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FRANK IACOBUCCI AS CONSTITUTION MAKER: FROM THE
QUEBEC VETO REFERENCE TO THE MEECH LAKE ACCORD
AND THE *QUEBEC SECESSION REFERENCE*†

1 *Introduction*

Frank Iacobucci occupies a unique place in Canadian constitutional history. As a Justice of the Supreme Court of Canada for thirteen years, he played a central role in the development of Canadian constitutional jurisprudence. Yet prior to his appointment to the bench, he served as deputy attorney-general of Canada between 1985 and 1988 and was a principal member of the federal team in the negotiations over the Meech Lake Accord. This accord was not only a legal but also a political document, reflecting and advancing a view of Quebec's place in the federation and proposing a set of constitutional amendments that would have implemented that vision. Although the negotiations failed, we are arguably still living with the consequences of that failure today.

Does exploring Iacobucci's views on his role as constitution maker during the Meech Lake saga shed light on his subsequent career as constitutional interpreter on the bench? As *Brian Dickson: A Judge's Journey*¹ reminds us, in the Canadian legal academy, biography is both an important and an underutilized source of insight on the judicial mind. In Iacobucci's case, his career prior to his judicial appointment is all the more valuable as a source of insight because of his central role in the politics of constitutional reform.

The natural place to explore this link is the case in which the Court was thrust into the heart of the national unity dispute – the *Secession Reference*.² One of the most puzzling aspects of the judgment, which has thus far escaped attention, is its curiously selective account of constitutional history. We do not refer to the Court's partial description of

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1 Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003).

2 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [*Secession Reference*].

Canada's constitutional evolution, as one of us has done elsewhere.³ Rather, we draw attention to the Court's passing reference to the recent politics of constitutional reform. For nearly a decade – from the Patriation Round through the Quebec Round and the Meech Lake Accord, and the Canada Round and the Charlottetown Accord – Canada was consumed by a debate over the constitutive question of what the basic terms of the Canadian political community should be. As Iacobucci himself said to us in an interview for this article, the failure of Meech led 'to a string of consequences' including the 1995 Referendum and the *Secession Reference* itself. So situating the *Secession Reference* against the backdrop of the constitutional politics that gave rise to it should advance our understanding of the judgment. Given Iacobucci's central role in both episodes, his personal experience in the Meech process must have affected how he understood the politics that set the stage for the *Secession Reference* and, indeed, may have shaped the judgment.

But another reason to draw the link between Meech and the *Secession Reference* through Iacobucci is the Court's central role in the patriation process. In the *Patriation Reference*, the Court held that under the previous regime governing constitutional amendment, there was a constitutional convention that required substantial provincial consent to federal requests to Imperial authorities to amend the *British North America Act*.⁴ Nine of the ten provinces ultimately agreed to the patriation package, with Quebec in dissent. In a subsequent case brought by Quebec, the *Veto Reference*, the Court held that the convention of substantial provincial consent did not incorporate a veto for Quebec.⁵ Just as the federal government was attacked in Quebec for patriating the Constitution without the consent of Quebec, so too was the Court for its judgment in the *Quebec Veto Reference*. Yet this history is entirely absent from the *Secession Reference*, despite being directly relevant. At the heart of the dispute between Quebec and Canada that led to the *Secession Reference* was the applicability of the new amending rules in the patriation package. Since the Court legitimized the constitutional politics that made the amending rules possible, Quebec's challenge to the legitimacy of those amendments was also a challenge to the role of the Court in producing them. As we argue, both 1982 and Meech Lake make sense of the most puzzling aspects of the *Secession Reference*.

3 Jean François Gaudreault-DesBiens, 'The *Quebec Secession Reference* and the Judicial Arbitration of Conflicting Narratives about Law, Democracy and Identity' (1999) 23 Vermont L.Rev. 793.

4 *Reference re a Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 [*Patriation Reference*].

5 *Reference re Amendment of Canadian Constitution*, [1982] 2 S.C.R. 793 [*Veto Reference*].

II *The legacy of 1982*

The legacy of 1982 is inevitably complex and open to diverging interpretations. To be sure, 1982 was the year when the Constitution of Canada was patriated, the culmination of a project that sought to sever Canada's colonial ties to the United Kingdom. It also marked the entrenchment of the Charter of Rights and Freedoms. But in addition to completing Canada's independence, it also marked the formal victory of a particular vision of Quebec's relationship to Canada over a competing vision. Further, it represented the culmination of a lengthy maturing process of the Canadian state that led it through multiple constitutional negotiations and crises. Thus, while there are many dimensions to the legacy of 1982, it would be futile to deny that this legacy, first and foremost, revolves around the question of the constitutional status of Quebec. Indeed, Quebec has had no equal in shaping the constitutional agenda during the years that followed 1982: the failed Meech Lake Accord, the 1995 referendum on sovereignty, the Clarity Act,⁶ and the *Secession Reference*.

First and foremost, 1982 itself should be seen as a Canadian nationalist response to the redefinition of Quebec nationalism since the 1960s, a redefinition accompanied by an assertiveness that ended up testing the very boundaries of Canada's constitutional order.⁷ In all likelihood, 1982 would probably not have happened, or would have happened quite differently, had the Parti Québécois not been elected in 1976 and had a referendum on sovereignty-association not been held in 1980. The response to nation building by Quebec was to engage in a Canadian nation-building project. Thus, then prime minister Pierre Elliott Trudeau pledged in the referendum campaign to change the Constitution. It is by no means clear that the types of amendments he envisaged were the same as those expected by the majority of his Quebec audience,⁸ but, for our purposes, that is not important. Rather, what is of fundamental importance is that there might not have been a 1982 without an acceleration of events largely due to the political

6 S.C. 2000, c. 26.

7 This nationalist dimension may explain, in part, why reception of the 1982 project was so overwhelmingly positive outside Quebec. It bears noting that such a reception was not a foregone conclusion, as several elements of both the process and the content of the 1982 reform went against a constitutional image – from the ties to the United Kingdom to the principle of absolute parliamentary supremacy – that was still deeply entrenched at the time in English-speaking Canada. On this see Stéphane Kelly, *Les Fins du Canada selon Macdonald, Mackenzie King et Trudeau* (Montreal: Boréal, 2001) at 234.

