

GETTING TO THE BOTTOM OF MEECH LAKE: A DISCUSSION OF SOME RECENT WRITINGS ON THE 1987 CONSTITUTIONAL ACCORD

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I. INTRODUCTION

On June 3, 1987, eleven men — the first ministers of Canada and the ten provinces — shook hands, signed their names and created the 1987 Constitutional Accord, known more commonly as the Meech Lake Accord. The official purpose of the exercise was to “patriate” Quebec. The 1982 amendments to the Constitution had not met Quebec’s concerns, despite promises by the federal government during the 1980 Referendum campaign that if Quebecers voted “No” on the referendum (which they did) they could expect constitutional amendments that would reflect and protect Quebec’s historic claims.¹ Quebec was, of course, legally bound by the provisions of the *Constitution Act, 1982*. Because of its exclusion from the latter stages of the 1982 amendment process, however, there was a “strong and quite understandable push to bring Quebec into the constitutional family at the symbolic level”.² The terms of the Accord explicitly recognize Quebec as a “distinct society”, and enhance provincial powers in a number of areas. In exchange for entrenching the Accord in the Constitution, the Quebec government would officially consent to inclusion in the 1982 amendments. Thus far, Parliament, the Quebec National Assembly and the legislatures of every province but Manitoba and New Brunswick have endorsed entrenching the Accord in the Constitution.

The federal government and many others have portrayed the Accord as a great achievement, a remedy for the deficiency in the Constitution created by Quebec’s unwillingness to join in the 1982

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¹ P.E. Trudeau, *Letter to the Editor*, LA PRESSE (10 March 1989) B-3; C. Morin, *Letter to the Editor*, LA PRESSE (14 March 1989) B-3. We would like to thank Mr Gaetan Pinard for bringing our attention to these letters.

² L. Smith, *The Distinct Society Clause in the Meech Lake Accord: Could it Affect Equality Rights for Women?*, in K.E. Swinton and C.J. Rogerson, eds, *COMPETING CONSTITUTIONAL VISIONS: THE MEECH LAKE ACCORD* (Toronto: Carswell, 1988) at 52.

patriation exercise. In this essay we will take a more skeptical view. We will argue that the Meech Lake Accord is undemocratic. In both the process leading to the Accord and in its substance, the Accord should cause concern for those who take seriously the idea of democratic participation in self-government. As we shall see, the process leading up to the Accord excluded the input of just about everybody but the first ministers and their advisors. This exclusion is reflected in the substance of the Accord by its notable absence of recognition or protection of aboriginal peoples, women and ethnic minorities. After discussing these forms of exclusionary constitutional politics, we will argue that Quebec's *inclusion* in the Constitution through the "distinct society" clause would not necessarily have the effect of protecting or promoting Quebec's cultural and linguistic autonomy and might function to delegitimize and defuse popular and political struggles for such autonomy. Thus, our skepticism about the "distinct society" clauses does not endorse the view often expressed outside Quebec that the clause provides Quebec too much cultural and linguistic autonomy. Rather, we are concerned it does not provide enough.

While debate was conspicuously absent from the process leading up to the Accord, there was much discussion in its wake. In this essay we will attempt to develop our concerns about the Meech Lake Accord through analysis and review of five recent books on the topic. Schwartz's *FATHOMING MEECH LAKE*³ is an analytical, critical and comprehensive study of the Accord; Hogg's *MEECH LAKE CONSTITUTIONAL ACCORD*⁴ is a section by section annotation of the Accord; *COMPETING CONSTITUTIONAL VISIONS*,⁵ *PERSPECTIVES FROM THE WEST*⁶ and *L'ADHESION DU QUEBEC A L'ACCORD DU LAC MEECH*⁷ are each a collection of papers presented at academic conferences on the Accord. Among all the books, the various topics that have been the subject of debate about the Accord are covered: the democratic process, the distinct society clause, human rights, aboriginal peoples, Senate reform, the Supreme Court of Canada, the spending power, visions of federalism, the amending formula and immigration. We will focus on the treatment of the first four of these in the books under review.

II. MEECH LAKE AND THE DEMOCRATIC PROCESS

Political analysts have long been aware of the disjuncture between the democratic ideal of citizen participation in political decision-making

³ B. Schwartz, *FATHOMING MEECH LAKE* (Winnipeg: Legal Research Institute of the University of Manitoba, 1987).

⁴ P. Hogg, *MEECH LAKE CONSTITUTIONAL ACCORD ANNOTATED* (Toronto: Carswell, 1988).

⁵ Swinton and Rogerson, *supra*, note 2.

