

# Caught in a Seamless Web: The Northern Territories and the Meech Lake Accord

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There is no doubt that the *1987 Constitutional Accord* reflects a more decentralized view of Canada than does the *Constitution Act, 1982*. It addresses the five conditions set out by the government of Quebec as essential to its willing assent to the Constitution. None of these five conditions address directly the rights of individuals. Rather, the "Quebec Round" was about adjustments in the rights and powers of governments and acceptance of a measure of institutional reliance on federal-provincial cooperation.<sup>1</sup>

A Constitution has been described as "a mirror reflecting the national soul": it must recognize and protect the values of a nation.<sup>2</sup>

## *Introduction*

Political power is a very dangerous tool in the hands of the unprincipled. That is one of the reasons we have constitutions. Constitutions, in part, should be contracts between the people and their governments. They should not be documents of surrender in which the people of a nation cede their individual and collective rights to a few wily politicians. A Constitution should be a principled document which acts like a beacon to draw us back to certain fundamental values when our vision is clouded by ordinary politics or ordinary politicians. This idea is expressed with some force, for example, in the Alaskan Constitution:

All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.<sup>3</sup>

A similar idea was eloquently expressed in an address to Inuit on Baffin Island in 1966 by members of the federal Advisory Commission on the Development of Government in the Northwest Territories:

... it is important to have organizations or organized government in order that people can live within certain laws and know the way they are going. . . .<sup>4</sup> In the higher echelon of government we find elected persons whom we elect. . . . that is

why you and I are free people. We are not the ones who take orders or who are servants, we are the ones who give orders by voting for somebody...<sup>5</sup>

Which way are we going in Canada? Where is the Meech Lake Accord taking us and who is giving the orders? These questions are particularly poignant for residents of the Northwest Territories and Yukon. The national soul reflected in the Meech Lake Accord reveals a dark and unprincipled attitude towards the people and governments of the two territories.

*The Federal Principle:*

There are many principles which are contained in or underlie the Constitution of Canada, but one of the most obvious is the federal principle. Lord Watson in the case of *Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick* described the federal principle in the *Constitution Act, 1867* as follows:

The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to central authority, but to create a federal government in which they should be all represented, and entrusted with the exclusive administration of affairs of which they have a common interest, each province retaining its independence and autonomy.<sup>6</sup>

Lord Watson's statement recognized that under the constitutional law of Canada provinces were not to be dominated by the federal government nor was any province or region to be dominated by other provinces or regions in a constitutional law sense.

This federal structure was no accident. It had been carefully designed and set down by the Fathers of Confederation in the Quebec Resolutions of 1864 and the London Resolutions of 1866.<sup>7</sup> Lord Sankey in the *Edwards* case<sup>8</sup> described these resolutions in glowing terms:

These [Quebec] Resolutions as revised by the delegates from the different provinces in London in 1866 were based upon a consideration of the rights of others and expressed in a compromise which will remain a lasting monument to the political genius of Canadian statesmen.<sup>9</sup>

In the case of *Re: Aerial Navigation*, Lord Sankey further elaborated on the connection between the federal principle and the rights of minorities:

Inasmuch as the [Constitution] Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the

preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected.<sup>10</sup>

In more recent times, Premier Bourassa has also articulated this same federal principle, albeit in a rhetorical fashion:

Are we, yes or no, a federation in this country? Are we to have provinces with their own powers? Or are we a unitary nation, with only regions without powers?<sup>11</sup>

The Meech Lake Accord will make some fundamental changes to the federal system as we know it in Canada. The new federation would not appear to be particularly sensitive to the rights of minorities in some regions; nor would it recognize any role in national affairs for the governments in regions such as the Northwest Territories and Yukon. In the analysis of the Meech Lake Accord which follows, the role or the absence of a role for territorial residents and territorial governments in the proposed new federation will become apparent. The provisions of the Meech Lake Accord which might have a direct impact on the territories are analyzed in the order they appear in the documents which make up the Meech Lake Accord.

### *Territorial Concerns*

The territorial governments<sup>12</sup> have highlighted five areas of concern arising from the Accord:

1. The new amending formula provisions relating to the establishment of new provinces;
2. The new amending formula provisions relating to the extension of boundaries of existing provinces into the territories;
3. The provisions requiring annual First Ministers' Conferences on the economy and on constitutional matters that might exclude the participation of Government Leaders from the two territories in national affairs;
4. The provisions relating to the Supreme Court of Canada which exclude territorial governments from nominating qualified territorial residents for appointment and which discriminate against qualified individuals in the territories who otherwise would have been eligible for appointment, had they resided in one of the provinces;
5. The provisions which create confusion in relation to Senate appointments from the two territories.

In addition, the Accord has created special concerns for aboriginal peoples in the two territories, and in Canada in general, in relation to

establishing a process for further identifying and protecting aboriginal and treaty rights under the Constitution of Canada. This is a subject which warrants comprehensive analysis; however, it is only dealt with in a peripheral manner in this paper.

A closer look at the Meech Lake Accord reveals that the role of the Northwest Territories and Yukon in the Canadian federation has been drastically weakened at precisely the time when all the rhetoric would indicate that we are entering a new period of decentralization of power premised upon cooperation and equality among the provinces.

### *The Meech Lake Accord Documents*

The "Meech Lake Accord" was shaped for the most part, in two meetings of First Ministers in April and June of 1987.<sup>13</sup> The Accord is comprised of three parts: a political agreement; a motion for a resolution to authorize constitutional amendments; and the legal text of constitutional amendments contained in a Schedule to the motion for a resolution.<sup>14</sup> These three parts will each be reviewed separately in the pages which follow; however, the major concentration will be on the legal text.

### *The Political Agreement*

The political agreement portion of the Accord has a short preamble and four paragraphs which operate to:

1. Commit the individual First Ministers to introduce resolutions in each of their legislatures to authorize the constitutional amendments contained in the legal text;
2. Commit the federal government to conclude an agreement with Quebec in relation to immigration matters;
3. Recognize that the federal government and other provinces may also enter into similar agreements on immigration;
4. Allow provincial governments, through a temporary political arrangement, to nominate persons to fill Senate vacancies.

The main purpose of this political agreement was to guarantee that each First Minister was honour-bound to support the legal text of amendments and would take the necessary steps to ensure the adoption of a resolution in their legislatures authorizing these amendments to the Constitution.

## *The Resolution and the Process of Amendment*

The motion for a resolution [referred to hereinafter as "the Resolution"] is the device by which the various governments presented the legal text of proposed amendments to their legislatures for debate and approval. Since the meeting at the Langevin Block on June 3, 1987, the First Ministers have stated that Parliament and all ten provincial legislatures must adopt resolutions by June, 1990, or the Accord will die. The Resolution raises an interesting point with regard to this three year time limit.

There are two main amending formulae contained in the *Constitution Act, 1982*. One requires both Houses of Parliament and all ten provincial legislatures to consent to amendments (the "unanimity formula").<sup>15</sup> The other requires the consent of both Houses of Parliament and at least two-thirds of the provinces having fifty per cent of the population of all the provinces (the "7/50 formula").<sup>16</sup> (The population of the two territories is not counted for purposes of amending the constitution.) The three year time limit comes from the so-called "7/50 amending formula".<sup>17</sup>

To determine whether resolutions of seven or ten of the provincial legislatures are required for a particular constitutional amendment one must look to the subject matter of the proposed amendment. Some of the amendments proposed by the Meech Lake Accord would normally only require the 7/50 formula. Nonetheless, the Resolution contained in the Accord identifies the unanimity formula in s.41 of the *Constitutional Act, 1982* as the one which is to be employed for all of these constitutional amendments.

