

# smiley

**Excalibur:** Do you feel the distinct society clause, with its provisions to preserve and promote the identity of Quebec, may become a long-term prescription for Quebec's movement towards independence?

**Smiley:** No. I see no way Quebec could move towards independence under the distinct society clause. My guess would be that if we refuse Meech Lake we are in more danger of a resurgence of independence than if we accept the Accord.

**Excalibur:** A lot of people feel there will be a 'balkanization' or deunification of national objectives because of the opting out clause. Do you view this as a serious problem?

**Smiley:** Not a very serious problem. It seems to me that on a lot of these social programmes we need experimentation and recognition of diversity. The one we're thinking about the next national social programme, I suppose, is daycare, and it would seem to me that this lends itself to a rather decentralized kind of programme in which various kinds of arrangements will qualify. In other words I would think that what we don't need is a national daycare programme with very rigid standards prescribed by Ottawa which don't take into account the needs of local communities and provinces.

**Excalibur:** Another objection which has been raised is that individual rights might be undermined, mainly because of the distinct society clause and the "preserve and promote" distinction.

**Smiley:** A very interesting point about that is that, as I understand it, the Quebec women's groups are willing to accept the distinct society clause and do not think that is going to compromise women's rights or individual rights. It seems to be that we who are not French Canadians are a little bit presumptuous in our notion that these Quebecers might elect repressive governments. Another thing that should be remembered that the final authority on the Charter and on the Constitution is going to be the Supreme Court of Canada which is always going to have a majority of non-Quebeckers. So if Quebec becomes a repressive society—which I don't think (will happen)—its record on individual rights, and women's rights, and aboriginal rights are at least as good as anybody else's over the last 10 or 15 years—we still have a Supreme Court composed of a majority of judges who are non-Quebeckers.

**Excalibur:** As we understand it, the Accord stipulates that three of the nine judges must be from Quebec.

**Smiley:** What will happen is the provincial government will nominate a list of candidates but Ottawa has full power to refuse that. Some people have brought up the question: "What about a deadlock?" I think that they would

count communities, and PEI is a community in the political sense. The second point is that, although in a sort of formal sense, if you have 11 governments, they are all equal, they are really not all equal in power. It's like the United Nations Assembly; they're not all equal in power. My guess is that Ottawa will lean pretty hard on a very small province which wanted to go in a different direction than all the rest. I think the small provinces cannot really, and do not really, exercise that kind of veto except under the most unusual circumstances.

**Excalibur:** Are you saying, then, that this is just a token veto power?

**Smiley:** It's a little more than a token. But let's look at the Yukon and Northwest Territories. There are 90,000 people in an area about the size of Europe. A case can be made that, unless things change very rapidly, the provincial form of government is not a very adequate form of government for those people. As long as there's this handful of people they will always be very highly dependent on Ottawa and they'll have a very limited source of revenues of their own. So, the notion of being provinces in the next 10, 15 or 20 years seems to me rather remote. Things could change; you might have a tremendous population move up there and so on. But it seems to me that this question is one for the long-term future.

**Excalibur:** What do you see as a fundamental objection to Meech Lake? Do you have one?

**Smiley:** I don't have any fundamental objections. My notion of Meech Lake is that it is pretty important for us to have it (in order) to end this constitutional estrangement from Quebec. Quebec is bound by the Constitution, but I think there is this lack of legitimacy in that the Quebec government and legislature didn't sign it. In November 1981, if you were from Ontario or BC, your federal representatives and your provincial government assented to it. But in Quebec only the federal representatives did. So I think it's important, notwithstanding all the objections to it. I think some of the opposition to Meech Lake has been based on worst-case scenarios; things that you might conjure up that could happen and wouldn't they be awful. Most of those things, I think, are unlikely.

**Excalibur:** Do you think as Canadians we're being overly-cautious and overly-paranoid about it?

**Smiley:** Not really. I think Meech Lake raises important issues and I think we should be pretty careful about what kind of country we are: centralized, decentralized; one distinct society or 10 distinct societies. So I think that we would be immature if we didn't take this debate seriously. Constitutional reform is a serious business. The more debate about it we have the better off we are. Some Canadians might say, "We find this constitutional debate a little too tiresome and we wish the country would quit agitating itself all the time about what kind of country it is and what kind of a constitution it is and get on with it."

