NEW CONSTITUTIONAL SIGNPOSTS: DISTINCT SOCIETY, LINGUISTIC DUALITY, AND INSTITUTIONAL CHANGES[1]

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The approval of constitutional changes by the provincial premiers and the Prime Minister gathered at Ottawa on June 2-3, 1987, bas been interpreted as a movement towards national reconciliation. If Quebec's refusal, in November 1981, to take part in the patriation of the Constitution as well as in the related changes did not affect the Constitution's legality, it did challenge its legitimacy. The Constitutional Accord of 1987 is properly seen as the "Quebec Round" in that it attempts to fulfil the conditions Robert Bourassa's government set forth to ratify the constitutional changes of 1982, or what is known in Quebec as the "Canada Bill."

The Constitution is clearly a juridical document in nature. It expresses, nevertheless, political compromises between different visions of federalism; any constitutional debate gives politicians and citizens the opportunity to promote their own conception of Canada (Simeon, 1988b, chp. 32). Amongst other objectives, the Canadian Constitution seeks to shape the exercise of political power, and any reform must therefore be viewed in terms of the transformation it causes in the political dynamics of intergovernmental relations.

The intention of this chapter is twofold. Our primary objective is to underline what is at stake in the Constitutional Accord of 1987 in terms of the reconfiguration of state power in Canada. From this perspective, many questions come to mind. Can we conclude that this agreement leans toward political decentralization, or, on the contrary,

does it maintain the orientation defined in the Constitution of 1982? Do the proposed institutional changes outlined in the Accord profoundly transform the course of intergovernmental relations? Is the power relationship between the federal government and the provinces modified?

The Constitutional Accord of 1987 has generated much debate regarding the nature of Canadian federalism. Our second objective is to present the significance of that debate for Canadian society. In Quebec the discussion has revolved around how to interpret the Accord, with the distinct society clause having monopolized most of the attention. But the problems raised by the Accord cannot be understood without attending also to what has been said outside Quebec. Indeed, the power struggle between the various conceptions of Canadian federalism will account for the success or failure of the 1987 Constitutional change.[3]

Furthermore, very little has been said in Quebec with respect to the institutional changes emanating from the Accord. We think these changes are significant and require particular attention.

Although our primary task is not to evaluate Quebec's gains or losses, our discussion centres on the five conditions officially set forth by the Quebec Liberal Party in May 1986. Following an overview of the intentions of the federal government, we will offer an analysis of the original underpinnings of Quebec's conditions, the stakes of the various actors, and the scope of the proposed changes.

The debates surrounding the Meech Lake Accord have been formulated around centripetal and centrifugal views of Canadian federalism. They accentuate, above all, the division of powers between the two levels of government (Scott, 1977, pp. 235-54). This raises the inevitable question: do the proposed changes increase provincial powers at the expense of federal powers?

For the proponents of the first vision, centripetal federalism, the federal level of the state is where the multitude of "national" interests are expressed, subsuming local and provincial particularities. From this perspective, the provincial level of the state cannot pretend to define the national interest. It is thus erroneous to believe that the

two levels of government are equal and have the same power and status. If the federal government has been vested from the outset with major economic jurisdictions, it was essentially because of, but also in spite of, the country's many distinct regional, cultural, and linguistic features. While the federal government must be aware of regional interests, in a sense it alone can claim to speak on behalf of all Canadians, for it is the only level of the state that is mandated to do so by the population as a whole.

For the proponents of the second vision, centrifugal federalism, Canada is perceived as the outcome of a contract: the provinces delegated some of their powers to an artificially created federal government. The provincial governments are considered sovereign in their areas of jurisdiction, and the only place where provincial interests can be suitably and fully expressed. Consequently, it is only normal that Quebec has at its disposal sufficient leeway to guarantee its cultural security and promote its distinctiveness (Mallory, 1965; Stevenson, 1979, pp. 50-78). Political decentralization thus contributes to the process of nation-building that characterizes Quebec. We should note that this centrifugal tendency does not necessarily mean an actual transfer of powers to the provincial level, but can also be expressed in terms of increased provincial control over central political institutions (Simeon, 1988a, pp. 371-72).

THE FEDERAL GOVERNMENT'S POSITION

The constitutional exercise of 1987 was an attempt to respond to the conditions laid out by Quebec. All premiers agreed to avoid multiplying their own demands in order to reach an agreement on the basis of Quebec's stated requirements. The momentum favoured a new round of constitutional negotiations, especially since Mr. Mulroney had solemnly promised in his 1984 federal election campaign to bring Quebec into the Canadian constitution with "honour and enthusiasm." Not only did the Trudeau-Lévesque polarization dissolve into a collaborative climate under the auspices of a prime minister whose philosophy was in harmony with that of Quebec Robert Bourassa, but the other premiers were similarly disposed to Quebec's initiative, given their objective of

attaining concessions in the area of federal institutional reform (Gagnon & Garcea, 1988, p. 316-317).

The Meech Lake Accord is constantly presented by the Prime Minister as a symbol of national reconciliation. This rhetoric leads one to believe that the federal government has put an end to the 1982 Constitution's centralizing tendencies – so much so as to favour increased power for the provinces. In fact, one of the underlying themes of the Meech Lake Accord is the recognition of the importance of the provinces (Canada, 1987b, p. 14). This theme is expressed in two complementary ways. On the one hand, the Accord specifies the role of both levels of government in terms of protection of linguistic duality, while granting Quebec's provincial government the role of protecting and promoting its distinct character. On the other hand, the Accord's proposed provincial participation in the nomination of Supreme Court judges and senators would sensitize the central institutions of the Canadian state to regional concerns.

