CANADA

The 1987 Constitutional Accord

The Report of the Special Joint Committee of the Senate and the House of Commons

Joint Chairmen:

Hon. Arthur Tremblay, Senator
Chris Speyer, M.P.

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SENATE
HOUSE OF COMMMONS

Issue No. 17

Wednesday, September 9, 1987

Joint Chairmen:
Hon. Arthur Tremblay, Senator
Chris Speyer, M.P.

SÉNAT
CHAMBRE DES COMMUNES

Fascicule nº 17

Le mercredi 9 septembre 1987

Coprésidents:
L'hon. Arthur Tremblay, sénateur
Chris Speyer, député

Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on

The 1987 Constitutional Accord

Procès-verbaux et témoignages du Comité mixte spécial du Sénat et de la Chambre des communes de

L'entente constitutionnelle de 1987

RESPECTING:

Order of Reference from the Senate dated June 17, 1987 and Order of Reference from the House of Commons dated June 16, 1987.

INCLUDING:

Report to the Senate and to the House of Commons.

CONCERNANT:

L'ordre de renvoi du Sénat, du 17 juin 1987 et l'ordre de renvoi de la Chambre des communes du 16 juin 1987.

Y COMPRIS:

Rapport au Sénat et à la Chambre des communes.

Second Session of the
Thirty-Third Parliament
1986-1987

Deuxième session de la
Trente-troisième législature
1986-1987

SPECIAL JOINT COMMITTEE OF THE SENATE AND OF THE HOUSE OF COMMONS ON THE 1987 CONSTITUTIONAL ACCORD

Joint Chairmen:

Hon. Senator Arthur Tremblay
Chris Speyer, M.P.

Representing the Senate:

The Honourable Senators

Philippe D. Gigantès
Nathan Nurgitz
Raymond J. Perrault
Yvette Rousseau—(5)

Change in Membership of the Committee:

Pursuant to rule 66(4) of the Rules of the Senate of Canada, membership of the Committee was amended as follows:

the name of the Honourable Senator Perrault was substituted for that of the Honourable Senator Lucier (September 3, 1987).

Representing the House of Commons:

Members

Suzanne Blais-Grenier
David Daubney
Leo Duguay
Charles Hamelin
Jim Hawkes
Pauline Jewett
Robert Kaplan
Robert Layton
Lorne Nystrom
Lawrence O'Neil
André Ouellet—(12)

Other Senators and Members who served on the Committee:

The Honourable Senators

Michel Cogger
Joyce Fairbairn
Jacques Flynn
Derek Lewis
Paul Lucier
Brenda M. Robertson
Norbert L. Thériault
Charlie Watt

COMITÉ MIXTE SPÉCIAL DU SÉNAT ET DE LA CHAMBRE DES COMMUNES DE L'ENTENTE CONSTITUTIONELLE DE 1987

Coprésidents:

L'hon. sénateur Arthur Tremblay
Chris Speyer, député

Représentant le Sénat:

Les honorables sénateurs

Philippe D. Gigantès
Nathan Nurgitz
Raymond J. Perrault
Yvette Rousseau—(5)

Modification de la composition du Comité:

Conformément à l'article 66(4) du Règlement du Sénat du Canada, la liste des membres du Comité est modifiée ainsi qu'il suit:

le nom de l'honorable sénateur Perrault substitué à celui de l'honorable sénateur Lucier (le 3 septembre 1987).

Représentant la Chambre des communes:

Les députés

Suzanne Blais-Grenier
David Daubney
Leo Duguay
Charles Hamelin
Jim Hawkes
Pauline Jewett
Robert Kaplan
Robert Layton
Lorne Nystrom
Lawrence O'Neil
André Ouellet—(12)

Autres sénateurs et députés qui ont participé aux travaux du Comité:

Les honorables sénateurs

Michel Cogger
Joyce Fairbairn
Jacques Flynn
Derek Lewis
Paul Lucier
Brenda M. Robertson
Norbert L. Thériault
Charlie Watt

Members

Warren Allmand
David Berger
Gilles Bernier
Gabrielle Bertrand
Don Boudria
Pauline Browes
Mary Collins
Marion Dewar
Ernie Epp
Sheila Finestone
Benno Friesen
Jim Fulton
Jean-Robert Gauthier
Len Hopkins
Donald Johnston
Steven Langdon
Russell MacLellan
Jean-Claude Malépart
Jim Manly
Sergio Marchi
Howard McCurdy
Audrey McLaughlin
Margaret Mitchell
Rod Murphy
Pat Nowlan
John Nunziata
Dave Nickerson
Keith Penner
Lucie Pépin
Marcel Prud'homme
Fernand Robichaud
Svend Robinson
Jack Scowen
Bill Tupper
Barry Turner

From the Research Branch of the Library of Parliament:

Bruce Carson
Louis Massicotte
Jacques Rousseau

Legal Counsel to the Special Joint Committee:

W.I.C. Binnie, Q.C.
Mark J. Frieman
Eric Gertner

(Quorum 8)
Andrew Johnson
Eugene Morawski
Joint Clerks of the Committee

Les députés

Warren Allmand
David Berger
Gilles Bernier
Gabrielle Bertrand
Don Boudria
Pauline Browes
Mary Collins
Marion Dewar
Ernie Epp
Sheila Finestone
Benno Friesen
Jim Fulton
Jean-Robert Gauthier
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Steven Langdon
Russell MacLellan
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Jim Manly
Sergio Marchi
Howard McCurdy
Audrey McLaughlin
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Rod Murphy
Pat Nowlan
John Nunziata
Dave Nickerson
Keith Penner
Lucie Pépin
Marcel Prud'homme
Fernand Robichaud
Svend Robinson
Jack Scowen
Bill Tupper
Barry Turner

Du Service de recherche de la Bibliothèque du Parlement:

Bruce Carson
Louis Massicotte
Jacques Rousseau

Conseillers juridiques du Comité mixte spécial:

W.I.C. Binnie, c.r.
Mark J. Frieman
Eric Gertner

(Quorum 8)
Les cogreffiers du Comité
Andrew Johnson
Eugene Morawski

MOTION

Text of the motion adopted by the Senate of Canada on Monday, September 14, 1987:

With leave of the Senate and notwithstanding Rule 45(1)(*e*),

THAT, notwithstanding the Order of the Senate adopted on Wednesday, 17th June, 1987, the Special Joint Committee on the 1987 Constitutional Accord be empowered to present its final report no later than Monday, 21st September, 1987.

MOTION

Texte de la motion adoptée par le Sénat du Canada le lundi 14 septembre 1987 :

Avec la permission du Sénat et nonobstant l'article 45(1)*e*) du Règlement,

Que, nonobstant l'ordre adopté par le Sénat le mercredi 17 juin 1987, le Comité spécial sur l'Entente constitutionnelle de 1987 soit habilité à présenter son rapport final au plus tard le lundi 21 septembre 1987.

ORDER OF REFERENCE

Extract from the Votes and Proceedings of the House of Commons for Monday, September 14, 1987:

"By unanimous consent, the reporting date in the Order adopted by the House earlier this day, in relation to the Special Joint Committee on the 1987 Constitutional Accord, was changed to read Monday, September 21, 1987."

ORDRE DE RENVOI

Extrait des Procès-verbaux de la Chambre des communes du lundi 14 septembre 1987 :

«Du consentement unanime, la date de présentation du rapport du Comité mixte spécial sur l'Entente constitutionnelle de 1987, prévue dans l'ordre spécial adopté par la Chambre plus tôt aujourd'hui, est reportée au lundi 21 septembre 1987.»

ATTEST

ATTESTÉ

Le Greffier de la Chambre des communes

Robert Marleau

Clerk of the House of Commons

ACKNOWLEDGEMENTS

The Committee wishes to gratefully acknowledge the dedication, diligence and valued assistance of the following people who cheerfully spent countless hours in preparation of our Report:

The Joint Clerks:

Eugene Morawski
Andrew N. Johnson
Elizabeth Kingston
André Reny

Office Staff:

Fiona Bladon
Carl Blais
Karen Blais
Laurette Calippe
Nancy Clairmont
Hélène Cousineau
Isabelle DesChênes
Jeannine Deveault
Shirley Dunne
Marielle Duval
Denise Fauvel
Kathleen Ippersiel
Jennifer Joseph
Pauline LeBon
Hélène Nault
Danielle Paquette
Cathie Rockburn-Pilon
Keray Poulter
Sharron Scullion
Kathleen Schade

and the many others who contributed their time and effort.

The Joint Chairmen

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CHAPTER I

Constitutional Chronology 1926-1987

The *1987 Constitutional Accord* is not an isolated event. It must be seen in the context of our constitutional evolution, of which some relevant highlights are as follows:

1926 At the Imperial Conference, a committee chaired by Lord Balfour produced a declaration in principle on the constitution of the British Empire. The declaration defined the Dominions, including Canada, as autonomous communities within the Empire, standing on an equal footing with one another and not in any way subordinate in either external or internal affairs, although united in a common allegiance to the Crown, and associated freely as members of the British Commonwealth of Nations.

1927 A federal-provincial conference was held in Ottawa to discuss amending the Canadian Constitution. The federal government argued that it would be appropriate, given Canada's new international status, to request the British Parliament to pass an act giving Canada the right to amend its own Constitution. The proposal was not approved by all the provinces.

1931 At the request of the Dominions, the British Parliament passed the *Statute of Westminster, 1931*, giving legal recognition to Canada's independence while reserving the British Parliament's power to amend the Canadian Constitution.

1940 At the request of both Houses of the Canadian Parliament, backed by the approval of all the provinces, the British Parliament passed a constitutional amendment placing unemployment insurance under federal jurisdiction.

1949 At Canada's request, the British Parliament proceeded to patriate the *British North America Act* in part. The Parliament of Canada was granted a general power to amend the Canadian Constitution, except when the amendment pertained to the powers of the provincial legislatures (including those in the education field) the use of the French and English languages, the requirement that Parliament meet annually, and the maximum duration of a Parliament. The same year saw the

abolition of appeals to the Judicial Committee of the Privy Council. The Supreme Court of Canada became the Court of last resort in all matters of Canadian law.

1950 A federal-provincial conference was convened to consider an amending formula applicable to matters of interest to both the federal and provincial governments.

1960 At Canada's request and with the unanimous consent of the provinces, the British Parliament adopted an amendment providing for the retirement of Superior Court judges at 75 years of age.

1961 Following several meetings between Attorneys General, the federal government and a majority of provinces agreed on a constitutional amending formula (the "Fulton formula") but there was no unanimity and the proposal was abandoned.

1964 At Canada's request, and with the consent of all the provinces, the British Parliament enacted section 94A of the *British North America Act* in respect of old age pensions. During a conference in Charlottetown, the First Ministers unanimously accepted a new constitutional amending formula (known as the "Fulton-Favreau formula"), which closely resembled the 1961 proposal. However, the government of Quebec later withdrew its approval and this proposal, as well, was abandoned.

1965 Constitutional amendment enacted by the Parliament of Canada requiring Senators appointed after June 1, 1965 to retire at the age of 75.

1967 On the initiative of Premier John Robarts of Ontario, a provincial First Ministers' conference was held in Toronto to discuss the confederation of the future.

1968 A first round of constitutional discussions was held in February 1968, on the initiative of Prime Minister Pearson, to examine the recommendations of the Bilingualism and Biculturalism Commission, the question of a Charter of Rights, regional disparities, and the timeliness of a general review of the Constitution.

At their meeting in February the First Ministers agreed to give priority to finding an amending formula and patriating the Constitution. They agreed in principle on a formula later known as the "Victoria formula". Under the terms of its final version, consent would be required from all provinces having or having had in the past at least 25% of Canada's total population, from two of the Atlantic provinces, and from two of the western provinces with at least 50% of the total population of the western provinces. The First Ministers also agreed to incorporate language rights into the Constitution. The existence and independence of the Supreme Court would be guaranteed by the Constitution, which would define the Court's fundamental structure and recognize the importance of provincial participation in the process of selecting the justices. Finally, provisions would be added to define the federal and provincial government's responsibilities in respect of regional disparity.

1971 Meeting in Victoria in June 1971, the First Ministers drew up a draft Canadian constitutional Charter embodying the consensus reached at February's meeting, with the addition of a compromise on social policy. They agreed that the text was important enough to require approval from all the legislatures, approval which had to be given within 12 days. On June 23 the Premier of Quebec rejected the Victoria Charter.

1973 An administrative compromise between Ottawa and Quebec City on the issue of family allowances eliminated one of the obstacles that had blocked the way in Victoria.

1975 In April 1975, Prime Minister Trudeau and his provincial colleagues reached an agreement in principle on the timing of the patriation of the Constitution and the adoption of the Victoria amending formula.

1976 On March 31, 1976, Prime Minister Trudeau wrote letters to the provincial premiers setting out new constitutional proposals. Three options were offered. The least ambitious was pure and simple patriation of the Constitution, with unanimous consent of Parliament and the provincial legislatures for amendments to be required until a definitive formula could be agreed on. The second option would have patriated the Constitution in conjunction with adoption of the Victoria amending formula. The third and most far-reaching called not only for patriation but also for adoption of a constitutional proclamation essentially reproducing the consensus achieved in Victoria (an amending formula plus provisions on the Supreme Court, language rights, and regional disparities) and (at Quebec's insistence) for two new provisions on protection of the French language and culture and on federal-provincial agreements.

Speaking on behalf of his fellow premiers, Premier Lougheed of Alberta responded that Mr. Trudeau had been ready in June 1976 to accept any proposal unanimously approved by the provinces, and stated that patriation, although desirable, should not be undertaken until a consensus could be reached on expanding the role and powers of the provinces. Among the issues on which the premiers had achieved unanimity were the following: greater provincial involvement in immigration; confirmation of the language rights of anglophones and francophones; subjection of the exercise of the declaratory power to the consent of the provinces concerned; inclusion in the Constitution of a requirement that conferences of the eleven First Ministers be held at least once a year.

The *Parti québécois* of René Lévesque came to power in the Quebec provincial elections held on November 15, 1976.

1977 Prime Minister Trudeau tabled an amended version of his 1976 proposals, noting in the process that in his opinion, patriation was a priority and must precede any changes to the power-sharing structure.

The federal government set up the Task Force on Canadian Unity, chaired by Jean-Luc Pépin and John Robarts.

1978 On June 12, 1978, the Prime Minister tabled a white paper entitled *Time for Action.* A proposed bill on constitutional reform (Bill C-60), setting out the federal government proposals in detail, followed a week later. In the white paper, the federal government announced its intention of giving Canada a new Constitution before the end of 1981, by acting immediately in relevant areas that it believed to be under the sole jurisdiction of the national Parliament. It proposed to replace the Senate before July 1, 1979, with a House of the Federation, whose members would be chosen half by the House of Commons and half by the provincial legislatures. The provinces would be given a voice in the appointment of judges to the Supreme Court.

The provincial premiers expressed their disapproval of the action taken by the federal government and the federal government referred the legality of its proposed bill to the Supreme Court of Canada for its opinion.

1979 On November 1, the Quebec government tabled a white paper describing the new relationship with Canada it would be proposing to Quebeckers in a referendum planned for the following year.

On December 29, the Supreme Court of Canada ruled that the power to amend conferred by s. 91(1) of the *British North America Act* was limited to areas of federal jurisdiction affecting the federal government only. A number of the amendments suggested in Bill C-60, in the opinion of the Court, did not fall within this definition.

1980 In the referendum, held on May 20, 1980, the Quebec government sought a mandate from the people to negotiate sovereignty- association. The final results of the vote were: 40.4 *percent* YES and 59.6 *percent* NO. During the referendum campaign, Prime Minister Trudeau pledged to renew federalism.

1980-82 Meeting in Ottawa on June 9, 1980, the First Ministers set an agenda and gave their ministers responsible for constitutional issues a mandate to proceed with exploratory discussions over the summer. At the next First Ministers' Conference, in September, in the midst of rumours that Ottawa was planning to take unilateral action, it became clear that no agreement would be possible between the federal government and the provinces. The federal government chose to proceed unilaterally, without securing the consent of a majority of the provinces. A draft resolution was tabled on October 2, 1980, that would, had it been passed by both Houses of Parliament and endorsed by the British Parliament, have patriated the Constitution, imposed an amending formula, and included a Charter of Rights subject to "reasonable limits", which would have bound both levels of government. Strong opposition in the House of Commons, and doubts as to the legality of the procedure, led the federal government to refer its proposal to the Supreme Court of Canada. On September 28, 1981, the Court concluded in a majority ruling that the course of action proposed by the federal government was within the law, but was at the same time unconstitutional in that it ignored the conventions and the spirit of the federal system. The federal government

called a further constitutional conference, which was held in Ottawa in early November. In the final hours of that meeting, the Prime Minister reached a compromise with the premiers of all the provinces except Quebec. The Accord of November 5, endorsed a month later, as slightly amended, by both Houses of Parliament, was enacted as *The Canada Act* by the British Parliament, and was proclaimed by the Queen on April 17, 1982.

1983 A constitutional amendment was adopted calling for the holding of two new federal-provincial conferences on the issue of native rights.

1985 In December, the *Parti québécois* government was defeated in the provincial election and replaced by a Liberal government headed by Premier Robert Bourassa.

1986 At a symposium held in Mont-Gabriel in May, Quebec's Minister of Intergovernmental Relations reaffirmed and clarified Quebec's conditions for adhesion to the *Constitution Act, 1982*. (These conditions had been set out in June 1985 in a Quebec Liberal Party manifesto entitled "Maîtriser l'avenir"). They were:

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

At their meeting in Edmonton in August the provincial premiers unanimously agreed that their first constitutional priority was to commence negotiations on the five conditions set out by Quebec. Once this phase was completed, discussion could then turn to issues of particular interest to certain provinces, notably Senate reform, fisheries, property rights and so forth.

1987 At a meeting at Meech Lake, Quebec, on April 30, the First Ministers worked out an agreement in principle on Quebec's five proposals. Officials were directed to draft a legal document to incorporate the agreement in principle.

On May 11 the Prime Minister proposed the following resolution to the House of Commons:

> That this House endorses the Meech Lake statement of principles approved by all First Ministers, April 30, 1987, as a basis for Quebec's participation as a full partner in the Canadian Constitution, and as a basis for the establishment, in a spirit of equality and fairness, of a process for considering further constitutional reforms.

All Members, including the leaders of the three parties, supported the agreement in principle, although some amendments were suggested.

A Commission of the Quebec National Assembly held public hearings during May to give constitutional experts, jurists, political scientists and sociologists an opportunity to discuss in greater detail the scope of the

agreement. The committee met for eight days and heard testimony from 17 individuals and 20 groups.

On June 2 and 3, the First Ministers reached agreement following an all-night negotiating session at the Langevin Block in Ottawa on the provisions of the *1987 Constitutional Accord.*

On June 23, a large majority of the Quebec National Assembly approved the *1987 Constitutional Accord.*

On June 16 and 17, the Senate and the House of Commons set up the Joint Committee on the *1987 Constitutional Accord.* Senator Arthur Tremblay and Chris Speyer, M.P. were elected Joint Chairmen. Public hearings were held from August 4 to September 1 inclusive.

CHAPTER II

An Overview of the Accord

1. The Constitution is not merely a dry collection of tabulated legalisms. It gives order to our national institutions. In legal terms, it ordains which level of government can do what and to whom and in what circumstances. But it is also more than that. As Professor Maxwell Cohen has observed, "it is the revered script in our national passion play". Ordinarily, talk of family reconciliation in connection with a constitutional impasse between governments would sound somewhat theatrical, but the *1987 Constitutional Accord* has been presented to the Joint Committee as a means of bringing Quebec "back into the constitutional family". It is not only the federal government that has presented the *1987 Constitutional Accord* to us in this light. The Joint Committee has heard many Canadians from all regions of the country, but especially from Quebec, who have urged acceptance of the 1987 Accord as a means of national reconciliation and as a way for Canada to put behind it the trauma of the 1980 Quebec Referendum and the subsequent isolation of Quebec during the 1981-82 patriation process. It is time, they say, to get on with other things; but first we must deal with Quebec's outstanding grievances.

2. The Joint Committee would not fulfil its mandate to report fully on our proceedings were we simply to pass on the diverse opinions of lawyers and politicians but fail to underline the moments of high emotion on both sides of the issue expressed at times during the testimony.

3. Madame Solange Chaput-Rolland, a leading participant in the Task Force on Canadian Unity (1977-79) and a member of the Order of Canada, described her emotions to the Joint Committee in these words:

> Inside Quebec, seven years ago, we decided that Canada was our country. We have yet to find out whether our loyalty was well placed. Frankly, in 1982 I wondered if the agonies, the pains, the quarrels, the bitterness following the referendum had been necessary. We voted for Canada; Canada through its central government totally absorbed in its will to patriate the *British North America Act of 1867,* cared very little about those who had openly stated their will to remain linked to this country. Promises and dreams were shattered; not a single *Québécois* will want to go through such emotions again. You English-speaking Canadians have asked during years; *what does Quebec want*. Now you know. It has been described in five proposals not written

by constitutionalists, jurists or nationalists; but by men duly elected by "we the people"...
(Submission, p. 6)

4. Other witnesses felt that these emotions, genuine and strongly held though they are, put unfair pressure on other Canadians to accept the Accord without proper scrutiny. They did not wish their opposition to particular terms of the 1987 Accord to be misrepresented as being "anti-Quebec". However, they said, talk of "bringing Quebec back into the Constitution" was inappropriate. Indeed National Chief Georges Erasmus of the Assembly of First Nations characterized it as "nonsense":

> Quebec never left Canada. Our Prime Minister comes from Quebec. Let us quit this nonsense about Quebec entering Canada and Confederation. It never left. It could not. It is all political nonsense. Constitutionally and legally it was here.
> (Erasmus, 9:66)

We are therefore conscious of the deep emotions generated on both sides of this debate and we approach our task of analyzing the merits of the issues in the full knowledge that this is no arid academic exercise, but the collision of strong and passionate views about what is best for the future of Canada.

5. While Chief Erasmus is correct in a formal or legal sense, many witnesses, including lawyers, emphasized to us the difference between legality and legitimacy. Yves Fortier, Q.C., a Montreal barrister and former President of the Canadian Bar Association, told us that any consideration of the 1987 Accord should not isolate consideration of its terms from the objective that it was intended to accomplish:

> I believe that the *1987 Constitutional Accord* must be analyzed in light of its essential objective of bringing Quebec back into the Canadian constitutional family. I see 1982 as a key date in Canada's constitutional history. That is when our Constitution was patriated, an amending formula adopted and, particularly, the *Canadian Charter of Rights and Freedoms* enshrined in our Constitution. Despite their importance, the achievements of 1982 are so far incomplete because my province, Quebec, is not part of the new constitutional order. From a strictly legal point of view, of course, the *1982 Constitution Act* applies to Quebec. But in this area, as in many others, lawyers must show some modesty. The fact is that politically, and even morally, the *1982 Constitution Act* does not apply to Quebec. Those who claim it does are guilty of constitutional heresy. (Fortier, 12:81)

6. Extracts of *Hansard* filed with the Joint Committee confirm, of course, that promises were made by the federal government in the aftermath of the 1980 Quebec Referendum. On May 21, 1980, then Prime Minister Pierre Elliott Trudeau rose in the House of Commons to call the country to action on the matter of constitutional renewal:

> It marks a new beginning. It heralds a period of healing and rebuilding. By voting for Canada the people of Quebec have recognized that their fellow Canadians are prepared to listen to them, to understand them, and to meet their legitimate aspirations.
>
> ... Those (Quebec) voters said no because they put their confidence in Canada. They said no because they accepted the assurances from Mr. Ryan of the Liberal Party of Quebec, and from the other federalist groups in that province. They accepted the assurances from the premiers of the other regions of the country, from the Leader of the Official Opposition, from the Leader of the New Democratic Party, from all my

> colleagues in the Liberal Party of Canada and from myself that changes were not only possible within confederation but that the rejection of the option advocated by the *Parti Québécois* would take us out of the dead end and allow us at last to renew our political system.
> (*Hansard*, May 21, 1980, p. 1263)

7. The *1987 Constitutional Accord* is presented to this Joint Committee by the federal government as part of the renewal promised in Mr. Trudeau's referendum speech, albeit it is not constitutional renewal in a form that Mr. Trudeau envisaged or that today he accepts as appropriate.

8. In the course of the 1980 Quebec Referendum campaign, the people of Quebec were promised that constitutional change would go forward on two levels: first, the linguistic and educational rights of individuals would be expanded and entrenched in the Constitution. This was accomplished by the *Constitution Act, 1982*. Second, the role of the provincial government in maintaining and strengthening the distinct identity of Quebec in the North American "sea of English-speaking peoples" — in other words, the ability of Quebec people to act collectively in matters touching language and culture through their provincial government — would be re-examined and, where appropriate, reformed. This second level of renewal was not addressed in the *Constitution Act, 1982*. On the contrary, the adoption of the patriation resolution by all other governments in Canada, despite the position taken by every member of the Quebec National Assembly as expressed repeatedly and unequivocally, was taken to be a denial on the part of other governments in Canada of the legitimacy of such a role for the Quebec government. On this point, the Honourable J.W. Pickersgill, a former Liberal Cabinet Minister, told the Joint Committee:

> It left a wound and a grievance. Not only that, but it did something that had never been done before; it reduced the powers of the legislature of Quebec, as it reduced the powers of all the other legislatures and of the Parliament of Canada with the Charter of Rights. This was really taking away from the plenitude, the sovereignty, of our Parliament and our legislatures, and doing it without the consent of all of them. To me, that was really a very serious situation.
> (Pickersgill, 10:123)

9. In view of the sovereignty objectives of the *Parti québécois* government, its isolation on this issue was understandable: "an unfortunate necessity" as Professor Lederman described it (Lederman, 7:29). However, the election of the Liberal government of Robert Bourassa on December 2, 1985, made possible serious and realistic negotiations with a view to securing the Quebec government's "willing assent" to the Constitution of Canada. The question before the Joint Committee is whether the *1987 Constitutional Accord*, having regard both to its terms and to the circumstances that gave birth to it, is good for *all* of Canada.

10. In light of this background it is convenient to group together in seven major areas the provisions of the *1987 Constitutional Accord*:

(1) *Linguistic Duality and the Distinct Society*

This proposal would require the Constitution of Canada to be interpreted consistently with certain sociological realities — that French-speaking Canadians are centred in Quebec but present elsewhere in Canada, and that English-speaking Canadians are concentrated outside Quebec but also are present in Quebec. This is

described as *a* fundamental characteristic of Canada and "the role" of Parliament and all provincial legislatures to preserve it is "affirmed". At the same time, in light of this fundamental characteristic, it is recognized that Quebec constitutes within Canada a distinct society. The legislature and government of Quebec have the role of preserving and *promoting* its distinct identity. However, nothing in this proposal is intended to derogate from the powers of either level of government.

(2) *The Senate*

The Senate provisions would introduce a new process of appointments for Senators. At the present time, the Governor General (advised by the government of the day) enjoys an almost unfettered discretion in filling vacancies in the Senate. The only restriction on this discretion is that persons selected must meet the geographical and other qualifications for appointment. The new provision would require Senate vacancies to be filled by persons whose names have been submitted by the government of the province to which the vacancy relates. Thus, for the first time provinces will enjoy a constitutional right to participate in the appointment of Senators. However, the Governor General of Canada would continue to make the appointment and appointees must be acceptable to the federal government. This procedure has been described by some as a double veto — no person will be appointed who is not acceptable to both levels of government.

(3) *Supreme Court of Canada*

The *Constitution Amendment, 1987* would continue the process of entrenching the Supreme Court in the Constitution of Canada begun in the *Constitution Act, 1982*. The present qualifications for appointment to the Supreme Court bench would be entrenched. The new provisions would eliminate much of the ambiguity surrounding the 1982 provisions concerning the status of the Court and the composition of the Court. The most significant change that would result from the proposed amendments would be that, as in the case of the Senate vacancies, the provinces would have a role to play in the filling of vacancies on the Supreme Court of Canada. The appointment procedure would be much like that in the case of the Senate, with the result that a double veto would be created. The provinces would decide whose names to submit, but the federal government need only appoint from the provincial lists persons acceptable to it.

The proposed amendments, as stated above, would constitutionalize the present composition of the Court — a Chief Justice and 8 other judges, at least 3 of whom must be from Quebec, that is, a member of the Quebec bar or a Quebec judge for a period of 10 years. The informal allocation of 3 judges to Ontario, one to British Columbia, one to the Prairie provinces and one to Atlantic Canada would continue to be informal and not binding on the Governor General. A Quebec vacancy would have to be filled by a person whose name was submitted by the government of Quebec. A non-Quebec vacancy could only be filled from among the persons whose names have been submitted by a provincial government other than Quebec.

(4) *National Shared-Cost Programs*

At the present time the government of Canada funds many programs in areas that are within exclusive provincial legislative jurisdiction. Some programs involve direct grants to individuals or organizations; others involve funds transferred to the

provinces; still others are programs in which expenditures are shared by the two levels of government. The federal government sometimes has, but other times has not, established the conditions of programs. In some instances, the program for post-secondary education for example, no conditions are attached.

Under the Accord, in the case of future national shared-cost programs in an area of exclusive provincial jurisdiction, a provincial government that establishes a program or initiative that is compatible with the national objectives of the national shared-cost program but that chooses not to participate in the program, would be entitled to reasonable compensation from the federal government. A province that fails to meet the requirements would not be entitled to any compensation, reasonable or otherwise.

(5) *Immigration*

The major thrust of the immigration provision would be to give constitutional recognition to federal-provincial immigration agreements, such as those negotiated by the governments of Canada and Quebec since 1971. These agreements can only deal with immigration and the temporary admission of aliens. Naturalization and other matters pertaining to aliens would continue to be within the exclusive legislative authority of Parliament. Even in those areas covered by such agreements, Parliament would still enjoy the paramount legislative authority to set "national standards and objectives" relating to immigration and aliens. Immigration agreements would not be valid if repugnant to the national standards and objectives established by Parliament.

Immigration agreements would be subject to the *Canadian Charter of Rights and Freedoms*, ensuring that immigrants to any part of the country would be guaranteed, among other things, the right to move from one province to another.

(6) *First Ministers' Conferences*

The *Constitution Amendment, 1987* would entrench two types of First Ministers Conference. Conferences dealing with the state of the Canadian economy would be required to be convened annually. Conferences to address constitutional matters would also be required to be convened annually starting in 1988. Regardless of what other matters might be on the agenda of these conferences, the agenda would have to include the following matters: Senate reform, which must include "the role and functions of the Senate, its powers, the method of selecting Senators and representation in the Senate", and "the roles and responsibilities in relation to fisheries".

(7) *The Amendment Formula*

The general procedure for amending the Constitution set out in section 38(1) of the *Constitution Act, 1982* is not changed. It requires that an amendment be authorized by resolution of the Senate and House of Commons and the legislative assemblies of at least two-thirds of the provinces that have, according to the latest general census, at least fifty per cent of the population of all the provinces. The *Constitution Act, 1982* also includes a number of special amending formulae.

The changes proposed by the *Constitution Amendment, 1987* are two in number. First, certain matters now listed in section 42(1) of the *Constitution Act, 1982* — which are now subject to amendment under the 7-50 formula — would in

future become subject to amendment only with the unanimous consent of all governments. These include representation in the House of Commons, the powers of the Senate and the method of selecting Senators, representation in the Senate and the residence qualifications of Senators, the Supreme Court of Canada (other than the composition of the Court), the extension of existing provinces into the territories and the establishment of new provinces.

Second, the right to compensation for amendments resulting in a transfer of legislative powers from the provinces to the federal government would be broadened to guarantee compensation to a province that opposes the transfer of *any* legislative powers to Parliament, not simply the transfer of legislative powers "relating to education or other cultural matters" as provided by section 40 of the *Constitution Act, 1982.*

CHAPTER III

Some Basic Constitutional Principles

1. Before examining the details of the *1987 Constitutional Accord* on a clause by clause basis, it is convenient to ask ourselves a number of threshold questions about the nature of our constitutional arrangements, and the values they reflect, and to keep these more general questions in mind as we descend into the detail of the Accord itself. This is because some witnesses were concerned not so much with individual provisions as with the philosophy of Confederation that the Accord, taken as a whole, seems to represent.

In general terms, these philosophical questions relate to the respective roles and responsibilities of the federal government and the provincial governments in the formation, preservation and enhancement of national values, identities and institutions. For example, in matters of national importance should Canadians deal only with the federal government or is there a role for the provinces in matters having a national dimension either as intermediaries or as partners? This is the golden thread that runs through some basic questions, such as those following, that were repeatedly raised by witnesses before the Committee in discussing the "implications" of the 1987 Accord:

(1) Is the *1987 Constitutional Accord* consistent with the structure and values of the existing Constitution or is it a package of provincially-oriented measures that will stand the Constitution on its head?

(2) If Quebec is legally bound by the *Constitution Act, 1982*, what does it mean (if anything) when First Ministers claim that the 1987 Accord is intended "to bring Quebec back into the Canadian constitutional family"?

(3) Should Canada say no to any changes to the Constitution that confer a different role on any provincial government, including that of Quebec? Does a special "role" for Quebec mean special powers that undermine the principle of equality of the provinces which is said to be fundamental to the Constitution?

(4) Do the "linguistic duality/distinct society" rules of interpretation encourage "provincial patriotism" at the expense of national patriotism, and if so, in the long run will this undermine the unity of Canada?

(5) Are not national institutions such as the Senate and the Supreme Court of Canada the sole responsibility of the federal government? Is it appropriate for

provinces to depart from their sphere of local responsibility to participate in nominations at the national level? Will the result be to subject vital federal institutions to provincial control?

(6) The *1987 Constitutional Accord* did great things for the provinces, but what did Canada get out of it?

2. Our answer to these and similar questions will emerge throughout the Report and especially in the concluding chapter of this Report. At the moment, however, it is important to make some preliminary observations about these questions in terms of the submissions that we have heard.

Question 1: Is the *1987 Constitutional Accord* consistent with the basic structure and values of the Canadian Constitution or is it a package of provincially oriented amendments that will stand the constitution on its head?

3. It is fashionable to analyze Canadian federalism in terms of "pendulum" swings between greater centralization during some periods and greater decentralization at other times. There was considerable talk about "the original spirit of 1867". Former Liberal Cabinet Minister Eric Kierans told the Joint Committee:

> Meech Lake is not new. It is simply the closest that we have come to following the original intent and meaning of the *British North America Act* since Confederation itself. It reflects more accurately the view of what the original Fathers of Confederation thought that they were agreeing to a Confederation. They lived with each other, quarrelled and wrangled in debates, assemblies and conferences for years. They knew what was possible and what the different colonies could accept. They never intended that the provinces should be as dependent as they, in fact became. Above all else, they knew that a centralized Canada would not work.
> (Submission, p.4)

4. However, witnesses who opposed the Accord also relied upon "the original spirit" of 1867, reflected, they said, in the strong legislative and executive powers of the federal government, particularly the residual power in relation to "the Peace, Order and Good Government of Canada".

5. One could be forgiven, perhaps, for concluding that in 1867 there were as many "original intents" about the desirable shape and structure of Canada as there were Fathers of Confederation. The question for decision is not so much what is historically "correct" but what approach is right for now and the future.

6. A unifying theme of the *1987 Constitutional Accord* is its recognition of the importance of the provinces. It makes explicit the role of the provincial governments as well as that of the federal government to preserve our "linguistic duality", and the role of Quebec to protect and promote the "distinct identity" of that province. Moreover, as Senator Lowell Murray told the Joint Committee, the *1987 Constitutional Accord* accepts the legitimacy of provincial governments furthering regional views at the national level, both directly and through participation in appointments to such national institutions such as the Senate and the Supreme Court of Canada. Real progress in dealing with the national agenda, we were told, is likely to be made only on the basis of federal-provincial consultation. Confrontation is not inherent in relations between different levels of government. Cooperation is to be the engine of national development.

7. The legitimacy of provincial governments as a source of regional "patriotism" and as a participant, through the appointment procedure concerning the legislative (Senate) and judicial (Supreme Court of Canada) functions, at the national level was wholly rejected by former Prime Minister Pierre Trudeau. In his view, the role of the federal government is to act in its sphere of responsibility without reliance on the provincial governments. The object of the federation is to foster Canadian patriotism, not regional patriotism. He believes that the rights of the individual are better protected by the Canadian *Charter of Rights and Freedoms* than by provincial governments or, for that matter, by the federal government. The job of the provincial governments is to deal with matters of a local nature within the province.

8. Professor Edward McWhinney of Simon Fraser University told the Joint Committee that Mr. Trudeau's view of federalism was right for the 70's and early 80's, but that the time had come to move on to a more flexible view of confederation. Divisive forces of separation have abated: acceptance of the "distinct society" is a concept, in Professor McWhinney's view, whose time has come. Some witnesses emphasized that different times require different approaches. Few would argue for decentralization in time of war or national emergency. Professor Ronald Watts of Queen's University observed that excessive centralization can lead "to anemia in the extremities and apoplexy at the centre". (Watts, 13:61)

9. There is no doubt that the *1987 Constitutional Accord* reflects a more decentralized view of Canada than does the *Constitution Act, 1982*. It addresses the five conditions set out by the government of Quebec as essential to its willing assent to the Constitution. None of these five conditions address directly the rights of individuals. Rather, the "Quebec Round" was about adjustments in the rights and powers of governments and acceptance of a measure of institutional reliance on federal-provincial cooperation.

10. But all the centralizing forces in the *Constitution Acts* of 1867 and 1982 remain. Of course, they will now have to be interpreted in light of the "linguistic duality/distinct society" clause, but the Accord expressly provides that nothing in that clause "derogates from the powers, rights or privileges of Parliament *or* the Government of Canada or of the governments or legislatures of the provinces". As Gordon Robertson, former Clerk of the Privy Council during part of the Trudeau government, told us:

> Another question is whether the argument weakens the federal government in any significant and important way. Here one has to note that the accord does not change the distribution of powers in any way; nothing is changed in sections 91, 92 and 93.
>
> During the constitutional negotiations in 1968 to 1971 and later up to 1979, it was fully expected that there would be changes in the distribution of powers. Quebec sought a number of changes in the distribution of powers. This accord does not change that distribution in any way.
> (Robertson, 3:77)

11. In the view of many witnesses, therefore, the enhanced role for provincial governments contemplated by the 1987 Accord simply strengthens the counterweight to central power in a way that is desirable for economic as well as political balance. Mr. Eric Kierans addressed this point:

> Economic integration creates heartlands and heartlands create peripheries which no level of regional, economic development assistance can reverse. The centre becomes

strong and affluent, able to buy off some mesure of material frustration and poverty by equalization payments and transfers. With the transfers grow the dependence, vulnerability and helplessness of the outer regions, a deterioration that expands with time. To block the drain of skills, and material resources requires a return of political power to the provinces so that regional interests and goals arising out of particular aspirations, culture, history, language and geography may be pursued responsibly and effectively. It is only in devolution that local initiatives, effort and choices will find expression...
(Submission, p.16)

12. Many witnesses believed the *Constitution Act, 1982* and the *1987 Constitutional Accord* to be complementary. The 1982 initiative stressed national values (the Charter) and the need to sever our residual colonial links to Britain, while the 1987 Accord reaches into our domestic arrangements to strengthen the voice of the provinces at the national level. As Professor Richard Simeon of Queen's University put it:

> I think 1982 and 1987 together represent a kind of blending and compromise among a very complex set of values and competing conceptions about what defines the Canadian political community.
>
> In a sense that is a problem we have had throughout all our history, the conceptions or the conflicts between the view of the rights of individuals and the concerns of communities, between seeing Canada as a partnership between two great language groups and seeing it as a society of many ethnic and linguistic groups. There is a conception of linguistic duality, which sees English- and French-speaking Canadians as present in all parts of Canada and a conception of duality that recognizes Quebec as the home of the great majority of French-speaking Canadians, and therefore, a distinct and different society within Canada.
>
> There is the desire for a strong central government able to define and implement objectives that all Canadians share, and the virtues of strong dynamic provinces, each responsive to local communities, each able to experiment and innovate. Indeed, there is a view of nation building on the one hand as the creation of a single, unified national Canadian community, expressed ultimately through the federal government, and a view of nation building more, I think, in the Laurier tradition, which sees our national strength as building on rather than setting aside strong provincial communities.
> (Simeon, 5:67)
>
> It seems to me that these often competing values and conceptions are all legitimate and fundamental parts of our Canadian political reality and a Constitution must, therefore, represent a blending and a balancing among them.
> (Simeon, 5:68)

13. A preliminary response to the first question we have posed, therefore, is that the 1987 Accord does not so much "stand the Constitution on its head" as it attempts to put the country back on its feet by restoring a more "traditional" political balance between central power and provincial power. Whether or not it achieves this objective is of course a different question which we address in later chapters of this Report.

Question 2: If Quebec is legally bound by the *Constitution Act, 1982*, what does it mean (if anything) when First Ministers claim that the 1987 Accord is intended "to bring Quebec back into the Canadian constitutional family"?

14. The process leading to adoption of the *Constitution Act, 1982*, and the estrangement of the government of Quebec, has to be understood, of course, in light of the sovereignty objectives of the then *Parti québécois* government. The result, however, was that in response to what it regarded as the imposition of a foreign constitution through duplicitous conduct on the part of other provincial governments, the *Parti québécois* and Premier René Levesque adopted a negative stance designed to thwart the *Constitution Act, 1982*:

(1) The Attorney General of Quebec initiated action in the Quebec courts seeking a declaration that Quebec retained a veto over constitutional change, and that the *Constitution Act, 1982* was therefore unconstitutional. This action was ultimately dismissed by the Supreme Court of Canada on December 6, 1982 in *Attorney General of Quebec v. Attorney General of Canada* (1982) 140 DLR (3d) 385.

(2) The Quebec National Assembly "opted out" of the Charter to the maximum extent possible by exercising its legislative authority under section 33 of the Charter to exclude the application to Quebec laws of section 2 and sections 7 to 15 of the Charter.