**Excalibur:** So you're talking about national identity: Canadian identity.

**Smiley:** Yes. Canadians tend to become a fairly inward-looking people, I think. As I remember at least, 10 or 15 or even 20 years after World War II, we looked outward

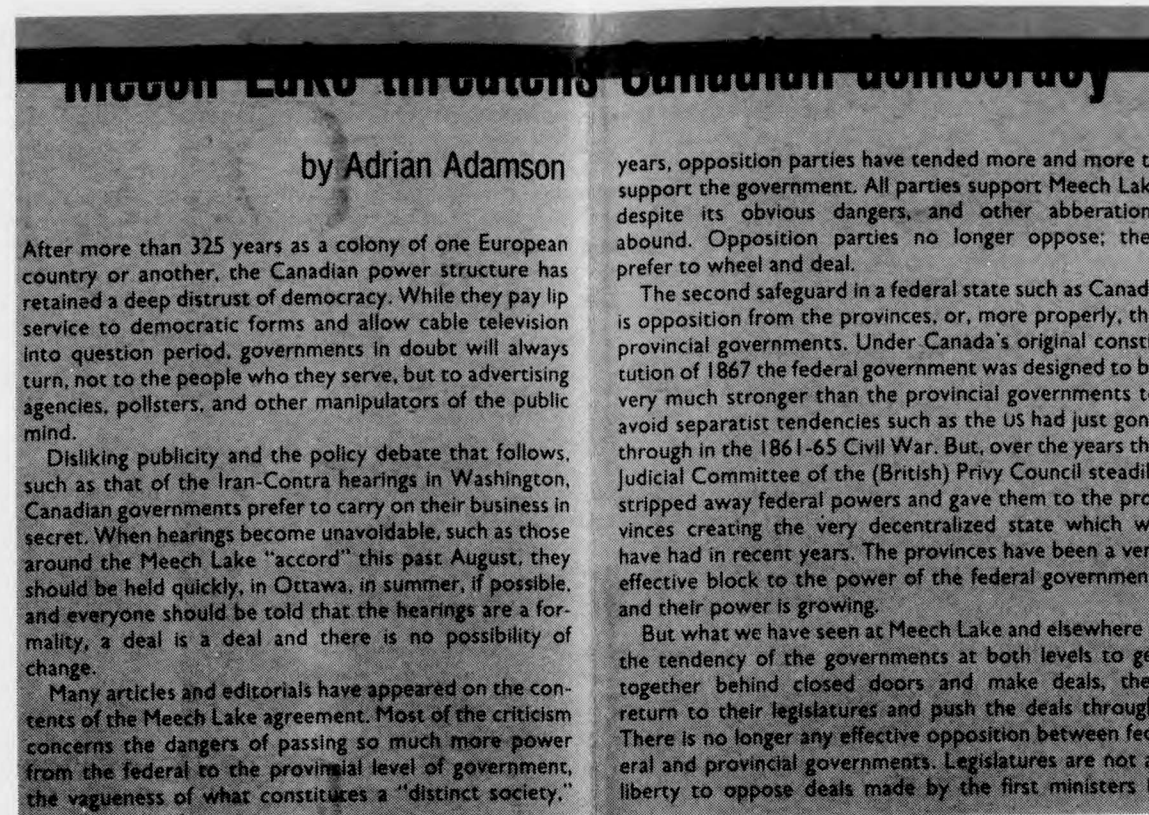
much more than we do now. I'm not sure that it's good. I think we're looking at our own problems in the context of Canada without placing ourselves (in the larger context). And, let's face it, to people who have real problems, these things are pretty minimal. I don't mean the objections are minimal. I think the objections to Meech Lake and the supporters of Meech Lake are really thinking about two kinds of Canada. I think, beyond all the emotions, all the anti-Meech Lake people really think of a Canada where the national government is dominant. It's not just one government, it's the government, the national will and purpose. We have provinces and that's necessary, but if there's a clash between the nation's will and purposes and the provinces, the national wills and purposes should get their way.