8 For most interesting insights on Trudeau's pledge through an analysis of the private correspondence he exchanged with close advisors, see André Burelle, *Pierre Elliott-Trudeau. L'intellectuel et le politique* (Montreal: Éditions Fides, 2005).

situation in Quebec. The federal patriation project responded to that basic political fact.

So what were the goals of federal nation building, and what was the result? The goal of the patriation project was to transform Canada's legal and political cultures. Nineteen eighty-two was presented as a (re)foundational experience to give rise to a new *pan-Canadian constitutional patriotism* that revolves around the Charter. Outside Quebec, the outcome of the 1982 round has been received very positively. But it is worth noting that it has promoted a conception of political citizenship that leaves hardly any room for desires of differentiated citizenship, at least ones that are both formalized and explicit. Sociologists Gilles Bourque and Jules Duchastel describe the Charter enterprise as having been informed by a state-centred civic nationalism that posits the existence of a community of equal individual citizens that precedes the state itself but nevertheless needs the state to express itself.⁹ However, the Charter's emphasis on individuals *qua* individuals, as well as the largely symmetrical conception of rights it reflects, entails significant *consequences* on popular constitutional culture.

The focus on equal individual citizens who all have the same rights and freedoms *a priori* induces these very citizens to understand equality as implying identity or uniformity.¹⁰ And this logic of uniformity is easily transposable in the political realm, where relations between collective entities that are institutionally recognized by the constitutional order take place. However, this logic is likely to fly directly in the face of the logic implied by the federal structure of Canada, which seeks to allow for the expression of a certain level of diversity. Recall here that Canada was structured in this way precisely to address the vectors of diversity that already existed in 1867. And one of the main vectors at that time (i.e., the presence in Canada-East of a society with a French Catholic majority) was given a political expression in the re-creation of the

9 Gilles Bourque & Jules Duchastel, *L'identité fragmentée. Nation et citoyenneté dans les débats constitutionnels canadiens, 1941-1992* (Montreal: Éditions Fides, 1996) at 115.

10 That is possibly the conclusion to which could lead a superficial and uninformed reading of subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. However, it is now well known that in its case law on s. 15 of the Charter, the Supreme Court of Canada has not accepted formal equality as a monolithic benchmark from which to evaluate the claims of equality seekers. See, *inter alia*, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Weatherall v. Canada (A.G.)*, [1993] 2 S.C.R. 872; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. Moreover, the Court has carefully avoided systematically trumping concerns pertaining to federalism in its Charter jurisprudence, irrespective of the right or freedom involved. See, *inter alia*, *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591; *R. v. S. (S.)*, [1990] 2 S.C.R. 254; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157.

province of Quebec. But not only is the logic of uniformity induced by the Charter at the political level opposed to the diversity implied by federalism, it is also inhospitable to claims that demand a formal recognition of asymmetries, even those that predate Canada, if there is a collective dimension to such claims. Any derogation to that logic is thus viewed with suspicion.

In this manner, the Charter indirectly encourages the expansion of ahistorical conceptions of Canada. This form of ahistorical constitutionalism inevitably presupposes a depoliticization of the claims of historical minorities such as Quebec so as to make them acceptable to the majority. As this depoliticization somehow implies a merger into Canada's multicultural whole, it is inherently unacceptable for any community that sees itself as a nation, that is, as a collective that, by definition, is political. As noted by Alan Cairns, '[t]he *Charter* was a denial of the nationalist vision of Quebec as a potentially independent French-speaking nation entitled to undertake the measures necessary to ensure its linguistic and cultural survival in the face of the assimilating pressures of an English-speaking continent.'¹¹ In this way, equality under the Charter ended up being viewed outside Quebec as a tool for unity rather than as a tool to pursue liberal principles of justice *per se*,¹² and, when understood as implying a logic of identity rather than a logic of equivalence, as an idea that would protect this unity against the threat posed by a political minority such as Quebec.¹³

Ironically, in large part, the legacy of 1982 is the opposite. To be sure, Canada is still united, but the sovereigntist option in Quebec has progressed significantly since 1982. Moreover, there is a hole in the panCanadian constitutional patriotism that the Charter inspires, and that hole is Quebec. It is not that Quebecers disagree with the content of the Charter. Actually, polls show that most of them do not, and that most would not hesitate to rely on the Canadian Charter, arguably

11 Alan C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reforms* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 122.

12 Gerald Kernerman, *Multicultural Nationalism: Civilizing Difference, Constituting Community* (Vancouver: UBC Press, 2005) at 37.

13 Andr  e Lajoie, *Quand les minorit  s font la loi* (Paris: Presses Universitaires de France, 2002), defines *political* minorities as those whose primary locus of identification is a sub-state entity (which in and of itself forms a political community) rather than the global polity constituted by the state, and for whom belonging to the latter is conditional upon the respect by that polity of their primary identification with the sub-state entity. In contrast, *social* minorities are those who are in a legitimate position to advance an equality claim but whose sense of belonging to the political community formed by the state is not conditioned by any prior, and primordial, identification with another sub-state political community. As a result, claims made by political minorities potentially threaten the integrity of the state, while those made by social minorities do not.

legitimizing this instrument by practice. But a significant number have not accepted the way in which their conception of Canada was ignored when the Constitution was patriated and amended in 1982, and they still construe the 1982 reform as marking the end of *their* Canadian dream.¹⁴ Their wish to see Quebec's nationhood, distinctiveness or uniqueness formally recognized in that constitution evinces it. As well, their reaction to the failure of the Quebec round in the early 1990s, which found a rather strident expression in the 1995 referendum, is further evidence of their ambiguous stance toward the 1982 patriation.

