

## FROM THE BACKROOM TO THE FRONT LINE: MAKING CONSTITUTIONAL HISTORY

OR

### ENCOUNTERS WITH THE CONSTITUTION: PATRIATION, MEECH LAKE, AND CHARLOTTETOWN

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Toward the end of the previous century, Canadians experienced an unprecedented period of constitutional activity involving changes and proposed changes to our constitution, three referendums, and a series of important court decisions. The patriation of the constitution of Canada was formally proclaimed in Canada on April 17, 1982. The new amending formula was tested in a series of constitutional negotiations. The two most prominent of the proposed amendments, the Meech Lake and Charlottetown Accords, although ultimately unsuccessful, had a very significant impact. A number of other, less extensive amendments were achieved with little controversy. In this lecture, as drafter of the proposed amendments and former legal advisor to the Government of Canada, I will look back on the drama of these events, paying particular attention to the context in which they took place, the different processes that were carried out, the events that were taking place in the backrooms, and the aftermath of some of these initiatives.

Vers la fin du siècle dernier, les Canadiens et Canadiennes ont vécu une période d'activité constitutionnelle sans précédent, incluant des changements effectifs et proposés à notre constitution, trois référendums et une série de décisions judiciaires importantes. Le rapatriement de la constitution du Canada a été formellement proclamé le 17 avril 1982. La nouvelle formule d'amendement a été mise à l'épreuve dans une série de négociations constitutionnelles. Les deux propositions d'amendement les plus prééminentes, les Accords du Lac Meech et de Charlottetown, ultimement sans succès, ont eu un impact significatif. Un certain nombre d'autres amendements, moins controversés, ont été réussis avec peu de bruit. Dans cette conférence, en tant que rédactrice des amendements proposés et ancienne conseillère juridique pour le Gouvernement du Canada, je reviendrai sur ces événements, portant particulièrement attention au contexte dans lequel ils eurent lieu, aux différents processus utilisés, aux événements se déroulant dans les coulisses et aux répercussions de certaines de ces initiatives.

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## Introduction

I am honoured to have been invited to deliver the *McGill Law Journal* Annual Lecture for 2012. It is a special pleasure for me to do so, as I received my B.A. and B.C.L. from this university.

This year marks the thirtieth anniversary of the patriation of the constitution. I have therefore chosen as my topic the experiences that I have had in relation to constitutional developments in Canada. I became involved in these developments in September 1980, when I took on a leadership role in the Drafting Section of the Department of Justice in Ottawa. I remained involved as principal legal advisor and drafter until my retirement in 2005.

### I. Background

Canada was the first of the former British colonies to achieve an independent status, but because its founding statute, in 1867, did not establish procedures for major amendments to the constitution to be made in Canada, that task remained with the UK Parliament,<sup>1</sup> as it turned out, until 1982.

It was not for want of trying that Canada was unable to devise an amending procedure for itself. Important advances were made with the *Statute of Westminster, 1931*.<sup>2</sup> This act removed the rule that UK statutes had supremacy over dominion<sup>3</sup> laws (section 2) and provided that no UK act would apply in the future to a dominion unless the act expressly declared that the dominion had requested and consented to the enactment (section 4). However, the power to make major amendments to our constitution was left to the UK Parliament. This failure to agree on an amending formula persisted for another half century despite many, many attempts to find a consensus at numerous federal-provincial constitutional conferences.

My intention in this presentation is to provide an overview of the constitutional activities that I was directly involved in, and to give some insight into the forces behind the proposals, the processes that were followed, including in the backrooms, and the aftermath of some of these initiatives. I will describe in some detail the drama of the final months lead-

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<sup>1</sup> This was not the case for the other colonies that became independent somewhat later. See, for example, *The Commonwealth of Australia Constitution Act* ((UK), 63 & 64 Vict, c 12, s 128), enacted in 1900.

<sup>2</sup> (UK), 22 & 23 Geo V, c 4, reprinted in RSC 1985, App II, No 27.

<sup>3</sup> The term “dominion”, at that time, was used to refer to the more independent of the British colonies. It has now fallen out of use.

ing to the *Constitution Act, 1982*, some of the issues and events surrounding the Meech Lake Accord—the initial excitement and the disappointment of its defeat—and the broad consultation and inclusiveness of the Charlottetown Accord, which could not overcome its own weight. I will mention, as well, some of the oft-forgotten constitutional amendments that were attempted in the intervening years, some of which succeeded and some of which did not. I see the final two decades of the last century as part of one story.

### A. *Forces for Change*

Before I begin, I would like to recall briefly the years leading up to the patriation of the constitution in 1982. The themes raised during those years remain central to our understanding of ourselves as Canadians.

The 1960s were a time of excitement and change. Canada was celebrating its centennial year in 1967, and pride in Canada was at a high point. That was the year of Expo 67 in Montreal. It was time for Canadians to take ownership of their own constitution.

At the same time, Quebec nationalism was on the rise, and some groups of militants were beginning to emerge. The October Crisis in 1970 was a serious shock to Canadians. To most Canadians, the kidnapping of a British diplomat, the kidnapping and murder of a Quebec cabinet minister, and the invocation of the *War Measures Act*<sup>4</sup> seemed totally alien. Another major event occurred in November 1976, when the Parti Québécois, a party committed at the time to taking Quebec out of Canada as we know it and proposing a new sovereignty-association arrangement, was voted into power under its popular leader, Premier René Lévesque.

Language issues had already taken on a new prominence. A Royal Commission on Bilingualism and Biculturalism had made strong recommendations in 1967 to enhance the equality of both official languages and to provide language protections.<sup>5</sup> Pierre Elliott Trudeau, prime minister from the end of the 1960s almost continuously until the early 1980s, himself perfectly bilingual, had a vision of a Canada in which both French and English could flourish across the whole country.

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<sup>4</sup> RSC 1970, c W-2, as repealed by *Emergencies Act*, RSC 1985, c 22 (4th Supp), s 80. Perhaps as an omen of what was to come, one of my first assignments in the Legislation Section of the Department of Justice was advising on the regulations made under this act.

<sup>5</sup> Canada, *Report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen's Printer, 1967) (Chairs: A Davidson Dunton & André Laurendeau).

Human rights in general became a preoccupation in the 1960s in Canada, as elsewhere. The Parliament of Canada had enacted the *Canadian Bill of Rights*<sup>6</sup> in 1960 under Prime Minister John Diefenbaker but, as an ordinary statute, it was not having as great an impact in the courts as legislators had hoped. Prime Minister Trudeau, who was very much an advocate of individual rights in the traditional liberal mould, became a strong advocate of an entrenched bill of rights, and this objective remained constant from the late 1960s through to the achievement of the constitutional package that became the *Constitution Act, 1982*.

There were several lengthy periods of intense federal-provincial constitutional negotiation, involving a range of proposals, between 1967 and 1980, but all ultimately ended in failure. Several different amending formulas were explored, as well as the possibility of establishing an entrenched bill of rights.

In 1978, the federal government gave up trying to achieve agreement and took another approach. It published a white paper entitled *A Time for Action*, putting forward a plan for the federal government, as a first step, to go ahead with constitutional renewal in areas of federal jurisdiction, where agreement would not be necessary with the provinces.<sup>7</sup> This too failed, when the Supreme Court found that the federal government's Bill C-60 had overstepped its jurisdiction when it attempted to replace the Senate with a new institution called the "House of the Federation".<sup>8</sup>

## II. The *Constitution Act, 1982*

### A. *Moving Forward*

There was then a brief lull in constitutional activity, followed in 1980 by the first of two referendums held in Quebec on the matter of Quebec's independence. Despite the popularity of the Quebec leader, René Lévesque, the referendum resulted in a vote of 59.6 per cent<sup>9</sup> in favour of Canadian federalism and against embarking on a process that would lead to sovereignty-association. Late in the process, Prime Minister Trudeau, who had recently been re-elected after a short period out of office, weighed

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<sup>6</sup> SC 1960, c 44, reprinted in RSC 1985, App III.

<sup>7</sup> The Right Honourable Pierre Elliott Trudeau, *A Time for Action: Toward the Renewal of the Canadian Federation* (Ottawa: Minister of Supply and Services Canada, 1978).

<sup>8</sup> *Reference Re Authority of Parliament in Relation to the Upper House* (1979), [1980] 1 SCR 54, (*sub nom Reference Re Legislative Authority of Parliament*) 102 DLR (3d) 1.

<sup>9</sup> *Referendums*, online: Le Directeur général des élections du Québec <<http://www.electionsquebec.qc.ca/english/provincial/election-results/referendums.php>>.

in with his contrasting image of a strong Canada. He undertook to press ahead with constitutional change. Over the summer of 1980, the Government of Canada embarked on yet another intense period of federal-provincial consultations in an attempt to reach an agreement. Yet again, no agreement was reached.

Once again, the federal government proposed to act unilaterally. Apparently despairing of ever reaching an agreement with the provinces, Prime Minister Trudeau boldly proposed to go over the heads of the provincial politicians to present the people of Canada with a “people’s package” that included, among several other elements, a charter of rights and freedoms and an amending formula to provide for all future constitutional amendments to be made in Canada. The package contemplated the possibility of a referendum as a deadlock-breaking mechanism if the Senate and House of Commons had approved an amendment and there was insufficient approval by the provincial bodies within a year. Prime Minister Trudeau proposed to take this package directly to the UK Parliament without involving the provinces at all.

It was at this point that I became directly involved in the constitutional files. The draft that was tabled in Parliament in October 1980 was based on the proposals that had been put before the provincial representatives in the summer of that year, and I was asked to prepare the draft resolution and address any editorial adjustments that might be necessary.

### *B. The Special Joint Committee*

A special joint committee was established to consider the proposed amendments, and it was through this process that the proposals truly became a people’s package. Representations were heard from a wide variety of groups and resulted in many amendments to what was to become the *Charter*. Perhaps of most significance was the fact that the proceedings of the committee were, as a result of the insistence of the leader of the Opposition, the Honourable Joe Clark, televised for the first time ever. Many Canadians watched the proceedings, and this generated a sense of excitement around the changes being proposed, which gave the package additional legitimacy.

I prepared amendments to the package to incorporate the changes that the government was willing to accept from among the many proposals made by witnesses appearing before the parliamentary committee. At the same time, I had the chance to make a significant number of editorial improvements to the drafts. A comprehensive document including these changes was tabled by Jean Chrétien, then minister of justice, in February of 1981.

I cannot overstate the breadth and significance of the changes that were made over the course of the several months during which the proposals were being discussed and considered. Many of the fundamental rights and freedoms set out in the *Charter* were significantly strengthened.<sup>10</sup> As well, a number of new provisions were added to the *Charter*. These additions included an enforcement section (section 24), a new paragraph in the language rights provisions to include children of parents who received their primary-school education in the province involved (section 23), and interpretive provisions to protect multicultural heritage and denominational schools (sections 27 and 29).

Several significant additions were also made to other parts of the constitutional package. A new part II was added to recognize and affirm the Aboriginal and treaty rights of the Aboriginal peoples of Canada.<sup>11</sup> As well, section 92A was inserted into the *British North America Act, 1867* to give provincial legislatures express powers over certain resources.<sup>12</sup>

Among the numerous editorial adjustments I made to the package was the removal of all pronouns to avoid the then controversial use of the pronoun “he” to cover both men and women. So as not to raise issues of comparisons of usages between this fundamental constitutional document and our statutes, and particularly since a revision of the federal statutes that used the pronoun “he” alone was well advanced, I thought it best to avoid the issue by restructuring the provision or repeating the noun. This was accomplished fairly easily, although there are several provisions in the *Charter* that may look a little strained.<sup>13</sup> I followed this same approach in a number of federal statutes I drafted during this period, including the *Access to Information Act*, the *Privacy Act*, and the *Official Languages Act*.<sup>14</sup>

The changes tabled in February 1981 were by and large accepted by Parliament, and there were several more added before the package was finally approved. These later alterations included a change of the amending formula that would apply to part II (Aboriginal and treaty rights); the

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<sup>10</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. I mention in particular sections 1, 3, 8, 9, 11, 13, and 15 of the *Charter*.