**Excalibur:** Do you think this will remain, notwithstanding the Accord, or do you think this is going to be a dichotomy that is going to have to be worked out in time?

**Smiley:** You know as well as I do the emotion Meech Lake stimulates among people, particularly people who don't like it. And this Meech Lake thing has touched in some English Canadians a very fundamental and emotional chord that challenges their view of the country. Now there's another view of Canada, and it happens to be my view, of a much looser-knit Canada than that, (where) one has a national government (which) have some tasks, and we get governed in some sort of effective manner by both of these levels of government. It's much more willing to accept differences; much more willing to accept stronger provinces; to accept a Quebec that does not have precisely the same powers as other provinces. I think that's what this debate is really about. It's an important debate because I think that beyond all the emotion and beyond the fine legal arguments and so on that is really largely what it's about. It's a real debate about the Canadian identity. I think that's what we're really disputing about and if we weren't disputing about that in such a fundamental way people on both sides of the issue would not become so emotional. I think there are groups, particularly women's groups, who say, "We thought we won these rights in 1982 in the Charter and now we're very apprehensive."

**Excalibur:** We think they're afraid that Meech Lake will override the Charter. Do you see that as a problem?

**Smiley:** I don't, but I understand why other people do. It's very interesting that the Quebec women's groups, who you would think would be more directly involved, are less apprehensive about this than the groups composed predominantly—although not entirely—of non-Quebec women.



the exclusion of native peoples and the territories, and the various vetoes over constitutional change.

Less has been written about the process by which the accord was reached, and the implications for democratic government that this process will have.

The Meech Lake "accord" was developed in secret by 11 men, the first ministers, and confirmed in secret a few weeks later. The agreement is effectively binding on 11 legislatures and 25 million people. First Ministers Conferences have proven to be an unusually efficient method of government (any Latin-American junta would agree); they are to be held regularly, will undoubtedly have a secretariat, and will become an increasingly important feature of the Canadian political landscape.

If the Meech Lake agreement holds, it appears that the first ministers conference will become, not a third level of government, but the senior level, to whom legislatures will report, a new family compact, a new colonial administration.

Under the British parliamentary system, that elusive power of legitimacy in government, known as "sovereignty," resides, not in the people, but in a representative parliament. The struggle for democratic forms, which goes back to Magna Carta in 1215, is a struggle between an authoritarian power (king or colonial authority) and the representatives of the people. When the people's representatives finally took the reins of power from the monarchy in the 19th century, our present system of democratic, parliamentary government came into existence. Anything that interferes with the effective functioning of this delicate system threatens democracy and our way of life.

In Canada this struggle began with the absolute authority of colonial administrations, continuing through representative and responsible government in the 1840s, to "dominion status" (with a colonial veto) in 1867, to final independence in 1931. We still believe and teach our children that the cabinet must have the approval of parliament, and parliament of the people. The system must be public, subject to the rule of law and the constitution, and under continual scrutiny and opposition.

A number of recent events, of which the Meech Lake "accord" is the most obvious, have exposed the fairy tale nature of these arrangements. Under our parliamentary system of democracy a prime minister with a majority of seats in the legislature has nearly total control over the legislative process. Unlike Britain and many other countries that have adopted the parliamentary system, in Canada party discipline is so strong that very seldom has a sitting member of the governing party ever voted against a government bill and survived politically.

Three safeguards exist in Canada against the unreasonable use of power by a prime minister. The first is the existence of the parliamentary opposition. But in recent

Last week, in the first of a two-part series on the Meech Lake Accord, *Excalibur's* Jeff Shinder and Deborah Dundas presented the views of two economists. This week, we focus on the legal, political and historical implications of the Accord. First, Peter Hogg, a constitutional professor at Osgoode Hall Law School, discusses the effects which the Accord will have on the Charter of Rights and the Constitution. Next, Donald Smiley, Professor of Political Science at York, who feels the real debate surrounding the Accord is one of Canadian identity. Finally, Adrian Adamson, Teacher of Political Geography at Humber College, comments on what he feels is a serious threat to Canadian sovereignty.

years, opposition parties have tended more and more to support the government. All parties support Meech Lake despite its obvious dangers, and other aberrations abound. Opposition parties no longer oppose; they prefer to wheel and deal.