Another legacy of 1982 was to elevate citizens to the rank of potential actors, through litigation, in the production of law. But this empowerment has provoked side effects that, arguably, are not uniformly positive. One is the rise of populist constitutionalism. At least outside Quebec, constitutional changes operated through executive federalism now risk being considered systematically illegitimate, while all significant constitutional amendments adopted prior to 1982 were precisely adopted in this way. This major cultural shift renders any multilateral constitutional amendment extremely difficult, if not outright impossible when the amendment contemplated touches upon an existential or controversial question. The Meech and Charlottetown debacles illustrate that difficulty. The paradox, obviously, is that the 1982 Constitution's amending formula does not provide for any formal popular input in constitution making. Unlike Switzerland, Canada has a constitutional tradition to which referenda are still foreign. It is thus vicariously (i.e., through politicians) that the alleged voice of the people is expressed. But in a fragmented society where consensus is rare and rather thin when it does exist, politicians are particularly prone to fear misrepresenting the will of the people and may therefore be tempted to do nothing even remotely controversial. The contemporary post-Meech/Charlottetown *Zeitgeist*, whereby any politician openly talking about amending the Constitution in any significant way is derided as being 'out of sync' with the population, exemplifies this tendency.¹⁵ Ironically, the most immediate practical effect of populist constitutionalism is to pre-emptively prevent the launching of any constitutional reform in which popular input could seriously be taken into consideration.

However, there is another side effect of populist constitutionalism that speaks more directly to the legacy of 1982, especially as it concerns Quebec. The rise of the 'people' as a constitutional actor, albeit an

14 We are paraphrasing here the title of Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal & Kingston: McGill-Queen's University Press, 1995).

15 The overwhelmingly negative reactions outside Quebec to Michael Ignatieff's statement, during the recent federal Liberal leadership race, that it would indeed be appropriate to recognize Quebec as a nation are a vivid example.

informal one, creates a particular problem in a multinational federation: it implicitly reintroduces the majoritarian logic that the very structuring of a federal society as a full-fledged federation seeks to obviate, as it masks the existence of majority-minority relations within the federation.¹⁶ In other words, the 'people's constitution' raises the question of which people we are talking about. The superficially democratic varnish that it claims for itself can also be seen, from a different standpoint, as a reincarnation of George Brown's argument in favour of 'rep by pop' at the time of the Union Act, which, coincidentally, was made when English speakers became the majority in the Canadas.¹⁷

Both the pan-Canadian constitutional patriotism and the populist constitutionalism that are part of the legacy of 1982 have become means by which a new Canadian nationalism is expressing itself. Like Quebec nationalism, this nationalism tends not to be overly tolerant of ambivalence. The rise of Charter-based Canadian nationalism since 1982 has arguably rendered more difficult than ever the reception, in the formal constitutional order, of any claim advocating the possibility of having dual national loyalties *within* Canada.¹⁸ Indeed, the strengthening of Canadian nationalism outside Quebec has led to the blossoming of an 'enough is enough' discourse toward any potential claim demanding the formal recognition of the legitimacy of dual national loyalties within Canada.¹⁹ The problem is that, for a good number of Quebecers and, perhaps, Aboriginals, some form of constitutional ambivalence is inherent to their political identity. As noted by historian Jocelyn Létourneau, the fundamental ambivalence of Quebecers' political identity implies a refusal on their part to choose between the Manichean options of dissolution into a broader multicultural Canada or outright independence.²⁰

16 W.S. Livingston coined the term 'federal society' to designate a society characterized by a plurality of territorialized ethno-linguistic communities, irrespective of the presence of a formal federal structure. See William S. Livingston, 'A Note on the Nature of Federalism' (1952) 67 *Pol.Sci.Q.* 81.

17 Already in 1973, Jim Laxer had made a similar argument against conceptions of democracy that overemphasize individual rights and ignore the existence of the national communities that constitute Canada in view of advancing a 'one-nation' conception of the country. See J. Laxer, 'Québec in the Canadian Federal State' in Robert Laxer, ed., *The Political Economy of Dependency* (Toronto: McClelland & Stewart, 1973) 232.

18 The expression 'within Canada' refers to a possible adherence both to the Canadian nationality and to a sub-state nationality, as opposed to the adherence to the Canadian nationality and to that of another sovereign state when dual citizenship is an option.

19 Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000) at 119.

20 Jocelyn Létourneau, *Passer à l'avenir. Histoire, mémoire, identité dans le Québec d'aujourd'hui* (Montreal: Boréal, 2000) at 166. Political scientist Léon Dion makes the same point in

In sum, the new pan-Canadian constitutional patriotism, the rise of populist constitutionalism, and the radicalization of constitutional politics all form an important part of the legacy of 1982, particularly outside Quebec, and have reduced the ability of the Canadian federation to acknowledge Quebec's specificity. However, within Quebec, the legacy of 1982 primarily revolves around the process of patriation. Hardly anyone will be surprised to hear that the process that led to the adoption of the Constitution Act, 1982, and especially the Charter, has been submitted to a barrage of criticism within Quebec. The majority of commentators, nationalist or not, have been critical of the process, even when they hold rather moderate opinions about its ultimate outcome. There is little need to revisit the political events that surrounded the signing of the 1982 Constitution. Suffice it to say that, for better or for worse, the myth of the night of the long knives and of the exclusion of Quebec still influences the dominant interpretation of these events. But the antagonisms generated by 1982 were not new. Indeed, the principal legacy of 1982 may be that it brought to the surface antagonisms that, in the past, had been left unstated. Nowhere has this been clearer than in the debates that surrounded the Meech Lake Accord. Frank Iacobucci himself mentioned to us in our interview with him that he saw in Meech's failure an illustration of the resilience of the two solitudes.²¹ In Quebec, Meech has been said to have created a 'psychological wall' between Quebec and the rest of Canada.²² Arguably, since 1982 and especially since Meech, never have the two solitudes been so deeply estranged from each other at the political level, even though the two societies have probably never been so close in their mores. It could be argued that Canada is at best a community of mutual tolerance, at worst a community of indifference. Even in the Canadian Parliament, where the notion of a community of fate should take its fullest meaning, since the failure of Meech the majority of Quebec members have come from a secessionist party. And, as evinced by the *Secession Reference* and the Clarity Act, federal strategies have been targeted more at containing and managing a possible secession of Quebec than at proposing a deal to accommodate and recognize Quebec's specificity. This growing mutual indifference, and the policy shift toward the management of a possible secession, may, sadly, constitute one of the most lasting legacies of 1982.

describing the identity of Quebecers as 'uncertain.' See Léon Dion, *La révolution dévotée, 1960-1976* (Montreal: Boréal, 1998).

