THE MEECH LAKE ACCORD: THE END OF THE BEGINNING--OR THE BEGINNING OF THE END?

J. Peter Meekison

In 1965 the Royal Commission of Bilingualism and Biculturalism referred to the greatest crisis Canada had ever faced. The following is from the Commission's Preliminary Report:

> "The Commissioners, like all Canadians who read newspapers, fully expected to find themselves confronted by tensions and conflicts. They knew that there have been strains throughout the history of Confederation; and that difficulties can be expected in a country where cultures exist side by side. What the Commissioners have discovered little by little, however, is very different: they have been driven to the conclusion that Canada, without being fully conscious of the fact, is passing through the greatest crisis in its history.
>
> The source of the crisis lies in the Province of Québec ..."

I believe we are in a similar state of affairs today.

The title selected for this address is deliberately provocative, but to me it vividly portrays the dilemma in which Canadians now find themselves. Viewed as the "End of the Beginning", Meech Lake can be characterized as the end or culmination of the first major series of reforms to the Canadian Constitution since 1867. It represents the minimum agreement necessary for the Province of Québec to accept, politically, and thereby legitimize, the constitutional reforms which were proclaimed in April 1982. It must be remembered that the 1982 reforms were in large measure a response to the 1980 Québec referendum. Unfortunately Québec refused to sign the agreement and, in fact, rejected it.

The second title raises the spectre of continuing Québec concerns with Canada's Constitution. Who knows when or why another constitutional crisis with Québec might erupt? Without a firmly stated and formalized commitment to the nation's fundamental political document by the Government of Québec, the legitimacy of the Constitution to approximately one quarter of Canadians remains in doubt. To understand both views requires some understanding of the origins of Meech Lake. The government of Robert Bourassa cautiously entered the arena of constitutional reform by means of a speech by Gil Remillard, Intergovernmental Affairs Minister, in May 1986. The conditions for Québec's acceptance of the 1982 Constitution were clearly spelled out. They included:

(1) Recognition of Québec as a distinct society.
(2) A greater provincial role in immigration.
(3) A provincial role in appointments to the Supreme Court of Canada.
(4) Limitation in the federal spending power.
(5) A veto for Québec on constitutional amendments.

Once this speech was given, the stage was set. Throughout the next several months, private discussions or negotiations between Québec officials, ministers, and representatives of other governments took place. The first of these discussions took place in Edmonton during the 1986 Premiers' Conference at which time the idea of an agenda, limited to Québec's objectives (and this is important), with a commitment to future constitutional discussions, was endorsed. Step by step, the discussions led to Meech Lake.

Unlike earlier constitutional discussions which had been characterized by a series of intergovernmental conferences, the discussions leading to Meech Lake were primarily

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THE MEECH LAKE ACCORD
DISTINCT SOCIETY CLAUSE

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 Québec 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 Québec 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.

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bilateral. They took place between Québec officials and ministers, or their counterparts, in the other governments. They also took place between representatives of the federal government and all provinces. The process was unusual but was a result of an abundance of caution; the last multilateral conference ended in failure. All governments accepted the fact that failure was not in anybody's interest and would probably lead to a refusal (or inability) of the Bourassa government to pursue the matter again. In other words, it was necessary to assess and weigh constantly the probability of success while realizing that the longer the process continued, the more difficult it would be to disengage without further damage to national unity.

On the road to Meech Lake there were a lot of questions, including: Where is the point of no return? Does the risk of failure increase as one goes from general principles to constitutional texts where differing interpretations abound and shades of meaning may become divisive? Would failure to reach agreement indicate to Québec that the rest of Canada was unwilling to negotiate a constitutional settlement? If there were a failure, would future constitutional demands from Québec be more or less extensive? Was Québec adamant on all five conditions? Regardless of the answers to these questions, after several months of essentially private bilateral discussions, the probability of success was considered reasonable but by no means assured and the Meech Lake conference was scheduled. There could be no turning back. One month later, a second meeting was held in the Langevin Block to finalize the agreement. The fact that it took all day and night to conclude an agreement indicates that the understanding reached a few weeks earlier was more fragile than one might have expected.

Constitutional reform has, in one way or another, been a fact of life of the Canadian political process for at least 100 years and the subject of extensive debate since 1968. Since 1981 constitutional change has been made problematical because Québec has refused to participate as an active member of constitutional discussions. For example, in 1983 Québec abstained from voting on the aboriginal rights amendment. That amendment was approved because it met the minimum requirements of the amending formula of two thirds of the provinces representing fifty percent of the population. That was the first (and to date only) amendment to the Constitution since 1982. Had the amendment been one requiring unanimity or one where Ontario had registered its dissent, the amendment would have failed. Thus, for practical reasons, it is important to have Québec fully involved in constitutional deliberations. It is also important for reasons of national unity to have Québec a full and active participant in any constitutional negotiations.