Taking as proof the fact that the Accord fulfils the conditions set forth by Quebec in return for its signature on the Constitution, the Joint Committee of the Senate and the House of Commons claimed "there is no doubt" that it "reflects a more decentralized view of Canada than does the *Constitution Act 1982*" (Canada, 1987b, p. 15). The Committee was quick to add, however, that the distribution of powers was not modified despite the Accord's recognition of Quebec's linguistic duality and distinct character. According to this interpretation, the Quebec government was not granted new powers; at best, its role in the exercise of existing constitutional powers was made more explicit. In the opinion of the Joint Committee, white the recognition of Quebec's distinct character may bring significant changes, it does not compromise the principle of equality of the provinces nor does it grant Quebec a special status at the expense of the other provinces.

Senator Lowell Murray, Minister of State for Federal-Provincial Relations, declared that "three objectives will be achieved through the Accord: recognition of Canada's diversity and linguistic duality; respect for the principle of the equality of the provinces; and promotion of co-operation and collaboration among governments" (Canada, 1987c,

vol. 2, pp. 10-11). For him, the federal government's philosophy does not constitute a break with that of the preceding government. Instead, the Accord completes the work begun in 1981 (Canada, 1987c, vol. 2, p. 10) with a clearer understanding of the role that each level of government should play. It attempts at the same time to break away from the conflictual approach favoured by the Trudeau government (Boismenu & Rocher, 1988).

Be that as it may, the federal government remains vested with the mission of promoting national values, leaving to the provincial level the responsibility of expressing local and regional interests.

From this perspective, Quebec's re-entry into the Constitution represents the ultimate victory of this round of negotiations, especially as the federal government is well aware of the modest and reasonable nature of Quebec's demands. The Meech Lake Accord never would have been possible had the Parti Québécois remained in power. In 1985 the latter sought to exempt Quebec from practically all the provisions of the Charter of Rights and Freedoms and to increase its provincial legislative powers at the expense of Ottawa. The election of Robert Bourassa 's Liberal government modified the position of the Quebec government and created conditions that Ottawa deemed to be "clearly articulated, reasonable, modest in scope and based on the work of the previous twenty years" (Murray, 1988, p. 4). Quebec's return to the constitutional fold meant that it would henceforth recognize the legitimacy of the Canadian Charter of Rights and Freedoms and its judicial interpretations. For Senator Murray, Ottawa's principal spokesman on constitutional matters, "the Accord strengthens Canada by recognizing the legitimacy and clarifying the role of both orders of government in a few but very important areas of longstanding dispute" (Canada, 1987c, vol. 2, p. 11).

Having said this, we have yet to understand in what sense this philosophy will lead to a genuine modification of Canadian federalism, what implications the recognition of a distinct Quebec will have, what impact the institutional amendments will have on intergovernmental relations, and finally, what the emerging vision of federalism will be.

LINGUISTIC DUALITY AND DISTINCT SOCIETY

In 1985 the Quebec Liberal Party insisted that there be in the preamble of the new Constitution "a statement explicitly recognizing Quebec as the home of a distinct society and the foundation of the francophone element in the Canadian duality" (Dossier du Devoir, 1987, p. 53). This recognition of Quebec's distinctiveness echoed the desire to ensure the province's cultural security. Included in the theme of the province's cultural sovereignty – a theme dear to provincial Liberals – is Quebec's determination to obtain the power to plan its own immigration, to be in total control of its own areas of jurisdiction, and thus to limit Ottawa's spending power (Dossier du Devoir, 1987, p. 57). These demands have been met by including in the Constitution two interpretative guidelines: linguistic duality and distinct society. While the distinct character of Quebec is to be protected and promoted by that province's legislature and government, Parliament and the legislatures of all provinces are to guarantee Canada's linguistic duality. This double guideline of interpretation does not depart from the present jurisdictional division between the two levels of government.

The answer to Quebec's main request has posed once more the problem of the nature of the Canadian federation. In the public debates that ensued, two traditional and opposing concepts of federalism, reflecting relations between the francophone and anglophone communities, were once again put forward (Simeon, 1988c, pp. 10-11). What's more, the constitutional dynamic of the 1980s brought into play new actors who were equally vocal and intent on making their views known: cultural communities, Native nations, and groups defending individual or equality rights.

For the federal government, the distinct society clause demonstrates its intention to explicitly recognize a historical reality that had always been implicitly acknowledged, namely, that Quebec is different because of its language, culture, and civil code. Consequently, "insofar as the 'linguistic duality' and 'distinct society' clauses are statements of fact, they are neither revolutionary nor particularly innovative" (Canada, 1987b, p. 39). However, the admission that Quebec henceforth constituted a distinct society created the possibility of other collec-

tivities claiming a similar status. To be sure, it is not for the Accord to anticipate the future; in this case, it was merely a way of dealing with a pressing problem posed by Quebec's demands.

A Threat to Freedom

For the opponents of the Accord, with Mr. Trudeau leading, the notion of a distinct society is contrary to the consolidation of a "national sentiment." It allows Quebec to adopt policies that can contradict certain provisions of the Charter of Rights and Freedoms, and eventually deny that all Canadians are equal before the law. The Meech Lake Accord introduced the logic of collective rights into the Constitution, while the Canada Bill opted merely for the affirmation of individual rights; the federal level of the state seemed to be the principal defender of the rights of citizens regardless of their place of residence. The federal government represents the society as a whole; it is founded on shared values and acts in the name of the general interest of the country. Hence, for Mr. Trudeau, the proposed amendment was nothing less than a massive shift towards provincial patriotisms, towards the idea that Canada is a nice country, but is made up of a collection of provinces, no more no less, and that our provincial loyalties will be enough. Just put that all together, and it will make loyalty to Canada (Canada, 1987c, vol. 14, p. 121).