⁶ R. Gibbins, ed., *MEECH LAKE AND CANADA: PERSPECTIVES FROM THE WEST* (Edmonton: Academic Printing & Publishing, 1988).

⁷ R.-A. Forest, ed., *L'ADHESION DU QUEBEC A L'ACCORD DU LAC MEECH* (Montreal: Les Editions Thémis Inc., 1988).

and the actual operations of "democratic" institutions.⁸ Recent developments in the political institutional structures of western democratic states have been analyzed by commentators as widening this gap. There is a trend towards more powerful executives and bureaucracies, and a corresponding disempowerment of legislative assemblies, which functions to restrict the already limited scope for citizen participation in government.⁹ In Canadian political thought, this point has been made in relation to "executive federalism",¹⁰ and in discussions of judicial review under the *Charter of Rights and Freedoms*.¹¹ The Meech Lake Accord is a part of this trend and should cause those committed to the ideal of democratic participation great concern. With regard to political process, the Accord challenges the democratic ideal in two related ways. First, the process leading up to the Accord was elitist, secretive and exclusionary, representing the worst aspects of executive federalism; and second, the Accord strengthens the institution of executive federalism by entrenching First Ministers' Conferences in the Constitution. We will examine these in turn.

A. *The Meech Lake Process*

Most commentators who discuss the process leading up to the Meech Lake Accord agree that it was a sorry affair from the standpoint of democratic principles.¹² They emphasize the haste, secrecy and elitism of the process,¹³ and argue that it is anathema to democratic principles "to let eleven men (because it was ultimately eleven *men*)"¹⁴ — operating in "a secretive, masculine air"¹⁵ — construct a "constitutional machinery [that will] mold the behaviour of unborn generations".¹⁶ As Cairns points out, "women, aboriginals, social policy

⁸ See, e.g., R.A. Dahl, A PREFACE TO DEMOCRATIC THEORY (Chicago: University of Chicago Press, 1956); and C.B. MacPherson, THE LIFE AND TIMES OF LIBERAL DEMOCRACY (London: Oxford University Press, 1977).

⁹ See, e.g., N. Poulantzas, STATE, POWER, SOCIALISM (London: New Left Books, 1978); C. Offe, CONTRADICTIONS OF THE WELFARE STATE (Cambridge: M.I.T. Press, 1984).

¹⁰ L. Panitch, *The Role and Nature of the Canadian State*, in L. Panitch, ed., THE CANADIAN STATE: POLITICAL ECONOMY AND POLITICAL POWER (Toronto: University of Toronto Press, 1977) at 11.

¹¹ M. Mandel, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA (Toronto: Wall and Thompson, 1989); A. Petter, *The Politics of the Charter* (1986) 8 SUP. CT. L. REV. 473.

¹² A.C. Cairns, *The Limited Constitutional Vision of Meech Lake*, in Swinton and Rogerson, *supra*, note 2 at 247; A.C. Cairns, *Ottawa, The Provinces and Meech Lake*, in Gibbins, *supra*, note 6 at 105; D. Barrie, *Who Spoke for Canada?*, in Gibbins, *supra*, note 6 at 143; R. Gibbins, *A Sense of Unease: The Meech Lake Accord*, in Gibbins, *supra*, note 6 at 121; W.F. Gold, *Meech Mumbles*, in Gibbins, *supra*, note 6 at 147; Schwartz, *supra*, note 3 at 1-7.

¹³ Schwartz, *ibid.* at 1-3.

¹⁴ Barrie, *supra*, note 12 at 144.

¹⁵ Gibbins, *supra*, note 12 at 123.

¹⁶ Cairns, in Swinton and Rogerson, *supra*, note 2 at 248.

activists, northerners, and those Canadians who are not founding peoples [should not] be encouraged to sleep soundly and securely when future first ministers reshuffle, in private, the constitutional relationships among the governments and peoples of Canada".¹⁷ The exclusionary nature of the Meech Lake process was compounded by the presentation of the Accord as a *fait accompli* for rubber stamp approval by provincial legislatures and Parliament. There was no opposition, no debate, no discussion. As we will see below, many of the authors have strong reservations about executive federalism. Others believe there is a place for it in the Canadian political process. Regardless of which position they take, however, most agree that the Meech Lake process was an example of executive federalism at its very worst.¹⁸

B. *The Entrenchment of First Ministers' Conferences*

Commentators who are critical of executive federalism tend to view the Meech Lake process as a manifestation of its deficiencies. They are particularly concerned about clauses 8 and 13 of the schedule to the Accord which would entrench First Ministers' Conferences in the Constitution.¹⁹ Criticisms of entrenching First Ministers' Conferences are based upon two related concerns about executive federalism: (1) it is elitist and does not allow for sufficient public input and (2) it shifts power away from legislative assemblies and the House of Commons and into the hands of provincial and federal executives.

