

The Formation of Section 7 of the *Charter*¹

THE HONOURABLE ROY McMURTRY, O.C., O. Ont, Q.C.*

I am delighted to participate in this interesting *Ottawa Law Review* Symposium. I have been invited to give a personal overview of the patriation process which included an entrenched *Canadian Charter of Rights and Freedoms*.² Participating in the negotiations³ and Supreme Court reference⁴ were most memorable experiences for me. The result was that Canada actually changed from a parliamentary democracy to a constitutional democracy. The Supreme Court of Canada, of course, became the major institution in the interpretation of the *Charter*. Former Supreme Court Justice Frank Iacobucci⁵ played a major role in the evolution of the *Charter* and I very much enjoyed hearing his address.

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1 I have dealt at greater length with some of the events discussed in this address in my article "The Search for a Constitutional Accord: A Personal Memoir" (1982-83) 8 *Queen's LJ* 28.

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

3 As the Attorney General of Ontario within the Davis Government, the Honourable Roy McMurtry played a major role in the constitutional negotiations that ultimately led in 1982 to the patriation of the Canadian Constitution and the creation and entrenchment of the *Canadian Charter of Rights and Freedoms*. See RR McMurtry, "The Search for a Constitutional Accord: A Personal Memoir" (1982-83) 8 *Queen's LJ* 28 [McMurtry, "Constitutional Accord"]; RR McMurtry, "Historical Considerations in Relation to the Constitution" (1999) 18:3 *Advocates' Soc J* 6; RR McMurtry, "The Creation of an Entrenched *Charter of Rights*: A Personal Memoir" (2006) 31 *Queen's LJ* 456. See generally Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3d ed (Toronto: University of Toronto Press, 2004) at 92-126; Keith G Banting & Richard Simcon, eds, *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983); Robert Sheppard & Michael Valpy, *The National Deal: The Fight for a Canadian Constitution* (Toronto: Fleet Books, 1982).

4 *Reference re a Resolution to amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1 [*Patriation Reference*].

5 The Honourable Frank Iacobucci, CC, QC, has led a distinguished career and held positions including Dean of the Faculty of Law, University of Toronto; Interim President, University of Toronto; Chief Justice of the Federal Court of Canada; and Justice of the Supreme Court of Canada from 1991 to 2004. He is currently Counsel for Torys LLP and is a member of several boards and commissions, including the Board of Governors of the Law Commission of Ontario, the Board of Directors of the Higher Education Quality Commission of Ontario, where he is the Chair. In August 2011, he was appointed by the Government of Ontario to lead an independent review into enhancing First Nations representation on juries.

Immediately following the provincial election of September 18, 1975, I was appointed the Attorney General of Ontario. Québec, given its unique position and dare I say “distinct society” in Canada, had long been a matter of great interest to me. I felt strongly that some reform of the Constitution, particularly in relation to Québec, would have to become a political priority. I was also aware of the historical role that Ontario had played in the evolution of the *British North America Act*⁶ particularly in the context of strengthening provincial powers in advocacy before the Judicial Committee of the Privy Council in the United Kingdom.⁷

The emergence of the Parti Québécois⁸ as a serious alternative to the Liberal Government of Québec was a major factor in the renewal of constitutional discussions that had largely been in abeyance following the unsuccessful Victoria Conference of 1971.⁹

The Annual Premiers’ Conference in Edmonton in August of 1976, which I attended, was to be the first serious discussion at that level since Victoria. There appeared to be a degree of urgency, since Québec was in an election year and it was believed that some progress on the constitutional front might assist the federalist forces in the province.¹⁰

As a newcomer to the politics of the Constitution and as someone who cared deeply about the separatist threat in Québec, I was particularly enthusiastic about any initiatives that could bring about meaningful constitutional reform and satisfy the legitimate aspirations of Québec.

On this latter point, I soon learned that the traditional view of Québec political leaders was that patriation should await the resolution of all the other constitutional issues important to Québec and that, in fact, patriation should be the final step in Canada’s constitutional evolution. Progress on the constitutional front immediately before an election was not a priority for the Robert Bourassa¹¹ Government.

6 (UK), 30 & 31 Vict, c 3, now *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, App II, No 5.

7 See McMurtry, “Constitutional Accord,” *supra* note 3 at 32-34; Russell, *supra* note 3 at 34-52.

8 The Parti Québécois was formed in 1968 following the merger between René Lévesque’s Mouvement souveraineté-association and the Ralliement national, with the primary goal of obtaining political, economic and social independence for the province of Québec.