It should be recognized that all five items identified by Québec had previously been discussed at constitutional conferences which spanned more than five decades, ranging from a limited review of "distinct society" to the exhaustive analysis of the amending formula. In this respect there was nothing new, surprising, or unexpected about the five subjects.

Does the Accord meet Québec's five demands? The answer is yes, but there is also an important modification inserted at the insistence of Alberta and other provinces--the concept of provincial equality. First manifested in the 1982 amending formula, that principle has been carried forward into Meech Lake in both the preamble to the amendment and in its various provisions, especially the amendment to the amending formula, where every province is given a veto, not just Québec; in the provisions for First Ministers' Conferences where provinces are given an equal say at the table; and in the provisions on the spending power and appointments to the Senate and Supreme Court. In other words, Québec is not singled out for preferential treatment or special status.

The one area where there is a difference is in the first section dealing with distinct society. Here the difference is real but understandable. Québec is already different in terms of its constitutional status. This distinction was recognized and protected in 1867, both in terms of the language provisions (s.133) and the uniformity of laws provision (s.94) where Québec was exempted to maintain the civil law. The demography of the province was recognized in terms of fixed representation in the House of Commons. Later, there was a statutory requirement for three seats on the Supreme Court to go to Québec. Other differences can be identified but the reality is that Québec's distinctiveness was identified and given constitutional recognition and protection as long ago as 1867. To me, Meech Lake is a 1989 manifestation of that principle--it is not special status.

Viewed in this light, Meech Lake represents the end of the beginning. As of today, the House of Commons has twice given its approval to the Accord as have eight provinces. Because of changes in their governments, Manitoba and New Brunswick have not, and Newfoundland is threatening to withdraw, raising the possibility that the Accord may still not receive the unanimous consent that is required before it can come into effect. At this stage of the process, failure to ratify could have serious consequences for Canadian unity--the beginning of the end.

The fact that there may still be difficulties leads one to assess the nature of the criticisms which have been raised. There are many but they can be summarized as follows:

(1) the distinct society clause is seen to undermine the Charter and to grant special status to Québec,
(2) acceptance of decentralization and therefore balkanization of the federal system,

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(3) rigidity,
(4) the process.

Under the first criticism one can include, for example, the concern of women's groups and ethnic minorities that the distinct society clause may undermine the Charter. When the distinct society clause was drafted, two clauses in the Charter (both of them interpretation clauses) were specifically protected, thereby raising the question of the status of the others. What will the courts say? Nobody knows, but my own view is that the clause neither undermines the Charter nor confers special status. None of the three provincial reviews argued that special status will be established--and this after exhaustive and critical analysis.

The second line of reasoning attacks the section on the spending power and provincial involvement in the appointment of Supreme Court Judges and Senators. Essentially the argument here is that these significantly limit the ability of the federal government to establish national programs and control national institutions. To me, these provisions are neither unreasonable nor unrealistic in a federal system. For one thing, the spending power clause refers to areas of exclusive provincial jurisdiction.

The third criticism is aimed at the changes to the amending formula. Although the existing amending formula already has a few items which require unanimity before they can be changed, the proposed additions have created some controversy. For example, critics state that senate reform is, for all intents and purposes, dead. Senate reform will be difficult under any circumstance and in my view will not proceed without Québec's participation. It will certainly not be approved without Québec's agreement.

With respect to process, there is considerable criticism over the process of intergovernmental negotiation and the lack of public input. What was particularly galling to many was that the Accord, once it had been worked out by governments behind closed doors, could not be changed for fear the agreement would collapse. I, for one, share the view that any amendments now would destroy the agreement. Moreover, to argue that the Accord is a result of a single 20 hour negotiation distorts reality.

When an agreement is reached after long and sometimes difficult negotiations, it is usually based on a series of compromises and the recognition that perfection or absolutes may be impossible, but acceptable solutions are attainable. To pull on a particular thread could unravel the entire agreement because the delicate design, so carefully woven, can be easily destroyed. There will be future discussions. All of Canada's problems cannot be solved at once or, for that matter, through the constitutional process.

The frustration felt by many is reflected in the Report of the Ontario Committee which, while it recommended the agreement be accepted, was at the same time critical of the process by which it was reached.