Mr. Trudeau firmly believes it is the fundamental role of the federal government to preserve a common set of values, in spite of ethnic and geographic differences. The notion of a distinct society would be harmful. It would lead to the weakening of the powers held by the federal government, and reinforce provincial patriotism at the expense of Canadian patriotism:

> *When a province becomes distinct, when it says it is a society different from the rest of the society and it seeks more powers to maintain that difference, it is really saying that in a measure sovereignty is being transferred from the national government to the provincial government, and it is certainly contrary to what the whole Charter of Rights, including linguistic rights, tried to achieve (Canada, 1987c, vol. 14, p. 132).*

Essentially, the Charter of Rights and Freedoms bad eliminated the need for special protection for Quebec by protecting the linguistic integrity of all citizens. Recapturing the same controversial argument he made twenty-five years earlier in *Cité libre*, Mr. Trudeau saw the distinct society clause as an insult to the Members of Quebec's National Assembly and to the Québécois Members of Parliament: the former were deemed incapable of managing their province with the same powers as those vested in their provincial counterparts, while the latter, Mr. Trudeau inferred, did not genuinely represent their constituents in Ottawa.

The fact that the 1987 Accord introduced new concerns without profoundly modifying the Constitution Act of 1982 bas prompted Richard Simeon to conclude that the Accord did "tilt the balance" and "places both models [the model of Quebec as a distinct society versus the model of Canada in which dualism exists from sea to sea] of Quebec-English relations in the Constitution" (1988, 1988c, p. 11). Meech Lake can be seen as progress for Quebec when it states that "the role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec... is affirmed" (Canada, 1987a, p. 15). This recognition means two things: 1) for the first time the Quebec state and the Québécois community are constitutionally made to coincide, and 2) in this connection particular responsibilities are granted to the Quebec state. In the present context, however, the consequences of both are merely symbolic. In addition, the recognition of a distinct society in Quebec allows for reinstatement of the main components of Quebec's constitutional imagination, which have been so severely tested since 1980: the compact theory, the political and juridical veto, and the ability of unilateral federal action. It is impossible, at this stage, to say whether the consequences of this recognition will increase Quebec's powers or weaken the federal government's capacity to intervene. We can, however, appraise whether the linguistic duality and distinct society clauses will change both Ottawa's and Quebec's capacity to intervene, and, if so, how and how far.

Premier Bourassa believes the notion of a distinct society is highly significant and corresponds to an increase in Quebec's powers. His view is shared by Mr. Trudeau, who, for different reasons, views this

prospect with anguish. Downplaying Mr. Trudeau's alarmist understanding of "distinct society," the Special Joint Committee reminds us that the proposed amendment does nothing more than add a guideline for interpretation, which alters neither the present nor the future state of shared powers; nor does it modify the Charter of Rights and Freedoms. It will actually clarify certain grey zones. The Committee maintains 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 (Canada, 1987b, p. 46).

Hence, at the juridical level, and notwithstanding the effects of the clauses relating to spending power, Quebec obtained in the Accord a confirmation of its legislative powers without further provoking any constitutional asymmetry between itself and the other provinces. In this sense, Senator Murray rightly maintained that the Accord confirms the equality of the provinces, in that a certain number of changes related to federal institutions give them all a role to play in the process (Canada, 1987c, vol. 2, p. 15).

The Fundamental Characteristic of Linguistic Duality

The notions of distinct society and linguistic duality cannot be considered independently of each other. The Quebec state has the mandate to protect and promote the distinct character of Quebec society, but also to protect the fundamental characteristic of Canada, which is linguistic duality. Various principles of interpretation therefore coexist within the Constitution. However, the Accord explicitly gives primacy to duality, as opposed to Quebec's distinct character, so that Quebec cannot rely on this Accord to restrict further the constitutional rights of its anglophone minority, on the one hand, and to shirk its obligation to promote and valorize multiculturalism, on the other (Woehrling, 1988a, p. 57; 1988b, pp. 29-31). This hierarchy, in which duality occupies the apex, distinct character the middle rank, and multiculturalism the inferior level, is clearly recognized by Senator Murray, who believes that there is no contradiction

between the concept of linguistic duality and that of a distinct society, as the latter forces the eleven governments to protect linguistic duality (Canada, 1987c, vol. 16, p. 46). He thus limits the interpretative scope of the distinct society clause when he contends that "the proposition means the Constitution should be interpreted in a manner consistent with Quebec's distinct character, but this recognition... applies only to linguistic duality" (*Le Devoir*, May 8, 1987, p. 4).

Beyond the consequences of linguistic duality for Quebec society, it is important to remember that many groups have manifested their apprehension about the weakness of the duality principle. This was especially the case for francophones outside Quebec and Anglo-Quebecers, as well as representatives of cultural and Native communities and women's groups.

The debate around the protection of civil rights emphasized a new dimension of the constitutional dispute. Since 1982, the Canadian Charter of Rights and Freedoms bas helped to highlight the contradictions between two visions of the Constitution: a Constitution of governments versus a Constitution of citizens (Cairns, 1988, p. 141). The proposals put forward by different groups demonstrated that the Constitution no longer concerns merely the question of intervention between two levels of government, but directly touches upon the relations between citizens and the state. Yet the amendments sought by various actors in the name of citizens' rights have not gained support within the federal government, a fact which might be construed as the putting aside of the second vision of the Constitution to the exclusive benefit of the first.

