NOTES

Meech Lake — The Reality of the Time Limit

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In a recently published piece, Gordon Robertson argued that the three year time-limit on the ratification of the Meech Lake Accord was illusory. He suggested that s.41 of the Consititution, under which ratification by all the provinces as well as the Senate and the House of Commons is required, contains the suitable amending formula for the Accord. Since s.41 is not associated with a time limit, the June 23, 1990 "deadline" for the Accord is meaningless.

In this reply, the author argues that Mr. Robertson's thesis is unconvincing. Although the matters within the Accord are inseverably bound, the different subjects may continue to attract different amending formulae. The Constitution does not contain any provision which permits the substitution of one amending procedure for another. In addition, Mr. Robertson's argument that s.41 is equivalent to the "highest level approval" is wrong because it ignores the temporal restrictions imposed by s.38(1). The author emphasises that there is not a hierarchy of consents, but rather that there are different qualities of consent, some more appropriate for certain subjects than for others. Finally, Mr. Robertson's purposive interpretation is flawed. It is true that the constitutional drafters wished to prevent s.43 or s.44 procedures from being used to amend s.42 subjects. However, they also wanted to prevent s:42 subjects from being brought under the s.41 unanimity formula, and the text of the section bears this out.

Dans un récent article, Gordon Robertson soutient que la limite de trois ans pour la ratification de l'Accord du Lac Meech est illusoire. Il suggère que l'article 41 de la Constitution, qui requiert la ratification par toutes les provinces, ainsi que par le Sénat et la Chambre des communes, représente la formule d'amendement la plus appropriée à l'accord. Puisque l'article 41 n'impose aucune date limite, l'échéance du 23 juin 1990 est vide de sens.

Dans cet article, l'auteur réplique que les propos de M. Robertson ne sont pas convaincants. Bien que les thèmes majeurs de l'accord soient inextricablement liés, les points individuels peuvent être soumis à différentes formules d'amendement. La Constitution ne contient aucune disposition permettant de substituer une formule à une autre. De plus, l'argument de M. Robertson à l'effet que l'article 41 équivatu au "plus haut degré d'assentiment" est erroné puisqu'il fait abstraction des limites temporelles de l'article 38(1). L'auteur souligne qu'il n'existe pas une hiérarchie d'assentiments, mais plutôt différentes formes d'assentiment, et que certaines sont mieux adaptées à certains sujets que d'autres. L'auteur conclut que l'interprétation de M. Robertson, basée sur l'objectif poursuivi, est inadéquate. Il est vrai qu'on a tenté de faire en sorte que les procédures décrites à l'article 43 ou à l'article 44 ne servent pas à amender des sujets compris à l'article 42. Toutefois, on a aussi voulu éviter que les sujets de l'article 42 ne soient soumis à la règle d'unanimité de l'article 41, et le texte de la section en fait bien état.

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In the Institute for Research on Public Policy 'Newsletter', Volume III, Number 3, May/June 1989, Gordon Robertson published a piece entitled 'Meech Lake — the Myth of the Time Limit'.[1] It was an interpretation of the amending formula contained in the *Constitution Act, 1982*.[2] According to Mr. Robertson, the formula would impose no time limit on the ratification of the amendments contained in the Meech Lake Accord. This is a startling conclusion. As Mr. Robertson pointed out, spokesmen for the Government of Canada, and for some of the provinces, have frequently suggested that the Accord will die if it is not ratified by all eleven Canadian governments within three years from the adoption of the resolution initiating the procedure. That initiating resolution was passed by the Quebec Assembly on June 23, 1987, making the ratification expiry date June 23, 1990. Mr. Robertson, with all the authority of the senior advisor to Prime Ministers Pearson and Trudeau in the conferences of First Ministers on the Constitution from 1968 to 1978, argues that the 'solemn sentence of death' pronounced by the federal and provincial governments 'is almost certainly wrong'. In fact, this time it is Mr. Robertson who is almost certainly wrong.