(3) The *Parti québécois* government refused to participate in the process of constitutional evolution. Some matters of amendment (section 41 of the *Constitution Act, 1982*) required unanimity, e.g. language rights. In other matters Quebec took the position that its assent was mandatory, e.g. Senatorial representation (as discussed below in Chapter 9) even though there were those who took a different view. And, in other matters, such as constitutional changes in respect of the rights of aboriginal peoples, Quebec's abstention was equivalent to a veto (although, in principle, Quebec was a supporter of aboriginal rights) because of the inability of aboriginal groups to otherwise muster the consent of seven provinces representing 50 percent of the population of all the provinces. In short, Quebec's dissent limited the chance of success even for reforms that did not explicitly require that province's consent.

15. Many of these same policies were continued by the Liberal government of Robert Bourassa after its election on December 5, 1985. As we noted in Chapter 2, Quebec was legally bound by the *Constitution Act, 1982*. On the other hand, Gordon Robertson, a former Clerk of the Privy Council, told us: "That is a legal fact but it is unimportant" (Robertson, 3:76). A law that is perceived to be unjust generates resistance and resentment. This is true whether the provisions considered unfair are found on the statute books or in the Constitution itself. Professor Lederman put it this way:

> Everybody knows that in the technical, legal sense, it (the Constitution) is in force in Quebec. But that is not good enough, particularly for a constitutional document. We always have to be renewing our beliefs in and our allegiance to our constitutional principles. A bare, technical legality is not good enough.
> (Lederman, 7:30)

16. Most of the witnesses who appeared before us agreed that the legitimacy of a constitution rests on the willing assent of the governed. Opinions differed about the extent of popular support in Quebec for the Quebec government's continuing opposition

to the *Constitution Act, 1982*. Mr. Trudeau told us that only two to four or "maybe three" per cent of the Quebec people still regard constitutional change as important.

17. Nevertheless, the historical fact is that the *Constitution Act, 1982* was imposed on the government of Quebec against the opposition of its legislative assembly. The imposition included a Charter which limits the authority of provincial governments as well as that of the federal government. Nothing had been done since 1982 to effectively heal the wound that, rightly or wrongly, occurred at that time. These facts have inevitably left a dark cloud over the Canadian confederation. It would not be blown away by reliance on legal formalism.

Question 3: Should Canada say no to any changes to the Constitution that confer a different role on any provincial government, including that of Quebec? Does a special role for Quebec mean special powers that undermine the principle of equality of the provinces said to be fundamental to the Constitution?

18. Former Prime Minister Pierre Trudeau predicted that the 1987 Accord would have a profound effect on divisions in the country:

> ... has it ever struck you that a lot of Canadians prefer the kind of Canada that some Quebec politicians prefer, in which Quebec will be French, Canada will be English and we will all be friends. That is what Mr. Levesque used to be preaching: You speak English in your provinces and we will speak French in ours — this stuff of bilingualism was a noble dream.
> (Trudeau, 14:144)

19. Robert L. Stanfield, a supporter of the 1987 Accord, regarded such fears as being without foundation:

> Those who see these provisions in the Accord as a slippery slope towards two nations, a concept I have never advocated, and which I would oppose, should just pull the bed clothes over their heads and try to get a good night's sleep. That bogey man will not get them.
> (Stanfield submission, p. 6)

20. Professor Gérald Beaudoin, University of Ottawa Law School, pointed out that the "distinct society" interpretation rule confers no new powers on the Quebec government:

> In my opinion, (the Quebec National Assembly) has a role within the boundaries that have already been set, not an additional role. It has been told to promote bilingualism, to promote the concept of a distinct society. But this does not change sections 91 and 92. It has to promote these things, but within the scope established in sections 91 and 92; that is what we forget to mention.
> (Beaudoin, 2:68)

21. It is true, of course, that the 1987 Accord "affirms" for the first time an explicit constitutional role for Quebec to preserve and promote its "distinct identity" using the constitutional powers that it already possesses, but Professor Wayne MacKay of Dalhousie Law School rejected the argument that this represented a significant departure from the basic principles of the Canadian federation:

> The equality of the provinces constitutionally recognized is an important point and part of the positive vision that is identified in the Meech Lake accord. It is true that there is some retreat from that principle in the distinct society clause in respect to

> Quebec, since there is an element of saying some are more equal than others, but I personally think that is justified given the unique position of Quebec and I do not see that as a significant subtraction.
> (MacKay, 3:45)

22. In the course of our Report we shall examine in detail what the *1987 Constitutional Accord* does and what it does not do. Suffice it to say at this stage that we share neither the apocalyptic vision of some of its opponents, nor do we accept the bland assurance of some witnesses who have damned it with faint praise as a "do nothing" amendment. We believe the amendments are meaningful. But in our view any degree of asymmetry in the Constitution brought about by the "linguistic duality/distinct society" interpretation rule and the other changes can be accommodated within the Constitution without significantly jeopardizing the "equality of the provinces" or otherwise creating a "special status" for Quebec to the detriment of Canada.

Question 4: Canada needs to foster national values (like the *Canadian Charter of Rights and Freedoms*). Does the "linguistic duality/distinct society" rule of interpretation encourage "provincial patriotism" at the expense of national patriotism, and if so, in the long run will this undermine the unity of Canada?

23. The Joint Committee fully acknowledges the crucial importance of national symbols (e.g. the flag) and national values (e.g. the Charter). At the same time, we do not share the assumption of some witnesses that "national patriotism" and "provincial patriotism" are mutually exclusive. Dean John Whyte of Queen's University Law School put his case against the *1987 Constitutional Accord* this way:

> ... The national will cannot be the aggregation of political choices made by units, the sub-state units, the units in society. It is not true that we have a nation when what the nation declares for itself is defined simply by virtue of what its various component parts allow to be defined.
>
> For Canada as a federal state, the national will requires the expression of both Parliament and the provinces. But if we think that the expression of the people through provinces requires all-provincial participation, we are not living as a nation at all; we are living as an aggregation of political units. Sovereignty is not in Canada; Canada only reflects a sovereignty expressed elsewhere in other forms, in other places.
> (Whyte, 10:59,60)

24. We approach our assessment of the 1987 Accord on the premise, which we know from our own experience to be true, that one can be a strong Albertan as well as a patriotic Canadian, and the same is true of the inhabitants of every region and province in the country. To deny regional values, regional "patriotism" if you will, amounts to artificial suppression of a perfectly natural state of affairs.

25. Canada is a pluralistic state that cherishes important symbols at all levels, — locally, regionally and nationally. Every locality and region has its special values. Some of these values are expressed through local and regional governments. National values are expressed through the national government. Nothing in the 1987 Accord requires these values to operate in competition with each other in a new or undesirable way. Mr. Eric Kierans even invoked Aristotle as authority for this view of federalism:

> Clearly we are a plural society, geographically, culturally and linguistically. Plural means more than one and while there is a need for unity in some matters there will be a desire for autonomy in many others. This is the problem of politics that will continue throughout history. The Greek city-states failed to solve it as they argued the merits of *communitas communitatum* (community of communities) and what Aristotle described as the mindless conformity of Plato's unitary state. This is what makes politics an art, the art of living together in changing times and circumstances. Meech Lake is that adaptation.
> (Submission, p.2)

On this view of the matter, national unity cannot be purchased at the price of being blind to regional diversity, and the need to allow that regional diversity to be given cultural expression through local and regional governments if that is what the people want. The constitution is supposed to be the servant of the people, not their master.

Question 5: Are not national institutions such as the Senate and the Supreme Court of Canada the sole responsibility of the federal government? Is it appropriate for a province to depart from their sphere of local responsibility to participate in nominations at the national level? Will the result be to subject vital national institutions to provincial control?

26. Institutions with a national mandate are not necessarily the property of the federal government. The Supreme Court of Canada, for example, is the "umpire of Confederation" and it has always appeared anomalous to some court observers that one of the leading litigants in the Court, the federal government, has the exclusive right to select the umpires. Mr. Trudeau, in his submission to the Joint Committee, did not dispute this:

> ... I recognized that it made no sense for the Supreme Court, the supreme arbitor among the parties, to be the exclusive responsibility of the federal government. Mr. Duguay made reference to this a while ago. A way must be found to avoid having the provinces feel that this is a court appointed and set up without their involvement. In Victoria, I made the proposal mentioned by Mr. Duguay. I agreed with it.
> (Trudeau, 14:139)

27. Nor is the Senate exclusively a matter of concern to the federal government. In the late 1970's the Trudeau government moved to reform the Senate without the participation of the provinces on the theory that changes in the Senate were none of the provinces' business. This position was rejected by the Supreme Court of Canada in *Reference Regarding Legislative Authority of Parliament to Alter or Replace the Senate* (1979) 102 DLR (3d)1. The Court pointed out at p. 18 of the reported judgment:

> It is not open to Parliament to make alterations which would affect the fundamental features, or essential characteristics, given to the Senate as a means of ensuring regional and provincial representation in the federal legislative process. The character of the Senate was determined by the British Parliament in response to the proposals submitted by the three provinces in order to meet the requirement of the proposed federal system.

28. Provincial participation in the nominating process for Senators and Supreme Court judges was opposed by former Prime Minister Trudeau on the basis that the federal government answers to individual Canadians not provincial governments, and that to

enhance the role of provincial governments in national institutions wrongly suggests that Canada is simply the sum of its provincial parts.

On the other hand, the Committee was told by Professor Ronald Watts of Queen's University, a specialist in comparative federalism, that it is the practice in other federal states, such as Australia and the Federal Republic of Germany, for the equivalent of our provincial governments to have a say in nominations to their highest constitutional court and to the Upper House. He noted that regional representation (though not provincial government nomination) was a key element in the original design of the Canadian Senate.

29. From provincial participation in the nominating process, former Prime Minister Pierre Trudeau drew a broad significance that, in his eyes, condemns the *1987 Constitutional Accord*. He said:

> They undermine and eat away at our Canadian sovereignty, in a way, by submitting these three fundamental arms or divisions of the modern state to a kind of remote control by the provinces. Finally, in the case of the legislature, our Canadian Parliament is of course made up of two legislative bodies, the Senate and the House of Commons, the House of Commons being an elected body, and the Senate one, up until now, appointed by the federal government. Henceforth, members of the Senate will have to have been nominated by the provinces. In other words, the national government, our Canadian state, loses its ability to choose those who will sit in one of our legislative chambers, both of which, as we well know, are absolutely essential for the passage of all legislation. A veto by the Senate, commandeered by the provinces, which, in a way, are assured the loyalty of their senators, would be enough to ensure that no federal legislation could be passed.
>
> The mechanism for the Supreme Court is the same; only those nominated by the provinces will be appointed to that body. So, once again, provincial governments will be exercising remote control over a body which, thus far, has been entirely the responsibility of the federal government; the Accord transfers that aspect of federal sovereign power to the provinces.
> (Trudeau, 14:117)

30. However, the Committee also heard from Professor McWhinney that Mr. Trudeau's vision represents a "fortress Ottawa" mentality that no longer corresponds to the reality of Canada and provides an unsafe guide to the future:

> Mr. Trudeau, as a Prime Minister, was much more pragmatic in his policies than the public utterances recently, I think, might suggest. I would also suggest to you that... the same truth ten years ago is not necessarily the truth of today. The centralizing imperative that Mr. Trudeau reacted to, the feeling that he had to build a strong fortress, Ottawa; that he had to stamp on what he felt were dissident separatist forces, represented a truth of 10 years ago, or 15 years ago. I would have said today, though that the very success of Mr. Trudeau in building a strong central government, in consolidating McKenzie King and St. Laurent, Pearson and others... is one of the things that facilitates our moving on to the next stage.
>
> I do not think you have to be afraid today of Canada splitting up. I thought the Quebec referendum was an exercise in participatory democracy...
>
> And the vote was taken and the result was categorical, a page in history is turned. And a great deal of the credit for that goes to Mr. Trudeau, as Prime Minister.

> But the reality today is the society is different. We are moving on to other things. You do not need this fortress mentality in Ottawa anymore.
> (McWhinney, 15:71-72)

31. Be that as it may, our assessment of the submissions of the many constitutional experts who appeared before us is that there seems to be no fundamental constitutional principle that would be compromised by allowing provinces to submit nominations to either institution for the consideration of the federal government and limiting the federal government's appointments to the men and women so nominated. Whether the particular mechanism adopted for this purpose in the 1987 Accord is appropriate or workable is considered in Chapter 8 (the Supreme Court of Canada) and Chapter 9 (the Senate).

Question 6: The *1987 Constitutional Accord* did great things for the provinces but what did Canada get out of it?

32. An important gain for Canada, in the view of many witnesses, would be the acceptance of constitutional recognition of linguistic duality as a fundamental characteristic of Canada by all governments from Newfoundland to British Columbia. Another important gain would be that the federation would be back together in spirit as well as tied together by law. The very fact this question is posed, however, assumes that federal-provincial relations is a game of winners and losers. Professor Ronald Watts of Queen's University was strongly critical of the assumption, characterizing it as a Canadian peculiarity. In most federations, he said, the different levels of government see their relationship as one where everybody wins through intelligent cooperation.

33. Senator Lowell Murray justified the federal government's position on the following basis:

> I have also heard it said that the federal government gained nothing in these negotiations and that it gave but did not get. I reject these contentions totally. Canada is the clear and undisputed winner in the current round of constitutional negotiations. The strengthening of our country, the reconciliation of Quebec, opportunities for economic policy co-ordination and future constitutional reform are all significant gains as a result of the present round of constitutional negotiations.
> (Murray, 2:10)

34. In a sense, the question itself is no longer relevant. The 1987 Accord is signed. It has been approved by the Quebec National Assembly. The question now is whether it will be adopted or rejected. As Laurent Picard, former President of the Canadian Broadcasting Corporation, told us:

> The choice is not between what you have and what you might have, but between what you have and what you will have if the accord is rejected.
> (Picard, 12:65)

> Once you have reached an accord you have created a credibility. You have created a process of understanding. And to break the accord after that is not going to bring you back to the day before, it is going to create a totally different situation. No Quebec government will be able to accept less, so the situation will be much worse than it was before.
> (Picard, 12:55)

35. Former Liberal Cabinet Minister J.W. Pickersgill expressed the view that not only is the 1987 Accord good for Canada but that Canada should take it in both hands and run with it:

> If Quebec is rebuffed, if this accord becomes discord, and the opportunity is lost to get the acquiescence of the constitutional authorities in Quebec, my guess is — I am not an especially good prophet but I do not hesitate to say this — that it probably will not arise again for another generation, and never again on such reasonable terms.
> (Pickersgill, 10:126)

36. For reasons that we develop in Chapter 4, we do not accept the idea that any agreement that brings Quebec "into the constitutional family" must *a fortiori* be a good agreement. Nor do we believe that the terms of the 1987 Accord should be looked at in isolation, as if the high policy priority of seeking an accommodation with Quebec did not exist. But there is no doubt, in our view, that if the 1987 Accord is otherwise acceptable, Canada is the clear winner by ending the impasse with Quebec generated by the *Constitution Act, 1982*. As Professor Wayne MacKay of Dalhousie Law School put it:

> ... in terms of constitution-making, I think it is time to make love and not war, and I am not sure that riding tall in the saddle and giving no quarter to the provinces is any longer the way to try to build the nation in Canada.
> (MacKay, 3:46)

CHAPTER IV

The Task of Evaluation

1. On May 9, 1986, at Mont Gabriel, Quebec, the Quebec Minister of Intergovernmental Affairs, Gil Rémillard, set out the five conditions that would have to be met in order to secure the Quebec government's willing assent to the Constitution:

(1) Recognition of Quebec as a distinct society.

(2) A greater provincial role in immigration.

(3) A provincial role in appointments to the Supreme Court of Canada.

(4) Limitations on the federal spending power.

(5) A veto for Quebec on constitutional amendments.

2. Immediate reaction outside Quebec to these conditions was generally favourable. It was noted that earlier Quebec demands for a significant redistribution of legislative power from the federal Parliament to the Quebec National Assembly had then been put aside. Even the Toronto *Globe and Mail*, on June 2, 1986, commented:

> The great danger with the list is that it is close to being a final position. It is impossible to imagine any Quebec government signing a Constitution on the basis of anything less.

3. On August 12, 1986, at the 27th annual Premiers' Conference, the 10 provincial leaders issued their Edmonton Declaration, which sought to avoid a general "constitutional bidding war" by limiting the next round of constitutional talks to an attempt to achieve agreement on Quebec's demands, and to defer other pressing constitutional issues to subsequent rounds. The Edmonton Declaration read:

> The premiers unanimously agreed their top constitutional priority is to embark immediately upon a federal-provincial process, using Quebec's five proposals as a basis for discussion, to bring about Quebec's full and active participation in the Canadian federation.

4. The Edmonton Declaration, in Senator Lowell Murray's view, was the key to the *1987 Constitutional Accord*:

> Had this agreement not been secured and had it not been possible to limit the agenda and to limit the objective, it is highly unlikely we would have succeeded in our

primary goal, which was the repatriation of Quebec.
(Murray, 2:10)

5. The negotiations that led to the *1987 Constitutional Accord* were directed, specifically and intentionally, to the five conditions formulated by the Quebec government.

6. Obtaining Quebec's assent was the purpose and the major achievement of the *1987 Constitutional Accord*. Yet the question must be asked: by what criteria are the merits of the Accord to be evaluated? As a package whose chief strength is that Quebec has agreed to it? As a series of distinct and free-standing constitutional proposals each to be judged on its own merits, or on some other basis?

7. No criteria are spelled out in the resolutions appointing the Joint Committee passed respectively on June 17 and June 16, 1987 by the Senate and the House of Commons.

8. By these resolutions we are directed to consider the *1987 Constitutional Accord* and to report no later than September 14, 1987. Our interpretation of this mandate was explained by one of our Co-Chairmen, Chris Speyer M.P., at the opening of our first public session:

> First, we are to consider the issues and concerns that led the First Ministers to the *1987 Constitutional Accord*, and we are to give full and thorough consideration of the arguments both for and against acceptance of the Accord that they reached. Our job in this Joint Committee is not to make final decisions. That will be for Parliament, when it debates and votes on the Resolution. Our job is to listen to what Canadians have to say and to ask questions to get to the bottom of the issues they consider to be important.
>
> The second branch of our mandate is to report to Parliament fully, to report accurately and fully the concerns and arguments that have been raised by both those who oppose the Accord and those who support it. Our objective is to ensure that the members of the Senate and the members of the House of Commons are fully informed about all relevant matters when the *1987 Constitutional Accord* comes before Parliament for debate and decision. All of us are determined that these objectives will be achieved.
> (Speyer, 2:8,9)

9. So far as criteria for evaluation of the 1987 Accord are concerned, the witnesses who made submissions to the Joint Committee tended to associate themselves with one of three schools of opinion.

(1) *Enthusiasts*

These witnesses perceived reconciliation with Quebec to be an urgent priority. In their view, the *1987 Constitutional Accord* represents the best achievable basis for such a reconciliation. This view was put forward by, among others, Laurent Picard, former President of the Canadian Broadcasting Corporation:

> No Quebec government will be able to accept less than what has been offered at Meech Lake since this will be interpreted by the electorate as abandoning legitimate gains with, as a corollary, the defeat of the government and in the long term the total destruction of the party which formed that government.

> It is already apparent, I think, if one looks at politics in Quebec, that no Quebec government will take that risk. The only possible alternative will be to sign a similar agreement much later, with all the interim costs in the meantime, if it is possible, or to have the federal government giving more of its power, which in no way could give comfort to those who claim that Canada is even now too decentralized.
> (Picard, 12:55)

Other witnesses, including Professor William Lederman, former Dean of the Law School at Queen's University, also believed the Accord should be welcomed. In his view, a "window of opportunity" that may not be open again in the foreseeable future, had presented itself.

> ... it should be very dangerous to start amending this text at this point. As I have said, this is an extraordinary operation to repair an unfortunate omission in 1982, and it responds to what the Quebec government has told us would satisfy them. We think that objective is so important that we do not want to see it jeopardized in any way.
> (Lederman, 7:32)

(2) *Sceptics*

Some witnesses, including historian Professor Ramsay Cook of York University, questioned whether the 1987 Accord represents Quebec's "final position". Therefore he rejected any suggestion that the Accord should be accepted on that basis:

> ... The argument that this set of proposals will bring Quebec into the Constitution is not in itself an argument in favour of the proposals.
> (Cook, 5:35)

In his view, each term of the proposed Accord should stand on its own. The overall objective of securing Quebec's assent is important but

> These proposals should be considered on their own merits as constitutional changes. Will they give Canadians a better Constitution? I think that is the question...
> (Cook, 5:35)

Many witnesses who believed strongly in reconciliation with Quebec, nevertheless were of the view that the 1987 Accord, as it stands, is seriously deficient. These include some of the women's groups, aboriginal organizations, territorial governments and others whose concerns are dealt with in detail in the chapters that follow.

(3) *Defenders of the Status Quo*

These witnesses were of the view that the status quo should be maintained. In their view, our present constitutional arrangements are satisfactory and "if it ain't broke, don't fix it". Has the exercise of the spending power been so harmful, they ask, that it must be curtailed? Has the Supreme Court of Canada demonstrated a bias against the provinces and if not why change the procedure for appointing Supreme Court of Canada judges? Which aspects of the existing Constitution are so unfair as to require Quebeckers to seek the protection of a "distinct society" clause?

10. To some extent, these differing approaches simply reflect a different appreciation of the facts. To obtain as broad a spectrum of opinion as praticable, the Joint Committee placed advertisements in major Canadian newspapers approximately one month prior to its first public session, inviting written submissions or requests to appear before the Committee. In response we received 301 written submissions plus requests to appear that resulted in some 131 individuals and groups testifying before us to share their opinions and answer our questions. The Committee sat in Ottawa but paid the expenses of witnesses who asked to be reimbursed.

11. We are aware, of course, that our mandate has been criticized for not encouraging adequate public participation. A number of witnesses complained about the short period of time available to prepare written submissions. Others believed that holding hearings during the summer would have the effect of both reducing the number of participants appearing and diminishing the size of the audience for the hearings. Still others regretted that the Committee did not travel throughout Canada and hold hearings across the country.

12. According to some of our harsher critics, the time constraints under which the Committee operated, coupled with the agreement by the First Ministers that they would limit changes in the text of the Accord to the correction of "egregious errors", indicated that the Committee was not intended to carry out a proper consideration of the Accord.

13. Bearing in mind the need, acknowledged by a number of witnesses before us, to preserve the momentum of the Accord, we do not believe that the five and one-half weeks of public hearings was too short a period of time to canvass the potential issues and problems raised by the 16 sections that make up the proposed *Constitution Amendment, 1987*. The number of submissions that we received and the number of witnesses that we heard are roughly similar to those received and heard by the Joint Committee considering the more numerous and arguably more complex proposals that were to become the *Constitution Act, 1982*. We believe that the submissions we received and the witnesses that we heard dealt thoroughly and comprehensively with all aspects of the Accord, both in terms of support and in terms of opposition. Any fundamental flaws in the Accord would have emerged in the course of this process.

14. There can be no doubt that our timetable has been a demanding one, and one that has required all involved to focus their energies and attention on the task at hand. We do not, however, feel that our schedule was an unrealistic one or one that in fact excluded meaningful public participation. We believe that the process has provided us with a strong basis upon which to evaluate the 1987 Accord.

15. The public was not in any way excluded from the process. We heard witnesses from all walks of life, from all regions of the country, representing a wide spectrum of political opinion and the broadest imaginable range of special concerns and perspectives. Our hearings were open to the public and were broadcast virtually in their entirety on television.

16. In the process of gathering views and opinions we have, of course, developed our own perspective on the 1987 Accord and how it should be evaluated. We clearly reject the "if it ain't broke don't fix it" school of thought. While, as will become evident, we

do not accept some of the propositions put forward by Senator Lowell Murray on behalf of the government, we entirely agree with him when he observed:

> ... The psychological and emotional and political implications of having Quebec legally bound to a Constitution its national assembly did not accept and does not subscribe to are in my judgment a destabilizing force within our federation.
> (Murray, 2:22)

17. At the same time, we also find ourselves unable to agree entirely with either those who placed almost total emphasis on securing Quebec's agreement to the Constitution or those who, on the contrary, urged that each term of the *1987 Constitutional Accord* must be viewed in isolation and accepted or rejected on its own merits. In our view, a proper evaluation must balance the importance of the objective against the means used to achieve the objective and the likelihood of getting agreement on anything better.

18. This is an approach shared by some of those who were sceptical about the 1987 Accord. Dean John Whyte of Queen's University Law School, for example, told us:

> Of course it is not perfect. Nothing could be perfect. It is time to ask directly what exactly it is that is being done here and is it damaging and harmful for the future of Canada? I will repeat again, is it more damaging and more harmful to the future of Canada than to continue to live in a country where one of the provinces representing one of the founding peoples of this country is not reconciled, at a formal level in any event, to the Constitution?
> (Whyte, 10:61)

19. Members of the Joint Committee were particularly impressed with the approach formulated by Gordon Robertson, former Clerk of the Privy Council and a participant in almost every important federal-provincial conference on constitutional matters from 1950 until his retirement from the federal public service in 1979. Mr. Robertson advocated a three step approach:

> As I see it, the basic question is what are the prime objectives of policy to be achieved at this time, 1987, in the constitutional realm? The (federal) government has decided, and I think the other governments, the provincial governments agree, that the prime objective is to achieve an arrangement under which Quebec can become a willing participant in the Canadian Confederation. This seems to me to be right as to the prime objective of policy at this time. If that is agreed, the second question I think is whether the arrangements to achieve that objective involve consequences that are seriously adverse for Canada. Then the third question, it seems to me, is whether there is a reasonable prospect of getting better arrangements than the arrangements that are incorporated in the *Constitutional Accord, 1987.*
> (Robertson, 3:75)

20. It is perhaps too limited a standard to say that the Accord should be accepted unless it involves "consequences that are seriously adverse for Canada", but the general approach suggested by Mr. Robertson has the advantage that it combines the elements of ends, means and practicality in a balanced relationship. In our view, Mr. Robertson's approach provides a useful framework within which to evaluate the merits of the *1987 Constitutional Accord.*

21. Having set out some of the general thinking that has guided our approach assessing the merits of the 1987 Accord, we shall turn next to a more detailed analysis of its various terms.

CHAPTER V

Canada's Linguistic Duality and Quebec's "Distinct Society"

1. Of the five proposals for constitutional change put forward by Quebec, perhaps the most central was the recognition of Quebec as constituting a distinct society within Canada. The response in the Accord to this proposal is to make two principles of interpretation applicable to the whole of the Constitution of Canada, namely, that the Constitution is to be interpreted in a manner consistent with linguistic duality across the country ("a fundamental characteristic of Canada") and with the recognition of "a distinct society" in Quebec. These principles are more than merely preamble. They must in future be taken into account by the courts, along with other rules of interpretation, in arriving at a balanced understanding of the whole of our Constitution, including the Charter.

2. The precise text of the proposed amendment is as follows:

"2.1(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."

3. This text is to be read in conjunction with section 16 of the Accord, which specifies:

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 91 of the *Constitution Act,1867*.

4. The Joint Committee received numerous written submissions and heard the testimony of a great many witnesses on the subject of proposed section 2 of the *Constitution Act, 1867* and of the meaning and implications of section 16 of the Accord.

Rules of Interpretation

5. On at least one point the constitutional experts were virtually unanimous. The "linguistic duality" and "distinct society" clauses do not bring into existence new legislative or executive powers. They do not increase the "rights or privileges" of the provincial governments at the expense of the government of Canada or vice versa. Rules of interpretation do not create substantive new rights. They do not in themselves override existing substantive rights. They become two additional constitutional values that, when balanced with other values already represented in the Constitution, will be used to arrive at a fair and proper interpretation in the decision of a particular case.

6. Many witnesses referred to section 2 simply as "the distinct society clause". This misses the point. What is described as "a fundamental characteristic of Canada" is the existence of linguistic minorities, i.e., 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. It is in light of this "fundamental characteristic" that the courts are also asked to keep in mind that Quebec is "a distinct society". The amendment does not describe the "distinct society" itself as a fundamental characteristic.

7. The Quebec government is to preserve the fundamental characteristic of Canada (the linguistic minority) within its borders while at the same time it is to "preserve and promote" the distinct identity of Quebec. The "five conditions" announced by the Quebec government did not ask for explicit recognition in the Constitution of linguistic minorities in Quebec or elsewhere; nor did Quebec ask for a role to play in their preservation.

8. Of equal significance is the position of the other provincial premiers. They came to Meech Lake to deal with Quebec's distinct society. They went home with a commitment to entrench in the Constitution an obligation to preserve the French speaking' minorities in their own provinces. They accepted explicit recognition of the presence of these minorities as a "fundamental characteristic" of Canada. It is hard to know who must have been more surprised the morning after the night before — the Premier of Quebec or some of his counterparts in the other provinces.

9. While minorities within Canada are identified in terms of language, the "distinct identity" of Quebec is not limited to language. Ultimately, the courts will want to hear evidence about Quebec's "distinct society". What is the "distinct identity" that Quebec is to preserve and promote? Undoubtedly, it includes the language and culture of French-speaking Canadians and that of the English-speaking minority, but such a statement does not do justice to the variety and richness of the many other cultures and

peoples within Quebec's borders, including aboriginal peoples. The expression "distinct identity", in its ordinary meaning, is broad enough to include anything and everything that makes Quebec recognizably different, both in its many constitutent parts and in the relationship they bear to one another. *Maître* Yves Fortier explained his view as follows:

> Quebec is different from its other partners in the Canadian federation. In this regard, clause 2 enshrines a fact that was already obvious to both politicians and the courts. Does clause 2 distort reality? I do not think so, because Quebec society within Canada is not defined solely by the characteristics of the francophone majority, and clause 2 states this specifically. Quebec's distinct society is composed of English-speaking Canadians, French-speaking Canadians, native people and people from ethnic groups.
> (Fortier, 12:82)

10. The Joint Committee explored with each witness the potential difficulties that the "linguistic duality" and "distinct society" rules of interpretation might create for other important aspects of federalism. The consensus of opinion seemed to be that while these rules were significant in their own sphere of operation, they would not override other equally important constitutional values. Professor Richard Simeon of Queen's University said they would not upset the balance of the federation:

> Indeed, of all of the ways we might have chosen to represent Quebec's distinctiveness in our federal institutions, the means chosen in the accord seem to me to amount the least imaginable challenge to the other important values of Canadian federalism.
> (Simeon, 5:71)

An Accurate Reflection of Canada?

11. The first and major issue raised by the amendment is whether its vision of Canada is accurate and appropriate.

12. We were told an anecdote about Sir Wilfrid Laurier who, speaking in 1900 in Nova Scotia, recalled a visit he had made to a great Cathedral in England at the time of Queen Victoria's Jubilee:

> A marvel of gothic architecture which the hand of genius, guided by an unerring faith, had made a harmonious whole in which granite, marble and oak were blended ... This cathedral is the image of the nation I hope to see Canada become. As long as I live, as long as I have the power to labour in the service of my country, I shall repel the idea of changing the nature of the different elements. I want the marble to remain marble; I want the granite to remain granite; I want the oak to remain oak ... I want to take all these elements and build a nation that will be foremost among the great powers of the world.

13. Former Prime Minister Trudeau, in his evidence to the Joint Committee, denounced the "distinct society" clause as a threat to a unified federal authority:

> ... Read the speeches. Read Mr. Rémillard. It is just ridden with this stuff: now we will be able to occupy the grey areas; now we will be able, even in foreign affairs, even in the area of banking, even the area of telecommunications, to get and exercise more powers.
> (Trudeau, 14:136)

14. Mr. Trudeau's concerns were not shared by Robert Stanfield, former Leader of the Opposition, who spoke in favour of the proposal:

> I cannot see anything in the accord that puts us on a slippery slope toward two nations. True, the accord, if it is fully implemented, becomes part of the Constitution of this country. It is true it recognizes something special about Quebec — not for the first time, by the way — and a role for Quebec in connection with that identity. But it is a very limited thing. There are no specific powers given to Quebec in that connection. I find it very difficult to see how that puts the country on any kind of a slope, and I do not have any difficulty living with that degree of asymmetry in the Constitution.
>
> On the other hand, I think we have been on a very slippery slope following 1982. That is the slippery slope. If the accord that has been negotiated is rejected, I think we are on a very slippery slope indeed. To me, that is the slippery slope we should be watching.
> (Stanfield, 5:112)

15. Sir Wilfred Laurier's vision that the granite is to remain granite and the oak is to remain oak is, of course, older than confederation itself. It distinguishes the Canadian approach from the "melting pot" approach adopted elsewhere. It is an accurate reflection of Canada. The question raised by critics is how, if at all, this social reality should be incorporated in the constitution.

Analysis of the Proposal

16. After reflecting on the testimony we have heard from 131 individuals and groups and the 301 written submissions that we have received, it seems to us that the major issues on this aspect of the *1987 Constitutional Accord* can usefully be organized around a number of key questions, as follows:

Part I: The legal meaning of "linguistic duality" and the "distinct society"

(1) Are these concepts constitutional innovations whose implications have not been adequately assessed?

(2) Why is the "distinct society" of Quebec singled out for special recognition while other distinct societies in Canada, such as that of the aboriginal peoples, are not?

(3) Have the framers of the amendment given appropriate guidance to the courts about the intended meaning of the "linguistic duality" and "distinct society" rules of interpretation, or will the amendment thrust the judges into a political role that elected politicians should properly discharge?

Part II: The legal status of the "distinct society"

(1) Assuming (as all witnesses did) that Quebec is sociologically a "distinct society" within Canada, should the constitutional recognition of this fact confer upon its

provincial government and legislature a special legal role for the preservation and promotion of its "distinct identity"?

(2) Will recognition of Quebec's distinct society undermine the "equality" of the provinces?

(3) Will recognition of Quebec's "distinct society" balkanize Canada's social and economic programs?

Part III: Legal effect of "linguistic duality"

(1) Will recognition of Canada's linguistic duality and Quebec's distinct society disadvantage French-speaking Canadians outside Quebec and the English-speaking minority inside Quebec?

(2) Will recognition of Canada's "linguistic duality" and Quebec's "distinct society" disadvantage the status of multiculturalism?

17. While these questions are certainly not exhaustive, they do serve to organize the issues into a manageable order for the detailed discussion that follows.

18. The whole issue of the impact of these new rules of interpretation on Charter rights is itself a major area of discussion and this is dealt with separately in Chapter 6.

Part I: The legal meaning of the linguistic duality and the distinct society

19. Some witnesses who came before the Committee were troubled by the prospect of inserting into the Constitution additional concepts whose meaning and implications are not spelled out in the text. This criticism was made, among others, by Professor Ramsay Cook of York University:

> ... it does seem to me that the phrase "a distinct society" was put in the Constitution because it meant something, and all I have asked in my brief is to be told what it means. If it does not mean anything, then it should not be there; if it does mean something, then I would be glad to know what it does mean.
> (Cook, 5:43)

The lack of definition creates uncertainty, it was argued, and uncertainty in a constitutional document is a bad thing.

Question 1: Are the concepts of linguistic duality and the distinct society constitutional innovations whose implications have not yet been adequately assessed?

20. The question of definition evoked much discussion about law, history and sociology in the course of the Committee's hearings.

21. In terms of sociology, we were told that the linguistic minorities across Canada and Quebec's "distinct society" are well studied phenomena. Former Prime Minister Trudeau acknowledged that sociologically Quebec is a distinct society and former

Senator Eugene Forsey, who questioned the *1987 Constitutional Accord* on many grounds, had no trouble in recognizing a "distinct society" when he saw one:

> That Quebec is, sociologically distinct, again, who can question? It is, for one thing, the only province with a French-speaking majority. It is, for another, the only province with a French-type civil law, constitutionally guaranteed. Many features of its community life are very different from what we find in any of the other provinces. (Forsey, submission, p.6)

22. As a matter of law, we are told that arguments based on Canada's "linguistic duality" and Quebec's "distinct society" have already been addressed to the Supreme Court of Canada from time to time. In its decision in the *Attorney General of Quebec and the Attorney General of Canada* (1982), 140 DLR (3d) 385 (the "Quebec Veto" case), the Supreme Court of Canada noted the following argument presented by counsel on behalf of the Attorney General of Quebec (at p. 401):

> What was meant by the principle of duality was what counsel called its "Quebec" aspect which he defined more precisely in his factum at pp. 8 and 16 (translation):
>
> > "In the context of this reference, the word "duality" covers all the circumstances that have contributed to making Quebec a distinct society, since the foundation of Canada and long before, and the range of guarantees that were made to Quebec in 1867, as a province which the Task Force on Canadian Unity has described as "the stronghold of the French-Canadian people" and the "living heart of the French presence in North America". These circumstances and these guarantees extend far beyond matters of language and culture alone: the protection of the *British North America Act* was extended to *all aspects of Quebec society — language, certainly, but also the society's values, its law, religion, education, territory, natural resources, government and the sovereignty of its legislative assembly over everything which was at the time of a "local" nature*".
> >
> > (Emphasis added)

23. While rejecting the relevance of Quebec's reliance on "the principle of duality" in that case, the Supreme Court has on other occasions taken note of related matters such as "the basic compact of Confederation" (*Reference Re Adoption Act*, [1938] S.C.R. 398 per Duff C.J.C., at p. 402), the "political compromise" in respect of the founding languages (*La Société des Acadiens v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549 at 578) and the "compromise that is clearly expressed" in relation to denominational schools (*Reference re Ontario Separate School Funding*, Supreme Court of Canada, judgement released June 25, 1987, per Wilson J. at p.48).

24. As a matter of history, linguistic duality (including the accommodation of linguistic minorities) and the "distinct society" of Quebec are far older than Canada itself. The evidence before the Joint Committee suggested that their legal roots reach back at least to April 11, 1713, when most of Acadia became a British colony. By Article XIV of the *Treaty of Utrecht*, those Acadians who chose to remain were to enjoy the free exercise of the Roman Catholic religion. Coexistence of the two religious communities was officially recognized, although the change of sovereignty made English the language of government.

25. In 1763, by the *Treaty of Paris*, France ceded the whole of Canada to Great Britain. Article IV recognized the liberty of the Roman Catholic religion, but it said

nothing regarding the private law or the use of language. After the Conquest, the English pressed for assimilation, while the French petitioned for the maintenance of French private law, access to French-speaking lawyers and a bilingual system of justice. The British bowed to the reality of the linguistic and cultural "duality". Reports of the Attorney General and Solicitor General of the day emphasized the difficulties inherent in failing to give the French and English languages an equal status and the need to recognize the distinct nature of French-Canadian society (Report of Attorney and Solicitor General Regarding Civil Governments of Quebec, 1766). On July 1, 1766, Governor Irving issued an Ordinance of Judicature which provided for juries composed of persons speaking the same language as the parties involved in the litigation, or for mixed juries if the litigants spoke different languages. By an Ordinance in 1771, the French seigneurial system of land tenure was officially recognized and new land grants were thereafter to be made according to French law.

26. It thus appears that not only has the accommodation of linguistic minorities within what is now Canada and the fact of French-speaking people "concentrated" within a defined geographic base been recognized almost since the arrival of the Europeans in North America, but elements of the "distinct identity" of this community — including religion, language and laws — have been reflected in our legal arrangements from earliest times.

27. Professor Gérald Beaudoin, referred in his evidence to *The Quebec Act* of 1774, which he said responded to French Canada's demands for the preservation of its laws and customs. While the criminal law of England was preserved by Article XI, Article VIII re-established French law in relation to property and civil rights. In addition, the anti-papist laws of England were curtailed in their application to Quebec. Article V declared that Roman Catholics were to enjoy freedom of religion, and the clergy of the Catholic Church was to hold, receive and enjoy its accustomed dues and rights. Furthermore, religious impediments to holding public office were removed.

28. The *Constitutional Act, 1791* divided Quebec into two parts corresponding to the linguistic and cultural division of its inhabitants. The Act said nothing about the constitutional status of the French and English languages, but certain of its provisions recognized the "linguistic duality". For instance, section 24 provided that electors could be sworn in either French or English.

29. In 1840 the British government decided to withdraw recognition of some minority rights and to play down Quebec's "distinct society". The *Act of Union* brought together Upper Canada and Lower Canada into the "united" Province of Canada, with unexpected results. Mr. J.W. Pickersgill described this aspect of our history to the Committee as follows:

> ... they were attempting to follow Lord Durham's proposal to submerge the French and turn them into English colonials. That was the purpose. The French language no longer had any official status in that act. They were thwarted in that, however, and I think this is one of the proudest things in Canadian history. They were thwarted in that effort by the Parliament of the Province of Canada, with an anglophone majority that insisted on the restoration of the French language as an official language. I say that was one of the great moments in Canadian history.
>
> The distinct society was of course restored completely in the act of 1867, but French Canadians, I believe, have never forgotten what was attempted in 1840, and there has

always been a worry that the majority might try to do it again. That is why they are so insistent on having an affirmation in the Constitution itself of the distinct character of that society.

There was a kind of repetition of 1840 in 1982. I quote Mr. Stanfield's words: the Charter was shoved down the throats of the legislators and the Government of Quebec. It took away provincial rights, as I have already said, without provincial consent.
(Pickersgill, 10:125)

30. The point made by Mr. Pickersgill is, we think, an important one. When efforts were made by the British in 1840 to re-fashion Canada according to pre-conceived notions of what the country *should* (in their view) look like, the result was failure. Many witnesses suggested that our Constitution should be an uplifting text that inspires us to do better, but at the same time our history suggests that it should not ignore the realities of the society we live in. When a constitution wanders too far from the society it is intended to regulate it is the constitution, not the society, that ultimately has to yield.

31. The *Constitution Acts* of 1867, 1870 and 1982 contain extensive provisions dealing with language rights, religious rights and recognition of the civil law system of Quebec and the common law system elsewhere in Canada. Section 94 of the *Constitution Act 1867*, which contemplated the possibility of uniform federal legislation for property and civil rights in some of the provinces, made no reference to Quebec in recognition of its very different civil law system.

32. Enough has been said to indicate that our laws *already* reflect, sometimes implicitly and sometimes explicitly, "the existence of French-speaking Canadians centered in Quebec but also present elsewhere in Canada and English-speaking Canadians concentrated outside Quebec but also present in Quebec", as well as the fact that Quebec society presents certain distinctive features not found to the same extent, if at all, elsewhere in Canada.