Francophones Outside Quebec

The Federation of Francophones Outside Quebec (FFOQ) bas focused on two complementary dimensions: collective rights in relation to individual rights, and the promotion of linguistic duality (Canada, 1987c, vol. 3, pp. 5-8). FFOQ considers the scope of section 2(1)a of the Meech Lake/Langevin Accord too restrictive. Even though the April 30, 1987, proposal at Meech Lake recognized the presence of two communities in Canada, that of June 3 at the Langevin Building limited this recognition

to people who expresses themselves in French. The primary difficulty, according to FFOQ, lies in the fact that Canadian duality coincides solely with the notion of official languages. Yet, language policy is nothing more than the reflection of a cultural and sociological reality, namely, the existence of two large communities whose permanency constitutes such an essential condition for the development of the federation that a court ruling based on the recognition of collectivities would define the Canadian reality more aptly. The rights of minorities must be protected, not only in order to guarantee citizens access to institutions (schools, courts) in their language, but also to ensure their cultural survival. For the president of FFOQ, "the fragility of francophone communities requires strong constitutional guarantees in order to ensure vitality in the francophone dimension of Canada" (*Le Devoir*, May 27, 1987). With respect to the provinces' obligation to protect linguistic duality, FFOQ reminds us that the courts have traditionally interpreted linguistic rights in a restrictive manner, so that the provincial obligation to protect linguistic minorities cannot, at best, do more than maintain the *status quo*. This is why FFOQ insists that the provinces be held responsible for promoting linguistic duality – in order to obtain for francophones outside Quebec a status at least equivalent to that of the Anglophone minority in Quebec, whose survival is not as threatened. The federal government did not dispute the foundation of FFOQ's position, but claimed it could not convince the premiers to go any further. This situation illustrates the legal, social, and economic asymmetry between linguistic minorities in Canada, confirming the remarks of the president of the Franco-Manitoban Society, who maintained that "there will be a double standard in Canada when it comes to the treatment of francophones"; she deemed this situation to be "completely unacceptable, from both a moral and political point of view" (Canada, 1987c, vol. 11, p. 51).

Quebec Anglophones

The position of Quebec anglophones, represented by Alliance Quebec, most vocal defender and promoter of anglophone Quebecers' linguistic rights, mirrors the concerns of francophones outside Quebec (Canada, 1987c, vol. 8, pp. 79-85). Doing away with the asymmetry of the demographic, political, and economic situations of linguistic communities,

Alliance Quebec demands an identical status for francophone and anglophone minorities. In other words, they would like the Constitution to assert the role of provincial legislatures in the preservation and promotion of linguistic duality in Canada. Acknowledging the correctness of the notion of a distinct society, Alliance Quebec nevertheless adds that this should not infringe upon the rights of its citizens: "it is a repugnant notion to us that the fundamental rights of Canadians could vary, depending on who they are, where they live, what language they speak, or to which group they belong" (Canada, 1987c, vol. 8, p. 82). The distinct character of Quebec should, in no case, contravene the principle of full respect for individual rights. Alliance Quebec thus requested that article 16 of the Constitutional amendment of 1987 be amended to state clearly that nothing in the Accord will affect the rights and liberties stipulated elsewhere in the Constitution.

Alliance Quebec tries to neutralize the potential of the notion of a distinct society, whether in linguistic or other areas. Its demands, relative to the primacy of linguistic duality and the inalienable character of rights of freedoms recognized in the Canadian Charter, would in fact annihilate the distinct society clause. This is because the logic of individual rights leaves no room for collective rights. In this sense, and despite appearances, Alliance Quebec bas distanced itself from the position of francophones outside Quebec. While Alliance Quebec was careful not to launch a frontal attack on Quebec linguistic legislation, other anglophone interest groups were not so reserved. The Freedom of Choice Movement made clear their apprehension that with the distinct society clause, the principle of a unilingual French Quebec would be entrenched in the Constitution (Canada, 1987, vol. 9, pp. 5-8).

The Special Joint Committee's response to this fear was simple: the linguistic rights of Anglo-Quebecers are already inscribed bath in the BNA Act and in the Charter, and the probability of using the new article of interpretation to limit them is, in all respects, non-existent (Canada, 1987b, p. 52).

Natives and Cultural Minorities

Native representatives expressed numerous objections to the Accord. While they were not opposed to Quebec joining the Constitution, they did point out that the distinct society provisions excluded recognition of other distinct elements within Canadian society. The distinct society clause reinforces the binational conception of Canada, which fell into disuse after the patriation of the Constitution:

> *It perpetuates the idea of a duality in Canada, and strengthens the myth that the French and English peoples are the foundation of Canada. It neglects the original inhabitants and distorts history. It is as if the peoples of the First Nations never existed (Canada, 1987c, vol. 9, p. 50).*

Natives feel that recognition of a distinct society takes Canada away from the vision of a multicultural society, because the First Nations are not constitutionally considered as constituent members of the country.

These considerations were shared by the Canadian Ethnocultural Council, which fears that entrenchment of Quebec's rights in the Meech Lake Accord would be to the detriment of other social groups, namely, ethnic and linguistic minorities, Natives, and women. The Council believes "it is very important to avoid a situation where we have competition among societies within this country so that one society wants to claim it is more distinct that another" (Canada, 1987c, vol. 7, p. 55). Reiterating the fact that Canada is fundamentally bilingual and multicultural, the Council claimed that the notion of a multicultural heritage should also be considered a fundamental Canadian characteristic. Hence, even Quebec would have to protect and promote its multicultural heritage, and would thus be unjustified in claiming that the presence of ethnic minorities threatens its distinct character. The idea here is to deny the notion of a distinct society having a status superior to that of multiculturalism. Indeed, a broad interpretation of multiculturalism would render obsolete all references to Canadian duality, because multiculturalism "includes English and French ethnic groups in whatever way they wish to state their eth-

nocultural heritage" (Canada, 1987c, vol. 7, p. 95). In other words, representatives of ethnocultural organizations believe the notions of linguistic duality and distinct society, because they are blind to the pluralism that characterizes our society, could be detrimental to the status of multiculturalism.

The Special Joint Committee's response to its critics recalls the constraints of the constitutional exercise and the objectives sought. It was imperative that Quebec's demands be addressed. In addition, the interpretation ruling in question does not attempt to take into account all the fundamental characteristics of Canada, but refers to one of them (Canada, 1987b, p. 54). Far from closing the door on any new modification, the Accord of 1987 emphasizes one particular dimension of Canadian reality without denying the others.