The Robertson thesis is, at first blush, persuasive. It is categoric: s. 41 of the *Constitution Act, 1982* contains the necessary and unique amending formula for ratifying Meech Lake. It is direct: it proceeds on the basis of a strict textual construction of s. 41. According to Mr. Robertson, the Meech Lake amendments to the constitutional amending formula and to the Supreme Court attract the s. 41 procedure. That procedure calls for the unanimous approval by the Senate, the House of Commons and the legislative assembly of each province. The procedure contains no time limit for gathering the necessary approvals. Ergo, there is no time limit for the ratification of Meech Lake.

Meech Lake also contains proposals for constitutional change which fall within categories governed by s. 42 and s. 38(1) of the *Constitution Act, 1982*. The procedure to be followed in both of these categories is outlined in s. 38(1). It differs from the unanimity procedure of s. 41 in that it requires that proposed constitutional amendments be ratified by the Senate, House of Commons and only seven out of ten provinces containing 50% of the country's population. In addition, by way of s. 39(2), this procedure imposes a three year time limit on ratification of proposed amendments. Mr. Robertson's challenge is to explain how those provisions of Meech Lake, which would have attracted the time limit had they stood alone, somehow escape that time limit because they are included

[1]This interpretation has also been published as chapter three in Mr. Robertson's book *A House Divided(;) Meech Lake, Senate Reform and the Canadian Union* (Halifax: Institute for Research on Public Policy, 1989).

[2]Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*].

in a package with changes governed by an amending procedure containing no time limit.

Mr. Robertson accepts that challenge head on. He assumes that the amendments proposed in Meech Lake are not severable, that the various proposed changes are 'so inextricably bound up' that it cannot be assumed that they would have been adopted independently.[3] This assumption is plausible given that the Accord is a compromise package reached as a result of a negotiating process which would inevitably have involved concessions on some items for gains on others. All of the items are important, more than mere housekeeping matters. To allow some of them to stand, and others to fall, would upset the balance of the Accord. However, the provisions of the Accord are severable in the sense that they can be made operative standing alone: for example, the amendments affecting the Senate are not directly related to the amendments affecting the Supreme Court.

Accepting that the parts of the Accord are inseverable, Mr. Robertson uses three manoeuvres to do away with the three year time limit arguably attached to the proposed amendments in the s. 38(1)/s. 42(1) category. First, he proceeds on the basis that the Accord, being inseverable, must be covered by one, and only one, applicable amending procedure. He points out that the Accord's authors stipulated in two places in the Accord's recital that s. 41 was the appropriate ratification procedure. I will call this manoeuvre the 'single ratification formula' move.

The second manoeuvre is to label s. 41, the unanimity procedure, the 'highest level of approval'. That being the case, the theory is that it can be substituted for the s. 38(1) amending procedure as necessary. Even though s. 42(1) says that amendments affecting that category of subjects, 'may be made *only* in accordance with subsection 38(1)'(original emphasis), Mr. Robertson states that s. 42(1), 'cannot mean what it appears to say'. To interpret the section literally, 'would be nonsense ... would be absurd'.[4] This is because s. 38(1) calls for ratification by seven of ten provinces with 50% of the population whereas s. 41 calls for ten of ten provinces with 100% of the population. For Mr. Robertson, s. 41 requires, 'everything that s. 38 does in the way of consent and approval and a good deal more'. I will call this manoeuvre the 'highest level approval' move.

The third manoeuvre attempts to bring s. 42(1) subject matters under the s. 41 amending procedure by demonstrating that such a move does not offend the intended purpose of s. 42 of the *Constitution Act, 1982*. According to Mr.

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[3]*A.G. Alberta.* v. *A.G. Canada*, [1947] A.C. 503 at 518. See P. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 325-27.

[4]Robertson insists on interpreting s. 41 literally, that is as a section containing no time limits. Somehow his penchant for literal interpretation wanes as he moves from s. 41 to s. 42.