21 Interview with Frank Iacobucci (9 June 2006), transcript at 23 [Iacobucci interview].

22 Louis Sabourin, *Passion d'être, désir d'avoir: le dilemme Québec-Canada dans un univers en mutation* (Montreal: Boréal, 1992) at 47.

III Recovering the Court: The *Quebec Veto Reference*

Although the myth of the night of the long knives in Quebec depicts Trudeau and René Lévesque as the principal actors,²³ the Supreme Court of Canada was a central player in the patriation saga. It first intervened in the *Patriation Reference*, when it held that patriation without 'a substantial degree of provincial consent' would breach constitutional convention. That judgment is widely credited with breaking the deadlock in constitutional negotiations. When those negotiations produced an accord agreed to by the federal governments and every province except Quebec, the Court held in the *Veto Reference* in December 1982 that the federal government had complied with the conventions governing constitutional amendment, notwithstanding its failure to secure Quebec's consent. The Court thus affirmed both the illegitimacy of the federal government's initial actions and the legitimacy of its subsequent conduct.

The origins of the *Patriation Reference* lie in the fact that the Constitution Act, 1867, contained no procedures for constitutional amendment, leaving that power with Westminster.²⁴ As Canada attained political independence after World War I, the question arose of how to reflect this shift in legal terms. Even the Statute of Westminster, which conferred on Canadian governments the authority to modify or repeal imperial legislation applicable to Canada and purported to terminate Westminster's authority for Canada, exempted from its scope the repeal or amendment of the Constitution Act, 1867.²⁵ This exception was included at the request of the federal government, which had unsuccessfully attempted to come to an agreement over a domestic formula in 1927. Subsequent attempts to secure federal-provincial agreement on an amending formula – notably in 1964 and 1971 – failed. One of Trudeau's principal constitutional goals was to patriate the constitution by entrenching a domestic amending formula and ending Westminster's role in constitutional amendment.

The real restraint on imperial authorities was a constitutional convention that amendments be made only with the federal government's request and consent. The dispute at the heart of the *Patriation Reference* was whether the federal government was required to secure provincial consent prior to requesting amendments. The case was precipitated by the federal decision, in October 1980, to request constitutional amendments very close to the final patriation package. Negotiations with the

23 On this personal opposition see the seminal book of political scientist and sociologist Gérard Bergeron, *Notre miroir à deux faces* (Montreal: Éditions Québec/Amérique, 1985).

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

25 *Statute of Westminster, 1931* (U.K.), 22 Geo. V, c. 4, s. 7.

provinces had become deadlocked over a number of issues, especially the Charter. Only two provinces supported the federal package. The federal position was that there was no legal requirement for provincial consent and no consistent practice of provincial consent giving rise to a constitutional convention. In response, Quebec, Newfoundland, and Manitoba posed reference questions to their respective courts of appeal, asking whether there was a requirement for 'the consent of the provinces' flowing from constitutional convention or as a matter of constitutional law. The three appeals eventually reached the Supreme Court of Canada.

A seven-judge majority summarily dismissed the legal argument. But the controversial part of the judgment was the decision of a differently constituted six-judge majority that there was a constitutional convention for a 'substantial degree of provincial consent.' A sign that something was amiss emerged from the Court's decision to answer the reference question on constitutional convention, notwithstanding the Court's own description of the nature of conventions as subject to political, not legal, enforcement. These concerns were compounded by the Court's treatment of the precedents. The reference question asked whether there was a constitutional convention requiring provincial consent for amendments 'affecting federal-provincial relationships or the powers, rights or privileges' of the provinces. Several constitutional amendments fell into this category. In three cases provincial consent 'was neither asked for nor given.'²⁶ Unanimous consent was given to five.²⁷ In the remaining case,²⁸ only the consent of the affected provinces was obtained. These precedents may indicate the *absence* of a consistent practice. So, as the dissent and the majority of commentators outside Quebec pointed out, the Court should have concluded that there was no constitutional convention of any kind.

But the Court evaded this conclusion by narrowing the scope of the reference question to those precedents that 'directly affected federal-provincial relationships in the sense of changing provincial legislative powers.' This had the effect of excluding precisely those precedents where provincial consent had *not* been obtained. The clear wording of the

26 *British North America Act, 1871* (U.K.), 34-35 Vict., c. 28 (empowering Parliament to create new provinces out of territories); *British North America Act, 1886* (U.K.), 49-50 Vict., c. 35 (authorizing Parliament to provide for parliamentary and Senate representation for the territories); *British North America Act, 1915* (U.K.), 5-6 Geo. V, c. 45 (adding a new Senatorial Division for the four western provinces).

27 *British North America Act, 1907* (U.K.), 7 Edw. VII, c. 11 (financial subsidies to provinces); *Statute of Westminster, 1931*, supra note 25; *British North America Act, 1940* (U.K.), 3-4 Geo. VI, c. 36 (unemployment insurance); *British North America Act, 1951* (U.K.), 14-15 Geo. VI, c. 32 (old-age pensions); *British North America Act, 1964* (U.K.), 1964, c. 73 (disability and survivors' pensions).

28 *British North America Act, 1930* (U.K.), 20-21 Geo. V, c. 26 (natural resource transfer agreements).

question did not justify this move. Some saw this 'creative' interpretation as manipulative; others defended it because it allowed the Court to tackle the core question raised by unilateral patriation – whether the provinces and federal government were co-equals or whether the provinces were subordinate to the federal will.²⁹

But limiting the set of precedents to those where provincial consent had been obtained created another problem. The remaining precedents indicated a practice of *unanimity*. This was the position of the majority of Quebec authors.³⁰ But the Court refused to reach this conclusion. Instead it argued that the failure of the reference questions to refer to 'all' the provinces left it open to answer if the consent of some, but not all, was required, and held that this is what the precedents established. Finally, while the Court refused to specify the measure of provincial consent required, the consent of two provinces was deemed insufficient.

