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

The Meech Lake Accord addresses itself to this latter objective: its purpose and intent is to strengthen the bonds of nationhood as they are felt in the Province of Quebec. I take this to mean the strengthening of the bonds of nationhood as they are felt by the people of Quebec; clearly, it is their feeling for Canada which finally determines the strength of nationhood in that province.

The Accord, however, addresses itself not to the people of Quebec, but to the government of that province. As it turns out, its concern is to meet the demands of the Government of Quebec that the powers of the federal government be diminished in that province (in certain particulars), and that the powers of the Government of Quebec be increased correspondingly. The fathers of Meech Lake reasoned that, if this concern is met, the Government of Quebec would be persuaded to become a signatory to the Constitution of Canada — which was the objective of Meech Lake in the first place. And that is what happened, of course.

However, if I am right about the bonds of nationhood — that they depend upon the sense that a people feels for the nation as a whole — then the fundamental question about the Meech Lake Accord is its underlying assumption concerning the place of citizens in the drafting of constitutions, as opposed to that of governments. The Accord clearly seems to assume that the feeling of the people of Quebec for Canada will be enhanced if the powers of the Government of Quebec are increased, and the powers of the Government of Canada are correspondingly reduced. On the basis of this assumption, the Government of Canada was prepared to strengthen the powers of all the provincial governments, and to weaken its own powers correspondingly, in order to achieve the desired results in Quebec.

The validity of this assumption — a more powerful Quebec government will increase the sense of Canadianism on the part of individual Quebecois — is at least open to question. What effect will the Meech Lake Accord have upon the identification of Quebecois, and of all Canadians, with Canada? In my judgment, the bonds with the nation, and with the national government of Canada, will almost certainly be weakened.

First, the Accord weakens the potential for Canadians to come to share certain common privileges and benefits of citizenship, wherever they live in Canada. The Accord brings this about by reducing the future capacity of the Canadian Government to initiate certain nation-wide programs or public services which, while lying within provincial jurisdiction, have come to be seen by Canadians generally as being important to a decent and dignified life for all Canadians.

Second, the sense of affinity and association — even esteem —which Canadians feel, or may reasonably come to feel, for their national governmental institutions is weakened. The Accord brings this about by the provision which will, in future, give to a provincially-nominated Senate — an appointed, not an elected one — the power to veto or amend any decision the elected arm of the government may reach. The relative representation of the smaller provinces in the Senate is to remain unchanged, short of unanimous agreement on the part of all the premiers.

These two bonds of nationhood have been weakened by the Meech Lake Accord — at least in my view. I will examine both of them, in turn.

From Competing Constitutional Visions: The Meech Lake Accord, Toronto: Carswell, 1988
by K.E. Swinton and C.J. Rogerson.

SHARED RIGHTS AND BENEFITS

The question of shared rights and benefits is one which individual Canadians deeply and intuitively understand. They know they enjoy the rights and the freedoms which the Charter now guarantees, and they know that, beyond this, they enjoy other rights and benefits which their national cum provincial governments have conferred upon them. I'm talking about medicare, hospital care, old age security

pensions and disability allowances, accessibility to higher education, even the Trans-Canada Highway — all of which were established or made national in scope as a result of the actions of the national, the federal, government. In every one of these cases, save for post-secondary education where only federal finances were involved, one of two courses of action was pursued to make the shared public service possible: either a federal-provincial shared-cost program was established, with the provinces administering the programs in accord with nationally-established criteria or principles (like medicare and hospital care), or a constitutional amendment was passed to enable the federal government to undertake the program itself (such as unemployment insurance and old age security).

Simply to reflect upon the history of Canada's social security programs, or indeed of other programs, is to perceive the importance of these two constitutional means to Canada's development. Parliament used its spending power to provide conditional grants to the provinces for the purpose of establishing medicare, hospital care, and the Canada Assistance Plan; and it sought and obtained constitutional amendments to enable it, alone, to undertake unemployment insurance, old age security pensions, and the Canada Pension Plan. Even the Trans-Canada Highway was built, as I have said, because Parliament offered to give the provinces financial support if they would build it.