<sup>11</sup> *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>12</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, as amended by *Constitution Act, 1982*, *supra* note 11, s 50. The schedule to the *Constitution Act, 1982* renamed the *British North America Act, 1867* as the *Constitution Act, 1867*.

<sup>13</sup> See e.g. *Charter*, *supra* note 10, ss 11(c), 13.

<sup>14</sup> *Access to Information Act*, RSC 1985, c A-1; *Privacy Act*, RSC 1985, c P-21; *Official Languages Act*, RSC 1985, c 31 (4th Supp).

addition of section 28, intended to give supremacy to equality rights; and a preamble recognizing the supremacy of God and the rule of law.

The provinces were not prepared to let the federal government proceed directly to the UK Parliament with the unilateral package without a court challenge. Three actions were initiated at the provincial level, and these were referred on to the Supreme Court of Canada. The Supreme Court came out with its nuanced decision in October 1981. The Court found that it would be legal for the federal government to go alone to the United Kingdom but that to do so ran against constitutional convention. Constitutional convention dictated “that a substantial degree of provincial consent is required.”<sup>15</sup> The Court declined to set a specific formula but left it to the political actors to determine the degree of provincial consent required. This left all parties prepared to have one last try at reaching a consensus.

### *C. The November Conference*

The first ministers’ conference that took place from November 3 to 5, 1981, was one of high drama. It was the first one that I was to experience as a participant. I did not sit with the other officials behind the first ministers for this conference but was relegated to a small room on the fifth floor of the Government of Canada Conference Centre, formerly Ottawa’s railway station, far above the first floor where the discussions were taking place, to wait for instructions to draft. None came for two days. In fact November 3 and 4 were so quiet for me that I was working on other files. That was to change.

On November 4, at the end of the afternoon, I was called to a meeting with the deputy minister of justice, Roger Tassé. There, I was given instructions to prepare a new draft that would allow for a referendum on the *Charter*, as well as a referendum to choose an amending formula. These measures were in addition to the deadlock-breaking referendum procedure within the federal proposed amending formula that I mentioned earlier. The new proposal, I was to learn later, was issued as a challenge by Prime Minister Trudeau during the discussions that day. Premier René Lévesque had accepted the challenge. I was to draft the changes and take the revised draft to a meeting at 8:00 a.m the next day.

Right after the meeting with the deputy minister, I went to my own office to prepare the draft for the next morning along with my secretary. I

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<sup>15</sup> *Reference Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 904-905, (*sub nom Reference Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)*) 125 DLR (3d) 1 [*Patriation Reference*].



do not remember even stopping for dinner, although I think someone must have brought me something to eat while I worked.

We always had a number of what we called “hip pocket drafts” ready, covering a number of possible policy changes that we could foresee. I actually had a hip pocket draft for the *Charter* referendum provision, so I had only to make a slight adjustment to that draft to exclude the language protections from the referendum provision.

I had no hip pocket draft, however, for the referendum to choose the amending formula. Most of my time was spent trying to develop that proposal and to fit it into the existing draft. The federal proposal that had been tabled for the conference already included a referendum procedure within the amending formula itself, but the new proposal was to create a referendum procedure to determine what the amending formula was to be.

Then, it was necessary to wait to ensure that the French version corresponded appropriately with the English version. I always worked with a French-speaking counterpart, who prepared the French versions of the drafts. We worked, as much as possible, simultaneously on the English and French versions, although in every file, one or the other would take the lead. I had the lead on the constitutional files.

Finally, a number of copies of each version had to be made. It took me the entire night to complete the draft. The sun was coming up when I headed for home. Once home, I decided that a short nap would be worse than none, so I settled for a shower and breakfast before heading out for my 8:00 a.m. meeting.

#### *D. November 5: Consensus Reached*

On my arrival at that meeting, I was informed without ceremony that the numerous copies of the draft that I had carried in were no longer needed and that there was a new proposal to be drafted. For a number of years, I wondered if others had simply neglected to tell me earlier that plans had changed. If they had let me know, I would have got some sleep before embarking on the final package. I have since realized that a final decision was not taken by the prime minister on this new proposal until that morning, not long before my 8:00 a.m. meeting. The fact of the matter is that the situation was very volatile and uncertain, and the outcome could have gone in a number of different directions.

Reports indicated that the new deal was constructed during what has come to be known as the “Kitchen Accord”, resulting from a meeting between Jean Chrétien, the minister of justice and Attorney General of Canada; Premier Roy Romanow of Saskatchewan; and Roy McMurtry, Attorney General of Ontario. From what I have subsequently surmised from

speaking with various central actors in the process, the matter was discussed through the night of November 4 to 5 by most, if not all, delegations, with the unfortunate exception of Quebec. This night has become known, rather dramatically and perhaps unfairly, as “The Night of the Long Knives”.

It appears that the proposal that was presented to the prime minister not long before 8:00 a.m., while reflecting the direction of the Kitchen Accord, may have been adjusted in its detail over the hours of that long night. I can only surmise that the shape of the accord was the result of a gradual consensus that included most of the provincial delegations, probably over a good portion of the conference, and a final push over the evening of November 4, and the early morning of November 5, 1981.

There were several major changes in this new agreement. The general amending formula that had been proposed by the federal government required approvals from four regions of Canada—the West, the East, Ontario, and Quebec. It was based on a formula known as the “Victoria Formula”, which had achieved federal-provincial consensus at a 1971 conference held in Victoria, but which ultimately failed due to a change of heart of the Quebec government after their delegation had returned home.

The federal proposal was replaced by a general amending formula, based on the principle of the equality of the provinces, that had been agreed to earlier in the spring of that year by the premiers of eight provinces. This group came to be known as the “Gang of Eight” and included all but Ontario and New Brunswick. The new amending formula required the approval of the Senate and House of Commons and the legislative assemblies of any seven provinces. Some recognition of population was reflected in the requirement that the seven approving provinces must include fifty per cent of the population of Canada.<sup>16</sup>

This formula also included a power for provinces to opt out of any amendment where provincial powers, rights, or privileges were to be affected. The original Gang of Eight proposal also provided that, where the amendment related to education or other cultural matters, compensation was to be paid by the Government of Canada to any province that had opted out of the amendment. The compensation provision was initially left out of the draft on November 5 but shortly afterwards found its way back

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<sup>16</sup> There were a total of five procedures, including: the general amending formula; a unanimity procedure for certain amendments considered to be central to the federation as a whole; a bilateral or multilateral procedure for amendments that related to one or more, but not all, of the provinces; and separate unilateral procedures for the provincial and federal governments for amendments of internal concern only: see *Constitution Act, 1982*, *supra* note 11, part V, ss 38 to 49.

in.<sup>17</sup> This aspect of the amending formula would have been of significance to Quebec in particular.

As already mentioned, I was briefed, along with other federal officials, at 8:00 a.m., on the proposed changes that had been accepted by Prime Minister Trudeau. I headed over to the little room on the fifth floor of the Government of Canada Conference Centre to adjust the draft package, along with the drafter for the French version, Gérard Bertrand; our two secretaries; and two constitutional experts from the Department of Justice. Sometime in the middle of the morning, while we raced to complete the detailed drafting, the first ministers, with the exception of Quebec's premier, were signing the formal agreement before the television cameras.

Before going further, I should describe the drafting process at the time. In 1981, we were still using typewriters. Our method of reproduction was photocopying. Our drafts were prepared on legal-size paper, and when we adjusted our drafts, our secretaries prepared strips of paper containing the changes, which they then Scotch-taped over the changed provision. Sometimes the pages got quite thick, until we could no longer work with them, at which point a new page was created. This led to draft packages with pages of unequal thicknesses and unequal lengths. A few years later we moved to computers.

Agreement to the "7/50" amending formula was something of a shock to me. Having been assured that the federal government would never accept this proposal of the Gang of Eight, I had spent no time at all considering it and certainly had no hip pocket draft. All I could do was make the editorial adjustments to the Gang of Eight draft that seemed to be desirable and fit the new formula into the existing draft. When we found something in the draft to be ambiguous, there was no one to consult in order to determine the intent of the provision and no time to spare. I remember in particular puzzling over the interpretation of the amending formula in relation to the Supreme Court, since the Court itself is not entrenched in the constitution. I spent most of the morning on the amending formula.

A second very significant change, although no problem to draft, was the deletion altogether of the Aboriginal-rights part of the package. All that replaced it was a new provision mandating a constitutional conference that would address matters directly affecting the Aboriginal peoples

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<sup>17</sup> It is reflected in subsection 38(3) and section 40 of the *Constitution Act, 1982* (*ibid.*).

of Canada.<sup>18</sup> This was not, however, the end of the matter, and I will come back to this issue.

There were several relatively minor adjustments to the *Charter*. At the November conference, there had been little, if any, discussion of the contents of the *Charter*. There appeared to be little appetite to retreat from the advances that had been made during the deliberations of the special joint committee early in the year. Rather, the controversy centred around whether to have an entrenched charter at all.

The major change to the *Charter* was the addition of the notwithstanding clause, now section 33 of the *Charter*, providing for a legislative override of the sections dealing with fundamental freedoms and legal rights. This override was limited to five years. I had several hip pocket drafts for an override clause, so I was able to draft this change fairly quickly. I note that the democratic rights, and more notably the language provisions—including those relating to the status and use of the two official languages of Canada<sup>19</sup> and the minority language educational rights of Canadian citizens<sup>20</sup>—were excluded from the override. The language rights, in particular, were very important to Prime Minister Trudeau.

The override clause was the essential compromise to address the difference of opinion between those who believed Parliament should be supreme and those who believed the courts should have the last say. From all reports, this was a very bitter compromise for Prime Minister Trudeau. He would no doubt be pleased to know that Parliament has not, to this date, employed the override.

Other changes related to section 6 of the *Charter*, allowing an exception to the mobility rights for affirmative action programs, and to section 23, extending minority language education rights to include all provinces.

Finally, proposals relating to equalization and regional disparities, and to resources, were to be included in the package, as well as the constitutional conference for the Aboriginal peoples of Canada.

### *E. The Afternoon Meeting*

Once the draft was completed, in the early afternoon, it was copied and distributed to be considered by a small group of ministers and senior officials. They met around a large, round table in a room on the fourth

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<sup>18</sup> See *ibid*, part IV, as repealed by *Constitution Amendment Proclamation, 1983*, proclaimed in force 11 July 1984, SI/84-102, SC 1984, vol I.

<sup>19</sup> *Charter*, *supra* note 10, ss 16-22.

<sup>20</sup> *Ibid*, s 23.

floor of the conference centre at a meeting chaired by the then minister of justice, Jean Chrétien. All provinces were represented except Quebec, whose delegation had left the conference when Premier Lévesque rejected the proposal that morning.

The vetting of the draft took several hours. As explanations were given and decisions were made about changes to the English version, I would draft them on my copy and send the relevant page or pages up a set of back stairs to our fifth-floor drafting room. There, my secretary made the changes using the system I have already described of pasting strips onto the legal-size pages. Once the parallel French version was prepared, the changes were sent back down to the fourth-floor conference room for final approval.

My recollection is that the adjustments were all made and agreed to around five o'clock in the evening. The final drafts were photocopied on machines that were in a hallway open to the participants, and I recall some difficulty managing that process as some of the delegates, anxious to make their flights, crowded around the photocopier to get the first copies off the machine.

#### *F. After the Conference*

This was not the end of the process. The participants left the conference with the understanding that they could contact us over the next few weeks to discuss any technical adjustments they might have to suggest. The phone lines were busy over those weeks, and a few technical changes were made.