Women and the Distinct Society

Women's groups, including the National Advisory Council on the Status of Women, have expressed their concern over the possibility that provincial legislatures (and notably that of Quebec, in the name of its distinct character) would exercise their power at the expense of the rights and freedoms guaranteed by the Charter. These groups fear the Accord will jeopardize the constitutional guarantees of women's equality because it does not place the Charter on the same footing with other constitutional documents. In order to ensure women's rights, the Council, and other groups demanded that those rights be explicitly expressed in article 16 (Canada, 1987c, vol. 10, pp. 84-85). This article stipulates that the article on linguistic duality and distinct society must not undermine the constitutionally recognized rights and liberties of Natives nor the provision favouring the multicultural heritage of Canada. As the scope of the expression "distinct society" is not specified in the Accord, the Women's Legal Education and Action Fund (LEAF) wondered "what will happen to the rights and freedoms of women and minorities within the distinct society?" This question is a serious one for LEAF, who, having taken stock of the Québécois culture's traditionally oppressive character with respect to protection of individual rights, and specifically the rights of women, believes that "discrimination is in fact culturally based" (Canada, 1987c, vol. 3, p. 115).

Responding to this interpretation, Quebec's Council on the Status of Women (CSW) suggested that Quebec has often played a leading role in the establishment of measures favouring the rights of women, and that "it would be a shame to give credence to the idea that the women of Quebec require more protection than others" (Canada, 1987c, vol. 15, 80-81). The CSW shares the Federation des femmes du Quebec (FFQ)'s belief that the Accord does not constitute a threat – direct or indirect – with respect to the equality rights of Quebec's women. Hence, for the FFQ,

> *the history of women's rights clearly illustrates that is not necessary to bring the concept of a distinct society into play for our rights to be compromised or threatened, and that the concept of a distinct society is a neutral concept within the context of women's rights (Canada, 1987c, vol. 13, p. 44).*

The right to equality is already recognized in the Canadian Charter of Rights and Freedoms. It sits at the top of the constitutional hierarchy and so the introduction of an additional clause of non-derogation would be redundant.

The vision of Canada conveyed by the 1987 Accord could eventually be interpreted as constitutionally entrenching the thesis of the two founding nations. Indeed, there are certain novelties in it for Quebec. The introduction of the distinct society clause goes further than the initial demands of Quebec's Liberal Party, which was content to have a statement of principle in the preamble of the Constitution. Also, the Accord acknowledges the responsibility of Quebec's political institutions in promoting the province's distinct character. Despite the interest generated by these innovations, however, they may be of little importance in practice.

Given the coexistence of a number of rules of interpretation within the Constitution, Quebec's "gains" seem very relative. The Accord gives precedence to the notion of linguistic duality, considering it a fundamental characteristic of Canada. Quebec's distinct character is not granted such a status. Hence, the protection and promotion of the francophone character of Quebec are possible only insofar as they

are achieved in conformity with the principle of linguistic duality (Woehrling, 1988a, p. 47). Furthermore, Quebec is not in any way vested with new powers to protect the linguistic duality of Canada, and especially the French character of Quebec society (Conseil de la langue française, 1988, pp. 22-23). In any event, taken in its context, does the notion of a distinct society mean anything more than the existence of "reverse linguistic duality" with respect to the situation outside Quebec? Considering the important network of health, education, information, and cultural institutions anglophones control (*Le Devoir*, January 25-26, 1989, p. 1), their fears do not seem justified, especially because the Constitution guarantees their protection as a minority in three ways: bilingualism in institutions, the supremacy of linguistic duality, and the Charter of Rights and Freedoms. However, the rights of francophones outside Quebec are not at all extended by the provisions of the 1987 Accord; the provincial governments' role of protecting minorities means, at best, the maintenance of the *status quo* as far as francophones are concerned.

The public debates raised by the Meech Lake Accord made it obvious that the historical logic of Canada-Quebec duality governed the process of negotiation. The critiques put forth by Natives and organizations representing ethnocultural minorities underlined the lack of attention to their needs as well as the inequitable character of the approach.

One should, nevertheless, remember that the text of the Accord of June 3 differs substantially from that adopted on April30, 1987. Although in the latter the notion of community is outlined with reference to "the existence of a Francophone Canada" not limited to Quebec, the final text of the Accord was amended to indicate "the existence of French-speaking Canadians," thus reinforcing the dominance of individual rights over collective rights, in accordance with the spirit of the 1982 Constitution. As Peter Leslie observed, "the accord makes marginal changes to the Canadian constitutional structure, establishing conditions Quebec can 'live with' but without altering the principles of the 1982 act" (1988, p. 129).

Furthermore, the recognition of the distinct character of Quebec society did not come complete with a transfer of powers from Parliament to the National Assembly. It seems fair to say that the centrifugal character of the agreement was particularly limited. The proposed constitutional change did not meet previous Quebec governments' demands for the transfer of constitutional powers. For all intents and purposes, it was a symbolic innovation whose real impact remains highly uncertain. Some commentators are concerned that the introduction of a new role of interpretation could, in doubtful cases or in certain grey areas of the Constitution, encourage Supreme Court judges to favour the provincial or, indeed, the Quebec point of view. Let us note in passing that such apprehension only reaffirms the current tendency to leave government in judges' hands. More importantly, given that the safety clause that ensures the powers, rights, and privileges of the national and provincial governments will not be modified as a result of the rules governing interpretation of the Constitution, the changes will be marginal in areas such as economic management (Courchene, 1988, pp. 77-78). The same could be said of any other area. For example, a recent study on the juridical logic of the Supreme Court and the 1987 Accord reasonably leads us to believe that had the latter been in force, the recent ruling on the language of signs in Quebec not only would have been the same, but would even have been vindicated by the provisions of the Accord (Woehrling, 1989).