33. Witnesses were asked whether this everyday reality had so far escaped the attention of the courts. Professor William R. Lederman assured the Joint Committee that it had not:

I think it has been true since 1867 that the courts have known that the Quebec society is, in certain important ways, a distinct society. That has always weighed with them in settling constitutional issues that touched closely on Quebec. This has been implicit ....

I believe it is worth making that which has been implicit, explicit, in general terms, because it is, as we say in our brief, one of the fundamental realities of the Canadian free and democratic society.
(Lederman, 7:28)

34. In this connection we were referred to the decision of former Chief Justice Jules Deschênes of the Superior Court of Quebec in the *Quebec Association of Protestant School Boards et al v the Attorney General of Quebec et al (No 2)* (1982) 140 DLR (3d) 33, [1982] CS 673. In deciding whether some of the education provisions in Quebec's language law, Bill 101, were demonstrably justified within the meaning of section 1 of the Canadian *Charter of Rights and Freedoms*, as a reasonable limit on the

minority language education rights guaranteed in section 23 of the Charter, Chief Justice Deschênes considered evidence on contemporary political thought in Quebec, on demographic trends and projections with regard to Quebec's linguistic groups, on the relationship of language and culture in Quebec, on the economics of school funding in Quebec, and on the historical contrast between Quebec's approach to linguistic education and that of the other provinces in Canada. In his decision, Chief Justice Deschênes acknowledged the legimitacy of the government of Quebec's aim to protect the distinct features of Quebec society that were revealed by this evidence, but held that the means adopted in Bill 101 overshot that purpose. On appeal, the Supreme Court of Canada affirmed the correctness of the result arrived at by Chief Justice Deschênes but on grounds that did not involve a consideration of his approach to "distinct society" evidence. (The Supreme Court's decision is reported at [1984] 2 SCR 66.).

35. Some witnesses took the position that appeals to history cannot in 1987 justify associating the legal rights of each of the founding cultures with a particular geographic base within Canada. This, they feared, could eventually lead to acceptance of the idea that Canadians belong only in their "assigned" geographic area. This could be the beginning of "two nations". All of Canada is the homeland, it was pointed out, and constitutional recognition of regional distinctiveness is neither relevant nor desirable.

36. In the Committee's view, however, the limited recognition given by the proposals to the "distinct society", and the assignment of a role to the Quebec government to "promote" its distinct identity, are appropriate values to be reflected explicitly rather than implicitly in the Constitution. Insofar as the "linguistic duality" and "distinct society" clauses are statements of fact they are neither revolutionary nor particularly innovative. They reflect Canada as it is. Insofar as criticism has been directed not so much at the concepts as at the particular way in which the amendment is formulated, these aspects of the 1987 Accord will be discussed in greater detail below.

Question 2: Why is the "distinct society" of Quebec singled out for special recognition while other distinct societies in Canada, such as that of the aboriginal peoples, are not?

37. Many of the submissions before us were concerned with elements of Canada's identity that were seen to have been excluded from the definition in section 2(1)(*a*). Witnesses were quick to suggest other entities within Canada that could also be described as "distinct societies".

38. Former Senator Eugene Forsey put the point in his submission:

> But it can be argued that other provinces also are sociologically distinct. My own native province of Newfoundland, for example, has its own varieties of the English language... its own special system of education, constitutionally guaranteed. New Brunswick also is sociologically distinct: the only province with a French-speaking minority amounting to nearly a third of the total population, and a French-speaking community which is by no means just a carbon copy of Quebec's. (Forsey submission, pp.6-7)

39. The viewpoint of aboriginal peoples was expressed by Mr. Zebedee Nungak, on behalf of the Inuit Committee on National Issues, as follows:

> We have much concern with the distinct society clause, mainly because it abjectly ignores that people or groups other than Quebec are not distinct; it implies that Quebec is the only distinct thing that deserves such special recognition. We know that to be a basic fallacy, because we are distinct just as much as Quebec is: we are aboriginally distinct.
>
> With the distinct society, our concern is we may be "out-distincted" by a distinct Quebec, especially if we have the circumstances of living within the boundaries of what is called Quebec now.
> (Nungak, 3:24)

40. As we have already pointed out, to the extent that aboriginal peoples reside in Quebec they are as much part of the "distinct society" as anyone else, and as much entitled to both the protection and affirmative support of the "distinct society" rule of interpretation.

41. With respect to other "distinct societies" outside Quebec, section 2(1)(*a*) does not pretend to be a compendious definition of what constitutes the identity of Canada. As for the "linguistic duality" clause, it is not put forward as "*the* fundamental characteristic of Canada" or as "the *only* characteristic of Canada", but simply as *a* fundamental characteristic.

42. The members of the Joint Committee have no doubt that other communities within Canada might also be defined as "distinct societies" and the fact that they are not referred to in section 2 does not mean that these other characteristics or other cultural groups have been rejected or given second-class status. They do not appear in these sections because these sections are addressed to a much more narrow and much more specific issue, namely, the appropriate constitutional response to the demand of the Quebec government in the Quebec Round that Quebec be recognized as "*a* distinct society".

Question 3: Have the framers of the amendment given appropriate guidance to the courts about the intended meaning of the "linguistic duality" and "distinct society" clauses, or will the amendment thrust the judges into a political role that elected politicians ought properly to discharge?

43. Professor Ramsay Cook put this particular objection to the drafting of the Accord in this way:

> It seems to me that by failing to define clearly the terms "distinct society" and "distinct identity", the proposed Constitutional Accord, instead of resolving the sensitive issue of Quebec's place in the Canadian federal system, only opens that question to further claims and counter-claims; claims about the meaning of terms that, as they stand, are at best calculated ambiguities and at worst a long, irreversible step into a quagmire. Quebeckers and all other Canadians need a precise definition of that province's place in our Constitution before any sensible judgment of this Constitutional Accord can be made.
> (Cook, 5:36)

44. Other witnesses suggested that the phrase "distinct society" was likely not defined further because no consensus could be reached by the participants at Meech Lake, who therefore simply thrust the whole matter of definition upon the courts. To these critics, this represents an abdication of political responsibility which ought properly to have

been exercised by the drafters of the Accord. In their view, this "abdication" imposes upon the court a political rather than a judicial role. A variant to this argument characterizes the decision that the court is called upon to make in interpreting the meaning of "distinct society" as a sociological matter that is equally inappropriate for a court of law.

45. The real question is whether it is either necessary or desirable to lay down more specific guidance to the courts in a constitutional document. The technique adopted in the *Constitution Act, 1982* was to use broad language and few definitions in its formulation of Charter rights and freedoms. Even such key ideas as "reasonable limits" and "demonstrably justified" and "a free and democratic society" are left undefined. It was believed by the framers of the *Constitution Act, 1982* that the country would in the long term be better served by allowing the courts to work out the meaning of general concepts, based on proper evidence, on a case by case basis, when issues arise in the context of specific fact situations.

46. Senator Lowell Murray advised the Joint Committee that it is the government's view that to spell out the particulars of the "distinct society" in the text of the Constitution would risk obsolescence and rigidity:

> We decided not to define Quebec's distinct society more clearly. If, in the 1930's, anyone had tried to define Quebec's specificity, it might have been said that Quebec was Catholic and French-speaking. I do not think today's politicians would use these kinds of terms to define Quebec's specificity.
>
> We all know that we can quickly draw up a list of those characteristics that describe Quebec. There is the obvious fact that Quebec is the only province to have a French-speaking majority and an English-speaking minority. There is also the fact that it uses the civil code and that it evolved under a different Crown for 150 years before the 1763 Royal Proclamation. There are also the cultural and social institutions. As you can see, it would be easy to draw up a list, but that list might unduly limit the concept itself. A constitution is a living and evolving instrument.
>
> We decided to allow this concept, as well as other concepts contained in the Constitution, to evolve through time.
> (Murray, 2:43)

47. A number of potential definitions were suggested. *La Fédération des femmes du Québec* recommended adoption of the definition used by Mr. Claude Ryan in the Beige Paper:

> Our laws, our legal system, our municipal and provincial institutions, our volunteer organizations, our media, our arts, our literature, our education system, our network of social and health care services, our religious institutions, our savings and loans institutions, as well as our language and our culture.
> (Submission, p.4)

48. Those who favour flexibility point out that it is impossible for the framers of any constitutional amendment to anticipate every circumstance in which a concept may have some application. Judges have the advantage of seeing everything with hindsight. The particular aspect of the "distinct society" under consideration by the court will at that time have to be established in evidence.

49. The Supreme Court of Canada has itself argued for flexibility and a "living tree" approach to the Constitution. Chief Justice Dickson made the following observations in an early Charter case, *Hunter v. Southam Inc.*, [1984] 2 SCR 145, at p. 155:

> A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. *It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.* The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".
> (Emphasis added)

50. The Joint Committee does not wish today's "definition" to become tomorrow's "last will and testament" for Canada's linguistic minorities and Quebec's distinct society. The concept of distinctness is clear enough, as is the intention of section 2 to ensure that it is preserved and encouraged to flourish. The content of this distinctness, even if it were ascertainable as of the date of a constitutional amendment, ought not to be frozen or "fixed in amber" for all time.

51. Nor do members of the Joint Committee believe it to be an abdication of political responsibility to call upon the courts to ascertain from time to time the evolving meaning of these rules of interpretation. The categories of evidence to be considered in such a decision and the processes used to come to a conclusion, including the consideration of sociological or political factors, are precisely those to which the court resorts when it makes determinations with regard to the Canadian *Charter of Rights and Freedoms*, especially on the subject of whether a particular enactment which appears to infringe Charter rights can nevertheless be saved as "demonstrably justifiable in a free and democratic society".

52. If Canadians are willing to allow the courts to determine the concept of a "free and democratic society" in relation to evolving circumstances, it is not a "quantum leap" to add linguistic duality and the "distinct society" to the court's docket of responsibilities. The quantum leap was made in 1982. The Supreme Court of Canada was at that time handed a major policy role as a shaper of Canadian society. Those who framed the *Constitution Act, 1982* decided that some important judgements about social and cultural values would better be solved institutionally (i.e. by entrusting them to the courts) rather than by trying to articulate extensively a hierarchy of values in the text of the Constitution itself. If the 1987 Accord requires a measure of political judgment from the courts so be it. It is a role that was thrust upon the judiciary in 1982 with the advent of the Charter.

Part II: The Legal Status of the Distinct Society

53. Many of the points under this heading have already been mentioned in earlier paragraphs of this report but it is convenient at this stage to bring together some of the main themes before embarking on a more detailed discussion.

Question 1: Assuming (as all witnesses did) that Quebec is in fact a "distinct society" within Canada, should constitutional recognition of this fact confer upon Quebec's government and legislature a special legal role for the preservation and promotion of its "distinct society"?

54. Some witnesses argued that the recognition of Quebec as a "distinct society" means that Canada is being redefined as a country composed not of individuals nor even of 10 provinces plus the northern territories, but of two nations, a concept which must, the argument continues, lead to the steady erosion of the unifying effect of the federal government and its institutions and ultimately to a bifurcation of Canada.

55. A less alarmist version of this argument asserts the possibility that recognizing the respective roles of Canada and the provincial legislatures, including Quebec, to preserve a "fundamental characteristic" of Canada, namely linguistic duality, and the role of the government and legislature of Quebec to preserve and promote the distinct society, may shift the constitutional balance of Canada either in terms of conferring new powers on legislatures, especially that of Quebec, or in terms of justifying encroachments on individual rights in ways that were hitherto prohibited by the Charter.

56. An interesting variation of this view was put forward to the Joint Committee by Dean John Whyte of Queen's Law School, who foresees the possibility that the *1987 Constitutional Accord* will hinder rather than promote bilingualism in Canada:

> I am worried about the other provinces that have weak bilingualist features. The sociological feature they have which is now expressed and identified in the Constitution, is that they are essentially English provinces.
>
> So long as you have a government which promotes bilingualism and wants bilingualism in its education policy and in its governmental administration policy and its justice policy, it will be there. I am not suggesting that governmental power is sapped. What I am suggesting is that the language of Meech Lake and the language of section 2 the political obligation to promote certain things, gives a strong political message, a strong political support, for those who want to say that the Constitution says we are a mostly English-speaking province, and that is your role as legislators — to keep it that way.
> (Whyte, 10:74)

Rules of Interpretation

57. Some of the submissions that we heard appeared to lose track of an essential feature of the proposed amendment — it is nothing more (and nothing less) than a rule of interpretation. We were told by *Maître* Robert Décary of the Quebec Bar that it can of course be expected to have a meaningful application to at least two areas of the Constitution, the *interpretation* of the distribution of powers and the *interpretation* of the Canadian *Charter of Rights and Freedoms*:

> It must be borne in mind that this concept is a rule of interpretation, at the outset. It is a rule of interpretation that will have to be applied to the division of powers within the federal state of Canada. Under it, certain powers could be assigned to the provinces, by virtue of the fact that Quebec, as a province, is a distinct society. The division of powers could, in case of doubt, be decided by the Supreme Court. Because it is possible that this dimension of power relates to the concept of a distinct society in Quebec, the Court could decide that a power lies within provincial jurisdiction. Thus,

this power would fall within the purview of all the provinces, and not only within that of Quebec.
(Décary, 4:66)

Mr. Hamelin: When the Supreme Court interprets certain provisions of the Charter, it will, I imagine, take into account the concept of a distinct society. Do you think so?

Mr. Décary: Yes, yes it will, because the Charter is part of the Constitution and because it is an interpretive clause with the Constitution, it also affects the Charter.
(Décary, 4:75)

58. Professor Gérald Beaudoin, with whose testimony a number of other constitutional experts concurred, described the legal effect of these clauses as follows:

In my opinion, as in the opinion of a good number of lawyers, the recognition of a distinct society ... is an explicit and important interpretative clause but it does not change the distribution of powers or the Canadian *Charter of Rights and Freedoms*. But it can, in certain cases, in particular under section 1 of the Charter and in grey areas concerning the distribution of powers, give more weight to certain arguments.

... it is an express rule of interpretation. It is important. It is fundamental. It may influence the interpretation of the courts under section 1 of the Charter or the interpretation of the division of powers, but it is not more than that and it is not less than that. It is a rule of interpretation.
(Beaudoin, 2:65)

59. We should also keep in mind the observation of Dean John Whyte on this point:

Of course, you only get to construe terms of a Constitution when they are ambiguous. On the other hand, they are always ambiguous. So you get to construe, according to this social norm, in almost every case.
(Whyte, 10:61)

60. As a matter of law, the "linguistic duality" and "distinct society" clauses neither grant new powers nor derogate from existing powers. They are merely aids to interpretation of what is already there. Subsections (2) and (3) of the 1987 Accord do not speak of granting powers or conferring jurisdiction. The English text speaks of "affirming" certain roles for a government and all the legislatures. The French text merely presents these roles as an existing fact. The clear implication is that the roles in question, and the exercise of powers necessary to fulfil these roles, were already within the jurisdiction of the legislature or the government in question.

61. To eliminate any uncertainty on this point, section 2(4) was added on the road between Meech Lake and the Langevin Block to declare expressly that nothing in section 2 "derogates from the powers, rights or privileges" otherwise enjoyed by the legislatures or governments in question.

62. In these circumstances, nevertheless, is there a serious risk that the "linguistic duality/distinct society" clause might cause some shift in the constitutional distribution of powers or erode the protection of Charter rights and freedoms?

Distribution of powers

63. It has been held repeatedly by the courts that the *Constitution Act, 1867* exhaustively divides the entirety of legislative competence between Canada and the

provinces. It might therefore appear difficult to see how the "linguistic duality/distinct society" clauses could affect the division of powers without derogating from the powers, rights or privileges of one level of government in favour of the other.

64. Nevertheless, the Joint Committee was advised that the definition of the scope of a legislative power is an ongoing process of allocating subject matters to heads of jurisdiction. Take, for example, the regulation of markets for financial securities. Would such a law be classified as an aspect of the federal "trade and commerce" power, as some say, or of "property and civil rights" within exclusive provincial jurisdiction, as others contend? And what about a new law purporting to regulate the content of radio or television broadcasting? As new laws are made and challenged before the courts this process of classification of laws into federal or provincial jurisdiction continues. The court docket is limited only by the imagination and productivity of Canada's legislators and lawyers. The ongoing process of the constitutional "classification" of laws by the courts is one of the important areas where the interpretative provisions of the "linguistic duality" and "distinct society" clauses will come into play. Indeed, if this were not so, then the "linguistic duality" and "distinct society" interpretative provision would be meaningless, a result that can hardly have been intended by its framers.

Peace, Order and Good Government

65. In addition to the specific areas of legislative competence assigned by the *Constitution Act, 1867* to Parliament or the provincial legislatures, there is also a generalized grant in section 91 which assigns to the Parliament of Canada the power to make laws for "Peace, Order and Good Government". This power has been interpreted by the courts as a "residual" power so that when a particular matter cannot be fitted into any of the specific heads of power enumerated in the *Constitution Act, 1867*, it falls under the authority of Parliament. Examples of federal jurisdiction based on its residual "Peace, Order and Good Government" power are aeronautics and broadcasting, both of which result from technology that was not anticipated in 1867.

66. With respect to the residual federal power, the federal government representatives had this to say:

> **Senator Murray:** "... the powers that accrue to the federal Parliament by virtue of the peace, order, and good government clause are every bit as explicit and as safe as any of the other heads of powers that are enumerated in the old *Constitution Act of 1867*.
>
> I will ask the Deputy Minister of Justice whether he would like to add something in a more complete and professional way to this statement.
>
> **Mr. Iacobucci:** There is nothing I could usefully add. I believe it is the analysis we have advised the government on."

67. The net result of the advice received by the Joint Committee is that federal powers are "safe" but that they continue to be subject to judicial interpretation and evaluation. The possibility, therefore, exists that the affirmation in section 2(3) of the role of the government and legislature of Quebec "to protect and promote" Quebec's distinct society could be used by the courts to *interpret* the distribution of powers in a way not precisely the same as these powers would have been interpreted if the "distinct society" clause were not part of the constitutional mix. In the same way, the "linguistic duality"

rule of interpretation would also be of use to the courts to interpret "grey areas" in appropriate circumstances. But that is the full extent of the changes in respect of the distribution of legislative competence brought about by this aspect of the 1987 Accord.

Executive Authority

68. On the level of executive authority (as distinguished from legislative jurisdiction), there may also be some re-definition of constitutional power. *Maître* Robert Décary, foresees an enlarged role for Quebec on the international stage in matters of direct concern to the "distinct society". As a general rule, executive authority in Canada is divided between the federal and provincial governments along the demarcation lines established by the Constitution and the courts for legislative competence. Accordingly, the above discussion about the possible re-interpretation of the distribution of legislative powers generally applies to executive power as well.

69. The Committee acknowledges that the precise impact of the "distinct society" clause cannot be authoritatively determined in advance, but nor was it possible to foresee the future when, in 1867, the key words "Peace, Order and Good Government" were written into the Constitution; nor in 1982 when the words "free and democratic society" were written into the Charter. That being said, however, the weight of constitutional authority, nevertheless, strongly suggests to the Committee that the impact of the "linguistic duality/distinct society" clause will be felt at the margins of government authority. There is simply no basis to predict a "massive shift" of power from the federal government to the provincial governments, including Quebec.

Question 3: Will recognition of Quebec's distinct society undermine the equality of the provinces?

70. The preamble to the Resolution moving adoption of the *Constitutional Amendment, 1987* recites that "the amendment proposed in the schedule hereto also recognizes the principle of the equality of all the provinces". At Meech Lake, Quebec's original 5 conditions were negotiated, where possible, into amendments of equal application to all provincial governments. A necessary exception to this general approach was the "distinct society" clause and the question is whether this exception unduly undermines the general principle of equality of the provinces.

71. Some witnesses were concerned about an "asymmetrical Constitution", i.e. a constitutional arrangement not perfectly balanced and equal in all its constituent parts.

72. The express identification of a special "role" for a particular provincial government is a constitutional innovation, although in broad terms each provincial government is given a different "role" to play depending on its location and circumstances. British Columbia plays a role in the protection and promotion of the forest industry. Prince Edward Island does not. This is not because Prince Edward Island lacks the same arsenal of legislative and executive power as British Columbia, but because history and geography have not blessed it with major forestry resources.

73. In the same way, it was argued by some witnesses, history and geography have created for the government of Quebec a cultural and linguistic community which is unquestionably "distinct". The "role" is thrust on the Quebec government by its history

and the special facts of its situation and not by some abstract constitutional doctrine. The rule merely makes explicit a role that is already implicit, in their view. If the Constitution is "asymmetrical" it is because it has to accommodate a country which, to this extent, is asymmetrical.

74. The precise future role of the government of Quebec was questioned by Professor Ramsay Cook:

> Does preserving and protecting that distinct society, for example, include a role in international affairs that might be denied to other provinces, as it will include under the new agreement, and indeed to some degree did in the past, a special role in immigration policy? Does it imply manpower or child care policies different from those of other provinces? Could it imply a special role in the making of economic policy?
> (Cook, 5:36)

75. Two broad answers emerged to these questions. In the first place, it was pointed out that just as factual realities gave rise to the "distinct society" clause in the first place so other factual realities will constrain its exercise. On the matter of international relations, for example, Mr. Gordon Robertson testified:

> A lot will depend on the attitude of future federal governments. If they are determined that Canada is to speak with a single voice and there is to be a single foreign policy for Canada, I think this can be firmly and clearly established ...
>
> A second consideration is that most foreign countries are not at all anxious to promote provincial governments in Canada as spokesmen, or "spokesgovernments", on an independent basis. I would be very skeptical whether a future government of Quebec will find the kind of support abroad, if it seeks that kind of support. I am very dubious if it will try it. I would be most surprised if it did.
> (Robertson, 3:81)

76. Secondly, it must be repeated that the "distinct society" clause does not itself confer on Quebec the power to do anything. Quebec's jurisdiction, like those of the other provinces, must be found elsewhere in the constitution. *An interpretative clause, by definition, cannot breathe life into a jurisdiction that does not exist.* Thus, on a legal level, Quebec will be restrained by the limits of its existing legislative and executive powers (subject to the "grey areas" of interpretation already discussed). This point was emphasized by Professor Peter Leslie of Queen's University:

> The distinct society clause does not give the Quebec legislature a free hand to do whatever it thinks necessary to "preserve and promote" the distinctive character of Quebec, because the division of powers is unchanged.
>
> Thus I think it is unwarranted and I think it is alarmist to suggest or to allege that the distinct society clause could confer upon Quebec significant powers that are denied to other provinces. We can expect that by virtue of its linguistic composition and its cultural distinctiveness Quebec will wish to exercise a certain policy role or to take on certain policy responsibilities different from those of other provinces. But it will do so within a constitutional status that is not greatly different from that of the other provinces. That is why I consider that the alleged political imbalance between Quebec and the other provinces is a bogey.
> (Leslie, 4:99)

77. The role of preserving Canada's "linguistic duality" is allocated to the legislative branch of government, federally and provincially, whereas the role of preserving and promoting Quebec's "distinct identity" is allocated to both the legislative and executive branches of the Quebec government. Should not the executive branches of governments elsewhere in Canada as well as provincial legislatures take a role in preserving Canada's linguistic duality? We believe so, but we understand that some governments were not prepared to make this commitment at this time.

78. A point of the drafting of the proposed text also attracted some comment. While subsection 2(1)(*b*) recognizes Quebec's "distinct *society*", subsection 2(3) speaks of Quebec's role to promote its "distinct *identity*". Presumably, "identity" embraces those aspects of Quebec society that make it distinctive, but the intended significance of the shift in meaning from "society" to "identity" is an unexplained subtlety.

Question 4: Will recognition of Quebec's "distinct society" balkanize Canada's social and economic development programs?

79. The principal concern expressed by witnesses in this respect was not the "distinct society" clause itself, but the interrelationship of the "distinct society" clause and the new arrangements respecting the federal spending power discussed in Chapter 7. However, a number of submissions did stress on a more general level the importance of the concept of the equality of individual Canadians (as distinguished from the equality of the provinces) and questioned whether this equality could be undermined by the "distinct society" rule of interpretation. These submissions underlined the importance of the federal government and its institutions as a unifying element in Canada, particularly in terms of its ability to legislate uniformly for all Canadians and in the interests of Canada as a whole. Viewed from this perspective, giving special recognition to one element (or even, one would expect, to several elements) of Canada, no matter how "distinct", could create inequalities, undermine the universality and portability of our national social programs and deprive Canadians of a *minimum* national standard of care.

80. Other witnesses responded that the federal government has no monopoly on the shaping or the safeguarding of the Canadian identity. The provinces are legitimate partners in the Canadian Confederation and the role they play in creating, protecting and defining the Canadian reality in everyday matters is equal to, if not greater than, that of the federal government. Most of our major national social programs were pioneered by the provinces, they pointed out, not the federal government.

81. Witnesses who held this view maintained that to the extent that the "distinct society" clause would assist the Quebec government to promote programs and policies tailored to the particular needs and aspirations of its constituents, it is acting in a manner entirely consistent with the federal structure of the country.

Part III: Legal effect of "linguistic duality"

82. Most of the discussion on the branch of the 1987 Accord was directed to the "distinct society" provision. However, the constitution must also now be interpreted in light of the "linguistic duality" clause, and this was also the subject of comment from a different group of critics.

Question 1: Will recognition of Canada's linguistic duality and Quebec's distinct society disadvantage French-speaking Canadians outside Quebec and the English-speaking minority within Quebec?

(*a*) French-speaking minorities outside Quebec

83. Concern was expressed by some French-speaking minorities outside Quebec that, while section 2(3) affirms the role of the legislature and government of Quebec to "preserve and promote" the distinct society of Quebec, section 2(2) merely affirms the role of Parliament and of the provincial legislatures to "protect" the linguistic duality defined in subsection 2(1)(*a*). Their main concern was that the role of "preservation" could be interpreted as looking backward rather than forward and as contemplating a perpetuation of the status quo even if such status quo is unjust.

84. Moreover, the "fundamental characteristic" of French-speaking Canadians outside Quebec is described in terms of their "presence" not their rights. Little is required, it was pointed out, to respect the "presence" of minority language groups and, arguably, considerable encroachment on the linguistic rights of individuals within such groups would be possible without jeopardizing their presence or existence.

85. It was pointed out by *L'Association des Francophones Hors Québec* that to define "a fundamental characteristic" of Canada only in terms of an individual's linguistic identity misses the key point that language is merely an obvious manifestation of culture, and that not only must the minority language be protected in the Constitution, but it must also be supported by the recognition of collective cultural rights. If the francophone communities outside Quebec wither away, their language will die with them. In this connection, *L'Association des Francophones Hors Québec* objected to the change in language between Meech Lake and the Langevin Block. The Meech Lake Accord it will be recalled, referred to French-speaking "Canada" and English-speaking "Canada", whereas the Langevin text substituted "Canadians" for "Canada" as follows

> the recognition that the existence of French-speaking Canadians, centered in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec,

L'Association des Francophones Hors Québec said that this change, by substituting a reference to individuals for a reference to geography made more difficult the argument that the 1987 Accord preserves collective community rights. However, most witnesses were of the view that the earlier language of the Meech Lake Accord could have been misinterpreted as approval of "two Canadas" and the change in language was generally considered to be an important improvement.

86. The federal government's response to the other criticisms of the "linguistic duality" clause was generally that the provinces had been moved as far as they were collectively prepared to go at this time, and that the effort to expand minority rights in future rounds of constitutional talks and in other ways would continue. Senator Lowell Murray described the federal government's position in this way:

> It is a step in the right direction, and an important step. I assure you that the Prime Minister of Canada — and this will come as no surprise to anybody here — tried,

both at Meech Lake and in the Langevin Block, to move the Premiers somewhat farther than that. It was not possible.

But do not sneeze at the declaration that is there. The Commissioner of Official Languages, *dont il n'y a personne de plus exigeant à cet égard*, has pointed to the progress this represents. It does represent progress. It is this acknowledgement by all governments, for the first time in history, that linguistic duality is a fundamental characteristic of our federation and that they have a role to protect that. That is a basis. That is all it is. It is a minimum, not the maximum, and on that foundation we can and will build and we are building, in collaboration with the provinces, to promote linguistic duality.
(Murray, 2:36, 37)

87. Amending the Constitution to include an explicit and unanimous acknowledgement of Canada's "linguistic duality" across the country is, in the Joint Committee's view, a major achievement.

(*b*) English-speaking minority in Quebec

88. Representatives of the English-speaking minority in Quebec expressed concern about what "promotion" of the distinct identity of Quebec might do to their minority rights.

89. Former Senator Eugene Forsey pointed out that the English-speaking minority in Quebec numbers over 800,000, ("something depends on whether you measure it by mother tongue, or by the language usually spoken in the home"), which he stated to be larger that the population of Newfoundland, New Brunswick, Prince Edward Island or Saskatchewan. It is almost as large as the total population of Nova Scotia. It is larger than the combined French-speaking minorities of Ontario and New Brunswick and, according to Senator Forsey:

The English-speaking minority in Quebec might find that the principle of duality gave them nothing, and the principle of the distinct society gave the Legislature and Government of Quebec the power to take away such rights as they now have. The English-speaking minority might find that what was sauce for the French goose was not sauce for the English gander.
(Forsey submission, p. 8)

90. The weight of opinion among other constitutional experts, however, appears to be to the contrary. The language and educational rights of English-speaking Quebeckers are already entrenched in clear and explicit terms in the *Constitution Act, 1867* and in the Charter. The Supreme Court of Canada has considered their application to a variety of factual situations. The jurisprudence in the area is extensive. It is unlikely, in the view of these experts, that a mere interpretative clause could be used to weaken the constitutional guarantees that are already in place. The government view, expressed by Senator Lowell Murray, was as follows:

In any case, they [the English-speaking minority in Quebec] have section 133 of what used to be the *British North America Act* regarding the use of the languages in the legislature of Quebec and in the courts, and there is section 23 of the *Charter of Rights and Liberties* concerning the language of instruction. So it would be difficult to see how this declaration, this interpretative clause, does anything but enhance, albeit slightly, the status of those minorities.

91. The Joint Committee accepts the advice that the "linguistic duality" clause is a constitutional step in the right direction for French-speaking minorities outside Quebec and that in law the "distinct society" clause is unlikely to erode in any significant way the existing entrenched constitutional rights of the English-speaking minority within Quebec.

Question 2: Will recognition of the "linguistic duality" and Quebec's "distinct society" disadvantage Canada's multicultural heritage?

92. Section 27 of the *Constitution Act, 1982* recognizes the multicultural heritage of Canadians and instructs the courts to interpret the Canadian *Charter of Rights and Freedoms* consistently with this heritage.

93. A number of representatives of Canadian ethnocultural organizations dedicated to the preservation and promotion of this multicultural heritage expressed their concern to the Committee that the "linguistic duality/distinct society" rules of interpretation might have negative implications for the status of multiculturalism in Canada.

94. The German Canadian Congress reminded the Committee that a Constitution has a symbolic as well as a practical significance and told us that insofar as the "linguistic duality/distinct society" clause attempted to define Canadian reality, it was in the Congress's view, incomplete and inaccurate:

> Our observations are guided by the reality that the Constitution is both a legal and a sociopolitical document. It not only sets out the legal framework for the governing institution of the nation and the rights and freedoms of individuals but also makes a statement about and is indeed guided by the sociopolitical values and realities of the nation.
>
> It is our position that the interpretation clause of the Constitution, as proposed in section 1 of the accord, is not true to the social reality of Canada in the 1980s and, for that matter, in the future. It recognizes a linguistic duality, and English-French duality, which is only part of the Canadian society we live in today. Whether we speak of culture pluralism, community of communities, sociocultural mosaic, or multiculturalism, the fact is that we are a society quite different from the 1940's and 1950's and one that is undergoing sociocultural changes of enormous proportions.
> (German Canadian Congress 7:70-71)

95. According to the Chinese National Council, the linguistic duality recognized in proposed section 2(1)(*a*) of the *Constitution Act, 1867* described less of the Canadian reality than did multiculturalism:

> If paragraph 2(1)(*a*) is allowed to stand by itself, without a similar clause addressing multiculturalism, which would include these members of our community, the Constitution will not be broad enough to address the true nature and reality of Canada fully. In other words, bilingualism does not embrace all Canadians; it may officially, but may not in fact, whereas multiculturalism does.

96. Other witnesses worried that recognition of Quebec as a "distinct society" might implicitly carry with it a denial of pluralism and an expectation that members of ethnic communities will have to assimilate into one of the two dominant cultures.

97. Few if any of the representatives of ethnocultural communities objected to describing linguistic duality as a fundamental characteristic of Canada nor did any

deny the importance of recognizing the distinctness of Quebec society within Canada. Their objection was to a definition of Canada that includes linguistic duality but does not speak of multiculturalism; that identifies Quebec's distinctness but is silent about other distinct elements in the Canadian mosaic. Some saw this as a "backward step" from the notion of bilingualism and multiculturalism to bilingualism and biculturalism. Others see the lack of mention of multiculturalism as either an intentional downplaying of Canadians whose ethnic origin is neither English nor French, or as a telling lapse which indicates that Canada's political leaders are insufficiently sensitive to present cultural realities.

98. To correct this omission, they propose to amend section 2(1) either by adding the words "within a multicultural Canada" to paragraphs (*a*) and (*b*) of subsection 2 or to add to the subsection a new paragraph (*c*) which would also recognize multiculturalism as an interpretive principle for the Constitution of Canada.

99. The Canadian Ethnocultural Council considered this proposal so vital that it suggested that unless it were accepted, the Accord should be rejected. The Ukranian Canadian Committee agreed, stating that if the multicultural reality of Canada is not enshrined in the Constitution now, it never will be.

100. The Joint Committee fully agrees with the vital importance of our multicultural heritage but we do not share the concerns expressed with regard to the omission from section 2 of any mention of multiculturalism. Section 2(1)(*a*) does not purport to offer a comprehensive definition of Canada. It is, as we have indicated, an articulation of one of the fundamental characteristics of Canada. Had First Ministers attempted to formulate a comprehensive definition that captured all of the fundamental characteristics of Canada they would have gone far beyond their agenda of dealing with amendments necessary to enable the government of Quebec to give its willing assent to the Constitution.

101. The Committee also agrees that the lesson of the darker episodes in the history of Canada's treatment of its minority groups as recounted to us, among others, by the National Association of Japanese Canadians, the Chinese National Council, fully justifies the determination of ethnocultural groups to ensure that recognition of Canada's linguistic duality and of Quebec's distinct society does not override recognition of our multicultural heritage. That, we believe, is the intent of section 16 of the Accord. Whatever else it might do, section 16 counters any possible implication that recognition of linguistic duality and the distinct society as interpretative principles would be capable of compromising the continuing status of Canada's multicultural heritage as another interpretative principle.

102. The Committee understands the desire of the representatives of some 30% of Canada's population whose ethnic origin is neither British nor French to see multiculturalism given a more prominent position in the Constitution and to have multicultural rights strengthened. We see no reason to doubt that First Ministers, all of whom have expressed strong support for multiculturalism, will address this topic in their further constitutional discussions and we have no hesitation in recommending that this topic be added to their agenda at one of their forthcoming conferences.

103. In the interim we do not believe that adoption of the "linguistic duality/distinct society" rule of interpretation will transform our cultural mosaic into a melting pot and we would not recommend rejecting the 1987 Accord because its framers did not go beyond their agreed upon agenda to give multiculturalism the prominence it may one day achieve.

CHAPTER VI

The 1987 Accord and Charter Rights

1. By far the most controversial area explored in evidence before the Committee was the suggestion that the "linguistic duality/distinct society" rule of interpretation might be used to "override" particular Charter rights. The question was raised most extensively by women's groups, but the concern applies as well to all those who rely upon the equality guarantees of section 15 of the Charter, and, indeed, on any of the other rights and freedoms guaranteed by the Charter.

2. These groups claimed that little comfort could be drawn from the provisions of section 2(4), since these only state that nothing in section 2 derogates from the powers, rights or privileges of Parliament or the government of Canada or the legislatures or governments of the provinces. If section 2 is interpreted to permit governments and legislatures to carry out their respective "roles" at the expense of Charter rights and freedoms, then arguably there would be no "derogation" from the powers of any other level of government or legislature. The "derogation" would be at the expense of individuals and such a derogation is not prohibited by section 2(4).

3. Nothing in the proceedings of the Joint Committee has given rise to more searching examination and consideration on our part than this issue. We acknowledge that what began as a legal argument grew into an important matter of public policy and perception. It is obvious that a substantial number of women believe that their hard won Charter rights are threatened.

4. The great weight of constitutional opinion put before the Joint Committee however, leads to the conclusion that the fears that entrenchment of the "linguistic duality/distinct society" interpretative clause will cause such an erosion are not justified. This is not to deny the expertise of those who perceived a problem. Nor is it to dismiss the searching questions and troubling conundrums raised by the witnesses — especially those who appeared on behalf of women's groups — who expressed their fears that the promotion of one set of constitutional values (namely, the "linguistic duality/distinct society") might undermine other important constitutional values (such as gender equality rights).

5. After a good deal of discussion we have come to the view, for reasons that we shall outline, that the more fundamental problems raised by constitutional experts who made submissions on behalf of the women's groups are problems rooted in the Charter provisions of the *Constitution Act, 1982* itself. These matters of controversy will remain whether or not the "linguistic duality/distinct society" rule of interpretation is added to the *Constitution Act, 1867*. We do not believe that the entrenchment of this clause will in any realistic way erode the present constitutional protections of individual rights, including gender equality rights.

6. We believe that the sort of discriminatory legislation feared by some of the women's groups would have little if anything to do with the preservation of linguistic duality or the promotion of the distinct society. This became clear, we believe, as the factual assumptions on which these concerns were based were explored at great length and with admirable candor in the submissions made on behalf of the women's groups. This is not to suggest, that we see the proposed new rule of interpretation as meaningless. We recognize that the "linguistic duality/distinct society" clause applies as a rule of interpretation, but it is not a new grant of power that will enable governments to do something that they cannot now do.

7. For the sake of completeness we should set out in their entirety the two Charter sections particularly relied upon by critics of this aspect of the Accord.

Section 15

15.(1) 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.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 28

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

8. Much of the argument about whether the "linguistic duality/distinct society" clause will undermine gender equality rights can also be applied to potential erosion of the other rights and freedoms guaranteed in the Charter. This would include freedom of religion and freedom of expression and the important legal rights guaranteed by section 7 of the Charter, namely the right to life, liberty and security of the persons not to be deprived thereof except in accordance with the principles of fundamental justice. However, as the issue was raised with us in the context of gender equality rights, and in order to explain the Committee's conclusion that entrenchment of this clause will not result in erosion of these rights, it is appropriate to review in some detail the legal arguments that were presented to us on this point.

(a) What happens when there is a conflict between a law passed to preserve or promote linguistic duality or to promote the distinct society and one of the rights or freedoms guaranteed by the Canadian Charter of Rights and Freedoms?

9. By virtue of section 52 of the *Constitution Act, 1982*, any law or governmental act that is inconsistent with the Constitution of Canada, including the Canadian *Charter of Rights and Freedoms*, is, to the extent of the inconsistency, of no force or effect. Unless therefore, there is some constitutional rule or principle leading to a different conclusion, any law or administrative measure designed to protect Canada's linguistic duality or promote Quebec's distinct society, which at the same time infringed upon the gender equality rights guaranteed by section 15 or section 28 of the Charter, would to the extent of the inconsistency be of no force and effect unless it were "saved" by section 1 of the Charter (and we shall return to the issue of section 1 presently). In other words, according to normal constitutional principles, legislation or governmental actions taken in furtherance of linguistic duality or the distinct society would be subject to Charter review.

10. Is there anything in the "linguistic duality/distinct society" clause to suggest that this normal principle would not apply? On its face, there is nothing in the 1987 Accord to suggest that the values of linguistic duality or Quebec's distinct society are to override the Charter or that legislation or governmental acts in furtherance of these values are to be immune to Charter review. As *Maître* Yves Fortier, Q.C., told the Committee:

> I believe that those fears are totally groundless. And if it were not for the seriousness of those organizations that expressed those views, I would simply say we were dealing with a smokescreen.
> (Fortier, 12:82, 83)

The Ontario Separate School Funding Reference

11. The field of controversy was widened on June 25, 1987 when the Supreme Court of Canada delivered its judgement in the Ontario *Separate School Funding Reference*. A large number of witnesses, including representatives of the National Association of Women and the Law, the Women's Legal Education and Action Fund, the Canadian Advisory Council on the Status of Women, the National Action Committee on the Status of Women and the Ad Hoc Committee of Canadian Women on the Constitution, told us that this decision raises a serious possibility that discriminatory laws and governmental acts in relation to Canada's linguistic duality or Quebec's distinct society would be immune from Charter review.

12. Other witnesses, including representatives of *Le Conseil du statut de la femme du Québec* and Professor William Lederman, asserted that the decision in the *Separate School Funding Reference* had a very narrow and specific application and was irrelevant to the present debate.

13. Because the true meaning of the *Separate School Funding Reference* has come to play a central role in connection with this aspect of our deliberations, we think it appropriate to deal in some detail with precisely what was and what was not decided by the Supreme Court in that case.

14. The Supreme Court of Canada decided that a provincial legislature, enacting a statute under the power granted by section 93 of the *Constitution Act, 1867* to expand or to enlarge a system of denominational education, cannot be challenged on the basis

of the provisions of the Canadian *Charter of Rights and Freedoms* that guarantee freedom of religion and equality and the equal benefit of the law. The principal judgment of the Court in this reference runs to 50 pages and is supplemented by two concurring judgments. In the course of her reasons for judgment, which was the judgement supported by a majority of the members of the court, Madame Justice Bertha Wilson stated (at page 48):

> ... the special treatment guaranteed by the Constitution to denominational, separate or dissentient schools, even if it sits uncomfortably with the concept of equality embodied in the Charter because not available to other schools, is nevertheless not impaired by the Charter. *It was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise.*
> (Emphasis added)

15. A number of the witnesses from whom we heard, including Ms. Mary Eberts, an experienced constitutional lawyer from Toronto who represented the Ad Hoc Committee of Women and the Constitution, told us that these words *could* mean that the exercise by a legislature of any power granted to it by a provision of the Constitution, and particularly a provision that forms a fundamental part of a "Confederation compromise", is immune from Charter review. Other proponents of this reading pointed out to us that, once entrenched, the "linguistic duality/distinct society" clause would — like section 93 — become part of the *Constitution Act, 1867*. They also argued that the courts may well consider this clause — again like section 93 — as part of a "Confederation compromise" despite being enacted 120 years after Confederation. If this is so, the argument continues, then "linguistic duality" or "distinct society" legislation, however discriminatory, may be shielded from Charter review.