Robertson, certain matters were included by s. 42 under the seven of ten provinces, 50% of the population amending procedure in order that they would not be included under either the s. 43 or s. 44 amendment procedures. Section 43 permits amendment of certain matters by Parliament and only the provinces affected; section 44 permits Parliament acting alone to make constitutional amendments where only its interests would be affected. As Mr. Robertson points out, using the 1912 territorial expansion of certain provinces as an example, without s. 42(1) it might arguably have been possible to accomplish the territorial expansion under either s. 43 or s. 44. In such a scenario, s. 43 or s. 44 would then provide a way of evading the seven of ten provinces/50% of the population consent requirements. The purpose of s. 42 was to prevent this by requiring a more broadly based consent where amendments would affect provinces, either directly or indirectly. It follows that s. 42 was never intended to exclude subject matters from the s. 41 unanimity procedure. I will call this manoeuvre the 'purposive interpretation' move.

These three moves unlock the Meech Lake ratification difficulty for Mr. Robertson. Even though the Meech Lake package contains matters attracting two different amending formulae, and even though the subject matters are inseverably bound, the moves enable Mr. Robertson to argue that there is, in fact, one amending formula which will get the whole job done. That formula is s. 41. Section 41 has no time limit attached to it. The three year ratification deadline disappears.

The difficulty is that each of these attempts to bring s. 38(1) and s. 42(1) subject matters under the s. 41 amending procedures fails under careful analysis. With respect to the 'one applicable formula' move, even if one considers Meech Lake to be an inseparable package, it does not follow that ratification must, or can, be achieved using only one amending formula. The different subject matters may continue to attract the appropriate amending procedures set out for them in the Constitution. Inseverability does not oblige, or even permit, the adoption of one convenient formula. Severability implies that all of the exigencies of the several amending formulae in play must be met. One could say that the inseverability feature of the amendment package makes the amending formulae themselves inseverable.

Why is this the case? Simply, when dealing with packages of reform proposals, the Constitution nowhere authorizes a special procedure which would permit either the abandoning of the ratification procedures appropriate to the subjects in question or the substitution of other amending procedures. The situation would be different if the Constitution contained the following clause:

> s.42(A) Where amendments to be made in accordance with the procedures under subsection 38(1) are inextricably linked with amendments to be made under section 41, for the purpose of ratification the amendments may be treated as one amendment to be made in accordance with the procedures under section 41.

However the Constitution does not imply such a clause, nor is it permissible to imply it. First, there is no need to imply such a clause: there is nothing in the package aspect of the Meech Lake situation which prevents the procedures actually set out in the Constitution from being followed. Second, consent requirements in the constitutional amendment process are strict requirements. If one is to err, it should be on the side of caution. When one amends the Constitution, one writes the Constitution. For the Constitution to retain its legitimacy as 'supreme law',[5] with the grave consequences flowing therefrom, it must be amended using the precise kind of consensus and in the precise manner called for. Otherwise, the moral authority of the Constitution is put in doubt. It does not add anything that the signators of Meech Lake cited s. 41 in the recital to the Accord. It is not for the authors of constitutional change to dictate the process of ratification. That task is left to the Constitution itself.

With respect to the 'highest level approval' move, the very fact that somehow Meech Lake ratification becomes *easier* using the 'highest level of approval' procedure suggests that something is wrong with the characterization of that procedure. In fact, there is no basis for saying that the s. 41 unanimous amending procedure is 'higher' than the s. 38(1) seven of ten, 50% procedure. When Mr. Robertson says 'higher', he is speaking in numerical terms. There is no doubt that all ten provinces includes any subset of seven provinces imaginable. This, however, entirely misunderstands the nature of the amending formula contained in the *Constitution Act, 1982*. Section 41 emphasizes the numerical element: one must have the approval of all of the eleven governments, and time is not a factor. Section 38(1) emphasizes the temporal factor: one need only have seven of ten provinces containing 50% of the population but the consents must be gathered within three years. Sections 43 and 44 emphasize the jurisdictional aspect: only those governments directly interested or affected by the proposed amendment need consent. Where those affected consist of the federal government plus some of the provinces, the s. 43 procedure is appropriate; where only the federal government is affected by the proposed amendment, s. 44 provides the appropriate procedure.

