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CONSTITUTIONAL REFORM AND THE *CHARTER OF RIGHTS AND FREEDOMS*

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It is now widely agreed that the *Charter of Rights and Freedoms*[1] is transforming the general conduct of politics and our language of political discourse. Equally, at least since the Meech Lake debacle, it is now widely agreed that the *Charter* has in particular transformed the dynamics of constitutional reform.

As political scientist Alan Cairns and others succinctly observe,[2] with the implementation of the *Charter* in 1982, and the entrenchment of basic rights and freedoms against all levels of government, Canadians now have a very real sense that the Constitution belongs to the *people*. It is not something that can be tinkered with by the pre-1982 methods of elitist executive federalism.

In addition, the *Charter* has bolstered Canadians' firm belief in the equality of all citizens in Canada. This translates into an insistence on the uniform application of the *Charter* across Canada so that all Canadians have the same rights and freedoms wherever we live.

These two principles, as I would call them—that the Constitution belongs to the *people* and that all Canadians should have the same rights and freedoms—emerge as perhaps the most significant lesson we have learned from the Meech

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* St. John's, Newfoundland. Revised version of a presentation made at the University of Saskatchewan conference "After Meech Lake," November 2-3, 1990.

1 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

2 See, *e.g.*, A.C. Cairns, "The Politics of Constitutional Renewal in Canada" in K.G. Banting and R. Simeon, eds, *Redesigning the State: The Politics of Constitutional Change* (Toronto: University of Toronto Press, 1985) 95; A.C. Cairns, "The Limited Constitutional Vision of Meech Lake" in K.E. Swinton & C.J. Rogerson, eds, *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) 247; C. Williams "The Changing Nature of Citizen Rights" in A.C. Cairns & C. Williams, eds, *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) 99.

Lake debacle. I am confident that the *people* of Canada want the country to hold together. So we need to let the *people* into the process in a meaningful way, to ensure this result.

In my brief remarks, I will address two topics. First, I will argue that the Canadian *Charter* is unique to Canada and will not have an inevitably "Americanizing" impact on us, as some observers rather simplistically assert. Second, I will say a few words about the specific Charter issues during the debate over the Meech Lake Accord in the hope that we can draw some lessons for the future.

The Canadian *Charter* has profoundly altered the relationship between the individual and the state, and the political and socio-economic fabric of the country. The *Charter* is now the key component of our Constitution that articulates the fundamental values that are common to all of us and that define ourselves, our concept of the Canadian federation, and our commitment to a fairer, more compassionate society.

The *Charter* is a uniquely Canadian document—one that must be interpreted in light of Canadian political traditions. It is also a late twentieth century document—one that is not preoccupied, for example, with how to limit government as was the case 200 years ago when the American Constitution emerged.

Rather, in sharp contrast to the American *Bill of Rights*, the *Charter* reflects a belief that there need not be any contradiction between state regulation and individual liberty, and that freedom, where appropriate, is enhanced by public institutions and state action.

The *Charter* also blends an emphasis on individual freedom with a respect for community values. For example, it requires us to take into account cultural, religious, linguistic, and aboriginal communities in interpreting the rights guaranteed to individuals. This allows for the protection of minorities and those individuals whose fulfilment depends on the preservation of a group identity, while not undermining the ideal of juridical equality of all citizens.

These unique aspects of the *Charter* are most obvious in the broad guarantees of equality, minority language and education rights, mobility rights, and our commitment to multiculturalism, all of which are subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[3]

This formula for reasonable limits is a critical element of our *Charter*. It is set out explicitly in the first section of the *Charter*, and is just one of many specific contrasts to the American *Bill of Rights*. Nothing specific was set out in the American document and it took years for the judiciary to develop the concept of judge-made limits on rights and freedoms that provided governments with the

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3 *Supra*, note 1 at s. 1.

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needed flexibility to implement, among other things, progressive social legislation.