The Constitution does *not* set a time limit for amendments under the unanimity formula. By contrast, the clock begins to run under the 7/50 formula from the date of adoption of the resolution initiating the amending procedure. The Quebec National Assembly initiated the process by adopting the first resolution on June 23, 1987. First Ministers have continued to state publicly that the Meech Lake Accord must be fully ratified by June 23, 1990, though the unanimity amending formula which they appear to have chosen in the Resolution requires no such time constraints. In doing this it appears that First Ministers have blended the time limits in the 7/50 formula with the unanimity rule in s.41 of the Act to create a new formula which, although perhaps politically binding, is not expressly authorized by the Constitution. With Parliament and eight legislatures having already approved the Accord, several of its provisions could have been included in the Consti-

tution by now had the First Ministers not chosen to treat all matters as a package requiring unanimous consent. Timing has played a very important role in the selling of the Meech Lake Accord. The sense of urgency created by the three-year time limit and the decision of First Ministers to treat the legal text as an unalterable package requiring unanimous consent has operated to discourage efforts to improve upon the existing legal text.

### *The Legal Text*

It is the legal text contained in the Schedule to the Resolution which is of real importance. This Schedule contains seventeen clauses which amend or add to the *Constitution Act, 1867* and the *Constitution Act, 1982*. (For convenience the legal text contained in the Schedule will simply be referred to hereafter as the "Accord". Sections referred to are reproduced in the endnotes.) These two Acts presently have several blank spaces where sections have been previously repealed. All but one of the new provisions are to be plugged into these gaps.

The *Constitution Act, 1990* will presumably house the solitary provision which is not plugged into one of the existing holes in the 1867 or the 1982 Acts. This solitary provision states that the so-called "distinct society clause" will affect neither the constitutional protections afforded to aboriginal or treaty rights, nor the preservation and enhancement of the multicultural heritage of Canadians.<sup>18</sup>

A review of the Accord reveals no clause which confers any benefit on the Northwest Territories or the Yukon. This is perhaps not surprising considering that the objective of the Accord was to close the political gulf between the Government of Quebec and the federal and other provincial governments. (The fact that Quebec was already legally bound by the Constitution has been considered by some as unimportant.)<sup>19</sup> What is surprising is that some of the clauses have an obvious direct and damaging impact on individuals and governments in the territories. An editorial in the *Globe and Mail*<sup>20</sup> described these negative aspects of the Accord as "difficult judgement calls". It was alarming to the residents and the governments of the two territories that First Ministers made these judgement calls without any apparent hesitation and without giving territorial leaders any prior opportunity to speak for the interests of territorial residents.

## *The Distinct Society Clauses*

The importance of this section of the Accord for the two territories is likely to emerge in the context of future talks on aboriginal rights and aboriginal self-government. There has been no shortage of discussion and literature on the so-called "distinct society clause". The Accord really contains two main clauses relating to the distinctiveness of Quebec. One clause recognizes that Quebec constitutes a "distinct society" within Canada.<sup>21</sup> This could be interpreted as simply acknowledgment of a fact. The other clause affirms the role of the legislature and Government of Quebec to preserve and promote the "distinct identity" of Quebec. This could be interpreted to mean that Quebec has special powers or immunities which are not available to other provincial legislatures or governments.

These clauses appear to consolidate the powers of the Quebec government rather than guarantee any specific rights of individuals in Quebec. Nor are they so much an entrenchment of collective language or cultural rights as they are a shield with which the Quebec government can defend whatever policy or legislation the Government or Legislature of Quebec adopts in preserving and promoting the "distinct identity" of Quebec. For example, "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" is described as "a fundamental characteristic of *Canada*"<sup>23</sup> [emphasis added]. Parliament and the provincial legislatures are recognized as having the role of "preserving" this fundamental characteristic of Canada<sup>24</sup> but only the legislature and government of Quebec are assigned the role of promoting a distinct identity within their province. It may be that the Government of Quebec could choose in the future to promote and protect some other non-language characteristic of Quebec.

The "distinct society" and "distinct identity" clauses are unadorned by definition. The text itself generates uncertainty: the latter clause proclaims that the role of the legislature and government of Quebec is to preserve and promote the "distinct identity" of Quebec referred to in the distinct society clause, but the words "distinct identity" are not referred to anywhere in that clause. More importantly, the distribution of French-speaking and English-speaking Canadians in Quebec is described as "*a* fundamental characteristic of Canada", rather than *the* fundamental characteristic of Quebec's distinct society or distinct identity.<sup>25</sup>

The four clauses of this section of the Constitution may be used as interpretive tools should the court ever be called upon to rule on a particular piece of legislation relating to the distinctiveness of Quebec or a fundamental characteristic of Canada. However, the section could also be construed as a clear mandate for Quebec to exercise powers which might otherwise have been considered discriminatory under the *Charter of Rights and Freedoms*. A clause provides that the powers, rights or privileges of provincial governments and of Parliament will not be eroded by this section.<sup>26</sup> The clause does not provide, as does s.31 of the *Canadian Charter of Rights and Freedoms*, and indeed the spending power provision in the Accord itself, that the legislative powers of a province have not been extended.<sup>27</sup>

In political affairs, governments are happiest when they have room to manoeuvre and the "distinct identity" and "distinct society" clauses seem to provide a large degree of political and legislative latitude. By comparison, s.35 of the *Constitution Act, 1982*, the clause which recognizes and affirms aboriginal and treaty rights, provides a different sort of approach to the concept of collective rights and distinct societies.<sup>28</sup> It names the distinct aboriginal peoples: Indians, Inuit and Metis. It recognizes and affirms their aboriginal and treaty rights. In addition, s.25 of the *Charter* shields "aboriginal, treaty or other rights or freedoms" of aboriginal peoples from any erosion which might otherwise result from an interpretation given to other *Charter* provisions. However, sections 25 and 35 do not require than any government preserve and promote the distinct identity of aboriginal peoples. Aboriginal peoples have to generate their distinct identities as individuals or as associations of individuals. In fact, after five years of negotiations between 1982 and 1987 the First Ministers rejected the idea that aboriginal peoples should be given self-government powers under the Constitution to protect and promote their distinct aboriginal identities and societies.

A positive interpretation of the distinct society clause in the Accord might suggest that the clause will act as a model for some future accommodation of distinct aboriginal societies.<sup>29</sup> This seems unlikely, however, when we consider that aboriginal peoples and the government of the Northwest Territories (which is the only government in Canada representing a population with an aboriginal majority) have, by virtue of the Accord, been effectively shut out of future negotiations which will shape the federation.



## Senate

The Meech Lake Accord<sup>30</sup> raises two main questions in relation to Senate representation from the two territories:

1. will Senate vacancies in relation to the territories continue to be filled after the Accord is ratified;
2. who will nominate territorial residents to fill territorial seats.

The first issue was raised in a presentation by Gordon Robertson, a former Commissioner of the Northwest Territories, to the Special Joint Committee of the Senate and House of Commons. Mr. Robertson suggested that until Senate reform occurs in the so-called "second round", "presumably . . . there will not be any further appointments to the Senate from the northern territories".<sup>31</sup> It is this sort of interpretation which has made the people and governments of the two territories apprehensive about the Senate provisions of the Accord, and has caused them to call for clarification of these provisions as they will apply to the territories.