9 The Victoria Charter of 1971 had proposed significant constitutional reforms including, among other things, the addition of a miniature charter of rights, a plan for entrenching the Supreme Court of Canada in the Constitution, the abolition of the federal powers of reservation and disallowance and the introduction of an all-Canadian formula for amending the Constitution. The Victoria Charter had been negotiated and debated at the First Ministers’ Conference held in British Columbia’s legislative chamber between June 14-17, 1971, with great fanfare. However, on June 22, 1971, the Québec Liberal Government led by Robert Bourassa formally rejected the Victoria Charter, which had stirred political opposition and grown very unpopular within the province.

10 The Constitution was among those matters discussed in closed session at the 17th Annual Premiers’ Conference, held in Edmonton, Alberta, between August 18-20, 1976. See Canadian Intergovernmental Conference Secretariat, *Premiers’ Conferences 1887-2002* (2002), online: CICS <http://www.scics.gc.ca/CMFiles//premiers_report_e.pdf> [CICS, *Premiers’ Conferences*].

11 Robert Bourassa, GOQ served as a Liberal Party Premier of Québec from 1970 to 1976 and from 1985 to 1994.

The election of the Parti Québécois in November of 1976 clearly surprised Ottawa as well as most of Canada.¹² The election did not bode well for progress in the constitutional reform process, as there was a great deal of skepticism about the Québec government seriously participating in constitutional discussions.

In any event, there were many meetings leading up to the Québec referendum in the spring of 1980 but the Québec government's separatist agenda did not permit any real progress on any reform of the Constitution. While the majority of provinces recognized the importance of strengthening the federalist forces in Québec, they also had their own constitutional agendas.

Between the summer of 1978 and the end of 1979, there were no fewer than twelve major meetings between the federal government and the provinces.¹³ By the end of 1979, it was apparent that any further discussions would have to await the Québec referendum scheduled for the spring of 1980. Given the extent of the federal government's public commitment to "renewed federalism" during the referendum campaign, the Constitution was to become a priority again.¹⁴

At a meeting in June of 1980, the first ministers of Canada committed many of their ministers, including myself, to a long, hot summer of constitutional discussions.¹⁵ They agreed on a list of twelve subjects¹⁶ and a continuing committee of ministers was created from all provinces which would meet at regular intervals at different locations across Canada.¹⁷

The principle difficulty with the process was that most provinces had specific agendas or "wish lists" that would have to be satisfied before any real effort would be made to address the other issues.

12 The Parti Québécois (PQ) came to power and formed the Government for the first time in Québec on November 15, 1976. Receiving over 40% of the popular vote and more than 70 seats in the election, the PQ obtained well-beyond what was required to form a majority government in the province. The Parti Québécois had won only a handful of seats in the two previous elections.

13 See CICS, *Premiers' Conferences*, *supra* note 10; Canadian Intergovernmental Conference Secretariat, *First Ministers' Conferences 1906-2004* (2004), online: CICS <http://www.scics.gc.ca/CMFiles/fmp_e.pdf> [CICS, *First Ministers' Conferences*].

14 See Prime Minister's Office, *A Time for Action: Toward the Renewal of the Canadian Federation* (Ottawa: Government of Canada, 1978); Sheppard and Valpy, *supra* note 3 at 33. See also Russell, *supra* note 3 at 100-13; Banting and Simeon, *supra* note 3 at 75. The "No" side in the 1980 Québec Referendum, which favoured federalism, captured just under 60% of the total votes cast.

15 Private, informal meeting of the eleven First Ministers held on June 9, 1980, at the official residence of the Prime Minister of Canada (24 Sussex Drive). See Russell, *supra* note 3 at 110. See CICS, *First Ministers' Conferences*, *supra* note 13 at 72.

16 The list twelve of subjects comprised: Resource Ownership and Interprovincial Trade; Communications; A New Upper House, Involving the Provinces; Supreme Court; Family Law; Fisheries; Offshore Resources; Equalization; Charter of Rights and Freedoms; Patriation and the Amending Formula; Powers over the Economy (Economic Union, Trade and Commerce); and The Preamble/Principles.

17 The Continuing Committee of Ministers on the Constitution (CCMC), co-chaired by Jean Chrétien and Roy Romanow, held three week-long meetings during the summer of 1980; it met from July 8-11 in Montreal, Québec; July 14-18 in Toronto, Ontario; and July 22-24 in Vancouver, British Columbia. See Parliament of Canada, "Constitutional Conferences" (2007), online: Parliament of Canada <<http://www.parl.gc.ca/parlinfo/compilations/Constitution/ConstitutionalConferences.aspx>>.