¹⁷ *Ibid.* at 249.

¹⁸ Gibbins, *supra*, note 12 at 125; Barrie, *supra*, note 12 at 143; Schwartz, *supra*, note 3 at 5; Cairns, in Gibbins, *supra*, note 6 at 106; Cairns, in Swinton and Rogerson, *supra*, note 2 at 248-50.

Deficiencies in the democratic process are often thought to be compensated for by the existence of a free press. While politicians might hope to cut their deals in private, the commitment of the press to finding the facts and reporting them to the public is understood as ensuring that the public is kept aware of important political manoeuvres when politicians prefer secrecy. A number of the authors in PERSPECTIVES FROM THE WEST concentrate on the role of the press in the Meech Lake process. They point to the failure of the press in compensating for the undemocratic aspects of the Meech Lake process and provide interesting insight about why this happened.

D. Taras, *Meech Lake and Television News*, in Gibbins, *supra*, note 6 at 219; E. Alboim, *Inside the News Story: Meech Lake as Viewed by an Ottawa Bureau Chief*, in Gibbins, *supra*, note 6 at 235; L. Felske, *Fractured Mirror: The Importance of Region and Personalities in English Language Newspaper Coverage of Meech Lake*, in Gibbins, *supra*, note 6 at 247.

¹⁹ Clause 8 of the schedule to the Meech Lake Accord proposes a new section 148 of the *Constitution Act, 1867* which requires that a First Ministers' Conference be convened by the Prime Minister of Canada at least once a year to discuss the state of the Canadian economy and such other matters as may be appropriate. Clause 13 of the schedule replaces Part VI of the *Constitution Act, 1982*, with a requirement that a First Ministers' Conference be convened by the Prime Minister at least once a year and must include on its agenda Senate reform and fisheries as well as "such other matters as are agreed upon".

1. *Executive Federalism and the Absence of Public Input*

A number of authors are critical of clauses 8 and 13 of the schedule to the Accord because of their understanding of executive federalism as elitist and exclusionary. According to them, the exclusion of women, aboriginal peoples, social policy activists, northerners and other Canadians from the Meech Lake process was very much related to the deficiencies of executive federalism as a political process.²⁰ Schwartz, for example, states:

Part VI of the proposed Constitution Act, 1987 [which is found in clause 13 of the schedule to the Accord] would only reinforce the tendency of first ministers to see themselves as members of a miniature constitutional convention. The constitutional will must intensely reflect the philosophies and partisan political aims of the eleven leaders, rather than the shared resolve of Canadians that is crystallized through a sustained period of serious debate.²¹

A number of authors have emphasized the “maleness” of executive federalism,²² and others point out that there is no representation of aboriginal peoples at First Ministers’ Conferences.

With respect to the latter point, clause 13 of the schedule to the Accord provides no guarantee of aboriginal participation, nor even input, at First Ministers’ Conferences. According to Schwartz even the most limited representation of aboriginal peoples in First Ministers’ Conferences is unlikely to occur if the provision for First Ministers’ Conferences in the Accord is entrenched:²³ Senate reform and fisheries jurisdiction are mandatory items on the agenda of First Ministers’ Conferences as provided for in the Accord, while aboriginal issues are not.²⁴ Indeed, the exclusion of aboriginal peoples is even worse than Schwartz portrays it. Fisheries *are* after all an aboriginal issue. “It is incredible”, according to Chief Erasmus, “that the First Ministers are planning to discuss fisheries in the absence of aboriginal people, when everyone in Canada knows that fishing is an aboriginal right, confirmed in many treaties, and is an industry in which several first nations earned their livelihood”.²⁵ Without aboriginal participation at future

²⁰ Cairns, in Swinton and Rogerson, *supra*, note 2.

²¹ Schwartz, *supra*, note 3 at 115.

²² D. Greschner, *How not to Drown in Meech Lake: Rules, Principles and Women’s Equality Rights*, in Swinton and Rogerson, *supra*, note 2 at 55; Barrie, *supra*, note 12.

²³ Schwartz, *supra*, note 3 at 120. Schwartz notes that representation of several aboriginal leaders at “cozy Meech-like get togethers” would not reflect the ethnic diversity of aboriginal peoples, nor their commitment to democratic decision-making.

²⁴ *Ibid.* at 122.