The second safeguard in a federal state such as Canada is opposition from the provinces, or, more properly, the provincial governments. Under Canada's original constitution of 1867 the federal government was designed to be very much stronger than the provincial governments to avoid separatist tendencies such as the US had just gone through in the 1861-65 Civil War. But, over the years the Judicial Committee of the (British) Privy Council steadily stripped away federal powers and gave them to the provinces creating the very decentralized state which we have had in recent years. The provinces have been a very effective block to the power of the federal government, and their power is growing.

But what we have seen at Meech Lake and elsewhere is the tendency of the governments at both levels to get together behind closed doors and make deals, then return to their legislatures and push the deals through. There is no longer any effective opposition between federal and provincial governments. Legislatures are not at liberty to oppose deals made by the first ministers in

**Excalibur:** In some quarters, the concern has been raised that the distinct society clause, the clause that empowers the Quebec National Assembly with the right to promote this identity, will be abused by future governments by moving towards greater provincial independence.

**Hogg:** Well, I don't think we absolutely know what it means, but my feeling is that the reference to preserving and promoting the distinct society of Quebec probably does not allot any new powers to Quebec, because the provision uses the words "role" and "affirmed" and those are not the words used elsewhere in the constitution when new provinces are granted powers. So I think the basic interpretation of the distinct society clause is that it simply recognizes that within the government of Quebec's existing powers it has the role of preserving the distinct identity of Quebec.

## Each of the changes that were agreed to at Meech Lake . . . is sufficiently small that cumulatively they don't amount to a serious weakening of national power.

**Excalibur:** Do you feel the distinct society clause may override the protections granted to various groups, women's groups, for instance, under the Charter of Rights?

**Hogg:** It certainly does not override the Charter of Rights, but you recall that under the Charter of Rights, it is open to a government to argue that a law is justified under Section One of the Charter. I don't think it is true that in deciding Section One, it would be a relevant factor that the law was designed to preserve and promote the distinct identity of Quebec. So to that extent, the distinct society clause may have some impact on the Charter of Rights.

**Excalibur:** You don't see that as a potentially dangerous development?

**Hogg:** I don't see that as very dangerous, because it's already the case even without Meech Lake that the government can rely on arguments based on the distinct society of Quebec under Section One. So I don't think the distinct society clause adds very much.

**Excalibur:** If the distinct society clause does not release the Quebec government from the Charter's restraining impediments, why was it such an insistent demand by the government of Quebec that it be included?

**Hogg:** I don't know if the government of Quebec agrees with my interpretation, but my interpretation will probably be the one accepted by the courts. Undoubtedly, one reason the Quebec government wanted it was a symbolic recognition of their distinctiveness. Symbols in constitutions are important. Another reason may well be that they thought it would add to some degree to their powers. What I am saying is that any increase in the powers of the government of Quebec are going to be very slight.

**Excalibur:** With respect to the nomination of Supreme Court Justices, do you feel that it may be necessary to implement a mechanism to resolve disputes that may arise when the federal government disapproves of the provincially suggested candidates?

**Hogg:** I don't think that there will ever be a problem about the appointment of Supreme Court judges from English Canada, because if the federal government doesn't like the list of judges that is offered by one province, it can simply go to a list provided by another province and take the best candidate. Meech Lake will promote a healthy competition between all the provinces to put up the best candidate. The only problem I see is appointments from Quebec, because three of the judges have to be from Quebec. So therefore, if it is one of the three Quebec positions that is vacant it has to be appointed from Quebec. When an appointment is made from Quebec, there is no escape from the fact that there has to be an agreement between the two levels of government. It probably would be better if there is a deadlock-breaking provision but my guess is the fact that there isn't one will force the governments to come to an agreement.