In the view of many constitutional experts, the balancing performed to date by our courts pursuant to section one of the *Charter* is accommodating well the Canadian tradition of greater public action, as well as our federal diversity. For example, in the famous Bill 101 sign law case,[4] although the Supreme Court of Canada found that banning English on outdoor signs was a breach of freedom of expression, the Court also held that it would nevertheless be permissible, under section one, for the Quebec government to mandate greater predominance for the French language vis-à-vis any other. As we all know, the Quebec government rejected this option and took the regrettable step of invoking the notwithstanding clause to sustain the complete ban on English. But I am confident, having read a great deal of commentary on the subject, particularly by francophones in Quebec, that a significant number of thoughtful and moderate Quebeckers could have accepted the Supreme Court option, which was indeed the original position of the Quebec Liberal Party.[5]

At a conference in April of 1989, some months after the Bill 101 decision, I had a conversation with Claude Morin, a former Parti Québécois minister of intergovernmental affairs. It was on the eve of the release of another key Supreme Court decision on the validity of certain stringent Quebec regulations on commercial advertising aimed at children.[6] Morin, like so many within both the nationalist-dominated elite and the media in Quebec, was lamenting the expected result that the Court would knock down the regulations on the grounds of a breach of freedom of expression, something which would provide yet another allegedly iniquitous example of the operation of the Canadian *Charter* against the interests of Quebec. Needless to say, these were crocodile tears since Quebec nationalists preferred precisely such a result in order to use it to further their own interests.

I replied to Morin that, in my view, he was wrong and that he was forgetting about the balancing of interests that the Court was required to perform under section 1 of the *Charter*. I thought it was highly likely that the Court would consider the regulations to be "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." My prediction proved true, much to the disgruntlement, I'm sure, of Morin and other nationalists.

To further demonstrate the unique features and impact of our *Charter*, it

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4 *Ford* v. *A.G. Quebec*, [1988] 2 S.C.R. 712.

5 See, for example, the lead editorial by J. Paré in *l'Actualité* (février 1989); M. Adam, "Gérard Filion n'aime pas la loi 178," *La Presse* (2 mars 1989); and the open editorial by the president of le comité scientifique à l'institut international de droit linguistique comparé: P. Pipier, "La Survie du Français et L'affichage" *Le Devoir [de Montréal]* (18 janvier 1989). See also general discussion in D. Coyne, "Beyond the Meech Lake Accord" in Centre for Constitutional Studies, *Language and the State* (Montreal: Les Éditions Yvon Blais, 1991).

6 *A.G. Quebec* v. *Irwin Toy Ltd*, [1989] 1 S.C.R. 927.

should be noted that the focus on rights and fundamental values in the *Charter* is clearly shaping the public policy agenda not only as a result of legal challenges to legislative and administrative action. It shapes the agenda through the increased sensitivity of policy-makers who are determined to "Charter-proof" any proposed legislation or other government action in order to pre-empt such legal action. It also shapes the agenda through the activities of groups and individuals who use the *Charter* as a symbolic document in their lobbying efforts with governments.

The *Charter's* influence is perhaps most obvious with respect to our approaches to dealing with the inequality and inequities in society, notably in our employment and social assistance policies. For example, we are increasingly conscious of the needs of disadvantaged groups such as women, visible minorities, native Canadians, and the disabled, and are consequently taking steps through affirmative action and pay equity initiatives to improve their wellbeing. We also more frequently speak of a person's right to a decent minimum standard of living—a decent quality of life—as something that is as worthy of protection as traditional property and contractual rights.

More broadly, the *Charter* is having a subtle nationalizing effect as it gives expression to a national citizenship that is independent of territorial-regional location and that transcends regional identities. This appeal to our non-territorial identities, such as ethnicity and gender, is finding concrete expression in the new popular coalitions that are emerging.

In discussing the profound impact of the *Charter*, I want to single out minority language and education rights. These illustrate not only the unique character of the *Charter*, but also the perennial debate on how best to protect minority rights in Canada which yet again surfaced with a vengeance during the Meech Lake debate.

The decision in 1982 to vest minority language rights in individuals represented an important historical compromise. Canadian history is littered with examples of the dangers of having to rely only on benevolent government action to protect minority rights. For example, when Ontario moved to eliminate French language instruction in schools in the early part of the century, the federal Liberal Party leader, Wilfrid Laurier, could only plead unsuccessfully for a "regime of tolerance." So the answer in 1982 was to provide members of minority language groups with legally enforceable rights that could be asserted against both levels of government.