The point is clear: one of the distinguishing features of nationhood in Canada — the sharing across the country of certain common public services — has been made possible by these instruments of the Constitution. The fathers of Meech Lake, however, have not recognized this point. Whether this is because they have forgotten Canada's history, or because they simply do not believe the country will, in the future, need new or revised national public services, we do not know. But what they have done is clear. They have adopted provisions which will seriously attenuate the future potential for amending the Constitution to give the Government of Canada the power to establish new nation-wide programs. They have adopted provisions which will seriously attenuate Parliament's capacity to influence the provinces to establish new nation-wide programs — that is to say, provincial programs which are consistent or congruous with one another — by using spending power in particular ways. In both cases, this has been done by endowing the provincial governments with the right to "opt-out" of the amendment, or of the federal-provincial program, with federal compensation.

THE SPENDING POWER

Under the Meech Lake provisions, the Government of Canada could not have enacted medicare as we know it today — at least, so it seems to me. It could not have incorporated into the law the five principles which now bind the provinces in their medicare plans, and under which extra-billing was ended. All the Government of Canada could have done, had Meech Lake been in effect, would have been to declare in the law the "national objectives" it hoped to achieve. That, unhappily, is a long way from the principles as we know them today. An "objective", after all, has to do with "the object of an action" (Oxford), while a "principle" is a "fundamental attribute, an essential characteristic" (also Oxford) — which is why the word "principle" was used in the first place in medicare.

More than this, the provinces are effectively told by Meech Lake that they would not have been obliged, had the Accord been in effect, to enact similar, or mutually consistent medicare plans, in order to qualify for federal money. All they would have been required to do would have been to "carry on" plans or initiatives which were "compatible" with the federal objectives. Now, it is true that in English the word "compatible" may mean "accordant, consistent, congruous", as well as "capable of existing together" (Oxford). But in the French language, "compatible" means only "capable of existing together" (Robert).

So there it is. Under Meech Lake, the only power our national government will have in the future, in establishing federal-provincial programs, is the power to finance provincial programs which are "capable of existing together", in the achievement of certain specified "national objectives". This is surely to return to the "hodge-podge" federalism of the past, in respect of future national programs — be they in the field of home services for the elderly and disabled, or legal aid, or child care, or any other public program under provincial jurisdiction — where the public may believe there should be nationwide levels of service, but where some provincial governments do not. Some argue that the Meech Lake Accord is not as bad as

I have portrayed it. For example, they say that "objective" might be interpreted as meaning "principle", or that "compatible" might be interpreted as meaning "consistent" or "congruous". If that is so, why were these words not chosen in the first place? It must surely have been because one or more of the premiers didn't want the more precise words: they wanted the door left open to the literal and less limiting (for them) interpretations I have mentioned.

Another argument advanced by the advocates of Meech Lake in support of the spending power provision is that even with the worst-case interpretation of the new limitations on the spending power, the changes are not as serious as they are being made to appear. All that is required in the future, they argue, is the same imaginative approach to the development of new policy instruments to achieve national goals, as has been evidenced in the past. For example: in 1968, medicare was started by the substitution of "principles" in a federal statute, for the much criticized "conditions" in a shared-cost agreement; in 1967, federal financing of post-secondary education was extended by the use of unconditional grants to the provinces, instead of direct grants to universities and colleges, but with the grants being calculated by reference to the operating expenditures of universities and colleges (and hence indirectly to the level of provincial support for these institutions). By the use of this kind of imagination in the future, governments might be brought to use grants to persons and institutions, where opting-out is not a problem, instead of shared-cost grants to the provinces, where it is a problem, or to find new means for achieving unanimity among the provinces, in order to avoid the opting-out provisions of the Meech Lake Accord.