Despite these obstacles, the ministers reached substantial agreement on a majority of the items on our agenda. However, in retrospect the major importance of the summer of 1980 was that the ministers representing each province gained a much better understanding of the concerns and aspirations of their sister provinces. More importantly perhaps, was that a number of personal friendships were created which would provide vital links between the premiers when the search for consensus was renewed in the fall of 1981.

Any cautious optimism that some of us harboured for at least some agreement at the First Ministers' Conference in September of 1980¹⁸ was soon dispelled before the Conference had even formally commenced. The Governor General¹⁹ hosted a dinner for the first ministers²⁰ and their ministers on the eve of the meeting. The formal portrait photograph barely had been taken when it became evident that an atmosphere of good will did not permeate the gathering. The obvious animosity between some of the English-speaking premiers and Prime Minister Trudeau²¹ was thoroughly enjoyed by a gleeful René Lévesque²² who made several references to

- 18 Federal-Provincial Conference of First Ministers on the Constitution, held between September 8-13, 1980, at the Ottawa Conference Centre. See CICS, *First Ministers' Conferences*, *supra* note 13 at 71.
- 19 The Right Honourable Edward Schreyer, PC, CC, CMM, OM, CD, was appointed Governor General in 1978. Mr. Schreyer was a strong advocate of Canadian unity and a promoter of bilingualism. During his term which lasted until 1984, Mr. Schreyer promoted the equality of women and the protection of the environment. Born and educated in Manitoba, he was first elected to political office in 1958 at the age of 23. During his political career, he would also go on to serve in both the provincial and federal legislatures, leader of the New Democratic Party of Manitoba, Premier of Manitoba (1969 to 1977) and as the High Commissioner to Australia. He now lives in Winnipeg, Manitoba, where he is involved in a number of charitable foundations and nonprofit organizations, including Habitat for Humanity and Ecojustice (formerly the Sierra Legal Defence Fund).
- 20 The First Ministers attending were The Right Honourable Pierre Elliott Trudeau (Chair), The Honourable William G Davis (Ontario), René Lévesque (Québec), The Honourable John M Buchanan (Nova Scotia), The Honourable Richard B Hatfield (New Brunswick), The Honourable Sterling R Lyon (Manitoba), The Honourable William R Bennett (British Columbia), The Honourable J Angus MacLean (Prince Edward Island), The Honourable Allan E Blakeney (Saskatchewan), The Honourable Peter Lougheed (Alberta) and The Honourable A Brian Peckford (Newfoundland).²⁰ The Government Leaders of the Northwest Territories and the Yukon Territory were invited to attend the First Ministers' meeting as independent observers.
- 21 The Right Honourable Pierre Elliott Trudeau, PC, CC, CH, QC, FSRC, was the 15th Prime Minister of Canada, from 1968-1979 and again from 1980-1984. Born and raised in Montreal, Québec, he worked as a lawyer, law professor, academic, author and journalist before entering federal politics in 1965. In 1967, he became the Minister of Justice in the Government of Lester B Pearson. As Prime Minister, Mr. Trudeau would, among other things, champion a number of important policies (the principle of a "Just Society," official bilingualism and multiculturalism) and prove a determinative force in significant political events (the October Crisis of 1970, the Québec Referendum of 1980 and the patriation of the Canadian Constitution in 1982). He retired from public office in 1984 and continued working as a lawyer and prolific writer in Montreal until his death in 2000.
- 22 René Lévesque, GOQ, was a reporter before he entered politics in 1960. He founded the Parti Québécois in 1968 and won the PQ's first majority government in 1976. As the 23rd Premier, he introduced the *Québec Charter of the French Language* (also known as "Bill 101"). In the 1980 Québec referendum, he campaigned on behalf of the PQ proposal to pursue Québec secession which was subsequently defeated. As Premier of Québec, Mr. Lévesque also played a significant role in the constitutional negotiations which, ultimately, led to the patriation of the Canadian Constitution. Québec would, however, never endorse the 1982 Constitution. He died in 1985, a few years after leaving public office.

the Prime Minister as the “princeling” who was “clearly out of sorts.” I remember telephoning my wife that night and stating that the meeting of first ministers had for all practical purposes ended before it had even officially begun.