This issue might be resolved by reference to the *Constitution Act (No.2), 1975*<sup>32</sup> which gives a very strong guarantee of Senate representation to the territories. It states:

1. Notwithstanding anything in the *British North America Act, 1867* [now the *Constitution Act, 1867*], or in any Act amending that Act, or in any Act of the Parliament of Canada, or in any order in Council or terms or conditions of union made or approved under any such Act, . . .  
(c) the Yukon Territory and the Northwest Territories shall be entitled to be represented in the Senate by one member each.[emphasis added]
2. For the purpose of this Act, the term "Province" in s.23 of the *British North America Act, 1867* has the same meaning as is assigned to the term "province" by s.28 of the *Interpretation Act*. [emphasis added]

Does the notwithstanding clause in s.1 above operate to guarantee the territories representation in the Senate even after the Meech Lake Accord is ratified? It seems clear that it does. However, the question as to whether persons would actually be summoned to fill these territorial Senate seats still remains.

As to who will nominate territorial residents to fill territorial Senate seats, both the political agreement and the legal text of the Meech Lake Accord contain provisions relevant to the process of Senate appointments. The political agreement portion of the Meech Lake Accord provides an interim Senate appointment mechanism which is not part of the *Constitution of Canada* and has no legal force.<sup>33</sup>

There is no mention in this interim process of a means for summoning persons from the territories to fill vacancies in the Senate in relation to the territories. It is probably safe to assume that under this interim appointment mechanism, the Prime Minister alone would nominate a candidate to fill any Senate vacancy in relation to the territories. He need not consider names submitted by territorial governments. (The Governor General is the person who formally summons persons to the Senate).<sup>34</sup> A refusal to fill a vacant Senate seat for the territories would run contrary to the provision in the *Constitution Act (No.2), 1975* which guarantees that there must be one Senator for each of Yukon and the Northwest Territories.

If the Accord is implemented in its present form, the interim procedure described above will be replaced by a new legal text inserted into the *Constitution Act, 1867*.<sup>35</sup>

Again, there is no explicit mention of a process for filling vacant Senate seats in relation to the territories. The guarantee of Senate representation for the two territories contained in the 1975 Act will remain, so how will territorial Senators be appointed? One possibility is that the Prime Minister alone will continue to nominate persons for territorial Senate seats. Another possibility is that a political arrangement, similar to the interim mechanism<sup>36</sup> which now applies to the provinces, may be reached between federal and territorial governments whereby territorial governments would submit lists of candidates to the Prime Minister.

Finally, there is a more intriguing possibility: the *Constitution Act (No.2), 1975* might require that territorial governments are to be treated exactly the same as provincial governments if the Accord's Senate nomination process is added to the *Constitution Act, 1867*. By this constitutional amendment in 1975, the word "province" in s.23 of the *Constitution Act, 1867* was defined as "a province of Canada, and includes the Yukon Territory and the Northwest Territories". Would the courts interpret the 1975 amendment to mean, therefore, that the word "province" in the new Senate nomination provisions in s.25 should be interpreted in the same way? Sections 21 to 36 of the *Constitution Act, 1867* cover the Senate. The word "province" will also be used in a general sense only in s.23 which deals with qualifications of Senators. The word "province" is now used in a general sense in the new s.25 which deals with appointments. It would, therefore, seem logical that for consistency the word "province" should be given the same meaning in both sections.

One of the purposes of the *Constitution Act (No.2), 1975* is certainly to guarantee Senate representation for the territories. The *Senate Reference*<sup>37</sup> case reveals the importance of Senate representation in the federal system. The court stated:

. . . it is not open to Parliament to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process.<sup>38</sup>

Given the Supreme Court of Canada's view of the importance of the Senate and Senate representation and the new amending formulae for Senate changes after 1982, one could also ask whether resolutions of the Legislative Assembly of the Northwest Territories and Yukon would be required under the amending formulae for purposes of certain amendments in relation to the Senate. For example, s.42(1)(c) in the *Constitution Act, 1982*<sup>39</sup> requires that a change in the number of the members by which a "province" is entitled to be represented in the Senate, or a change to the residence qualifications of Senators, can only be made by resolutions of the Senate and House of Commons and  $\frac{2}{3}$  of the provincial legislatures representing 50% of the Canadian population. In the face of an attempt to deny territorial Senate representation by a removal of the guarantee of seats or an alteration in the qualification provisions, would the courts find that resolutions of territorial legislatures were a required part of the amending formula? At present, the need for territorial resolutions under the 7/50 formula would be academic in any case, because of the low territorial population. Seven provinces could simply overpower the territories in any such amendment process and the territorial legislatures could not opt out of any amendment in relation to Senate representation or qualifications of Senators.<sup>40</sup> However, if the Meech Lake Accord is ratified the situation would change dramatically. Each provincial legislature would have an absolute veto in relation to these matters. This raises the intriguing possibility that if the word "province" includes "territories" when it is used in the amending formulae in relation to the Senate, both territorial legislatures might have to be involved in any future process of Senate reform.<sup>41</sup>

### *Immigration*

The Accord commits the federal government to negotiate agreements with provincial governments relating to immigration or the admission of aliens into a province to meet the needs and circumstances of the

province. The Accord also contains a mechanism whereby these agreements can be made to have the force of law. There is no explicit provision to allow territories to enter into agreements on immigration and aliens. Aboriginal peoples in the Yukon and Northwest Territories are likely to be particularly concerned about immigration arrangements which might directly or indirectly lead to a decrease of their proportional representation in the territorial population.

### *Supreme Court of Canada*

It is in the provisions of the Accord relating to the Supreme Court that the First Ministers' attitudes to the two territories are, perhaps, most clearly revealed. The Accord proposes a new process for appointing judges to the Supreme Court of Canada<sup>42</sup> which will be based on provincial governments submitting names of candidates to the Attorney General of Canada. Three of the nine seats on the court will have to be filled by persons whose names have been put forward by the Government of Quebec.<sup>43</sup> Vacancies in relation to the six remaining seats will have to be filled by persons selected from the lists put forward by the other nine provinces. The current law respecting the composition of, and method of appointment to, the Supreme Court of Canada is set out in the *Supreme Court Act*,<sup>44</sup> a federal statute. Under this statute qualified persons in the territories are already treated equally with qualified persons in the provinces.<sup>45</sup> The Accord will elevate the appointment process to the status of constitutional law and will entrench provisions that discriminate not only against the territorial governments, but also against individuals who would otherwise have been qualified for appointment under the current *Supreme Court Act*.

The rationale behind the discriminatory aspects of these provisions is difficult to fathom. There is some indication that the drafters believed a distinction between qualified persons in the territories and similar persons in the provinces was justified simply because territories are not provinces. The obvious flaw in this logic was pointed out in the Report of the Special Joint Committee of the Senate and House of Commons:

Senator Lowell Murray indicated that the territorial governments were not given a role to play because they lack provincial status. This observation, while true, does not address the apparent disadvantage inflicted on qualified *individuals* (not governments) who happen to reside in the territories.<sup>46</sup>

At least one Attorney General has suggested that qualified persons in the territories gained something through the Accord, namely eligibility to be

nominated for appointment to the court.<sup>47</sup> This is clearly not the case. Under the present *Supreme Court Act* territorial residents are already treated identically with provincial residents.

To understand the discriminatory aspects of the Accord we must examine two aspects of the appointment process:

1. eligibility in terms of years at the bar or on the bench; and
2. eligibility to be placed on a *provincial* list.