The Charter guarantees of minority language and education rights are unique, however, because they reflect a blend of individual rights and group identity. More specifically, the assertion of individual rights depends on personal identity, and that identity likely reflects membership in the relevant community or collectivity. This is because language rights do not exist in a vacuum—to allow for the meaningful assertion of those rights and to provide meaningful

protection, we must also ensure the preservation and promotion of linguistic communities. So the language guarantees, while accorded to individuals, reflect a positive, rather than negative, idea of freedom and place a positive obligation on the courts and on our legislatures to promote the opportunity to use and to develop one's language.

Already, we have seen several important court challenges, such as those instigated by members of francophone minorities outside Quebec, that have successfully forced provincial governments to expand the availability of French language services and French language education.[7] The important thing to note is that, to the extent that francophone minorities outside Quebec are able to galvanize governments into promoting their interests and the bilingual character of Canada, this sends positive signals to French-Canadians in Quebec and helps to build up their confidence in both themselves and Canada. This is a critical component of any long-term reconciliation of Quebec's position within Canada.

Of course what definitely does *not* help is the equal and opposite reaction created by the intolerant English-only resolutions in some Ontario municipalities and the stomping on the Quebec flag by some APEC extremists. Unfortunately this effect was magnified irresponsibly by the media which played the otherwise marginal flag scene over and over again on Quebec television.

This brings me to the Meech Lake Accord.[8] I do not have time to go into a detailed analysis of how the distinct society clause would have disrupted the linguistic equilibrium that has gradually emerged over the years and would have potentially halted future progress towards strengthening the bilingual character of Canada as a whole. By way of general observation, however, the distinct society clause undermined the idea that all Canadians have common rights and freedoms regardless of where we live because it directed that the entire Constitution, including the *Charter,* be interpreted in light of geographic and socio-cultural considerations. In other words, the nature of our basic rights would henceforth vary depending on which province we lived in, which linguistic group we belonged to, and so forth. This is clearly not a desirable course for a democracy that has always prided itself on its ability to sustain a diverse yet tolerant society and to promote bilingualism and multiculturalism throughout Canada.

As was demonstrated clearly during the Meech debate, Canadians generally will not tolerate any uneven application of the *Charter* to Canadian citizens. *A fortiori,* they were outraged when this was accomplished in a secretive meeting of first ministers.

I will briefly turn to this particular aspect of the Meech debate.

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7 See, for example, *Mahé* v. *Alberta,* [1990] 1 S.C.R. 342. See also annual summaries in the Annual Reports of the Commissioner of Official Languages.

8 Government of Canada, *Strengthening the Canadian Federation: The Constitutional Amendment, 1987* (Ottawa: Government of Canada, 1987).

From my perspective back in the trenches in 1987 in Toronto, the widespread sense of outrage with and concern for the process leading to the substance of the Meech Lake Accord was apparent from the beginning. But there was no outlet for the opposition given the total failure of the parliamentary opposition in Ottawa—by the Liberals and the N.D.P. Hence my efforts and those of many others to create the Canadian Coalition on the Constitution.

The common thread uniting opponents of the Accord was probably the concern about how it undermined the *Charter*, in addition to concern for its excessive provincializing impact. The lack of sensitivity to the *Charter* or the concerns of what Alan Cairns calls "Charter Canadians" was all too obvious in the very text of the Accord.

For example, just before the Accord had been signed at the Langevin Block meeting, a new clause was inserted—Article 16—stipulating among other things that certain provisions in the *Charter* dealing with aboriginal rights and our multicultural heritage were not affected by the distinct society clause.[9] Unfortunately, this had the effect of compounding the widespread concern since it then explicitly exposed all other Charter rights to the distinct society clause. Most importantly, the last minute *ad hoc* decision to insert Article 16 simply confirmed that at Meech Lake the first ministers had not been sensitive to Charter concerns and, in retrospect, definitively makes the case for a radical opening-up of the process.