We were not surprised, therefore, when Prime Minister Trudeau in October of 1980 announced his intention to unilaterally request that the United Kingdom patriate the Canadian Constitution.²³ The Governments of Ontario and New Brunswick were supportive and the battle would now shift to the courts. The Governments of Québec, Manitoba and Newfoundland initiated references to their appellate courts seeking declarations that the federal government’s patriation request without the support of the provinces was unconstitutional.²⁴

In January of 1981, I travelled to the United Kingdom to support Trudeau’s proposed patriation while assessing political attitudes about the Canadian constitutional controversy. My visit convinced me of two realities. Firstly, there was a surprisingly high level of political interest in our constitution; and, secondly, there would be no easy or routine passage of the Canadian constitutional patriation package by the Westminster Parliament.

My most important meeting was with the Attorney General, Sir Michael Havers.²⁵ He stated that while the United Kingdom Cabinet wanted to accommodate the request of the Canadian federal government, he was clearly concerned about the court challenges in Canada.

Immediately following my return to Canada, I wrote to him reiterating my views as to the importance of the resolution of the “legality” issue by the Supreme Court of Canada. I had become convinced, as a result of my meetings in London, that the Westminster Parliament would never act on our Constitution until the issue had been addressed by Canada’s highest court. In part, I wrote to him as follows: “My fear is that these worthy goals may be put in jeopardy by an approach which, in its haste, does appear insensitive to legitimate questions that others have posed as to legality, and perhaps inattentive to the need to gain the support of a broad consensus in Canada for the changes.”²⁶

23 Prime Minister Trudeau announced his Government’s intention to proceed unilaterally with patriation and other constitutional reforms, known subsequently as the “People’s Package,” to a live national television audience on October 2, 1980.

24 *Reference re Amendment to the Constitution of Canada*, [1981] CA 80, 120 DLR (3d) 385 (Qc CA); *Reference re Amendment to the Constitution of Canada* (1981), 7 Man R (2d) 269, 117 DLR (3d) 1 (Man CA); *Reference re Amendment to the Constitution of Canada* (1981), 29 Nfld & PEIR 503, 118 DLR (3d) 1 (Nfld CA).

25 The Right Honourable Lord Michael Havers, Baron Havers, PC, QC, was elected as a Conservative member of Parliament in 1970. He would remain in office until 1987 and hold various senior positions in the Government of the United Kingdom. He served as Solicitor General for England and Wales and then Attorney General for England, Wales and Northern Ireland in the Thatcher Government between 1979 and 1987. A number of high profile trials dominated his term as Attorney General, including the Yorkshire Ripper trial. In 1987, he was appointed Lord Chancellor and a life peer. He died in 1992.

26 Letter to the Right Honourable Sir Michael Havers, QC, MP, Attorney General of England from the Honourable R Roy McMurtry, QC, MPP, Attorney General for Ontario, January 30, 1981. Excerpted in McMurtry, “Constitutional Accord,” *supra* note 3 at 46-47.

As a result, the federal government reluctantly did agree to an early hearing by the Supreme Court and some weeks later it was announced that the historic arguments would commence on April 28, 1981.²⁷

It turned out that I would be the only Attorney General personally to make an oral argument as counsel for his or her government.

The two key questions that were being asked of the Supreme Court of Canada to determine were:

(a) Whether the federal government's unilateral request of the Parliament of the United Kingdom to amend the Canadian Constitution without the consent of the provinces was constitutionally legal.

(b) Whether there was an established constitutional convention whereby the federal government had generally sought the consent of the provinces before asking the Parliament of the United Kingdom to amend the Canadian Constitution.²⁸

For most scholars, constitutional conventions are political issues and are not justiciable by the courts.²⁹

The Supreme Court of Canada in 1981 was faced with an absolutely unprecedented situation. It was regrettable that our political institutions had failed to resolve the issue. The problem required a political solution; but, after years of political gridlock, the Supreme Court of Canada, in effect, was being asked to resolve the political dilemma. In any event, a majority of the Court held that there was a political convention that required the substantial support of the provinces for any amendment to the Canadian Constitution.³⁰

For me, the preparation and the five days of argument in the Supreme Court of Canada were immensely fascinating and invigorating experiences.³¹ The submissions and material presented to the Court contained a great deal of Canadian history, as well as law. In particular, it was emphasized that the lack of an already-defined process for patriation and the absence of an amending formula were constitutional anomalies, which were historical legacies of Canada's evolution from a colony to a nation.³² In 1867, the political reality of Canada was one of a "glorified colony" with a good deal of autonomy only in relation to local affairs. At that time, it was assumed that the future course of Canada's constitutional development would remain, to a considerable extent, the responsibility of the United Kingdom.

