Could the Meech Lake Accord Affect the Protection of Equality Rights for Women and Minorities in Canada?

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Constitutional Crisis?

On the one hand, passage of the Meech Lake Accord is seen as a serious threat to the Charter's guarantees of rights and freedoms. On the other hand, failure to receive unanimous provincial assent of the Accord is seen to have disastrous consequences for the future of the country. We have asked two participants in this debate, Lynn Smith and Peter Meekison, to present their views on the Meech Lake Accord. Each of their comments were originally delivered as lectures before different audiences at different stages of the debate. We thank them both for the valuable insights which follow. [ed.]

The Meech Lake Accord, if ratified, would bring about profound changes in many areas of constitutional law, including the national spending power, immigration, appointments to the Senate and to the Supreme Court of Canada, and the constitutional status of the Supreme Court of Canada.

The motivating force behind the Accord, however, was the need for a reconciliation between the rest of Canada and Québec, which had not assented to (though it had been bound by) the constitutional changes of 1982, including the entrenchment of the Canadian Charter of Rights and Freedoms. A linchpin of the agreement and reconciliation with Québec is the so-called "distinct society clause". It would become section 2 of the Constitution Act 1867 [reproduced on opposite page]. Section 2 must be read in conjunction with section 16 of the Meech Lake Accord (Constitution Act 1987):

16. Nothing in section 2 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 92 of the Constitution Act, 1867.

Before addressing the question whether the distinct society clause could have an effect on the protection of equality rights for women and minorities, we should address the question "what equality rights?" The rights referred to are those guaranteed in section 15 of the Charter (as well as sections 25, 17 and 28 of that document). Section 15 is the "working" equality rights guarantee: it states that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Section 25 is an interpretive clause saying that the Charter is not to affect aboriginal or treaty or other rights pertaining to aboriginal peoples of Canada; section 27 says the Charter is to be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians; and section 28 says that notwithstanding anything in the Charter,

the rights and freedoms referred to in it are guaranteed equally to male and female persons.

These are rights guaranteed to all Canadians, binding at least the federal and provincial levels of government

(and perhaps all levels of government), and enforceable through the courts. The final arbiter of the meaning of the equality rights is the Supreme Court of Canada, to which appeals from all provincial court systems come.

The equality rights resulted from the efforts of numerous individuals and organizations, seeking to obtain meaningful guarantees of equality in the Charter after the unfortunate results which had followed from the Canadian Bill of Rights. Of course, the 1980-82 process was not the first time that women or minorities had attempted to seek constitutional changes or to affect the nature of changes - for example, as early as 1928 with the Persons Case, women had attempted to bring about change. What was new in 1980-82 was that there had actually been some participation in the process of women, disabled people, and representatives of other normally excluded groups, prior to the proposed wording being achieved.

As is well known, despite the full public debate which had preceded it, the November Accord of 1981 (which resulted from a closed late-night meeting among some premiers and the federal representatives) left crucial guarantees for women and aboriginal peoples on the floor. The reinstatement of section 28 and section 35(1) (relating to aboriginal rights) in the final version of the Charter came about only after intensive lobbying and political pressure. One of the most commonly-expressed criticisms of the Meech Lake Accord relates to the similar way in which it was created: at a closed, all-night meeting at Meech Lake, the first ministers agreed on a package of amendments. There was no consultation with anyone outside a very limited number of advisors, and the package was then presented as a fait accompli, with no room for change unless "egregious errors" could be shown. (It is in the persistent unwillingness to countenance any changes to the Accord that the situation is different from that of the November Accord of 1981.)