16. However, in his separate concurring judgment in the Supreme Court of Mr. Justice Estey appears to qualify the broad language used by Madame Justice Wilson by pointing out that the denominational school power is inherently discriminatory. It cannot be exercised without making distinctions that would otherwise infringe Charter rights. Thus it is a special case. Mr. Justice Estey wrote (p. 11):

> Although the Charter is intended to constrain the exercise of legislative power conferred under the *Constitution Act, 1867* where the delineated rights of individual members of the community are adversely affected, *it cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the Constitution Act, 1867.*
> (Emphasis added)

17. It is not, of course, the task of the Joint Committee to deliver legal opinions, and we do not purport to do so. However, it is necessary for us to determine whether the concerns expressed by Ms. Eberts and others are of such weight as to justify calling for amendments to the 1987 Accord. Ms. Eberts candidly admitted that the sweeping result she feared could arise if, and *only* if, the "linguistic duality/distinct society" rule of interpretation were held to be a grant of legislative or government power like section 93 of the *Constitution Act, 1867*. It is only if this clause gives governments or legislatures some new source of power that they did not formerly have that it can be analogized to section 93, which was at issue in the Ontario *Separate School Funding Reference*.

18. On this issue, we accept the views of Professor Beaudoin, Professor Lederman, *Me.* Fortier and others that the "linguistic duality/ distinct society" clause is not a grant of legislative or government power. This clause is, as we were repeatedly told, an interpretative clause. It directs the courts on how to interpret other constitutional provisions; it does not give any new legislative or executive powers to anyone. That is why subsection (2) and subsection (3) of the clause speak about "affirming" various "roles". To "affirm" is not "to create". It presupposes that a legislative or executive power necessary to exercise the "role" already exists. We had the impression that Ms. Eberts also believes this to be but she is concerned that the contrary *could* be held to be the case.

19. We believe the *Separate School Funding Reference* cannot mean what the women's groups fear it may mean. If Madame Justice Wilson's words are to be given the meaning suggested, they would practically put the Charter out of business. It would mean that no exercise by Parliament or by a provincial legislature of any of its powers under section 91 or section 92 of the *Constitution Act, 1867* could ever be challenged on the basis of the Charter. The Charter could therefore never apply to any legislation that is *intra vires*. But section 32 of the Charter specifically states that it *does* apply to any enactment within the legislative competence of Parliament or the provinces. And the courts, including the Supreme Court, have struck down legislation because of an invasion of Charter rights regardless of the fact that it was enacted pursuant to a power assigned to Parliament or to the provincial legislatures by the *Constitution Act, 1867.*

20. Professor William R. Lederman gave his opinion to the Joint Committee that the Ontario *Separate School Funding Reference* must be interpreted as restricted to section 93 of the *Constitution Act, 1867*, which allows the provinces to provide religious schooling in a way that would otherwise be treated as discriminatory.

> In the separate school system of Ontario, yes, the denominational characteristics, the religious characteristics, have special protection. But this does not mean there can be sex discrimination in the hiring of teachers. Section 28 would apply. Section 15 would apply.
>
> ... It is a unique situation. This is why I say I just do not believe that Madam Justice Wilson intended to speak generally about plenary powers of legislatures in general. This is a special situation.
> (Lederman, 7:36, 37)

21. The "narrow" reading of the Ontario Separate School Funding Reference is also confirmed by the following passage in the concurring reasons of Mr. Justice Estey:

> *Action taken under the Constitution Act, 1867, is of course subject to Charter review.* That is a far different thing from saying that a specific power to legislate as existing prior to April 1982 *has been entirely removed* by the simple advent of the Charter. It is one thing to supervise and on a proper occasion to curtail the exercise of a power to legislate; it is quite another thing to say than an entire power to legislate has been removed from the Constitution by the introduction of this judicial power of supervision.
> (Emphasis added)

22. In other words, the reason the provinces' power under section 93 with regard to denominational education is shielded from Charter review is that this particular power cannot, as the Supreme Court stated, be exercised without violating those Charter

provisions. By its very nature, a power exercised with regard to denominational education *must* legislate in an unequal manner and in a manner that abrogates full freedom of religion. For this reason, to make section 93 subject to the Charter rights to freedom of religion and to equality would have been tantamount to repealing section 93 entirely. In the words of Mr. Justice Estey, "the purpose of [the] grant of power [in section 93] is to provide the province with a jurisdiction to legislate in a *prima facie* selective and distinguishing manner with respect to education". It is only when a constitutional provision gives Parliament or a provincial legislature a power or jurisdiction which *cannot* be exercised except in a manner inconsistent with the Charter that the Charter does not apply. Where the power or jurisdiction *can* be exercised consistently with the Charter, then the Charter *will* apply to ensure that the power is exercised in a manner that respects the Charter rights of individuals.

23. Even if the "linguistic duality/distinct society" rules of interpretation were taken to be a grant of constitutional power, which seems clearly not to be the case, there is nothing in the submissions that we have heard to suggest that in fact Quebec's distinct society is inherently discriminatory, i.e. that it cannot be promoted except in a manner that contradicts the Canadian *Charter of Rights and Freedoms*. As *Maître* Yves Fortier pointed out:

> The critics who are crying wolf forget that, in comparison with Canada as a whole, Quebec has scarcely been behind-hand in promoting the equality of the sexes. Actually, people seem to be forgetting, within the context of this debate, the very existence of the *Quebec Charter of Human Rights and Freedoms*. The Quebec Charter prohibits any distinction, exclusion or preference based, amongst other things, on race, colour, sex, civil status, social condition, pregnancy or language; to this prohibition is added a preponderance over any Quebec law, even those passed after the Charter, unless there figures therein a notwithstanding clause.
> (Fortier, 12:83, 84)

24. None of the women's groups asserted that Quebec's distinct society *is* inherently discriminatory. And insofar as the "linguistic duality/distinct society" rule of interpretation can be said to favour linguistic discrimination, it adds nothing to the preferred status of the two founding languages already entrenched in the Charter. This is not to say that the government of Quebec, like every other government, is beyond using its power in a discriminatory way. But once it is established that such legislation is subject to Charter review, discrimination can be attacked in the courts by women and others, relying on their Charter rights in the usual way.

25. We recognize that the conclusion that legislation enacted in fulfilment of the roles described in section 2(2) and (3) is amenable to Charter review does not dispose of the issue whether the "linguistic duality/distinct society" clause could come into conflict with Charter rights. That possibility led into the second area of concern raised by women's groups, namely, section 16 of the Accord.

(b) Should gender equality rights be treated as a special case?

26. Section 16 specifies that certain constitutional provisions relating to multiculturalism and aboriginal rights, including two provisions of the Charter, are not "affected" by proposed section 2 of the *Constitution Act, 1867*. It was feared by some witnesses that mention of only two provisions of the Charter as *not* being affected by the "distinct

society" clause must mean by necessary implication that the other provisions of the Charter, including the gender equality rights provision, could be affected.

27. Section 16 is itself an interpretative clause designed to preserve certain constitutional values in the face of the "distinct society" and "linguistic duality" interpretative clauses. Its function is thus to "interpret the interpreter" and, as several witnesses commented, the Constitution seems to be increasingly entangled with numerous interpretative rules that only serve to confuse matters.

28. At this stage we invoke the common sense of Mr. J.W. Pickersgill, who gave the Committee his robust analysis of the situation:

> A Constitution should be as brief as possible and a Constitution is not a Christmas tree on which everybody is entitled to get some kind of special recognition for some kind of special thing.
>
> It also seems to me that most of the people who have opposed Meech Lake seem to assume that unless you get something into the Charter of Rights, nothing can be done about it. They seem to think parliaments and legislatures do not matter and if they do that they are against the people, which seems to be pretty absurd since they have to get the votes of the people. I think it would be a great mistake to try to import into the Meech Lake accord, as revised in the Langevin Building, anything that is not there already.
>
> I understand the reason for section 16 and I think everyone else does. It was because two of the provincial Premiers were under great pressure and they put great pressure on their colleagues to re-affirm what was already in the Charter, but it does not seem to me that matters at all as far as anything else in the Charter is concerned. It is just as sacred as those clauses.
> (Pickersgill, 10:128)

29. Be that as it may, a number of thoughtful and broadly representative women's groups argued that gender equality rights also needed to be treated as a special case and safeguarded from "linguistic duality/distinct society" laws. They urged that section 16 ought to be amended to specify that section 15 and/or section 28 of the Charter as well are not to be affected by proposed section 2 of the *Constitution Act, 1867*.

30. The task of this Committee, as we see it, is to attempt to ascertain exactly what section 16 does and, in the light of that understanding, to assess the need for recommending an amendment to it.

(i) Why are certain constitutional provisions included in section 16?

31. It must be acknowledged at the outset that various distinguished constitutional experts appearing before the Joint Committee had great difficulty in providing a legal rationalization as to why certain sections are included in section 16 and why others are left out.

32. Section 16 was added on the road between Meech Lake and the Langevin Block. Senator Lowell Murray sought to justify section 16 on the following basis:

> Multicultural heritage, or that reference in the Charter, is itself an interpretative clause, and the various references to aboriginal peoples relate to collective rights, if you wish, not to individual rights. It was for this reason that those two matters, our multicultural heritage and native peoples, both identifiable groups with a cultural aspect, were mentioned — out of an abundance of caution. Frankly, we do not think

> the interpretative clause respecting the distinct society or the linguistic duality of Canada could conceivably detract or diminish from those other recognitions in the Constitution. But because multiculturalism and native peoples related to groups with a cultural aspect, it was thought appropriate to put in that non-derogation clause.
> (Murray, 2:39)

33. Two of the provisions in section 16 are interpretative (sections 25 and 27) but the other two are not. Section 91(24), also mentioned in section 16, is the source of Parliament's power to legislate in relation to Indians and lands reserved for Indians. Section 35, also mentioned, recognizes and affirms existing aboriginal and treaty rights. Neither of these sections is merely a guide to interpretation. Moreover, other Charter sections that *are* interpretative (such as sections 26 and 29) are left out.

34. Some experts sought to rationalize section 16 as referring to groups whose Charter rights were only vaguely defined, and thus in need of extra protection, whereas, it was said, that the women's rights and equality rights sections in the Charter are clear and unambiguous. The problem with this theory is that only two of the four sections referred to in section 16 are Charter sections and one of the other two sections mentioned, section 91(24), does not deal with individual rights at all, vaguely or otherwise.

35. *La Fédération des femmes du Québec* suggested that perhaps section 16 is an attempt to harmonize a small cluster of rules selected on the basis that there might otherwise be room to believe that they could come into "inter-cultural" conflict, and that other provisions were omitted from section 16 because there was no room to suspect the potential for such a conflict:

> According to our understanding of section 16 of the accord, section 25 of the Canadian *Charter of Rights and Freedoms*, concerning native people, and section 27, concerning multiculturalism, were expressly mentioned in section 16 because the new section 2 of the *Constitution Act of 1867* could be interpreted to mean that the recognition of Canada's fundamental characteristics and of Quebec's fundamental characteristics and of Quebec's distinctiveness could undermine the rights provided for in those sections. But since the revised section 2 of the 1867 Act does not refer to matters that can, given their very nature, affect women's rights, we thought it quite plausible that only sections 25 and 27 of the Charter be mentioned.
> (13:43,44)

36. Professor Wayne MacKay thought that section 16 does not perform any useful function at all:

> Section 16, in trying to clarify what we meant by "distinct society", indicates it is not to have any impact on section 27, multiculturalism. It is not to have any impact on sections 25 and 35 of the *Constitution Act, 1982*, or on section 91(24) of the *Constitution Act, 1867*, native rights.
>
> By doing so, I quite frankly think they have further confused and muddied the waters. In my opinion, you would be better off without section 16.
> (MacKay, 3:48)

37. *Maître* Robert Décary thought the reasons for section 16 must have been political rather than judicial:

> Obviously Quebec must be feeling that women in Quebec are protected enough, that it was not a major concern at this specific stage. That this is the stage where we want to get Quebec in, and Quebec includes Quebec women as well.
>
> I honestly do not know why all the other articles were not put there (i.e. section 16), but I suspect these were put in just for political purposes.
> (Décary, 4:72)

Maître Yves Fortier was of the same opinion:

> I do not think it was juridically essential to do it.
> (Fortier, 12:94)

(ii) What does section 16 do?

38. Many of the witnesses from whom we heard spoke of section 16 as "shielding" certain constitutional provisions from the effects of the "linguistic duality/distinct society" rules of interpretation. *La Fédération des femmes du Québec* pointed out that the provisions dealing with Canada's multicultural heritage and with aboriginal peoples are concerned with cultures that might be seen as conflicting with Quebec's distinct society. This is true, but the cultures are not in any event mutually exclusive. The distinct society is itself a major "culture" within the Canadian multicultural mosaic, and aboriginal peoples and other cultures within our multicultural heritage are important elements in Quebec's distinct society. To the extent these cultures can be treated separately the courts could, as Professor Wayne MacKay observed, have some difficulty in accommodating their conflicting cultural demands whether section 16 is there or not:

> It [section 16] states that section 2, distinct society, will have no impact on multiculturalism and no impact on native rights. I think this is unlikely to be true.
>
> I think what is going to happen is that the courts are going to have to make some difficult value choices in many cases between promoting a distinct society in Quebec and in doing so limiting the rights of certain ethnic groups or multiculturalism in Canada. In some cases there may be difficult choices between the rights of aboriginal people in Canada and the distinct society in Quebec. The nature of these principles in constitutional law is that they do conflict.
> (MacKay, 3:49)

The "linguistic duality" rule of interpretation stands on a different footing. The preferred status of the English and French is already entrenched in the Constitution.

(iii) Do gender equality rights need to be protected by section 16?

39. Whatever the level of protection, the question remains whether gender equality rights ought to be added to the list of sections mentioned in section 16.

40. In order to answer this question, we must first determine whether the "linguistic duality/distinct society" rule of interpretation will have a negative effect on these rights. Another way of asking this question is whether there is any real or potential conflict between proposed section 2 of the *Constitution Act, 1867* and the gender equality rights guaranteed to men and women by the Charter.

41. Dealing with the "distinct society" portion of this clause, neither *La Fédération des femmes du Québec* nor *Le Conseil du statut de la femme du Québec* see any potential conflict. Representatives of Le Conseil told us:

"Nous ne souscrivons pas à la malheureuse interprétation laissant croire que les Québecoises peuvent se voir priver de leurs droits à l'égalité en raison de l'application du concept de "société distincte". D'aucuns, dont certains groupes de femmes ont devant vous manifesté des inquiétudes en ce sens."
Le Conseil du statut de la femme du Québec (1:5)

42. *La Fédération* told the Joint Committee:

... if only the Province of Quebec is recognized as a distinct society, we strongly hope that our sisters will not see threats where we feel they do not exist. In answer to the question: Does the concept of a distinct society threaten Quebec women? the *Fédération des femmes du Québec* answers: No.

The purpose of the accord is to bring Quebec into the Constitution, and the protection of the French language, of our culture, our educational system, our network of social services, our volunteer associations, and so on, does not create a situation particularly apt to jeopardize women's rights.
Fédération des femmes du Québec (13:43)

43. Some Quebec men asserted an equal right to be heard on this topic, and Laurent Picard told us:

Also, there are about 50% of women in Quebec. They are not inactive and passive. They can fight their own battles.
(Picard, 12:63)

44. The Women's Legal Education and Action Fund gave us hypothetical possibilities of conflict between the distinct society and gender equality rights. These involved the possibility of denying women access to therapeutic abortion services on the grounds of Quebec's dominant religion, the refusal to provide women with education in "non-traditional trades" or the refusal of educational institutions to hire women on religious grounds. While stressing that these were only hypothetical examples, LEAF declared that they did show *potential* for conflict between the concept of Quebec's distinct society and gender equality rights.

45. The Ad Hoc Committee of Canadian Women on the Constitution attempted also to demonstrate potential conflicts between linguistic duality and gender equality rights. Ms. Mary Eberts cited the potential for provincial language-orientated programs aimed at enhancing employment opportunities for members of the minority official language group undertaken at the expense of affirmative action programs for women, or the rationing of social services in a manner that benefits disadvantaged linguistic groups rather than disadvantaged women. The Committee finds it difficult to see how any of these examples raise the issue of "linguistic duality" potentially overriding the Charter. In effect this argument suggested that the Charter could be used by the courts to set government priorities and budgetary allocations even when, as Ms. Eberts acknowledged, "the constitutional issue lies between two equally appealing exercises in promoting minority interests or social values". These examples do not raise a Charter issue at all, in our opinion.

46. Moreover, in none of the hypothetical situations cited by the women's groups was it alleged that the "linguistic duality/distinct society" rule of interpretation would have an impact on section 15 itself to permit inequality or discrimination. Rather, their concern is directed to the "reasonable limits" limitation in section 1 of the Charter.

(iv) The Role of the Courts

47. Section 1 of the Charter provides that the rights and freedoms set out in the Charter are guaranteed subject to "such reasonable limits prescribed by law as can be demonstrably justifiable in a free and democratic society". If the concern is that Quebec's distinct society or Canada's linguistic duality could prevail over equality rights, it must be because the women's groups fear that courts may hold that the "linguistic duality/distinct society" factors could give rise to "reasonable limits demonstrably justifiable in a free and democratic society".

48. As Professor Beaudoin and Professor Lederman informed us, the presence of section 1 has, from the very entrenchment of the Charter, made it possible to bring before the court evidence of social, political or historical factors that might justify what would otherwise be an infringement on a Charter right or freedom. Professor Beaudoin and Professor Lederman expressed the opinion that the "linguistic duality" and "distinct society" clauses may indeed impact on a section 1 justification, and that governments may indeed attempt to rely on one or the other of these factors to prove that legislation infringing Charter rights is nevertheless "demonstrably justifiable in a free and democratic society". Adding an explicit rule of interpretation, could give added force to arguments based on these factors. If there was any doubt previously that Canada's linguistic duality or Quebec's distinct society were legitimate matters to be considered under section 1, that doubt would now be dispelled. We note, however, that constitutional experts also informed us that this possibility was already open to a government and did not depend on Canada's linguistic duality or Quebec's distinct society being entrenched in the Constitution.

49. Some witnesses appeared to be concerned that mere mention of the "linguistic duality/distinct society" interpretative rule would be enough to impose a "reasonable limit" on Charter rights. But, we were told, this is not the way the courts work. Any court confronted with an argument seeking to justify a limitation on a Charter right on that basis would want to hear evidence about the "linguistic duality/distinct society" and why the proposed limit is not only reasonable but "demonstrably justified".

50. The onus of proof to justify a Charter violation lies on the government. It is not easily discharged, as noted by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 SCR 103, per Dickson, C.J.C. at page 138:

> Where evidence is required in order to provide the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit.

51. The Chief Justice of Canada then laid down a requirement of "proportionality" between the Charter right and the limits sought to be imposed, as follows, at pages 138-140:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations.
>
> Secondly, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right of freedom in question.
>
> Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

> Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

52. A number of witnesses have questioned whether a "reasonable limits" provision, such as that in section 1, is appropriate for a Charter. That is a question that is beyond the mandate of this Committee. Section 1 has been in the Charter since its beginning. If it represents an unsatisfactory limitation on Charter rights, the problem is not created by the *1987 Constitutional Accord*. It is an issue that will have to be raised, if at all, in a future round of constitutional negotiations dealing with reform of the Charter.

53. It follows from this that if, as we have concluded, the main concerns about possible negative effects of the "linguistic duality/distinct society" rule of interpretation on Charter rights in general, and gender equality rights in particular, are in fact concerns about the use of these factors in section 1, then they are less directed to the *1987 Constitutional Accord* than to the *Constitution Act, 1982* and a requirement for a thorough reconsideration of the role of the courts in formulating appropriate limits on Charter rights.

(v) Ought section 16 nevertheless to be amended to include gender equality rights?

54. Even accepting that the conflict between linguistic duality or distinct society and gender equality rights is more theoretical than real, and more relevant to the use of these factors in a section 1 analysis than to their application to interpret substantive Charter rights, is there nevertheless any justification for including gender equality rights in section 16?

55. As matters now stand, the "linguistic duality/distinct society" rule will not override gender equality rights or vice versa. They will be read together, along with other constitutional values, in any Charter analysis by the court under section 1. Professor Lederman put it this way:

> As the late Associate Chief Justice MacKinnon said, in the end the courts have to come back to our own free and democratic society. You learn what you can from looking at other countries, but in the end you have to come back to your own country and you have to make a decision about the values that will best sustain your own free and democratic society. That means that these things, the distinctiveness of the society of French-speaking Canadians in Quebec, the importance of aboriginal rights, the importance of multicultural rights, are assured by these provisions, that they will be in the mix when Charter section 1 considerations are being weighed. But how it will come out is in the hands of the judges.
> (Lederman, 7:35)

56. Professor McWhinney put it more generally:

> ... the better judges in the end make an overall judgment, they are not worried about the fine print, they say here is the society and here is the law and we have to get a compromise or balance between them.
> (McWhinney, submission p. 15)

57. At one stage the Canadian Advisory Council on the Status of Women proposed that the "linguistic duality/distinct society" clause itself be amended so as to include the Canadian *Charter of Rights and Freedoms* as one of the interpretative principles upon which the Constitution is to be interpreted. This suggestion was met with disapproval by most of the constitutional experts whom we questioned on the matter. They believed it would be redundant to stipulate that the Constitution ought to be interpreted in accordance with itself.

58. The National Association of Women and the Law and the Women's Legal Education Fund proposed adding section 15 and section 28 to the list of provisions in section 16 of the Accord. They took the position that only by adding both of these sections to section 16 of the Accord could sexual equality rights be guaranteed. The National Action Committee on the Status of Women informed us, on the other hand, that because of concerns expressed by Quebec women's groups, they and other major women's groups had now reached a compromise. They were now seeking the inclusion simply of section 28 of the Charter in section 16 of the Accord. *La Fédération des femmes du Québec* told us that while they saw no need for it, they did not oppose the inclusion of section 28 in section 16 of the Accord.

59. Would these amendments accomplish their intended effect? As the National Association of Women and the Law and LEAF recognized, gender equality rights depend on both section 15 and section 28 of the Charter. Section 28 simply guarantees that Charter rights are to be guaranteed equally to men and women. It does not define the content of those Charter rights. If, therefore, an interpretative provision were able to cut down or even overrule a substantive Charter right, then it would be only the diminished or non-existent Charter right that men and women were entitled equally to share. On the hypothesis that the "linguistic duality/distinct society" rule of interpretation was capable of supporting a violation of equality rights, then it would be essential for section 16 of the Accord to include at least section 15 of the Charter. Yet, as *Maître* Yves Fortier told us:

> I am afraid, however, that if we add to clause 16 of the Langevin accord a reference to certain substantive provisions of the Charter we will be opening a Pandora's box the effect of which will be to create new and quite considerable uncertainty.
>
> On the other hand, if it were decided to exempt the whole of the Charter from the effect of the distinct society clause, including clause 1 of the Charter, then that would mean the death of the Meech Lake Accord, period.
> (Fortier, 12:84)

Conclusion

60. In a written opinion that was brought to our attention by the Ad Hoc Coalition of Women on the Constitution, Professor Peter Hogg of Osgoode Hall Law School, one of Canada's foremost authorities on constitutional law, stated:

> I think it unlikely that the duality and distinct society clauses in section 2 of the Accord would be interpreted as permitting governments to discriminate directly or indirectly against women.

61. Without denying the reasonableness of this assessment, representatives of some women's groups found it insufficient. The Ad Hoc Coalition of Women on the

Constitution told us that what they required was a guarantee that the provisions of the 1987 Accord would not "affect" gender equality rights.

62. Under the terms proposed by the *1987 Constitutional Accord* neither gender equality rights nor the "linguistic duality/distinct society" rule of interpretation will be given automatic paramountcy in all situations. Neither overrides the other. Neither is automatically subordinate to the other. The courts are entrusted with the task of maintaining a proper balance. The outcome will depend on the particular circumstances of the case. If the proposed interpretative rule on occasion is invoked to justify an alleged infringement of gender equality rights, the courts will be called upon to decide whether the infringement is "demonstrably justified" or not.

63. The various amendments to the 1987 Accord that were presented for consideration, all had the common objective of telling the courts that in *all* circumstances gender equality rights are to be treated as paramount to the demands of "linguistic duality/distinct society" rule of interpretation.

64. The real issue, it seems to us, is whether the courts should be trusted with the responsibility of striking the proper balance between Charter rights and "reasonable limits". And if the courts are to have their hands tied with respect to certain Charter rights, but not others, where should the line be drawn?

65. The Joint Committee believes that the issue of the reasonable limits, if any, on gender equality rights and other Charter rights should be left to the courts to decide. We cannot foresee all the circumstances in which these values may come into conflict. The decision was taken in 1982, when the Charter was introduced, to leave these questions of balance to be determined by the courts on the facts of a particular case. We believe that this was a sensible solution and that nothing in the *1987 Constitutional Accord* relating to the "linguistic duality/distinct society" rule of interpretation calls for a different solution. However, as discussed in our conclusion in Chapter 15, it may well be that the whole issue of the Charter and its structure should be looked at again in light of 5 years of experience with it before the courts and in light of some of the issues raised in these hearings. At that time, in our judgment, the more fundamental concerns of the women's groups with section 1 of the Charter and other matters could appropriately be addressed.

CHAPTER VII

The Federal Spending Power

1. Although one level of government cannot legislate in respect of matters over which the other has exclusive legislative authority, the so-called spending power permits one level of government to expend its funds in respect of matters over which the other has exclusive legislative authority. It would seem that each level of government enjoys such a spending power, although neither section 91 nor section 92 of the *Constitution Act, 1867* contains any explicit reference to it in the distribution of legislative and executive responsibilities.

The Proposal

2. The *1987 Constitutional Accord* proposes to regulate the future exercise of the federal spending power as follows:

> "106.A(1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.
>
> (2) Nothing in this section extends the legislative powers of the Parliament of Canada or the legislatures of the provinces."

3. Clearly, the most significant aspect of proposed section 106A is the fact that the government of Canada will be obligated to provide reasonable compensation to the government of a province "that chooses not to participate in a national shared-cost program" if the province carries on a program or initiative that is "compatible with the national objectives".

Policy Considerations

4. The principal issues raised in the submissions to our Joint Committee are:

(*i*) the language of the proposed amendment is said to be uncertain and its effect unpredictable; and

(*ii*) in a "worst case scenario" the amendment could lead to a balkanization of social programs and thus weaken their unifying force across the country.

Present Shared-Cost Programs

5. The federal spending power is at present used in a variety of different ways. Many expenditures are now governed by the *Federal-Provincial Fiscal Amendments and Federal Post-Secondary Education and Health Contributions Act, 1977*. Part I of that Act is concerned with fiscal equalization payments, a matter also addressed by section 36 of the *Constitution Act, 1982*. These payments are made to the provinces without conditions being attached to the payments. Part II of the Act deals with fiscal stabilization payments, which, again, are unconditional payments to the provinces. Part IV is concerned with another type of direct payment to the provinces known as provincial personal income tax revenue guarantee payments.

6. Part VI of the Act deals with the major existing national shared-cost programs. These established programs are the post-secondary education financing program and the insured health services program covered by the *Canada Health Act*. Once again, payments authorized by this Act are paid to the provinces. Some of these payments are subject to the satisfaction of certain criteria and conditions. Others (as in the case of post-secondary education) are made without conditions.

7. The third major national shared-cost is governed by the *Canada Assistance Plan* or CAP. CAP replaced four conditional grant programs under the *Old Age Assistance Act*, the *Blind Persons Act*, the *Disabled Persons Act* and the *Unemployment Assistance Act*.

8. While the education, health and assistance programs are by far the largest national shared-cost programs, there are numerous other such programs, including programs concerning highways, national parks, retraining, young offenders, etc.

9. In addition to these national shared-cost programs, there are a plethora of programs that are not shared-cost programs. Perhaps the best known of these programs is the family allowances program under the *Family Allowances Act, 1973*. Payments under that program are made not to provincial governments but to those individuals entitled to payments under the terms of the statute. The provinces establish the level of payments within the overall limit of the amount of money allocated by the federal government. An example of another program dependent on the federal spending power is the Canada Council grants program, under which payments can be made directly to individuals and organizations who satisfy the requirements established by the Canada Council.

10. Each of the programs described above results in payments being made in areas that are under exclusive provincial legislative jurisdiction. Yet, there would appear to be no question about the validity of the legislation establishing these programs.

Explicit Recognition of the Federal Spending Power

11. Many witnesses sought to highlight the fact that proposed section 106A will, for the first time, constitutionally "recognize" the federal spending power. This was to be seen as a positive feature of the section.

12. For almost the first fifty years of Canada's history, the existence, and the extent, of any spending power as we know it today was not of great concern. The issue came to the fore during the Depression, when Parliament sought to establish an unemployment insurance scheme for the country. The provinces challenged the federal scheme on the ground that an insurance scheme was a matter within the exclusive legislative jurisdiction of the provinces under section 92.13 of the *Constitution Act, 1867* ("Property and Civil Rights in the Province"). The federal government argued that the legislation was valid federal legislation on the ground, *inter alia*, that the proposed scheme constituted an expenditure of federal funds and, therefore, did not trench on the provinces' legislative authority. The Supreme Court of Canada, in *Reference Re: Employment and Social Insurance Act*, [1936], SCR 426 per Kerwin J., p. 457, took the view that "generosity is not unconstitutional";

> Parliament, by properly framed legislation may raise money by taxation and dispose of its public property in any matter that it sees fit. As the latter point, it is evident that the Dominion may grant sums of money to individuals or organizations and that the gift may be accomplished by such restrictions and conditions as Parliament may see fit to enact. It would then be open to the proposed receipt to decline the gift or to accept it subject to such conditions.

13. Although the Judicial Committee of the Privy Council ruled that the scheme was unconstitutional, it recognized, for the first time, the existence of a federal spending power. The federal unemployment insurance scheme was held to be invalid because it constituted a legislative insurance scheme, insurance being a matter of exclusive provincial jurisdiction within section 92.13 of the *Constitution Act, 1867*. Implicit in the judgment of the Judicial Committee is the notion that a simple expenditure of federal funds in an area over which the provinces have exclusive legislative jurisdiction would be valid. The Judicial Committee of the Privy Council stated the general principle in this way at [1937] 1 DLR at 687:

> That the Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities could not as a general proposition be denied...But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.
>
> It may still be legislation affecting classes of subjects enumerated in s.92, and, if so, would be *ultra vires*. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Provinces, or encroach upon the classes of subjects which are reserved to provincial competence...If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid.

14. Since 1937, there have been only a handful of cases in which there has been a challenge to the exercise of the federal spending power, and in none of the cases has the challenge been brought by a provincial government. (The reason for this may well be that a successful challenge to a federal program would not only deprive the province of a desirable sum of money but judicial limitations imposed on the federal spending power may result in parallel limitations on the provincial spending power as well.) The challenges — none of which has been successful — have been to the *National Housing Act*, the *Mothers' Allowances Act*, the *Canada Health Act*, and the *Canada Assistance Plan*. The conclusions of the courts in theses cases may be summarized as follows:

1. There is a federal spending power.
2. The federal spending power is most likely based on ss. 91(1A) and 102 of the *Constitution Act, 1867*. Other suggested bases for this power include the peace, order and good government clause and the royal prerogative (see LaForest, *The Allocation of the Taxing Power Under the Canadian Constitution* (2d ed. May, 1981, at 46-47)
3. The federal spending power supports the outright grants of federal funds to individuals, organizations and governments.
4. However, the federal spending power is not necessarily unlimited. "If on the true view of the legislation it is found that in reality in pith and in substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid": *Reference Re: Employment and Social Insurance Act, supra.*
5. There is nothing in the above statement from the *Unemployment Insurance Reference* to suggest that conditional grants would *per se* constitute an invasion of a provincial field. Indeed, Rinfret J. in the decision of the Supreme Court of Canada in the *Unemployment Insurance Reference* suggested that grants to individuals or organizations may be made conditional.
6. What is not perfectly clear is whether grants to provinces may be made conditional.

15. Accordingly, it would appear to be inappropriate to justify proposed section 106A *solely* on the ground that it constitutionally sanctions the federal spending power. Section 36 of the *Constitution Act, 1982*, and not proposed section 106A, has the "honour" of first expressly recognizing the federal spending power and even it was foreshadowed to some extent by section 118 of the *Constitution Act, 1867* in respect of equalization payments. Second, Canadian courts in the last 30 years have shown little or no hesitation in "recognizing" the federal spending power, even in the case of conditional payments in areas of exclusive provincial jurisdiction. Third, it is possible that the limited recognition of the federal spending power in proposed section 106A could be interpreted as restricting the federal spending power to these kinds of program covered by the section although in our view this is not a supportable position. *Maître* Yves Fortier, Q.C., gave his opinion on this point as follows:

> I arrive at the conclusion that when a federal initiative does not meet any one of the five conditions identified in the Langevin Accord, the federal spending power remains intact. The federal government can therefore spend, as payments or otherwise, for the benefit of individuals, governments or even entire regions of the country in federal or

provincial areas. The only limit to its power is inherent in the federalist principle and has existed since 1867: the federal government cannot use the spending power to invade and regulate areas that fall under exclusive jurisdiction.
(Fortier, 12:85)

The Two Major Criticisms

16. At the same time, it must be recognized, that the federal spending power has to date, not been unquestionably accepted as a feature of federalism. While lower courts have dismissed challenges to the federal spending power in areas of exclusive provincial legislative jurisdiction, the Supreme Court of Canada has not yet authoritatively ruled on this issue. Thus, there is some question whether the almost unqualified judicial support of the federal spending power has so far received will withstand the scrutiny of the Supreme Court. To the extent that proposed section 106A obviates the need for judicial sanctioning of the federal spending power in respect of national shared-cost programs in areas of exclusive provincial jurisdiction, it will immunize such programs from constitutional challenge, and will eliminate debate between the levels of government about the validity of the federal spending power.

17. We return, then, to the two major criticisms that were levelled at proposed section 106A — the uncertainty of its terms and the consequences flowing from such uncertainty and the provision's potential to result in balkanization of major social and other programs.

(a) Uncertainty of terms

18. Dean John Whyte of Queen's Law School told us:

> The uncertainty about when the right to compensation will apply and the conditions under which it will apply seems to me to lead to a very strong incentive to the federal level not to engage in certain forms of spending for social programs. It has a disincentive effect because two things cannot be known: first, what the cost by way of compensation is going to be — that is, compensation without political credit or political accountability — and second, the extent to which the aims of the project can be achieved in the first place, since there is no way of knowing how many provinces, once it is announced, will choose to pursue their own initiatives that are consonant with objectives.
> (Whyte, 10:62, 63)

19. On the other hand, Professor Al Johnson, a former Deputy Minister both in Saskatchewan and in Ottawa, pointed out that unpleasant uncertainties can arise at the provincial level when Ottawa is in the driver's seat. He recalled his days as Deputy Minister of Finance in Saskatchewan:

> The way the shared-cost agreements worked at that time was the Parliament of Canada passed legislation saying we think X, Y, Z would be a good national program and under that legislation, the Government of Canada and the provincial governments, entered into agreements. The agreements by and large specified the national standards or the conditions — they were called conditions then. "Conditions" became an opprobrious word, and we moved to "standards".

> This approach manifestly not only gave to Parliament the power to act arbitrarily, but it created specific situations which were offensive. When you read in the newspaper in the morning that ... the old-age pensions were being raised by $5, of which you were going to find $2.50 and your budget had already been brought down, it jarred you. (Johnson, 11:40)

20. Professor Gérald Beaudoin of the University of Ottawa Law School told us that terms employed in the section dealing with national shared-cost programs were unlikely to give rise to great difficulty because the concepts such as "compatibility" and "initiative" were already known to the law. He emphasized that, in any event, the section would only come into play in the limited category of future programs that have the following characteristics:

(1) it must be a *national* program;

(2) it must be a *shared*-cost program;

(3) the program must have been established *after* the section has come into force; and

(4) the program must be in an area of *exclusive* provincial jurisdiction.

Only if all four of these conditions are satisfied will the section be triggered.

21. Accordingly, the proposed section 106A will have no impact on established national shared-cost programs, nor will the section affect non-shared-cost programs, such as the Family Allowances program. If the government of Canada establishes a regional, rather than a national program, proposed section 106A will not come into play. Proposed section 106A will not apply to programs established in areas of shared jurisdiction, such as agriculture, immigration and perhaps education.

22. Senator Lowell Murray suggested that undue emphasis should not be put on the phrase "the national objectives". In his opinion, the concepts of national objectives and national standards, conditions or criteria were more or less interchangeable. Senator Murray suggested that the phrase "the national objectives" was used so as to ensure that comparisons between the national program and provincial initiatives or programs would focus on the aims of the programs rather than on the manner in which a program is administered.

23. The possible ambiguities of proposed section 106A, along with the possible ambiguities in other provisions of the *Constitution Amendment, 1987*, were also rationalized as a feature of constitution making. It was suggested, for example, that the provisions of the Meech Lake Accord were no more ambiguous than the provisions of the *Constitution Act, 1867* (e.g. "peace, order and good government") or the *Constitution Act, 1982* (e.g. "demonstrably justifiable in a free and democratic society").

24. On the other hand, those expressing a concern about proposed section 106A argued that the section was dangerously ambiguous, that too many questions were being left to be answered by the courts. They suggested that there was no obvious meaning to be ascribed to many of the terms employed in proposed section 106A, such as "reasonable compensation", "initiative", "compatible" and "the national objectives".

25. There is no doubt that the meaning of many of the terms in the section will have to await judicial interpretation. The phrase "reasonable compensation", for example,

could be interpreted as meaning compensation commensurate with the proportion of the population of opting-out provinces to the population of Canada as a whole. Or the reasonableness of the compensation may be commensurate with the compatibility of a provincial program or initiative to the national objectives. Yet, a third possible interpretation is that the compensation to be provided can in no case exceed the size of the provincial expenditures on the compatible provincial program or initiative. No doubt some ambiguity exists, but it must be acknowledged that the same expression "reasonable compensation" is already used in section 40 of the *Constitution Act, 1982*, where it is also undefined.

26. While the words "compatible" and "initiative" do, on occasion, appear in federal and provincial statutes others witnesses pointed out that, these terms have not, in any real sense, been judicially interpreted. In any event the statutory context would be different from the context of proposed section 106A. The fact that these words might appear in federal or provincial statutes would not itself justify their use in a constitutional document if the ambiguity of these terms is likely to result in federal-provincial conflict.

27. As stated above, Senator Murray suggested that the terms "objectives", "standards", "conditions" and "criteria" are more or less interchangeable, but we note that section 95B(2), refers to both "standards" and "objectives", which suggests that these concepts are intended to be different. That "objectives", "conditions" and "criteria" are not likely interchangeable is also suggested by the *Canada Health Act*, which governs an established national shared-cost program. That Act contains a preamble, an objective clause and a purpose clause. The preamble to the Act sets the historical stage for the legislation; the "objective" clause states that the "primary objective of Canadian health care policy...is to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers". The "purpose" clause states that the purpose of the Act is "to establish criteria and conditions that must be met before full payment may be made". The *Canada Health Act* then refers to five "criteria": public administration, comprehensiveness, universality, portability and accessibility. Properly worded these broad criteria would likely qualify as "national objectives" within the meaning of the proposed amendment. On the other hand, the Act also requires the recognition of federal contributions and payments in public documents. This is unlikely to qualify as a "national objective".

(b) Balkanization of social programs?

28. Professor Al Johnson objected to the proposed amendment because, in his view, national shared-cost programs that satisfy the conditions of portability and universality are an important element in binding Canada together.

> **Ms. Jewett:** So your main concern would be that the variations in the programs would be such as to destroy, say, the principle of universality?
>
> **Prof. Johnson:** Destroy the principle of universality would be one illustration. Even more important, in my judgement, would be to destroy the sense of Canadians that they were entitled to the same kinds of services wherever they went in Canada.
>
> I worry about a country in which we do not really have much of a common memory. I have a regional memory from Saskatchewan. I can give my little lecture about hating

> the east, hating banks, hating railway companies, etc., like anybody else in the west can do — I have a regional memory. We have different cultural memories, we have different linguistic memories, we have different memories of heritage. That is the nature of the country.
>
> ... the vehicles by which, we develop a common conciousness are very, very precious indeed. They are difficult to find in a country like ours, and they are precious when we find them. And we have found an instrument here, one of the instruments, for saying to Canadians, yes, we all have that. We know that. It is an essential public service we all enjoy, and we can move in this country and still enjoy it.
> (Johnson, 11:47)

29. Ms. Havi Echenberg, Executive Director of the National Anti-Poverty Organization, agreed that some regional diversity in social programs was acceptable but that Parliament should have the authority to impose minimum national standards.

30. Other witnesses noted that the amendment would leave it open to the federal government to define "national objectives" in such a way as to achieve the desired results, and that, in any event, as a practical matter new programs would either be supported by federal-provincial consensus or they would not proceed at all. For example, Gordon Robertson, a former Clerk of the Privy Council, was skeptical about future recourse to the spending power because of economic realities:

> I am skeptical about whether the spending power is going to have the importance or will have the importance in the future it has had in the past.
> (Robertson, 3:77)

Conclusions

31. We do not share the doom and gloom prophesies of the opponents of proposed section 106A. The drafting of the section may not be a picture of perfection but this is likely one of the areas where some ambiguity was the price of agreement. We are not prepared to reject the section or call for changes in its language simply on the ground that some of the language is ambiguous. We believe that the courts will be able to work out the interplay of concepts in the concrete fact situations that come before them.

32. The Committee further believes that proposed section 106A constitutes a reasonable accommodation of federal and provincial concerns. On the one hand, the section clearly recognizes that there are advantages in decentralization. The history of the development by the provinces of many of Canada's social programs underlines the importance of provincial experimentation. The present health care system has its origins in the health care system first established in Saskatchewan over 40 years ago. It must be recognized that Canadian society is not monolithic in nature. What may be needed in Ontario is probably not exactly what is needed in New Brunswick or British Columbia.