Under ss.101B.(1) of the Accord, judges and lawyers from the provinces and territories are expressly stated to be eligible for appointment to the Supreme Court after ten years on the bench or at the bar. However, it is the eligibility to be placed on a provincial list that creates the discrimination against qualified territorial residents and territorial governments. There is no provision for *territorial* lists: territorial governments cannot submit lists, nor can the federal government submit a territorial list. Unless territorial candidates can get on a provincial list, they cannot be appointed to the Supreme Court of Canada. How, then, will their names get on a provincial list? There are two problems which territorial candidates will face in this regard: one is political, the other is legal. The political difficulty is described in the Report of the Special Joint Committee:

Although qualified lawyers and judges from the territories can in theory be included on provincial lists, provincial governments are more likely to nominate candidates closer to home, with whose abilities they may be more familiar. For all practical purposes it would likely be difficult for someone from the territories to be appointed to the Supreme Court of Canada under the present proposals.<sup>48</sup>

Presumably provinces did not exclude territorial governments from the process of nominating candidates simply because they wanted to nominate territorial residents themselves. They were more likely concerned about additional competition for the six seats which nine provinces must share once Quebec has filled its quota of three seats on the court. As a matter of politics, it seems highly unlikely that a province would want to add a territorial candidate to its list.

Let us suppose, however, that a unanimous provincial government did decide to nominate a territorial candidate. It would only be able to do so if the person were a member of the bar of that province<sup>49</sup> as this is the additional legal requirement that a territorial candidate must meet. Because they reside in one of the territories, these territorial candidates

must be members of two bars rather than one like all other candidates. At present, superior court judges in the territories are appointed by the federal government as they are in all other jurisdictions of Canada. At least two highly respected judges, Mr. Justice Tallis, and the late Mr. Justice Morrow, were elevated from the Supreme Court of the Northwest Territories to the Court of Appeal of Saskatchewan and Alberta respectively.

What possible reason could there be for denying qualified territorial residents an opportunity that would be available to them if they resided in a province? If these sorts of provisions had been put in the current *Supreme Court Act* it is likely that a strong challenge could have been launched under the equality rights clause of the *Charter of Rights and Freedoms*<sup>50</sup> It is notable that no such distinction now exists under the *Supreme Court Act* nor has such a distinction been seen as necessary until the Meech Lake Accord. None of the signatories to the Accord have explained why such discrimination is necessary.

Professor Schwartz of the University of Manitoba has raised another interesting point:

Northern governments are especially likely to nominate jurists who are familiar with aboriginal peoples and the legal issues connected with them. Eventually, many of the best lawyers and judges in the North will be aboriginal persons; but their prospects of serving on the Supreme Court of Canada will be minimal. In denying equal democratic rights to the people of the North, the proposed *Constitution Act, 1987* would also deny them equal opportunity for public service. The effects of both kinds of discrimination will be disproportionately injurious to aboriginal peoples.<sup>51</sup>

In addition to discriminating against qualified territorial residents, the Supreme Court provisions of the Accord discriminate against the territorial governments by denying them the power to nominate territorial residents for appointment. The only apparent justification given to date by a proponent of the Accord is as follows:

We were told by Senator Lowell Murray that at least some of the provinces are extremely jealous of the "trappings of provincehood", and oppose even giving the opportunity to territorial governments to nominate residents as senators or qualified residents to fill a vacancy on the Supreme Court of Canada.<sup>52</sup>

The northern territories already have many of the trappings of provincehood. The Northwest Territories was admitted to Canada in 1870. The

Yukon became a separate territory in 1898. Both the Northwest Territories and the Yukon exercise legislative jurisdiction over subject matters which are virtually the same as those allowed to the provinces under s.92 of the *Constitution Act, 1867*.<sup>53</sup> For example, the legislative jurisdiction over the administration of justice given to provinces under s.92 of the *Constitution Act, 1867* is mirrored in identical wording in the *Northwest Territories Act* and the *Yukon Act*. In a recent Yukon Supreme Court decision, *St. Jean vs. The Queen*<sup>54</sup> Mr. Justice Meyer described the territories as "infant provinces". It is disturbing, therefore, that the provincial jealousy described in the Joint Committee Report has apparently become an acceptable basis for constitution building in Canada.

### *Spending Power and Conferences on the Economy*

The Accord contains a provision which would impose certain limitations on federal spending where the objects of spending are matters which are under the exclusive jurisdiction of the provinces.<sup>55</sup> The provincial governments can opt out with compensation from any new national cost-shared programs that fall within an area of exclusive provincial jurisdiction. This option is only available to a province if it has its own program which is compatible with national objectives. Various programs in relation to education and health care might be examples of the sorts of national cost-shared programs to which this section could apply. The ability to opt out of national cost-shared programs is not open to territorial governments. The reason for denying this option to the territories is by no means self-evident, especially bearing in mind the unique cultural, geographic and environmental factors involved in delivering such programs in the two territories.

The Accord also creates a requirement for First Ministers to meet annually to discuss "the state of the Canadian economy and such other matters as may be appropriate". The role of the territorial governments in Canada's economic and fiscal relations is perhaps the most complex and least discussed aspect of constitutional development in the territories.<sup>56</sup> This subject will require careful analysis by territorial governments in the future because it appears to be the nebulous backdrop for the arguments of those opposed to territorial advancement to provincehood. It might be as a result of the assumption that northern provinces would never be able to "pay their way" that First Ministers believed that no purpose could be served by allowing them to participate in the First Ministers' Conferences on the economy. Obviously, though, fiscal and economic issues which are important to the provinces are equally impor-

tant to the territorial governments. For example, it is interesting to note that the budget for the Northwest Territories for 1989/90 already exceeds that of Prince Edward Island (\$882 million versus \$652 million).

*Extension of Provincial Boundaries into the Territories and Provincehood*

It is in the provisions of the Accord which alter the amending formula that the most serious long-term implications for the constitutional development of the territories are to be found.<sup>57</sup> There is some concern in the territories that certain provinces might have expansionist designs on land in the North. According to one interpretation, under the existing 7/50 formula contained in the *Constitution Act, 1982*<sup>58</sup> seven provinces with the consent of both Houses of Parliament could agree to divide the territories and annex portions to existing provinces. The new unanimity required under the Accord would likely make “deal-making” more difficult and to that extent the new formula might protect the territories. But this would be rationalization after the fact. There is no evidence that this was the intention of the First Ministers and the logic is not comforting in any case: certainly, this sort of clause prevents deals between Ottawa and a few provinces, but if it were ever used, it is unlikely that a deal could be struck unless all ten provinces acquired territorial lands. In any case this provision is most objectionable because it allows annexation of the territories without any involvement of territorial residents or territorial legislatures. One can imagine the crisis if seven provinces were able to decide to annex parts of Ontario to Manitoba without any involvement of the people or government of Ontario. Any deals for annexing territorial lands to the provinces would likely be made in closed, secret meetings of First Ministers without territorial representatives.