**Excalibur:** In the future, with the appointments of senators being recommended by the provinces, it is possible that the Senate will perform the function of providing a provincial voice in Ottawa. Do you feel this will necessitate further Senate reform to make the institution more accountable to the people?

**Hogg:** I'm not very happy with the Senate provision, because I don't really know what its implications are. If it means that the Senators are to be nominated by the provinces and will see themselves to be beholden to provincial governments and as obstructionists to the elected House of Commons, then I think that would be a

really unfortunate development. I don't think that a provincially appointed Senate fits very well into our system of responsible government. What also worries me is that I am rather skeptical that the first ministers are going to be able to agree on a reformed Senate. The western provinces want a "Triple E" Senate: elected, equal and effective. I see a lot of difficulties in securing agreement on that. It may well be that the Meech Lake provision for the Senate may end up to be permanent if that changes the nature of the Senate in an unpredictable direction. I'm not sure that is desirable.

**Excalibur:** Meech lake has entrenched a trend in Canadian political life by establishing the convention that the first ministers will deliberate every year, perhaps shifting sovereignty from parliament and the legislatures to the First Ministers Conferences. How do you feel that will affect democracy in this country?

**Hogg:** I do see that as a dangerous element of our constitution, but I don't think that Meech Lake has anything to do with it. It seems to me that it's a product of a system of responsible government under which the Prime Ministers and the Premiers always have control over their legislative assemblies. What that system has done is to place inordinate powers in the hands of the Prime Minister and the Premiers. Meech Lake didn't create that. It simply recognizes a situation which I think is a potentially serious problem.

**Excalibur:** Perhaps we should look towards a more American style of government, at least in terms of rigidity of party lines in Canadian political life?

**Hogg:** I think we ought to be looking at constitutional reform that would shift power more in the direction of the elected assembly and would provide more checks on the Prime Minister and Premiers.

**Excalibur:** Do you feel that the provincial ability to opt out of shared cost programmes is part of a decentralization of powers in Canada that will undermine Ottawa's ability to impose national programmes and even a free trade deal?

**Hogg:** I don't think it will undermine the federal government's powers in any significant way. The new spending power provision only applies to shared cost programmes now and we have had no shared cost programmes since 1968. The reason why we have had no new shared cost programmes is because the federal government did not feel politically powerful enough to dictate programs to the provinces. I believe that if a new shared cost programme were established, the federal government would feel constrained by political considerations to provide options alternatives anyway. I feel that the Meech Lake provisions simply reflect the political reality that the federal government cannot dictate to the provinces in areas of exclusive provincial jurisdiction.

**Excalibur:** Certain concerns have been raised that the Meech Lake Accord will impair the federal government's ability to pursue free trade, because the general shift of power to the provinces will allow them to focus on the regional interests that may be detrimental to a national free trade policy.

**Hogg:** I think that Meech Lake is entirely neutral in the question of free trade. There are very serious problems about the federal government implementing a free trade treaty, because the free trade treaty will deal with a lot of matters that are within provincial jurisdiction. The constitutional difficulties that are associated with that exercise are not going to be changed one way or another by Meech Lake. Has Meech Lake so strengthened the provinces as a general proposition that national power has been undermined? I don't really think so. I think that each of the changes that were agreed to at Meech Lake—despite admittedly adding to provincial power—is sufficiently small that cumulatively they don't amount to a serious weakening of national power.

**Excalibur:** Do you agree with the Yukon and the Northwest Territories' complaint that the new amending formula that demands unanimity will impair their ability to achieve provincial status?

**Hogg:** It will make it harder for the Territories to get provincial status. What I am not clear about is whether it is desirable to have a new province created without unanimous consent of the existing provinces. It's appropriate that a matter as important as the introduction of a new province in the federation should be agreed to by all provinces.

**Excalibur:** With respect to any kind of future constitutional reform, do you see the amending formula as a harmful restriction of future potentially necessary constitutional changes?

**Hogg:** I think the changes in the amending formula do make the constitution more rigid and difficult to change. However, most of the damage was done in 1982 when the present amending formula was adopted, which in my view is not a good formula. Meech Lake makes it a bit worse.