The *Patriation Reference* was clearly driven by the Court's political agenda. The problem was a federal–provincial deadlock over proposed constitutional amendments. The Court's judgement call was that unilateral patriation would severely damage the fabric of federal–provincial relations. The judgment forced the parties back to negotiations. Both sides could claim victory – the federal government on legality, the provinces on legitimacy. Both parties also had strong incentives to reach a settlement. Unilateral patriation would be tainted with illegitimacy, but the federal government would be on firm legal ground if it went it alone. But the *Patriation Reference* may have increased the risk of isolating Quebec, by significantly changing the dynamics of federal–provincial negotiations. Prior to the judgment, the provinces assumed that unanimity was required. The shift to the convention of a substantial measure of provincial consent had the effect of dividing the provincial coalition, because each province could no longer claim a veto.³¹

29 For two interesting contributions that focus on how the majority and minority judgments both 'massage' the questions posed in the *Patriation Reference* to achieve the desired outcomes, see Pierre Blache, 'La Cour suprême et le rapatriement de la constitution : l'impact des perceptions différentes de la question' (1981) 22 C.de D. 649; Robert Décary, 'Le pouvoir judiciaire face au jeu politique' in Peter Russell et al., eds., *The Court and the Constitution: Comments on the Supreme Court Reference on Constitutional Amendment* (Kingston: Institute of Intergovernmental Relations, 1982) 33.

30 Nicole Duplé, 'La Cour suprême et le rapatriement de la constitution : la victoire du compromis sur la rigueur' (1981) 22 C.de D. 619 [Duplé, 'Cour suprême']; Yves de Montigny, 'Preuve d'une convention constitutionnelle devant les tribunaux – Modification de l'Acte de l'Amérique du Nord – Rôle du Québec' (1983) 43 R.du B. 1133 [de Montigny, 'Preuve']; José Woehrling, 'La Cour suprême et les conventions constitutionnelles : les renvois relatifs au « rapatriement » de la Constitution canadienne' (1984) 14 R.D.U.S. 391 [Woehrling, 'Cour suprême'].

31 Alan Cairns, 'The Politics of Constitutional Conservatism' in K. Banting & R. Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act, 1982* (Toronto:

Yet the *Patriation Reference* also gave Quebec the ammunition to challenge the legitimacy of the patriation package. The Court's willingness to adjudicate upon constitutional conventions meant that it could not refuse to do so in a subsequent case. Moreover, the *Patriation Reference* provided two arguments for Quebec. The requirement for a 'substantial measure of provincial consent' could be interpreted as not only *quantitatively* but also *qualitatively* requiring the consent of Quebec, in recognition of the dualistic nature of the Canadian federation.³² Moreover, the Court's own methodology suggested the existence of a distinct constitutional convention granting a veto to Quebec. The best support for a Quebec veto arises from two negative precedents: the aborted attempts to secure agreement on a domestic amending formula, in 1964 and 1971,³³ which were objected to by Quebec alone. This was regarded by the other constitutional actors as sufficient to scuttle them.

Quebec launched a constitutional challenge to the patriation package. Quebec argued that notwithstanding the *Patriation Reference*, the question of whether a convention of unanimity existed was open, and that such a convention did exist. Quebec also argued for a conventional veto. In the *Veto Reference*, the Court rejected both arguments. Since the *Patriation Reference* had held that the convention was substantial provincial consent, it had by logical implication rejected unanimity. On the Quebec veto, the Court shifted gears. The criteria for a constitutional convention are a consistent practice of political behaviour accompanied by 'acceptance or recognition by the actors in the precedents,' which distinguishes behaviour motivated by constitutional obligation from conduct driven by expediency. On the facts, the evidence of such acceptance was lacking. But this is very hard to square with the *Patriation Reference*, in which the Court did not point to a single statement of the need for substantial provincial consent.³⁴ The Court was willing to *infer* acceptance of such rule from constitutional practice. Had the Court imposed the standard applied in the *Veto Reference* in the *Patriation Reference*, it would have

Methuen, 1983) 28 at 52; Peter H. Russell, *Constitutional Odyssey*, 3rd ed. (Toronto: University of Toronto Press, 2004) at 119.

32 Peter Hogg, 'Case Comment' (1982) 60 Can.Bar Rev. 307 at 324; Peter Russell, 'Bold Statescraft, Questionable Jurisprudence' in K. Banting & R. Simeon, *And No One Cheered: Federalism, Democracy and the Constitution Act, 1982* (Toronto: Methuen, 1983) 210 at 225; G.J. Brandt, 'Judicial Mediation of Political Disputes: The Patriation Reference' (1982) 20 U.W.O. L.Rev. 101 at 125.

33 Donald Smiley, 'A Dangerous Deed: The Constitution Act, 1982' in K. Banting & R. Simeon, *And No One Cheered: Federalism, Democracy and the Constitution Act, 1982* (Toronto: Methuen, 1983) 74.

34 Andrew Petter, 'Maitre Chez Who? The Quebec Veto Reference' (1984) 6 Sup.Ct.L.Rev. 387; Marc Gold, 'The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada' (1985) 7 Sup.Ct.L.Rev. 455.

denied that claim as well. Had it done the reverse, it would have accepted Quebec's argument for the existence of a conventional veto.

Once again, a political agenda apparently drove the judgment. The key was the timing of the litigation in relation to ratification. By the time the *Veto Reference* was heard by the Supreme Court, the patriation package had been adopted by the Imperial Parliament and was a legal *fait accompli*. Since Quebec had impugned only the legitimacy, not the legality, of the constitutional amendments, the Court was faced with the prospect of finding that valid constitutional amendments were nonetheless illegitimate. A judgment to this effect would have inflicted serious damage on the constitutional order, as well as on the Court. But although the result may have been politically unavoidable, it was legally incoherent. Not only had the Court manipulated its analysis to achieve a result inconsistent with the evidence but, in doing so, it contradicted the *Patriation Reference*, handed down just one year earlier. Politics trumped legal consistency. The *Veto Reference* confirmed what critics had been saying all along – that although the Court claimed to have been acting impartially as a judicial tribunal, it had acted in a politically partisan way to favour the federal government.