More interesting were the substantive changes that were made. Pressure was brought to bear, notably by Ed Broadbent, then leader of the New Democratic Party in Ottawa, and Premier Roy Romanow of Saskatchewan, to reinsert into the package the clause recognizing Aboriginal and treaty rights. That clause had been a late addition to the package that had been approved by Parliament in the spring of 1981. Aboriginal communities in Canada had made strong representations both at home and in the United Kingdom, and these efforts were ultimately successful in receiving the support of Parliament. The clause was reinstated and became section 35 of the *Constitution Act, 1982*, outside the *Charter*, in its own part II.

The concern on the part of some of the provincial leaders regarding the provision for Aboriginal and treaty rights was not irrational. It was very unclear at the time what scope this provision would be given. As a result, it was drafted cautiously, not in terms of adding to the rights of the Aboriginal peoples but as a recognition and affirmation of those rights.

The controversial addition of the word “existing” to define the rights was a result of this uncertainty.

As mentioned earlier, a new section 40 was added at this time to the amendment procedures, providing for compensation to provinces that opted out of any constitutional amendments transferring provincial legislative powers to the federal government in the area of education or cultural matters.

In an attempt to get Quebec’s support for the package, the minority language schooling right—to have one’s children educated in one’s mother tongue—was suspended for Quebec until the legislative assembly or government of that province authorized a proclamation to bring it into force.<sup>21</sup> No such proclamation has been made to date. A similar proposal for Manitoba failed to receive the necessary support.

The final change was the removal of section 28 from the scope of section 33, the notwithstanding clause, meaning that governments could not override the extra guarantee of equality between the sexes that women’s groups had lobbied for and won during the deliberations of the special joint committee.

There was some dispute during the drafting meeting that took place in the afternoon of November 5 as to whether the first ministers had intended to exclude section 28 from the override under section 33. My drafting instructions had been to include it, and it was left unchanged following the discussion on November 5.

The effect of section 28 itself is somewhat unclear and gave me some difficulty when it was first proposed to the special joint committee. It appears to add little to section 15, the general equality section of the *Charter*, which expressly includes sex as one of its elements, but there is one significant difference. Section 28 appears to override even section 1 of the *Charter*, the section that limits all other rights and freedoms by making them subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” This seemed to me to go too far, and I was surprised that the politicians agreed to it. Interestingly, the courts have rarely relied on section 28.

The inclusion of section 28 in the section 33 override would have been equally puzzling. Section 28 provides that this extra guarantee of equality is to apply notwithstanding anything else in the *Charter*. Section 33 provides that the override applies notwithstanding anything else in the

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<sup>21</sup> This exception for Quebec is well hidden in section 59, near the end of the *Constitution Act, 1982* (*supra* note 11).

*Charter*. Which notwithstanding provision would have trumped the other was, to say the least, unclear.

Two issues—the reinstatement of the Aboriginal and treaty rights, and the exclusion of section 28 from the override—became linked, and both appeared to have been agreed to as a result of the consultations that took place after the November conference, particularly with members of the New Democratic Party. However, my experience was that the fate of section 28 was not finally decided until the very last minute.

On the morning of November 18, the day that Prime Minister Trudeau held a press conference to release the final package that was to be tabled in Parliament and then sent to London, I received a phone call informing me that it was still uncertain whether or not section 28 was to be included among the sections that could be overridden by section 33.

I was instructed to go immediately to the National Printing Bureau in Hull along with Gérard Bertrand, who was working on the French version, to manage the preparation of two alternative versions of section 33, one including section 28 and one excluding it, so that the appropriate version would be ready when the final decision was taken. Word on the decision only came to us with about half an hour to spare before Prime Minister Trudeau's press conference was to take place. The timing was so tight that I had to leave the printing bureau before all the copies that were needed were made, and I sped over to the press gallery with half of them, to arrive just as the prime minister was arriving. Gérard followed some minutes later with the rest of the copies.

The House of Commons passed a resolution approving the constitutional package on December 2, the Senate followed suit on December 8, and the package was duly sent on to London for enactment.

### *G. The UK Parliament*

I can report that, even after the package went to the United Kingdom, there were a few small changes requested by British advisors before the amendment could be made. Perhaps the most significant was the insistence by British advisors that the title of the act be changed to refer to 1982, the date on which it was passed in the United Kingdom, rather than 1981, when it was approved in Canada.

To my embarrassment, they also suggested that a change had to be made as a result of a grammatical error in sections 54 and 59. I had used an adjectival form in the phrase “consequential upon”, rather than the more proper adverbial form in the phrase “consequentially upon”. There were several other very small editorial adjustments made to punctuation.

Despite some previous concerns about how difficult it would be to have this legislation passed in the United Kingdom, the package passed easily

in the House of Commons on March 8, 1982, and unanimously in the House of Lords on March 25, 1982. It was proclaimed in Canada by the Queen on April 17, 1982.

#### *H. Final Comments*

By the end of the process, nine premiers and the prime minister had signed on to the package proposed by the prime minister, but some significant changes had taken place since he had first presented it to the premiers in November 1981.

The premier of Quebec had left in anger without signing. This was to affect federal-provincial relations for decades to come. The Government of Quebec turned inward and significantly limited its relations with the rest of Canada until 1986, when a new round of negotiations, dedicated to Quebec's proposals, commenced.

The characterization of the events of the night of November 4, 1981, remains to this day a matter of deep disagreement. Did Premier Lévesque precipitate the exclusion of the Quebec delegation from the last minute negotiations by breaking with the Gang of Eight on the amending formula? Was the exclusion deliberate? Would a government dedicated to separating from Canada ever have signed on to an agreement to patriate the constitution of Canada? I do not know where the truth lies, but I cannot point to what in the patriation package might have been a deal breaker for Quebec. In any event, Quebec withdrew from further constitutional discussions and refused to accept the legitimacy of the *Constitution Act, 1982*.

The constitutional changes that were achieved were far-reaching and profound. They were the result of many years of discussion. In the end, negotiations were very fluid: there was no guarantee that a deal would be struck, and despite the broad public involvement during the deliberations of the special joint committee, the final resolution was made in the absence of public scrutiny and away from the formal bargaining table. The negotiations related to the amending formula, the *Charter*, and Aboriginal rights.

I believe that governments finally succeeded in coming to an agreement on the package to patriate the constitution because it was in everyone's interest to do so. It appeared that Prime Minister Trudeau would have gone directly to the United Kingdom had the provinces not been able to come to an agreement, which would have left the provinces unable to influence the final outcome. Prime Minister Trudeau would likely have received the support of the United Kingdom, because the Supreme Court had found that it would have been legal for the federal government to act unilaterally. This unilateral patriation would, at the same time, have



been a far less desirable outcome for the federal government. Without the substantial provincial agreement required to satisfy constitutional convention,<sup>22</sup> the patriation package would have been tainted by a cloud of illegitimacy.

In this connection, I should mention the *Quebec Veto Reference* of 1982, in which the Government of Quebec claimed that its consent was necessary to meet the requirement for substantial provincial agreement.<sup>23</sup> Quebec based its claim on the fact that it was the only province whose population was primarily French-speaking and on the fact that it included at the time over twenty-five per cent of the population of Canada. The Supreme Court of Canada found against the Quebec position, thus removing any suggestion that the patriation of the constitution was either legally or conventionally unconstitutional.

### III. After Patriation

There were three changes of enormous import made in the *Constitution Act, 1982*. They were the entrenchment of the *Charter*, the recognition of Aboriginal and treaty rights of the Aboriginal peoples of Canada, and the establishment of a comprehensive amending procedure within Canada. All three of these areas, as we have seen, were not settled until the end of the long negotiation process. Each area underwent significant last-minute changes. I will take a look at some of the early ramifications of each of these three changes.

#### A. *The Canadian Charter of Rights and Freedoms*

Despite the widespread concern about changing the balance of power between Parliament and the courts, an issue that still stirs some controversy, individual Canadians very quickly took ownership of the *Charter*. It has become a symbol of pride and a source of identification for Canadians. It is now quite unimaginable not to have a charter of rights and freedoms.

The years in the mid-1980s that followed the patriation of the constitution were years of consolidation under Canada's new legal rules. Federal and provincial laws were amended to comply with the *Charter*. There was an increasing focus on minority rights in general and minority language issues in particular.

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<sup>22</sup> See *Patriation Reference*, *supra* note 15.

<sup>23</sup> *Reference Re Objection to a Resolution to Amend the Constitution*, [1982] 2 SCR 793, (*sub nom Reference Re AG Quebec and AG Ontario*) 140 DLR (3d) 385.

The federal government embarked upon two initiatives to implement the new *Charter*. An omnibus bill was undertaken to amend all of the provisions in federal legislation that would offend the new *Charter*.<sup>24</sup> Determining what amendments might be necessary was challenging. This was particularly true in relation to the equality provisions found in section 15 of the *Charter*. In recognition of the need for a delay, the *Charter* itself provided for a three-year period before section 15 came into force.

The second initiative was a thorough revision of the federal *Official Languages Act*, which reflected the expanded status of French and English as official languages under the constitution.<sup>25</sup> The bill was introduced into Parliament on June 25, 1987, and proclaimed in force on September 15, 1988. The Meech Lake Accord, which was being considered at the same time as the *Official Languages Act*, had some effect on the language in that legislation.

Procedures were set up within the federal government to ensure that all legislation would meet the requirements of the *Charter*. In my own drafting branch, every bill had to be accompanied by a certification by the drafter that there were no *Charter* problems. This was no easy task in the early days before there were any Supreme Court decisions to follow. A new human rights section was created within the Department of Justice to provide advice on the *Charter*. Before long, cabinet documents containing proposals for legislation had to include a separate part addressing *Charter* implications.

### ***B. The Aboriginal Peoples of Canada***

The recognition and affirmation of the Aboriginal and treaty rights of the Aboriginal peoples of Canada has also had an enormous impact. No one knew what the courts would do with section 35. Some may have thought it would change little. As it has turned out, the courts have given section 35 a broad and progressive interpretation, and its impact continues to unfold.

The *Constitution Act, 1982* also provided for an additional constitutional conference that would address matters affecting the Aboriginal peoples of Canada and would include their representatives as participants. It was to be held within one year of the *Constitution Act, 1982* coming into force. This was the beginning of an intense period, between 1983 and 1987, that included a total of four formal first ministers' conferences

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<sup>24</sup> The resulting act was assented to on June 28, 1985, as the *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act* (SC 1985, c 26).

<sup>25</sup> *Supra* note 14.

at which representatives of the Aboriginal peoples were present, three of which were constitutionally mandated. Each of these conferences was preceded by varying numbers of officials' and ministers' meetings that were devoted exclusively to Aboriginal interests.

Only the very first of these conferences resulted in amendments to the constitution.<sup>26</sup> These amendments added two important clarifications to section 35—that new land claims agreements would qualify as treaty rights and that Aboriginal and treaty rights were guaranteed equally to male and female persons. The amendments also added a statement of the principle<sup>27</sup> that representatives of the Aboriginal peoples of Canada be invited to participate in discussions at a constitutional conference before any amendment is made to a provision in the constitution that relates to the Aboriginal peoples of Canada. The commitment to at least two additional constitutional conferences within five years of the *Constitution Act, 1982* coming into force was included in the 1984 amendment as well.<sup>28</sup>

These amendments were made under the general amending formula, receiving the support of the federal government and the governments of all the provinces except Quebec. These have been the only amendments achieved under the 7/50 formula since patriation.

The remaining three Aboriginal constitutional conferences focused, in increasing detail, on establishing a framework for self-government arrangements. None of these was successful, but an agreement on an amendment appeared, to some of us, to be in sight during the fourth constitutional conference, which was held in February 1987.