²⁵ G. Erasmus, *Native Rights*, in Gibbins, *supra*, note 6 at 182.

first ministers' meetings, according to Chief Erasmus, there is a substantial risk "that aboriginal rights, interests, status, and aspirations [will be] further undermined".²⁶

2. *Disempowering the House of Commons and Legislative Assemblies*

Entrenching executive federalism in the Constitution raises concern about "more *fait accomplis* hammered out away from the elected assemblies".²⁷ In a political system like ours where rigid party discipline is the rule, to the extent that executive federalism is promoted, the role of the more open and democratic legislative assemblies and House of Commons in political decision-making will be weakened. As Gold puts it:

The institutionalization of First Ministers' meetings on the senate and the fisheries further establishes the permanency of this undemocratic apparatus. . . . The additional federal provincial machinery thus required will sooner or later lead to the establishment of a formal First Minister secretariat. The worst fears of those who have long warned of creation of yet another level of quasi government, and a nearly unaccountable one at that,, will be that much closer to fruition.²⁸

Defenders of First Ministers' Conferences emphasize the efficiency of the process. Both Hogg and Courchene point out, for example, that first ministers are able to make commitments to each other concerning executive or legislative action which they are in a position to carry out because they can "deliver" their legislatures.²⁹ As well, both authors portray the entrenchment of First Ministers' Conferences in the Constitution as mere confirmation of an already existing practice.³⁰

The argument that executive federalism is an efficient form of political decision-making does not, of course, answer the concerns of those who view it as an attenuation of democracy. It does not tell us why we should prefer efficiency when it entails curbing participation. Hogg, for example, begs the question of where to establish the balance between efficiency and democracy. He notes that "at first blush, the group [of eleven first ministers] seems to be too small and too narrowly composed to serve as a constitutional convention". His answer to this difficulty is, however, unsatisfactory: "The reality is that the evolution of responsible government in Canada has concentrated extraordinary power in the hands of these eleven first ministers."³¹ It is not clear

²⁶ *Ibid.*

²⁷ T.J. Courchene, *Meech Lake and Federalism*, in Swinton and Rogerson, *supra*, note 2 at 137.

²⁸ Gold, *supra*, note 12 at 149.

²⁹ Hogg, *supra*, note 4 at 53; Courchene, *supra*, note 27 at 139.

³⁰ Hogg, *ibid.*; Courchene, *ibid.* at 137-8.

³¹ Hogg, *ibid.*

why this "reality" is desirable, nor why it should be perpetuated through constitutional entrenchment.

Courchene is similarly unclear on the point. He acknowledges that increases in the scope of executive federalism necessarily correspond to erosion of the powers of the House of Commons (and, presumably, provincial legislatures). He then says, "one way of countering the influence of executive federalism is to move away from responsible government — hardly an appealing prospect for Canadians".³² The inference is that executive federalism is somehow a necessary feature of responsible government; that the key to responsible government is the capacity of first ministers to reach agreements and deliver their respective legislatures through party discipline. We have always understood the *ideal* of responsible government as meaning something quite different: that, to use Hogg's words, the first minister (and other members of the executive) "are accountable to their legislative bodies and, ultimately, to their electorates".³³ Courchene appears to be saying that responsible government requires legislatures be responsible to executives. Yet this is exactly the antithesis of responsible government as a democratic ideal.

III. THE DISTINCT SOCIETY AND LINGUISTIC DUALITY CLAUSES

The undemocratic aspects of the Meech Lake Accord go deeper than the process leading up to the Accord or its proposals concerning executive federalism. Indeed, as we shall see, the exclusivity and elitism of the Meech Lake process is very much reflected in the final document by its failure to include in a substantial way the concerns of aboriginal peoples, women and ethnic minorities. This failure is correctly condemned by a number of authors. We agree with them that the Accord's exclusion of various groups from constitutional politics is wrong *per se*. We will argue, however, that it does not follow from this that *inclusion* of provisions reflecting the concerns of these groups would actually provide them with any concrete benefits. The hallmark of constitutional politics is to turn complicated and controversial political issues into questions about the proper interpretation of abstract textual prescriptions. The Supreme Court of Canada is then given the final say on their meaning.³⁴ Thus, a vague constitutional guarantee provides nothing more than a right to have the legal profession and judiciary — institutions not known historically for their empathy with disempowered groups — hammer out a "solution" to a complex political problem.³⁵

³² Courchene, *supra*, note 27 at 139.

³³ Hogg, *supra*, note 4 at 53.

³⁴ Mandel, *supra*, note 11.

³⁵ Petter, *supra*, note 11.