27 The Supreme Court of Canada heard oral arguments in the *Patriation Reference*, *supra* note 4 on April 28-30 and May 1 and 4, 1981.

28 *Patriation Reference*, *supra* note 4 at 762.

29 See e.g. Peter W Hogg, *Constitutional Law of Canada*, loose-leaf, 5th ed, (Toronto: Carswell, 2007), at 1.10. But see also Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 1999) ch 1.

30 *Patriation Reference*, *supra* note 4 at 910. The Supreme Court delivered its opinion on September 28, 1981, for the first time ever, on national television.

31 See e.g. Robert Sheppard, "Trudeau bid shows spirit of federalism Supreme Court told", *The Globe and Mail* (May 2, 1981) P1.

32 *Patriation Reference*, *supra* note 4 at 774.

The Court described the political stalemate; after more than fifty years of struggling for a consensus on patriation and an amending formula, it appeared that the political leaders had come to a complete impasse.³³

During the argument, it was suggested that even if the *Canada Act* were passed at Westminster, there was nothing to prevent a future United Kingdom parliament from rescinding the legislation. To this suggestion, I recall Chief Justice Laskin³⁴ directly replying that, if that totally unlikely event ever occurred, we would become, in his words, “floating constitutionalists.”

In July of 1981, while waiting for the Supreme Court of Canada decision, Minister of Justice Jean Chrétien,³⁵ Saskatchewan Deputy Premier Roy Romanow³⁶ and I debated the constitutional issues generally at the Canadian Institute for Advanced Legal Studies at Cambridge University.³⁷ As well as touching base with some politicians in London, it gave us the opportunity to discuss some alternatives over a few beers in that lovely university setting.

During my 1981 visits to London, I had taken every opportunity to stress that while the Westminster Parliament obviously had a vital role to play in the patriation process, it should avoid any temptation to make any political judgments in relation to the internal politics of Canada. Doing so would, of course, represent a major assault on the sovereignty of Canada. However, what appeared in January 1981 to be a genuine desire “to do the right thing for the Canadians”³⁸ had, by July, taken on some worrisome paternalistic dimensions.

This paternalistic attitude was experienced by Jean Chrétien as he told me of a dinner with some members of the Westminster Parliament. They had volunteered their personal views as to solutions for Canadian political issues, particularly related

33 *Ibid* at 904-05.

34 The Right Honourable Bora Laskin, PC, CC, FRSC, was appointed to the Supreme Court of Canada in 1970 after a 25-year career in academia. In 1973, he was elevated to the position of Chief Justice, which he held until his death in 1984. During his time on the Court, he was noted for his staunch support of strong federal powers under the Constitution.

35 The Right Honourable Jean Chrétien, PC, OM, CC, QC, has led a distinguished political career in Canada, holding a variety of influential positions in Canadian politics. He served as a Liberal member of Parliament, Cabinet Minister in the portfolios of Indian Affairs and Northern Development, Industry, Finance and Justice, among others; Deputy Prime Minister; and Prime Minister from 1993 to 2003. At present, Mr. Chrétien is counsel at the Ottawa office of Heenan Blaikie LLP, specializing in international law.

36 The Honourable Roy Romanow, PC, OC, QC, SOM, has held a variety of positions in the Canadian political realm. He led an influential career in the provincial politics of Saskatchewan, serving as a member of the Legislative Assembly, provincial cabinet minister, Deputy Premier and Premier from 1991 to 2001. He was also a key player in the discussions about constitutional amendment and patriation. He has received numerous recognitions for his work, including an appointment to the Queen's Privy Council and an appointment as an Officer of the Order of Canada. At present, Mr. Romanow holds the position of Senior Fellow in Public Policy at the University of Saskatchewan.

37 The Canadian Institute for Advanced Legal Studies at Cambridge University sponsors a series of law lectures on a variety of legal issues. The Right Honourable Paul Martin, Sr, PC, CC, QC, was responsible for the introduction of these biannual lectures at Cambridge: see <<http://www.canadian-institute.com/english/index.html>>.

38 See McMurtry, “Constitutional Accord,” *supra* note 3 at 45.

to Québec and national unity, even though they had never been in Canada. Jean Chrétien had the last word when, at the conclusion of the dinner, he stated that he was going to have lunch in Belfast the next day so he could provide his United Kingdom colleagues with the solution to the continuing divisions in Ulster.