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It may be asked whether we are talking about something principled here, or just about "special interest groups" seeking to advantage themselves. In other words, should the level of public participation in the formation of the 1982 Constitutional amendments (prior to and after the November Accord) be seen as a model of some kind or as just a happenstance of the 1980's? What is wrong with leaving statecraft up to the statesmen, and leaving constitution-making up to the "modern fathers of Confederation"? Clearly the First Ministers who signed the Accord saw nothing wrong in the closed-door process -- in fact, executive-level decision-making in closed meetings appears to be a preferred option, judging from the fact that it has been followed more and more frequently in recent years and would be constitutionalized and made compulsory on an annual basis by the Meech Lake Accord (section 50). And (through some amazingly distorted reasoning) the fact that women and aboriginal people managed, at the end of the day, to achieve reinstatement of their rights in the final version of the 1982 Constitution Act has been cited to show how powerful they are and, indirectly, to support a closed-door process.

I would suggest that in thinking about this issue, we should bear in mind three things. First, the individuals who created the November Accord in 1981 and the Meech Lake Accord in 1987 were geographically representative of Canadians (with the exception of those who live in the Yukon or Northwest Territories), but were demographically representative of Canadians only if one assumes that all Canadians are white, male, able-bodied, middle-aged and Christian. That assumption of course is ill-founded since the majority of Canadians are female, and when you add to that majority the number of men who are not white, or are disabled, non-Christian or elderly you come to a very high percentage of the Canadian population. Thus, with reference to the drafting of the terms of equality rights, the term "special interests" to refer to the great majority of the population seems inapt. And what happened with the November Accord shows exactly what can happen when the demographics are so skewed -- the interests of those not "at the party" are overlooked.

Second, the history of legal inequality in Canada is such that women, the disabled, members of racial minorities, and others, have real concerns about constitutional wording that leaves issues open for debate: one need only remember the wartime internment of Japanese Canadians, the treatment of native people, the disenfranchisement of women, the racial segregation in public places sanctioned by law, and the systematic overlooking of disabled people's needs. Even when the Canadian Bill of Rights section 1(b) was in effect from 1960 onward (it provides for equality before the law and the protection of the law without discrimination), there was no improvement since the courts interpreted its wording so narrowly. Thus, the concerns about legal inequality and

the need for strongly worded guarantees against it were not imaginary.

Third, Charter equality rights exist on a national plane; various individuals and groups worked to achieve them at a national level. Thus, in some sense, more people now than previously identify nationally with members of their ethnic or religious group, or on the basis of race or gender, rather than wholly with their co-provincialists or fellow French or English speakers. The process which led to the creation of the section 15 equality rights was important. Allan Cairns has commented that it amounted to a new method of constitution-making in that it involved a great many ordinary Canadians -- at least, Canadians who were neither First Ministers nor advisors to First Ministers. And the participation in the process led the organized representatives of the equality-seeking groups to consider that they had a specific interest in those parts of the Charter which they had worked to accomplish, and that they had set a precedent for future constitution-making processes, i.e. that there would be consultation at least to the extent of 1980-82.

The terms of the distinct society clause have been set out above [p.13]. They require that the Constitution of Canada be interpreted in a manner consistent with the recognition of two things: first, that it is a fundamental characteristic of Canada that there are French-speaking Canadians centred in the Province of Québec but also present elsewhere, and that there are English-speaking Canadians concentrated outside Québec but also present there; second, that the Province of Québec constitutes within Canada a distinct society. It goes on to say that both Parliament and the provincial legislatures have a role in preserving linguistic duality and that the Québec government and legislature have a role in preserving and promoting the distinct identity of Québec. Finally, it clarifies that these statements do not derogate from existing powers of Parliament or the legislatures.

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The question, then, is whether the distinct society clause might affect the equality rights in the Charter. I will first describe the debate about this issue as a political phenomenon, and then illustrate the legal arguments about it through giving an example of a case in which the distinct society clause might be used.

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The first ministers who were signatories, when the possible impact of the distinct society clause on equality rights has been urged, have reacted by saying "No -- we didn't mean it to have an effect -- our advisors tell us it won't." However, the opinions of those advisors have not been made public. Further, although some leading constitutional scholars have said that it is unlikely that the Accord will affect equality rights and that the risk of opening up the Accord and losing the consensus is not worth taking, others (probably equal in number and stature) disagree.