This is true nowhere more than in Quebec, where there was an almost universal denunciation of the Court's departure from its own precedent issued a year before. While politicians such as René Lévesque did not hesitate to resort to Maurice Duplessis' old metaphor of the 'Leaning Tower of Pisa' to describe what he perceived as a partial and profoundly unjust attitude on the part of the Court, legal scholars were generally more circumspect, though no less critical. Predictably, they particularly deplored the Court's arbitrary decision to require evidence of some kind of *formalized* acceptance of the alleged convention by the actors involved in the precedent, noting that many well-recognized constitutional conventions could, if examined, possibly fail to meet such a stringent requirement.³⁵ All noticed the Court's rather impoverished conception of what constituted an 'acceptance,' relying either on analogical reasoning referring to customary international law or on legal theoretical analyses. Interestingly, in a comment published immediately after the *Patriation Reference*, an author had shrewdly anticipated all the problems that the *Veto Reference* would subsequently raise. Assuming both Westminster's approval of the 1982 reform package and Quebec's decision to refer the matter of the veto to the courts, Nicole Duplé indeed noted that the Supreme Court would be bound either to strictly apply the criteria set forth in the *Patriation Reference* or to find a way to deny the existence

35 de Montigny, 'Preuve,' supra note 30 at 1144–50; Woehrling, 'Cour suprême,' supra note 30 at 407; Gil Rémillard, *Le fédéralisme canadien*, t. 2, *Le rapatriement de la constitution* (Montreal: Québec-Amérique, 1985) at 168 [Rémillard, *Fédéralisme*].

of the veto claimed.³⁶ Needless to say, the Supreme Court's image was badly bruised in Quebec after the *Veto Reference*, and its legitimacy was substantially weakened: the general court of appeal for Canada instantly became *la Cour des Autres* ('the Others' Court').

IV *Meech Lake and Frank Iacobucci*

Meech Lake was a direct response to the events of 1982. And Frank Iacobucci's daily involvement in the process that led to the elaboration of the accord, as Deputy Minister of Justice in Ottawa, possibly sheds light on the events that followed Meech's demise. From a legal angle, the most important of these events is undeniably the opinion of the Supreme Court in the *Secession Reference* of 1998, which was itself precipitated by the very narrow victory of the federalist option in the 1995 Quebec referendum. But not only was Iacobucci an important actor in the Meech Lake process, he was also sitting on the Court when it released the *Secession Reference*. Could his experiences during Meech Lake have affected his views on federalism, on the relations between Canada and Quebec, and, ultimately, on the *Secession Reference* itself?

We met with Frank Iacobucci on 9 June 2006 to gather his reflections on what gave rise to the Meech process, on the dynamics that marked that process, and on the consequences of the Accord's demise. Our questions dealt as much with general issues on the Meech process as with the specifics of the legal dimension of the accord itself. Given Iacobucci's contribution to the Supreme Court's opinion in the *Secession Reference*, we could not ask him directly about that case.

At a time when the idea of holding wide-ranging formal constitutional negotiations has become almost anathema, it is interesting to reflect on the factors that caused the Meech Lake process to be launched. According to Iacobucci, both a favourable political conjuncture and the presence of a certain type of political leadership explain why Meech was undertaken, despite its potentially controversial dimension. A window of opportunity had been opened by the recent election of two federalist politicians from Quebec, Brian Mulroney and Robert Bourassa, for whom the signature by Quebec of the Constitution Act, 1982, was of the utmost importance, even if there was no legal necessity for such a signature.³⁷ Iacobucci stresses, on this point, how important personal leadership is in the field of politics, in view of responding to the difficult challenges facing a country like Canada. For him, the resurgence of the separatist threat after the adoption of the Constitution Act, 1982, without Quebec's assent, and the 'we're not in' argument that

³⁶ Duplé, 'Cour suprême,' supra note 30 at 646–8.

³⁷ Iacobucci interview at 2.

stemmed from it, forces us to consider the notion of leadership from a different angle. Leadership, he argues, should be evaluated in light of what a person succeeds at, fails at, and tries to do. And the legacy of 1982 was so problematic, as far as Quebec was concerned, that it was legitimate to try to do something about it, even though there was an acute sense of the potential costs of failing in any attempt at bringing that province into the constitutional family.

It is the weak legitimacy of the 1982 Constitution that posed the most acute problem in Quebec. Although the opposition to the 1982 package was not unanimous in the province (this became one of Trudeau's favourite arguments for the rest of his life), it still had not been approved by the National Assembly, even by the federalist Bourassa government. Arguably, the knot caused by Quebec's refusal of the 1982 reform could have been untied much earlier by holding a referendum on this reform, but, as Iacobucci observes, such a procedure was foreign to our constitutional tradition in the early 1980s.³⁸ In his view, legality is not enough.³⁹ Thus, it was to address this lack of formal and symbolic legitimacy that the Meech Lake process was launched. Rejecting what he calls 'extremist characterization[s] of Meech,' Iacobucci argues that 'Meech was not a panacea, [but] neither was it the end of the Canadian federal union.'⁴⁰ Most importantly, Iacobucci emphasizes that, had it passed, it would have bound Quebec politically to the Constitution. From this perspective, Quebec's signature would have been a sign that some form of reciprocal trust had been restored. Meech's significance, in his view, was that it was not 'just Quebec coming in, but [...] the rest of the country endorsing the entry.'⁴¹ It would have constituted, in that sense, a reciprocal recognition. Thus, the focus on Quebec in the Meech process was entirely justified, as it was Quebec that 'was the one that was to come in.'⁴²

This objective inevitably informed the strategy adopted during the negotiations. The idea was both to get an 'honourable deal' and, given the importance of the stakes, to prevent the isolation of Quebec.⁴³ Since 'process can [...] determine product,' the closed-door process that characterized Meech mainly sought to respond to the particular situation of the federalist government of Quebec, which was faced with

38 Although it would probably be incorrect to state that referenda are now part of our constitutional tradition, they would arguably be less likely to trigger a negative reaction today than they were in the early 1980s, especially after the 1992 Charlottetown episode and the 'populist' constitutionalism that took root after the adoption of the Constitution Act 1982.