Few of the Accord supporters had yet realized the far-reaching impact of the entrenchment in 1982 of the *Charter*, and the subtle but powerful sense of attachment that most Canadians now had to their Constitution. The Accord signatories and negotiators, perhaps epitomized by Senator Lowell Murray, still operated in the pre-1982 mode: constitutional change was only a matter for first ministers at the executive level who, after all, were elected to represent their respective constituents. In the summer of 1987 this attitude was captured succinctly in a response of Lowell Murray to a question from a Special Committee member who suggested that the two territories should have been represented at the Meech negotiating table. Murray's reply was simply: "But they are not provinces." At this point, some observers and I, sitting near the back of the hall, looked at each other in consternation. It was as if Murray could not fathom the idea that there were people in the territories whose interests were clearly affected and whose voice had been denied.

Indeed, Meech supporters were always fond of saying that the closed-in executive level process they followed was set out in the 1982 Constitution. This is wrong. Admittedly the 1982 Constitution provides for amendments by way of resolutions of the appropriate legislative assemblies and Parliament. But it does not say what process is to be pursued in arriving at those resolutions. In other

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9 *Ibid.*

words, nothing precludes any first minister from deciding, for example, to hold a referendum in his or her province to determine which form the resolution should take. To argue that the First Ministers' Conference is the required process is one of many fabrications and myths perpetrated by Accord supporters over the years.

Another fabrication and myth that emerged during the hearings in the summer of 1987 and that played an important role throughout the debate was that to oppose the Accord was to be anti-Quebec. It is unnecessary to repeat all the arguments demonstrating how Brian Mulroney strengthened nationalist forces in Quebec by constantly talking about the alleged "exclusion" of Quebec from the 1982 Constitution. Equally serious was how he and other Accord supporters distorted the concern about the *Charter*. Because the basis for concern was the special role accorded to the Quebec government, Quebeckers were irresponsibly encouraged to believe that Meech Lake opponents not only objected to the preservation and promotion of the French language and culture but also were determined to erase Quebec's distinctiveness and to create instead a bland sea of uniform lowest-common-denominator bilingualism from coast to coast.

This fabrication was strengthened by the apparent absence of any major group in Quebec professing concern about the *Charter*. The reality was of course that, for example, the Fédération des femmes de Québec was funded by the Quebec government and could hardly have challenged the hand that fed it. In contrast, the arms-length Quebec Human Rights Commission did quietly join in a 1988 joint communiqué with other provincial commissions expressing concern for the impact of the Accord on the *Charter*.

The fabrication was also strengthened by the difficulty in getting any sort of balanced coverage in the nationalist-dominated, inward-looking Quebec media. I am convinced that had Quebeckers been able to listen to and to analyze the opposition objectively, they would have realized that the Charter issue would have arisen had any other provincial government been involved. The opposition to the Accord provisions stemmed from the outrage that, after finally entrenching our rights and freedoms in 1982, eleven first ministers would even attempt to tinker with them and, in a private meeting, purport to expand a government's ability to override these rights and freedoms. In the Canada of 1987, with half a decade of Charter experience, this kind of "reform" was simply unacceptable in the absence of significant debate and careful analysis of all the implications.

In addition, virtually no one opposed to the Accord denied or challenged Quebec's distinctiveness. On the contrary, they welcomed and encouraged it. The Quebec government was already using its substantial existing powers to effectively preserve and promote the French language and culture. Claude Ryan was unable, in response to Marc Lalonde's challenge during a "Le Point-Journal" debate in the spring of 1990, to provide a single example of a Quebec law or initiative that had been stymied by the 1982 Constitution. The sign law

provisions of Bill 101 were struck down for infringing the Quebec *Charter* as well as the Canadian *Charter*. The tremendous advances made to secure the French language and culture were recently confirmed by a study commissioned by Quebec's Conseil du Patronat du Québec which was submitted to the Bélanger-Campeau commission.

However, Quebeckers were constantly being told that somehow they would gain something new and different in the Accord that was essential to the survival of their language and culture, and that opponents were trying to prevent this acquisition. They were virtually never presented with any of the broader arguments regarding the impact of the Accord's provisions on Canada as a whole, and the long term value to Quebec of remaining within a viable Canadian federation committed to bilingualism.

