Supreme Court justices, it is provided that at least three justices must be members of the bar of Quebec. Except for this provision, which also is to be found in the existing Supreme Court Act, the formulation is the same as far as provincial consultation is concerned.

So, an examination of the various points submitted by Quebec and their resolution in the Meech Lake Accord clearly shows that the accord is not a "Quebec issue" but clearly a "Canadian issue".

The fact remains that perhaps some of the misunderstandings about Meech Lake which prevail in certain quarters affect us Quebecers more directly than other people. For instance, some people would have us believe that Meech Lake threatens the rights of English-speaking Quebecers because it acknowledges that Quebec is a distinct society in Canada. Nothing could be farther from the truth; as we have seen, the distinct society clause is linked to the clause which recognizes Canada's linguistic duality and which clearly refers to Quebec's anglophone minority as it does to francophone minorities in the

other Canadian provinces. Neither clause takes precedence over the other.

And the Accord provides that Quebec, like all the other Canadian provinces and the federal Parliament, has responsibility for protecting the linguistic duality of the country at the same time as it promotes its characteristic as a distinct society. Those who liken the distinct society clause to the notwithstanding clause are mistaken.

The notwithstanding clause is included in the *Constitution Act*, 1982, and it is that clause which allows all Parliaments, federal and provincial to override certain provisions of the Charter of Rights. The Meech Lake Accord has nothing to do with the notwithstanding clause, so much so that even after ratification the National Assembly, I believe, should have resorted to the notwithstanding clause instead of the distinct society clause to make sure that legislation such as Bill 178 would not be subject to constitutional challenge.

In conclusion, allow me to recall the words of a great Canadian whose voice was heard recently over the cacophony of Meech Lake opponents.

In a speech delivered October 19 at Dalhousie University, the former Premier of Nova Scotia and former Leader of the Progressive Conservative Party of Canada, the Honourable Robert Stanfield, had this to say at the end of his exhaustive analysis of the Accord:

I ask English-speaking Canadians to summon enough common sense to save our country from disaster. We have been given a second chance. We would not deserve a third. ...

The importance of Meech goes beyond the changes it proposes. For the Quebec Government and non-separatist Quebecers it represents identity. For the federal government and for the provincial governments which support Meech Lake, it represents, not a weaker Ottawa, but a new vision of the federal provincial relationship and hopefully the end of the debate about the place of Quebec in Confederation.

As he did so often during his long political career and when he held high office, Mr. Stanfield is appealing to the clear mindedness and sense of responsibility of Canada's leaders and the Canadian people. I remain convinced that this appeal will finally be heard.