33. At the same time, we realize that proposed section 106A has the potential for creating elements of a checkerboard of social programs across Canada. In our opinion, a checkerboard Canada, insofar as the details of national shared-cost programs are concerned, can be countenanced and, to some extent, should even be encouraged: all provinces and all Canadians may stand to benefit from local experimentation. What should not be countenanced is a checkerboard Canada on fundamental aspects of national shared-cost programs. But we do not believe that proposed section 106A

necessitates the acceptance of this type of checkerboarding. Otherwise the very concept of "national objectives" included in that section would be meaningless.

34. We agree that the phrase "the national objectives" does not equate with national standards. Given the language of proposed section 95B(2), it would be impossible to equate objectives with standards. Nor can it be said that "the national objectives" can be equated with conditions or criteria, as exemplified by the *Canada Health Act*. But that does not end the matter.

35. What opponents of proposed section 106A have too often lost sight of is the fact that the section is concerned with national *shared*-cost programs. There will inevitably be federal-provincial negotiations leading up to the establishment of any such program. Such negotiations are as likely in future to result in a reasonable compromise on such programs as has been the case in the past. Thus, standards, conditions or criteria could well form part of the program approved by all the governments.

36. Section 106A provides a new bottle for an old problem. Negotiations and compromises by both the federal and provincial governments will be necessary for the establishment of any new national shared-cost programs given the present economic conditions in Canada. The federal government will retain most, if not all, of its bargaining chips in such negotiations. Without a doubt, the provincial governments have gained a constitutional right to opt-out of new programs with reasonable compensation. But this right, we believe, is justified since the programs envisaged by proposed section 106A will be in areas of exclusive provincial jurisdiction. If governments take their obligations seriously, Canadians in various parts of the country will be guaranteed the right to programs which may differ in their particulars, but which all strive to achieve the same goal.

CHAPTER VIII

The Supreme Court of Canada

The Establishment of the Supreme Court of Canada

1. The Supreme Court of Canada was not established at Confederation. The Judicial Committee of the Privy Council in Great Britain served as the final Court of Appeal from all British Colonies at that time, and that right of appeal continued after Confederation. The *Constitution Act, 1867*, section 101 authorized the federal Parliament "to provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada". The Court was established by an Act of Parliament in 1878. Having been created by statute, it was within the power of Parliament to make changes to the Court by an ordinary federal statute. Using this legislative power, Parliament abolished appeals to the Privy Council in 1949. In 1975, Parliament imposed a general requirement of leave to appeal that gave the Court substantial control over its docket (subject to some significant exceptions). At least up until 1982, Parliament, if it had chosen to do so, could have unilaterally abolished the Supreme Court of Canada by ordinary statute.

The *Constitution Act, 1982*

2. The dependence of the Supreme Court of Canada on a federal statute for its existence, jurisdiction and composition has been the subject of concern among constitutional experts for many years. The Supreme Court of Canada occupies a central role in our national life. In recent years, the Court's decisions in disputes between the federal and provincial governments have been of tremendous significance for Canada, with the Court performing the role of "umpire" in Confederation. During the 1970's, the Court made a number of important and controversial rulings relating to the division of powers, including decisions on provincial power to impose taxes with respect to their natural resources and on the federal government's anti-inflation legislation of the 1970's.

3. During the turmoil of the late 1970's and early 1980's at the time when the federal government was pushing the pace of constitution reform, the Supreme Court's decisions

in the *Senate Reference*, the *Patriation Reference* and the *Quebec Veto Reference* played a critical role in our constitutional evolution.

4. It became increasingly anomalous that so important a federal institution should be subject to the exclusive legislative authority of one of the major litigants before it, namely, the federal government. Accordingly, in 1982, after much discussion about the Court's constitutional status, the Supreme Court of Canada was "entrenched" in the Constitution of Canada by sections 41(*d*) and 42(1)(*d*) of the *Constitution Act, 1982*. That is to say, the status of the Supreme Court was for the first time reflected in the Constitution of Canada and certain aspects of the Supreme Court were immunized from unilateral legislative change by the Parliament of Canada.

5. Section 41(*d*) of the *Constitution Act, 1982* requires the unanimous consent of the House of Commons and the Senate and the legislative assembly of each province for changes to the "composition" of the Supreme Court. Section 42(1)(*d*) sets out that any changes to the Supreme Court other than its "composition" are to be accomplished by the seven provinces — fifty per cent amending formula. Commentators dealing with these parts of the amending formula have characterized them as ambiguous. For one thing, it is difficult to determine the precise meaning of the word "composition". The Court's actual existence was, in the view of some critics, still dependent on the *Supreme Court Act*, which is simply an Act of Parliament.

The *1987 Constitutional Accord*

6. Section 6 of the *Constitution Amendment, 1987*, if adopted, would result in the following constitutional "changes" to the Supreme Court of Canada.

First, the Supreme Court would be continued as the general court of appeal for Canada.

Second, the Constitution, for the first time, would recognize the make-up of the Court, consisting of a chief justice and eight other justices with at least three judges coming from Quebec.

Third, the *Constitution Amendment, 1987* would entrench the appointment process (so that it could not be altered except by a constitutional amendment), and would give the provinces a constitutional voice in the appointment process.

Fourth, when a vacancy occurs on the Supreme Court, it must be filled from the lists supplied by the provinces.

Fifth, the qualifications for appointment, the tenure of the justices and the process for fixing the salaries of the Supreme Court justices would be entrenched.

Sixth, constitutional amendments in relation to the Supreme Court of Canada would require the unanimous approval of the provinces and of the House of Commons and the Senate.

Entrenchment of the Supreme Court of Canada in the Constitution

7. The Task Force on Canadian Unity in its report, "A Future Together", stated that "the existence and independence of the judiciary at both the central and the provincial

orders of government should be recognized as a fundamental principle of Canadian federalism and be entrenched in the Constitution".

8. The sections of the *1987 Constitutional Accord* which would entrench the Supreme Court in the Constitution have been widely welcomed. It should be noted, however, that section 101E(1) provides that nothing is section 101A "shall be construed as abrogating or derogating from the powers of the Parliament of Canada to make laws under section 101 [of the *Constitution Act, 1867*]". As Parliament would retain the legislative powers it enjoys under section 101 of the *Constitution Act, 1867*, the framers of the amendment must have intended that there will continue to be some aspects of the Supreme Court that Parliament can change without resort to a constitutional amendment. It can be assumed that such powers will invariably be exercised in close consultation with the Supreme Court as is now the case. Retention of some legislative authority on the part of Parliament will enable necessary changes to be made in the practice and procedure of the Court from time to time and will ensure that changes concerning a housekeeping matter, which need not involve the elaborate procedural exercise of a constitutional amendment, can be easily achieved.

9. It should be noted in passing that entrenchment of the Supreme Court could give rise to some problems of legal interpretation. New section 101A(1), for example, provides that "[t]he court existing under the name of the Supreme Court of Canada is hereby continued as the general court of appeal for Canada". It is unclear, for example, whether this provision would preclude Parliament from enacting legislation to abolish all appeals as of right (as is now proposed in Bill C-53), whether it would preclude Parliament from making the court officially bilingual (as is now proposed in Bill C-225), whether Parliament could alter the *Supreme Court Act* to change the qualifications of those appearing before the Supreme Court, or whether the Supreme Court's power to enact rules of procedure would be affected. It has been suggested that section 101A(1) entrenches all existing features of the Court; the better view, it appears, is that the section only entrenches those aspects that the Supreme Court itself regards as fundamental to its role as the final court of appeal.

The Appointment of Judges to the Supreme Court of Canada

10. Although the Governor General at present legally has an unfettered discretion in the appointment of qualified men and women to be judges of the Supreme Court, since the 1970's the governments of the day have, with some exceptions, followed the practice of consulting with other groups, such as the Canadian Bar Association, before exercising this appointment power.

11. Since 1949, a pattern of regional representation has been maintained under which three judges come from Quebec as required by statute, while by informal custom, there is a rough allocation (that is varied from time to time) of three judges from Ontario, two from the western provinces and one from the Atlantic provinces.

12. The *Constitutional Amendment, 1987* would affect the process of making appointments to the Supreme Court of Canada in two ways:

> (*a*) proposed section 101B(2) would entrench the requirement that three of the judges of the Court be persons who have been members of the Quebec bar or judges of a

court of Quebec, or a court established by Parliament (such as the Federal Court of Canada), for a total of 10 years; and

(*b*) proposed section 101C would entrench an appointment procedure that would include a role for the provinces in the appointment of judges to the highest court in the land.

Before considering each of these proposals in detail, these changes should be put into historical perspective.

(*a*) *The Quebec requirement*

13. The Joint Committee heard no criticism of entrenchment of the requirement that three of the Court's judges come from Quebec. This was recognized as a necessity given the fact that Quebec, with its civil law system, is unique in Canada. Many believed that, in order for the Supreme Court to fulfil its role as the general court of appeal for Canada, Quebec representation among the judges of the Supreme Court is a necessity. Others commented that Quebec representation was consistent with the Constitution's recognition of Quebec as a "distinct society" within Canada and would ensure that the Quebec perspective was represented on the Court in constitutional cases.

14. However, some witnesses and some of the briefs were critical of the fact that only Quebec was guaranteed representation on the Court. Some suggested that the Constitution should guarantee regional representation; others criticized the fact that representation was not guaranteed for women, for the aboriginal peoples or other minorities.

(*b*) *Provincial role in the appointment of judges to the Supreme Court of Canada*

15. The most controversial change introduced in relation to the Supreme Court of Canada by the Accord is the method by which future court vacancies will be filled. When a vacancy occurs the government of each province is to have the opportunity to submit names of persons who are members of the bar of that province and are otherwise qualified to sit on the Court to the Minister of Justice for Canada. The Governor-in-Council would be required to make the appointment from the names on the provincial lists. Only persons on the list submitted by the government of Quebec could be appointed to fill vacancies on the Court in relation to the province of Quebec. Vacancies created by the death or resignation of judges from elsewhere in Canada could be filled from any of the provincial lists. It need not be filled from the list of the province or territory of origin of the former incumbent.

16. The proposed amendments have given rise to 4 major criticisms:

(*i*) A significant number of the witnesses and the briefs submitted to the Committee opposed the whole concept of provincial input into the appointment of Supreme Court judges. The basis for the criticism was a concern that provincial input would result in the appointment of judges with a provincial, rather than a national, outlook.

(*ii*) Considerable criticism was directed at the process envisaged by the *Constitution Amendment, 1987*. The focus of this criticism was the possibility of a deadlock in the appointment process. For example, the federal government might find the persons whose names have been submitted unacceptable, and a deadlock would ensue, with the Court having to function at less than full capacity at a time when the demands of their role in Charter adjudication in particular has become more and more onerous. The problem would be most acute, it has been suggested, in the case of Quebec

appointments for the federal government would have only one provincial list of names from which to choose. In the case of non-Quebec appointments, the federal government would at least be able to choose from among the names of persons submitted by any one of the provinces other than Quebec. This discretion would likely encourage other provinces to put forth attractive nominees so as to increase the chance that one of that province's nominees would be selected. Neither the federal nor the provincial governments, it is said, would want to risk criticism of using the appointment process to the nation's highest court for political purposes.

(*iii*) Some witnesses criticized the appointment proposals on the basis that it would operate unfairly against the possible appointment to the Supreme Court of qualified lawyers and judges from the Yukon and the Northwest Territories. While the *1987 Constitutional Accord* does not exclude appointment to the Supreme Court of Canada of a person who is a member of the bar of the territories or a judge in the territories, the territorial governments do not, under the Accord, have the right to submit lists of persons qualified to be members of the Supreme Court to the federal Minister of Justice.

(*iv*) Some witnesses complained that the proposals respecting the appointment process no more guaranteed excellence on the bench than does the present process of unilateral federal appointments to the Supreme Court of Canada. The proposal is viewed by many, such as the Canada West Foundation, as merely spreading patronage possibilities from the federal level to the provincial level.

We propose to examine each of these criticisms in turn.

(*i*) *Provincial input*

17. For many years, attempts have been made to find a formula for appointing judges that would structurally involve participation of the provinces. Some witnesses considered such participation to be a necessary feature in a federation. Since the *Victoria Charter* of 1971 numerous proposals have been suggested, including mandatory consultation with the provinces by the federal authorities; ratification of appointments proposed by the federal government by a reformed Second Chamber or House of the Federation; alternate federal and provincial lists; or lists provided by the provinces with a double veto (which is in fact the proposal that is contained in the *1987 Constitutional Accord*).

18. We believe that a provincial bias among newly appointed judges is no more likely than a federal bias among the present judges of the Supreme Court of Canada. Legal scholars who have examined the issue whether the Court has displayed a federal bias in its constitutional decisions have been unable to substantiate any such bias. Indeed, recent constitutional jurisprudence would, if anything, suggest a provincial bias. This is particularly evident in the Court's recent approach to the paramountcy doctrine, i.e. the Court has refused to declare inoperative provincial laws which are arguably repugnant to federal laws except in the limited circumstances where obedience to one law would result in a breach of the other.

19. Some witnesses also commented that the advent of the *Canadian Charter of Rights and Freedoms* has reduced the number of division of powers cases heard by the Court and increased the number of cases concerning individual rights. A provincial or national bias — assuming that any such bias exists — is largely irrelevant to deciding Charter cases.

(*ii*) *Federal-provincial deadlock*

20. It is evident that a deadlock in the appointment process is a possibility, particularly in the case of Quebec appointments. However, once it is decided that provincial input in the appointment process is desirable, if the input is to be of significance, the risk of deadlock must be accepted. Obviously, if the provinces are to play only a consultative role, a deadlock cannot arise: the federal government could simply "go through the motions" and then appoint any individual that it desired. If the provinces are to have a real say in the appointment process, the possibility of disagreements between the two levels of government must be countenanced. *Maître* Robert Décary, a barrister of many years standing, told the Joint Committee:

> ...one must not examine a constitution by looking at all the obstacles in its interpretation, or whether it will be taken to extremes. I do not cross bridges before I come to them. If we begin to wonder what will happen, there will be no end to it. Each provision would be looked at and we would be wondering what would happen if the Governor General did not accede to the Prime Minister's request to dissolve the House. There are a great many "ifs" but, in practice, they do not arise. Our democratic system, with its public opinion, its public pressures, is such that it is unthinkable that governments could not agree on the selection of judges within a reasonable period of time.
> (Décary, 4:70)

21. The possibility of a deliberate deadlock could be envisaged, as Professor Ramsay Cook speculated, if a separatist government were in future to be elected in Quebec and were to put forward candidates with strong anti-federalist views. Such candidates would likely be rejected by the federal government. Without any mechanism to break a deadlock, the Supreme Court would have to operate with less than a full complement of Quebec judges. Among other matters, this could create severe difficulties in the disposition of civil law cases from Quebec.

22. Professor Beaudoin drew our attention to the procedure in the United States where Supreme Court judges are nominated by the President but must be confirmed by the Senate (representing the states). There is no procedure to "break" a deadlock yet, according to Professor Beaudoin, the procedure has worked satisfactorily.

> In the United States, they have a double veto. The fact that the Senate rejected 20 presidential nominees did not really create any insurmountable problems. Two elected people usually manage to reach an agreement.
> (Beaudoin, 2:67)

23. Some witnesses referred to possible "neutral" procedures for breaking a deadlock in the appointment process, should such a problem occur. For example, under the *Victoria Charter*, if a vacancy occurred in the Supreme Court of Canada, the Attorney General of Canada would have been obliged to consult the Attorney General of the relevant province when he considered a possible nomination. No such vacancy could be filled until both Attorneys General were in agreement, or until a nominating council recommended an appointee. The nominating council was to be established by both Attorneys General. The Attorney General of Canada would then submit to the nominating council the names of three candidates who had been submitted to and rejected by the provincial Attorney General. The nominating council's recommendation as to who should fill a vacancy on the Supreme Court of Canada would be binding on the government of Canada. As to this possibility Professor Beaudoin told us:

> Some might say that we could have a college, like the one in Victoria. This is a good solution. But is it the best? It is a matter of opinion. But in this case, in the end, the arbitrator that has the final word is a non-elected person. Is it not preferable that a judge be appointed by people that the province or the entire country trust!
> (Beaudoin, 2:71)

24. Also in 1986, the Canadian Bar Association adopted the report of a committee chaired by E. Neil McKelvey, Q.C., which recommended a wide consultative process to precede the appointment of Supreme Court of Canada judges. An Advisory Committee on Federal Judicial Appointments in each province and territory would be established to advise the Minister of Justice of Canada. The Committee would be composed of a representative of the Minister of Justice of Canada, the Attorney General of the jurisdiction in question, the Chief Justice of the jurisdiction, a representative of the Canadian Bar Association and the bar of the jurisdiction, and two representatives of the public chosen by members of the committee. This committee would make its recommendations to the Minister of Justice, and while this would be an advisory body only, the Minister would be expected to make each appointment from the list supplied, or failing agreement, to ask the committee for further recommendations.

25. Another method that could be used on a short-term basis, should a deadlock occur, would be for the Chief Justice of Canada to invoke section 30 of the *Supreme Court Act*. Under this section, the Chief Justice has the authority to appoint ad hoc judges "where at any time there is not a quorum" of permanent judges available to sit. The ad hoc judge may be taken from either the Federal Court or be a judge of a provincial superior court.

26. However, each of the procedures to break a deadlock that has been proposed to date suffers from the same frailty, that is to say, the tie-breakers proposed have been unelected officials. This flies in the face of the principle that all members of the judiciary, and particularly the judges of the Supreme Court of Canada, should be appointed by persons responsible to the electorate. The advent of the *Canadian Charter of Rights and Freedoms* has, in our view, added weight to this principle. Given the types of decision that the Supreme Court of Canada must now make because of the Charter, the need for electoral responsibility has, if anything, been heightened.

27. Moreover, some witnesses have argued that the introduction of a tie-breaking formula, in the context of the present proposal, would likely be self-defeating. A tie-breaking formula would, it is said, tend to discourage negotiations and compromise on the part of the governments involved in the appointment process. The very possibility of a deadlock is likely to discourage deadlock, whereas the existence of some tie-breaking formula is more likely to encourage, rather than discourage, deadlocks.

(*iii*) *Appointments from the territories*

28. Although qualified lawyers and judges from the territories can in theory be included on provincial lists, provincial governments are more likely to nominate candidates closer to home, with whose abilities they may be more familiar. For all practical purposes it would likely be difficult for someone from the territories to be appointed to the Supreme Court of Canada under the present proposals.

Senator Lowell Murray indicated that the territorial governments were not given a role to play because they lack provincial status. This observation, while true, does not

address the apparent disadvantage inflicted on qualified *individuals* (not governments) who happen to reside in the territories.

29. *Maître* Robert Décary qualified his support for the 1987 Accord on this point:

> I think an amendment should be made to that part of the agreement, to make sure that lawyers and judges from the Territories... who already can be appointed to the court but who cannot make it to the lists is somehow illogical. We should find a way to allow the authorities of the Territories to put their names on a list when a judge is picked.
> (Décary, 4:73)

Maître Yves Fortier expressed the same reservation:

> ...I deplore, for example, the fact that the Yukon and the Northwest Territories are not granted the right to propose candidates for the Supreme Court of Canada and the Senate. A simple oversight? Would that have been a stumbling block? I do not know.
> (Fortier, 12:85)

30. The only practical way to have qualified northerners considered for appointment to the Supreme Court bench is by having their names submitted for consideration by the territorial governments. Therefore, the proposed procedure should be amended by the First Ministers at the first opportunity.

(iv) Quality of Supreme Court appointments

31. Some witnesses suggested that the new procedure would do nothing to guarantee excellence on the bench. Of course, the proposed appointment process no more encourages or discourages excellence in Supreme Court appointments than the present appointment process. There is nothing in the proposals to preclude either the federal government or the various provincial governments from devising procedures to ensure excellence. *Maître* Yves Fortier, Q.C., a former President of the Canadian Bar Association, said that provincial participation in nominating Supreme Court judges would not prejudice the quality of appointments:

> **Senator Nurgitz:**... in this country we have a tradition of men and women who have taken on appointments to the Supreme Court that has been absolutely outstanding, would you not agree?
>
> **Mr. Fortier:** It is absolutely outstanding, I agree with you, and there is no reason to believe that because another equal partner in Confederation is going to have a say in the appointment of judges in later days this tradition of excellence is not going to be duplicated. With the greatest of respect to those who have said otherwise, I think to say the opposite is pure hogwash.
>
> ..., I question whether in any instance the final short list — and I am not privy to these matters, but I have a crystal ball just like we all do — would have been different in Ottawa from what it would have been in the relevant provincial capital.
>
> The cream rises to the top, whether you are looking at the cream with provincial eyes or with federal eyes. (Fortier, 12:90)

Conclusions and Recommendations

32. The Joint Committee is of the view that the proposals for amendment relating to the Supreme Court of Canada are workable. However, we have a continuing concern with respect to the exclusion, for all practical purposes, of qualified candidates from the

territories for appointment to the Supreme Court. As already discussed, while appointment from among members of the territorial bench or bar is constitutionally possible, such appointments are politically unlikely. We recognize that the territories are not provinces, but we do not believe that the territories' present status should deprive individuals who choose to work or serve in the North, of a real opportunity to be appointed to the Supreme Court of Canada.

33. We recommend that consideration be given by the First Ministers at a later constitutional conference to a further amendment to enable the territorial governments to submit the names of qualified persons for appointment to the Supreme Court and that the federal government be empowered to appoint such persons to a non-Quebec vacancy on the Court.

CHAPTER IX

The Senate of Canada

1. An exceptional amount of the Joint Committees' time was taken up with the question of Senate reform. This is only partly because 5 of our 17 members are Senators. The more basic reason is that, in the Committee's view, Senate reform is one of the most pressing and urgent areas for constitutional reform.

2. Witnesses appearing before the Joint Committee on this issue can be divided into three categories:

(*i*) Those, like former Senator Eugene Forsey, who believe that the prospects of Senate reform are virtually nil under either the 1982 or the 1987 formula. He believes that there are too many institutions, including the House of Commons, that have nothing to gain from a more powerful and credible Senate.

(*ii*) Those, like the Canadian Committee for a "Triple E" Senate, who believe that reform is possible but that chances of success would be less under the 1987 formula than they are under the 1982 formula.

(*iii*) Those, like Dr. Peter Meekison, a long-time constitutional advisor to Alberta, who believes Senate reform is possible and that the proposed changes to the amending formula would not harm its chances of success:

> My own feeling is that Senate reform is no more difficult under the proposed change than it is under the existing formula, in that merely looking at the mathematics, unanimity versus 2/3:50, overlooks entirely, I would argue, the realities of coalition behaviour.
>
> I think it is very difficult for a province to cast a veto. It is very difficult to do so. Obviously it is there to be used, but the natural tendency in those circumstances is to try to find a compromise. So I feel that what Alberta has gained under this accord is a guarantee that constitutional discussions will take place on Senate reform. (Meekison, 10:50)

3. Before commenting on the merits of the controversy about Senate reform, it is convenient to review the relevant background to the issues under discussion.

Constitution Act, 1982

4. At present, any constitutional amendment relating to the method of selecting Senators, the powers of the Senate, the number of Senators from each province, and the residence qualifications of Senators, requires the approval of the two Houses of Parliament and the legislative assemblies of at least two-thirds of the provinces containing at least fifty per cent of the population of the provinces.

5. It should also be noted that the 1982 Act limited the authority of the Senate over amendments to the Constitution (including amendments affecting the Senate). Section 47 provides that amendments to the Constitution may only be delayed by the Senate for a period of one hundred and eighty days after they have been approved by the House of Commons.

1987 Constitutional Accord

6. The 1987 Accord provides that "any amendment in relation to the powers of the Senate and the method of selecting Senators" must have the unanimous support of the House of Commons and the Senate and the legislative assembly of each of the provinces.

7. The 1987 Accord contains two other provisions which are relevant to the Senate. The entrenched agenda for future First Ministers' Conferences would include "Senate reform, including the role and functions of the Senate, its powers, the method of selecting Senators and representation in the Senate".

8. Moreover, until Senate reform is accomplished, the political accord accompanying the proposed constitutional amendment of June 3, 1987 provides a "transitional" appointment procedure effective immediately as follows:

> Until the proposed amendment relating to appointments to the Senate comes into force, any person summoned to fill a vacancy in the Senate shall be chosen from among persons whose names have been submitted by the government *of the province to which the vacancy relates* and must be acceptable to the Queen's Privy Council for Canada.
> (Emphasis added)

9. In 1975, a constitutional amendment provided for representation in the Senate from the Yukon and Northwest Territories on the basis of one Senator for each territory. In the case of Senate seats occupied by the Senators from the territories, there would not be "a province to which the vacancy relates". Therefore, it would appear to us that appointments to the Senate from the Territories would continue to be made by the Governor General under section 24 of the *Constitution Act, 1867*.

The Original Purpose of the Senate

10. The Senate was created to fulfil two major roles in the federation. It was to protect and represent sectional interests or those interests peculiar to a region or to linguistic or religious groups. This has become known over time as representing regional interests. The other major role was to act as a counterweight to the popularly elected House of

Commons and thus to encourage political stability. The exercise of these roles was to be provided in the "sober second thought" that was to be given to proposed legislation by the Senate.

11. The role of protecting and representing regional interests is reflected in the structure of the Senate. In 1867, an equal voice was given to each region, originally three, later expanded to four, regardless of the size of its population. This meant that both the less populous provinces and the predominantly French-speaking province of Quebec were to be given some protection against the wishes of a simple majority of Canada's population expressed in the decisions of the House of Commons.

Proposals for Reform

12. No institution of Canadian government has been the subject of so much controversy regarding the reasons behind its creation, whether the original objectives for its creation have been met and finally how it can be changed so that it may better fulfil its original purpose. Within the first three days of its first sitting in 1867, at least one Senator publicly complained about the lack of useful work to do. Since 1890, the prospect of reform has been under "active consideration".

13. A major focus of reform proposals has been the method of selection of Senators. Various proposals for popular election, provincial government appointments and a mixed formula whereby half would be appointed and half elected have been proposed through the years. In 1908, it was proposed that one-third should be named by the federal government, another third by provincial governments and the final third by universities and public bodies. In recent years, reform proposals have included adaptation of the German Bundesrat model whereby the provinces would send delegations to represent them in the federal Senate. The Australian model has been the object of several parliamentary delegations. In 1984, a Special Joint Committee on Senate Reform called for a Senate elected directly by the people.

14. The major thrust of these proposals is the attempt to find some legitimacy for the exercise of power by the Senate. There is a concern that, because of the present method of selection of Senators (by federal appointment), it is impossible for the Senate to represent the regions of Canada effectively. Perhaps through a change in the method of selection, it could assert its place as protector and enuciator of regional and minority interests and perform a more active role in the legislative life of the country.

15. At the moment, the two leading reform theories appear to be either outright abolition of the Senate (supported by the New Democratic Party) or establishment of a "Triple E" Senate, a concept particularly popular in Western Canada.

16. The idea of outright abolition is self-explanatory. The concept of the "Triple E" Senate involves a Senate that is "elected, equal and effective".

(*i*) *Elected* directly by the people.

None of the witnesses who wished to see the Senate retained in some form disagreed with the concept of an elected Senate.

(*ii*) *Equal* representation of the provinces.

At present, 104 Senators are distributed on a basis that achieves an approximation of regional equality, as follows:

Ontario	24
Quebec	24
Newfoundland	6
Nova Scotia	10
New Brunswick	10
Prince Edward Island	4
Manitoba	6
Saskatchewan	6
Alberta	6
British Columbia	6
Yukon	1
Northwest Territories	1

The disincentive for Quebec and Ontario to move towards "equal representation" is evident from the numbers. As Dean Whyte of Queen's University Law School commented:

> All I want to say is that I think it is reasonable to predict that Ontario and Quebec have a strong incentive not to agree to reform of the Senate, since they will control a quarter of the Senate each. This is big provincial influence in Ottawa and I do not understand the terms under which they are going to give that up.
> (Whyte, 10:68)

(*iii*) *Effective* powers to exercise.

A principle issue here is the relationship between the Senate and the House of Commons, as explained by Dr. Meekison:

> One of the issues that will have to be considered at great length is the relationship between a reformed Senate and the House of Commons and what kind of deadlock provisions. So you get into the question of effective... Should the Senate, which currently has considerable legislative authority, continue to exercise the full range of the legislative authority it now does or should it have specialized authority? What areas would it be in? It would perhaps be in areas of particular concern to provinces.
> (Meekison, 10:52)

17. It is clear from all this that many issues remain to be worked out in connection with the proposal for a "Triple E" Senate. There is as yet no political or public consensus.

18. There is however a question of principle. Some witnesses commented that it would be conceptually awkward to be seen to impose a "Triple E" Senate, incorporating the idea of equality, on provinces that did not have an equal voice in the amendment that brought it into existence. On that basis, it was considered important at Meech Lake to establish the principle that each province should have a veto over changes in important national institutions such as the Senate. This point was also made by former Liberal Cabinet Minister J.W. Pickersgill:

> I do not think it will make more than a millimetre's difference whether you require all the Premiers or eight-tenths of them. I do not see it as of any importance whatever. It was obviously essential to get the approval, curiously enough, of these western Premiers to recognize this unanimity rule as an expression of the equality in status of

all the provinces. I think it is a perfectly reasonable position to take.
(Pickersgill, 10:133)

Chances of Meaningful Reform

19. Clearly there are strong institutional interests that could be expected to resist change. The Committee heard frank comments about the patronage potential from the Canada West Foundation in respect of the "transitional" appointments procedure:

> The proposals not only maintain patronage appointments but they encourage premiers to perpetuate patronage and make in essence an empty mockery out of the commitment to Senate reform.
> (Elton, 4:22)

20. Former Senator Eugene Forsey identified a number of other "vested interests".

> The chances of any amendment being adopted even under the seven-province formula are virtually nil. Ontario and Quebec will never accept any reduction in the number of Senators from either province; nor will the Atlantic provinces any reduction in their quotas. The House of Commons will never accept any change that gives the Senate more real power; the reformers will never accept any change that does not. Under the unanimous consent formula, the chances of change are microscopic.
> (Forsey submission, p. 18)

21. But the Committee has heard from other witnesses who believe that adoption of the 1987 Accord would *improve* the prospects of successful Senate reform. So long as Quebec refused to participate in constitutional change, they told us, there was no hope of Senate reform: first because Ontario, with its 24 Senate seats and about one-quarter of the population of Canada, could in Quebec's absence itself veto any proposed amendment; second, because it was assumed that neither the federal government nor the other provinces would ever want to repeat the 1982 trauma of imposing on Quebec a major constitutional change without its consent; third, Quebec took the legal position that it could veto Senate reform in any event because any change to the elaborate provisions in section 22 of the *Constitution Act, 1867* allocating Quebec Senate seats in respect of "each of the 24 electoral divisions of Lower Canada" would be an amendment "that applies to one or more, but not all, provinces" and therefore under section 43 of the *Constitution Act, 1982*, would require the resolution of "the legislative assembly of each province to which the amendment applies", namely, Quebec.

22. Accepting, therefore, the threshold imperative of bringing Quebec's vote to the constitutional table, the provincial premiers agreed to tackle Quebec's demands first and postpone consideration of Senate reform until later. The Edmonton Declaration of August 1986 expressly postponed consideration of Senate reform until after the "Quebec Round" had been completed. At that time, without the federal government even being present, the provincial premiers established that there would be no direct action on Senate reform in the 1987 negotiations. Moreover, moving to accommodate Quebec meant acceptance of the idea of an explicit Quebec veto over amendments to important federal institutions including the Senate. This had been spelled out by Quebec in May 1986 in the statement of its "five conditions". Having regard to provincial support for the principle of the "equality of the provinces" the veto claimed by Quebec was inevitably extended to all existing provinces. According to these

witnesses, therefore, meaningful Senate reform prior to the *1987 Constitutional Accord* was impossible, and it was believed that the 1987 Accord certainly could not make things worse than impossible.

23. According to these witnesses, the other positive benefits for Senate reform, brought about by the *1987 Constitutional Accord* are four in number:

(1) Each of the provincial governments in western Canada leading the campaign for Senate reform has acquired its own veto against watered-down proposals that would be an unacceptable substitute for a "Triple E" Senate.

(2) Provincial participation in Senate nominations under the "transitional arrangements" would make the present Senate less attractive to the federal government. Under the present appointment rules the federal Cabinet is perceived to have a clear interest in maintaining the status quo. Discussion of Senate reform in the context of a larger constitutional agenda will have advantages, as Professor Meekison pointed out:

> Discussion on Senate reform will not take place in a vacuum. Other subjects will also be on the agenda. I assume that governments will enter these future discussions with a view to seeking an agreement or agreements of some kind reached.
>
> A quickly cast veto on Senate reform could lead to rejection of other proposed changes. From my experience, governments are more likely to agree on reforms when a variety of topics are discussed simultaneously. Some recognition and attention must be given to the different priorities and concerns of each government.
> (Meekison, 10:43)

(3) Moreover, the new appointement procedure will likely add to the stature of the new Senators, especially if candidates for provincial nomination submit themselves to an election that each province is free to organize. In some regions, the provincial governments may come under strong public pressure to organize "Senatorial" elections. While neither level of government is bound to nominate or appoint the winner of the election, there would be strong public pressure to do so, federally as well as provincially. Whether such elections are held or not, future appointees will carry the approval of both the federal and provincial governments and can be expected to be even readier than the present Senators to flex their muscles at the expense of the House of Commons. Former Senator Eugene Forsey sees the transitional appointment procedures of the 1987 Accord as shifting power from the House of Commons to the Senate:

> The transformed Senate will have all the legal powers of the present Senate, notably the power to reject, absolutely, any bill whatsoever. But it will have a political clout the present Senate cannot even dream of. Its members will take seriously their job of representing provincial and regional interests, and if that makes trouble for the federal government, or annoys the House of Commons, what of it?
> (Forsey, submission p. 20)

24. The result, according to supporters of the 1987 Accord, is that the added complexities of dealing with the new "transitional" Senate will encourage the federal government to go whole hog and seek meaningful reform of the whole institution.

25. Ultimately, the federal government could precipitate long-term pressure for Senate reform simply by refusing to appoint any new Senators, as recommended by the Canadian Committee for a "Triple E" Senate:

> Rather than "tinker" with the fundamentally undemocratic practice of appointing people to a legislative body, let us suspend appointments pending meaningful Senate reform. Barring the possibility of some senators dying before they reach 85 between now and January 1991, ten vacancies will occur in the Senate: 1 from Newfoundland, 3 from Nova Scotia, 2 from New Brunswick, 2 from Quebec, 1 from Ontario, 1 from Manitoba, and 1 from Alberta. In the last two decades, the vacancies in the Senate have exceeded twenty.
> (Submission, pp. 2-3)

Conclusions

26. After reflecting on the various arguments raised by the testimony on this point, the Joint Committee is of the view that

(*a*) there is widespread support for an elected Senate that would more equally represent the provinces of Canada and that could then justify the effective use of its powers;

(*b*) meaningful Senate reform must be pursued by the First Ministers on a priority basis in order to justify their claim that the temporary appointment procedure in the Meech Lake Accord will indeed be temporary;

(*c*) the "temporary" appointment procedure does not prevent Senate reform and, in fact, may enhance the possibilities of reform through the new options available to the provinces such as direct popular election of provincial nominees; and

(*d*) the veto powers now available to all provinces will assure provinces such as Alberta, who feel strongly about Senate reform, that they cannot be forced to accept a Senate reform package that does not live up to their expectations.

CHAPTER X

Immigration

The Proposal

1. The 1987 Accord contains a procedure by which constitutional status can be conferred upon certain federal-provincial agreements related to immigration and the temporary admission of aliens. Once a federal-provincial agreement, freely entered into, is blessed by a Proclamation issued by the Governor General under the Great Seal of Canada authorized by resolutions of both the Senate and the House of Commons and the provincial legislature, both levels of government will be firmly bound by the terms they have agreed to except in two circumstances:

(*i*) Parliament continues to have paramount legislative authority to set "national standards and objectives" relating to immigration or aliens, including any provision that establishes general classes of immigrants or relates to levels of immigration for Canada or that prescribes classes of individuals who are inadmissible into Canada.

(*ii*) The entrenched agreement can be changed by the consent of the parties expressed through elaborate formalities akin to a constitutional amendment.

2. Pending adoption of the proposed constitutional amendments, Quebec and Canada will continue to cooperate in immigration matters under the terms of the Cullen-Couture Agreement of March 30, 1979, as hereafter described. In the meantime, however, the political Accord, which is not part of the constitutional amendment itself provides, that the government of Canada will conclude an agreement with the government of Quebec that will

> guarantee that Quebec will receive a number of immigrants, including refugees, within the annual total established by the federal government for all of Canada proportionate to its share of the population of Quebec, with a right to exceed that figure by five per cent for demographic reasons.
>
> provide an undertaking by Canada to withdraw services (except citizenship services) for the reception and integration (including linguistic and cultural) of all foreign nationals wishing to settle in Quebec where services are to be provided by Quebec, with such withdrawal to be accompanied by reasonable compensation,

and the Government of Canada and the Government of Quebec will take the necessary steps to give the agreement the force of law under the proposed amendment relating to such agreements.

Any such new agreement will come into effect, we are told, only if the constitutional amendments are made and the new agreement is approved by the Senate and House of Commons (and the Quebec Legislative Assembly) and entrenched under the new formula.

3. The *1987 Constitutional Accord*, in paragraph 3, provides that the Accord should not be construed so as to prevent the negotiation of similar agreements with other provinces.

The Policy Considerations

4. The principal concerns raised by witnesses at our hearings were as follows:

(1) some witnesses believed that too great a provincial role in immigration might lead to the encouragement of new arrivals to develop provincial loyalties instead of national patriotism; and

(2) some witnesses were concerned that any shortfall in Quebec immigration could lead to the imposition of cuts in immigration to other regions of Canada. If true, this could have an adverse effect on people (reunification of families) and on the economy (fewer workers in areas where they are needed).

5. With respect to the argument about regional "loyalties" at the expense of national patriotism, the Joint Committee notes that, since 1971 the government of Quebec and the government of Canada have operated under three comprehensive agreements dealing with the issue of immigration — the Lang-Cloutier Agreement in 1971, the Andras-Bienvenue Agreement in 1975 and, effective March 30, 1979, the Cullen-Couture Agreement referred to in the *1987 Constitutional Accord*. The purpose of these agreements is to lay down the basis for cooperation in all areas relating to immigration and, in particular, to enable Quebec and Canada to participate jointly in the selection of persons who wish to settle permanently or temporarily in the province of Quebec.

6. Other provinces have made similar agreements with the federal government including Newfoundland (1979), Nova Scotia (1978), Prince Edward Island (1978), New Brunswick (1978), Saskatchewan (1978) and Alberta (1985). These agreements are all authorized by section 109(2) of the federal *Immigration Act, 1976*, which provides that "the Minister, with the approval of the Governor in Council, may enter into an agreement with any province or group of provinces for the purpose of facilitating the formulation, coordination and implementation of immigration policies and programs".

7. The clear objective of the constitutional amendment so far as Quebec is concerned was to ensure that any immigration agreement made with the federal government would not be overridden by the exercise of Parliament's paramount legislative power except with respect to "national standards and objectives". Any abuse of the present administrative arrangements with respect to immigration, as feared by some critics,

would likely have surfaced before now in our opinion. The only change brought about by the amendment would be that the agreements become "more" unbreakable. The actual contents of the agreements will be placed before the Senate and House of Commons for their review and approval.

8. In the event that the Senate and House of Commons are not satisfied with the provisions of a new agreement, they will have an opportunity to say so, and if they think fit, to refuse to approve the agreement.

9. Much of the concern expressed by witnesses about the allocation of new immigrants to Quebec, and the potential difficulties that could be created if Quebec did not in fact attract the number of immigrants it seeks, appears to have been created by the text of the Accord and in particular the underlined words:

> *guarantee* that Quebec *will receive* a number of immigrants, including refugees, within the annual total established by the federal government for all of Canada proportionate to its share of the population of Canada, *with the right to exceed that figure by five per cent* for demographic reasons,...
> (Emphasis added)

10. Witnesses questioned how such a "guarantee" could be given to Quebec in light of the fact that Quebec has not achieved even its present immigration quota in recent years. Moreover, the clause does not say that Quebec "is *entitled* to receive" that number of immigrants. It says Quebec "*will receive*" that number of immigrants. And further, if Quebec is to be guaranteed its proportionate share of immigrants plus another 5 per cent of the national quota, what will that do to agreements with other provinces? They are entitled to negotiate similar agreements. Will this result in Canada having to accept 150 per cent of the immigration quota? Obviously not. What will happen to the proportion of immigrants allocated to other provinces if Quebec does not satisfy its quota? Will the other provinces have to cut back on their allocation to stay in line with any shortfall experienced by Quebec?

11. These provisions caused particular concern among some witnesses from western Canada who anticipated that operation of these agreements could impede the free flow of immigration to the western provinces and thereby slow western economic development.

12. Most of these concerns seem to result from the curious (and inappropriate) language used in the *political Accord* quoted above in paragraph 9. The controversial language is not repeated in the *Constitutional Amendment, 1987* itself. The quoted language thus has no "constitutional" status.

13. As already pointed out, any new agreement between the government of Canada and the government of a province must be approved federally by the House of Commons and the Senate and provincially by the legislative assembly of the province in question. Thus, the House and the Senate will have an opportunity to scrutinize any provisions about numbers and guarantees and cut backs in immigration to other provinces *before* the agreements acquire constitutional status. At that time important policy issues, such as those described above, can be addressed.

14. Moreover, as discussed below, the *Canadian Charter of Rights and Freedoms* is expressly made applicable to federal-provincial agreements on immigration and

temporary admission of aliens, including its mobility rights provisions. Accordingly, regardless of the original point of settlement, new immigrants to Canada are guaranteed the right to migrate within the country to the areas where they see the greatest economic opportunity. We are told that more than a third of immigrants to Quebec in recent years have in fact decided to migrate to other parts of Canada and, of course, there is nothing in any of the federal-provincial agreements on immigration to prevent this.