39 Iacobucci interview at 3-4.

40 Ibid. at 3.

41 Ibid. at 4.

42 Ibid. at 5.

43 Ibid.

an opposition that would have been quick to denounce as insufficient any feature of the accord that looked like a compromise on the part of Quebec.⁴⁴ In all likelihood, any leak to that effect would have killed Meech *in utero* in the province.⁴⁵ Other questions not appearing on Quebec's list were discussed in view of ensuring that 'everybody had an issue on which there could be agreement.'⁴⁶ Such was the case of the question of an elected Senate, introduced by Alberta's premier, Don Getty, which the parties agreed to examine. The idea underlying that strategy was to strengthen the resolve of all premiers involved by making them personal stakeholders in the constitutional reform process.⁴⁷ It is interesting that the two premiers who contributed the most to Meech Lake's demise, Frank McKenna of New Brunswick and Clyde Wells of Newfoundland, were not stakeholders in the process, not having partaken in the initial negotiations at the Langevin Building in Ottawa. Ensuring that all parties to the accord remained on board was even more important given that it was soon resolved that while some clauses of the accord could be incorporated in the Constitution using the 7/50 amending formula, others very likely required unanimity.⁴⁸

Although we discussed the various clauses of the Meech Lake Accord during our interview, our main focus was on two of these clauses: the provision purporting to constrain the federal government's spending power and, obviously, the famous 'distinct society' clause. Iacobucci confirmed that the amending formula found in the Constitution Act, 1982, was not to be reopened, which remains somehow surprising, since one of Meech's main engineers on the Quebec side, Gil Rémillard, then

44 Ibid. at 11.

45 Ibid. Only a few years after an event that had been constructed as a grave affront to the province's dignity, the government of Quebec found itself in a very delicate situation during the Meech negotiations. The last thing it wanted was to be seen as compromising on Quebec's historical rights, a perception that the Parti québécois opposition would have exploited. These particular circumstances may explain Iacobucci's view that the political personnel played a bigger role in the Quebec delegation than in the federal delegation, where lawyers were front and centre (Iacobucci interview at 5). Iacobucci also establishes a link between the Victoria and Meech processes, in that the strategy for the latter may have been influenced by a recollection of Bourassa's retreat on the former after realizing that the intelligentsia in Quebec was largely opposed to it (ibid. at 3). In a recent paper reminiscing on the Meech Lake Accord after twenty years, Gil Rémillard does not really distinguish between the lawyers' input and that of the political personnel in the Quebec delegation, especially since several of the latter were also lawyers. See Gil Rémillard, 'L'accord du lac Meech 20 ans après' in Michel Venne & Miriam Fahmy, eds., *L'Annuaire du Québec 2007. Le Québec en panne ou en marche?* (Montreal: Fides, 2006) 233 at 241.

46 Iacobucci interview at 11.

47 Ibid.

48 Ibid. at 7.

minister of intergovernmental affairs, had been quite vocal, in his previous life as a constitutional law professor, about the need to correct the strategic error Quebec had committed by abandoning its veto in pre-patriation negotiations.⁴⁹

If there was a surprise, it probably stemmed from Iacobucci's understanding of the spending power clause (s. 106A of the accord). After noting that the post-World War II expansion of federal spending posed a general problem for the federation and that the objective of restraining it was on the agenda of many provinces, he acknowledged that, in his view, the federal spending power could be neither totally constrained nor unconstrained. Moreover, in his view, the spending power clause of Meech, with its references to open-textured standards such as 'reasonable level of compensation' and 'compatibility with national objectives,' was not justiciable. Iacobucci interprets this broad language as reflecting a government-to-government approach that seeks to channel the resolution of disputes about the federal spending power in the political realm.⁵⁰ In other words, the spending power clause was viewed as a means by which intergovernmental negotiations would be structured. By and large, it was to have a symbolic, aspirational, value. Arguing that the litigation of such a provision would even be 'dangerous,' and drawing a parallel with s. 36 of the Constitution Act, 1982, Iacobucci characterizes the allegedly non-justiciable nature of Meech's spending-power provision as a compromise between those he calls 'strong federalists' and those he designates as 'provincialists.'

The idea of the non-justiciability of the spending-power clause of the Meech Lake Accord is not entirely new, as it reflects a longstanding belief in the inappropriateness of courts' getting involved in the details of vertical redistribution within the federation. It may also evince, at least to some extent, the continuing influence of those scholars advocating the de-juridification and de-judicialization of disputes pertaining to federalism.⁵¹ This view, however, has never been widely shared by Quebec federalism scholars, who have historically been extremely concerned about the potentially deleterious impact of judicially unchecked power imbalances in a multinational federation, where the central government's agenda may be at risk of being hijacked by the nation that forms the majority in the country. It would be interesting, in this respect, to examine the Quebec delegation's perception of the justiciability of Meech's spending-power clause.

49 Ibid. For Rémillard's observations on this error, see Rémillard, *Fédéralisme*, supra note 35 at 162-8.

50 Iacobucci interview at 9.

51 The classical exposition of this thesis can be found in Paul Weiler, *In the Last Resort* (Scarborough, ON: Carswell/Methuen, 1974).

As to the 'distinct society' clause, Iacobucci characterized it as Meech's 'symbolically and legally most challenging [clause].'⁵² He sees in it an extension of the policy of bilingualism and of its bicultural implications. According to him, the 'distinct society' clause was a means to ensure the protection and blossoming of the society the very existence of which lies at the heart of Canada's commitment to bilingualism. That is how he establishes a link between the 'distinct society' clause and the constitutional obligation of preserving bilingualism.⁵³ This obligation is, in his view, much more tangible and demanding than that of promoting multiculturalism:

I have my own view of multiculturalism; it's not biculturalism. We do have in this country official languages. We also have the importance of promoting multiculturalism. But to me, I don't think that [it] is the state's obligation, to promote multiculturalism – it should do what it can – but its real legal obligation [...] [is] to preserve bilingualism, it seems to me, and that is something the 'distinct society' clause was all about.⁵⁴