Similarly, the prospect of provincehood in the territories, according to one interpretation, had initially been reduced at the time of “patriating” the constitution by the *Constitution Act, 1982*. Until 1982, Parliament alone had exclusive constitutional authority to create new provinces.<sup>59</sup> The Act of 1982, however, appeared to give existing provinces a direct role in the establishment of new provinces. It did this in two ways:

1. By section 46(1) of the Act, provincial legislatures were authorized to *initiate* constitutional amendments.<sup>60</sup>
2. By section 42(1)(f), an amendment to the “Constitution of Canada” in relation to “the establishment of new provinces” required the consent of both



Houses of Parliament and two-thirds of the provinces having at least fifty percent of the population of "all the provinces" under the 7/50 amending formula.<sup>61</sup>

In many ways the adoption of the 7/50 formula was a major blow to territorial aspirations toward provincehood. For example, the failure to include any reference to a territorial role in initiating a call for provincehood underscored the colonial attitude that prevails despite the ever-increasing ability of territorial governments to exercise virtually all province-type powers. Even the *Constitution Act, 1867* had given more attention to the need for some input from the representative institutions of colonies seeking admission to the federation. Section 146 of that Act had provided that the "colonies or provinces" of Newfoundland, Prince Edward Island and British Columbia would be admitted only after the British Parliament had received addresses from the Canadian Parliament and the legislature of the colony in question.<sup>62</sup>

It is difficult to conceive of the basis on which the provincial governments justified having authority to initiate a resolution for provincehood in the Yukon or NWT, or on what basis the federal government decided to limit its own jurisdiction in these matters. How would the legislators of Nova Scotia or British Columbia, for example, know enough about local conditions in the territories to take such a step? It is also difficult to determine how the drafters of the 1982 Act intended to reconcile the new amending formula provisions with the power to create new provinces given to Parliament by the *Constitution Act, 1871* which states:

4. The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

It might be argued that allowing provincial legislatures to initiate provincehood resolutions simply gives a territory twelve possible forums to initiate provincehood (ie. ten provincial legislatures, the Senate or the House of Commons). A territorial government presumably could lobby the provinces until it convinced one or more to bring a resolution. Provincial governments have been noticeably reticent about explaining precisely why they require a role in establishing new provinces, and how they intend to exercise their apparent new authority. Furthermore, it

remains to be seen how broadly the courts might construe the phrase “establishment of new provinces” in s.42(1)(f) of the amending formula [s.41(i) of the Accord]. It can be argued that provinces will only be able to exert influence over the *process* of amending the Constitution to admit new provinces, and not over the *substantive* aspects of the constitutions for new provinces.

Alternatively, a literal reading of the amending formula suggests that provincial legislatures need only be involved if establishing a new province requires “an amendment to the Constitution of Canada”. The most readily apparent amendment to the Canadian Constitution required to create a new province would be to include in the Schedule to the 1982 Act the federal Act establishing the new province’s constitution. For example, Alberta and Saskatchewan were created in 1905 by the *Alberta Act* and *Saskatchewan Act* passed by the Canadian Parliament. Both of these Acts are now included in the Schedule to the 1982 Act and are, therefore, by definition, a part of the Constitution of Canada.<sup>63</sup> There are also likely to be amendments in relation to representation in the House of Commons and Senate.

But is it necessary to make any amendments at all to the Constitution of Canada when a new province is created? Arguably, under the 1871 Act, new provinces could be created in the territories by Parliament alone without changing territorial representation in the Senate and House of Commons. Even the amending formulae do not need to be amended to accommodate new provinces. The 7/50 formula should more accurately be called the “two thirds/50 formula”; it would not have to be changed to make it an “8/50 formula”, for example.

It may not even be necessary to put the federal Act creating a new province into the Schedule of the 1982 Act in order to ensure that it is a part of the Constitution of Canada. Section 52(2) states that the Constitution of Canada “includes” the Acts and Orders referred to in the Schedule, and it therefore might not be exhaustive. At least one eminent constitutional scholar has suggested on the basis of the wording of s.52(2) that parts of the *Supreme Court Act* might, for example, already be entrenched in the Constitution.<sup>64</sup>

Alternatively it might not be necessary to make a new province’s constitution a part of the “Constitution of Canada” as that expression is defined by the *Constitution Act, 1982*. It is not necessary to place a new province’s constitution in the Schedule of the 1982 Act to give it protection from Parliamentary alterations at a later date. The *Constitution Act, 1871* already provides that:

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament [*Manitoba Act*] . . . , or of any other Act hereafter establishing new Provinces in the said Dominion . . .

To understand the relationship between the 1871 Act and the amending formula in the 1982 Act, ultimately one must ask what meaning will be given to the phrase "notwithstanding any other law or practice" which appears in the amending formula clause 42(1)(f):

42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):
  - (f) notwithstanding any other law or practice, the establishment of new provinces.

Does this phrase operate in effect to "repeal" Parliament's unilateral power to create new provinces under the 1871 Act? It would be unusual if it did. The *Constitution Act, 1871* assigns legislative powers to Parliament. By comparison, the amending formulae are procedural sections which were not intended to redistribute heads of legislative power between provincial legislatures and Parliament, but rather to ensure, in part, that such powers could not be redistributed without the consent of Parliament and the requisite number of provincial legislature.

On what basis can existing provinces claim a role in creating new provinces? Can it be argued that creating a new province will affect the powers of an existing province? Section 38, for example, requires that at least seven provincial legislatures must consent to any amendment to the "legislative powers, proprietary rights or *any* other rights or privileges" of a provincial legislature or government. If an amendment is made to these rights or powers by seven of the provinces, the three remaining provinces can "opt out" if they do not like it and the amendment will not apply to them. However, under the 1982 Act, while at least seven provinces are apparently required to establish a new province, "the establishment of a new province" is not a matter in respect of which a provincial legislature can opt out. This seems to be a clear recognition that creating a new province does *not* affect the legislative powers, proprietary rights or *any* other rights or privileges of a provincial legislature or government.

If the Accord is finally ratified by all provinces amendments "to the Constitution of Canada in relation to the establishment of new provinces" will be a matter in the category of subjects requiring unanimous consent. The provinces have perhaps convinced the federal government that creating a new province would somehow affect the

legislative powers, proprietary rights or any other rights or privileges of a province.

There has been no public explanation for this change of direction. The argument that creating a new province will somehow affect the powers of the existing provinces does not seem to be supportable. Professor Schwartz has argued forcefully that the creation of a new province would not affect the existing powers of provinces.<sup>65</sup> In the community of equals, which proponents suggest the Accord will create, what possible motives could provincial governments have for insisting that Canadian residents in the territories and their governments should be treated differently?<sup>66</sup> The main arguments presented in support of the unanimity requirement are that the addition of new provinces would:

1. alter the numerical operation of the amending formula;
2. alter the fiscal relations between provinces.<sup>67</sup>

Are these sorts of arguments confusing current political issues and principles of constitutional law? Changing the numerical operation of the amending formula and fiscal relations might have political implications but they do not alter the provisions of the Constitution of Canada. An increase in population in one or more of the provinces will also affect the operation of the population test in the 7/50 formula. The free-trade agreement may alter the fiscal relations between governments, but such trends cannot be blocked by a constitutional veto from Parliament or any other province.

### *Constitutional Conferences*

The Accord entrenches a requirement for annual First Minister's Conferences on the Constitution.<sup>68</sup> Such conferences are to be composed of "the Prime Minister of Canada and the first ministers of the provinces". The failure to allow for territorial representation at these conferences is in stark contrast to the former s.37.1 of the *Constitution Act, 1982* which was repealed by operation of law only two weeks before the First Ministers met at Meech Lake. Section 37.1 fell under the heading "Constitutional Conferences" in Part IV.1 of the Act, and provided that:

- 37.1(1) In addition to the conferences convened in March, 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the First Ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

- (3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

The conferences which were held under s.37.1 are usually associated with talks on aboriginal rights: between 1982 and 1987 a total of four First Ministers' Conferences were held on this subject. Representatives of the Yukon and Northwest Territories governments attended all of these conferences as well as the numerous meetings of officials and ministers which prepared the agendas and materials for consideration by First Ministers. However, s.37.1 on its plain wording is not confined to aboriginal rights conferences. It is therefore unusual that territorial representatives were not invited even to the preparatory meetings which led to the meeting of First Ministers at Meech Lake on April 30, 1987, particularly in light of the number of items in the Accord which directly affect the two territories. These preparatory meetings occurred prior to the repeal of s.37.1, so it must be concluded that "in the opinion of the Prime Minister", issues such as establishment of new provinces, and extension of provincial boundaries into the territories for some reason did not directly affect the Yukon and the Northwest Territories.<sup>69</sup>