During this period, significant legislative activity took place in the area of Aboriginal rights, independently of the constitutional negotiations. I was asked to draft legislation that would establish a framework for self-government for bands or other communities that met the conditions set out in the legislation. The proposed *Indian Self-Government Act* was in-

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<sup>26</sup> *Constitution Amendment Proclamation, 1983*, *supra* note 18. This is the only amendment that includes the erroneous reference to the proclamation in its title. I plead innocent, since I was out of town on the critical day when the printing of the package was finalized. The error was compounded by a reference to the year prior to the actual year of proclamation. I hasten to add that every amendment since then has followed the more appropriate designation "Constitution Amendment".

<sup>27</sup> See *Constitution Act, 1982*, *supra* note 11, s 35.1. I confess to a spelling mistake in this provision. It was drafted late at night, and neither I nor anyone else, at the time, noticed that I had used the improper spelling "principal" in this provision. That spelling survived in consolidations for a number of years but was, at one point, quietly corrected.

<sup>28</sup> *Constitution Amendment Proclamation, 1983*, *supra* note 18, s 4 (Part IV.1 of the *Constitution Act, 1982* (*supra* note 11)), which included this commitment, was automatically repealed on April 18, 1987).

troduced as Bill C-52 at the end of June 1984 but went no further due to the election held over that summer. I drafted two other initiatives that did pass. The first, introduced as Bill C-31, addressed the inequitable treatment of women and certain others under the *Indian Act* and also gave Indian band councils new bylaw powers.<sup>29</sup> The second, the *Sechelt Indian Band Self-Government Act*, was the first piece of federal legislation to establish a measure of self-government for a specific Aboriginal group independently of a land claim settlement.<sup>30</sup>

### C. *Applying the New Amending Procedures*

The establishment of our amending procedures in 1982 was long overdue and symbolically important. It was the final realization of many attempts, going back to Confederation itself, at a consensus that had continued to elude us. It did not take long to put the new amending procedures to use. I have just discussed the successful Aboriginal amendments of 1984. I will later discuss the less successful Meech Lake and Charlottetown Accords. Before I do so, however, I will pause to consider some of the other proposals for constitutional amendments that have been considered since 1982.

Between 1984 and 2001, a period covering less than twenty years, a total of ten constitutional amendments were proclaimed. One of these ten, the Aboriginal amendments just mentioned, was under the general 7/50 formula in section 38 of the *Constitution Act, 1982*, seven were under the bilateral or multilateral formula in section 43 of that act, and two were amendments made by Parliament acting alone under section 44 of that act.<sup>31</sup>

Following soon after patriation, there were a variety of proposals that were circulated among the jurisdictions but that were not pursued to fruition. Several provinces that had advocated the inclusion of protections for property rights in the *Charter* floated proposals along the same lines, but these were not extensively discussed. There was some consideration of an amendment to include language rights for Ontario similar to those already included in the *Charter* for New Brunswick. We also took another

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<sup>29</sup> This bill became *An Act to amend the Indian Act*, RSC 1985, c 32 (1st Supp).

<sup>30</sup> SC 1986, c 27.

<sup>31</sup> The two federal unilateral amendments were the *Constitution Act, 1985 (Representation)* (being Part I of the *Representation Act, 1985*, SC 1986, c 8), which amended section 51 of the *Constitution Act, 1867* (*supra* note 12) to readjust the representation in the House of Commons; and the *Constitution Act, 1999 (Nunavut)* (being Part 2 of *An Act to amend the Nunavut Act and the Constitution Act, 1867*, SC 1998, c 15), which provided for representation of Nunavut in the Senate and House of Commons, the latter through another amendment to section 51 of the *Constitution Act, 1867* (*supra* note 12).

look at some of the areas that had been developed during constitutional negotiations held in the 1970s relating, for example, to administrative tribunals and unified family courts, and considered several specific adjustments to the amending formulas. None of these proposals resulted in a constitutional amendment.

Before long, however, there were a number of amendments that were more vigorously pursued. These amendments generally dealt with single issues and were relatively straightforward. In each of these cases, it fell to the federal government, and more specifically to me, to ensure that each government whose legislative body was to authorize the amendment had the identical resolution for tabling. In some cases, the provincial officials relied on the federal level to prepare the first draft. In all cases, the provincial and federal officials worked together to come to a mutually acceptable final draft of the substantive provisions.

I worked with Manitoba to develop a bilateral constitutional amendment proposal under section 43 of the *Constitution Act, 1982* to address the failure of that province to comply with its obligation under section 23 of the *Manitoba Act, 1870* to enact its legislation in French as well as English.<sup>32</sup> That amendment would have limited the potential need to translate all existing acts into French but, at the same time, would have recognized the equality of the French and English languages and made provision for services to the public in both languages. This initiative was abandoned in light of the reference to the Supreme Court of Canada, which determined that all of Manitoba's legislation was invalid and ordered all existing legislation to be translated within a defined period of time.<sup>33</sup>

I also worked on two trilateral amendments to settle the boundaries between two sets of Western provinces. These amendments were well-developed and ready to go, but for reasons unknown to me, all went quiet, and they were not pursued. I wondered if someone who thought that they were important had simply retired.

Early in 1985, the Government of Canada proposed to limit the power of the Senate by replacing the absolute veto that the Senate has over legislation with a suspensive veto. The impetus for this initiative was an impasse in the Senate on a borrowing authority bill. The federal government tabled a resolution, seeking a constitutional amendment, that was debated in the House of Commons. It appeared for a while that the requisite seven provinces would support this amendment, but the initiative stalled

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<sup>32</sup> SC 1870, c 3, reprinted in RSC 1985, App II, No 8.

<sup>33</sup> *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721, (*sub nom Reference Re Language Rights under the Manitoba Act, 1870*) 19 DLR (4th) 1.

when the Senate finally passed the legislation, and the support for the amendments ebbed as provincial governments changed.

I worked with Newfoundland on a total of three amendments to term 17 of the *Terms of Union of Newfoundland with Canada*,<sup>34</sup> all of which resulted in bilateral amendments under section 43 of the *Constitution Act, 1982*. The first one, in 1987, added the Pentecostal Assemblies to the list of seven religious denominations that had originally been given the right to operate their own publicly funded schools when Newfoundland became part of Canada in 1949.<sup>35</sup>

The second one, in 1997, was a halfway-compromise measure that attempted to give the government powers to organize and administer public education in Newfoundland while observing that the churches were to continue to have a role in the schools.<sup>36</sup> Although this proposal met with substantial opposition, it was ultimately successful.<sup>37</sup> This amendment proved to be unworkable on a practical level and soon led to the third “schools amendment” for Newfoundland, in 1998, which provided for a single, publicly funded and publicly administered school system. This amendment was clearer and more direct. It gave the Newfoundland legislature exclusive authority over education but required that courses in religion be given, on the condition that they not be specific to a religious denomination. It also allowed for religious observances in schools where requested by parents.<sup>38</sup>

Quebec also proposed a constitutional amendment relating to schools and, again, I worked with officials of that province to complete the bilateral process. This amendment simply removed Quebec from section 93 of the *Constitution Act, 1867*,<sup>39</sup> thus eliminating any mention of denominational schools in relation to Quebec and leaving the Government of Quebec free to organize schools on the basis of language alone.

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<sup>34</sup> Being Schedule to the *Newfoundland Act* (UK), 12 & 13 Geo VI, c 22.

<sup>35</sup> *Constitution Amendment, 1987 (Newfoundland Act)*, proclaimed in force 20 January 1988, SI/88-11, SC 1988, vol I.

<sup>36</sup> *Constitution Amendment, 1997 (Newfoundland Act)*, proclaimed in force 2 May 1997, SI/97-55, SC 1997, vol I.

<sup>37</sup> This amendment did not get Senate approval, but this was not fatal because the Senate only has a suspensive veto for constitutional amendments by virtue of section 47 of the *Constitution Act, 1982* (*supra* note 11). The House of Commons approved the amendment a second time in accordance with that section. The only other time that this section was used was for the Meech Lake Accord.

<sup>38</sup> *Constitution Amendment, 1998 (Newfoundland Act)*, proclaimed in force 14 January 1998, SI/98-25, SC 1998, vol I.

<sup>39</sup> *Constitution Amendment, 1997 (Quebec)*, proclaimed in force 22 December 1997, SI/97-141, SC 1997, vol I.

Three more bilateral amendments have been adopted. New Brunswick had proposed an amendment establishing equal status, rights, and privileges for the English and French linguistic communities in New Brunswick, which would have been included in a companion agreement to the Meech Lake Accord had that initiative succeeded. I will come back to this later. New Brunswick pursued that amendment after the failure of the Meech Lake process, and it became the only provision from those discussions to survive. It was adopted in 1993, as section 16.1 of the *Charter*.<sup>40</sup>

The proposal to build a bridge to Prince Edward Island resulted in the need for an amendment to the schedule to the *Prince Edward Island Terms of Union*<sup>41</sup> to remove the requirement for the federal government to maintain a ferry service to the island once the bridge was available, as well as to allow for tolls and private operation of the bridge. The Government of New Brunswick was very much interested in seeing the bridge project go through, so it involved itself in the discussions leading to this amendment, along with Prince Edward Island, even though it was not necessary for New Brunswick to be involved in the bilateral amending process. The amendment was proclaimed in force in 1994.<sup>42</sup>

The most recent amendment to the constitution was proclaimed in 2001. It changed the name of Newfoundland to Newfoundland and Labrador.<sup>43</sup>

#### *D. The French Version of the Constitution*

Before leaving this part of my discussion, I will mention one significant obligation under the *Constitution Act, 1982* that has not yet been fulfilled. Section 55 of the act, located among the technical amendments in part VII, requires the minister of justice to prepare a French version of the constitution “as expeditiously as possible” and then, “when any portion thereof sufficient to warrant action being taken has been so prepared,” it is to be put forward for enactment.

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<sup>40</sup> *Constitution Amendment, 1993 (New Brunswick)*, proclaimed in force 7 April 1993, SI/93-54, SC 1993, vol I.

<sup>41</sup> SC 1873, ix, reprinted in RSC 1985, App II, No 12

<sup>42</sup> *Constitution Amendment, 1993 (Prince Edward Island)*, proclaimed in force 4 May 1994, SI/94-50, (1994) C Gaz II, 2021. This is the second case where the year in the citation of the amendment does not reflect the actual year it was proclaimed. This discrepancy occurred because the resolution passed by the legislative assembly of Prince Edward Island showed the year 1993, instead of leaving the designation open using the standard “(year of proclamation)” citation. In order for the resolutions to be identical, it was necessary for the Senate and the House of Commons to follow suit.

<sup>43</sup> *Constitution Amendment, 2001 (Newfoundland and Labrador)*, proclaimed in force 6 December 2001, SI/2001-117, (2001) C Gaz II, 2899.

A committee, called the French Constitutional Drafting Committee, was set up in 1984 to assist the minister of justice to prepare the drafts, and the final report of the committee was tabled in both Houses of Parliament in December 1990.<sup>44</sup> The report has been shared with the provinces, some of which have, at one time or another, given detailed comments. The *Constitution Act, 1867* is one of the parts of the constitution that has no official French version. All five of the amending procedures, including the unanimity formula set out in section 41 of the *Constitution Act, 1982*, would have to be engaged to enact a comprehensive French version. Therefore, it was impossible to proceed further until Quebec re-engaged in the constitutional talks.

Over the years, there have been further consultations with the provinces on the French version prepared by the committee, but there appears never to have been a broadly shared appetite at the political level to push this initiative forward. I raised the matter, however, with every minister of justice under whom I worked, beginning in 1986. This matter remains outstanding.

#### IV. The Meech Lake Accord

Following patriation, Quebec withdrew from all formal involvement in constitutional negotiations and stayed on the sidelines. The Government of Quebec refused to recognize the validity of the constitutional amendments that had taken place in 1982. Neither ministers from Quebec nor the premier of Quebec attended the federal-provincial meetings that related to constitutional change. This approach did not necessarily extend to senior Quebec public officials who did, for example, attend the Aboriginal conferences of the early 1980s, at least as observers, but these officials from Quebec lacked a mandate to take part.