While one cannot deny the importance of exclusion at the level of symbolic politics, abstract provisions purporting to include particular groups in the Constitution will not necessarily go beyond symbolism. In particular, constitutional recognition of women, aboriginals or ethnic minorities, if at the same level of abstraction as the Accord's recognition of language duality and Quebec's distinctiveness, would not necessarily lead to concrete gains for these groups. The proof is, indeed, in the pudding. As we will argue at the end of this section, the inclusion of a "distinct society" clause in the Constitution, while potentially of some symbolic value, will not necessarily function to advance the historical aspirations of Quebec to promote and preserve its language and culture and may, indeed, be an impediment to the realization of those aspirations.

A. *The Legalization of the "National Question"*

Section 1 of the Meech Lake Accord, if entrenched in the Constitution, would transform the question of Quebec's distinctiveness into a legal issue.³⁶ Inclusion of the "distinct society" clause will have the effect of focussing discussion of the question of Quebec's relationship with the rest of the country on technical questions of construction and interpretation — the lawyerly search for the truest reading of a constitutional prescription. Indeed, this has already happened. In place of the heated and politicized debates about Quebec to which we have become accustomed, we see commentators raising "fascinating" and "interesting" questions about how the words of the Accord fit together. When reading commentaries on Meech Lake one cannot help but notice the enthusiasm with which lawyers and law professors embrace

³⁶ 1. The *Constitution Act, 1867* is amended by adding thereto, immediately after section 1 thereof, the following section:

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.

the legalistic challenge presented by section 1 of the Accord. The most common questions raised relate to the interaction of the distinct society and linguistic duality clauses with the existing distribution of powers between federal and provincial governments, and with the *Canadian Charter of Rights and Freedoms*.

Technically, the relevant provisions enunciate a principle of interpretation for the rest of the Constitution, and then affirm certain "roles" for federal and provincial governmental and legislative bodies. Many of the difficulties in the technical/legal debate about section 1 of the Accord stem from the use of the word "roles". As Woehrling points out, the assigning of a role is a new approach in Canadian constitutional law.³⁷ How does a role compare to a legislative power, or to a duty or obligation? Are the roles new or are they merely declaratory of existing ones? Do they add to existing legislative powers, or do they limit the way these powers may be exercised from now on? In the context of the division of powers, commentators ask whether the interpretive provisions and affirmed roles, specifically as regards Quebec forming a distinct society within Canada, alter the federalism scheme found in the former Constitution Acts. In particular, because the Accord was agreed to by Quebec to satisfy its historical aspirations, should it not acquire new, exclusive and sovereign jurisdiction, at least in respect to language, culture and social policies? The position among most of the scholars who address the issue is that section 1 of the Accord does not modify the existing distribution of powers. Subsection 4 of the proposed section 2 of the *Constitution Act, 1987* is relied on in support of this claim.³⁸ At the same time, however, commentators appear to agree that "whether or not there is a grant of legislative power in [the proposed] s. 2, a new interpretive direction will be added to the Constitution".³⁹

The question raised concerning the *Charter* is this: by what criteria does one resolve a conflict between the requirements of section 1 of the Accord and those of the *Charter*? For example, assuming entrenchment of the Accord, if the Quebec government exercised its power to promote the distinctiveness of Quebec by passing a piece of legislation, would that legislation be subject to the *Charter*? Or would it be immune from the *Charter* because the *Constitution Act, 1987* is subsequent to the *Charter*?⁴⁰ Textual support for the view that such legislation would be immune from the *Charter*, at least in relation to

³⁷ J. Woehrling, *Les clauses de l'Accord relatives à la dualité linguistique et la reconnaissance de Québec comme "société distincte"*, in Forest, *supra*, note 7 at 16.

³⁸ Woehrling, *ibid.* at 17-18; Hogg, *supra*, note 4 at 14-15; but see also Smith, *supra*, note 2 at 41, for an opposing viewpoint.

³⁹ Smith, *ibid.* at 41.