As everyone knows, the issue of the *Charter* never went away and just kept getting bigger and bigger, spurred on by the regrettable use of the notwithstanding clause by Quebec in December 1988.[10] I should note here that I have always believed, and now even more so, that the notwithstanding clause must be removed at the earliest opportunity. It was an unfortunate concession to some of the premiers in 1981 and is certainly an alien feature to any Charter. In addition, as I emphasized earlier, for those sincerely concerned about preserving the scope for state action, the "reasonable limits" clause of the *Charter* is proving very satisfactory, and thus there is no longer a need, if there ever was one, for the notwithstanding clause.

In the final desperate stages of the Meech debate when the Charest Committee—dubbed the "Charade Committee" by many—was established, there was finally some official recognition of the Charter concerns. But here was what happened.

On May 3rd, one of the final days of the Committee hearings, a man named Roger Tassé surfaced. In a less-than-subtle attempt to assuage Charter activists, he was described as a principal architect of the *Charter*. (He had been the Deputy Minister of Justice in the 1980-82 period.) Tassé articulated what has been referred to as the "calmez-vous" interpretation of the distinct society clause and set out a couple of recommendations "[t]o clarify the Accord in order to reassure those who are concerned without, however, modifying the Accord."[11] The first recommendation dealing with the spending power restrictions was a meaningless statement that they "do not interfere in any way with the government commitment stated in Section 36 of the Constitution Act of 1982"—the commitment to equality of opportunity for all Canadians.[12] This was

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10 *An Act to amend the Charter of the French Language*, S.Q. 1988, c. 54.

11 Minutes of Proceedings and Evidence of the Special Committee, *The Proposed Companion Resolution to the Meech Lake Accord*, 3 May 1990, trans. (Ottawa: Queen's Printer, 1990) at 32 (Chair: Hon. J. Charest).

12 *Ibid.* at 33.

an empty guarantee since nothing was done to offset the massive disincentive to initiating new national programs under the Accord.

The second recommendation proposed that a new provision stipulate that the distinct society clause was merely an interpretive clause that would work with, and not override, the *Charter* and would be used only when the courts had to decide whether a limit imposed by a government on our rights or freedoms was "reasonable" and "demonstrably justified in a free and democratic society." This was to prove, in my view, to be one of the most deceptive tactics displayed by the pro-Meech supporters, however well-meaning many of them might have been, and was to play a major role in the negotiations to the bitter end.

It is critical to describe how the deception worked. On the surface everything looked great: a statement to the effect that nothing in the distinct society clause would override our *Charter*. (Eventually the words "infringes or denies" were used in the final version which emerged in the form of the legal opinion annexed to the June 1990 companion agreement.) To the general public and media, this was seen as a major concession. Indeed, the *Globe and Mail*[13] and others referred to the proposal in laudatory terms when it surfaced, to no one's surprise, as a key recommendation of the Charest Report on May 17th.

Yet, the proviso in the proposal was the key element and it expressly authorized what was merely implicit or vague in the distinct society clause: it would make it easier for the Quebec government to justify measures similar to Bill 178 despite any infringement of our basic rights. In other words, the Tassé recommendation would make it virtually certain that a future court considering Bill 178-type legislation would uphold it under section 1 of the *Charter* (the reasonable limits clause), with no need for the Quebec government to resort to the notwithstanding clause (which requires re-enactment every 5 years). No matter how you cut it, the Tassé recommendation, or any variation thereof, did nothing to eliminate, and indeed reinforced, the expanded ability of the Quebec government alone to justify limits on rights and freedoms, thereby effectively creating different classes of Canadians and a hierarchy of rights.