Under each of the three procedures, the quality of consent is different depending on whether the numerical, temporal or jurisdictional plane is emphasized. The Constitution calls for different kinds of consent depending on the subject matter of the amendment. The point is not that there is a hierarchy of consents, some high and some low; the point is that there are different qualities of consent, some more appropriate for certain subject matters than for others. The authors of the Constitution set out which amendment procedures were appropriate for which subject matters. It is not open to us to second guess their

[5]*Constitution Act, 1982*, s. 52.

judgment on what is appropriate in terms of approval by attempting to create a hierarchy out of what are essentially apples and oranges.

There is a beguiling simplicity in Mr. Robertson's "ten is greater than seven" assertion; it is a little more subtle to say that the temporal element can undermine the numerical truism. An example proves the point. Suppose that the federal government proposes to give to the provinces its s. 91(9) power over buoys in the *Constitution Act, 1867*.[6] The appropriate amending procedure is s. 38(1). Six provinces ratify the proposed amendment quickly. The four maritime provinces hesitate because of the cost of maintaining buoys. Finally the maritime provinces decide to ratify the amendment, but only manage to do so three years and one month after the first government to approve the amendment passed its ratifying motion. The amendment will fail because the exigencies of the temporal element of the s. 38(1) amendment procedures, as set out in s. 39(2), have not been met.

However, had the s. 41 unanimous consent procedure been the operative procedure in this buoy example, the amendment would have passed as s. 41 contains only a numerical, and not a temporal, element. Using Mr. Robertson's analysis, it would be possible to substitute the 'higher level' approval of s. 41 for the 'lower level' approval of s. 38(1) and thereby save the amendment. However, this cannot be correct. Nor could it be correct that the buoy amendment would be saved had it been included as part of an inseverable package. Even supposing the package attracted the recalcitrant four provinces, thus creating unanimity in the thirty-seventh month, why should the buoy amendment be approved when it could not have attracted the approval of seven out of ten provinces within thirty six months as would have been necessary had it been standing alone? Of course in this 'late consent' situation there is an answer and the answer would apply equally to the Meech Lake Accord. It is not, as Mr. Robertson suggests, to substitute one amending procedure for another. That does not meet the constitutional concern, implicit in the time limit requirement, that consent with respect to certain categories of amendment will go stale. The correct solution is for the provinces which did ratify the proposals within the original thirty six months to confirm their continuing consent by re-ratifying the package.

This is the point to deal with a red herring which Mr. Robertson raises. He correctly points out that (unlike in the above buoy example) the s. 38(1) subject matters in the Meech Lake Accord have in fact met the s. 38(1) approval requirements within the three year time limit. However, the three year period applies not to the gathering of approvals but to the issuance of the proclamation of ratification (s. 39(2)). In terms of the s. 38(1) procedure, it matters not whether the delay in ratification is caused for want of adequate consent (the ini-

[6]*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

tial buoy scenario above) or for an inability to sever certain proposals from a total package (Meech Lake). What matters is that for amendment of these particular subject matters, delay in ratification will cause consent to go stale. Re-ratification, not changing the rules of the game, cures the difficulty.

In sum, contrary to the suggestion made in the 'highest level approval' move, s. 41 does not require everything by way of consent that s. 38(1) does. What is missing from s. 41 is the temporal element.[7] It might well be harder to get the approval of seven provinces containing 50% of the population in three years than to get unanimity in an indefinite period of time. Given that, the conclusion that s. 41 represents a 'higher level' of consent than s. 38(1) fails. As a result, there exists no valid hierarchical principle of the Constitution which will permit the s. 41 procedure to be substituted for the s. 38(1) procedure when dealing with the s. 38(1) subject in the Meech Lake package. Because the s. 38(1) parts of the package are inseverable, if the package as a whole cannot be ratified within the three year time frame, it will fail.