The essence of this proposition, I take it, is that the weakening of the federal powers in the Meech Lake Accord is acceptable because the new limits can be circumvented. A curious argument, I should have thought, but one which is assailable on purely objective grounds: the substitution of unknown for known means in order to achieve an agreed constitutional objective is scarcely good constitution-making. Certainly it is not good enough to reassure Canadians about the limiting of the spending power.

OPTING-OUT AND CONSTITUTIONAL AMENDMENTS

The real question is whether or not the fathers of Meech Lake agreed that provincial opting-out of proposed nation-wide programs is a good thing. The answer is to be found in the fact that the opting-out principle was introduced not once, but twice into the Accord: once in respect of the spending power and shared-cost programs, and once in respect of any future constitutional amendments which might transfer powers from provincial governments to the federal government.

The opting-out provision in respect of constitutional amendments is even more enfeebling to national initiatives than is the one having to do with the spending power. What the Accord says, in essence, is that when a constitutional amendment has been agreed upon, which transfers some legislative power from the provincial legislatures to the Parliament of Canada, and where there are provincial governments which continue to dissent from the amendment after it has been passed, these provinces will be entitled to "reasonable compensation" from the Government of Canada.

What this means, in practice, can be seen in a simple illustration. Suppose the Government of Canada were to seek an amendment to the Constitution enabling it to regulate all private pension plans in the country, in order to achieve wider coverage of the labour force, and to assure the portability of private pension plans. (Such a reform would be desirable since it would relieve the pressure on governments to use the public sector to provide more adequate retirement incomes.) Say the Government of Canada and

eight provinces agreed to the amendment, but two did not, persisting in their rejection of the amendment even after the eight provinces had agreed. These two dissenting provinces would be entitled, under the Accord, to "reasonable compensation" from the Government of Canada — whatever that may come to mean. No limits are placed upon how or where the "reasonable compensation" may be used by the recipient provinces.
What this provision implies for future amendments to the Constitution is clear. It provides a positive incentive to provincial governments not to agree to a constitutional amendment (presuming the required seven provinces will agree), particularly so where the newly proposed program involves large

expenditures. And it provides a disincentive to the federal government even to set out on the tortuous course of seeking a constitutional amendment.

In short, the future for nation-wide programs in areas which lie in provincial jurisdiction is very bleak indeed — particularly when one recalls that it has been federal, not interprovincial, action which has led to the extension of particular provincial programs across the whole of the nation.

NATIONAL INSTITUTIONS

This weakening in the powers of the federal Government to take national initiatives is exacerbated by the changes brought about in governmental institutions. The fathers of Meech Lake have decided, in effect, that the elected institutions of the national government shall be constrained in the exercise of their powers by empowering provincial governments or their delegates to interpose their views at strategic points in the decision-making process. This comes about in three steps.

First, the federal-provincial conference of first ministers' (CFM) is accorded constitutional status in the Meech Lake Accord and is empowered to discuss, once a year, "the state of the Canadian economy and such other matters as may be appropriate". I take this to mean economic and other policy matters which fall in the domain of the Government of Canada: obviously the governments of the provinces already possess the power to discuss provincial matters together.

As it is, the CAM already exercises a considerable influence over federal policy-making by reason of the platform which is afforded to the premiers and their views by televised federal-provincial conferences. Indeed, a good many Members of Parliament — who were elected to influence national policy-makers — would argue that the premiers have more influence on federal policy than they do. To give the CAM constitutional status alongside the elected House of Commons is to legitimize, and thus surely to increase, the role of the "first-ministers-in-conference", relative to that of the elected Commons. Conversely, it is to diminish the position of the MPs —who were elected to represent the public's views on national issues.