15. The same analysis should dispose of another concern raised at the hearings, namely, that a shortfall of immigrants to Quebec could lead to obstacles to family reunification for immigrants settled elsewhere in Canada. The perceived danger only arises if immigration allocations to regions outside Quebec are liable to be cut if Quebec immigration does not materialize in the expected numbers. We understand that this will not happen. Quebec is to receive an annual allocation, as will other provinces. If Quebec does not achieve its quota other provinces will not have their quotas cut back. They are entitled to rely on the quota originally allocated.

16. It is only fair to point out that despite the existence of the Cullen-Couture Agreement and other provincial agreements that have been in operation for many years, and despite the consistent shortfall in immigration to Quebec, the concerns discussed above do not seem to have arisen. There is no reason to believe that giving a new constitutional status to such agreements by itself would create any new administrative problems. The controversy about this section appears to be a false alarm.

Constitutional Background

17. Section 95 of the *Constitution Act, 1867* gives the federal government and the provinces concurrent legislative powers over immigration. The provinces are limited in that any laws that they may pass must not be "repugnant to any Act of the Parliament of Canada". Quebec is the only province that has exercised this constitutional power, and has established its own Ministry to deal with immigration matters.

18. Reference must also be made to section 91(25) of the *Constitution Act, 1867*. This provision states that Parliament shall have exclusive legislative authority over "Naturalization and Aliens". This power, unlike the power in respect of immigration, is not a shared power; only Parliament may enact laws relating to matters of naturalization and aliens.

19. The actual text of the proposed new constitutional jurisdiction in relation to agreements on immigration and the admission of aliens reads as follows:

> "95A. The Government of Canada shall, at the request of the government of any province, negotiate with the government of that province for the purpose of concluding an agreement relating to immigration or the temporary admission of aliens into that province that is appropriate to the needs and circumstances of that province.
>
> 95B.(1) Any agreement concluded between Canada and a province in relation to immigration or the temporary admission of aliens into that province has the force of law from the time it is declared to do so in accordance with subsection 95C(1) and shall from that time have effect notwithstanding class 25 section 91 or section 95.

(2) An agreement that has the force of law under subsection (1) shall have effect only so long and so far as it is not repugnant to any provision of an Act of the Parliament of Canada that sets national standards and objectives relating to immigration or aliens, including any provision that establishes general classes of immigrants or relates to levels of immigration for Canada or that prescribes classes of individuals who are inadmissible into Canada.

(3) The *Canadian Charter of Rights and Freedoms* applies in respect of any agreement that has the force of law under subsection (1) and in respect of anything done by the Parliament or Government of Canada, or the legislature or government of a province, pursuant to any such agreement.

95C.(1) A declaration that an agreement referred to in subsection 95B(1) has the force of law may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of the province that is a party to the agreement.

(2) An amendment to an agreement referred to in subsection 95B(1) may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized:

(*a*) by resolutions of the Senate and House of Commons and of the legislative assembly of the province that is a party to the agreement; or

(*b*) in such other manner as is set out in the agreement.

95D. Sections 46 to 48 of the *Constitution Act, 1982* apply, with such modification as the circumstances require, in respect of any declaration made pursuant to subsection 95C(1), any amendment to an agreement made pursuant to subsection 95C(2), or any amendment made pursuant to section 95E.

95E. An amendment to sections 95A to 95D or this section may be made in accordance with the procedure set out in subsection 38(1) of the *Constitution Act, 1982*, but only if the amendment is authorized by resolutions of the legislative assemblies of all the provinces that are, at the time of the amendment, parties to an agreement that has the force of law under subsection 95B(1)."

20. For purposes of this Report it is not necessary to review in detail the intended working of these sections. Clearly, what is intended is to continue in effect the cooperative arrangements of the Cullen-Couture Agreement or such different arrangements as may be agreed upon by the respective governments and approved by the Senate and the House of Commons and the Quebec National Assembly.

The Cullen-Couture Agreement

21. In order to evaluate the 1987 constitutional proposal it may be useful to set out what areas of immigration policy are already covered by the Cullen-Couture Agreement, dated March 30, 1979.

22. The Agreement establishes a Joint Committee of federal and Quebec immigration officials to provide a forum to develop cooperative policies on such matters as immigration objectives (economic, demographic and sociocultural), immigration levels, processing priorities, information exchange, and requirements for sponsors (Article II, 3).

23. The Cullen-Couture Agreement provides detailed criteria for the following five categories of persons seeking admission to Canada:

(a) Independent immigrants

Quebec is given a leading role with regard to independent immigrants, that is, those selected on the basis of economic and social factors designed to assess their ability to adapt and to contribute to Canada. Article II, A (1)(*a*) of the Agreement provides that the selection of independent immigrants will be "on a joint and equal basis, according to separate sets of criteria for Canada and for Quebec". Article III, A (2)(*b*) further provides that "the landing of an independent immigrant requires Quebec's prior agreement". In effect, both parties have a veto. Immigrants not passing Quebec's assessment may not proceed to Quebec (although if they meet Canada's criteria, they could proceed elsewhere if they wish).

Independent immigrants selected by Quebec may still be rejected by federal officials applying the statutory criteria of the *Immigration Act, 1976* relating to medical, criminal and security requirements.

Both the Quebec and federal governments have developed a point system which they use to select independent immigrants. Both grids have many of the same features, with points for education, employment, specific vocational preparation and so on. There are, however, several significant differences between the two. As might be expected, the Quebec grid rewards knowledge of French more significantly than knowledge of English. An applicant can receive up to 15 points for French and up to 2 points for English. The Quebec grid awards a potential number of points for adaptability that is more than double that available in the federal system and includes two points for knowledge of Quebec.

The Quebec grid also contains a number of factors not present federally. First, Quebec applicants can receive five points for relatives or friends who reside in Quebec in the settlement area (two points if they reside elsewhere in Quebec). Second, spouses can boost an applicant's points — four points each for the ability to speak French fluently and to follow an occupation in Quebec in which there is at least an average demand. Finally, there are points available for families with children under 12 years of age, with a maximum of four points for three children.

(b) Refugees

Quebec has agreed to receive approximately one-third of Canada's refugee commitment, currently 12,000 refugees selected abroad. The Agreement (Article III, C) states that Convention refugees and those in a "similar situation" (designated classes, special programs) will be selected jointly and that Quebec will contribute to their adaptation to the Quebec environment. In effect, refugees destined to Quebec are selected by Quebec, as are the independent applicants.

(c) Family members

The family class is not "selected" in the sense that independent and refugee applicants are selected. Provided family class applicants can prove the relationship required by the *Immigration Act, 1976* (e.g. parent, child under 21, spouse, fiancé(e) and so on) and pass the health, criminal and security checks, their entry is assured. Quebec's role is thus necessarily limited, although its officials often

interview applicants and provide counselling. The province does play a role in evaluating sponsors.

(d) Visitors

In the case of temporary or seasonal workers, the Agreement states that Quebec will express its views on the merits of each offer of employment made by a Quebec employer to foreign workers. In the first instance, the offer to foreign workers may be submitted for approval to either federal or provincial officials. The proposal will be refused if either Quebec or Canada can show that the jobs in question could be filled within Canada. The proposal will likely be approved if no other solution (i.e. training Canadian workers) can be found either by the federal government or Quebec.

(e) Students and teachers

Except for students coming to Quebec under a program of assistance to developing countries, Quebec must approve all student visas. The same rule applies to teachers college and university levels.

Effect of Constitutional Entrenchment

24. The provision of the *Constitution Amendment, 1987* can be divided into four different categories. First, proposed section 95A requires the government of Canada to negotiate an agreement relating to "immigration or the temporary admission of aliens" to a province if the province so requests. Second, section 95B deals with the constitutional status of an agreement that has been declared in accordance with the procedure under section 95C. Third, section 95C describes the process for a declaration respecting an agreement as well as the procedure for amending an agreement. Fourth, sections 95D and 95E deal with procedures to amend the federal-provincial agreements thus entered into.

(a) Negotiation of agreements

Section 95A of the *Constitution Amendment, 1987* requires the government of Canada to negotiate for the purpose of concluding an immigration agreement with any province that so requests. It does not compel the parties actually to enter into an agreement. It does not prescribe the terms of any agreement although it is likely that the Cullen-Couture terms will be the basic model for future agreements. The 1987 Accord above does not force either level of government to make an agreement that the government does not wish to make. If the federal government makes a foolish agreement it can be turned down by the Senate or House of Commons where public pressure may be brought to bear. This represents an improvement over the present process where federal-provincial agreements are frequently entered into as executive acts without any reference to Parliament and without any opportunity for public input.

(b) Constitutional status of immigration agreements

In addition to providing that an immigration agreement has the force of law once declared in accordance with section 95C(1), it is provided in section 95B(1) that an agreement "shall from that time have effect notwithstanding class 25 of section 91 or section 95". These words are included to ensure that an agreement is

valid even though the agreement allows the province to operate in an area in which Parliament has exclusive legislative authority, that is to say, the temporary admission of aliens. It also means that Parliament could not use its paramount legislative authority over immigration to override unilaterally a federal-provincial agreement once entered into, except on the basis of "national standards and objectives relating to immigration or aliens", over which Parliament does retain complete and unfettered legislative authority.

This is made clear by subsection 95B(2) which provides, in effect, that an agreement remains in force "only so long and so far as it is not repugnant to any provision of an Act of the Parliament of Canada that sets national standards and objectives relating to immigration or aliens".

The dividing line between "national standards and objectives", which Parliament may alter without provincial consent, and other terms of the Agreement which cannot be altered without compliance with the special amending procedure, is not entirely clear.

Some indication of what is encompassed in the term "national standards and objectives" may be found in the new section 95B(2) proposed by the 1987 Accord, which specifically refers to "any provision that establishes general classes of immigrants or relates to levels of immigration for Canada or that prescribes classes of individuals who are inadmissible into Canada". Examples of the areas where Parliament retains its paramount authority may also be found in section 3 of the *Immigration Act, 1976*, which lists the "objectives" of present Canadian immigration policy as follows:

> "(*a*) to support the attainment of such demographic goals as may be established by the Government of Canada from time to time in respect of the size, rate of growth, structure and geographic distribution of the Canadian population;
>
> (*b*) to enrich and strengthen the cultural and social fabric of Canada, taking into account the federal and bilingual character of Canada;
>
> (*c*) to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;
>
> (*d*) to encourage and facilitate the adaptation of persons who have been granted admission as permanent residents to Canadian society by promoting cooperation between the Government of Canada and other levels of government and non-government agencies in Canada with respect thereto;
>
> (*e*) to facilitate the entry of visitors into Canada for the purpose of fostering trade and commerce, tourism, cultural and scientific activities and international understanding;
>
> (*f*) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate on grounds of race, national or ethnic origin, colour, religion or sex;
>
> (*g*) to fulfil Canada's international legal obligations with respect to refugees and to uphold its humanitarian tradition with respect to the displaced and the persecuted;
>
> (*h*) to foster the development of a strong and viable economy and the prosperity of all regions in Canada;
>
> (*i*) to maintain and protect the health, safety and good order of Canadian society; and

(*j*) to promote international order and justice by denying the use of Canadian territory to persons who are likely to engage in criminal activity."

The variety of matters that could be characterized as "national standards and objectives" thus appears to be sufficiently broad to assure a continuation of federal leadership in matters affecting immigration and the temporary admission of aliens provided, of course, Parliament chooses to exercise its legislative authority in this respect.

(c) Immigration agreements and the Charter

Of particular importance is section 95B(3), which expressly states that the *Canadian Charter of Rights and Freedoms* applies to an agreement having the force of law and to anything done by the Parliament or government of Canada, or the legislature or government of a province, pursuant to any such immigration agreement.

A major practical effect of this provision is to assure the rights of immigrants in any part of Canada to move to any other part of Canada. Subsection (3) brings in its train section 6 of the Charter, which, among other things, gives every person lawfully resident in Canada the right "to move to and take up residence in *any* province" and "to pursue the gaining of a livelihood in any province", subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

Subsection 95B(3) not only guarantees mobility rights but also guarantees the exercise of other rights and freedoms such as freedom of religion, freedom of conscience and the legal rights guaranteed by sections 7 to 15 of the Charter, subject as well to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

(d) Sections 46-48 of the Constitution Act, 1982

Given the proposed constitutional status of immigration agreements, it is in our view appropriate that the adoption of amendments should be subject to procedural restrictions analogous to those that apply to amendments to the Constitution of Canada itself.

Conclusion

25. While these provisions represent an important new step in federal-provincial cooperation in immigration (a field that is already one of concurrent jurisdiction), they excited little comment at our hearings.

26. Because the proposed amendments relate to the legal status of immigration agreements rather than their content, it is important to keep in mind that the actual terms will be reviewed by the Senate and House of Commons before any such agreement acquires constitutional immunity under the proposed amendments. Parliament, in the exercise of its legislative powers in relation to immigration and the admission of aliens, will continue to be able to override any such agreements that have not received the appropriate approvals and therefore have not acquired constitutional status.

27. We are also reassured by the fact that similar agreements (lacking any constitutional status) have been in operation since 1971 and no serious adverse effects have been brought to our attention. Even under the proposed new regime, Parliament would retain its paramount authority to fix "national standards and objectives". The Charter is expressly made applicable to immigration agreements.

28. For these reasons we believe that the immigration provisions of the 1987 Accord represent a reasonable and workable solution to Quebec's demand for greater control in immigration matters as a condition of giving its willing assent to the Constitution.

CHAPTER XI

The Aboriginal Peoples of Canada

1. On April 17, 1982 the Constitution was patriated. It provided in section 35 that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". In addition, section 37 required the holding of a First Minister's Conference on matters that directly affect the aboriginal peoples of Canada "including the identification and definition of the rights of these people to be included in the Constitution".

2. A Constitutional Conference on Aboriginal Affairs was held pursuant to section 37 in 1983. It made some progress. An "ongoing process" was entrenched in the Constitution calling for three additional conferences. These were duly held in 1984, 1985 and 1987. There was little agreement. The optimism of 1982 gave way to frustration and recriminations. However, some good came out of these talks. A number of useful additions were made to section 35 by way of clarification. The awareness of non-native Canadians was raised by live television coverage of the Constitutional Conferences on Aboriginal Affairs. Canadians generally are much better informed today than 5 years ago because of the articulation of native concerns by gifted speakers on behalf of the Assembly of First Nations, the Native Council of Canada, the *Métis* National Council, the Inuit Committee on National Issues and many others. But at the end of five years of effort the principal objective of the aboriginal peoples — the right to self-government within the Canadian federation — remains an elusive vision.

3. Despite evident frustration about their own dealings with the First Ministers of Canada, most representatives of aboriginal peoples who testified to the Joint Committee welcomed the successful resolution of the "Quebec question". Mr. Zebedee Nungak of the Inuit Committee on National Issues, for example, told us:

> At the outset I want to make it clear that our people and our committee and our organization have absolutely no quarrel with the principle of Quebec being included or being a full partner in the Constitution of Canada. We know what it is to be outside looking in.
> (Nungak, 3:25)

4. Aboriginal peoples, like Quebec, believe that Canada would be strengthened by a recognition of the collective rights of their distinct society, and the further recognition

that they too have a "role" to play in governmental terms in the protection and promotion of their distinct identity.

5. Effective Canadian sovereignty in the North is a particular concern of Canadians, and Mr. John Amagoalik of the Inuit Committee on National Issues told the Joint Committee:

> Arctic sovereignty is not just ice-breakers, sovereignty is not just nuclear submarines; sovereignty can also mean giving the people up there the right to self-government, to make their laws and to enforce them. That is real sovereignty. We were born up there; we live there; and we will die up there. We are guardians of the Canadian Arctic, and that is the best form of Arctic sovereignty.
> (Amagoalik, 3:40)

6. Some of the major concerns raised by the aboriginal organizations in testimony before the Joint Committee include the following:

> (*i*) Aboriginal people see little "political will"on the part of First Ministers to come to terms with their demands even though aboriginal people constitute the majority in an area that encompasses over one third of the land mass of Canada (including the northerly third of Quebec);
>
> (*ii*) Recognition of Quebec as a "distinct society" ignores the reality that aboriginal peoples also form "distinct societies";
>
> (*iii*) Section 16 of the *1987 Constitutional Accord* safeguards the rights of aboriginal peoples from the "linguistic duality/distinct society" interpretation clause, but not from any of the other consequences of the 1987 Accord including, for example, changes to the federal spending power;
>
> (*iv*) Some aboriginal organizations believe that section 37 of the *Constitution Act, 1982* requires that their representatives be invited to participate at any First Ministers' Conference that includes agenda items respecting constitutional matters affecting in any way the aboriginal people of Canada including fiscal arrangements, shared-cost programs and (in the "second round") fisheries and Senate representation. They were not invited to Meech Lake;
>
> (*v*) Aboriginal people want a new constitutional process specifically dealing with treaty and aboriginal rights and "this process should continue until the process is complete".
> (Erasmus, 9:53)

Aboriginal Self-Government

7. The suggestion that the Constitutional Conferences on Aboriginal Affairs did not succeed because of a "failure of political will" on the part of First Ministers is, we believe, an unfair oversimplification.

8. It was the aboriginal peoples' organizations themselves that defined "aboriginal self-government" within the Canadian federation as the threshold question that had to be resolved before any progress could be made on other aboriginal issues. Introducing a third order of government into the Canadian federation raises questions of great importance and difficulty. How, for example, is legislative and executive power to be redistributed among the federal, provincial and aboriginal governments? Would senior levels of government have any say in the education of youngsters living in aboriginal

communities? Would the *Criminal Code* continue to apply to offences committed in all parts of Canada? How would aboriginal governments finance their programs? Mr. Jim Sinclair of the *Métis* National Council offered a philosophic response to this last question:

> ... many of the non-native people who have come and talked to us will always tell us, if you Indians and you half-breeds would begin to go to work and earn some money, you would be like us. They say, we came here and we had nothing when we came here, but look at us now. But my answer back to those people is always yes, you had nothing, and many of you people came from countries where there was oppression, where you were forced to leave because you did not like the system. And when you came to this country, you came with nothing. So where did you find the riches? You found them right here, right here in Canada. The resources that made people rich are right here in Canada. We feel those resources are ours, and we want to share in those resources. We are not asking for everything. We want to share in those resources, so we can participate in the economy of this country and the democracy of this country. And you cannot tell me that democracy works if you do not have some sort of economic back-up in terms of our people being self-supporting.
> (Sinclair, 9:47)

Even if this approach were accepted as valid, and we are not asked to express an opinion on it one way or the other, implementation of "resource sharing" involves highly complex arrangements. How, for example, would different levels of government share the responsibility for the conservation and management of important renewable resources, such as the salmon fishery in British Columbia? Moreover some aboriginal leaders contemplate a multiplicity of different types of self-government from place to place and First Nation to First Nation:

> ... there is no way you can have one form of self-government across this country when you have so many different economic regions and different tribal associations across the country.
> (Bruyère, 12:112)

9. There is no comparison, in our view, between the task set for themselves by Canada's aboriginal peoples — namely, creation of a third order of government — and constitutional recognition in an interpretation clause of Quebec's "distinct society". Among other differences, Quebec already has its governmental powers and jurisdiction spelled out in the *Constitution Act,1867*.

10. Aboriginal representatives told the Joint Committee that they too would be satisfied with a simple straightforward one-line statement in the Constitution recognizing aboriginal self-government. Some of them suggested that this would be no more difficult than to add an interpretative clause recognizing the "distinct society" of Quebec. This assumes that an interpretation clause performs the same function in the Constitution as a clause creating a new level of government. This is incorrect.

11. For example, if a law of the Quebec legislature were challenged in court by a disgruntled inhabitant of the distinct society, the judges would have before them a defined catalogue of legal powers, e.g. section 92 of the *Constitution Act, 1867* (including, it is proposed, a "distinct society" interpretation clause) and a well-established legal framework within which to assess the legal merits of the challenge. But if a law of an aboriginal self-government were challenged in court, the judges would have no idea, in the absence of a catalogue of powers for aboriginal self-

governments analogous to the detailed provisions of the *Constitution Act, 1867*, where the jurisdiction of aboriginal self-governments begins and where it ends and whether the challenged law is within its (undefined) powers or not.

12. Accordingly, the Joint Committee does not share the view that the failure of the Constitutional Conferences on Aboriginal Affairs can be attributed simply to a failure of "political will".

Aboriginal"Distinct Societies"

13. Aboriginal people say that they too constitute "distinct societies" within Canada. This is not denied by the *1987 Constitutional Accord*. Indeed, recognition in the preamble of the Constitution that aboriginal peoples form distinct societies that have made and continue to make an important contribution to Canada was discussed at the First Ministers' Conference on Aboriginal Affairs in 1983 and generally rejected by aboriginal leaders at that time as mere symbolic window-dressing.

14. Having regard to this rejection, Mr. John Amagoalik of the Inuit Committee on National Issues told us:

> It hurts us very much when political leaders like the Prime Minister continue to say that the two founding nations of this country are French and English. We have been saying for years now that we are of this country. We are of the soil. We did not come on a ship or immigrate to this country. We are of it. We are getting tired of being ignored in this respect.
> (Amagoalik, 3:28)

and Chief Georges Erasmus of the Assembly of First Nations said:

> How can you deny that First Nations, with their land, their cultures, their institutions, their people that have been here for thousands of years, are not a distinct society?
> (Erasmus, 9:60)

It is necessary to keep in mind that recognition of aboriginal people as part of the "founding nations of this country", (a statement that we readily acknowledge to be true) was not denied by the First Ministers. The Constitutional Conferences on Aboriginal Affairs were simply working on a different agenda that had largely been set by the aboriginal organizations themselves, i.e. aboriginal self-government.

Decentralization of Programs

15. With respect to the potential decentralization of national shared-cost programs that could affect aboriginal people, Chief Georges Erasmus of the Assembly of First Nations told us:

> Our experience shows us that when provincial governments choose to deliver services or programs to First Nations, be they national or provincial programs, they fall far short of what we need.
> (Erasmus, p. 9:50)

> If federal powers are to be increasingly weakened in favour of the provinces, without including aboriginal protections, we believe the ability of the federal government to

> exercise its moral and legal responsibility in practical terms under section 91(24) of the Constitution Act, 1867, will be significantly eroded, whatever the Constitution says.
> (Erasmus, 9:52)

16. In the view of the Joint Committee, however, Parliament, retains full authority under section 91(24) of the *Constitution Act, 1867* to legislate for "Indians and lands reserved for Indians". The federal legislative power is expressly immunized by section 16 of the 1987 Accord from being "affected" by the distinct society clause. Nor have we heard any evidence to suggest that federal jurisdiction in this area will be weakened by other provisions of the 1987 Accord. There is some question about whether *Métis* people fall within section 91(24) of the *Constitution Act*, 1867 but this particular legal quarrel is not affected by anything in the *1987 Constitutional Accord.*

Section 16 of the Accord

17. A distinction must be drawn between rights enjoyed by aboriginal people as Canadians and those enjoyed by them by virtue of their status as aboriginal peoples. The second category is safeguarded by section 16 of the Accord. No special treatment is offered in respect of the first category because in respect of such matters as national shared-cost programs (as distinguished from programs formulated especially for aboriginal people) all Canadians are entitled to equal treatment.

First Ministers' Conferences

18. Nor does the Joint Committee accept as justified the demand of aboriginal organizations for what amounts to a permanent seat at First Ministers' Conferences. It is true, as Chief Georges Erasmus told us, that:

> In the west, in the east, in the high Arctic and inland waters, aboriginal people take the approach that fishing is absolutely vital to their continuing as a people and that it has to be a jurisdiction they have under their control.
> (Erasmus, 9:62)

However, many groups in Canada are vitally affected by the allocation of jurisdiction over fisheries and the outcome of that agenda item at future First Minister's Conferences. The Joint Committee takes the view that for these purposes aboriginal people, like other Canadians, are appropriately represented by the leaders of the federal and provincial governments that aboriginal peoples help to elect.

19. Representatives of the aboriginal people urged the Joint Committee to recommend that aboriginal issues be placed on the agenda of the next First Ministers' Conference. Mr. John Amagoalik told us:

> I have no confidence in the First Ministers agreeing to get aboriginal matters back on the agenda unless this Committee and Parliament decide that this issue is important enough and it should be back on the agenda.
> (Amagoalik, 3:27)

20. The Assembly of First Nations told us that unless its five proposed amendments (Erasmus, 9:52-53) were adopted, the *1987 Constitutional Accord* should be rejected

(Erasmus, 9:60). We do not agree. There is a broad consensus that Quebec's five conditions are realistic and achievable and that the time is ripe for decision. There is no comparable consensus at this time on aboriginal self-government or other constitutional matters directly affecting aboriginal people.

Future Constitutional Progress

21. Quebec has supported a new deal for aboriginal peoples. Its participation in future Constitutional Conferences on Aboriginal Affairs, which would be made possible by its acceptance of the Constitution, would be to the benefit of aboriginal people and may perhaps break the impasse among some of the provinces that now impede progress in this area.

22. The Joint Committee believes that while the *1987 Constitutional Accord* does not itself represent a significant problem for aboriginal people, nevertheless, it is clear that their constitutional agenda has not yet been fully explored. Possibly one of the reasons for lack of progress was the public nature of the discussion. Mr. Smokey Bruyère of the Native Council of Canada acknowledged that some reconsiderations of that issue might be warranted in light of the success at Meech Lake.

> **Mr. Keith Penner:** Do you think the failure of those four First Ministers' Conferences was because the process was wrong? If it had been different, and if you ever have another chance at this constitutional recognition, would you propose that you follow a different pattern and go into seclusion somewhere and try and hammer out an agreement and stay there until you get one?
>
> **Mr. Smokey Bruyère:** It is an interesting solution. I think that that should be tried.
> (Bruyère, 12:108)

23. In any event, whatever the nature of the process preferred by the participants, we share the view that constitutional issues that directly affect aboriginal people deserve continued prominence until solutions are identified and implemented. The social and economic plight of many aboriginal people is well known. While many have achieved great success in different walks of life, others have not. Mr. Jim Sinclair of the *Métis* National Council spoke on behalf of the dispossessed when he told the Joint Committee:

> We have been living on a system of welfare. We have been living in a system where there are jails, foster homes; where we are unemployed; where there are courts and police and social workers who make a living off our people. So in a sense in Canada we have become a source of revenue for non-aboriginal people. We probably provide the most jobs of any industry in Canada, because billions of dollars, supposedly, are spent on our people.
> (Sinclair, 9:28)

24. Efforts by Canadian governments over the decades to break the cycle of poverty and dependence affecting a substantial number of aboriginal people have not worked. The failure of past policies calls for a fresh approach. Self-government appears to be the solution preferred by many aboriginal people. It deserves the best consideration that all governments, with the participation of aboriginal peoples' organizations, are capable of giving to it.

25. The Joint Committee was therefore particularly concerned to be told that government funding to enable aboriginal organizations to pursue constitutional reform on matters that especially concern them has been either cut off or seriously curtailed. Some representatives of aboriginal groups alleged that the money was cut off because some governments did not like what the aboriginal people had to say:

> When we came to the conference in March, and we spoke out about the way we were being treated, what was happening to our people, our funds were immediately cut off 100% because we spoke the way we did. Now, is that democracy?
> (Sinclair, 9:33)

26. It is, of course, quite possible that funding for the constitutional process was terminated because no further constitutional meetings on aboriginal affairs are scheduled. Yet, in the view of the Joint Committee, the important constitutional issues raised by aboriginal people remain on the nation's agenda as unfinished business. To deprive aboriginal organizations of money to carry on this work will not make the problems go away. It will simply exacerbate the already overwhelming sense of grievance felt by native Canadians towards the dominant non-native governments and bureaucracies.

Conclusion

27. Despite our view that the unsuccessful Constitutional Conferences on Aboriginal Affairs should not stand in the way of acceptance of the *1987 Constitutional Accord*, we regard the issue of aboriginal self-government as unfinished business of high constitutional importance. In these circumstances the Joint Committee:

> (*i*) affirms its view that First Ministers and representatives of aboriginal peoples must continue to work towards a satisfactory resolution of the constitutional issues brought forward by the aboriginal people of Canada, especially the issue of aboriginal self-government;
>
> (*ii*) recommends that the federal government restore funding to aboriginal organizations at an appropriate level to enable them to continue to participate in the preparatory work that is essential to successful constitutional negotiations;
>
> (*iii*) recommends that a timetable and serious work plan be established by the federal government, in consultation with the provinces and the aboriginal organizations, to prepare for a further Constitutional Conference (or Conferences) on Aboriginal Self-Government;
>
> (*iv*) recommends that serious consideration be given to conducting such Conference(s) on Aboriginal Self-Government in closed sessions as well as open sessions.
>
> (*v*) recommends that the first such Conference take place no later than April 17, 1990 and that any further conferences that may be required be scheduled at that time in light of whatever progress has been achieved.

CHAPTER XII

The Impact on the Northern Territories

1. The territorial governments of the Yukon and the Northwest Territories, together with Members of Parliament from the territories and many other witnesses, have criticized the 1987 Accord on the following grounds:

(*a*) it is unfair to give each of the existing provinces a right of veto over the creation of a new province. Yukon Government Leader Tony Penikett, told the Joint Committee:

> Surely this is a rule fit for an exclusive gentlemen's club, not for a democratic society. Decades from now the territories could be a million strong, but still be blackballed from the club for perhaps no reason other than that the south needed the north's oil;
> (Penikett submission, p. 1)

(*b*) it is not entirely clear whether the Governor General retains the authority to appoint territorial Senators under section 24 of the *Constitution Act, 1867* without the participation of the provinces;

(*c*) qualified territorial residents should have the opportunity of being considered for appointment to the Supreme Court of Canada without having to be nominated by a province;

(*d*) northern Canadians should have a say in constitutional and other matters by allowing territorial government leaders to participate in First Ministers' Conferences on issues that directly affect them.

2. The territorial governments have initiated court action against the federal government claiming that the process by which the *1987 Constitutional Accord* was reached, and the Accord itself, both violate the legal and Charter rights of northerners. The Yukon claim was filed May 27, 1987. The federal government moved to strike out the claim as disclosing no reasonable cause of action. In effect Ottawa argued that there was no need for a trial because even if everything alleged on behalf of the Yukon was true (which was, of course, denied), nevertheless in law the Yukon was not entitled to the relief it sought from the court. The federal government's argument was not wholly successful. By decision dated August 11, 1987, Mr. Justice, D.C. McDonald of the Supreme Court of the Yukon Territory determined that two parts of the Yukon claim would be allowed to proceed to trial. These two allegations are that:

(1) the lack of consultation with the government of the Yukon territories by the federal government prior to the conclusion of the Accord could *possibly* be held to violate the legal rights of Members of the Territorial Council. The judge emphasized that he was merely saying that the Yukon was alleging facts

> ... which if proved might possibly result in the court making a declaration that a common law duty of fairness existed, that such a duty was based on legitimate expectations created by the course of past dealing between the Government of Canada and the elected members of the Yukon Territorial Council, and that that duty was breached. Of course all I am saying is that it is not clear that there is *not* a reasonable cause of action or claim. This conclusion should in no way be interpreted as a statement that there is on this ground a right to the relief claimed against the respondents and in particular against the Prime Minister of Canada;
> (Judgement, p. 55)

(2) the judgement also held that the signing of the Accord by the federal government could *possibly* be a breach of an alleged duty to act in the best interests of the citizens of the Yukon. On this point Mr. Justice McDonald said:

> I prefer not to express any opinion as to the likelihood of the Petitioners succeeding in establishing their claim that the Government of Canada owes a fiduciary obligation which could be justiciable and the subject of a declaration that there has been a breach of the duty... It suffices to say that it is not clear to me that, even assuming that upon the hearing of the Petition the only facts proved were those few facts stated in the affidavit from which I have quoted, the claim would fail;
> (Judgement, p. 66)

3. In addition, Mr. Justice McDonald held at page 37 of his judgement that while a purported exercise of the procedure to amend the Constitution of Canada is subject to Charter review, the mere signing of the *1987 Constitutional Accord* by First Ministers is not sufficient to invoke the Court's jurisdiction because the Accord as such has no legal effect on anyone's legal rights. However,

> If the amendment is approved by resolutions of the requisite bodies and is proclaimed by the Governor General, there is no doubt in my mind that a Petition or other appropriate initiating court document alleging inconsistency between the provisions of which the Petitioners complain and sec. 7 and 15 of the Charter would be one that would be "justiciable".
> (Judgement, p. 45)

In other words, at that time the Court would entertain a Charter challenge to the amendments if such a case is brought.

4. The federal government has launched an appeal against the decision of Mr. Justice McDonald and is seeking to have the Yukon Court of Appeal reverse the lower court judge and strike out the Yukon action without a trial.

Government of the North

5. At the present time, of course, each of the territories is governed by a legislative assembly that operates on a similar basis to the provincial legislatures. There is a Cabinet system and the Commissioner of each territory, notwithstanding the sweeping powers conferred on him by federal legislation, in practice functions in a manner

analagous to that of a supercharged provincial Lieutenant Governor. The legislative and executive jurisdiction of the territorial governments is much less than that of a province and the powers are in any event not "entrenched". In other words, the powers of the territorial governments can be modified or taken away at any time by an ordinary statute of the Parliament of Canada.

6. Mr. Michael Ballantyne, Minister of Justice for the Northwest Territories, told us:

> The Legislatures and Governments of the Northwest Territories and the Yukon are not glorified municipal institutions. They legislate in respect of taxation, in respect of the administration of justice, in respect of municipal institutions, in respect of corporations, businesses, trades, industries. These legislatures exercise their authorities over an area as large as India.
> (Ballantyne, 8:50)

However, he added:

> there seems to survive in some provincial governments and in the Government of Canada an attitude that the territories are still a colony of Canada.
> (Ballantyne, p. 8:49,50)

7. Mr. Willard Phelps, Leader of the Opposition in the Yukon, put the case for further devolution of government powers this way:

> ... how does an average Yukoner with a valid complaint regarding government ever begin to effectively lobby the huge and remote bureaucracy in Ottawa?... In a country with the size and diversity of Canada, proximity to the people being served is important. As one former Commissioner of the Yukon Territory said: "You can't drive a team of horses with reins 3,000 miles long".
> (Phelps submission, pp. 5-6)

8. The federal government seems to agree that the territorial government should take on more and more responsibilities in relation to local matters as circumstances permit until ultimately provincial status is achieved. But when: the real question is one of timing. Gordon Robertson, former Clerk of the Privy Council, told us that in his view provincehood is at least many years in the future:

> The other problem I have seen referred to is that the provision for unanimous consent for the creation of new provinces will make it impossible, or virtually impossible, to establish provinces in the north. I myself do not consider that is important at all. I was commissioner of the Northwest Territories for 10 years. I think I understand quite well the situation in the north, the problems of the north and the difficulties with which they have to deal.
>
> I am perfectly confident that a northern province, a province north of 60 degrees, could not finance on any arrangement that would be acceptable or possible for federal-provincial relations... The grant the northern territories get in lieu of equalization provides a payment to the northern territories that is proportionately far in excess of what any province gets under equalization. And I do not think the circumstances that make the north so different are going to change.
>
> So I do not myself think it is in the realm of reality to think it is important that the possibility of creating a northern province has been made more difficult.
> (Robertson, 3:83,84)

9. In their submissions to the Joint Committee both territorial governments conceded that the creation of a new province would

(1) alter the numerical operation of the amendment procedure and

(2) alter fiscal relations among governments,

and that existing provinces therefore have some justification for demanding unanimity on provincial status *in relation to these limited matters*. However, they believe that the principle of provincial unanimity does not require that every province should have a veto over other aspects of "provincial status". These are of concern only to the federal government and the territories themselves, such as further devolution of executive and legislative power from the federal government to the territorial governments.

10. The territorial governments pointed out to us that there is ample precedent for creating a province that does not have all of the attributes of existing provinces. When Alberta and Saskatchewan became provinces in 1905, their natural resources were not transferred to them but remained with the federal government. This was unlike the legal position in the older provinces. This "qualification" on their provincehood remained until the Natural Resource Transfer Agreements were embodied in the *Constitution Act, 1930*.

11. Indeed the history of Canada shows a patchwork of different arrangements in the creation of new provinces. Section 146 of the *Constitution Act, 1867* contemplated the admission of the rest of British North America. In the case of British Columbia, Prince Edward Island and Newfoundland, it was provided that each could be admitted by Imperial Order in Council at the request of the legislature of the particular colony. In the case of the territories of Rupert's Land and the North Western Territory, it was provided that the request would have to be made by the Parliament of Canada. In none of these cases did existing provinces participate in making the decision.

12. In 1870, the procedure established by section 146 was employed to admit the huge territories of Rupert's Land and the North Western Territory to Canada. In the same year, immediately following the admission of the territories, the federal Parliament, by ordinary statute, created the province of Manitoba out of part of Rupert's Land. At that time, the population of Manitoba was 25,228. The *Constitution Act, 1871* conferred on the federal Parliament the power to create provinces out of federal territories and gave the federal Parliament full legislative authority over all federal territories.

13. After the passage of the *Manitoba Act* in 1870, what was left of Rupert's Land and the North-Western Territory was renamed the Northwest Territories and, in 1898, in response to the population increase caused by the gold rush, the Yukon Territory was carved out of the Northwest Territories and formed into a separate territory. In 1905, the provinces of Alberta with a population of 73,022 and Saskatchewan with a population of 91,279 were created out of the Northwest Territories and their government was provided for by federal statute. The Yukon and Northwest Territories now have a combined population of about 80,000.

14. In 1949, Newfoundland entered Confederation at the request of the Parliament of Canada. It is suggested that the then Prime Minister of Canada, Mr. Louis St. Laurent, deliberately refrained from consulting the provinces because he feared Quebec might use the opportunity to seek the annexation of Labrador.

The Constitution Act, 1982

15. The territorial representatives acknowledged to the Committee that the "rules of the game" were fundamentally altered by the *Constitution Act, 1982* and that their real problem is with the 1982 amendments not the 1987 amendments. By the *Constitution Act, 1982* the creation of new provinces, and the extension of existing provinces into the territories, requires the concurrence of Parliament and at least seven provinces having half the population of all the provinces. The proposed change in 1987 would impose a requirement of unanimity. Tony Penikett, Government Leader in the Yukon, told us:

> Why are the rules being changed for new provinces? What was wrong with the method by which the present ten joined confederation? Prior to 1982, the door was open to us. Since 1982, it has been shut. Now in 1987, it has been barred.
> (Penikett submission, p.1)

While the imposition of a unanimity requirement makes obtaining provincial status that much harder, even the most enthusiastic territorial witness did not suggest that provincehood could be achieved in the near future, even under the 1982 formula or, for that matter, under the 1871 procedure where new provinces sprang into existence on the sole authority of Parliament. The concern is for the future. It is feared that what was merely difficult will now become virtually impossible.

Appointments to the Senate and Supreme Court

16. It would be superfluous to repeat here the discussion about northern appointments in Chapter 8 (the Supreme Court of Canada) and Chapter 9 (the Senate). We believe every Canadian should have the opportunity to be appointed to a leading role in national institutions and we have dealt with the need to facilitate the appointment of qualified northerners in those chapters. In this connection we note the observation of Senator Lowell Murray in his testimony on August 4, 1987:

> Mr. Chairman, I do not see how citizens are being discriminated against in any way. Citizens of the territories are eligible to be appointed to the Senate, and qualified citizens of the territories are also eligible to be appointed to the Supreme Court of Canada, but the territorial governments do not sit at federal-provincial constitutional conferences, in terms of having a role in the amending formula, for example. The fact of the matter is that their constitutional evolution has not proceeded to the point that they have the status or the powers or privileges of provinces, and I cannot but give that direct answer to your question.
> (Murray, 2:28)

As already indicated, we think provincial governments are unlikely to make it a practice to reach outside their borders to nominate someone from another jurisdiction. Some of their own constituents might see such a gesture as did *Maître* Fortier, Q.C.:

> I deplore, for example, the fact that the Yukon and the Northwest Territories are not granted the right to propose candidates for the Supreme Court of Canada and the Senate. A simple oversight? Would that have been a stumbling block? I do not know.
> (Fortier, 12:85)

However, *Maître* Fortier goes on to add:

> My uneasiness in that respect, as well as in respect of certain other points, does not require immediate amendments to the Langevin Accord. The dynamics that led to the

1987 Accord must not be compromised.
(Fortier, 12:85)

Evolution to Provincial Status

17. The Joint Committee is of the view that the legitimate interests of the provinces (equalization payments and participation in the amendment formula) are not necessarily inconsistent with protection of the legitimate expectations of northerners for greater home rule in local matters. Existing provinces are conceded by the territorial governments to have a legitimate concern about the amending formula and possible dilution of equalization payments, but what interest do they have in whether the Yukon government exercises legislative authority under a federal statute, which can be unilaterally altered by Parliament at any time, or under section 92 of the *Constitution Act, 1867*? The transfer of power to the Yukon would take away some authority from the federal government but not from any of the provinces.

18. We were told by Senator Lowell Murray that at least some of the provinces are extremely jealous of the "trappings of provincehood", and oppose even giving the opportunity to territorial governments to nominate residents as Senators or qualified residents to fill a vacancy on the Supreme Court of Canada.

Conclusions

19. The principle of the "equality of the provinces" is important but it can be carried too far if it imposes artificial and unnecessary constraints on the natural development of an important part of the country and disadvantages the people who live there.

20. As explained in Chapter 9, we think it likely that the Governor General can continue to appoint territorial Senators under section 24 of the *Constitution Act* without provincial participation. This should be clarified.

21. It is further our view that the territorial government should be permitted to nominate qualified judges and lawyers from the territories for consideration for appointment to the Supreme Court of Canada. The fact that this is not contemplated in the proposed section 101C is anomalous and we have not heard any reasonable justification for it.

22. With respect to the more difficult question of accommodating the legitimate interest of the existing provinces without unfairly prejudicing the development of the North, it appears to us that a good deal of work remains to be done on at least the following matters;

(*a*) a better definition of those aspects of the creation of new provinces in the North that would be of serious and direct concern to existing provinces;

(*b*) a better definition of those government functions that really only involve the people of the North, the territorial governments and the federal government;

(*c*) consideration of a constitutional structure to permit the continued evolution of the territories in the areas defined in (*b*) while preserving the unanimity rule in the matters referred to in (*a*);

(*d*) a clearer definition of fiscal and resource-sharing arrangements necessary to support provincial-type government in the North;

(*e*) consideration of how provincial-type governments in the North would accommodate aboriginal self-government, e.g., whether the aspirations of aboriginal and non-aboriginal northerners could be accommodated in a single government structure in the Yukon and in the Northwest Territories; and

(*f*) consideration of the best means to facilitate gradual acquisition of provincial-type powers and responsibilities by governments in the Yukon and the Northwest Territories.