The Supreme Court of Canada gave its decision on September 21, 1981 and I privately recognized that the Court's recognition of a constitutional convention would make it impossible for the federal government to obtain the agreement of the United Kingdom to pass the patriation legislation without substantial provincial support.

Following the Supreme Court of Canada decision, Roy Romanow and I met with Jean Chrétien in the latter's home for a post-mortem. It was now quite evident to us that some significant compromises were necessary if the continuing constitutional impasse was to be resolved. We reviewed various areas of possible compromise, as there would have to be certain ingredients in any agreement, including an entrenched charter of rights, despite the opposition of the majority of the provinces. On the other hand, the federal government would have to demonstrate some flexibility in relation to the amending formula, as well as its proposal for a referendum mechanism as an alternative amending process.

We were, in many ways, an unlikely team: the Liberal, francophone Minister of Justice; the New Democratic Party Deputy Premier and Attorney General from the Ukrainian community of Saskatchewan; and, the Conservative, Irish, Protestant Attorney General from Ontario. While we represented three political parties, separate regions and different linguistic and cultural traditions, these differences were never an issue and were simply a reflection of the Canadian mosaic. Our efforts were consistent with the Canadian tradition of working for and achieving consensus and unity out of our nation's diversity.

Some of the most simplistic rhetoric in relation to the constitutional debate surrounded the issue of the *Charter*. It was often unfairly suggested that those opposing the *Charter* were less interested in individual rights. The debate was, however, about how to best protect individual rights. The provinces in opposition sincerely believed that legislatures could provide this protection more effectively, while avoiding the potential of rigid judicial decisions in relation to the *Charter*.

This issue is demonstrated by this exchange that I remember between Saskatchewan Premier Allan Blakeney³⁹ and Prime Minister Trudeau in September of 1980:

Blakeney: Canadians ought not to have taken from them their fundamental right to participate in all political choices. If we were to decide to place the *Charter of Rights* in the constitution, we would be

39 The Honourable Allan Blakeney, PC, OC, SOM, QC, FRSC, served as Premier of Saskatchewan from 1971 to 1982. He had previously served as the provincial Minister of Health and was a key player in introducing the first comprehensive public medical health care plan in Canada. He died in early 2011.

taking out of the hands of the elected representatives and giving to the courts the power to decide some of the country's most significant political issues . . .

Trudeau: Well, I say "what is wrong with going to the courts," or "why shouldn't a minority which is adversely affected be able to call us to account in front of the courts?"

As well, a long line of distinguished constitutional experts and jurists had warned against the danger of a constitutionally entrenched charter upsetting the historic and delicate balance between Parliament and the courts.⁴⁰ The unhappy American experience in the nineteenth and early twentieth centuries was frequently mentioned. Judicial interpretation of the American *Bill of Rights* had blocked badly needed reform legislation in the areas of worker protection and child labour. It also played a role in upholding the legality of racial segregation. There was also significant opposition to embarking upon a major departure from the tradition of parliamentary sovereignty and transferring some of the policy-making responsibilities of elected legislators to an appointed judiciary. This opposition was motivated less by any lack of respect for our judicial institutions, than by a deeply held conviction as to the role of the elected parliamentarians.

At the same time many of the premiers were very resentful over the Prime Minister's widely-publicized, provocative and rather unfair accusations that the premiers were bartering resources and fish for rights.

In Ontario's view, the entrenchment of a charter of rights in our constitution was a valid response to a widely felt need. The *Charter* represented a balance between the dominant English and French legal traditions, and reflected the plurality of our country as a whole. Above all, it represented what Canada stood for as a nation: a basic respect for individual rights subject only to the wise restraints that could be "demonstrably justified in a free and democratic society."⁴¹ While each province had passed human rights legislation, it was important to Ontario that there be a charter of rights that applied equally throughout the country.

Throughout the course of the constitutional discussions following the May 1980 Québec referendum, Premier René Lévesque remained a dominant figure. His powerful and engaging personality became a very effective glue that helped bind the "Gang of Eight" opposing provincial governments. It was an unusual alliance, a separatist government joined with seven other provincial governments which were committed to the Canadian federation.

The phenomenon of Western alienation was an important contributing factor to the opposition of the Western premiers, which was fuelled considerably

40 See e.g. Bora Laskin, "Constitutionalism in Canada: Legislative Power and a Bill of Rights" in Bernard Schwartz, ed, *The Fourteenth Amendment: Centennial Volume* (New York: New York University Press, 1970) 172.