To me, quite apart from the deception, the entire exercise was a futile attempt to try to square the circle, and it avoided addressing the fundamental issues upfront. It is clear that the Quebec government wanted, among other things, to have the ability to override the language rights in the *Charter* which are protected from even the notwithstanding clause. Its legal advisors believed that the distinct society clause power could enable such a result. More specifically, the Quebec government had indicated that it disagreed with the constitutional guarantee of access to education in English to Canadians who may move to

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13 "Keeping the Meech Lake Door Open" *The [Toronto] Globe and Mail* (18 May 1990) A6 and an earlier editorial commenting specifically on the Tassé presentation, "Meech Lake Was No Hasty Product" *The [Toronto] Globe and Mail* (8 May 1990) A6.

not been the intention of the authors of the legal opinion to take away from the Meech provision (appendix C).

Needless to say this was yet another concrete example of the complete lack of any real concern for aboriginal affairs, let alone the *Charter,* in the hothouse atmosphere in Ottawa. It also demonstrates unequivocally how critical it will be in future to change the process of constitutional reform and to broaden it to include the wide range of persons whose interests are clearly affected. As the renowned *Economist* newspaper put it in a lead editorial on the eve of the Accord's death:

> The answer of Mr. Mulroney...[to the demand that Quebec's distinctiveness does not give it the power to trample on the freedoms enshrined in the Charter], was to have six lawyers write an "opinion" last week that the charter of rights [sic] would not be denied or infringed by the application of the distinct-society clause. The opinion is not signed by any of the provincial premiers, and Mr. Robert Bourassa, Quebec's premier, was quick to promise Quebeckers that it would carry no legal weight. This is no way for a serious country to change its constitution, particularly if it lodges a fatal ambiguity in the constitution's heart. Unfortunately, it epitomizes Mr. Mulroney's approach to Quebec.[15]

CONCLUSION

I have set out the Charter aspect of the Meech Lake debate in some detail in the hope that this will contribute to greater understanding of the forces underlying the failure of the Accord. This, in turn, should ensure that as we undertake serious constitutional reforms, we not only implement an entirely new and open participatory process of constitutional reform, but also recognize the strong commitment of all Canadians to the *Charter of Rights and Freedoms.*

As for those who continue to try to argue that the opposition to the Accord was restricted to a mere seven percent of the Canadian population in three small provinces, I challenge them, as did journalist Richard Gwyn in a recent article[16] to read the over 30,000 letters received by Premier Wells since his first major intervention on the constitutional front in November 1989. As Gwyn perceptively notes, "they will find there the exposed, nerve-ends of a nation,"[17] and in my view, they inevitably will find themselves asking for what purpose was the Canadian body politic put through such unnecessary trauma and tension, the damaging consequences of which will be of far greater long-term significance than the rejection of the Accord.

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15 "Canada and Quebec" *The [London] Economist* (16 June 1990) 12.

16 R. Gwyn, "Wells' Mail Shows Gap Between People, Leaders" *The [Toronto] Star* (13 August 1990) A13.

17 *Ibid.*

It is my hope that all Canadians, including of course our leaders, will rise above the petty squabbles, intolerance, and misunderstandings that have so regrettably characterized our recent past. We must remember how we are regarded with envy and admiration in so many parts of the world and realize how bemused are those on the outside looking in to see us in our present state of disarray. There are so many urgent challenges facing Canada and the world right now that we must not, however inadvertently, hobble ourselves through constitutional discord, and fail to set the examples that so many people expect of us.

In this connection, I will briefly mention my experience in Peru and Bolivia where I spent most of July "demeeching" myself. Peru in particular is a country where people are so desperately poor that they will use knives to slash open the knapsack on your back just to try to steal what little of value might be in it. Young people without homes regularly die in the street at night from the cold or from unnatural causes. This is a country where you dodge terrorists who prey on people's insecurity and fear for the future with everything from random assassinations to disruption of water and electricity supplies, where street vendors will engage in violent riots merely to acquire a paltry licence to sell.

Whenever I mentioned that I came from Canada, you could see the envy and admiration light up people's eyes. When, as I often did, I spoke in French (since French is closer to Spanish), most of them were incredibly clear about the bilingual status of Canada, the distinctiveness of Quebec, and our overall difference from Americans. And they valued this greatly.

I left Peru as internal tensions were rapidly escalating and just a few days before the newly installed government declared martial law and suspended all civil liberties. I clearly remember thinking how lucky I was to be returning to Canada and wishing that all Canadians could spend a few weeks in a place like Peru to appreciate what we have and what we must preserve and promote.