⁴⁰ See B. Slattery, *The Constitutional Priority of the Charter*, in Swinton and Rogerson, *supra*, note 2 at 86.

the interests of certain groups, is found by some commentators in section 16 of the Accord.⁴¹ According to that section nothing in section 1 of the Accord affects *Charter* provisions concerning aboriginal rights or multiculturalism. Some argue that, by exclusion, all other provisions of the *Charter* are not exempt from the operation of section 1 of the Accord.⁴² This has raised concern on the part of a number of commentators that the gender equality guarantee of section 15 of the *Charter* could be over-ridden by the "distinct society" clause.⁴³

Others argue that section 1 of the Accord does not take precedence over the *Charter*, but can only be relied upon by courts when interpreting, under section 1 of the *Charter*, the reasonableness of limits on individual rights imposed by Quebec in pursuit of preserving or promoting its distinctiveness, or by Canada or a province in preserving linguistic duality. Thus, the Accord would not jeopardize the protection of *Charter* rights in Quebec, but would provide for, "un aménagement original du régime des droits et libertés qui concorde avec 'la reconnaissance de ce que le Québec forme au sein du Canada un société distincte'".⁴⁴ Under this approach, section 16 is merely cautionary, "designed to reassure native people and other ethnic, linguistic or cultural communities that the recognition of linguistic duality and Quebec's distinct society is not inconsistent with the protection of other distinct communities in Canada".⁴⁵

B. *The Politics of Exclusion: Aboriginal People, Ethnic Minorities and Women*

The legalistic debate about the distinct society and linguistic duality clauses is, like many legal debates, ultimately unsatisfying. There are at least two plausible readings of the relevant clauses; they are in conflict and, if the Accord is entrenched, the "solution" will be provided by the Supreme Court of Canada. Notwithstanding the technical dimensions of the debate around the relationship between the Accord and the *Charter*, however, the politics of the Accord are clearly

⁴¹ 16. Nothing in section 3 of the *Constitution Act, 1867* affects section 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 the *Constitution Act, 1867*.

⁴² K.E. Swinton, *Competing Visions of Constitutionalism: Of Federalism and Rights*, in Swinton and Rogerson, *supra*, note 2 at 287.

⁴³ Smith, *supra*, note 2; Greschner, *supra*, note 22; K. Mahoney, *Women's Rights*, in Gibbins, *supra*, note 6 at 159; Swinton, *ibid.*

⁴⁴ A. Morel, *La reconnaissance du Québec comme société distincte dans le respect de la Charte*, in Forest, *supra*, note 7 at 57. See also Slattery, *supra*, note 40; Hogg, *supra*, note 4 at 16; Swinton, *ibid.* at 286; Woehrling, *supra*, note 37 at 170.

⁴⁵ Hogg, *ibid.*

exclusionary. As one commentator states, the significance of Meech Lake "must be found. . . at the symbolic level".⁴⁶ And, at this level, the Accord can be understood as confirmation of the view that the fundamental structural constituents of Canada's polity are the provinces and the two linguistic groups, French and English. The "visions" symbolized by Meech Lake:

[A]re those which relate to the traditional, historic divisions or cleavages which have shaped Canadian political life. These include relations between French and English-speaking Canadians, between provincial and national communities and between federal and provincial governments. Meech Lake is really about these themes — a resolution of a traditional and continuing agenda. It is about the pattern of Canadian federalism.⁴⁷

The message is that Canada is *constituted* in accordance with the limited framework inherent in the traditional view.

The framework is exclusionary by definition. Within it, there is little room for claims that do not fit the traditional federalism scheme to be articulated and addressed. At the highest level of political ordering, the Canadian community is defined in narrow and limited terms. The Accord provides a framework that constitutes Canada solely in terms of provincial units and ethnic duality representing the two colonial powers. This has the effect of making invisible, for constitutional purposes, aboriginal peoples and ethnic communities other than those representing the colonial powers, as well as any other groups, including women. Section 1 of the Accord symbolizes, through that which it excludes, that Canada is to be defined exclusively from the perspective of the heirs of the European imperial powers who colonized it. That is nothing short of an outrage for aboriginal peoples who were here long before the French and English arrived, and who were victims of French and English imperialism, and it is a profound insult to ethnic communities who are neither English nor French.

Chief George Erasmus, National Chief of the Assembly of First Nations, develops this point in the context of the concerns of aboriginal peoples:

[T]he express recognition of Quebec as a distinct society] perpetuates the idea of a duality in Canada, and strengthens the myth that the French and the English peoples are the foundations of Canada. It neglects the original inhabitants and distorts history. . . . The amendment fails to give explicit constitutional recognition to the existence of First Nations as distinct societies that also form a fundamental characteristic of Canada.⁴⁸

⁴⁶ I. Bernier, *Meech Lake and Constitutional Visions*, in Swinton and Rogerson, *supra*, note 2 at 243.

⁴⁷ R. Simeon, *Meech Lake and Visions of Canada*, in Swinton and Rogerson, *supra*, note 2 at 300.

⁴⁸ Erasmus, *supra*, note 25 at 180.