It would appear from the evidence that we have heard that not all of these matters have been addressed in the necessary detail to allow decisions to be made by First Ministers at this time.

23. The leaders of the territorial government did not suggest that they believed that the territories were ready for provincial status now. Mr. Tony Penikett, Yukon Government Leader, told us:

> The Yukon and the NWT are not, of course, provinces now. Nor do we seek provincial status at this time. Few people in the Yukon and the NWT would argue that we have reached the point where provincial status makes sense. We know keenly our limitations: our small dispersed population, our limited economic base, our underdeveloped transportation system.
> (Penikett submission, p. 13)

24. In these circumstances we do not believe it would be justified to recommend rejection of the *1987 Constitutional Accord* on the basis of the failure of First Ministers to deal with a highly complex matter that goes well beyond the *1987 Constitutional Accord* and that is not ripe for determination.

25. We do, however, recommend that the steps referred to in paragraph 21 be pursued with vigour and that the results of the preparatory work on bringing the northern territories to province-type status entrenched in the Constitution, be presented to First Ministers no later than April 17, 1990.

26. The two other matters which cause us concern in this connection, namely:

(*a*) clarification of the appointment procedure for Senators to represent the territories and

(*b*) a procedure to permit the territorial governments to recommend qualified northern residents for appointment to the Supreme Court of Canada

should be placed on the agenda of the next First Ministers' Conference on constitutional matters in 1988.

CHAPTER XIII

The Amending Formula

The 1987 Proposal

1. As mentioned in Chapter 2, the changes to the amending formula proposed by the *Constitution Amendment, 1987* are two in number.

(*a*) Certain matters, which are now subject to amendment under the seven-province formula, would become subject to amendment only with the unanimous consent of all governments — namely, representation in the House of Commons, the powers of the Senate and the method of selecting Senators, representation in the Senate and the residence qualifications of Senators, the Supreme Court of Canada (other than the composition of the Court), the extension of existing provinces into the territories and the establishment of new provinces.

(*b*) The right to compensation for amendments resulting in a transfer of legislative powers from the provinces to the federal government would be broadened. The *principle* of compensation for a refusal to agree to such a transfer of power to the federal government was established in 1982. But in 1982, compensation was restricted to transfers in respect of "education or other cultural matters". The 1987 Accord would guarantee compensation to a province that opts out in respect of a transfer of *any* legislative powers.

The Existing Amendment Procedures

2. The present Constitution of Canada contains not one but five amending formulae.

First, section 38 of the Constitution of Canada sets out the general amending formula for changes to the Constitution. This formula requires the approval of the Senate and House of Commons and of the legislative assemblies of at least two-thirds of the provinces with at least 50% of the population of all provinces. The two-thirds 50% formula [colloquially referred to as the 7-50 formula] at present requires the approval of 7 provinces, representing at least 50% of the population of all the provinces. Among the features of the Constitution that may be changed in accordance with the 7-

50 formula is perhaps the most important element in it, namely, the distribution of legislative powers between Parliament and the provincial legislatures. This is the very substance of the federation.

Second, the Constitution of Canada then sets out other amending formulae, all of which are exceptions to the 7-50 formula. Section 41, which applies to a limited number of matters, requires the *unanimous* consent of the Senate and House of Commons and the legislative assembly of each province. The matters requiring unanimous consent are the following:

> (*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
>
> (*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
>
> (*c*) subject to section 43, the use of the English or the French language;
>
> (*d*) the composition of the Supreme Court of Canada; and
>
> (*e*) an amendment to this Part.

Third, another exception to the 7-50 formula is found in section 43 and concerns any provision that "applies to one or more but not all, provinces", including alterations to boundaries between provinces and language within a province. Amendments in respect of these matters require the consent of the Senate and House of Commons and the legislative assembly of each province to which the amendment applies.

Fourth, section 44 of the *Constitution Act, 1982* authorizes amendments to the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons, other than those matters referred to in sections 41 and 42 of the *Constitution Act, 1982*. The amendments authorized by section 44 are within the exclusive power of the Parliament of Canada.

Fifth, and the last exception to the 7-50 general amending formula, is to be found in section 45 of the *Constitution Act, 1982*. This provision empowers the *legislature* of each province exclusively to make laws amending the constitution of that province. This amending formula, like the formula set out in section 44, discussed above, must be read subject to section 41 of the *Constitution Act, 1982* — the unanimous consent formula.

Consideration of Changes Proposed by the 1987 Accord

3. The first point to be made is that the *Constitution Amendment, 1987* will leave unchanged the general 7-50 formula. Most amendments to the Constitution of Canada, including those that would bring about a change in the distribution of powers, will continue to require only the approval of the House of Commons and the Senate and at least two-thirds of the provinces having at least 50% of the population of all the provinces.

(a) Compensation for opting-out

4. The only change in the proposed *Constitution Amendment, 1987* that would affect the 7-50 formula is in section 40, which now requires reasonable compensation only for those constitutional amendments that result in a transfer to Parliament of provincial legislative powers relating to education or other cultural matters. The amended section 40 would require reasonable compensation for *any* constitutional amendment that transfers any exclusive provincial legislative power to the Parliament of Canada that a particular province rejects.

5. It has been suggested to us that this change will have limited practical application. It presupposes, in the first place, that seven provinces representing at least 50 per cent of the population of all the provinces decide to transfer to Ottawa a field of *exclusive* provincial jurisdiction. To meet the population requirement, at present either Quebec or Ontario would likely have to support the transfer. It is not easy to think of an area of exclusive provincial jurisdiction that Quebec or Ontario would be willing to vacate. If the seven-province amending formula is not satisfied, the amendment fails and section 40 does not apply.

6. It has been suggested that this provision encourages the "balkanization" of Canada. But this criticism is clearly wrong. Whatever "balkanization" exists was created in 1867 when the area of legislative competence was assigned to exclusive provincial jurisdiction. What is contemplated is a situation in which at least seven provinces, but not all, wish to "de-balkanize" the power by transfering it to Ottawa, thereby creating greater centralization in the hands of the federal Parliament.

7. The principle of compensation for "opting out" of an amendment was established in 1982. If the principle is otherwise acceptable it is not clear why a line should be drawn at "education or other cultural matters". The 1987 Amendment proposes to make the principle one of general application.

8. There was an assumption in some of the testimony that we have heard that the transfer of almost any power from the provinces to the federal government should be regarded as "a good thing". This is not necessarily so. Even areas of provincial jurisdiction that have a "national dimension", like education, provide an alternate mechanism to centralization in the hands of the federal government. Education is an example of a field where extensive inter-provincial cooperation occurs. The regulation of financial securities markets is another example. Accordingly, the "national dimension" can be covered in ways that do not involve the transfer of more power to Ottawa. In these circumstances enlargement of the "opting out" formula would not, on the evidence presented to us, appear to create a serious problem. At worst, the status quo would be maintained.

9. Where provinces make such a transfer of power to the federal government, they are relieved of whatever financial cost is involved in running programs in that area of activity. The cost is assumed by the federal taxpayer. Provincial taxpayers are federal taxpayers as well. Accordingly, the effect of the amendment is simply that a province that opts out of the transfer of jurisdiction to Ottawa and continues to carry the cost of the program itself gets some share of the Ottawa dollars that are being made available to fund that particular area of activity.

(b) The requirement of unanimity

10. The major change to the amending formula contained in the *Constitution Act, 1982* concerns section 41 of that Act. That section, it will be recalled, listed 5 features of the Constitution of Canada that can only be amended with the unanimous consent of the House of Commons and the Senate and the legislative assembly of each province. The *Constitution Amendment, 1987* would *add* to this list the following matters:

(*a*) the powers of the Senate and the method of selecting Senators;

(*b*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(*c*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(*d*) the Supreme Court of Canada;

(*e*) the extension of existing provinces into the Territories; and

(*f*) nothwithstanding any other law or practice, the establishment of new provinces.

These items, at the present time, are subject to the 7-50 formula.

(c) Where no changes are made

11. The *Constitution Amendment, 1987* would not introduce changes to the other amending formulae now found in the *Constitution Act, 1982*. In other words, the House of Commons and the Senate's power to make laws amending Canada's Constitution "in relation to the executive government of Canada or the Senate and House of Commons" remains unchanged. Similarly, the authority of the legislature of each province exclusively to make laws amending the constitution of the province remains unchanged. Finally, the formula set out in section 43 of the *Constitution Act, 1982* — concerning *inter alia*, alterations to boundaries between provinces and any provision relating to the use of the English language or the French language within a province — remains unchanged.

3. *The expanded unanimous consent formula*

12. The major point of controversy raised by witnesses who appeared before the Joint Committee related to the proposal to require unanimity for the matters to be added to section 41 of the *Constitution Act, 1982*. To some extent, additions to the list of matters requiring unanimous consent are consequential upon other changes proposed in the *Constitution Amendment, 1987*. For example, adding the requirement of unanimity for *any* amendment concerning the Supreme Court of Canada (and not just its "composition" as under the 1982 formula) reflects the fact that the *Constitution Amendment, 1987* would now entrench the Court in the Constitution and would introduce a new appointment process giving the provinces a voice in the appointment of judges to the Supreme Court of Canada. A similar rationale applies to entrenchment of the proposed procedures for the appointment of Senators. Inclusion in the rule of unanimity of changes "to the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada" merely reflects the reality that the House of Commons, like the Senate and the Supreme Court of Canada, constitutes a fundamental institution of Canadian federalism, and like the

Senate and the Supreme Court of Canada should be subject to amendment only with the approval of all the provinces.

13. The governments of the Yukon and the Northwest Territories, and the organizations of aboriginal people that appeared before us, expressed strong opposition to the requirement of unanimity for the creation of new provinces (or the extension of existing provinces into the territories). It was said that subjecting the territories' desire to achieve provincial status to the unanimous consent of all the provinces as well as that of the House of Commons and the Senate is unfair. This point has already been dealt with in Chapter 12 of our report.

Conclusion

14. The amendments addressed Quebec's demand for a veto over significant constitutional change. The response to Quebec was broadened to put all of the provinces on an equal footing. The two areas of primary importance are, first, the distribution of powers, and, second, changes in major federal institutions.

15. Quebec and the other provinces are protected against the adverse effects of an amendment whereby provincial legislative powers are transferred to Ottawa. The dissenting province(s) will be entitled to receive reasonable compensation, which presumably will bear some relationship to the money Ottawa would otherwise have laid out in the dissenting province(s) in relation to that particular field of activity. Otherwise, taxpayers in that province would be contributing to federal payments, e.g. for federal programs not available in Quebec, while having to pay again to their provincial governments for similar provincial programs in the same field.

16. Quebec and the other provinces are also protected against changes in national institutions to which they object. This principle was also established in 1982. The 1987 proposal simply adds to the number of existing federal institutions protected by the unanimity rule.

17. The Joint Committee is of the view that the proposed changes to the amending formula do not establish any new principles. They carry forward principles established in 1982 in a way that is consistent with both the "equality of the provinces" and a recognition of the stake that each and every province has in the basic elements of the Canadian federation.

CHAPTER XIV

The Process of Constitutional Change

First Ministers' Conferences

1. One of the important themes of recent Canadian constitutional history, as pointed out in Chapter 1 of this Report, has been the emergence of First Ministers Conferences as the engine of constitutional change. The present and future importance of these conferences is underlined in the process of the Meech Lake Accord and in a number of its provisions.

2. The 1987 Accord was arrived at as a result of two lengthy First Ministers Conferences on the Constitution held respectively at Meech Lake and at the Langevin Block. The Accord itself entrenches as section 50 of the *Constitution Act, 1982* an annual First Ministers' Conference on the Constitution and specifies that its agenda is to include, as permanent agenda items, consideration of Senate reform; roles and responsibilities in relation to fisheries; and such other matters as are agreed upon. A parallel series of First Ministers' Conferences dealing with the economy is to be entrenched by section 148 of the *Constitution Act, 1867*.

3. Concern has been expressed about the great emphasis given to First Ministers' Conferences in the 1987 Accord. Negotiating sessions among First Ministers behind closed doors was criticized as an inappropriate method for amending the Constitution of Canada for both theoretical and practical reasons, particularly if the "side agreement" of First Ministers in the "Quebec Round" — that the text of the Accord would not be modified thereafter except for the correction of what the First Ministers unanimously agreed to be "egregious errors" — is to be taken as a precedent for future rounds. The entrenchment of First Ministers' Conferences was criticized as another step toward "executive federalism" and as an erosion of parliamentary government.

4. The Joint Committee does not interpret the provisions of the 1987 Accord as requiring First Ministers to follow the Meech Lake process in their future constitutional talks. The "Quebec Round" is limited to its special factors. We therefore wish to consider separately the criticisms of the process followed in the "Quebec Round" and then to move to broader considerations of an appropriate procedure for future constitutional change.

A. *Were the Meech Lake and Langevin Block Negotiations an Appropriate Means by which to Negotiate the 1987 Constitutional Amendments?*

5. Some of the most colourful language heard by this Committee at its hearings was directed at the way in which the 1987 Accord was reached. Professor Deborah Coyne of the University of Toronto described the process as follows:

> Eleven men sat around a table trading legislative, judicial and executive powers as if engaged in a gentlemanly game of poker.
> (Coyne, 14:8)

Other witnesses, such as the Canadian Labour Congress, analogized the negotiations among First Ministers to marathon collective bargaining sessions, and stated that such methods were appropriate for short-term labour contracts, but not for the formulation of constitutional amendments that could bind the country for generations.

6. The basis for the concern of these and other witnesses who commented unfavourably upon the process by which the 1987 amendments were arrived at is that the Constitution is a document of singular symbolic and practical importance. Constitutional amendment, they pointed out, is a delicate process that cries out for a great deal of preparation, consultation and reflection, little of which, they said, was available to the First Ministers in the 1987 negotiations.

7. A related concern focused on the "closed" nature of the negotiating sessions. For some, it was the literal fact that the sessions were closed that was troublesome. They would have wished to open the sessions to the public and to the television cameras. Others, such as Professor Wayne McKay, were concerned that the sessions were "closed" in a different sense:

> While I understand the need to meet in closed door sessions with First Ministers to get agreement, I think it is very important on matters as basic as this, where we are basically talking about defining what it is to be Canadian and the nature of the Canadian federation, that there be significant access to all aspects and all segments of the public.
>
> My concern about that is accentuated by the fact that this group is a rather exclusive group, excluding, for example, at the present time, women entirely, and not normally including native people in that group, and certainly, in the most recent round, not including the Yukon and the Northwest Territories.
> (McKay, 3:43)

The concern, which was echoed by representatives of women's groups, aboriginal groups and ethnic groups, was that the physical isolation of the First Ministers behind closed doors and their political isolation from direct accountability might lead them to overlook important interests and concerns which might be brought forcibly to their attention in a more "open" process.

8. In assessing the validity of these concerns, it is important to bear in mind the singular nature of the "Quebec Round". In a written submission prepared on behalf of 12 distinguished Canadian academics, Professor Ronald Watts listed the following factors which, in their view, blunt the criticism of the Meech Lake process:

> The federal Progressive Conservative Party campaigned on the promise to reconcile Quebec to the Canadian constitutional order; the Quebec proposals have been public for more than a year; the Liberal and New Democratic Parties debated the issue at national conventions and passed resolutions fully consistent with the principles in the Accord; all three political parties in the House of Commons have endorsed the Accord.
> (Watts submission, para. 5)

9. As a number of witnesses indicated, the Accord was *not* the result of two all-night bargaining sessions. Its origins extend at least to the "unfinished business" of the patriation of the Constitution in 1982 and the issues it deals with have been the subject of discussion, debate, consultation and preparation for even longer. Senator Lowell Murray was particularly adamant on this point:

> Mr. Chairman, it will be grossly injust to say the *1987 Constitutional Accord* was a "one-night wonder". The accord was not cooked up in some kitchen overnight, nor was it simply cobbled together during the course of one or two marathon First Minister's meetings. The reality is that a long and complex process of federal-provincial consultations occurred, which was the culmination of often difficult constitutional debates over a period of 20 years. Events arising from the referendum created a historical turning point, making the successful resolution of the Quebec issue possible.
> (Murray, 2:14)

10. We believe that the text of the *1987 Constitutional Accord* should be judged on its objective merits. The public has made a valuable contribution at these hearings and in other similar hearings around the country. If the *1987 Constitutional Accord* is good for Canada, then it should be adopted and all the procedural criticisms should be put aside for consideration of a better way of doing things in the future. If the 1987 Accord is thought to be bad for Canada, then it should be rejected and all the procedural niceties in the world should not save it. In this instance, at least, process should not be allowed to triumph over substance.

B. *Was It Appropriate for the First Ministers to Agree Not to Modify the Text of the Accord Except to Correct "Egregious Errors"?*

11. The marathon length of the negotiating sessions leading up to the Accord demonstrates the delicacy and the fragility of the agreement that was reached. Dr. Norman Spector, Secretary to the Cabinet for Federal and Provincial Relations, repeatedly used the expression "deal-breaker" in describing various elements of the compromise. Dr. Peter Meekison, a longtime constitutional player for the Alberta government, put the problem in a practical light:

> ...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 easily be destroyed.
> (Meekison, 10:46)

12. In his opening testimony, Senator Lowell Murray described the 1987 Accord as a "seamless web". Other witnesses suggested that some First Ministers may be having second thoughts about some of the provisions and that any suggested modifications, however unrelated to their real concerns, could be used as a pretext to cause the Accord to fall apart.

13. The side agreement not to propose changes in the absence of "egregious errors" is binding only on First Ministers. It does not bind Parliament or the provincial legislatures. The whole Accord, or any part of it, can be amended or rejected. But practical politics being what they are, it is clear that flexibility *after* First Ministers have made a decision will always be limited and, therefore, in future the emphasis must be on a more open process *before* First Ministers meet to discuss constitutional issues.

C. *Does the "Constitutionalization" of First Ministers Conferences Erode Parliamentary Government?*

14. First Ministers' Conferences have been a fact of political life for many years. But until 1982 they were not recognized in the Constitution and had no formal constitutional responsibilities. Like the Cabinet, which is also not mentioned in the Constitution, the First Ministers meetings illustrate the gap that often exists between the formal language of the Constitution and its practical workings. The *Constitution Act, 1982* spoke of "a constitutional conference composed of the Prime Minister of Canada and the First Ministers of the provinces" to deal with matters that directly affect the aboriginal people of Canada. Section 49 contemplates a First Ministers meeting prior to April 17, 1997 to review the working of the 1982 amending formula. Now section 50 of the *1987 Constitutional Accord* would provide for formal First Ministers' Conferences on an annual basis. This disturbs some witnesses, including former Senator Eugene Forsey:

> I've heard too many statements from too many quarters, high and low, suggesting that a constitutional agreement by a First Ministers Conference is now, by convention, and not by law, the final word, as unchangeable as the laws of the Medes and Persians.
>
> Well, acceptance of such a convention will reduce Parliament and the provincial legislatures in relation to constitutional amendments to not much more than echoes. It would be subversive of a parliamentary government. It would establish a new, supreme, sovereign, omniscient, inerrant, infallible power, before which the function of Parliament and the legislatures would be simply to say *Roma locuta est*: the First Ministers have spoken, let all the earth keep silence before them.
> (Forsey, 2:103)

15. The constitutional amendments of 1982 and 1987 developed out of a series of federal-provincial meetings that began in the late 1960's. It is interesting to review the Secretary's Report of the Canadian Intergovernment Conference Secretariat dealing with the constitutional meetings between the years 1968-71. It reveals that the vast majority of both the ministerial and official's meetings were held behind closed doors. The Report indicates that after the experience in 1968 and 1969 with televised meetings it became apparent that some advantage could be gained by resorting to closed meetings where it would be possible to pursue more direct and candid discussions with less public pressure. Private discussions and closed meetings became the rule

during this period. The results of the *in camera* sessions were reported to the public at the conclusion of the conferences.

16. It has become the norm for First Ministers to meet for the purpose of discussing various federal-provincial subjects. So-called "executive federalism" thus developed because of the fact that the Prime Minister and the premiers can usually make binding commitments on behalf of their respective governments. Executive federalism of course relies on political party discipline "back home". Critics of this type of federalism are concerned because it seemingly diminishes the role of the legislatures "back home" and raises the role of the Cabinet and political party leaders far beyond what they feel should be the case.

17. It is against this background of experience that constitutional negotiations have taken place both in the lead up to the *Constitution Act, 1982* and to the *1987 Constitutional Accord*. It became normal practice for constitutional matters to be dealt with by meetings of First Ministers and for the most part behind closed doors. The two major recent attempts at constitutional reform that followed this methodology were largely successful. The first resulted in patriation of the Constitution in 1982 with a *Charter of Rights and Freedoms* and the 1987 Meech Lake and Langevin meetings resulted in the *1987 Constitutional Accord*. In fact, the major disappointment in the constitutional arena in the last few years has been the attempt by the aboriginal people to place aboriginal self-government in the Constitution. These conferences, the last of which was held earlier this year, became media events. There was a great deal of anticipation and high hopes for great achievement prior to each conference and there was a great deal of emphasis placed on the statements made before the television cameras in the public sessions. In retrospect these meetings might have been more successful if they had followed the more traditional closed-door approach to First Ministers' Conferences.

18. However, with the increasing importance of First Ministers' Conferences, it has become essential to define and to develop the role of Parliament in this process. It is clear that Parliament and the legislatures are too large and too cumbersome to participate in negotiations directly. But they can, and should, react and respond to proposals, both before and after First Ministers have had their say. In the negotiations themselves it is obvious that some degree of delegation of negotiating responsibility will have to occur. The obvious and appropriate delegation, in the final analysis, is to the leaders of governments who are themselves elected representatives and who enjoy the confidence of their respective legislatures.

19. We are very mindful of the need expressed in the thoughtful submission presented by the National Anti-Poverty Organization for meaningful public consultation and deliberation prior to First Ministers' Conferences. John Holtby, who appeared before us as a private citizen, pointed out:

> Public participation in this process is best done through a parliamentary body. I believe parliamentarians have a public responsibility to be an early influence in the constitutional developmental process, to act as advisers to governments, to teach Canadians what they do not know — as Gordon Robertson yesterday said, to condition the thinking — and to be the link between the people and the constitutional reform process prior to the First Ministers signing their agreements.
> (Holtby, 4:7)

20. Mr. Holtby proposed the establishment of a national joint committee on constitutional amendments composed of two Senators, four Members of the House of Commons, and two members from each provincial and territorial assembly, with the same powers as any parliamentary committee to conduct hearings and to report to its assemblies. It is beyond the mandate of this Committee to assess and report on the specifics of Mr. Holtby's proposal, but we do agree that at least a Joint Committee of the Senate and House of Commons, whether joined by representatives of provincial legislatures or not, would help to meet the concerns of such groups as the National Anti-Poverty Organization and *Alliance Québec* that First Ministers' Conferences be preceded by consultation and public input. Such a committee would be expected to meet prior to First Ministers' Conferences, hold public hearings and make recommendations to the First Ministers. Such a committee would help meet the basic objective of involving all Members of Parliament as full and active participants in the constitutional evolution of Canada. Moreover, such a committee would orchestrate a level of public involvement in the constitutional process that is vitally necessary to confer legitimacy on constitutional change. We therefore recommend the establishment of a Standing Joint Committee on Constitutional Reform.

THE AGENDA FOR FUTURE FIRST MINISTERS CONFERENCES

21. Section 13 of the Accord would not only entrench yearly First Ministers' Conferences on the Constitution, it would also "constitutionalize" the following items for the agenda of such conferences:

a. Senate reform, including the role and functions of the Senate, its powers, the method of selecting Senators and representation in the Senate;

b. roles and responsibilities in relation to fisheries; and

c. such other matters as are agreed upon.

22. Most witnesses support these conferences occurring on a regular basis with their agenda items known well in advance. But others expressed concern that these conferences could go on forever and that there should be a cut-off date after approximately ten years if no agreement can be reached on a particular item.

23. We discussed in chapter 9 the prospects for Senate reform. We turn therefore to Items B and C on the agenda of future First Ministers' Conferences on the Constitution.

A. *"Roles and Responsibilities in Relation to Fisheries"*

24. Pursuant to section 91(12) of the *Constitution Act, 1867*, seacoast and inland fisheries are matters within the exclusive legislative jurisdiction of the Parliament of Canada. At five First Ministers' Conferences between 1978 and 1985, the subject of fisheries has been an agenda item, with discussion on the possibility of transforming this subject to an area of shared jurisdiction or of arriving at some agreement for a consultative mechanism between the federal and provincial governments. Several witnesses who appeared before us expressed surprise and displeasure that fisheries will

now (apparently) become a permanent agenda item at future First Ministers' Conferences on the Constitution.

25. According to the Fisheries Council of Canada, an annual political forum on this subject could simply perpetuate domestic conflicts and undermine the efforts of those who have worked toward developing a unified, internationally competitive industry. The Seafood Producers Association of Nova Scotia argued forcefully against any change in the current allocation of responsibility respecting fisheries, and stated that the so-called fisheries clause in the Accord implied a political momentum that made such changes possible if not inevitable. They said that it would introduce instability and uncertainty into an industry that requires predictability in order to allow for long-range planning and investment. Most witnesses who opposed any change in the present division of powers with regard to fisheries were not averse to having the matter raised at a First Ministers' Conference, but rather objected to having it on the agenda of *every* First Ministers' Conference on the Constitution.

26. However, simply to place an issue on the agenda is not tantamount to having it actually discussed, nor does it presuppose reaching any agreement. The agenda item is not "*jurisdiction* over fisheries", but rather "roles and responsibilities with regard to fisheries" which is a much larger and wider subject that could result in federal-provincial agreements or other cooperative arrangements benefiting all fishermen without disadvantaging any of them.

B. *"Such Other Matters as are Agreed Upon"*

27. One of the recurrent themes of this Report has been that the success of the "Quebec Round" was due to some extent to the fact that the agenda for the *1987 Constitutional Accord* was intentionally limited by the provincial premiers in their Edmonton Declaration to Quebec's five conditions. Omission of worthy items from the 1987 Constitutional Accord is therefore not to be taken as proof that issues not dealt with have been ignored, rejected or deemed unimportant. The submissions that we have been privileged to hear over the past six weeks have made it clear that Senate Reform, aboriginal rights, devolution of power to the territories, multiculturalism, the extension and protection of linguistic rights, and the enhancement and further protection of individual rights within the Charter are all matters of the utmost concern that must now be addressed by the First Ministers.

28. Clause C of proposed s. 50(2) of the *Constitution Act, 1982* provides that the agenda for First Ministers' Conferences on the Constitution is to include "such other matters as are agreed upon". Does the inclusion of an item require the *unanimous* agreement of all the First Ministers? That appears to be a lawyer's question of little practical importance. If a substantial number of participants wish an item to be discussed, we believe that it will be discussed. If there is no substantial support for an agenda item, then discussion of it would not likely serve any useful purpose.

29. We have recommended establishing a Standing Joint Committee of the Senate and the House of Commons on Constitutional Reform. We would hope that, as part of the ratification process of the 1987 Accord, such a Joint Committee will be established on a permanent basis and that its ongoing proceedings and deliberations will play a

significant role in the determination of the agenda for future First Ministers' Conferences on the Constitution.

CHAPTER XV

Findings and Conclusions

1. In Chapter 4 of this Report, the Committee discussed its mandate and described the broad range of public opinion that emerged in the course of five and one half weeks of hearings. In line with our view of this mandate we have, in Chapters 5 through 14, examined the *1987 Constitutional Accord* in both its broad strokes and its fine detail. We have summarized, as accurately and as fairly as we have been able, the concerns and arguments put before us by the many groups and individuals who presented submissions to us.

2. We now turn to the final portion of our task and to lay out our findings and conclusions. As we explained in Chapter 4, evaluation of the *1987 Constitutional Accord* cannot take place in the abstract or in isolation from the historical context in which the negotiations and discussions leading up to the agreements at Meech Lake and at the Langevin Block took place. As has been emphasized throughout this Report, the proposed constitutional amendments that make up the Accord are intended to complete the unfinished constitutional business of 1982 and to secure Quebec's willing assent to the Canadian Constitution as patriated and amended. The text of the Accord is the response agreed upon by Canada's eleven First Ministers to the five proposals put forward by Quebec as the basis for that province resuming its place as a willing partner in Confederation. Born in an atmosphere of pessimism, the Accord was welcomed by many as "the miracle of Meech Lake". It was initially welcomed by the leaders of all parties in the House of Commons as a major achievement in federal-provincial relations. The question before Parliament, and therefore before us in preparing this Report, is not whether a different solution might have been reached or whether other constitutional issues might also have been addressed. It is quite simply whether or not the Accord that has been agreed upon should be adopted or whether any amendments should now be proposed.

3. We can report that the witnesses who appeared before us were virtually unanimous in their agreement that the goal of having Quebec willingly rejoin the Canadian constitutional family was an important and a desirable one.

4. For a number of witnesses, however, despite the desirability of the objective, the actual provisions of the Accord are unacceptable, either in terms of particular

provisions or its broad philosophy. For some witnesses, our constitutional history is seen as a history of conflict and confrontation between the national perspective of the federal government and the particular local interests represented by the provinces. They maintained that undue reliance on "cooperative federalism" would be naive, and that the forces of provincial distinctiveness have no positive role to play in the formation or preservation of national values and institutions. They regard themselves as the "realistic" school of federal-provincial relations.

5. We have also reported in some detail on the answers to these assertions that were given to us by members of the public, historians, constitutional experts, former federal Cabinet Ministers and retired senior public servants. We have indicated how they told us that the evolution of the Canadian Constitution does not need to be seen as a battle with winners and losers; that diversity is not necessarily synonymous with weakness or inequality; that decentralization and cooperative federalism is at least as authentic a Canadian theme as centralization and confrontation.

6. It must be acknowledged that both of these opposing views of the Canadian federation are sincerely held and that, as with many items of belief, the question of which view represents the better philosophic understanding of Canada is probably not susceptible to resolution by logical argument or debate. It is a matter of political judgment.

7. The Committee notes, however, that if one is to maintain that the terms of the *1987 Constitutional Accord* should not be accepted because they exact too high a price in terms of their vision of Canada, then one must be prepared to accept that at least in the foreseeable future Quebec will remain officially estranged from the Constitution and that a Constitution without Quebec will continue to limp along without the willing participation of one of the key parties to Confederation.

8. The evidence heard by the Committee suggests that the terms of the 1987 Accord reflect a compromise. No one should expect absolute perfection in a compromise. We were also told by a number of witnesses that the provisions of the Accord as it is now constituted are the absolute minimum terms upon which it will be possible to secure agreement among the governments of Canada and the provinces, including Quebec not only now, but into the foreseeable future. While such a conclusion is necessarily speculative, it is a speculation that comes to us from a broad range of sources — political, bureaucratic, academic, and thoughtful members of the public — and in our judgment it represents a risk to the well-being of this country that has to be taken into account along with other relevant considerations.

9. While opinions differ about the precise way in which some of these amendments if adopted, would operate, nothing has been said to lead us to believe that the basic principles of the Canadian federation would be compromised. On the other hand, to keep the government of Quebec in a continuing state of isolation would lead to the serious practical difficulties outlined in this report. Quebec has indicated that it wants to rejoin what witnesses referred to as "the constitutional family". Equally important, Canadians in other provinces want Quebec back as a full participant at the constitutional table. Dr. Peter Meekison, a long time negotiator for Alberta in federal provincial relations , told us:

> I have been involved in this process since 1969 and I know what a significant contribution to the overall debate they can make; to have them sit there and not participate, to me, is a tragedy.
> (Meekison, 10:54)

10. We should also say that we agree with those who place the onus on opponents of the Accord to demonstrate negative practical consequences flowing from its adoption. Proponents of the Accord such as Solange Chaput-Rolland have portrayed very convincingly the negative effect were it to be rejected. A widely respected journalist and political commentator, member of the Pépin-Robarts Commission, former member of the Quebec National Assembly and one of the leading campaigners for a "no" vote in the Quebec Referendum on Sovereignty-Association, Madame Chaput-Rolland, gave eloquent testimony about the widely-felt sense of betrayal among those who voted "no" in the Referendum. She recalled with some bitterness what she perceived as the lack of national reconciliation in the aftermath of the Referendum, a lack which was forcefully underlined by the patriation of the Constitution over the opposition of Quebec; the sense of elation that followed the unanimous First Ministers' agreement on the Accord; and her sense of foreboding as to the potential consequences should the Accord now be rejected:

> I think none outside Quebec knew the reality of the referendum. I travelled throughout Canada, about a few months after. It was all over, eh? Good. It was not exactly all over. Families against families, towns against towns, fathers and mothers not speaking to their children.
>
> [During the Referendum] we spoke with thousands of Quebeckers. Women wanted to leave to their children a country as big as the one they had received from their father. That was mainly the article that reached the heart, because you are right: in this country if we put a little more heart into what we are doing, maybe we would be aware of the hurt we inflict on others.
>
> And then we came home. We went back to the National Assembly, back to our villages, back to our houses, back to the friends that were no more friends; they were on the "yes", we were on the "no". It was not a picnic, it was not a social gathering, it was not a think-tank, it was a battle between brothers, a dangerous, divisive battle, and we still feel it. It was not 100 years ago, it was seven years ago that we lived that referendum.
>
> English Canada could not care less one month after, and it stung me and it stung all of us who fought so hard to remain in Canada and to find ourselves outside of Canada. You know, it was a very dramatic gesture when Mr. Levesque put the flag of Quebec at half mast on the day you were all celebrating here. But our hearts were at half mast too that day, because we were out of a country we had chosen to remain.
>
> So the Accord of Meech Lake brought us something "incroyable" as a gesture of friendship.
>
> Since the telephone rang at our house and a friend called me from Meech Lake to say "it is done", I have held my head high, believing at least that I did not deceive my compatriots when, with the NON team, we told them "that there would be a place for Quebec in the Canada of tomorrow. There will be room for French-speaking Quebeckers in Canada's federal institutions and the Canadian federation will be rejuvenated".
>
> And I would really like people to know that for us Quebeckers, as for all the others here and everyone else, the Meech Lake accords are not an end, but the beginning of

a grand process, I think. But I must tell you that for me it is really the first time that I have felt, YES, I won that referendum.

But surely by now, surely, you all know that if Meech is to fail for whatever reason, there can be no more negotiations, no more justifications. If Quebec is once again to realize that it is more difficult to opt in Canada than to stay out of Canada, then surely, you know that the roads of tomorrow can only lead to another form of independence, but this time not chosen by any political party in Quebec, maybe chosen and imposed on Quebec outside Quebec.
(Chaput-Rolland, 13:19, 13:20, 13:10)

11. As we have stressed throughout this report, a fair evaluation of the 1987 Accord must be approached not only with an understanding of the emotions on *both* sides of the issues, but also with a clear grasp of the practical consequences. In this respect we have listened carefully to the problems seen by opponents of the Accord and we have reviewed in detail in the body of the Report the negative practical consequences that they believe could result. We do not intend here to repeat what has been said on specific issues such as whether or not the proposed arrangements for future national shared-cost programs will compromise existing programs, or make it impossible to ensure universality and portability for future programs, or whether immigration agreements will "drain" some provinces to the benefit of others. We refer the reader back to the individual chapters for an analysis of the wording and of the effect of each of the provisions that make up the Accord.

12. For present purposes it is sufficient to report that the Joint Committee finds that the effects feared by some witnesses do not flow necessarily or even naturally from the text. A number of "worst case" assumptions invariably crept into the discussion and we do not think it appropriate to advocate rejection of the Accord on that account. If "worst case" assumptions were the appropriate criteria one would have to withhold legislative power from the provinces over "property and civil rights" out of fear that it could be used to expropriate all private landholdings, and withhold authority over defence from Parliament on the basis that it could arguably be used to start an offensive war.

13. Nor do we accept that recognition of Canada's linguistic duality and Quebec's distinct society will have the effect of justifying an erosion of bilingualism or Charter rights or lead to a denial of multiculturalism or result in a wholesale transfer of legislative authority from Ottawa to the provincial capitals. The plausibility of such fears was simply not borne out by the evidence.

14. At the same time, representatives of French-speaking Canadians living outside Quebec made out a very strong case that not only should their "presence" be *preserved* but that the Constitution should affirm the role of all governments to *promote* linguistic duality in all of the provinces and territories. We believe that this is an important matter that should be put back on the First Ministers' agenda at an early date.

15. A good deal of concern was initially expressed about the future of national shared-cost programs. But as we delved deeper into some of the practical aspects of federal-provincial financial arrangements, and as witnesses came to grips with the rather limited constraints placed on the federal spending power (as discussed in Chapter 7), the controversy appeared largely to diminish. We believe that national shared-cost programs in areas of exclusive provincial jurisdiction can still be negotiated to the

benefit of both the federal government and the provinces, and that the major effect of the proposed amendment would be to place a renewed emphasis on negotiation. According to the view of federalism underlying the 1987 Accord, this is as it should be.

16. Granting constitutional status to immigration agreements can scarcely have earthshaking consequences having regard to the fact immigration agreements have been operating successfully for the past 16 years, and that future agreements will come before the Senate and the House of Commons for review and approval before they can acquire constitutional status.

17. In its broad outline, therefore, we believe that the *1987 Constitutional Accord* represents a reasonable and workable package of constitutional reforms. Even its firm supporters do not claim more. Gordon Robertson, for example, told us:

> With the diversity that is characteristic of Canada and the different interests of the provinces, it is obvious that any arrangement has to be a compromise. No arrangement is going to represent perfection for 11 governments. No one government is going to get perfection according to its judgement because it would not be acceptable to the other 10. So with the knowledge that it has to be a compromise, I think this arrangement is probably as good as can be achieved. One is most unlikely to get anything better.
> (Robertson, 3:78)

18. We have kept in mind the advice given to us by Dean John Whyte of Queen's University Law School, who prefaced his lengthy and thoughtful criticism of many aspects of the 1987 Accord with the following test:

> Those who continue to oppose the 1987 Accord after it has been accepted and approved by Quebec must realize that they argue not simply against the adoption of certain terms for reconciliation, they argue to undo the historical act of reconciliation and that is a course with clear harmful, long-term consequences for Canada. Therefore, the deficiencies of the Accord must be serious and they must be likely.
> (Whyte, 10:71)

We do not believe the critics have met this test, which we believe to be appropriate, that "the deficiencies of the Accord must be serious and they must be likely".

19. At the same time, there are four areas of concern which have been extensively canvassed in our hearings, which point to issues that in our view go beyond the immediate confines of the 1987 Accord but which we think deserve the attention of First Ministers in the near future, namely:

(*i*) There is a widespread and healthy insistence that the Constitution belongs to the people of Canada, not to the First Ministers. We readily acknowledge that Canadian experience with the amendment process laid down in the *Constitution Act, 1982* is slight, having been used only twice, first in connection with aboriginal rights and secondly in connection with the 1987 Accord. We should learn from these experiences. Legislators and the public must be encouraged to participate in the process of constitutional change before and not after First Ministers meet to make decisions;

(*ii*) A number of important issues emerged in connection with the Canadian *Charter of Rights and Freedoms*. The interaction of various parts of the Constitution including the Charter raises questions as to whether any parts of the Constitution are or should be paramount over others and as to whether any rights and freedoms guaranteed by the Constitution are or should be absolute. Though canvassed most extensively by women's groups concerned about protection of gender equality rights, these questions apply to the entire Charter and, indeed, to the Constitution as a whole. The Joint Committee was also impressed with the need to reexamine the desirability of the "Charter override" provision in section 33 of the Charter. While we do not believe that the "linguistic duality/distinct society" rule of interpretation represents a significant risk to gender equality rights for the reasons which we have reviewed at length in Chapters 5 and 6, we do believe that the broader Charter issues raised in a most expert and challenging way by the women's groups should be pursued in a general look at the operation of the Charter as described below.

(*iii*) The residents of the Yukon Territory and the Northwest Territories believe that the new unanimity rule for the creation of new provinces will not only adversely affect their evolution to provincial status but will slow the present rate of devolution of government powers from Ottawa to the Territorial governments;

(*iv*) Aboriginal peoples' organizations believe that the *1987 Constitutional Accord* has taken their constitutional concerns off the national agenda for the forseeable future, and that the Accord will, if anything, render more difficult the achievement of aboriginal self-government.

20. All four areas of concern have two important facts in common. First, each raises issues that go well beyond the limited scope of the *1987 Constitutional Accord*. In our opinion, rejection of what First Ministers accomplished in their limited agenda in the "Quebec Round" would not solve the real problem for the people involved. Second, accepting that these issues are important and need to be addressed, there is no real consensus amongst members of the public or government leaders about what should be done. That much is obvious from our hearings. Having said this we do believe that some useful observations can be made on each of these issues which reflect on the need to make a serious and determined effort to address these matters in the process of constitutional evolution.

(*i*) *Future Process of Constitutional Change*

21. Our limited experience with home-grown constitutional change suggests to us that a Conference of First Ministers will likely always be necessary as the final step to reach agreement on proposed constitutional amendments. The meeting of First Ministers should be preceded by an open consultative process in which elected representatives, interested organizations, professional associations and members of the public would be *encouraged* to participate.

22. The constitutional work of the First Ministers should take place within an appropriate institutional framework. We have recommended a Standing Joint Committee of the Senate and the House of Commons on Constitutional Reform. The Joint Committee would be expected to create appropriate links with provincial

legislative committees sharing a similar mandate. The work of the Joint Committee could be greatly assisted by input and support from the Minister of Justice in consultation with the Attorneys General of the provinces. The Committee should also hold hearings to obtain the views of members of the public as well as constitutional experts and scholars. The recommendations of this Joint Committee would be reported to the First Ministers' Conference.

23. An example of a matter that might be addressed by the proposed Joint Committee at an early date is the concern of multicultural groups referred to in Chapter 5. Some of these groups believe that not enough has been done in the Constitution to recognize the ethnocultural reality of Canada. This deserves further study. The proposed Joint Committee would provide the appropriate forum for such a study, leading to its consideration at an early date by the First Ministers' Conference on the Constitution.