41 As reflected in s 1 of the *Charter*, *supra* note 2.

by the concentration of political power in Central Canada and the National Energy Program.

The provincial ministers were by now a fairly collegial group. Despite our differences, we had become quite close friends over the many months of our meetings. Having committed so much of our time and energy, further failure was a depressing prospect for us all, except for our colleagues from Québec.

As we approached the week of November 2, 1981, it became increasingly apparent to me that Alberta would be the key to any breakthrough. It was clear that a charter of rights was still crucial to any compromise. Alberta Premier Peter Lougheed⁴² did not appear to share the same deeply held philosophical convictions that motivated Premier Sterling Lyon⁴³ of Manitoba, and to a lesser extent Premier Blakeney, to oppose a constitutionally entrenched charter. However, it was also apparent that Premier Blakeney was becoming more prepared to accept an honourable compromise in the national interest.

I met with Jean Chrétien in Ottawa several days before the First Ministers' Conference of November 1981. We both agreed that we must do everything to prevent the issues from becoming too polarized within the first days of the meeting. I stated that I believed that there was a real possibility of a breakthrough at the First Ministers' Meeting, but that he must persuade the Prime Minister to avoid his argumentative style which was often unnecessarily provocative. I remember Jean replying, "the boss sure like to argue [pause] and he wins a lot of arguments [pause] but he can also lose the war." We agreed that a real degree of consensus was possible if a non-confrontational dialogue was maintained during the meeting.

The first day of the meeting suggested a more positive attitude in relation to the pursuit of an agreement than I had sensed at any earlier meetings. Furthermore, the Prime Minister had indicated privately to Ontario Premier Bill Davis⁴⁴ and me, a very frank awareness of the significant obstacles that would lie ahead in London in the absence of an agreement that included substantial provincial support.

After the opening statements, the eight opposition provinces decided to meet in private for the rest of the first day. This gave those of us in attendance from Ontario and New Brunswick an opportunity to have a very frank dialogue with the Prime Minister and Jean Chrétien.

42 The Honourable Peter Lougheed, PC, CC, AOE, QC, served as Premier of Alberta from 1971 to 1985 and as Chancellor of Queen's University from 1996 to 2002. A staunch supporter of provincial rights, Mr. Lougheed frequently quarrelled with the Government of Canada over increased federal incursion into matters relating to natural resources, including the 1980 National Energy Program.

43 The Honourable Sterling Lyon, PC, OC, served as Premier of Manitoba from 1977 to 1981 and as a judge on the Manitoba Court of Appeal from 1986 to 2002. A strong fiscal conservative, he also led the charge, successfully, for the inclusion of the notwithstanding clause in the *Charter* and, unsuccessfully, for the inclusion of property rights. He died in late 2010.

44 The Honourable William G (Bill) Davis, PC, CC, OOnt, QC, served as Premier of Ontario from 1971 to 1985. With his Progressive Conservative, "Big Blue Machine," he led a series of moderate conservative governments, both with minority and majority provincial parliaments.

The major issues related to the amending formula and the *Charter*. The Prime Minister was philosophically committed to a referendum mechanism as a device to go over the heads of the provincial governments if an important proposed constitutional amendment did not receive the necessary provincial support.

In any event, I had become convinced that the incorporation of a notwithstanding clause in the *Charter* had the best potential for an honourable compromise. This clause, which became section 33 of the *Charter*, would allow Parliament or a legislature to pass legislation notwithstanding a court decision declaring such legislation unconstitutional. Any notwithstanding clause would have to be renewed every five years. I was confident that such a clause would be rarely used given what I believed to be strong public support for a charter of rights. The clause would provide a form of balancing mechanism between the legislatures and the courts in the event that elected parliamentarians truly believed that a court decision was contrary to the public interest.

While the notwithstanding clause offended the Prime Minister's very absolutist view of a charter, he privately advised me earlier in the week that it was an option he would consider if it were absolutely necessary to obtain an agreement on a credible constitutional package.

Pierre Trudeau will always be remembered for maintaining rigid control of his emotions. It was therefore rather memorable to be treated to a prime ministerial rant as he raged against Prime Minister Margaret Thatcher.⁴⁵ He even suggested that if the stalemate with the United Kingdom continued that Canada should seriously consider withdrawing from the Commonwealth. I did respond by stating that this was not a thought that should be shared with Premier Bill Davis if he wished to retain Ontario's continuing support.