It is, indeed, inexcusable that aboriginal peoples are not included in a provision purporting to state the fundamental ethnic characteristics of Canada. Chamberlain points out that, while the exclusion of aboriginal people from the Constitution is not a new phenomenon, such exclusion is given "menacing constitutional encouragement" when in the context of a provision aimed at defining the fundamentals of Canada.⁴⁹ Ultimately, in Chamberlain's view, "the distinct society provision will diminish constitutional tolerance for effective expressions of aboriginal sovereignty, and distort constitutional acknowledgement of aboriginal rights".⁵⁰

The timing of the Meech Lake Accord adds insult to injury for aboriginal peoples. As Schwartz points out, the Accord was signed only months after the last constitutionally required First Ministers' Conference on aboriginal peoples at which no agreement was reached on entrenching a right to self-government for aboriginal people.⁵¹ Chief Erasmus notes, "We were told for five years that governments are reluctant to entrench undefined self-government of aboriginal people in the Constitution, yet there is an equally vague idea of distinct society, unanimously agreed to and allowed to be left to the courts for interpretation."⁵² Parts of the Accord may actually function to impede the struggle for aboriginal self-government by making it nearly impossible for the Yukon and Northwest Territories to achieve provincial status.⁵³ Within this wider context of exclusion, section 16 of the Accord is hardly an adequate reassurance for aboriginal peoples. Chief Erasmus notes that, "this was the barest minimum that the aboriginal leaders had advocated, and the fact that we got the bare minimum seems to reflect the attitude of First Ministers to do the bare minimum in dealing with the rights of aboriginal people".⁵⁴

The exclusionary framework of the Accord operates against other groups as well. With respect to ethnicity, for example, the section 16 protection of the multiculturalism provision of the *Charter* is not reassuring when the whole framework of the Accord is exclusionary. Whyte points out that, in constitutionalizing ethnic duality, the Accord "produces a shift away from ethnic accommodation more profoundly understood".⁵⁵ The restrictive framework of the Accord is, for Whyte, a lost opportunity for "visioning our future":⁵⁶ "The political values of tolerance, adaptation, accommodation, celebration of diversity and

⁴⁹ J.E. Chamberlain, *Aboriginal Rights and the Meech Lake Accord*, in Swinton and Rogerson, *supra*, note 2 at 12.

⁵⁰ *Ibid.* at 14.

⁵¹ Schwartz, *supra*, note 3 at 56.

⁵² Erasmus, *supra*, note 25 at 180.

⁵³ See clauses 9 to 12 of the schedule to the Accord. Erasmus, *ibid.* at 183.

⁵⁴ Erasmus, *ibid.* at 179. See also Schwartz, *supra*, note 3 at 52.

⁵⁵ J.D. Whyte, *The 1987 Constitutional Accord and Ethnic Accommodation*, in Swinton and Rogerson, *supra*, note 2 at 266.

⁵⁶ *Ibid.* at 269.

promotion of the worth of difference are not represented in the Meech Lake agreement. The fundamental restructuring of the state that has taken place in the Meech Lake process seems to be sadly anomalous and out-of-date."⁵⁷

The reasons for dissatisfaction with the Accord include, as we have seen, concerns about women's equality claims under section 15 of the *Charter* being subordinated by the courts in the name of Quebec's promotion of its distinctiveness or Canadian protection of linguistic duality in accordance with section 1 of the Accord. There is an important difficulty with this concern: its plausibility depends on the courts actually interpreting the *Charter's* guarantee of gender equality to advance the equality claims of women, something they have not yet done in any substantial way.⁵⁸ Feminist concerns, however, go further than the technical/legal issues and may be better understood at the symbolic level. If the Accord is saying that Quebec's distinctiveness and Canadian linguistic duality are more fundamental and important than women's equality claims, this is a disturbing message. In this sense there may be an analogy between the position of women and that of aboriginal peoples and ethnic communities. The distinct society and linguistic duality clauses imply that women as a group are not a fundamental constituent of the Canadian political community. In other words, the traditional federalism framework of the Accord excludes women as a group from constitutional politics by including only provinces and language groups. Thus, the problem is not confined to the issue of whether the actual *Charter* rights of women are overridden. Rather, it extends to the fact that the group identity of women is given no recognition as having a place in the constitutional community.⁵⁹

C. *The Politics of Inclusion: Quebec as a Distinct Society*

The Accord's exclusionary politics are to be regrettable. The message that various groups are excluded from constitutional politics runs counter to the democratic emphasis on enhancing participation in the governmental process, and it is a profound insult to the excluded groups. On the other hand, it is important to realize that while exclusion is undesirable *per se*, it does not follow that a mere formal and abstract *inclusion* of the excluded groups would necessarily provide anything more than symbolic and rhetorical recognition. There is always a large gap between the vague guarantees provided in a constitutional document and the concrete benefits to the supposed beneficiaries of the guarantees. Women fought long and hard for the

⁵⁷ *Ibid.* at 268.