In the light of the preceding, Simeon's observation and the Accord of 1987 did, in fact, "tilt the balance" between centripetal and centrifugal visions, should be nuanced. While it is true that Quebec takes on a new role through the 1987 Accord, the Accord does not modify the centralizing character of previous amendments. The centralistic logic of the exercise of power within the Canadian federation will continue to dominate our constitutional agenda. In fact, this tendency is quite clear in the constitutional changes suggested by the 1987 Accord.

Institutional Changes

The recognition of Quebec's distinctiveness is merely a prerequisite for the government of Quebec. Quebec's Minister of Intergovernmental

Relations, Gil Rémillard, stated the other conditions that would guarantee Quebec's full development and cultural security within the Canadian federal framework. Cultural security implies increased powers in the area of immigration and "the possibility for Quebec to act exclusively in its recognized areas of jurisdiction without federal government interference" (Dossier du Devoir, 1987, p. 57). The Quebec government also in tends to protect itself from all future modifications of the Constitution. Veto power for Quebec is thus crucial, as it would rectify the deficiencies of the present amending formula, which does not award financial compensation in all cases of "opting out," but does allow for modifications of federal institutions or the creation of new provinces without the explicit consent of Quebec. Moreover, as protection from informal constitutional modifications that could emanate from Supreme Court rulings, Mr. Rémillard requested the right to participate in the process of selecting and nominating appeal court judges.

These requests indicate a desire to make the evolution of Canadian federalism more sensitive to the aspirations of the provinces, especially Quebec. Be that as it may, the Quebec Minister of Intergovernmental Relations is still far from upholding the thesis of a special status for Quebec. At most, he is seeking a strengthened provincial role within federal institutions.

The Senate and the Supreme Court

Among the amendments proposed by the 1987 Accord, are new provisions concerning nominations to the Senate and the Supreme Court of Canada. From now on, the federal government should choose senators from names proposed by the provincial governments. In the same manner, appointments to the Supreme Court will be made from lists of nominees originating at the provincial level. In other respects, the Accord anticipates that at least three of the nine judges will be trained in Quebec's civil code tradition, that is, from the bar of Quebec, Quebec courts, or courts established by Parliament.

Through the provisions relating to the nomination procedure for senators (whose tenure is for a limited term), and with Senate reform on the agenda of future constitutional conferences, the federal govern-

ment has demonstrated its determination to discuss modifications of the role, functions, and powers of the Senate (Canada, 1987a, p. 5). Meeting Quebec's requests would enhance the chances of success for Senate reform, as Quebec's refusal since 1982 to participate in constitutional amendments would come to an end (Canada, 1987b, pp. 97-100). Quebec is unlikely to assent to a Senate reform that would reduce the authority and powers of provincial governments to the benefit of the federal government by making the Senate the main representative of provincial interests (J.-Y. Morin, 1988, p. 129).

All in all, the proposed changes do not constitute an important point in favour of the provinces. The federal government retains control over appointments, and nothing obliges it to accept candidates that do not satisfy it. Moreover, the provinces have the right to participate in the process, and henceforth hold at least a suspensive veto right. Beyond this, nothing indicates that the decisions to be reached by a tribunal composed of members indirectly designated by the provinces will exhibit a provincial bias. As for the genuine possibility of a deadlock in cases where a province, and specifically Quebec, decides not to submit any names, there is no mechanism in the Accord for remedy. Such a situation, however, would oblige the parties to undertake negotiations in order to reach an acceptable compromise, and would probably mobilize public opinion. The nomination process for judges, which dwells on the federal/provincial axis, illustrates the gap between the proposed amendments and the extension of the constitutional debate since 1982 to actors who do not conform with the traditional axis, namely, groups concerned with rights inscribed in the Charter.

The Amending Formula

With the general amending formula, based on seven provinces representing 50 percent of the population, the 1982 Constitution Act sanctions Quebec's loss of veto power. While it confirmed the general formula, the 1987 constitutional proposition essentially proposes two changes. First, it extends the rule of unanimity of provincial governments in matters related to institutional changes, such as the power of the Senate,

the nomination and provincial distribution of senators, the representation of provinces in the House of Commons, the Supreme Court, the joining of whole or parts of the territories to provinces, and the creation of new provinces (Canada, 1987a, pp. 19-20). Second, contrary to the provision of 1982, which limited compensation to areas of education or culture, the present proposition extends the principle of "reasonable compensation" to all amendments involving transferral of provincial legislative jurisdictions to Parliament.

In light of the preceding, the condition posed in 1985 by Quebec's Liberal Party – that "the constitutional amending formula must permit [Quebec] to efficiently preserve its present powers – is not formally fulfilled" (Dossier du Devoir, 1987, p. 53). However, the Quebec Premier bas justified this failure in declaring that the "withdrawal with compensation" formula provides guarantees comparable to those emanating from the veto right, because Quebec, like the other provinces, retains the possibility of refusing changes that would allow the federal government to operate to the detriment of the provinces and their exclusive power (Le Devoir, May 7, 1987, p. 1). Moreover, with regard to institutions, all provinces have a veto power. The proposed changes are thus part of the logic of a double juridical and political equality of the provinces.

In summary, the modifications to the amending formula inscribed in the Meech Lake Accord do not call into question the notion of equality of the provinces. This principle was agreed upon in 1982, and a step backward was unlikely (Boismenu, 1985, pp. 50-51). The right to withdraw with compensation modifies the traditional dynamic between the two levels of government by providing the provinces with a new tool of negotiation: the possibility of acting independently. Even if the risks of asymmetrical federalism remain hypothetical, the institutional modalities needed to make it real will be established. Nevertheless, it would be improper for Quebec to equate the right to withdraw with a veto right over the transfer of legislative powers to the Parliament.