In conclusion, I hope now as we embark on yet another significant constitutional reform debate, we will this time heed the following wise and timeless advice of constitutional expert and poet, Frank R. Scott:

> Changing a constitution confronts a society with the most important choices, for in the constitution will be found the philosophical principles and rules which largely determine the relations of the individual groups to one another and to the state. If human rights and harmonious relations between cultures are forms of the beautiful, then the state is a work of art that is never finished. Law thus takes its place, in theory and practice, among men's highest and most creative activities.[18]

18 F.R. Scott, "The State as a Work of Art" (1940s) [unpublished].

APPENDIX A

OTTAWA
June 9, 1990

Dear Prime Minister:

In response to certain concerns which have been expressed in relation to section 1 of the proposed Constitution Amendment, 1987 (Meech Lake Accord), it is our pleasure to confirm our opinion on the following.

In our opinion, the Canadian Charter of Rights and Freedoms will be interpreted in a manner consistent with the duality/distinct society clause of the proposed Constitution Amendment, 1987 (Meech Lake Accord), but the rights and freedoms guaranteed thereunder are not infringed or denied by the application of the clause and continue to be guaranteed subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, and the duality/distinct society clause may be considered, in particular, in the application of section 1 of the Charter.

The Constitution of Canada, including sections 91 and 92 of the Constitution Act, 1867, will be interpreted in a manner consistent with the duality/distinct society clause. While nothing in that clause creates new legislative authority for Parliament or any of the provincial legislatures, or derogates from any of their legislative authority, it may be considered in determining whether a particular law fits within the legislative authority of Parliament or any of the legislatures.

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APPENDIX B

NEWS RELEASE

June 14, 1990 For Immediate Release

Professors of constitutional law from universities across Canada are concerned about the use being made of a legal opinion attached to the First Ministers' agreement on the Meech Lake Accord.

In a letter to Prime Minister Brian Mulroney today, 11 law professors from nine universities, with extensive credentials in constitutional law and human rights, state their disappointment that the legal opinion is being portrayed as a reassurance to Canadians that their rights and freedoms will not be affected. The professors include two Deans of Law and two Officers of the Order of Canada.

"The legal opinion doesn't say what the politicians are saying it says," said John Whyte, Dean of the Faculty of Law at Queen's University. "In fact, it says the opposite. It says that the distinct society clause can lead to weakening our basic rights and freedoms under the Charter."

He explained that this is contained in the phrase in the legal opinion: "the duality-distinct society clause may be considered in particular in the application of section 1 of the Charter"; and that Section 1 is the section which permits limitations to be placed by governments on Charter rights.

Whyte went on to say that the legal opinion indicates that the distinct society clause could be interpreted to expand provincial legislative power. "This is not how the agreement is being portrayed to the public," he added.

"We think Canadians must be aware of the full implication of this opinion," said Professor Bryan Schwartz of the University of Manitoba.

Professor Lorraine Weinrib of the University of Toronto noted, on behalf of the group, "In a time of universal acceptance of the importance of strengthening protection of human rights and fundamental freedoms, we are disappointed that this letter is put forward as reassurance of adequate protection of the rights and freedoms of Canadians."

A copy of the signature sheet of the letter to Mulroney is attached. Publications by these professors include: Whyte: Canada Notwithstanding, Canadian Constitutional Law; Bayefsky, co-ed: Equality Rights and the Canadian Charter of Rights and Freedoms, Canada's Constitution Act 1982: A Documentary History; Gibson: The Law of the Charter: General Principles, Equality Rights in Canada; Schwartz: Fathoming Meech Lake, First Principles, Second Thoughts; Smith, ed: Righting the Balance: Canada's New Equality Rights.

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HALIFAX
MONTREAL
KINGSTON
TORONTO
OTTAWA
WINNIPEG
SASKATOON
EDMONTON
VANCOUVER

June 14, 1990

Dear Prime Minister:

On June 9, 1990 you received an opinion from six constitutional lawyers, consulted by the First Ministers, which was appended to the final Communiqué of the First Ministers' Meeting on the Constitution.