⁵⁸ See J. Fudge, *The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles* (1987) 25 OSGOODE HALL L.J. 485; Mandel, *supra*, note 11 at 256-73.

⁵⁹ Swinton, *supra*, note 42 at 284; Whyte, *supra*, note 55 at 264-65.

guarantee of sex equality in section 15 of the *Charter*, yet, to this point, there has been little to celebrate from the perspective of women's equality claims in judicial interpretations of section 15.⁶⁰ In a similar vein, recognition in the Accord of a place in the constitutional framework for excluded groups similar to the recognition of Quebec's distinctiveness, while no doubt of immense symbolic importance, would not necessarily translate into concrete gains for these groups.

Indeed, the "distinct society" provision is itself an example of the gap between abstract constitutional recognition of a group's place in the Constitution and the actual promotion of that group's claims. The distinct society clause superficially appears to end the passionate political struggle around Quebec nationalism by turning it into a legal debate about the correct interpretation of a vague constitutional provision. The issue is apparently resolved by removing it from the hands of Quebecers (who were at least given a say in the 1980 Referendum) and into those of federally appointed judges. Concerns about the potential erosion and attenuation of Quebec's socioeconomic, linguistic and cultural distinctiveness are not, however, necessarily met by the vague and ambiguous recognition of Quebec as a distinct society. There are very few who deny that Quebec is a distinct society. The question of what exactly that means in terms of the relative powers of Quebec, the other provinces and the federal government, however, is not answered by the constitutional labelling of Quebec as a distinct society. The "distinct society" clause has more to do with who can decide what Quebec's distinctiveness means than with the question of whether Quebec is a distinct society. In short, it empowers the Supreme Court of Canada to provide the ultimate definition of what it means for Quebec to be distinct. And this is unlikely to advance Quebec's aspirations given the several examples of that Court's ambivalence toward any substantial and concrete manifestations of those aspirations.⁶¹

At the end of the day, while the distinct society clause may have a "great symbolic value",⁶² it is unlikely to advance in any significant way Quebec's historical aspirations. The clause guarantees nothing of a concrete nature for Quebec, yet it has been taken in exchange for Quebec's consent to the *Constitution Act, 1982*. Indeed, the symbolic value of the distinct society provision may, in the absence of concrete guarantees of cultural and linguistic autonomy, turn out to be an impediment to the securing of such autonomy.

Sociologists of law often speak of the ideological function of abstract legal ideals in legitimating realities that are far removed from those ideals. The process is referred to as reification. The distinction

⁶⁰ *Supra*, note 58.

⁶¹ See Mandel, *supra*, note 11 at 90-127.

⁶² R. Gibbins, *Introduction: Meech Lake and Quebec*, in Gibbins, *supra*, note 6 at 64.

between the actual web of social relations in which people live and the legal idealization of the world is collapsed. The social situation of people is portrayed in terms of some abstract legal ideal and considered as justified on that basis.⁶³ The granting of a formal legal guarantee of Quebec's distinctiveness in the Meech Lake Accord may function in the future to legitimate denying Quebec the actual power to preserve and promote its distinctiveness. The historic struggle of Quebecers to preserve and promote a distinct society will be portrayed as having been fought and won: resolved through the granting to Quebec of a constitutional guarantee. In light of this, further complaints, protests and actions by the government and/or people of Quebec will be deemed illegitimate to the extent that they go further than the content of the constitutional guarantee of distinctiveness as determined by the Supreme Court of Canada. In light of the restrictive language of the Accord and the Supreme Court of Canada's several indications of commitment to minority language rights in Quebec, it is unlikely that that content will amount to very much from Quebec's perspective.⁶⁴ In short, the formal guarantee of distinctiveness for Quebec will be relied on to delegitimize the continued struggle on Quebec's part; while, as a matter of substance, Quebec may gain nothing.

⁶³ See, e.g., S. Picotto, *The Theory of the State, Class Struggle and the Rule of Law*, in P. Beirne and R. Quinney, eds, *MARXISM AND LAW* (New York: John Wiley and Sons, 1982); A. Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law* (1985) 19 *LAW & SOC. REV.* 11; C. Sumner, *READING IDEOLOGIES* (London: Academic Press, 1979) at 267-77.

⁶⁴ Mandel, *supra*, note 11 at 88.