The entrenchment of First Ministers' Conferences in the constitution has been criticized as an erosion of parliamentary government.<sup>70</sup> For example, former Senator Eugene Forsey presented this criticism in the following manner:

It would be subversive of a parliamentary government. It would establish a new, supreme, sovereign, omniscient, inerrant, infallible power, before which the function of Parliament and the legislature would be simply to say *Roma locuta est*: the First Ministers have spoken, let all the earth keep silence before them.<sup>71</sup>

As Professor Schwartz explains:

Unfortunately, the "process" connected with the 1987 Accord so far suggests that legislative ratification can sometimes be secured through the fiat of opportunistic leaders who impose party discipline, rather than through public consultation, debate and consent.<sup>72</sup>

A debate over the advantages or disadvantages of entrenching First Ministers' Conferences would be long and complex. Whether such conferences are held on the basis of political agreement or by the dictate of the supreme law of Canada may be ultimately unimportant.

The real cause for concern for the two territories arising from the new conference provisions will likely emerge from two factors:

1. The composition of the conferences will be established in law as including only the Prime Minister and Premiers of the provinces.<sup>73</sup> Will it require a constitutional amendment to have territorial leaders invited to these conferences as full participants?
2. Certain agenda items relating to the Senate and fisheries would be entrenched by the Accord.<sup>74</sup> New agenda items would, as a matter of law, require the agreement of the First Ministers. Is there any hope that First Ministers will choose in the future to add agenda items directed at correcting the injustices perpetrated against the territories in the "Quebec Round", particularly if there are protracted discussions on Senate reform and fisheries?

Under the proposed conference provisions a single province could refuse to include new agenda items until Senate reform and fisheries issues have been cleared away. It could be a very long time before First Ministers unanimously agree to discuss territorial concerns. Meanwhile, the federation will continue to be discussed and perhaps altered, without territorial participation.

By entrenching the composition of the conference to the exclusion of territorial leaders, First Ministers may have lost the flexibility which a politically-based process would allow. It can only be hoped that First Ministers will not point to the new conference provisions as legal impediments which prevent the participation of territorial representatives at future constitutional discussions.

### *Conclusion*

July 15, 1989 is the 119th anniversary of the admission of the Northwest Territories into the Canadian federation. In the intervening years between 1870 and the present, this vast area which was originally known as "Rupert's Land and the North Western Territory" has changed as Canada has changed. But even today this region is a link with Canada's colonial past—a vestigial remnant which in the late 1980's is still on the fringes of the Canadian psyche. Nowhere has this been more evident than in the Meech Lake Accord, a document that its proponents claim will unite Canada and reinvigorate the federation. It would be tempting to view the "Anti-North"<sup>75</sup> provisions of the Accord as mere oversights or aberrations caused by the late-night session of First Ministers when the final legal text was agreed upon at the Langevin Block on June 3, 1987. Unfortunately, there is some evidence to the contrary.<sup>76</sup>

Proponents of the present Accord would have us view it as just payment of a political debt. It is seen as a necessary constitutional price to be paid to eliminate Quebec's sense of alienation. In 1980, then Prime Minister Trudeau had promised Quebec a renewed federation in return for a "No" vote on sovereignty-association. The Accord provides bold steps towards that new federation, but in reducing Quebec's alienation, the First Ministers have profoundly exacerbated the alienation of territorial residents and territorial governments.

Few Canadians probably realize that the admission of the North-West Territory into the Canadian federation on "equitable terms" was part of the Confederation compromise on which Canada was founded. Section 2 of the Quebec Resolutions of 1864, and the London Resolutions of 1866<sup>77</sup> explicitly stated that provision be made:

... for the admission into the Confederation on equitable terms of Newfoundland, Prince Edward Island, the Northwest Territory and British Columbia.

The major concern of Northerners is that the rules of the game are being changed through a process which does not involve them, and in ways which promise to push them even further to the outside of the political life of the nation. There is a feeling in the two territories that the constitutional principles that applied when Manitoba, British Columbia, Prince Edward Island, Alberta, Saskatchewan and Newfoundland entered Confederation will not apply to their regions.

Quebec has always held a central role in defining the character of the Canadian federation. While residents of the territories can readily empathize with the cultural, economic and political aspirations of the people and government of Quebec, they cannot so readily understand the ease with which First Ministers rejected the aspiration of Northerners which are founded on virtually the same principles.

### *Addendum*

The manuscript for "Caught in a Seamless Web" was submitted in April, 1989. Since that time, the national drama surrounding the passage of the Meech Lake Accord has been played out, culminating in a gruelling eight-day marathon session of negotiations in June 1990 just weeks before the deadline for ratification. The First Ministers issued a "Final Communique" in the early morning hours of June 10th. This communique contained the elements of a tentative agreement that was

to lead to ratification of the Accord by New Brunswick, Manitoba and Newfoundland.

The leaders of the territorial governments were not directly involved in the negotiations leading up to the Final Communiqué. However, their work behind the scenes ensured that most territorial concerns were addressed to some degree. For example, although the Final Communiqué contemplated that the Meech Lake Accord would pass without amendments, the First Ministers agreed that at some point after June 23, 1990 further constitutional amendments would be made to provide for:

- a) territorial governments to nominate candidates for appointment to the Supreme Court and Senate
- b) territorial participation in First Ministers conferences on the economy and constitutional matters
- c) the establishment of a separate constitutional conference process to discuss the rights of the aboriginal peoples. The territorial governments would also be participants in these conferences.

In addition the Final Communiqué ensured territorial participation in a commission which was to be established to examine the issue of Senate reform. While no changes to the amending formulae were agreed upon, First Ministers did promise a constitutional conference to “address available options for provincehood” including the possibility of returning to the pre-1982 formula whereby Parliament alone could create new provinces.

With the death of the Meech Lake Accord, the Canadian constitutional debate can be expected to lead in new directions. It remains to be seen what role the territories will have in the discussions leading to a new or reformed federation.

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## NOTES

<sup>1</sup> Canada, Special Joint Committee of the Senate and of the House of Commons, Report, *The 1987 Constitutional Accord*, p.15.

<sup>2</sup> Hogg, Peter W. *Constitutional Law of Canada*. 2nd ed., 1985, at p.1 quoting Cheffin and Tucker, *The Constitutional Process in Canada*. 2nd ed., 1975, at p.4.



<sup>3</sup> Article I, section 2.

<sup>4</sup> This Commission (Carrothers Commission) was appointed by Order-in-Council on June 3, 1965 to advise the Minister of Northern Affairs and National Resources on matters related to political development in the Northwest Territories. The Commission was chaired by Dean A. W. R. Carrothers of the University of Western Ontario law faculty. Assisting him were then mayor John Parker of Yellowknife, and then Professor Jean Beetz of the University of Montreal law faculty.

<sup>5</sup> Canada. *Report of the Advisor Commission on the Development of Government in the NWT*. 1966. p.E4.

<sup>6</sup> [1892] A.C. 437 at pp.441-2.

<sup>7</sup> Reproduced in *British North America Acts and Selected Statutes 1867-1948*. 1948. pp.37-58.

<sup>8</sup> Re: Section 24 of *The British North America Act*. [1930]. A.C. 124 sub.nom. *Edwards et al vs. A.G. of Canada et al*. [1929].3 WWR 479.