As further evidence of its estrangement after patriation, the Government of Quebec enacted legislation,<sup>45</sup> assented to on June 23, 1982, that systematically applied the section 33 *Charter* override to all its legislation. The blanket override was not renewed when the five year limitation period set by section 33 ran out.

There were important changes at the political level beginning in 1984. Prime Minister Trudeau resigned as leader of the Liberal Party and was replaced by John Turner in June of 1984. There was a summer election,

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<sup>44</sup> *Final Report of the French Constitutional Drafting Committee Responsible for Providing the Minister of Justice of Canada with a Draft Official French Version of Certain Constitution Enactments* (Ottawa: Minister of Justice, 1990) (Chair: Jules Brière).

<sup>45</sup> *An Act respecting the Constitution Act, 1982*, RSQ c L-4.2.



and a Progressive Conservative, Brian Mulroney, became prime minister in September 1984. Little more than a year later, in December 1985, the Parti Québécois was, after almost ten years in government, replaced by Robert Bourassa's Liberal government. There were changes of government in a number of the other provinces as well.

The constitutional negotiations known as the "Quebec Round" began quietly, indeed secretly. The foundation was laid in May 1986 at a symposium at Mont Gabriel, Quebec, where the Quebec minister of intergovernmental affairs confirmed Quebec's five conditions<sup>46</sup> for acceptance of the patriation package of 1982. The Government of Quebec was asking for changes to the constitution that would have symbolic meaning but that it felt would have minimal impact on the constitution for those outside Quebec. The changes would relate to Quebec's distinctiveness, immigration agreements, the Supreme Court of Canada, the federal spending power, and the amending formula. This relatively short list was in sharp contrast to the much longer lists of demands that had been coming from Quebec in recent years.<sup>47</sup>

The provincial premiers agreed, in August 1986 at a meeting in Edmonton, to make the issues identified by Quebec their first priority and to set aside their other priorities until Quebec's demands had been addressed. Prime Minister Mulroney had written to them earlier in the summer to request that they consider this approach.

In September 1986, I took on an additional role in relation to the constitutional files. I became an assistant deputy minister responsible for the Public Law Sector in the Department of Justice but, at the same time, retained the drafting role for constitutional proposals. In the first week of my new job, I had my first meeting with Senator Murray and Norman Spector, his deputy minister, at what was then called the Federal and Provincial Relations Office, and I was launched immediately into the Quebec Round. The next week, I was in Iqaluit (then called Frobisher Bay) for a senior officials' meeting leading up to the fourth of the Aboriginal meetings on the constitution. The next five years were to become the most intense period of my career.

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<sup>46</sup> These five conditions were the same as had been set out in February 1985 in a Quebec Liberal Party position paper, entitled *Maîtriser l'avenir*, before that party came into power: Parti libéral du Québec, Commission politique, *Maîtriser l'avenir* (Document de travail), (Montreal: Parti libéral du Québec, 1985) at 49ff.

<sup>47</sup> For example, the Parti Québécois proposed twenty-two conditions in its *Projet d'accord constitutionnelle* in May 1985: Quebec, *Projet d'accord constitutionnelle: Propositions du Gouvernement du Québec* (Quebec: Gouvernement du Québec, 1985).

Through the fall of 1986 and the winter of 1987, a series of bilateral meetings took place out of the public eye, between Quebec representatives and representatives of the other provinces, with Quebec representatives reporting back to their federal counterparts. During this period, federal officials began to work on draft amendments with their Quebec counterparts. As a rule, no paper was exchanged. I remember one meeting in Quebec City in particular, when Quebec drafts were written on a blackboard and then immediately erased as I tried desperately to scribble down the essence of their proposals for further consideration.

While the Government of Quebec was reaching out to the rest of Canada through this process, at the same time it appeared to be doing everything that it could to avoid what it would consider to be yet another humiliation in the event of a public failure to achieve its modest set of conditions.

#### *A. An Agreement Reached*

When all the governments met at Meech Lake on April 30, 1987, the five conditions of Quebec had been well canvassed even though there had only been one meeting of officials, held early in March.

I had prepared drafts to reflect each of Quebec's five conditions, along with a number of hip pocket alternatives. We met at Wilson House, on Meech Lake in Quebec, just north of Ottawa. The house was more like a country retreat than a convention centre and had originated as just that. It was often used at the time by the federal government for day-long retreats and continues to be used in that way.

The prime minister and premiers met around a table on the second floor while the officials waited for further developments. The provincial officials were on the first level, where there was a living room with comfortable chairs and a fireplace, a kitchen, an adjoining room where food could be laid out, and another large room with round tables for the use of the delegations. The federal delegation was on the third level, where there were several small rooms that were probably originally bedrooms. The only place to which everyone had access was the first level, where everyone went, at some point, for something to eat.

The relative ease with which a deal was struck that evening came as a surprise to me. I had thought that this would likely be just the beginning of another long series of negotiations.

The main point of contention was the "distinct society" clause, and this was the last component of the package to be agreed upon. Late in the evening, I received a request from the second floor to look for a way to repackage that clause to better balance the recognition of the distinct society and the recognition of linguistic duality within Canada—the presence

of French-speaking Canadians and English-speaking Canadians throughout Canada.<sup>48</sup> The drafts that had been put before the premiers had set out these two elements in separate subsections that were independent of each other. This request resonated with me, and I happily rearranged the section by putting both elements together in the first subsection of the provision and adjusting the remaining provisions accordingly. To my delight, the draft was quickly accepted and the deal was struck.

Although the first ministers had before them detailed draft provisions for most of the elements of the package, the Meech Lake Communiqué issued that night contained only general descriptions of these various elements. The one exception was the distinct society clause. We did not want to lose the consensus on this clause. It was to remain the most sensitive part of the package through the three years of discussions that followed.

The agreement covered the five elements requested by Quebec, some of them generalized to apply to all provinces either at or before the April 30 meeting at Meech Lake or in the months immediately following that meeting, and there was a sixth element added at the April 30 meeting. This addition was to entrench in the constitution a requirement for annual first ministers' conferences, which were to cover Senate reform and fisheries roles and responsibilities, as well as for annual first ministers' conferences on the economy.

It was also agreed that, until the Senate amendments were achieved, Senate appointments were to be made from lists provided by the provinces, so long as they were acceptable to the federal government. Senate reform was a high priority for the Western provinces. In recognition that this was intended to be the Quebec Round, detailed proposals for Senate reform were not developed, but the interim arrangement was included in the package. This procedure was to apply until comprehensive Senate amendments were made.<sup>49</sup>

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<sup>48</sup> The redrafted subsection 2(1) (Government of Canada, *Strengthening the Canadian Federation: The Constitution Amendment, 1987* (np: Government of Canada, 1987) at 13 [*Meech Lake Accord*]) reads as follows:

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.

<sup>49</sup> *Ibid* at 11. The procedure was followed for three years, until the death of the Meech Lake Accord.

The Meech Lake Communiqué of April 30, 1987, was approved unanimously by the prime minister and the premiers of all the provinces, including Quebec, and was met with great enthusiasm and the hope that this might be the end of our constitutional difficulties. That mood held through the technical discussions over the next month or two at the officials' level as small changes were discussed. Another first ministers' meeting was held on June 2 and 3 to finalize the details of the proposed resolution.

The June 2 meeting was held across from the Parliament Buildings in the Langevin building where the prime minister had an office. The first ministers met in a boardroom on the fourth floor. There were a few final areas of concern to sort out in relation to the distinct society clause and the spending power provisions. The discussions dragged on well into the wee hours of the morning of June 3. I would occasionally get a request to draft a new provision for consideration, and some of these became quite vague as the night wore on. I remember one in particular relating to the spending power that made no sense to me at all. I was told, when I requested clarification, to "just draft something." It seemed that there was a desire to keep the discussions going until a consensus was reached and the final package was approved.

There were some heated exchanges between delegates waiting through the night as they met in the corridors of the Langevin building. Former Prime Minister Trudeau had already made his first public statement opposing the deal, and some doubts had started to creep in. As the night wore on, many were visibly stressed and exhausted, and some tempers became short. There was one light diversion in the middle of the night when several enormous trays of doughnuts arrived. They were welcomed by the weary delegates, who devoured them in no time.

An agreement was finally reached around four in the morning. This was the second unanimous agreement to proceed with the Meech Lake Accord. The first ministers signed the Meech Lake Accord (known also as the 1987 Constitutional Accord) on June 3, 1987, which included as one of its provisions the undertaking that all parties would proceed with the necessary resolution to trigger the proclamation of an amendment to the constitution.<sup>50</sup> This time, the exact legal text of the resolution was appended.

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<sup>50</sup> *Ibid* at 10.

Initially, the Meech Lake Accord was met with a level of public excitement and celebration.<sup>51</sup> Quebec was the first to table the necessary resolution in its National Assembly, and the resolution was adopted on June 23, 1987. That initiated the three-year period within which the resolutions of seven provinces would have to be adopted under the general amending procedure. The Meech Lake Accord included some amendments that called for the general procedure and others that required unanimous approval. The draft amendments were part of one interrelated package. I advised that both the three-year limitation period and the need for unanimity would apply simultaneously.<sup>52</sup>

A joint parliamentary committee was quickly set up after the resolution was adopted in Quebec, and the House of Commons followed, with little delay, in adopting the resolution in the fall of 1987. The legislative assemblies of eight provinces had passed their resolutions by the summer of 1988—all but Manitoba and New Brunswick.<sup>53</sup>

It was essential, of course, that every legislative body approve the identical package of amendments. We assured this by asking each jurisdiction to send me their resolution before tabling it, and it was checked very carefully both by me and by our legislative editors to uncover any discrepancies. As it happened, we did find a number of editorial discrepancies and these were adjusted.<sup>54</sup>

### *B. The Agreement Unravels*

Gradually, opposition to the Meech Lake Accord began to gather strength. People complained that the deal had been cooked up behind closed doors by a group of men in suits. There was a general mistrust of what was referred to as “executive federalism”. The *Charter* had given Canadians a sense of empowerment, and they were resisting what they characterized as secret deals. The federal government took the position, in

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<sup>51</sup> I cite, for example, the headline in the newspaper *Le Droit*. It read, “Un veritable tour de force.” I still have a copy hung on my wall at home (“Un veritable tour de force”, *Le Droit [Gatineau]* (4 June 1987)).

<sup>52</sup> Some commentators have suggested that only the unanimity procedure need apply, since it is the most stringent requirement, and that there was no need to worry about the three-year deadline. I think it is quite clear that both would apply.

<sup>53</sup> By then, the House of Commons, following the procedure in section 47 of the *Constitution Act, 1982* (*supra* note 11), had approved the resolution for a second time to compensate for the fact that the Senate had adopted it with amendments. Section 47 allows for amendments without Senate approval if the Senate fails to authorize the amendment within one hundred and eighty days of the House adopting its first resolution.

<sup>54</sup> This procedure has been followed for all the constitutional amendments that have been made to date where provincial resolutions have been required.

the course of the parliamentary hearings when the resolution was being debated, that no changes should be made to the proposed amendments unless an “egregious error” was found in the text. It certainly would have been problematic, once Quebec had approved the resolution, to try to change anything in it. This reluctance to make changes, however, only added to the suspicions held by some members of the public.

The distinct society provision was the focus of much of the dissent. Many objected to giving Quebec a special status, preferring the principle of the equality of the provinces. In response to these arguments, the Government of Canada pointed to the many other examples in the constitution where there were special provisions for individual provinces.