Although the amending formula was, over the past two decades, one of the principal stumbling blocks between the federal and pro-

vincial governments, the public debate surrounding the Meech Lake Accord remained relatively silent on this matter. No doubt, this is due to the "reasonable" and "minimal" character of Quebec's requests (Leslie, 1987, p. 39). Since 1982, Quebec could hardly associate this question with a review of the sharing of jurisdictions. Overall, the 1987 modifications relating to the constitutional amending formula follow the same logic as the 1982 modifications. They represent not so much a transfer of power to the provinces as a new deal in terms of the dynamics of future federal-provincial negotiations, when it comes time to modify the Constitution once again.

The Federal Spending Power

One of the principal mechanisms of adaptation of the Canadian federation has been the federal government's ability to affect expenditures in areas of exclusive provincial concern. The Meech Lake Accord constitutionally entrenches Ottawa's power to spend in areas of provincial jurisdiction. Furthermore, it allows a province that does not participate in a national shared-cost program to receive reasonable compensation if that province "carries on a program that is compatible with the national objectives" (Canada, 1987a, p. 19).

This new provision is nothing Jess than a recognition of the federal government's legitimate power to spend in areas of provincial jurisdiction. It eliminates *de facto* the exclusive character of provincial jurisdictions enumerated in the BNA Act, by conferring on the federal government the right to intervene in areas of provincial legislative jurisdiction. Given this change, the right to withdraw with compensation merely represents a new methodological framework by which provincial powers are transferred to the federal level. Recourse to this right is conditional upon the establishment of programs compatible with national objectives, as defined by Ottawa. This provision constitutionally confirms that the provinces no longer enjoy the exercise of full control in either the elaboration of their programs or the choice of whether or not to intervene. According to constitutionalists such as Andrée Lajoie, the provincial legislative jurisdictions are now subordinated to the conditions posed by the federal executive (1988, p. 185).

This translates into an increase in the federal government's capacity to intervene and henceforth legitimately occupy areas of jurisdiction to which it was not previously entitled. The provincial governments will, in effect, attend to the decline of the powers granted them by the Constitution of 1867.

In terms of shared-cost programs, the constitutional amendment clearly highlights the antagonism between the provincialist and centralist conceptions of Canadian federalism. For the proponents of the provincialist conception, who criticize the Accord, the amendment constitutes an extension of federal powers and a reduction in the autonomous intervention capacity of the provinces. This suggests an explicit and constitutionally sanctioned transfer of power with regard to shared-cost programs, because it is the federal government that will ultimately determine national objectives in areas of provincial jurisdiction. Nonetheless, one must keep three elements in mind: first, this power is not absolute, because the proposed formula recognizes the right to withdraw with compensation; second, the expression, "national objectives" is likely to open the door to much flexibility when a dissident province administers a shared-cost program; finally, the principle of right to withdraw with compensation was put in place during the 1960s to respond to Quebec's refusal to allow the federal government to occupy provincial jurisdictions (Morin, 1972). In terms of this last aspect, the amendment merely recognizes the already existing reality, which was inspired by the principle of juridical equality of the provinces.

The criticism formulated by the proponents of centralization (trade unions, anti-poverty coalitions, women's groups, etc.) relies less on the constitutionalization of previous practices than on the potential difficulty of establishing new social programs comparable within all provinces. The clause would contribute to the "provincialization" of social programs by diminishing the federal government's power to impose the same standards coast to coast.

The federal government would not lose its *de jure* capacity to intervene. However, by virtue of the Meech Lake Accord, its spending power would be circumscribed by a new dynamic in intergo-

vernmental negotiations. On the one hand, the federal government must define national objectives in collaboration with the provinces if its programs are to be uniformly established across the country. On the other hand, the provincial governments are forced to intervene in areas predetermined by the federal government. If the modalities of application may vary when provinces exercise their right to withdraw, their margin of manœuvre will be limited because financial compensation will be conditional. Even though, in the last resort, disputes can be settled by the courts, it is most likely that both levels of government would want to limit the political and financial costs of decisions that would necessarily disfavour one of them. It would thus be incorrect to conclude that article 106A unjustly favours the provincial governments, since it has the potential to divert part of their powers to the federal executive. At the same time, Ottawa's ascendancy over the provinces is attenuated by the latter's right to withdraw if national programs do not correspond to their interests. The new framework of the federal government's spending powers could thus establish a new equilibrium between the two levels of government in matters of shared-cost programs, while not affecting in the least other federal powers that allow Ottawa to influence the provinces. It could reinforce and extend an intergovernmental dynamic based on the double principle of collaboration and competition.

Immigration

Among the five conditions posed by Quebec, that of immigration is inscribed in an essentially demo-linguistic understanding of the Quebec question. For Gil Rémillard, the need for cultural security, to which Quebec society has always been sensitive, can be satisfied through "Quebec's power to plan its immigration to maintain its francophone character by balancing or reversing demographic tendencies which may eventually diminish its importance relative to Canada" (Dossier du Devoir, 1987, p. 57). In response to this expectation, the Meech Lake Accord allows the federal government to make agreements with any province that so wishes. This agreement would therefore grant some constitutional protection. However, Ottawa would retain the power to establish the norms and objectives of Canadian immigration policy.

Within the purview of these provisions, the governments of Ottawa and Quebec agreed to "constitutionalize," after the adoption of the Meech Lake Accord, the terms of the Cullen-Couture administrative agreement of 1979. This political (as opposed to constitutional) accord established the modalities of participation of the two levels of government in the process of selecting immigrants. Furthermore, the two governments agreed to guarantee Quebec's share of Canadian immigration (corresponding to the proportion of Quebec's population plus 5 percent) and to ensure by means of a right to withdraw, reasonable financial compensation for Quebec when it is prepared to receive and integrate immigrants.