<sup>9</sup> *Ibid*. p.136 A.C.

<sup>10</sup> [1932] A.C. 54 at p.70.

<sup>11</sup> Mr. Bourassa was quoted in a column by Thomas Walkom, "Agitation, rights, money and power" in the *Globe and Mail*, November 29, 1988. p.A7.

<sup>12</sup> See for example, presentations by the Honourable Michael Ballantyne and the Honourable Tony Penikett to the Special Joint Committee of the Senate and of the House of Commons on the 1987 Constitutional Accord contained in the *Minutes of Proceedings and Evidence of the Committee*, Issue No.8, August 18, 1987. pp.43-78 and Issue No.15, August 31, 1987. pp.91-108. See also: *Penikett and Yukon Government vs. A.G. of Canada*. [1988]. NWTR 18 (Y.C.A.); *Sibbeston vs. A.G. of Canada*. [1988]. NWTR 38 (NWT C.A.).

<sup>13</sup> For a concise view of the events which culminated in the Meech Lake Accord see W. H. McConnell "The Meech Lake Accord: Laws or Flaws" in *Saskatchewan Law Review*. 1988. Vol. 52, No. 1. p.115.

<sup>14</sup> The complete text of these documents is reproduced in French and English in: P. W. Hogg *Meech Lake Constitutional Accord Annotated*, 1988 and B. Schwartz *Fathoming Meech Lake*, 1987.

<sup>15</sup> The opening words of s.41 state:

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province: [the section then lists the five matters that require unanimous consent].

<sup>16</sup> Section 38 of the *Constitution Act, 1982* states among other things:

38(1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by  
(a) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

<sup>17</sup> Section 39 states:

39(1) A proclamation shall not be issued under subsection 38(1) [see *supra*. f.n.16] before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

(2) *A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder. [emphasis added]*

- <sup>18</sup> This provision is contained in s.16 of the Accord and reads as follows:  
 Nothing in section 2 of the *Constitution Act, 1867* affects sections 25 or 27 of the *Canadian Charter of Rights and Freedoms*, section 35 of the *Constitution Act, 1982* or class 24 of section 91 of *Constitution Act, 1867*.  
 See also B. Schwartz *Fathoming Meech Lake*, 1987 at p.52.
- <sup>19</sup> See Canada. Special Joint Committee of the Senate and the House of Commons report, *The 1987 Constitutional Accord* p. 17 citing the testimony of Gordon Robertson before the Committee on August 5, 1987.
- <sup>20</sup> This editorial entitled "Meech Lake (4)" appeared on December 12, 1988. The article erroneously stated that the Meech Lake Accord offers one improvement on the appointment of lawyers and judges from the territories to the Supreme Court of Canada. In stating that "under existing law, Northerners are eligible for appointment only if they have been members of a provincial bar for at least 10 years", the author of this column failed to take account of the *Interpretation Act* of Canada when reading the *Supreme Court Act* of Canada. The *Interpretation Act* provides that where the word "province" appears in a federal statute it is to be read as including the Northwest Territories and the Yukon. Lawyers and judges in the territories are presently eligible for appointment to the Supreme Court if they have been members of a territorial bar for at least 10 years.
- <sup>21</sup> The "distinct society clause" which would become clause 2.(1)(b) of the *Constitution Act, 1867* must be read in context with all the clauses of the section. The complete section reads:  
 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.  
 (2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed.  
 (3) The role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed.  
 (4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language.
- <sup>22</sup> See *supra*. f.n. 21, clause 2.(3).
- <sup>23</sup> See *supra*. f.n. 21, clause 2.(1)(a).
- <sup>24</sup> See *supra*. f.n. 21, clause 2.(2).
- <sup>25</sup> For an in depth discussion of these provisions see: B. Schwartz *Fathoming Meech Lake*, 1987. pp.8-76.
- <sup>26</sup> See *supra*. f.n. 21, clause 2.(4).
- <sup>27</sup> Section 31 of the *Charter* reads as follows:  
 31. Nothing in this Charter extends the legislative powers of any body or authority.  
 The new "spending power" provision of the Accord also states:  
 106A.(2) Nothing in this section extends the legislative powers of the Parliament of Canada or of the legislatures of the provinces.
- <sup>28</sup> The section reads:  
 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.  
 (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

- <sup>29</sup> A Report of the Senate Task Force to the Committee of the Whole entitled *Task force on the Meech Lake Constitutional Accord and on the Yukon and the Northwest Territories* (Feb. 1988) recommends at p.28 that as the Meech Lake Accord recognizes Quebec as a distinct society it should also recognize that the aboriginal peoples of Canada constitute distinct societies.
- <sup>30</sup> The political agreement provision reads:
4. Until the proposed amendment relating to appointments to the Senate comes into force, any person summoned to fill a vacancy in the Senate shall be chosen from among persons whose names have been submitted by the government of the province to which the vacancy relates and must be acceptable to the Queen's Privy Council for Canada.
- The provisions in the legal text would become s.25 of the *Constitutional Act, 1867*:
- 25(1) Where a vacancy occurs in the Senate, the government of the province to which the vacancy relates may, in relation to that vacancy, submit to the Queen's Privy Council for Canada the names of persons who may be summoned to the Senate.
- (2) Until an amendment to the Constitution of Canada is made in relation to the Senate pursuant to section 41 of the *Constitutional Act, 1982*, the person summoned to fill a vacancy in the Senate shall be chosen from among persons whose names have been submitted under subsection (1) by the government of the province to which the vacancy relates and must be acceptable to the Queen's Privy Council for Canada.
- <sup>31</sup> Mr. Robertson's presentation is contained in Canada. *Minutes of proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the 1987 Constitutional Accord* (August 5, 1987) Issue No.3, p.83.
- <sup>32</sup> Originally enacted as the *British North America Act (No.2), 1975* 23-24 Eliz.II, c.53 (Can.)
- <sup>33</sup> See *supra*. f.n. 30.
- <sup>34</sup> *Constitutional Act, 1867*, s.24.
- <sup>35</sup> See *supra*. f.n. 30.
- <sup>36</sup> See *supra*. f.n. 30.
- <sup>37</sup> *Re: Authority of Parliament in Relation to Upper House* [1980] 1 S.C.R. 54.
- <sup>38</sup> *Ibid.* at p.78.
- <sup>39</sup> Section 42(c) states:
- 42(1) an amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):
- (c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
- <sup>40</sup> For many amendments under the 7/50 formula, provinces can opt out and the amendment will not apply in that province [ss.38(3)]; however, this is not the case for amendments relating to the Senate, *inter alia*, under ss.42(2) of the *Constitutional Act, 1982*.
- <sup>41</sup> The courts would also have to consider whether Parliament alone could alter the Senate provisions in relation to the territories under s.44 of the *Constitution Act, 1982* which states:
44. Subject to section 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation of the executive government of Canada or the Senate and House of Commons.
- <sup>42</sup> The new sections would state:
- 101A.(1) The court existing under the name of the Supreme Court of Canada is hereby continued as the general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a superior court of record.
- (2) The Supreme Court of Canada shall consist of a chief justice to be called the Chief Justice of Canada and eight other judges, who shall be appointed by the Governor General in Council by letters patent under the Great Seal.

