

The Charlottetown consensus agreement places the distinct society clause in the Canada clause, which is interpretive of the entire Constitution, including the Charter of Rights and Freedoms. I believe this is its rightful place. However, the passage of time has not made the clause less controversial. During the last two weeks, a group of law professors and constitutional experts in Quebec have written an open letter to *La Presse* and *Le Devoir* explaining that the coupling of the distinct society clause with the linguistic duality clause in the Canada clause rendered the distinct society clause useless to Quebec.

This is not the opinion of the federal government or of the government of the province of Quebec; nor, may I say, is it my opinion. On Tuesday, September 8, 1992, former Supreme Court Justice Louis-Philippe de Grandpré and former Canadian ambassador to the United Nations Yves Fortier testified before the committee in Quebec City examining the Charlottetown agreement. Mr. Justice De Grandpré said that the distinct society clause was a step forward for Quebec and agreed that the province's language laws were not threatened by the Canada Clause. Mr. Fortier stated that the distinct society clause in this agreement is clearly stronger and clearly more precise than it was in Meech Lake.

I believe the distinct society clause accomplishes what it intends to do. It forces the courts, when looking at the constitutionality of either a Quebec statute or a federal statute, to construe it on the basis of the distinctiveness of Quebec. In relation to the Charter of Rights and Freedoms, it has been stated that this clause will be a prime consideration of the courts when determining if a statute is to be judged constitutional.

No, the distinct society clause does not create a legislative head of power for the province of Quebec. However, it does provide it with a powerful weapon which the courts must recognize and apply when construing Quebec laws or laws that specifically apply to Quebec. It is a clause that should not be feared or resented in the rest of Canada, because it does not place Quebec upon a higher level than any of the other provinces. It recognizes and forces the courts to deal with a reality that exists, the reality of Quebec.

I now wish to say a few words about the Supreme Court of Canada and the fact that it will now be enshrined within our constitution. The rule of law is fundamental to our democratic institutions, and the independence of the judiciary guarantees the maintenance of the rule of law. At the apex of the judicial system stands the Supreme Court of Canada. It was created in 1875 as a general court of appeal. In 1949, with the abolition of appeals to the Judicial Committee of the Privy Council in the United Kingdom, the Supreme Court became the court of final resort in all new cases emanating from Canadian courts and tribunals. In addition to cases which come to the court on appeal from lower appellate courts, the Supreme Court is empowered to hear references from the federal government on important issues. This reference power, although limited in use, is an important mechanism for determining the legal and

[Senator Oliver.]

constitutional validity of important issues while avoiding prolonged proceedings in the lower courts.

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With the adoption of the Canadian Charter of Rights and Freedoms, the Supreme Court has become an even more important and influential national institution. This institution is not presently entrenched in the Constitution. Rather, it is established under a federal statute, the Supreme Court Act. Under the terms of this act, the Supreme Court is composed of nine judges, including the Chief Justice of Canada, who are appointed by the Government of Canada.

The Supreme Court Act stipulates that at least three of the judges of the court must be selected from the bench or bar of the Province of Quebec in recognition of its civil law tradition. By convention of representation from other regions of the country, usually three judges are appointed from Ontario, two from the West and one from the Atlantic provinces.

The Charlottetown agreement proposes that the present composition of the Supreme Court—nine members with three from the Quebec bar—be entrenched in the Constitution. This is particularly important to the Province of Quebec because it means that its proportion of judges on the Supreme Court will never be diminished, at least not without the consent of the Province of Quebec.

The Constitution would also require the federal government to name judges from lists submitted by the governments of the provinces and territories. A provision will also be placed in the Constitution allowing the federal government to act unilaterally should a list not be submitted in a timely fashion or no candidate be acceptable. This is virtually the appointment procedure which occurs today in that broadly based consultation takes place among the bar associations and the provincial and federal governments prior to an appointment being made.

It is my belief that this will not regionalize the court. This has always been the major concern. That is to say, enshrining this procedure in the Constitution would mean that certain provinces would look to certain judges to support their cases in disagreements with the federal government. This has not been the result to date, even though this appointing procedure has been used informally. I doubt that it will be the case in the future, especially when the federal government is left with the final say on this matter if a nominee is unacceptable.

Finally, I should like to turn my attention for a few moments to the remarkable section of the Charlottetown agreement dealing with Aboriginal peoples. As I mentioned earlier, I was a member of the so-called liaison subcommittee of the Beaudoin-Dobbie committee which dealt specifically with Aboriginal issues. This subcommittee met with Aboriginal representatives across Canada, meeting for a day with the Métis National Council in Edmonton, the Assembly of First Nations in Vancouver, the Native Council of Canada in Yellowknife and the Inuit-Tapisat in Iqaluit. The committee heard from leaders of Indians of Nova Scotia, Quebec, British Columbia, Yukon and the Northwest Territories, Métis in