The constitutionalization of bilateral agreements in areas of immigration calls for some comments. To begin with, Ottawa will not lose any power. It will ratify agreements made with the provinces, and will remain responsible for establishing national norms and objectives concerning the creation of general categories of people not allowed to enter Canada. Provincial policies will have to operate within the ambit of the Charter of Rights, which guarantees immigrants the right to mobility (article 6). However, the modalities of agreement modification are inspired by the principle of mutual consent: the federal government and the provinces cannot adopt policies that will conflict with each other's interests. There is an element of rigidity in this, but also of flexibility, because this mechanism eliminates utilitarianism and promotes compromise. As for apprehensions regarding the Quebec-Ottawa provisions, consider two points: first, they sanction an administrative agreement that has raised very minor problems since it was put into effect, and second, the provisions in question should be the subject of bilateral negotiations, so that the present wording is by no means certain to be the final, official one.

CONCLUSION

Constitutional debates in contemporary Canada have continued to be sparked by the centralist and provincialist conceptions of Canadian federalism. The constitutional dynamic also continues to be dominated by federal-provincial relations. However, the entrenchment of the

Canadian Charter of Rights and Freedoms in 1982 helped establish the legitimate right of other actors to take part in constitutional matters. Hence, women's groups, Natives, and the different linguistic and ethnic minorities have promoted their points of view throughout the consultative process leading to the 1987 agreement between the first ministers. But despite their active participation, the terms of the debate remain confined within the logic of intergovernmental relations. We must wait for the next round of negotiations before the demands of these groups can become constitutionally entrenched.

The predominance of the Quebec-Ottawa dynamic throughout the discussions has been notable. It is the Quebec government that bas defined the agenda of the constitutional negotiations. In addition to the fact that the terms of the Accord attempt to fulfil the five conditions enumerated by Quebec, the federal government has continuously reminded us that the agreement was "closed" and would not undergo any change. The multitude of criticisms pertaining to the imprecision of the terms employed and the marginalization of the demands made by some groups – especially those of the First Nations (whose rights risk being compromised forever) – were not sufficient to reopen the Accord. This dynamic illustrates the fragility of the consensus obtained in spring 1987 between the signatories of the Accord. That consensus rested essentially on the need to solicit Quebec's adherence to the Constitution in order to ensure that other constitutional conferences would continue the review process. The Quebec government deemed the gains it achieved to be sufficient and lost no time in having the terms of the agreement adopted by the National Assembly. Whether Quebec in fact obtained enough and whether the initial demands conform to the history of constitutional negotiations between Quebec and Ottawa are totally different matters.

Two major questions are central to the Constitutional Amendment of 1987: the distinct society clause, and the provisions pertaining to the Senate, the Supreme Court, immigration, federal spending power, and the amending formula. It is clear from our analysis that the agreement (1) follows in the wake of the 1982 Constitution and reaffirms the principle of juridical and political equality of the provinces, despite the distinct society clause; (2) does not diminish in

any way the powers held by Ottawa, but rather modifies the dynamic of future federal-provincial relations.

All in all, the Meech Lake Accord does not respond to the major objections the Quebec government brought against the constitutional agreement of 1982 (Morin, 1988). It does award Quebec the right to withdraw with compensation whenever there is a transfer of provincial legislative jurisdiction to the federal level, in compliance with the request of the Parti Québécois government in 1980-81. The introduction of the distinct society clause does not give Quebec a special status nor does it introduce an asymmetry between the Canadian provinces. It does not invalidate any power held by the federal government. The dual role attributed to the government of Quebec – of protecting and promoting its distinct character – is enclosed within the fundamental characteristic of Canadian linguistic duality. In terms of linguistic policy, Quebec has no new assets. The constitutional amendment merely introduces a new guideline of interpretation in competition with others, leaving it to the courts to settle and determine the exact parameters according to the circumstances of Quebec's distinct character. The predominance of the Canadian Charter of Rights and Freedoms clearly emerges from the Accord, reaffirming the supremacy of individual rights over collective rights. Finally, the new rule of interpretation does not destroy the current logic of the juridical inequality of minorities. Despite the inscription of the principle of linguistic duality, the rights of francophones outside Quebec risk being less well protected in the future than those of Quebec anglophones.

The constitutional provisions concerning institutional changes do not affect the distribution of powers between the two levels of government. However, they imply a new dynamic between Ottawa and the provinces, because they rest on the need to establish a cooperative rapport in nominating and appointing senators and Supreme Court judges as well as managing shared-cost programs and immigration policy. Hence, the federal government and the provinces will have to collaborate on all appointments to the Senate and the Supreme Court and on future agreements in the area of immigration. The federal government will confirm its capacity to intervene and define

the national objectives of shared-cost programs in sectors of exclusive provincial jurisdiction, but subject always to consensual constraints, lest a number of provinces have recourse to their right to withdraw. In constitutional terms, Ottawa is not losing anything, even if, politically, certain provinces could use the threat of withdrawal to negotiate certain programs. The new amending formula extends the matters requiring unanimous consent and enlarges compensation to all matters concerning transfers of provincial legislative jurisdiction to the federal level. Once again, it involves less a decentralization of powers than the necessity to agree with the provinces on the increase of federal powers or the modification of central institutions. all these amendments are established in light of provincial juridical equality. The risk of asymmetry still exists, but only in terms of the provincial capacity to intervene in exclusive areas as defined by articles 91 to 93 of the BNA Act. Contrary to what is often asserted, the Meech Lake Accord was not "provincialistic." It only reinforced the centralistic tendency of 1982 by offering clearer signposts for the centrally inspired modifications affecting the provinces.

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3 For these reasons we give great importance to the testimonies presented throughout the summer of 1987 to the Special Joint Committee of the Senate and House of Commons. These public audiences served as fora for individuals and groups who wanted their position to be known, and the minutes of the meetings of the Special Joint Committee constitute an invaluable source of information.