The argument that the first ministers' statements about their intentions should end the debate amounts to "Trust us". Equality-seeking groups do not see this as a preferred option, given past experience and given the Supreme Court of Canada's consistent refusal to give much weight to the statements of intention of the framers in construing the meaning of the Charter's provisions. These groups therefore contend that the Accord should be amended to make it clear that there is to be no effect.

The response from the supporters then begins with a concern that the Accord will fall apart and moves to a discussion of how liberal the Supreme Court of Canada has been in its interpretation of the Charter. This amounts to "Trust them". Again, this is not a preferred option, given that times change and courts change, and whether or not constitutional scholars predict a certain judicial interpretation, such predictions often prove inaccurate. For example, the Morgentaler decision came as a surprise to a great many observers. In any event, as described earlier, the predictions are mixed, depending upon the constitutional scholars making them.

For the balance of this discussion I will focus on the potential effect of the equality rights on women, although most of the arguments will be applicable to the cases of other equality-seeking groups such as the disabled and racial and religious minorities. The debate has not been a particularly civilized one, and has included the Prime Minister calling national women's groups "anti-Québec" for raising concerns about the wording of the Accord, and pointing out that some of the Québec women's groups have publicly stated that they are not concerned. First, it must be remembered that every national women's group stated its support for the recognition of Québec as a distinct society. The characterization of these groups as Trojan horses for anti-Québec forces was highly inaccurate. Second, one must resist leaping to the conclusion that, at least with respect to the effect of the distinct society clause on women's equality, the rest of Canada should respect the autonomy of Québec women and mind its own business. There are Québec women and women's groups supportive of the view that there is a threat to women's equality and that changes should be made. They argue that the position of the other groups is based on an unrealistically rosy picture of the situation of Québec women

today and on the premise that backsliding is impossible. As well, the interpretation of sections 15 and 28 equality rights for women arising in the Québec context in the Supreme Court of Canada could have an impact across Canada even though the distinct society clause itself applies only in Québec.

"There is no doubt that equality rights for women and minorities could be affected by the addition of the distinct society clause to the constitutional equation."

I will address a specific example in which the distinct society clause could be invoked, in order to bring out some of the legal issues. Let us assume that Québec matrimonial property legislation excludes business assets from the definition of "property" divisible between spouses upon divorce, and that this legislation is part of Québec's Code Civile. Let us also assume that the effect of the exclusion of business assets is to disadvantage women, since many more women than men are the home-making partners in marriage who forego the opportunity to acquire business assets in their own names.

A Québec woman now wishes to challenge the exclusion of business assets from matrimonial property, using section 15 of the Canadian Charter of Rights and Freedoms. She claims that she is denied equality under the law and the equal protection and equal benefit of the law because of her sex, and leads evidence to show that the exclusion of business assets has a highly disproportionate impact on women. (The Supreme Court of Canada in its first Charter equality rights decision - Andrews v. Law Society of B.C. - indicated fairly clearly that unintended effects as well as the purpose of legislation will be susceptible to section 15 review). The government or the husband may choose to defend the legislation on the basis that it does not violate section 15 -- it is "reasonable and fair" in the circumstances taking into account the fact that it relates to the internal arrangements of families, which are fundamental institutions of society both for linguistic and cultural purposes, and further taking into account the fact that the legislation is part of the unique and distinct civil law system. Alternatively, they might argue that even if the legislation is inconsistent with section 15 of the Charter, it is saved by section 1, which allows governments to limit Charter rights where the limits are demonstrably justified in a free and democratic society. Either way, the distinct society clause could be invoked as indicating a result which would uphold the legislation.

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The wife might argue that the distinct society clause should not be taken into account either in determining whether there is a violation of section 15 or under section 1 -- for example, she might argue that the wording "distinct society" in the context of the Accord refers only to a limited range of linguistic issues. The government and the husband could answer that many commentators, including representatives of the Québec government, have indicated a much wider reading of the clause, encompassing cultural and social matters in general, and in particular, matters such as the Code Civile.