- 101B.(1) Any person may be appointed a judge of the Supreme Court of Canada who, after having been admitted to the bar of any province or territory, has, for a total of at least ten years, been a judge of any courts in Canada or a member of the bar of any province or territory.
- (2) At least three judges of the Supreme Court of Canada shall be appointed from among persons who, after having been admitted to the bar of Quebec, have, for a total of at least ten years, been judges of any court of Quebec or of any court established by the Parliament of Canada, or members of the bar of Quebec.
- 101C.(1) Where a vacancy occurs in the Supreme Court of Canada, the government of each province may, in relation to that vacancy submit to the Minister of Justice of Canada the names of any of the persons who have been admitted to the bar of that province and are qualified under section 101B for appointment to that court.
- (2) Where an appointment is made to the Supreme Court of Canada, the Governor General in Council *shall*, except among members of the Court, appoint a person whose name has been submitted under subsection (1) and who is acceptable to the Queen's Privy Council for Canada.
- (3) Where an appointment is made in accordance with subsection (2) of any of the three judges necessary to meet the requirement set out in subsection 101B(2), the Governor General in Council *shall appoint* a person whose name has been submitted by the Government of Quebec.
- (4) Where an appointment is made in accordance with subsection (2) otherwise than as required under subsection (3), the Governor General in Council shall appoint a person whose name has been submitted by the government of a province other than Quebec.
- 101D. Sections 9 and 100 apply in respect of the judges of the Supreme Court of Canada
- 101E.(1) Sections 101A and 101D shall not be construed as abrogating or derogating from the powers of the Parliament of Canada to make laws under section 101 except to the extent that such laws are inconsistent with those sections.
- (2) For greater certainty, section 101A shall not be construed as abrogating or derogating from the powers of the Parliament of Canada to make laws relating to the reference of questions of law or fact, or any other matters, to the Supreme Court of Canada.

<sup>43</sup> See *supra*. f.n. 42, clause 101B.(2).

<sup>44</sup> R.S.C. 1985, c.5-26, s.4-7.

<sup>45</sup> See *Interpretation Act* R.S.C. 1985, c.I-21, s.35. It provides that where the word "province" is used in a federal statute it shall include the Northwest Territories and Yukon.

<sup>46</sup> *Op.cit.* f.n. 1, at p.87.

<sup>47</sup> See: The Submission of the Honourable Ian Scott, Attorney General of Ontario, to the Ontario Select Committee on Constitutional Reform, dated May 4, 1988, pp.65-66.

<sup>48</sup> *Op.cit.* f.n. 1, at p.85.

<sup>49</sup> See *supra*. f.n. 42, ss.101C.(1).

<sup>50</sup> See: *Andrews vs. Law Society of British Columbia* (Supreme Court of Canada, February, 2, 1989, unreported).

<sup>51</sup> *Op.cit.* f.n. 25, at p.105.

<sup>52</sup> *Op.cit.* f.n. 1, at p.120.

<sup>53</sup> See: *Northwest Territories Act*, R.S.C. 1985, c.N.-27, and *Yukon Act*, R.S.C. 1985, c.Y-2.

<sup>54</sup> [1987] N.W.T.R. 118 at p.128. It is also noteworthy that s.30 of the *Canadian Charter of Rights and Freedoms* provides that: "A reference in this *Charter* to a Province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon

Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

<sup>35</sup> The new "spending power" provision would become s.106A of the *Constitution Act, 1867*:

106A (1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.

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

The section requiring annual economic conferences would become s.148 of the *Constitution Act, 1867*:

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

<sup>36</sup> For a general discussion of this topic see: Jack Stabler "Fiscal Viability and the Constitutional Development of Canada's Northern Territories" in *Development of Canadian Northern Territories* (1986) pp.551-567; and Gordon Robertson's *Northern Provinces: A Mistaken Goal* (1985).

<sup>37</sup> The new amending formula provisions would change some sections of Part V of the *Constitution Act, 1982*. Section 42 of the Act would be repealed and left blank. The new sections state:

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

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

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

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

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

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

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

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

(g) the Supreme Court of Canada;

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

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

(j) an amendment to this Part.

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

46. (1) The procedures for amendment under sections 38, 41, and 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if,

at any time after the expiration of that period, the House of Commons again adopts the resolution.

<sup>58</sup> See *supra*. f.n. 15.

<sup>59</sup> Section 2 of the *Constitution Act, 1871* provides:

2. The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order and good government of such Province, and for its representation in the said Parliament.

<sup>60</sup> Section 46(1) states:

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

The wording of the Accord provision contains no reference to s.42 because the matters in that section would be rolled into s.41. Section 42 would be left blank. See *supra*. f.n. 57.

<sup>61</sup> Section 42(1) (e) and (f) state:

42(1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1)

(e) the extension of existing provinces into the territories, and

(f) not withstanding any other law or practice, the establishment of new provinces.

<sup>62</sup> Section 146 of the *Constitution Act, 1867* also allowed for the admission of "Rupert's Land and the North-Western Territory" on an address from the Canadian Parliament alone. However, this might be explained by the fact that in 1867 there were no local legislatures in either Rupert's Land or the North-Western Territory.

<sup>63</sup> Section 52(2) of the *Constitution Act, 1982* defines the "Constitution of Canada".

<sup>64</sup> W. R. Lederman, "Constitutional Procedure and the Reform of the Supreme Court of Canada". (1986) 26 C.de D.195; for an assessment of this argument see B. Schwartz, *Fathoming Meech Lake* (1987) at pp.85-86. Also see *Dixon vs. A.G. of B.C.* [1987] 1 W.W.R., p.313.

<sup>65</sup> *Op.cit* f.n. 25, at pp.125-128.

<sup>66</sup> *Ibid.* at pp.128-129.

<sup>67</sup> Letter from Prime Minister Brian Mulroney to Mr. Willard Phelps, Leader of the Official Opposition of the Yukon, dated June 1, 1987, contained in Appendix III of the presentation by Mr. Phelps to the Special Joint Committee of the Senate and House of Commons on the 1987 Constitutional Accord. (August 31, 1987).

<sup>68</sup> These provisions would become section 50 of the *Constitution Act, 1982*:

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

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

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

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

(c) such other matters as are agreed upon.

<sup>69</sup> See: the *1983 Constitutional Accord on Aboriginal Rights* which is reproduced in: Senate of Canada. *Report of the Task Force on the Meech Lake Constitutional Accord and on the Yukon and the Northwest Territories.* (Feb. 1988) Appendix A, pp.43-45.

<sup>70</sup> Joint Committee, *op.cit.*, f.n. 1, at p.129; and Schwartz, *op.cit.*, f.n. 25, at p.109.

<sup>71</sup> *Op.cit.* f.n. 1, at p.132.

<sup>72</sup> *Op.cit.* f.n. 25, at p.113.

<sup>73</sup> See *supra.* f.n. 68, ss.50(1).

<sup>74</sup> See *supra.* f.n. 68, ss.50(2)(a),(b) and (c).

<sup>75</sup> This term was coined by B. Schwartz. *op.cit.*, f.n. 25, at p.126.

<sup>76</sup> For example, provinces had been bargaining for a role in the creation of new provinces since at least 1976; see: documents in Canada. Canadian Intergovernmental Conference Secretariat. *Proposals on the Constitutional 1971-78.* (Dec. 1978) pp.327-339. Quebec's Liberal Party's Policy Commission. *Mastering our Future* (Feb. 1985) extracts reproduced in P. M. Leslie's *Canada: The State of the Federation 1985.* (1985), Appendix B, p.75; Joint Committee *op.cit.*, f.n. 1, at p.120; testimony of Senator Lowell Murray to the Joint Committee in *Minutes and Proceedings and Evidence.* (Sept. 1, 1987) Issue No. 16, p.12.

<sup>77</sup> See *supra.* f.n. 7.