With respect to the third manoeuvre, the 'purposive interpretation' move, Mr. Robertson only tells half of the story. True, the purpose of s. 42 was to prevent s. 43 or s. 44 procedures from being used to amend s. 42 subjects, such as new province creation. Sections 43 and 44 have smaller numerical consent requirements whereas s. 42 subjects have broad direct impact. But the purpose of s. 42, which expressly calls for the s. 38(1) procedure, was also to prevent s. 42 subjects from being brought under the s. 38(2) to (4) opting out provisions. The subject matters covered by s. 42 are such that were opting out to be permitted, the effect would be to create a provincial veto, a unanimity requirement, over any amendment in this category. The drafters of the 1982 amendment formula may not have wanted the federal government, with or without the support of only some provinces, to create new provinces. However, neither did the drafters want any one government to be able to veto such a move. This fits with the underlying movement in the 1982 amendment formula away from the rigidity of unanimity — away from simple numerical consent, and towards temporal and jurisdictional consent wherever possible. Contrary to Mr. Robertson's claim, s. 42 means exactly what it says. One cannot, in the guise of construing a section using purposive reasoning, ignore the section's express words, particularly when dealing with a constitutional amendment formula.

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[7]Professor Soberman has pointed out to me that this, in itself, is a serious constitutional lacuna. In the case where all consents but one were quickly obtained under the unanimity procedure, it can hardly be doubted that these assents would have gone stale should the last consent eventually arrive only twenty years later. Would the courts be required to determine what a reasonable time limit would be in the circumstances? What factors would be taken into account? In any event, such is not the case under review. The Constitution already stipulates a three year limit for s. 38(1) amendments. For these changes, there is no lacuna.

Where does all of this lead in terms of ratifying Meech Lake? Enough has been said to show that Mr. Robertson's quest to find a single amendment procedure to cover all of the changes contemplated by Meech Lake, while elegant, is futile. In order to identify the correct ratification requirement the subject matter of the various proposed amendments must be identified. These must then be matched with the appropriate amending procedure under Part V of the *Constitution Act, 1982*. There are three proposed amendments in Meech Lake which fall unambiguously within the purview of the s. 38(1) amendment procedure: those amendments affecting immigration, those dealing with shared cost programmes and those concerning the holding of First Ministers' conferences. There is one proposed amendment, that dealing with the alteration of the 1982 amending formula, which is caught clearly by the s. 41(e) unanimity procedure. There is one amendment, that dealing with the appointment of senators, which falls under s. 42(1)(b). The subject matters of two of the amendments are ambiguous when it comes to matching them to an appropriate amendment procedure. The 'distinct society clause' falls under either the s. 41(c) ratification procedure or under the s. 38(1) procedure.[8] The proposed amendments to the Supreme Court of Canada must be ratified under s. 41(d), if the current *Supreme Court Act* is already considered an entrenched constitutional document. If not, the Supreme Court amendments would fall under the s. 38(1) procedure.[9]

Recognizing the applicability of both the s. 38(1) and s. 41 amending procedures, and accepting that Meech Lake must be treated as a package, it follows that the only way the ratification requirements of the Constitution can be fully met is for the exigencies of both s. 38(1) and s. 41 to be fully satisfied. This is possible because the two sections are in no way incompatible. The sections together require that the Meech Lake changes attract the unanimous support of all eleven Canadian governments (the numerical plane) within three years of ratification by the first government (the temporal plane). This is exactly the position of the federal government, to date, when it refers to the possible death of Meech Lake in June, 1990.

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[8]It could be argued that this clause will affect the interpretation of all of the language provisions in the Constitution of Canada and as such comes under the unanimity ratification procedure. Section 41(c) includes under that procedure, 'subject to s. 43, the use of the English or the French language'.