The wife might argue that section 28 of the Charter "trumps" anything else, including the distinct society clause, because it says that notwithstanding anything in the Charter, the rights and freedoms in it are guaranteed equally to male and female persons. The government and the husband could riposte by pointing out that the distinct society clause is not in the Charter, but in an arguably more fundamental constitutional document, the Constitution Act, 1867. In any event, they could say, section 16 of the Meech Lake Accord makes it clear that section 28 is not to have that role. Section 16 expressly states that parts of the Charter (regarding multicultural and aboriginal rights) are to be unaffected by the distinct society clause. By inference, other parts of the Charter (such as sections 15 and 28) are to be affected.

The wife would have some answers to these arguments, and some others to make, but the point here is that the dispute would be a serious one. The existence of the distinct society clause could clearly make a difference to the court's conclusion about the particular case, and about the nature and extent of the equality rights guaranteed in section 15 of the Charter.

Because the Charter does apply to all provinces and territories, as well as to the federal government, judicial decision about the nature and extent of Charter rights in one province are influential in arguments about the meaning of the Charter wherever the issues arise. And since the Supreme Court of Canada is the final court of appeal for all provinces, it does not make sense to think that whatever limiting effect the distinct society clause might have on equality rights will be confined to one province.

As a final point in assessing whether the distinct society clause could affect equality rights outside Québec as well as internally, consider the importance of symbolic statements. The very *raison d'être* of the Meech Lake Accord is the symbolic reconciliation between Québec and the rest of Canada. Unfortunately, the process leading up to and following the Meech Lake Accord, in which equality-seeking groups were first excluded and then ignored and told it was too late to change anything (absent egregious errors), and the wording of section 16 of the Accord, clearly allowing for a hierarchy of rights to be recognized (in which women's

rights are not given priority), make a negative statement at the symbolic level. When values are important enough, steps are taken to protect them even if the steps are quite likely redundant (see, for example, section 29 of the Charter, protecting rights or privileges with respect to denominational, separate or dissentient schools). By inference, when steps are not taken to protect values where there is a reasonable basis to consider them at risk, those values are unimportant or less important than others.

In conclusion, there is no doubt in my mind that equality rights for women and minorities could be affected by the addition of the distinct society clause to the constitutional equation. Despite section 16, multicultural and aboriginal rights are still at risk as well because the sections said not to be affected are interpretive rather than substantive; the problem is that section 15 (the working equality section) is excluded.

The Special Joint Committee of the Senate and the House of Commons, although supportive of the Accord, said that indeed the distinct society clause would come into play, at least at the section 1 stage of Charter review, and would be "balanced" against competing interests such as equality rights of women and minorities. However, the Committee said, there is really no change because there has always been a balancing process contemplated under section 1. (This is like saying there is no change in a game being played on the teeter-totter when an extra player is made available to one side.)

Given that there is reasonable cause for concern that the distinct society clause will directly or indirectly tend to restrict the scope of Charter equality rights, both inside and outside Québec, why not amend to make it clear that the clause is not to have such an effect? The answer that it would imperil the Accord to open it up only increases the concern, since it leads one to suspect even more strongly that the impairment of Charter equality rights is intended and is seen as necessary and desirable -- otherwise, there could be no difficulty in making the desired change. When arguments are made that the country is on the brink of falling apart unless the Accord is ratified in its original form (and how can you women be so selfish as to protest that your Charter rights might be at risk?), it must be remembered that women (and others who seek changes to the Accord) did not create the timing. The leaders of the various governments of the day adopted a wholly closed process, chose the timing, elected to stonewall when problems with the Accord were pointed out, and cannot now be heard to blame others for a different state of affairs.

ADDENDUM

In March, 1988, when this talk was prepared, there seemed little chance that the Accord would not come into effect.

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The betting is now running the other way. Newfoundland, Manitoba and New Brunswick (in order of strength) have supported the need to make changes or create a parallel Accord to eliminate the possibility of weakening the equality rights. In Ottawa, Québec, and some other provinces, the stonewall against change (even minor change to rectify the error in omitting reference to section 28 in section 16 of the Accord) is still in place. Of course, so was the Berlin Wall until it suddenly came down.