Many argued that the Government of Quebec would be able to evade the provisions of the *Charter* using the distinct society clause. Similar concerns had been raised during the period between the Meech Lake Communiqué of April 30, 1987, and the meeting in June, and section 16 was added to the final legal test to address these concerns. That section provided that the distinct society provision did not affect any of the provisions of the constitution that relate to the Aboriginal peoples of Canada or section 27 of the *Charter*, which related to multiculturalism. This addition did not satisfy those who had raised concerns.

Women’s groups attacked the Meech Lake Accord with particular vigour. They were encouraged by their previous successes with section 28 of the *Charter* during the patriation negotiations. Women outside Quebec now raised concerns that, under the Meech Lake Accord, the Government of Quebec could override rights of women using the distinct society clause. They went so far as to suggest that laws could be enacted, using the distinct society provision, that would require women to have a certain number of children so as to increase the population of Quebec. These comments were not well received by women’s groups in Quebec.

Aboriginal groups and territorial representatives complained that their concerns had been ignored. Comparisons between what appeared to be the quick resolution of the Quebec issues and the failure of the last Aboriginal first ministers’ conference, just two months before the meeting at Meech Lake, were likely fresh in their minds.

Changes of government in three provinces had a direct impact on the fortunes of the Meech Lake proposals. Frank McKenna, who was elected premier of New Brunswick on October 13, 1987,<sup>55</sup> early in the three-year process, had opposed the accord. Although Premier McKenna ultimately became one of its strongest supporters, he initially added to the momen-

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<sup>55</sup> His party won every seat in that landslide election.

tum against it. Manitoba's 1988 election led to a new minority government, and the members of the legislative assembly of that province remained less than enthusiastic about the Meech Lake Accord. Clyde Wells, who became premier of Newfoundland following his election victory on May 5, 1989, ultimately, in April 1990, revoked the assent given under the previous Newfoundland government.

One of the most significant factors in the ultimate demise of the Meech Lake Accord was the very fact that there were three years within which to complete all the provincial and federal resolutions. This allowed enough time for forces of dissent to gain strength and resulted in too long a period to maintain a sustained effort to push the agreement to completion.

There were months when attention was diverted from the Meech Lake Accord during this period. The most significant diversion was the Canada-United States Free Trade Agreement being negotiated with the Americans.<sup>56</sup> A federal election was held in 1988, during which the free trade agreement took centre stage and was hotly debated. Canadian legislation was developed to accommodate the free trade agreement, and this process involved its own series of federal-provincial negotiations.

The single event most damaging to the success of the Meech Lake Accord was probably the use of the notwithstanding clause (section 33 of the *Charter*) by Quebec's Premier Bourassa in December 1988 to override a recent Supreme Court judgment that struck down amendments to Quebec's language legislation, which banned the use of English on commercial signs.<sup>57</sup>

The timing of Premier Bourassa's announcement could not have been worse. Premier Gary Filmon of Manitoba had tabled Manitoba's resolution in support of the Meech Lake Accord on December 16, 1988, but withdrew it almost immediately on December 19, 1988, three days after it

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<sup>56</sup> *Free Trade Agreement Between the Government of Canada and the Government of the United States*, 22 December 1987, Can TS 1989 No 3, 27 ILM 281 (entered into force 1 January 1989). I myself became quite involved in this file, advising on the structure of the federal legislation and participating in some of the negotiations with the provinces.

<sup>57</sup> *Ford v Quebec (AG)*, [1988] 2 SCR 712, 54 DLR (4th) 577 [*Ford* cited to SCR]. The Supreme Court supported Quebec's objective of establishing measures to protect the French language in Quebec (*ibid* at 779-80). In fact, in assessing whether the limits on freedom of expression were reasonable under section 1 of the *Charter* (*supra* note 10), the Supreme Court took note of Quebec's unique linguistic situation in a predominantly English-speaking North America, thus recognizing Quebec's distinctiveness as the only French-speaking jurisdiction in North America. However, the Court found that the Quebec National Assembly had gone too far in banning English from public signs altogether, suggesting instead that some solution like a predominance of the French language on signs would be acceptable under the *Charter*.

was tabled and only one day after Premier Bourassa invoked the override. Premier Filmon angrily suggested that such an extreme restriction of English minority language rights in Quebec violated the spirit of the Meech Lake Accord itself.

Undoubtedly, the most important and persuasive foe of the Meech Lake Accord was former Prime Minister Trudeau. He still retained much of his original charisma. Mr. Trudeau had been the driving force behind the acceptance of the *Charter* and had argued against diluting its effect in any way (although he did agree to the section 33 override in November 1981). He argued forcefully against a special status for Quebec. The arguments that Quebec was already “distinct” and that the constitution already contained unique provisions for Quebec carried no weight with Mr. Trudeau. His intervention in the debate had a profound effect.

Throughout the whole period, federal officials tried to respond to concerns and to convince those opposing the Meech Lake Accord to come around.<sup>58</sup> In November 1989, Prime Minister Mulroney convened a private meeting of first ministers to canvass the situation. Then, Senator Lowell Murray made two tours of the provinces to pursue the discussions further.<sup>59</sup> Priority was given to the two provinces that had yet to adopt resolutions, New Brunswick and Manitoba, and to Newfoundland, in particular Premier Wells, who continued to express strong opposition to the accord.

In New Brunswick, Premier McKenna had long since changed his original position and had become an active proponent of the Meech Lake Accord. In fact, his position changed fairly soon after he took office as premier. He had become convinced that the Meech Lake Accord was important for the unity of the country. However, he continued to look for ways to make certain adjustments to the package. He was particularly insistent on getting a provision into the constitution to entrench the provisions of a New Brunswick statute that guaranteed equality of status to the English and French linguistic communities in New Brunswick.<sup>60</sup>

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<sup>58</sup> We even looked at other options, like whether we could start a new process and proceed with the proposals that only required the approval of seven provinces. The proposals relating to the amending formula and probably at least a portion of those relating to the Supreme Court would require unanimity. These other options were not seriously pursued, so far as I know.

<sup>59</sup> I went along on most of these trips, along with Norman Spector and David Paget from the Federal-Provincial Relations Office. It was my first and only experience on the government's Challenger jets.

<sup>60</sup> *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, RSNB 2011, c198 (commonly referred to at the time as Bill 88).



The federal government worked with Premier McKenna to develop what became known as New Brunswick's Companion Accord.<sup>61</sup> There were private and highly confidential meetings involving federal officials and ministers, Premier McKenna, and members of the McKenna government<sup>62</sup> to develop this agreement. Part of the proposal provided that the Companion Accord, while agreed to beforehand, would not be dealt with until the Meech Lake amendments had been proclaimed in force. It was intended to avoid the problem of opening the Meech Lake Accord. Furthermore, the resolution for the Companion Accord was drafted in such a way that its different components were severable, that is to say that those to which different amending formulas applied could be dealt with separately.

Both the Meech Lake resolution and the proposed Companion Resolution were tabled in the New Brunswick legislative assembly on March 21, 1990. The Companion Resolution was tabled two days later in the House of Commons and sent for study to a committee chaired by Jean Charest, then a young Conservative member of Parliament.<sup>63</sup> The Charest Report endorsed most of the recommendations contained in the Companion Resolution.<sup>64</sup>

On this basis, after canvassing each of the first ministers individually, Prime Minister Mulroney called them together one last time in early June 1990 to meet over dinner to consider the substance of the Companion Accord. He hoped to convince the premiers of the last three provinces, New

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<sup>61</sup> This accord, if acted upon, would have included the provision that New Brunswick wanted recognizing the equal status of the English and French linguistic communities; references to the territories in some of the provisions of the Meech Lake Accord; the power for the Senate and House of Commons to trigger, by resolution, the establishment of new provinces in the territories (a process that would currently take place under the general amending formula); and the inclusion of matters affecting the Aboriginal peoples of Canada on the agendas of the annual constitutional conferences provided for in the Meech Lake Accord.

<sup>62</sup> I remember well the trip to New Brunswick with Senator Murray, Frank Iacobucci (at the time, deputy minister of justice), and Norman Spector. We ended up sitting around the dining room table of Aldéa Landry, then minister of intergovernmental affairs for New Brunswick, with Premier McKenna and several others, refining the details of the Companion Accord. We jokingly suggested it should be called the "Dining Room Accord", in reference to the earlier Kitchen Accord.

<sup>63</sup> Jean Charest, head of the Liberal Party of Quebec since December 15, 1998, became premier of Quebec when the Liberal Party replaced the Parti Québécois government in the general election held in Quebec on April 14, 2003.

<sup>64</sup> House of Commons, Special Committee to Study the Proposed Companion Resolution to the Meech Lake Accord, *Report of the Special Committee to Study the Proposed Companion Resolution to the Meech Lake Accord* (May 1990) at 10 (Chair: The Honourable Jean Charest).

Brunswick, Newfoundland, and Manitoba, to take steps to have the Meech Lake resolution adopted in their provinces. That dinner at the Museum of Civilization in Hull stretched into a meeting that lasted a week, back across the river in Ottawa at the Government of Canada Conference Centre. At the end of a pressure-cooker week for which no one was prepared, an agreement was reached. That was the third time an agreement on the Meech Lake Accord was reached between the prime minister of Canada and the premiers of all ten provinces.

The agreement of June 9, 1990, included an undertaking that the three remaining provinces would complete their approval process for the Meech Lake Accord prior to June 23, 1990. It included a number of other undertakings as well. Senate reform would be pursued over the next five years according to a process set out in the agreement and would be given priority, and an agenda for future constitutional discussions was set out. The Companion Accord would be pursued only after the Meech Lake amendments were proclaimed. The bilateral amendment for New Brunswick in relation to English and French linguistic communities, which was part of the Companion Accord, would be pursued as soon as possible after the Meech Lake amendments were proclaimed.<sup>65</sup>

The premiers returned home with less than two weeks left before the deadline date for Meech Lake. Only New Brunswick adopted a resolution to approve the accord during that period.<sup>66</sup> In Manitoba, Premier Filmon tabled a motion for the resolution on June 20, 1990. However, Elijah Harper, an Aboriginal member of the Manitoba legislative assembly, acting with the backing of the Assembly of Manitoba Chiefs, refused to support the unanimous consent needed to adopt the resolution in the short time available. The image of Elijah Harper, holding a feather and refusing to back down, was carried in all the news media across the country and remains imprinted on our collective memory.

Premier Filmon had been warning of this possibility during the final negotiations. I thought this setback might be manageable, however, if provincial legislative assemblies that had adopted the resolution early in the process would readopt it in order to extend the three-year period. This solution would be complicated, though, because Quebec had been the first to adopt the Meech Lake resolution and might be unwilling to adopt the resolution again for fear of being rebuffed yet again. As well, Premier

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<sup>65</sup> The New Brunswick amendment was the only element of the June 9, 1990, agreement that was achieved. It came into force in 1993 as section 16.1 of the *Charter* under the *Constitution Amendment, 1993 (New Brunswick)* (*supra* note 40).

<sup>66</sup> The New Brunswick resolution was adopted on June 15, 1990.

Wells of Newfoundland, seeing the agreement unravel in Manitoba, decided not to put the resolution to a vote in Newfoundland.

On June 22, 1990, Senator Murray, on behalf of the Government of Canada, announced that the process was over. I had spent most of that day trying to pave the way for a possible reference to the Supreme Court of Canada on the question of rolling forward the three-year limit.<sup>67</sup> By the time that Senator Murray made his announcement on television, I had spoken to officials in almost all of the provinces, and all of them had agreed that they would support, or at least not oppose, the federal position in such a reference. It was not to be.

I was devastated by Senator Murray's announcement and by the failure of the amendments that we had worked for three years to achieve. I retreated for a week to our family cottage across the Ottawa River into Quebec to rest and recover from the disappointment. I had hoped in vain that we could extend the three years a little and that, hopefully, once Manitoba had adopted the resolution, Premier Wells would follow suit in Newfoundland.

However, the politicians in Ottawa had had enough. The drama of the Quebec Round had ended. Quebec withdrew once again from constitutional discussions.