24. We do not, as we have said in Chapters 4 and 14, accept the view put forward by some witnesses that the procedure leading to the *1987 Constitutional Accord* was flawed and should be rejected on that account. The procedure was appropriate to the particular exigencies of its special facts, including (i) Quebec's well-publicized "Five Conditions"; (ii) the Edmonton Declaration of provincial premiers in August 1986; (iii) the long history of debate and discussion about such matters as the "distinct society" and the "federal spending power" over many years; (iv) the opportunity for public debate and discussion between the Edmonton Declaration in August 1986 and the Meech Lake meeting at the end of April 1987; and (v) the public participation in hearings both in Ottawa and in some provinces to consider in an objective way whether what was agreed upon by the First Ministers should be accepted as an amendment to the Constitution. In future, without the special facts of the "Quebec Round", it will be possible and in our view highly desirable to adopt an active and open consultative procedure across the country.

(*ii*) *The interaction of the various parts of the Constitution and Charter rights*

25. The major issue raised by the women's groups whose testimony we heard, it seems to us, was whether any one part of the Constitution including The *Charter of Rights and Freedoms* can or ought to take absolute priority over others.

26. Major national women's groups, including the National Association of Women and the Law, Women's Legal Education and Action Fund, and the Ad Hoc Committee of Women on the Constitution, took the position that unless they could be given a guarantee that under no circumstances "could" the linguistic duality/distinct society rules of interpretation have any effect on gender equality rights, then the 1987 Accord should be amended to establish the absolute paramountcy of those rights.

27. Their fear was that using these new rules of interpretation, a court might refuse to invalidate a law despite the fact that it involved gender-based discrimination on the grounds that the law furthered the cause of Canada's linguistic duality or Quebec's distinct society. They wanted, in other words, an affirmation that gender equality rights were absolute, and they did not want to give to the Courts the power or the responsibility of weighing this right against the competing demands of social, historical or cultural facts which the courts might conclude justified some measure of limitation of the right.

28. The Committee sees this position, in essence, as expressing real doubts about the legitimacy of a role for the courts in assessing whether social or cultural facts justify certain limitations on a given Charter right and whether the proposed limitation is reasonable. The Committee also believes that although this position was taken with particular regard to gender equality rights, the argument could equally apply to other Charter rights.

29. Two of the basic principles underlying the entrenchment of the Charter in 1982 were that Charter rights are *not* absolute and that it should be left to the courts on a case by case basis to decide whether potential limitations of specific Charter rights would nevertheless be "reasonable limits, prescribed by law, demonstrably justifiable in a free and democratic society".

30. Whether these principles are sound ones is an important and much-debated question. It was an issue that created much controversy at the time of entrenchment. While the issue was decided one way in 1982, it might be appropriate to reopen the debate and reconsider the question in the light of the experience Canadians have had in the first five years of the Charter's operation.

31. Are certain values, such as gender equality, so important that in no circumstances should judges place "reasonable limits" upon them? Should attempts to advance communal values like Canada's linguistic duality and Quebec's distinct society always give way if they infringe, however minimally, on Charter rights such as gender equality?

32. On the other hand, two of the major women's groups in Quebec, including *La Fédération des Femmes du Québec*, told the Committee that they do not share the fears expressed by the national women's groups. The Joint Committee places great weight on the testimony of these Quebec women. They should know better than anyone what the distinct society is all about. They live in it. They constitute about half of its population. They have obviously given careful thought to possible conflict between Charter "equality rights" and the collective interests of the "distinct society" and they have concluded that there is in fact no real potential for conflict. Their opinion in this respect was strongly supported by most of the constitutional experts who made submissions on this point, including Professor William R. Lederman, Professor Gérald Beaudoin and *Maître* Yves Fortier.

33. The national women's groups were also concerned about the selectivity of section 16 of the *1987 Constitutional Accord* in dealing only with aboriginal and multicultural matters. Many of the constitutional experts that appeared before us testified that section 16 is unnecessary. Certainly it generates more heat than light. Adding section 28 of the Charter to it would accomplish little because section 28 only guarantees equal application to men and women of rights and freedoms referred to elsewhere in the Charter. But reaching into section 15 of the Charter to add gender equality rights to the "protected list" while leaving all other Charter rights "unprotected" would be even more arbitrary. What about religious discrimination? Freedom of expression? Religious freedom? Racial discrimination?

34. Former Prime Minister Pierre Trudeau took the debate one step further and proposed the repeal of section 33 of the Charter which enables Parliament or a

provincial legislature to pass a law that overrides important provisions of the Charter including section 2 ("fundamental freedoms") and sections 7 to 15 ("legal rights" and "equality rights") for renewable periods of 5 years. This was a controversial measure at the time it was put into the Constitution in 1982. It should be looked at again.

35. In light of what appear to be significant areas of controversy in the operation and effect of the Charter we recommend that a consultative process be initiated under the direction of the proposed Joint Senate and House of Commons Committee on Constitutional Reform to review the operation of the Charter. If, contrary to our expectations, any difficulties arise as a result of the linguistic duality/distinct society rules of interpretation the problems can and should be dealt with at that time.

(*iii*) ***Northern Territories***

36. It appears from the evidence that at least some of the provincial governments are overly sensitive to territorial governments' taking on the trappings of provincehood, even in such matters as nominations of qualified men and women for appointment to the Senate and to the Supreme Court of Canada. Insofar as the Supreme Court is concerned, we do not share the concerns of those provinces that opposed territorial nominations for appointments to the Supreme Court. We were informed that their opposition was adamant but we see no reasonable justification for it. In our view the territorial governments should be permitted to nominate qualified judges and lawyers from the territories for appointment to our highest court. We think this provision should be reconsidered and we recommend it be placed on the agenda of First Ministers at their first Conference on Constitutional Affairs in 1988.

37. As explained in Chapter 9, we think it likely that the Governor General can continue to appoint territorial Senators under section 24 of the Constitution Act without provincial participation. It is of course, open to the Prime Minister, before advising the Governor General on the appointment of territorial Senators, to seek nominations from the territorial governments in a manner analagous to the procedure now in place for provincial nomination. We believe such prior consultation with the territorial governments would be desirable and appropriate.

38. The territorial representatives who made submissions at our hearings acknowledged that each of the existing provinces has some legitimate concern about adding to the number of provinces with respect to two matters, namely equalization payments and participation in the amending formula. The territorial governments appear to be willing to concede a unanimity requirement on those two points. But other aspects of provincial status affect only the relationship between the federal government and the territorial governments, e.g. the exercise by a territorial government of "provincial" legislative powers under section 92 of the *Constitution Act, 1867*. The transfer of power to the territorial governments would take away some authority from the federal government and Parliament but not, it would appear, from any of the provinces.

39. The principle of the "equality of the provinces" is important but in our opinion, it is carried too far if it imposes artificial and unnecessary constraints on the natural evolution and development of the northern third of the land mass of our country.

40. The protection of the legitimate interests of the existing provinces without unfairly prejudicing the development of the North is a matter of considerable constitutional

importance. We believe it should be addressed in the steps we have indicated in Chapter 12, namely

(*a*) a better definition of those aspects of the creation of new provinces in the North that would be of serious and direct concern to existing provinces;

(*b*) a better definition of those government functions that really only involve the people of the North, the territorial governments, and the federal government;

(*c*) consideration of a constitutional structure to permit the continued evolution of the Territories in the areas defined in (*b*) while preserving the unanimity rule in the matters referred to in (*a*);

(*d*) a clearer definition of fiscal and resource-sharing arrangements necessary to support provincial-type government in the North;

(*e*) consideration of how provincial-type governments in the North would accommodate aboriginal self-government, e.g. whether aspirations of aboriginal and non-aboriginal northerners could be accommodated together in provincial-type government structures in the Yukon and in the Northwest Territories;

(*f*) The best means to facilitate the gradual acquisition of provincial-type powers and responsibilities by governments in the Yukon and the Northwest Territories.

We do not believe that the outcome of these discussions would be prejudiced by adoption of the *1987 Constitutional Accord* at this time.

(*iv*) ***Aboriginal Peoples***

41. For reasons set out in Chapter 11, we believe that the aboriginal peoples of Canada are justifiably apprehensive about the lack of progress on constitutional matters that directly affect them.

42. We believe the concerns they expressed about adoption of the *1987 Constitutional Accord* reflect their anger and frustration over four largely unsuccessful constitutional conferences in five years. We do not believe, however, that rejection of the *1987 Constitutional Accord* is the way to address their concerns. In Chapter 11 we have recommended a series of measures to push ahead the process of constitutional change in matters that directly affect them. In this respect the Joint Committee

(*i*) affirms its view that First Ministers and representatives of aboriginal people must continue to work towards a satisfactory resolution of the constitutional issues brought forward by the aboriginal peoples of Canada, especially the issue of aboriginal self-government;

(*ii*) recommends that the federal government restore funding to aboriginal organizations at an appropriate level to enable them to continue to participate in the preparatory work that is essential to successful constitutional negotiations;

(*iii*) recommends that a timetable and serious work plan be established by the federal government in consultation with the provinces and the aboriginal organizations to prepare for a further Constitutional Conference (or Conferences) on Aboriginal Self-Government;

(*iv*) recommends that serious consideration be given to conducting such Conference(s) on Aboriginal Self-Government in closed sessions as well as open sessions;

(*v*) recommends that the first such Conference take place no later than April 17, 1990 and that any further conferences that may be required be scheduled at that time in light of whatever progress has been achieved.

43. We believe these measures should galvanize the aboriginal constitutional agenda back into action and we urge the participants to make a thoughtful and realistic re-assessment, in light of the experience of the past four conferences, of what is likely to be acceptable to the other participants. Without significant moderation of some of the positions taken on all sides of the bargaining table we are deeply concerned that the legitimate objectives of aboriginal self-government may never be achieved.

Recommendation

44. The Joint Committee of the Senate and the House of Commons is therefore pleased to recommend to the Senate and the House of Commons adoption of the *1987 Constitutional Accord*.

FOR

AGAINST

ABSTENTIONS

ADDENDUM "A"

The Liberal members of the Special Joint Committee on the *1987 Constitutional Accord*, on behalf of the Opposition, once again confirm their support for the Langevin Accord as a positive step forward in Canada's constitutional evolution. At the same time, we believe that the Accord can and should be improved now by the inclusion of some amendments, which are set out below. These amendments are fully consistent with: (1) the Liberal Party policy resolution of November 1986; (2) the Quebec Government's constitutional agenda; and (3) the testimony of many expert witnesses at the hearings of the Special Joint Committee. We also believe that these amendments should be acceptable to the First Ministers. They take nothing away from the achievement of the Accord, rather they clarify its meaning and recognize other legitimate claims which are totally compatible with the Accord.

However, we wish to reiterate our regret, registered in both Houses of Parliament and in Joint Committee hearings, that this crucial exercise has been intentionally engineered by the Government to limit public scrutiny and serious debate. The Liberal Opposition urged that witnesses be given more time to prepare their briefs. We also expressed the view that travel by the Special Joint Committee should have been permitted, especially to those jurisdictions where no hearings are being convened by the provincial or territorial government. Many witnesses who came before the Committee stated that the severe time limits, imposed by the government, reduced their ability to prepare comprehensive submissions.

We reject the government's contention that the Accord is a "seamless web" which will unravel if improvement is attempted now. The experience of 1981-82 demonstrates that constructive change is possible, even at the 11th hour. At the same time, it would be unfair to fault the Accord for failing to resolve all of the unfinished business of Confederation. The amendments we propose complement the Accord. They clarify it and bring to it additional legitimacy by recognizing the important concerns of large numbers of Canadians who are currently dissatisfied. Our amendments do not undermine Quebec's conditions for returning to the Constitutional fold as a full partner.

We wish to draw attention again to the resolution passed last November at the National Convention of our Party on the subject of constitutional reform. A Liberal government would have used this resolution as a starting point for negotiations in what has been referred to as the "Quebec Round", to bring about Quebec's adherence to the Constitution. Indeed, the Liberal resolution demonstrates that the issue was given high priority by our Party long before the Mulroney government acted.

The Liberal Opposition, therefore, supports the Langevin Accord because we feel that the recognition of Quebec's distinctiveness is desirable, appropriate and sociologically accurate.

But, while we agree that a successful Quebec Round is essential, there is no reason why its achievement needs to be as limited as the government insists, or why it must result in other Canadians now feeling isolated, such as women, northern Canadians, native peoples, or western Canadians on the subject of Senate reform. We regret that the Prime Minister did not utilize this window of opportunity to complete more of the national constitutional agenda. We are convinced that this was, and still is, possible.

The Liberal Party has always believed in the concept of official bilingualism for Canada, which was advanced in the *Official Languages Act* first proclaimed by the Trudeau Government in 1969, and subsequently reinforced by the *Constitution Act, 1982*. We do not feel that the Langevin Accord undermines bilingualism in any way. On the contrary, the *Official Languages Act* is still the law of the land; constitutional protection for official language minorities across the country is not diminished; the option of becoming officially bilingual remains for each province. In fact, the Langevin Accord obliges governments to "preserve" the linguistic duality of Canada. This is a step in the right direction, but in order to strengthen it, our amendment proposes that provinces adopt a more positive attitude toward this fundamental characteristic of Canada.

In addition to our amendments, there are two other important issues which we consider essential for the next round of Constitutional negotiations. First, we believe that section 33 of the *Constitution Act, 1982* should be repealed. We consider the paramountcy of the Charter essential, and do not feel that this power of derogation can any longer be justified.

As a second matter for the next constitutional round, we will propose the removal of the "where numbers warrant" clause for minority language instruction, contained in section 23 of the *Constitution Act, 1982*. We feel that this provision is inhibiting and, to the extent that a safeguard is needed, one is already contained in section 1 of the Act, which provides for such limitations as are demonstrably justifiable in a free and democratic society.

In conclusion, we sincerely regret not being able to support the majority report of the Special Joint Committee, which accuses those who now propose amendments of inviting a "risk to the well-being of this country" and the previous government of having operated only by means of "conflict and confrontation". We profoundly disagree. Amendments are desirable and should be possible. The previous Government's achievement of patriation and the entrenchment of a Charter of Rights was historic and should not be diminished.

The Conservative majority refused to include our views, which were also expressed time after time by independent witnesses, in the body of the report; we therefore abstain.

— That section 1 of the *Constitution Amendment, 1987* be amended by striking out subsection 2.(1) of the *Constitution Act, 1867*, and substituting the following therefor:

"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;

(*b*) the recognition that Quebec constitutes within Canada a distinct society;

(*c*) *the recognition that aboriginal peoples constitute a distinctive and fundamental characteristic of Canada*;

(*d*) *the recognition of the multicultural nature of Canadian society, and in particular respect for the many origins, creeds and cultures as well as the differing regional identities that helped shape Canadian society; and*

(*e*) *the recognition of the advantages of developing the Canadian economic union.*"

The purpose of this amendment is to include as fundamental characteristics of Canada the recognition of aboriginal peoples, multicultural and regional identities and the advantages of developing the Canadian economic union.

— That section 1 of the *Constitution Amendment, 1987* be amended in subsection 2(2) of the *Constitution Act, 1867* by striking out section 2(2) and substituting the following therefor:

"2 (*a*) The role of the Parliament of Canada *to preserve and promote, and the role of the* provincial legislatures to preserve *and, subject to subparagraph (2)(b)* to promote, the fundamental characteristic of Canada referred to in paragraph 1(a) is affirmed.

(*b*) *The role of a province in relation to promotion applies from the time it is adopted by a resolution of the legislative assembly of that province.*"

The purpose of this amendment is to offer more protection to official language minorities throughout Canada.

— That section 16 of the *Constitution Amendment, 1987*, be amended as follows:

"16. *Nothing in the Constitution Amendment, 1987 derogates from any of the rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms or affects Part II of the Constitution Act, 1982.*"

The purpose of this amendment is to ensure that all provisions of the Charter, not just sections 25 and 27, have been included in this clause.

— That section 2 of the *Constitution Amendment, 1987* be amended in subsection 25.(1) and 25.(2) of the *Constitution Act, 1867*, by striking out subsection 25.(1) and 25.(2) and substituting the following therefor:

"25.(1) *Where a vacancy occurs in the Senate, and until an amendment to the Constitution of Canada is made in relation to the Senate pursuant to section 42 of the Constitution Act, 1982, the government of Canada shall, within six months after the vacancy occurs, call an election in the province or territory to which the vacancy relates for the purpose of filling that vacancy, and, notwithstanding the provision of section 29 of the Constitution Act, 1867, for a term of nine years.*"

The purpose of this amendment is to assure Senate reform.

— That section 6 of the *Constitution Amendment, 1987* be amended in subsection 101C.(1) of *the Constitution Act, 1867*, by striking out subsection 101C.(1) and substituting the following therefor:

"101C.(1) Where a vacancy occurs in the Supreme Court of Canada, the government of each province *and the elected government of each territory* may, in relation to that vacancy, submit to the Minister of Justice of Canada the names of any of the persons who have been admitted to the bar of that province *or territory* and are qualified under section 101B. for appointment to that court."

The purpose of this amendment is to allow appointments from the territories.

— That section 6 of the *Constitution Amendment, 1987* be amended in subsection 101C.(2) of the *Constitution Act, 1867*, by striking out subsection 101C.(2) and substituting the following therefor:

"(2) *Subject to subsection (5)*, where an appointment is made to the Supreme Court of Canada, the Governor General in Council shall, except where the Chief Justice is appointed from among members of the Court, appoint a person whose name has been submitted under subsection (1) and who is acceptable to the Queen's Privy Council for Canada."

This is a consequential amendment.

— That section 6 of the *Constitution Amendment, 1987* be further amended by adding immediately after subsection 101C.(4) of the *Constitution Act, 1867*, the following new subsection:

"101C.(5) *Where an appointment is made in accordance with subsection (2) and, if within a period of three months, no name which has been submitted under subsection (1) is acceptable to the Queen's Privy Council for Canada, the Chief Justice may make an interim one-year appointment from among justices of the Federal Court of Canada or provincial Superior Courts.*"

The purpose of this amendment is to provide for a deadlock resolution mechanism.

— That section 7 of the *Constitution Amendment, 1987* be amended in subsection 106A.(1) of the *Constitution Act, 1867*, by striking out subsection 106A.(1) and substituting the following therefor:

"106A.(1) The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the *Parliament* of Canada after the coming into force of this section, in an area of exclusive provincial jurisdiction, if the province carries on a *compatible program which meets minimum national standards.*"

The purpose of this amendment is to ensure greater national consistency in programs available to all Canadians and to ensure that minimum standards are met by provinces in order to claim compensation for opting out of such programs.

— That section 9 of the *Constitution Amendment, 1987* be amended by striking out section 9 and substituting the following therefor:

"9. Sections 40 to 42 of the *Constitution Act, 1982* are repealed and the following substituted therefor:

40. Where an amendment is made under subsection 38(1) that transfers legislative powers from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the right of a province of a number of members in the House of Commons not less than the number of Senators by which the province was entitled to be represented on April 17, 1982;

(*c*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(*d*) subject to section 43, the use of the English or the French language;

(*e*) the Supreme Court of Canada; and

(*f*) an amendment to this Part.

42.(1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(*a*) *the powers of the Senate and the method of selecting Senators*;

(*b*) *the extention of existing provinces into territories; and*

(*c*) *the number of members by which a province* or territory *is entitled to be represented in the Senate and the residence qualifications of Senators.*

(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1)."

"42A. *Notwithstanding subsection 42(1)(f) of the Constitution Act, 1982, the establishment of new provinces shall be a matter exclusively for the Governor General in Council and the elected government of the territory affected.*"

The purpose of this amendment is to remove amendments concerning the Senate from the unanimity rule and return them to the status quo of 7 and 50%. Also for the extension of existing provinces into the territories and the establishment of new provinces, we have deleted these entirely, returning us to the *Constitution Act, 1871* which allows for bilateral agreements between the Government and a new province.

— That sections 10 to 12 of the *Constitution Amendment 1987* be deleted.

This is a consequential amendment.

— That section 13 of the *Constitution Amendment, 1987* be amended in subsection 50(2) of the *Constitution Act, 1982*, by striking out subsection 50(2) and substituting the following therefor:

"(2) The conferences convened under subsection (1) shall have included on their agenda the following matters:

(*a*) *the aboriginal and treaty rights of the aboriginal peoples of Canada, including self-government*;

(*b*) Senate reform, including the role and functions of the Senate, its powers, the method of selecting Senators, representation in the Senate.

(*c*) roles and responsibilities in relation to fisheries *at the first meeting only*;

(*d*) such other matters as are agreed upon."

The purpose of this amendment is to restore aboriginal rights to the constitutional agenda and to put fisheries on the agenda for the first meeting only.

ADDENDUM "B"

The New Democratic Party members of the Special Joint Committee on the *1987 Constitutional Accord* fully support the report of the Committee.

We believe, however, that prior to a resolution being placed before Parliament, certain logical amendments to the Accord could be accepted by First Ministers without in any way putting the Accord in jeopardy.

Fairness for Canada's Northern Citizens

Our first amendments concern the North. First Ministers should immediately remove the anomaly of Canadians living in the Territories being denied the opportunity, available to other Canadians, of serving on the Supreme Court of Canada and possibly in the Senate as well. This could be done by adding the words "or territory" after the word "province" in sections 6 and 2 of the Accord relating respectively to section 101C(1), (4), and section 25(1), (2) of the *Constitution Act, 1867*.

First Ministers should also immediately address the injustice of requiring unanimous provincial approval for the creation of new provinces, a degree of concurrence that was not required for any of the existing provinces. The amendment would delete section 41(i) in section 9 of the Accord.

Fairness for Aboriginal Peoples

Our second amendments concern aboriginal peoples, Canada's first citizens. While the report of the Committee goes some distance in addressing the constitutional process on aboriginal self-government, we would like to see included in the Accord a commitment to hold a First Ministers' Conference to discuss aboriginal rights, in particular self-government. This could be accomplished by amending section 13 of the Accord to add a new subsection (*c*) to section 50(2) of the *Constitution Act, 1982* and renumbering section 50(2)(*c*), section 50(2)(*d*).

As well, representatives of the aboriginal peoples and the territorial governments must be assured of full participation. This would require a new section 50(3) to ensure the Prime Minister invites representatives of aboriginal peoples and territorial governments to participate in all matters that affect aboriginal rights.

Fairness for Women

Our third amendment deals with the equality rights of women.

The equality rights of women in the Canadian *Charter of Rights and Freedoms* were won a mere five years ago through the collective struggle of thousands of Canadian women. The "taking of 28" had great significance for the women of Canada and section 28 continues to stand as the major statement of our country's constitutional commitment to sexual equality.

During the course of the committee hearings women's organizations raised concerns with respect to the possible adverse effects of the linguistic duality/distinct society interpretation clause on the sexual equality rights guaranteed by the Charter. We heard strong but differing testimony on this question, although all groups addressing it welcomed the recognition of Quebec as a distinct society in the Constitution.

Quebec's largest women's organization, the *Fédération des femmes du Québec* , (FFQ), stated that the Accord neither expressly nor potentially threatens women's equality in Quebec. On the other hand, several national women's groups said there is a potential risk to women's equality in Canada generally.

Responding to this concern, the largest national women's organization, the National Action Committee on the Status of Women, (NAC), called for the addition of section 28, the sexual equality section of the Charter, to section 16 of the Accord, which already guarantees that neither Canada's multicultural heritage nor aboriginal rights will be affected by section 2 of the Accord.

The FFQ stated they would not oppose NAC's proposal, it being a question of consistency in section 16, rather than a matter of reassurance. The two groups worked together to develop this position and we applaud their efforts.

The New Democratic Party members of the Joint Committee do not believe that the linguistic duality/distinct society interpretation clause abrogates, supersedes or overrides sexual equality rights or any other rights guaranteed by the Charter. Senator Lowell Murray, however, stated that no matter how remote or unlikely an adverse effect of the clause would be with respect to aboriginal rights or our multicultural heritage, sections 25 and 27 were included "out of an abundance of caution". We believe the same abundance of caution should be applied to sexual equality rights and that it could be applied without jeopardizing the Accord. Further, section 28 has an interpretative function and is therefore consistent with the other Charter provisions contained in section 16.

Therefore, we recommend that the First Ministers amend section 16 of the Accord by adding section 28 of the Canadian *Charter of Rights and Freedoms*.

Proposals for the Future

Charter Review

Many of the concerns raised by women constitutional experts, as well as by representatives of visible and other minority groups, go far beyond the scope of the *1987 Constitutional Accord*.

They arise from judicial interpretations of the Charter to date, the operation of section 1 of the Charter and the relationship of sections 15 and 28 and their combined effect. We would like to underline our strong support for comprehensive Charter review culminating in a First Ministers' Conference, as set out in the report of the Committee.

We also recommend that serious attention be given to section 33 of the Charter, the "non obstante" or "override" clause. Although it has been invoked only infrequently, some of its possible uses to curtail the human rights and civil liberties of Canadians require that the First Ministers should discuss its possible repeal in the upcoming "second round".

We are particularly concerned about section 33's potential consequences for the rights of visible minorities, who have pointed out the dangers it presents to them and to others.

Canada's Ethnocultural Reality

During the hearings multicultural associations emphasized the reality that one-third of Canadians are of neither English nor French origin. These Canadians have also made an outstanding contribution to our development as a nation. Today they are an integral part of the Canadian mosaic.

The linguistic duality of Canada has now been recognized in the Accord as "a fundamental characteristic of Canada". The report of the Committee states that the ethnocultural diversity of Canada deserves further study. We would go further than this, urging early consideration of the ethnocultural reality of Canada as a fundamental characteristic of our nation.

The Democratic Process

Finally, we underline the recommendation of many who testified that the process of constitutional review and change is itself in need of review and change.

We reiterate the recommendation in the report of the Committee that there must be a Standing Joint Committee of the Senate and the House of Commons on Constitutional Reform which would hold hearings before as well as after First Ministers' Conferences, to facilitate the widest possible public participation in constitutional renewal, and we would urge appropriate links with provincial legislative committees sharing a similar mandate.

APPENDIX A

NAME	ISSUE	DATE
James Allen Vice-Chairman Council of Yukon Indians	15	31/08/87
Sam Allison Member, Freedom of Choice Movement	9	19/08/87
John Amagoalik Co-Chairman Inuit Committee on National Issues	3	05/08/87
Israel (Izzy) Asper, Q.C. Chairman CanWest Capital Group, Inc.	8	18/08/87
Bev. Baines, Member National Association of Women and the Law	2	04/08/87
Hon. Michael Ballantyne Minister of Justice Government of the Northwest Territories	8	18/08/87
Daryl Bean President Public Service Alliance of Canada	6	12/08/87
Professor Gérald A. Beaudoin University of Ottawa	2	04/08/87
Akua Benjamin Member Ad Hoc Committee of Women on the Constitution	15	31/08/87
Geoff Bickett Deputy Minister of Justice Government of the Northwest Territories	8	18/08/87
Lynette Billard President Canadian Day Care Advocacy Association	7	13/08/87
Emilio Binavince Member Canadian Ethnocultural Council	7	13/08/87

NAME	ISSUE	DATE
George Corn President Canadian Ethnocultural Council	7	13/08/87
Professor Deborah Coyne University of Toronto	14	27/08/87
Timothy Danson Constitutional Lawyer	6	12/08/87
Robert Décary Constitutional Lawyer	4	06/08/87
Louise Dulude President National Action Committee on the Status of Women	13	26/08/87
Wayne Easter President National Farmers Union	10	20/08/87
Mary Eberts Legal Counsel Ad Hoc Committee of Women on the Constitution	15	31/08/87
Havi Echenberg Executive Director National Anti-Poverty Organization	5	11/08/87
Dr. David Elton President Canada West Foundation	4	06/08/87
Georges Erasmus National Chief Assembly of First Nations	9	19/08/87
Patricia File Public Affairs Coordinator National Association of Women and the Law	2	04/08/87
Berkeley Fleming New Brunswick Director Canadian Parents for French	4	06/08/87
Yvon Fontaine President Federation of Francophones Outside of Quebec	3	05/08/87
Dr. R. Armour Forse President Freedom of Choice Movement	9	19/08/87

NAME	ISSUE	DATE
Professor Peter Leslie Director, Institute for Intergovernmental Relations, Queen's University	4	06/08/87
Tony Macerollo Chairperson Canadian Federation of Students	14	27/08/87
Professor A. Wayne MacKay Dalhousie University	3	05/08/87
Magalie Marc National Board Member Canadian Institute on Minority Rights	12	25/08/87
Dick Martin Executive Vice-President Canadian Labour Congress	10	20/08/87
Neil McKelvie, Q.C. Canadian Bar Association	8	18/08/87
Frank McKenna Leader of the Opposition Province of New Brunswick	12	25/08/87
Francine C. McKenzie President Quebec Status of Women Council	15	31/08/87
Wayne McKenzie Vice-President Association of Métis and Non-Status Indians of Saskatchewan	9	19/08/87
Marilou McPhedran Executive Committee Member Women's Legal Education and Action Fund	3	05/08/87
Edward McWhinney, QC.	15	31/08/87
Dr. J. Peter Meekison Vice President University of Alberta	10	20/08/87
Arthur Miki National President National Association of Japanese Canadians	7	13/08/87
Brigitte Mornault, Member (Quebec) National Association of Women and the Law	2	04/08/87

NAME	ISSUE	DATE
Brad Morse Legal Advisor Native Council of Canada	12	25/08/87
The Honourable Senator Lowell Murray Minister of State for Federal-Provincial Relations	2 16	04/08/87 01/09/87
Judith Nolte Senior Advisor Canadian Advisory Council on the Status of Women	10	20/08/87
Zebedee Nungak Co-Chairman Inuit Committee on National Issues	3	05/08/87
Linda Nye Member Ad Hoc Committee of Women on the Constitution	15	31/08/87
Jocelyne Olivier Secretary General Quebec Status of Women Council	15	31/08/87
Royal Orr President Alliance Quebec	8	18/08/87
Helena Orton Spokesperson National Association of Women and the Law	2	04/08/87
Bernard A. Pelot	5	11/08/87
Tony Penikett Government Leader, President of the Executive Council Government of the Yukon	15	31/08/87
Professor Louis Perret President Canadian Association of Law Teachers	15	31/08/87
Willard Phelps Leader of the Opposition Yukon Territory	15	31/08/87
Laurent Picard	12	25/08/87
The Honourable J. W. Pickersgill	10	20/08/87
Sydney Poon National President Chinese Canadian National Council	7	13/08/87

NAME	ISSUE	DATE
Nancy Purdy Member Ad Hoc Committee of Women on the Constitution	15	31/08/87
Dr. Susan Purdy President Canadian Parents for French	4	06/08/87
Nancy Riche Executive Vice-President Canadian Labour Congress	10	20/08/87
Dr. Marguerite Ritchie, Q.C. President Human Rights Institute of Canada	11	21/08/87
Gordon Robertson	3	05/08/87
Ginette Rodger Executive Director Canadian Nurses Association	8	18/08/87
Roger Roy National Representative, United Electrical, Radio and Machine Workers of Canada	10	20/08/87
Daniel St-Louis Deputy Chairperson Canadian Federation of Students	14	27/08/87
Professor Stephen Scott McGill University	8	18/08/87
Michel Simard Manager, Public and Governmental Affairs Canadian Nurses Association	8	18/08/87
Richard Simeon Director, School of Public Administration Queen's University	5	11/08/87
Jim Sinclair Representative Métis National Council	9	19/08/87
Michael Smith Chief Research Office E.G.A.L.E.	5	11/08/87
Norman Spector Secretary to the Cabinet for Federal-Provincial Relations	16	01/09/87
The Honourable R. L. Stanfield	5	11/08/87

NAME	ISSUE	DATE
Roger C. Stirling President Seafood Producers Association of Nova Scotia	14	27/08/87
Wm. A. Sullivan Member Freedom of Choice Movement	9	19/08/87
Beth Symes Member, National Legal Committee Women's Legal Education and Action Fund	3	05/08/87
Nick Taylor Liberal Leader Province of Alberta	15	31/08/87
Tej Pal S. Thind National Secretary National Association of Canadians of Origins in India	7	13/08/87
The Right Honourable Pierre Elliot Trudeau	14	27/08/87
Jan Turner Steering Committee Member Canadian Day Care Advocacy Association	7	13/08/87
Anne Usher President Canadian Council on Social Development	12	25/08/87
Aileen Van Ginkel Research and Communications Associate Council of Christian Reformed Churches in Canada	8	18/08/87
Richard Wagner Executive Member German Canadian Congress	7	13/08/87
Professor Ronald L. Watts Queen's University	13	26/08/87
John D. Whyte Dean of Law Queen's University	10	20/08/87
Noëlle-Dominique Willems Vice-President National Action Committee on the Status of Women	13	26/08/87
Bryan Williams, Q.C. President Canadian Bar Association	8	18/08/87

NAME	ISSUE	DATE
Wendy Williams Member of the Executive National Action Committee on the Status of Women	13	26/08/87
Jean Wright Researcher Canadian Federation of Students	14	27/08/878
Jacob S. Zeigel Joint Chairperson, Committee on Judicial Appointments Canadian Association of Law Teachers	15	31/08/87

APPENDIX B

The Committee regrets that it was unable to receive more witnesses. The following is a list of briefs, letters, and submissions to the Committee from groups and individuals from whom the Committee could not receive personal testimony.

Anne Adelson

Advisory Committee on Visible Minorities

Advocacy Centre for the Elderly

Affiliation of Multicultural Societies and Services Agencies of B.C.

Ahmadiyya Movement in Islam (Ontario) Inc.

Sally Aitken

Algonquins of Barrière Lake

Anishinaabe Child & Family Services Inc.

Association des juristes d'expression française de l'Ontario

Thomas Atherton

B.C. Government Employees Union

Michael Bassyouni

Michel Bastarache

John Bawden

Roderic Beaujot
University of Western Ontario

Alfred H. Beck

Pat Bennett

S.B. Benton

Bio-Végétal Inc.

Nicholas Birkett, M.D. Ms.C.

Michael Bliss, M.A., Ph.D.
Professor
University of Toronto

Barry Blow

S.H. Booiman

William Booth

André Bordeleau

Celso A.A. Boscariol

British Heritage Institute (Canada)

R. Buckna

Burnaby Multicultural Society

Alan C. Cairns
Department of Political Science
University of British Columbia

Canadian Artic Resources Committee

Canadian Association for Community Living

Canadian Civil Liberties Association

Canadian Jewish Congress

Canadian Multilingual Press Federation

Canadian Rights and Liberties Federation

Reuven Carin

Florence A. Cass

Centre Maghrebin de recherche et d'information

William Chahley

R. Barry Chapman

A.L. Charbonneau, P.Eng.

Charter of Rights Coalition

Citizen's Concerned about Free Trade

Coalition for an Inclusive Representation

Coalition of Provincial Organizations of Handicapped

Comité pour l'intégration du français à la pratique du droit au Manitoba

Committee for Racial Justice

Committee to Entrench Rights

Communist Party of Canada — Central Committee

Confederation of Regions Manitoba Party

Ern Condon

Council for Canadian Unity

Thomas Courchene
Robarts Professor of Canadian Studies
York University

Mark Crawford

Roland Crowe
Federation of Saskatchewan Indian Nations

Peter A. Cumming
Law Faculty
York University

Jeanne Dart

Jean Davey

Bruno Deshaies

Arthur Dolan

Joe Doris

Barbara Doyle

Allan Eaton

Jane Evans

Fédération des Franco-colombiens

Federation of Students — University of Waterloo

Feminist Grandmothers of Canada

FRAPPE

Daniel John Fraser

Neil A. Fraser, C.A.

Roderick Fry

Lorraine Giles

Grand Council of the Crees (of Quebec)

Glenn Gray

Ian Greene

Dario F.M. Gritti

Timothy Hemming

AMIAM

Philip H. Hobson

Henry Holgate

Chris Holloway

Ed Hoosen

Andrew P. Huchala

Richard Hudson

Université de Moncton

Institut politique de Trois-Rivières

Wayne T. Jackson

Frank Jameson

Michael Jarvis

Paul Johanis

Philip W. Jones

Thomas W. Joseph

Richard J. Joy

Peter Jull

Mary F. Keith

Anne Kent
Kingston and District Immigrant Services

Robinson Koilpillai

Lakeshore School Board

Albert LeBastard

E.J. Legg

Howard Levitt

Alex B. Macdonald, Q.C.

William MacGregor, P.Eng.

Vincent MacLean
Leader of the Opposition, Nova Scotia

Malcom H. MacNeil

Maritime Fishermen's Union

Michael Marshall

Deborah Mawry

Irene L. McAllister

Floyd McCormick

Douglas J. McCready, Ph.D.
Professor of Economics
Wilfrid Laurier University

Judi McGarty

Frank McKinnon
Professor Emeritus of Political Science
University of Calgary

Ken McRae

Murray Mincoff

Howard J. Mountain

David Murray

National Association of Canadians

National Capital Alliance on Race Relations

National Congress of Italian Canadians

Nova Scotia Young Liberals Association

Robert O'Brien

J. O'Donnell

Office of the Commissioner of Official Languages

Vincent Oldaker

Albert Opstad, P.Eng.

Ontario Federation of Home & School Associations Inc.

The Pas Indian Band

Pastoral Institute of Northern Ontario

John W. Patterson

Stephen E. Patterson
Professor of History & Chairman
Department of History
University of New Brunswick

PEI Advisory Council on the Status of Women

Katherine Penney

Andrew Petter
Assistant Professor, Faculty of Law
University of Victoria

J. Pilliteri

Robert J. Porter

Edward G. Price

D. Pritchard

Lawrence A. Purdy

Presbyterian Church of Canada

Quebec Association of Protestant School Boards

Quebec Federation of Home and School Association

Quebec for All

J. Quittner, P.Eng.

L. Douglas Rae

Roger P. Rawlyk

A.K. Ray, D.Sc.

Reform Association of Canada

Réseau national d'action-Éducation femmes

Ted Richard, M.L.A., Yellowknife South
Government of NWT

W.E. Rogers

Jean-Marie Rondeau

Shirley Rose

Saskatchewan Action Committee, Status of Women

Bryan Schuartz
Professor of Law
University of Manitoba

C. Schuetz
Department of Political Science
Carleton University

Steven A. Scott
McGill University

Martin Shulman

Jean M. Skelhorne, B.A., M.Ed.
Education Consultant

Ken Solomon
University Secretariat
University of Alberta

Carl Sorensen

Christopher R. Spence

C. Steele

George R. Stock

Théophane Thériault

Third Millenium Institute

G.A. Thompson

Toronto Mayor's Committee on Community and Race Relations

John Trent
Ottawa University

Union of Nova Scotia Indians

Union Nationale

J. Ursano

Vancouver Quadra Liberal Association

Darlene Varaleau

Stephen Vise

Erwin Voelker

Sidney A. Waite

Anthony Weagle

Elmer G. Weins

Greg Whincup

Blair Williams
Concordia University

Stephen C. Woodworth
McGibbon & Woodworth
Barristers & Solicitors

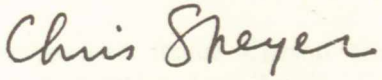
David Yeo

Yukon Status of Women Council

A copy of the relevant Minutes of Proceedings and Evidence of the Special Joint Committee on the *1987 Constitutional Accord* (*Issues Nos. 1 to 16 and 17 which includes this Report*) is tabled.

Respectfully submitted,

Senator Arthur Tremblay
Co-Chairman



Chris Speyer, M.P.
Co-Chairman

MINUTES OF PROCEEDINGS

WEDNESDAY, September 9, 1987
(28)

The Special Joint Committee on the 1987 Constitutional Accord met *in camera* this day at 12:30 o'clock p.m., in Room 356-S of the Centre Block, the Honourable Arthur Tremblay, Senator, and Chris Speyer presiding.

Representing the Senate: The Honourable Senators Philippe D. Gigantès, Nathan Nurgitz, Raymond J. Perrault, Yvette Rousseau, Arthur Tremblay.

Representing the House of Commons: Suzanne Blais-Grenier, Albert Cooper, David Daubney, Leo Duguay, Charles Hamelin, Pauline Jewett, Robert Kaplan, Lorne Nystrom, Lawrence O'Neil, André Ouellet, Chris Speyer.

In attendance: *From the Library of Parliament*: Bruce Carson and Jacques Rousseau, Researchers. *From McCarthy and McCarthy*: Ian Binnie, Q.C., Mark Freiman and Eric Gertner, Legal Counsels.

The Committee resumed consideration of its Order of Reference from the Senate dated June 17, 1987 and its Order of Reference from the House of Commons dated June 16, 1987, both relating to the document entitled "1987 Constitutional Accord signed in Ottawa on June 3, 1987 by the First Ministers of Canada" copies of which were tabled in the Senate and the House of Commons on June 3, 1987. (*See Minutes of Proceedings, Tuesday, August 4, 1987, Issue No. 2*)

The Committee proceeded to the consideration of a draft report.

At 2:50 o'clock p.m., the sitting was suspended.

At 4:40 o'clock p.m., the sitting resumed.

The Committee resumed consideration of a draft report.

It was agreed, -That the Draft Report of the Special Joint Committee on the 1987 Constitutional Accord be adopted as the Committee's Report to Parliament and that the Joint Chairmen be instructed to present it to both Houses on Monday, September 14, 1987.

It was agreed, -That all Members wishing to sign the Report of the Special Joint Committee on the 1987 Constitutional Accord may do so before 12 o'clock p.m., on Thursday, September 10, 1987.

On motion of David Daubney, it was agreed, -That the Committee be authorized to print an additional 4,450 copies of Issue 17, which includes the Report, thereby making available a total number of 5,000 copies.

On motion of Suzanne Blais-Grenier, it was agreed, -That the reports, submitted by the opposition parties, be printed as addenda to the Committee's Report.

On motion of Albert Cooper, it was agreed, -That the Co-Chairmen be authorized to correct any typographical stylistic or translation errors contained in the Report.

At 5:12 o'clock p.m., the Committee adjourned to the call of the Chair.

André Reny — Eugene Morawski
Andrew Johnson — Elizabeth Kingston
Joint Clerks of the Committee