From another direction, the British Columbia government has begun an initiative to deal with the Accord's amendments in stages, and to recognize each province (and territory?) as a "distinct society". Without having had the opportunity to read the proposal aside from newspaper commentary, I would venture the comment that it could lead to two possibilities, both of which seem unacceptable;

- (1) Any doubt about the potential effect of the "distinct society" clause on equality rights outside Québec would be eliminated. Each and every province and territory would have available the alleged need to preserve distinctly British Columbian/Albertan/whatever values, mores, ways of life, as an argument against claims of violations of equality rights. The matrimonial property issue, for example, could be played out in every province and territory in the way described above,
- (2) the "distinct society" clause would become quite meaningless in terms of what it was designed to accomplish - it may be as meaningless to say that each province or territory is a distinct society as it would be to say that everyone equally has the right to equality. If you are trying to move from inequality to equality, you don't get there by adding the same amount to each side of the balance. Instead, you right the balance by adding to the side that has been lacking. To fulfil Québec's aspirations for distinct recognition within Canada, you cannot say "Yes, yes, all provinces and territories are distinct, including you."

Based upon the newspaper commentary, the British Columbia agenda has "equality rights" set down for the third stage - which would be around 1993. It is difficult to know what this envisions. The point is not that women want the Meech Lake Accord to improve upon what is already in the Charter -- they just don't want it to make things worse. If that point is understood, there is little sense in putting the issue on the agenda for the somewhat distant future, long after the deed has been done.

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Charter in Andrews v. Law Society of British Columbia⁶, also invites an analysis of women-specific legal prohibitions in equality terms. In fact, equality rights analysis promises to be an important part of a distinctly Canadian approach to women's rights in reproduction-related matters. While the application of a woman's rights may become more complex if she is pregnant, any accommodation or balancing with Parliament's interest in fetal life should be done at the s.1 stage and not constructed as an inherent limitation on a woman's vested and inalienable Charter rights.

4. Conclusion

If Bill C-43 becomes law there may not be the race to the courts which many people anticipate. Proponents of constitutional rights for the fetus may be discouraged by the Supreme Court's decision in Daigle v. Tremblay. As well, groups advocating that women's constitutional rights apply in the abortion context may wish to wait and see how the legislation works in practice - to build the evidentiary record which will be so necessary to support claims that the law operates outside the principles of fundamental justice (s.7), places a disadvantageous and unequal burden on women (s.15), or is an improper fit between legislative means and ends (s.1).

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1. [1989] 1 S.C.R. 342.
2. [1988] 2 S.C.R. 1
3. Unreported, Supreme Court of Canada, No. 21533, November 16, 1989.
4. Ford v. Attorney-General of Québec (1988), 54 D.L.R. (4th) 577.
5. [1989] 1 S.C.R. 1219.
6. [1989] 2 S.C.R. 143.

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1. The Canadian Security Intelligence Service Act, RSC 1985, c.C-23, ("CSIS Act").
2. See Canada, Commission of Inquiry Concerning Certain Activities of the RCMP (the "McDonald Commission"), Freedom and Security Under the Law, Second Report and Certain RCMP Activities and the Question of Governmental Knowledge, Third Report (Ottawa: Supply and Services, 1981).
3. While some of the most intrusive techniques of surveillance require judicial authorization, judges determine whether the circumstances fall within the statutory criteria for permissible surveillance, not whether they believe there is a genuine threat to Canada's security.
4. While there is subsequent exemption for "lawful advocacy, dissent or protest" in section 2 of the CSIS Act, it is unclear whether the exemption would prevent CSIS from monitoring such lawful activities as fundraising or commercial negotiations.
5. Security Intelligence Review Committee, Annual Report, 1988-1989 (Ottawa: Supply and Services, 1989) p. 34.
6. Ibid. p. 32.
7. Ibid. p. 34.
8. McDonald Commission, Freedom and Security Under the Law, Second Report, Vol. 1, pp. 414-415, 432.
9. Ibid. p. 433.
10. Ibid. p. 43.