### *C. Echoes of Meech Lake*

Despite the failure of the Meech Lake Accord itself, its footprint remains. Quebec's five conditions are not reflected in the constitution of Canada, but most of them have been acted upon in one way or another in practice.

With respect to the distinct society clause, in 1988, even before the fate of the Meech Lake Accord was settled, the Supreme Court took note of Quebec's unique linguistic situation, recognizing Quebec's distinctiveness and the legitimacy of its objective of maintaining its French-speaking character. It found, nonetheless, that, in this particular instance, Quebec had gone too far.<sup>68</sup> In 1995, following up on a pledge made just before the Quebec referendum on sovereignty that year, the House of Commons and the Senate adopted similar resolutions recognizing Quebec as a distinct society within Canada.<sup>69</sup> Both resolutions made specific reference to Que-

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<sup>67</sup> I think it is quite clear that nothing in the amending procedures would prevent this approach, but there were some who disagreed with my interpretation.

<sup>68</sup> *Ford*, *supra* note 57 at 779-80.

<sup>69</sup> The resolution was adopted by the House of Commons on December 11, 1995, and by the Senate on December 14, 1995.

bec's French-speaking majority, its unique culture, and its civil law tradition, and encouraged the government and Parliament to be guided by that reality.

With respect to the amending formula, again following up on a pledge made just before the 1995 Quebec referendum on sovereignty, the Government of Canada introduced a bill, commonly known as the Quebec Veto Bill,<sup>70</sup> imposing upon itself the requirement that there be regional consent before a resolution can be proposed by any minister of the Crown under the general amending procedure. This statutory requirement would be applied over and above the requirements of the constitutional amending formula. It has the effect of giving Quebec, Ontario, and British Columbia a veto over all amendments under the general amending formula, bringing the situation closer to the expanded use of the unanimity procedure proposed in the Meech Lake Accord.

Three of the nine judges of the Supreme Court of Canada continue to come from the Bar of Quebec. Although an amendment has not been made to the constitution, there is an argument to be made that this requirement, found in the federal *Supreme Court Act*,<sup>71</sup> already forms part of the constitution. In any event, the rule has been followed for many years. No move has been made, however, to proceed with the proposal that Supreme Court judges be chosen from among names submitted by the provinces, and this would appear unlikely to happen in the near future.

The Meech Lake Accord would have given the right to provincial governments to require the federal government to negotiate agreements relating to immigration. Immigration agreements continued to be negotiated with Quebec after the failure of the Meech Lake Accord<sup>72</sup> and, so far as I know, continue to be negotiated with Quebec and with other provinces.

With respect to the federal spending power, the Meech Lake Accord provided for compensation to any province opting out of a national shared-cost program in an area of exclusive provincial jurisdiction if the province carried out a program or initiative that was "compatible with the national objectives."<sup>73</sup> The federal spending power is a difficult area that is a constant source of concern for the provinces. While some efforts toward establishing understanding and accommodation in relation to the spending

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<sup>70</sup> The resulting act is *An Act respecting Constitutional Amendments*, SC 1996, c 1.

<sup>71</sup> RSC 1985, c S-26, s 6.

<sup>72</sup> Under these agreements, the main objective for Quebec has been to participate in the selection of persons who will settle in Quebec so as to protect the linguistic and cultural profile of the province.

<sup>73</sup> *Meech Lake Accord*, *supra* note 48 at 16-17.

power took place in the 1990s after the failure of the Charlottetown Accord, it remains a contentious area.

Even though the Meech Lake Accord was ultimately unsuccessful, the five conditions set by Quebec are not forgotten and have been, to some extent, realized at a practical level.

## V. The Charlottetown Accord

In the late fall of 1990, less than six months after the demise of the Meech Lake Accord, the Government of Canada embarked once again on a constitutional journey, this time to address not only Quebec's demands but also the multitude of demands from other parts of Canada that had arisen during the Quebec Round. The government expanded its reach beyond provincial issues to include Aboriginal and territorial issues as well as those of "ordinary Canadians". All these concerns were considered.

The process that resulted in the Charlottetown Accord<sup>74</sup> was referred to as the "Canada Round". It stands in marked contrast to the Quebec Round, which appeared, when the Meech Lake Accord was made public, to come into being overnight and with no involvement of the Canadian public. The Canada Round began quite differently. Before any proposals were considered, extensive public consultations were carried out.

The two accords differed, as well, in their scope. The Meech Lake Accord was intended only to address Quebec's issues and was perhaps most important as a symbol of the acceptance of Quebec's special place in Canada by the other parts of Canada. The Charlottetown Accord, on the other hand, attempted to deal with a broad range of concerns from all parts of Canada. The Meech Lake Accord was short and relatively simple; the Charlottetown Accord was long and complex.

The concerns of Aboriginal communities were becoming increasingly public. In July 1990, there was a serious standoff between an Aboriginal community and police at Oka, Quebec, over sacred land that was to be used for a golf course. The territorial governments, with strong ties to Aboriginal communities, were also pushing to be heard.<sup>75</sup>

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<sup>74</sup> The designation of the Charlottetown Accord was chosen at the very end of the Canada Round. When it appeared quite certain that a deal was about to be struck, the first ministers decided to hold one final meeting in Charlottetown so that the accord could be signed in the place where the last conference was held in Canada in the process leading up to Confederation in 1867. Ironically, Prince Edward Island was not among the first four provinces to form Canada in 1867 but waited to join Confederation until 1873.

<sup>75</sup> One of the main concerns of the territorial governments was to make it easier for territories to attain provincial status. Before the coming into force of section 38 of the *Con-*

Western Canadians were feeling increasingly alienated. They found the federal government to be unduly preoccupied with the more populous and powerful central Canadian provinces of Ontario and Quebec, to the detriment of the West. Senate reform had become a touchstone for many Westerners, with the cry for a Triple-E Senate—one that was elected, equal, and effective.

The federal government began by establishing two separate consultative mechanisms. The first was the Citizens' Forum on Canada's Future, set up on November 1, 1990, to engage in dialogue with Canadians in an informal and unstructured way. The resulting report, which was tabled on June 27, 1991, reflected a general disenchantment with politicians and political processes<sup>76</sup> and recommended direct, grassroots consultations.

The second was a special joint committee,<sup>77</sup> set up on December 17, 1990, to consult on amendment processes. The committee's report, tabled on June 20, 1991, recommended a number of constitutional amendments. It recommended that we return to the model proposed by the Government of Canada in 1981, based on regional blocks, rather than the provincial formula that was agreed upon, based on the equality of the provinces.<sup>78</sup> Perhaps more significantly, the committee recommended a number of other measures that did not require constitutional change, several of which advocated expanded consultations with Aboriginal peoples, territorial governments, and the general public. It also recommended that legislation be adopted to provide for the possibility of consultative referendums in relation to proposals for constitutional amendments.<sup>79</sup>

All the provinces set up similar commissions or committees to consider constitutional issues during this period. All had reported by early 1992.

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*stitution Act, 1982* (*supra* note 11), which requires the consent of seven provinces under the general 7/50 formula to effect such a change, it would have been possible for a territory to become a province on the consent of the Government of Canada alone. The proposed changes to the amending formula in the Meech Lake proposals went further and would have required the unanimous consent of all the provinces.

<sup>76</sup> The chairman of the commission, Keith Spicer, put it bluntly in his oft-quoted comment "there is fury in the land against the prime minister" (Citizens' Forum on Canada's Future, *Report to the People and Government of Canada* (Ottawa: Minister of Supply and Services Canada, 1991) at 6-7).

<sup>77</sup> This committee is commonly referred to as the Beaudoin-Edwards Committee.

<sup>78</sup> House of Commons, Special Joint Committee of the Senate and the House of Commons on Process for Amending the Constitution of Canada, *The Process for Amending the Constitution of Canada: The Report of the Special Joint Committee of the Senate and the House of Commons* (20 June 1991) at 26-27 (Chairs: Gérald Beaudoin & Jim Edwards).

<sup>79</sup> *Ibid* at 69-70.

There were two reports tabled in Quebec,<sup>80</sup> still under a Liberal government, both of which called for radical changes to the powers of Quebec if it was to stay in Canada and both of which contemplated the possibility of sovereignty of Quebec. Both recommended a referendum on sovereignty in Quebec by the fall of 1992.<sup>81</sup>

In the spring of 1991, the Canada Round can be said to have begun. A newly constituted Cabinet Committee on Canadian Unity and Constitutional Affairs (Cabinet Committee) began work in earnest under the chairmanship of a new minister of constitutional affairs, former Prime Minister Joe Clark.<sup>82</sup> The Cabinet Committee met weekly and held its meetings at various locations across the country in order to underline its intention to take the concerns of all regions of Canada into account. The work done was detailed and serious. The Cabinet Committee was accompanied by a retinue of officials, including me. I assisted in developing proposals and prepared the usual binder of detailed drafts.

The government's proposals were made public in the form of a softcover publication called *Shaping Canada's Future Together*.<sup>83</sup> This publication covered the range of topics that were to become part of the Charlottetown Accord. It was augmented by a series of individual publications, all with matching blue covers with a red maple leaf. The government hoped that the public would read these publications and would gain a deeper understanding of the issues at play. The Special Joint Committee on a Renewed Canada (Beaudoin-Dobbie Committee) was established on June 21, 1991, to consider the government's proposals. The Beaudoin-Dobbie Committee, which itself had the power to travel and hold hearings

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<sup>80</sup> The reports of the Allaire Committee were made public on January 28, 1991 (Quebec, *A Québec Free to Choose: Report of the Constitutional Committee of the Québec Liberal Party* (Submission to the 25th members convention), (np: Québec Liberal Party, 1991 [*Allaire Report*]), and the report by the Bélanger-Campeau Commission was concluded on March 27, 1991 (Quebec, *Report of the Commission on the Political and Constitutional Future of Quebec* (St-Romuald, Que: Imprimerie St-Romuald, 1991) [*Bélanger-Campeau Report*]).

<sup>81</sup> *Allaire Report*, *supra* note 80 at 58-59; *Bélanger-Campeau Report*, *supra* note 80 at 79-81.

<sup>82</sup> Joe Clark was appointed to this position on April 21, 1991. He was the prime minister from June 4, 1979, to December 13, 1979, when his new Conservative government was unexpectedly defeated in Parliament. This defeat gave Prime Minister Trudeau the opportunity to return to power on February 18, 1980. Mr. Trudeau was sworn in as prime minister on March 3, 1980.

<sup>83</sup> Government of Canada, *Shaping Canada's Future Together: Proposals* (Ottawa: Minister of Supply and Services Canada, 1991).

throughout Canada, was given a deadline of February 28, 1992, by which to report.<sup>84</sup>

As one final consultation exercise before the provinces were formally engaged, the Government of Canada arranged for a series of five conferences, each held in a different part of Canada, each to concentrate on a different aspect of constitutional change. The conferences covered the distribution of powers, national institutions, the economic union, and a proposed Canada clause, and there was a final general conference. A sixth conference was added, at the request of Aboriginal groups, to cover Aboriginal issues. That last conference was held after the Beaudoin-Dobbie Committee's report came out.

These conferences were highly successful, so far as they went. They were attended by between two hundred and three hundred people, including: federal, provincial, and territorial representatives; Aboriginal representatives; members of the Beaudoin-Dobbie Committee; and, most interestingly, about fifty "ordinary Canadians". The conference organizers chose the "ordinary Canadians" by lot, but with an eye to regional balance, from among the individuals who had applied to take part in these conferences. Since the participants' expenses were paid, no one was excluded for cost reasons.

Participants were divided into smaller groups to study the issue at hand, functioning like focus groups and then reporting back to a plenary session, which was televised. It was remarkable how engaged the participants became and how seriously they worked to adjust proposals so that they were acceptable to all. Unfortunately, we did not figure out how to transpose that feeling of ownership from the participants in those conferences to the public at large.