There is no ready answer to these criticisms which are well-intentioned and, in most instances, well informed. Legal scholars differ on the impact on the Charter of the "distinct society" clause. The Charter already has reasonable limits and the courts have to balance the terms of section 1 of the Charter with this new interpretation clause. People who favour a balanced federal system with strong provinces feel that there has been too much centralization already and that these changes reverse that trend. Although unanimity is supposed to be impossible to achieve, it has been achieved several times in the past and, if Meech Lake is agreed to, it will be the result of unanimity. Finally, if Meech Lake is approved, a new era of constitutional change will emerge with an entirely new dynamic with respect to constitutional discussion.

"The risks associated with failure are to me greater than the fears expressed by the critics."

In assessing the criticisms, all of which are found in the Ontario, New Brunswick and Manitoba Committee reports, my view is that the arguments for national unity outweigh the specific criticisms of the accord. In other words, the risks associated with failure are to me greater than the fears expressed by the critics. Some of these can be overcome in the course of future constitutional discussions. One thing is clear to me. There will be no serious constitutional negotiations for a long time without the adoption of the Meech Lake Accord. For example, the Ontario, Manitoba and New Brunswick reports propose that aboriginal rights be discussed at future conferences. The chances of these discussions taking place without Meech Lake are virtually nil.

The political climate and mood has shifted considerably in the two and one half years since Meech Lake was agreed to by First Ministers. To me, perhaps the greatest change is the climate in Western Canada. Not only is there an apparent indifference to the issue but also there is growing hostility to Québec. After the Parti Québécois election in 1976 and the spectre of a referendum, there was an outpouring of affection. Questions such as, "What can we

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do?", "What does Québec want?", "What have we done?" were asked. Petitions were circulated in shopping centres to demonstrate our affection and concern.

Today one does not find that. Instead one is more inclined to hear, "let them go if they want to". The most obvious manifestation of this are the debates at a recent convention of the Reform Party. Another is a letter I received this past week from the Western Independence Association of Canada complete with a draft constitution for the west and proclaiming the west as unilingual English. The use of the notwithstanding clause by Québec last year in Bill 178, and the decision to award the CF-18 contract to a Québec firm, have had a profound impact on the west. There is no avoiding this reality.

At the same time there is little understanding of what Meech Lake means or includes. Lise Bissonnette's recent column in the Globe and Mail referring to the distinct society clause as a "monster" is an accurate description of the many misperceptions which have arisen. This reality was clearly demonstrated recently at the November First Ministers' Conference.

Having said all of this, what of the future? From the recent First Ministers' Conference it is clear that the future of Meech Lake is tenuous.

I, for one, subscribe to the fact that Mr. Bourassa is in a very difficult situation and cannot readily agree to amend the Accord. Québec's demands are very modest and reasonable. Consequently, it will be necessary to convince the Provinces of Manitoba, New Brunswick, and Newfoundland that there is more to lose than to gain by rejecting the Accord and to see if a parallel accord can be put together.

What should that accord contain? First, it should give a strong commitment to Senate Reform - something Mr. Wells referred to at the November conference. I would argue that progress on Senate reform could be the key that unlocks the door to progress. It is an item that all four western provinces have addressed positively as have three of the four Atlantic provinces.

Another suggestion is some agreement on the process of future change, i.e., after an agreement is reached on future amendments, public hearings should be held in Ottawa and in those provinces who choose to do so. No resolutions should be given final approval until this public process has been completed.

Another suggestion is an amendment clarifying the effect of the clause that limits the spending power on the equalization provisions in the Constitution (s.36(2)). Other changes would provide for Supreme Court and Senate appointments from the territories.

Another suggestion is to expand the scope of intergovernmental agreements to include communications--a proposal going back to 1976. Not only would this be of interest to Québec but also to Manitoba, which has denounced recent federal legislation in this area. This approach parallels the one already in place on immigration.

These are but a few ideas. I am sure there are others that can be considered. Many of them can be found in the committee reports.

What if Meech Lake is not agreed to in time? I, for one, believe that failure will bring to an end for the foreseeable future any chance of bringing Québec back to the constitutional table. We will have worked ourselves into, not out of, a constitutional stalemate. I can only hope that, during this period of discontent, there are no language crises such as the gens de l'air dispute of 1976 or the furor last year over Québec's use of the notwithstanding clause. It should also be recognized that any future negotiations will, in all likelihood, take place in a period of crisis. Consequently, one can surmise that the ante will be upped. One can also expect that the next Québec election will focus primarily on the question of independence.

What is most disconcerting is that while these problems are so obvious to those who are students of this subject, large segments of the public are either indifferent or ill-informed. We are sleepwalking towards a disaster. To avert it will require patience, hard work and all the diplomatic and negotiating skills our leaders can display. Despite my concern, I remain convinced that a solution will be found because I believe that common sense and goodwill will ultimately prevail.

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