As the week progressed, it continued to be evident that Québec was not interested in any agreement whatsoever, and while the other opposing premiers appeared to be interested in some compromise agreement, they would be very reluctant to isolate Québec in the process. The emotional undercurrents, related to many of the provinces' continuing battles with Ottawa, were still a powerful unifying force among the Gang of Eight. This could well have produced another impasse if Premier Lévesque had not unwittingly provided the impetus for the breakthrough that led to the Québec government's isolation.

By Wednesday of that week, it became apparent that a very frustrated prime minister was becoming more attracted to the view that a referendum process would be the only way to break the constitutional deadlock. Many of the premiers were clearly shocked when Mr. Lévesque told the Prime Minister that he would welcome battling him on another referendum, when Trudeau suggested national

45 The Right Honourable Margaret Thatcher, Baroness Thatcher, LG, OM, PC, FRS served as Prime Minister of the United Kingdom from 1979 to 1990. Known as the "Iron Lady" for her resolute character, her tenure in office featured fiscally conservative policies, industrial privatization and a rapprochement with the United States while simultaneously distancing the United Kingdom from Europe.

referendums to decide the issues of the amending formula and an entrenched charter of rights.

I believed that Lévesque's enthusiasm for the referendum process might well isolate him from the other premiers in the Gang of Eight. These premiers would be strongly opposed to any federal government using a referendum process as a mechanism to bypass the provincial legislatures when seeking a constitutional amendment. During a recess, my brief discussions with a number of my provincial colleagues revealed that the referendum proposal might well provide the basis for the splitting of the Gang of Eight notwithstanding the reluctance of all provinces to isolate Québec.

In misjudging the depth of the antagonism of his provincial allies to the referendum procedure, René Lévesque had provided the rationale for what he would bitterly describe later as the "most despicable betrayal" and the "night of the long knives."⁴⁶ In fact, at this critical moment, it was his provincial allies who felt betrayed by Lévesque's support of Trudeau's referendum proposal.

Later that same Wednesday afternoon, Jean Chrétien, Roy Romanow and I compared notes as to what we believed to be essential ingredients for an agreement. The Prime Minister was not happy with the proposed amending formula without a Québec and Ontario veto, the absence of a referendum procedure and, in particular, the notwithstanding clause, but his acceptance of these proposals would be and were critical to the agreement.

In the final chapter of the drama leading toward the constitutional accord of November 5, 1981, Ontario played a major role as broker, facilitator, compromiser and mediator between the other provinces and Ottawa. Our focus had been indeed on finding workable agreements, not on sweeping revision. It is highly unlikely that Ottawa would have proceeded with its constitutional initiatives after September 1980 without the support of Ontario.

Just as personalities shape the events that shape nations, so do events shape personalities. The *New York Times*, in an editorial analyzing Canada's agreement on the Constitution, praised its leaders for their flexibility and judgment:

In a large and diverse country, few things are more difficult than forming its regions into a more perfect union. It took secession and a civil war to settle comparable arguments in the United States. All the more credit then to a mellowed Mr. Trudeau and his reasonable opponents for settling a hard dispute in democratic fashion.⁴⁷

However, the absence of the signature of the Government of Québec on the constitutional accord of 1981 was destined to continuously haunt the Canadian political scene in the context of national unity.

46 René Lévesque, *Memoirs*, translated by Philip Stratford (Toronto: McClelland and Stewart, 1986) at 333.
47 "Canada Finds a Way", Editorial, *The New York Times* (7 December 1981) A26.

In the context of the ongoing separatist-federalist struggle in Québec, I am often asked if I regret working for the federal-provincial accord of November 1981. I have never had any real regret, although Québec's signature on the accord would have made the patriation of Canada's Constitution an infinitely more celebratory event.

However, it should be remembered that public opinion polls in Québec were strongly in support of "renewed federalism,"⁴⁸ as was the majority of elected parliamentarians in Québec in 1982. While the absence of the Government of Québec's formal agreement will continue to be employed as a weapon by the separatists,⁴⁹ the reasons for a divided Québec are, in my opinion, far more complex and largely unconnected to the events of November of 1981.

48 Pierre Fournier, *A Meech Lake Post-Mortem: Is Quebec Sovereignty Inevitable?*, translated by Sheila Fischman (Montreal: McGill-Queen's University Press, 1991) at 4.

49 See Eugenic Brouillet, *La Négation de la nation: L'identité culturelle québécoise et le fédéralisme canadien* (Sillery, Que: Septentrion, 2005). Contra André Pratte, ed, *Reconquérir le Canada: un nouveau projet pour la nation québécoise* (Montreal: Voix Parallèles, 2007).