Finally, after all these consultative exercises had taken place, the multilateral meetings of government leaders began on March 12, 1992. This time, however, in contrast to the Meech Lake process, there were representatives not only of the federal government and the provinces, but also of the territories and the four national Aboriginal groups. Quebec alone was not represented at the meetings. The meetings were held in private, but there were press briefings at the end of each day. A large retinue of officials attended these meetings with the leaders. Meetings were held in different parts of Canada at a frenetic pace, through the spring and into the summer of 1992.

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<sup>84</sup> House of Commons, Special Joint Committee of the Senate and the House of Commons on a Renewed Canada, *A Renewed Canada: The Report of the Special Joint Committee of the Senate and the House of Commons* (28 February 1992) (Chairs: Gérald Beaudoin & Dorothy Dobbie).



The range of subjects was extensive. All the elements of importance to Quebec that were included in the Meech Lake Accord were discussed, but there was much, much more. The preoccupations of all the participants were addressed. The only way to manage the breadth of subjects was to create separate working groups of officials to concentrate on specific parts of the package. Four working groups were created. Managing the legal and policy input in four groups that met simultaneously, let alone finalizing the drafting for each of those groups, was a truly daunting exercise. I assigned one or two lawyers from my Public Law Sector of the Department of Justice to each of these working groups, and I attended one or another myself, depending on which seemed most important at any particular time.

The first group dealt with the Canada clause and the amending formula. The Canada clause included an adjusted version of the distinct society provision<sup>85</sup> in one paragraph and a provision recognizing Canada's linguistic duality in another paragraph, but only as two of eight fundamental characteristics that were felt to be deserving of mention.<sup>86</sup> Many hours were spent refining the Canada clause.

The second working group dealt with institutions, including the Supreme Court and the Senate. The amendments proposed for the Supreme Court were similar to those in the Meech Lake Accord. The Senate proposals were complex and detailed. They were the last part of the accord to be drafted, and the drafting was only completed after the signing of the accord in Charlottetown.<sup>87</sup> The proposals outlined a smaller Senate that was to be elected and was to have equal representation from all provinces. A mechanism was proposed to break a deadlock between the Senate and the House of Commons by joint action, with the members of both houses voting as one body. This would usually favour the House of Commons be-

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<sup>85</sup> Canada, *Consensus Report on the Constitution: Charlottetown* (Final text), (Ottawa: no publisher, 1992) at 1 [*Charlottetown Accord*]. The distinct society provision now read: "Quebec constitutes within Canada a distinct society, *which includes a French-speaking majority, a unique culture and a civil law tradition*" (*ibid* [emphasis added]). The italicized words added to the end of this provision were intended to circumscribe the potential breadth of the provision.

<sup>86</sup> The others related to Canada's commitment to the rule of law, the Aboriginal peoples of Canada, racial and ethnic equality, respect for human rights and freedoms, equality of female and male persons, and the principle of equality of the provinces: *ibid* at 1.

<sup>87</sup> I remember spending one sunny weekend in September at my cottage trying to sort out a coherent final draft for a set of amendments that had only been generally discussed, without complete drafts.

cause of its larger size. There were also special rules for particular types of bills.<sup>88</sup>

The third working group dealt with Aboriginal peoples and their rights. The most interesting work was, I think, done in this working group. A proposal was fleshed out for the recognition of an inherent right to Aboriginal self-government within Canada, along with a commitment on the part of federal, provincial, and territorial governments to negotiate the implementation of that right.<sup>89</sup>

The fourth group dealt with the distribution of powers, the spending power, the economic union, and a social charter. The discussions in this group were not easy to manage, particularly in relation to the distribution of powers, and the issues were complex. I found the matters covered by this fourth group to be the most problematic area of the Charlottetown Accord.

When all these discussions were very well advanced and it seemed that a consensus was developing in each of the areas, Prime Minister Mulroney invited Premier Bourassa of Quebec to meet with the other first ministers on August 4, 1992. Premier Bourassa's acceptance of the invitation set the stage for the return of the Quebec delegation at the critical constitutional conference in Ottawa from August 18 to 22. A tentative agreement was reached at that conference and, with only a few details remaining, the final conference was held in Charlottetown for symbolic reasons. An agreement between all parties, including Premier Bourassa, was reached there on August 28, 1992.

It is interesting to note that even in the Canada Round, when so much emphasis was placed on public consultation, officials and first ministers found it necessary to carry on the serious negotiations in private. This is the way that all major agreements are made when the stakes are high.

A referendum on sovereignty had been planned in Quebec for October 26, 1992. The Charlottetown Accord provided an opportunity to proceed with a referendum on renewed federalism instead. A week after the accord was signed, Quebec set its referendum question on that agreement, rather than on sovereignty. Prime Minister Mulroney set in motion a national referendum for the rest of Canada on the same question for the same day, October 26, 1992.

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<sup>88</sup> *Charlottetown Accord*, *supra* note 85 at 4-6. The bills that would have had their own special rules included revenue or expenditure bills, bills relating to natural resources tax policy, and bills materially affecting French language or culture in Canada.

<sup>89</sup> *Ibid* at 14-15.

Holding a referendum on constitutional change was something new for Canadians, although, as I have noted, it had been proposed by Prime Minister Trudeau in relation to the amending formula and the *Charter* in 1981 during the patriation negotiations. The only two referendums ever held in Canada on a national level, one on prohibition in 1898 and one on conscription in 1942, had resulted in bitter divisions across the country.<sup>90</sup> We had serious concerns that the referendum on the Charlottetown Accord might result in similar regional splits.

The Charlottetown Accord might not have been taken to the people of Canada for a vote, had it not been for the Quebec referendum plans. Having been done once, however, the referendum process has likely set a precedent that will be followed in the future.

About fifty-five per cent of the national vote opposed the Charlottetown Accord. The Aboriginal vote against the accord on reserves was somewhat higher, at sixty-two per cent. As it turned out, we were very relieved that there were no major discrepancies in the voting patterns in the different regions of Canada. Only a very slightly higher percentage of those living in Quebec rejected the accord, as compared to those in other provinces.

Despite all the efforts that had been made to include the Canadian public in the development of the amendment package, there remained a significant level of distrust on the part of the public. Furthermore, the amendments were so wide-ranging that they left plenty of scope for the voters to find something that they did not like about them. The Charlottetown Accord was undoubtedly rejected not because of a united reaction by Canadians but for multiple different reasons. Certainly, the reasons for voting against the accord in Quebec were likely quite different from those outside Quebec.

I myself was surprised by the relief that I experienced as the results of the referendums were announced. There were parts of the package that I did not like, especially in the area of division of powers, but I had been so involved in the process that I had never realized that I might actually be happy if it failed. There was no sense of loss like the one I had felt after the failure of the Meech Lake Accord.

## VI. The Aftermath

As would be expected, the failure of the Charlottetown Accord aggravated the distancing of Quebec from the rest of Canada, although it was

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<sup>90</sup> Both of these referendums had been supported generally by English-speaking Canadians but opposed by French-speaking Canadians.

not met with the same emotion as the demise of the Meech Lake Accord. There was no appetite anywhere to try again for broad constitutional reform, and that feeling has persisted until the present time. On September 12, 1994, the Parti Québécois defeated the Liberal government of Daniel Johnson, and once again we had a separatist government in Quebec. Part of the Parti Québécois election platform was to hold a referendum on sovereignty. That referendum was held on October 30, 1995. It was so close<sup>91</sup> that it sent shock waves through the federal government and the rest of Canada.

The years following the failure of the Charlottetown Accord were tense ones. In the period prior to the 1995 Quebec referendum, much theoretical thinking was done about what would happen if Quebec were to separate, but there was an air of unreality to it all. The public statements at the federal level continued to focus on the reasons why Quebec should not separate. After the 1995 referendum, separation became a distinct possibility that could not be ignored. The federal focus shifted from the “why” of separation to the “how” of separation, including what would be involved in managing such a situation and what would be at stake. In the public statements by the federal government, there was a serious effort to dispel what we called the “myths of separation”—the idea that its effects would be minimal.

The Government of Canada ultimately took direct action to meet the threat of Quebec secession. It went before the courts in the *Secession Reference*<sup>92</sup> and put forward legislation known as the *Clarity Act*.<sup>93</sup> The legislation was carefully constructed to ensure consistency with the opinion of the Supreme Court in the *Secession Reference*.

It is not clear how much effect these efforts have had, but for whatever reason, the threat of Quebec secession seems to have abated in the late 1990s, and thoughts turned to other matters. The Parti Québécois government was defeated in a Quebec election held on April 14, 2003, and the Liberal government returned to power in Quebec, under the leadership of

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<sup>91</sup> The vote was 49.42 per cent in favour of the “yes” side and 50.58 per cent in favour of the “no” side (*Referendums, supra* note 9). Canadians outside Quebec, and many in Quebec, watched in horror on television as the vote projections swayed from one side to the other.

<sup>92</sup> *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385. Several actions had been filed in the Quebec courts, but it was evident that these actions would take some years to reach the Supreme Court of Canada for final resolution. The federal government set three questions and took a reference to the Supreme Court.

<sup>93</sup> *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, SC 2000, c 26. The act is commonly referred to as the *Clarity Act*.

former federal Conservative Jean Charest. The relative silence on secession issues and on constitutional issues has continued through the first decade of the twenty-first century. The turmoil and uncertainty of the 1990s, however, remains part of our collective memory, and we cannot dismiss the possibility that it could happen again.

## VII. Final Thoughts

Since the failure of the Charlottetown Accord, and up to the present time, there have not been many voices calling for major constitutional amendments. There have been no multilateral constitutional conferences held since 1992. Canadians appear to have lost their appetite for what had earlier been called our “national pastime”. It may be that we tried too hard for constitutional change and we need to allow some time to pass to determine what changes, if any, may actually be necessary or desirable.

At the same time, one must not lose sight of the fact that there have been a number of successful constitutional initiatives in Canada since 1982, as discussed earlier in this paper.

The Canadian constitution has shown itself to be quite flexible over the years. The courts have found ways to allow our constitutional rules to grow and develop, as necessary, to reflect new attitudes in our society and to accommodate changes brought about by modern life. Furthermore, one need not always amend the constitution to accommodate change. It is instructive to recall Quebec’s five objectives. While none are reflected in the constitution, they have not been ignored.

Senate reform was an important element of the Charlottetown Accord. It was addressed partly as a result of Western Canada’s belief that the West was not adequately represented in Ottawa and that Westerners’ concerns were being ignored. The Western first ministers proposed a comprehensive package of extensive changes to the Senate. Things have changed in recent years, and the Western provinces have a much stronger presence in Ottawa. The federal government is taking a different approach to Senate reform. It has put forward several pieces of legislation<sup>94</sup> to make incremental changes to the Senate. These initiatives will likely be challenged in the courts if they are passed. It will be interesting to see what happens.

In the mid-1990s, Prime Minister Jean Chrétien decided simply to operate on the assumption that there is an inherent right of the Aboriginal

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<sup>94</sup> See e.g. Bill C-7, *An Act respecting the selection of senators and amending the Constitution Act, 1867 in respect of Senate term limits*, 1st Sess, 41st Parl, 2011 (first reading 21 June 2011).

peoples of Canada to self-government and to go ahead with self-government arrangements on that basis, without the need for a constitutional amendment to recognize the right. Progress is being made on a case-by-case basis, and our understanding of the rights of the Aboriginal peoples continues to evolve in the courts.

Frequent constitutional change is not necessarily a good thing. In fact, it is perhaps quite undesirable. There are those who suggest that our constitutional amending procedures are too rigid. I would argue that this is not necessarily the case. A constitution is the fundamental law of a country, and adjustments to that law should not be taken lightly. Ideally, constitutional changes should have the support of a strong majority of the population and should reflect a desire for change for which support has developed over time.

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