Step two of the constraint of the Canadian Government is the transformation of the Senate into a "house of provincial delegates". In future, the senators will be nominated by the premiers of the provinces, not by the Prime Minister, and they will continue to enjoy plenary authority to veto or amend any legislation put before them. What this suggests seems clear: if the Prime Minister won't listen to the provincial governments' views in federal-provincial conferences, then he may be forced to do so by the premiers' delegates in the Senate. Checkmate the Government of Canada; checkmate, too, the House of Commons, despite the fact it is an elected body, while the Senate is to remain an appointed one.

Checkmate, finally, the electorates of the provinces. Not only are the people still disenfranchised in the naming of their senators; in the case of the smaller provinces, they are being told that there is little hope that their relative powerlessness in the Parliament of Canada will be alleviated. Aor Saskatchewan, to take the case of my native province, this means they must look forward, indefinitely, to a situation where they have only 14 elected Members of Parliament out of 282 (in today's terms), and where their relative representation in the Senate is not much better. This is powerlessness; this is the stuff of Western alienation.

Step three in limiting the federal government's powers is a provision that will make it extremely difficult to reform the Senate in the future — whether to increase the representation of particular provinces, or to cause the senators to be elected, or to limit the plenary powers of the new house of provincial delegates. The fathers of Meech Lake have decided that any and all of these constitutional amendments will, in future, require the approval of all the provincial governments, not just seven representing a majority of Canada's population. This means that any single premier, or any single legislative assembly may, from Meech Lake on, block Senate reform.

The supporters of the Accord — to do them justice — point out that the Accord is not this stark. In the first place, the Senate won't become a full "house of delegates" until all of the present senators have reached 75 years of age. That is true, though it does not alter the intent of the Accord, nor its future effect. This can be seen already, as even today's Senate has begun to flex its legislative muscles. Second, we are assured — on what basis, we do not know — that the new amending formula will not stand in the way of early Senate reform; indeed there is to be a constitutional conference (of first ministers) every year, beginning next year, and that Senate reform is to be on the agenda. That, too, is true: this is explicitly provided for in the Accord. But what does that tell us about the possibility of reform? Not much: one is left wondering, indeed, whether it is not an egregious error in constitution-making to make it more difficult to reform the Senate before setting out to do so.

A QUESTION OF BALANCE

These, then, are the limitations which have been made in the powers of the national government in order to gain the assent of the Government of Quebec to the Constitution Act, 1982.

One is forced to ask two questions. First, even given the emphasis the fathers of Meech Lake have attached to the reconciliation of government interests in constitution-making, as opposed to citizen interests, have they found the right balance between meeting Quebec's demands, on the one hand, and protecting the ability of the national government to meet the needs of Canadians at large, on the other? This, surely, is a question which ought to have been debated. That it has not been is a measure of the belief of Canada's leading politicians that constitution-making ought to be the preserve of governments, and not of citizens. It was the Prime Minister, and the ten premiers, and the two opposition leaders of the House of Commons who unanimously agreed that the Meech Lake Accord ought to be approved without any effective public debate.

The second question which needs to be asked has precisely to do with this question of constitutions for citizens versus constitutions for governments. Is it not possible that if the citizens of Quebec and of the whole of Canada had been consulted on the balance which had to be struck at Meech Lake, they would have come to a quite different conclusion than did the politicians? Would they have been as determinedly opposed to the use of the spending and amending powers for the creation of nation-wide programs as were the politicians? Would they have rejected the notion of an elected Senate which would give the citizens of Canada's several regions a larger and more direct voice in the national government? Would the citizens, in short, not have employed a "citizens' calculus", rather than a "governments' calculus", in determining what arrangements should be made to bring the Government of Quebec to become a signatory to Canada's Constitution?

Herein lies the root of the flaws in the Meech Lake Accord, as I see them. Both in the process by which the fathers of Meech Lake reached their conclusions about the Constitution, and in the conclusions they reached, the citizens and their perspectives were excluded. This may well have been acceptable — even necessary — in Charlottetown in 1864; it is not so today. A broad and unconstrained debate on the Meech Lake Accord is called for, if the citizens are to bring their judgment to bear on the question of how to strengthen the bonds of nationhood.