[9]See Hogg, *supra*, note 3 at 62-64. Professor Hogg points out that the *Supreme Court Act* is not included in the definition of the Constitution of Canada given in s. 52(2) of the Constitution Act, 1982. The s. 41 unanimity amendment procedure only applies to an 'amendment to the Constitution of Canada'. Accepting this approach, to the extent that Meech Lake purports to entrench the Supreme Court in the Constitution, the s. 38(1) ratification procedure is the correct one. Thereafter, changes to the composition of the Court would be made under s. 41(d). Professor Hogg acknowledges and sets out the arguments of those who feel the *Supreme Court Act*, or at least its basic elements, are already entrenched in the Constitution.

It is possible that one day we will have an answer to the debate which Mr. Robertson and I have joined. If Meech Lake does not receive unanimous ratification within the three year, June 1990 deadline, there are three possibilities. One is that it could be allowed to die. Alternatively, the federal government might seek to proclaim those parts of the Accord subject to the s. 38(1) ratification procedure assuming that seven of ten provinces with 50% of the population still support the Accord at that point. Alternatively, the federal government might wait to proclaim the Accord at some moment after the three year expiry date when the remaining recalcitrant provinces have all added their consent (the Robertson solution).[10] In the scenario where an attempt is made to proclaim only a part of the Accord, it will likely be challenged in court on severability grounds. Quebec, for one, might well object to certain constitutional reforms being made before its demands with respect to the distinct society clause or the amending formula are met.

In the case of proclamation where Meech lake received unanimous consent, but only after the three year deadline, the Supreme Court would likely be called upon to decide whether ratification could proceed on the basis of unanimity or whether approval of the package necessitated respect for the temporal element of s. 38(1). At the end of his article, Mr. Robertson reveals the real reason why he is so anxious to do away with this temporal element. He is a fervent political supporter of Meech Lake. He would allow an indefinite time for gathering assent to the Accord which he qualifies as 'a major accomplishment' in the 'renewal of federalism'. However, this is a political position which will bear no influence on the Court if it is called upon to decide the amending formula issue.

Instead, the Court must base its decision on the text of the Constitution and on the constitutional principles which underlie that text. On the level of textual interpretation, I have argued that the Constitution makes no provision for reading s. 38(1) out of the amendment process. The reference in s. 42 to the s. 38(1) procedure is explicit. Similarly, s. 39 is explicit about the temporal aspects of the s. 38(1) procedure.

On the level of constitutional principle, Mr. Robertson himself recognized the importance that constitutional renewal carry 'conviction' when he discussed the failure to obtain Quebec's assent to the 1982 amendments. Acceptance of the Meech Lake proposal on the basis of unanimity built over a period longer than three years would also lack conviction. As mentioned, and as is implicit in s. 39 of Part V, consents without renewal become stale. It will be objected that

[10]Here I am leaving aside the possibility of the governments which ratified the Accord within the three year period re-ratifying the Accord as discussed earlier. In effect, the process of amendment would be re-initiated, something which, if done correctly, would not be constitutionally objectionable.

the s. 39(1) procedure for revoking consent takes care of this concern. However, after a certain passage of time, agreement requires something more than a failure to act if the agreement is to continue to carry force. It requires a positive affirmation of unimpeachable character if the new constitutional amendments are to command the authority necessary to give them legitimacy, even in the eyes of those citizens originally opposed. The necessity for a consent which respects the temporal element in the Meech Lake situation has been conceded by other Meech Lake supporters in Mr. Robertson's camp, most notably by the federal government.

If the Supreme Court of Canada is called upon to decide the issue, the case will likely be heard in 1991. The irony will not be lost on constitutional historians. Exactly a decade after the Court was first called upon to write an amendment formula for our Constitution, it would be called upon to do so again. We will know in a year if history is going to repeat itself.