We are concerned by the use which has been and continues to be made of this opinion to assuage concerns about the impact of the Meech Lake Accord on the Canadian Charter of Rights and Freedoms and on provincial powers.

The six lawyers make two points. First, they fully recognize that the distinct society clause will be relevant in determining the limitations which can be placed on rights through the application of the Charter's general limitation clause, section 1. Under their analysis, the distinct society clause certainly could lead to weaker protection of the rights and freedoms of Canadians. It is therefore wrong to use this letter to support the claim that rights and freedoms could not be affected.

Second, the six lawyers clearly state that the distinct society clause will be relevant to defining the scope of constitutional authority. This means that provincial powers under the existing s.92 of the Constitution Act, 1867 could be expanded in scope when read under the interpretative mandate of the distinct society clause. Consequently, it is wrong to use this letter to support the claim that there could be no increase of provincial legislative authority.

We question the legal weight of a letter of this sort which has not been signed by the First Ministers or adopted by legislatures. Nevertheless, in a time of universal acceptance of the importance of strengthening protection of human rights and fundamental freedoms, we are disappointed that this letter is put forward as reassurance of adequate protection of the rights and freedoms of Canadians.

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Edmonton, Alberta

Lynn Smith
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Vancouver, British Columbia

APPENDIX C

APPENDIX C

OFFICE OF THE NATIONAL CHIEF

ASSEMBLY OF FIRST NATIONS/
NATIONAL INDIAN BROTHERHOOD

OTTAWA OFFICE:
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June 11, 1990 By Fax: 416-736-5736

Professor Peter W. Hogg, Q.C.
Osgoode Hall Law School
York University
4700 Keele Street
North York, Ontario
M3J 1P3

Dear Professor Hogg,

It was with a sense of dismay that my colleagues John Amagoalik of the Inuit Tapirisat of Canada and Chris McCormick of the Native Council of Canada and I read the legal opinion attached to the 1990 Constitutional Agreement which emerged from the First Ministers Meeting on Saturday, June 9, 1990.

Our dismay was occasioned by the fact that no account was taken of Section 16 of the proposed Meech Lake Accord which specially exempts subsection 91(24) from any adverse affects of the interpretation of the duality/distinct society clause.

The clear impression given by the legal opinion, to which you were party, is that any legislation emanating from the 91(24) powers would have to be considered in the light of the duality/distinct society clause.

My colleagues and I would be grateful if you would explain the implications of the legal opinion especially as it affects 91(24).

Any explanation that you can provide should be sent to me as a matter of urgency and I hope that you will have no objection if we bring it to the attention of the Ministers concerned and the Premiers in any conversations we would be having with them in connection with the Constitutional Agreement.

Yours sincerely,

ASSEMBLY OF FIRST NATIONS

Georges Erasmus
National Chief

c.c.: Mr. John Amagoalik, Inuit Tapirisat of Canada
Mr. Chris McCormick, Native Council of Canada

Peter W. Hogg
University Professor
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June 13, 1990

Georges Erasmus, Esq.,
National Chief,
Assembly of First Nations,
47 Clarence Street, Suite 300,
Ottawa,
Ontario, K1N 9K1.

By FAX: (613) 238-5780

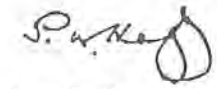
Dear Mr. Erasmus:

Thank you for your letter of June 11.

This will confirm that s.16 of the Meech Lake Accord expressly provides that nothing in the duality/distinct society clause affects s.91(24) of the Constitution Act, 1867. This means that the interpretation of s.91(24) will not be influenced by the duality/distinct society clause.

The legal opinion dated June 9, 1990, which was signed by me and attached to the 1990 Constitutional Agreement, was very brief and made no mention of s.16 of the Meech Lake Accord. In retrospect, it would have been better to add another paragraph describing s.16. But you may safely assume that there was no intention to negate the effect of s.16, and of course no legal opinion could negate the effect of s.16.

Yours sincerely,



Peter W. Hogg,
Professor of Law.