This 'Canadian' reading, so to speak, of the 'distinct society' clause is interesting, as it seems to reveal a belief that the clause directly (and primarily) benefited not only Quebec but also Canada as a whole – and not only in a negative manner, that is, as a means of prevent a further alienation of Quebec. That being said, Iacobucci traces back the inspiration of the 'distinct society' clause to s. 93 of the Constitution Act, 1867, and s. 23 of the Charter. In his view, the Victoria Charter, notably with its recognition of a veto for Quebec, had set a threshold below which no constitutional package could go, as far as Quebec's recognition was concerned.⁵⁵ It also cast into the question the credibility of Trudeau's violent opposition to the 'distinct society' clause in Meech. Moreover, Iacobucci notes that even before Meech, the Supreme Court had already taken into account the specific sociocultural and historical features of Quebec society in its case law.⁵⁶

During our conversation, Iacobucci discussed both the interpretive and the symbolic issues raised by the 'distinct society' clause. On the place of that clause in the Meech Lake Accord, he acknowledged that it could have been located in the preamble and still have had a tangible legal impact, given the weight accorded to constitutional preambles by courts.⁵⁷ But the most pressing issue was the clause's practical legal

52 Iacobucci interview at 11.

53 Ibid. at 12.

54 Ibid.

55 Ibid. at 15. For the Victoria Charter see *Canadian Constitutional Charter, 1971*.

56 Ibid. at 11.

57 Ibid. at 12.

reach, which, in turn, pointed to a paradox: 'If it means something, what does it mean? [and], [i]f it means nothing, why is it being put in and what utility is there from that?'⁵⁸ While the premiers of the nine English-speaking provinces were not opposed in principle to the 'distinct society' clause, they were nevertheless concerned that it could add to Quebec's powers. Quebec, for its part, wanted to ensure that the clause would not restrict its ability to promote the French language. The province's concerns were heightened, Iacobucci told us, by a legal opinion it had obtained from former Supreme Court justices Yves Pratte and Louis-Philippe de Grandpré to the effect that the clause's acknowledgement of the English presence in Quebec could fetter the province's ability to promote French.⁵⁹ In short, Quebec feared that the clause's wording would be unduly constraining, while the other provinces were worried that it would not be constraining enough.

The concern that the 'distinct society' clause could add to Quebec's powers shows that the tension between the 'distinct society' clause and the idea of provincial equality was present very early on in the process. As is well known, this idea later served as a springboard for one of Meech's most vociferous opponents, Newfoundland premier Clyde Wells, and it has since been used as a normative justification by all those opposed to any form of asymmetry between the provinces.⁶⁰ Iacobucci, however, has little respect for this idea, which conceives of equality in terms of a relation of identity instead of in terms of a relation of equivalence.⁶¹ Iacobucci indeed notes, on an empirical basis, that there are already several 'special-status' provisions in the Constitution of Canada, including, for example, Newfoundland's own terms of union. He further considers that distinctions can be made among federated entities on the basis of rational (and thus not arbitrary) criteria. Characterizing 'provincial equality' as it played out in the Meech debate (i.e., in its most extreme interpretation) as a 'bankrupt idea,' he believes that it is more appropriate to talk about provincial 'equity' in a federative context.⁶²

The federal government also had some queries about the effect of the 'distinct society' clause. More precisely, the main preoccupation of Prime

58 Ibid.

59 Ibid. at 12-3.

60 Interestingly, as early as 1984, Gil Rémillard, then still a constitutional law professor, was criticizing the Parti québécois government for having expressly accepted, in the 'gang of eight's agreement of 16 April 1981, the presence of a statement acknowledging the equality of all provinces, which inevitably led to Quebec's abandonment of its veto. See Gil Rémillard, 'Historique du rapatriement' (1984) 25 C.de D. 15 at 81.

61 On this point, see André Burelle, *Le mal canadien. Essai de diagnostic et esquisse d'une thérapie* (Montreal: Éditions Fides, 1995) at 105 *et seq.*

62 Iacobucci interview at 18-9.

Minister Brian Mulroney was the clause's potential impact on minority rights. Iacobucci assuaged Mulroney's fears by giving him the opinion that the clause would not hurt these rights.⁶³ On the whole, Iacobucci was of the view that the 'distinct society' clause was, from a legal standpoint, merely declaratory of what already existed, and that its interpretation would more or less follow the parameters set by the Supreme Court in such cases as *Ford v. Quebec (A.G.)*.⁶⁴ In all likelihood, the clause would have had its most tangible impact in the application of s. 1 of the Charter. Thus, the means chosen to achieve the goal of preserving and promoting the constitutive features of Quebec's distinctiveness would have had to be proportional.⁶⁵ In sum, Iacobucci's legal interpretation of the 'distinct society' clause was a rather moderate one, which stood light-years away from the doomsday scenarios heard during the Meech debate. This fact points to the highly symbolic and political dimension of the 'distinct society' clause, which Iacobucci stresses. Speaking to the paradox inherent in this clause – why enshrine it constitutionally, if it means so little, legally speaking? – he observed to us that 'constitutions can be redundant of the reality, can be duplicative of a reality.'⁶⁶ He even considers that the debate that Meech triggered essentially revolved around symbols, both for Quebec as a recognition-demanding party and for the opponents of the accord, notably the 'multiculturalists' and all those who feared 'special deals for a particular province.'⁶⁷

Why did Meech fail, then? According to Iacobucci, the causes of Meech's demise have to do with the adoption process itself and with events that took place while the accord was being debated. As to the adoption process, Iacobucci first noted the closed-door approach typical of executive federalism, which, in the post-Charter era, is seen as plagued by a deficit of legitimacy.⁶⁸ As well, the absence of a tight ratification schedule clearly ended up posing a problem, as it allowed the opposition to the accord to regroup and to propagate dubious ideas about its potential impact, particularly that of the 'distinct society' clause. Iacobucci still sounded outraged by some of the comments that were then made about the allegedly deleterious effects of the 'distinct society' clause. He particularly recalled the view, expressed by some feminist scholars and activists, that the clause 'was going to increase the birthrate [because] Quebec women would be bribed into having more children in order to preserve the French language and culture: Quebec, which has been the leader in

63 Ibid. at 14.

64 [1988] 2 S.C.R. 712.

65 Iacobucci interview at 12.

66 Ibid. at 15.

67 Ibid. at 16.

68 Ibid. at 19.

women's rights, and other areas. The Quebec women were insulted by this.⁶⁹ Iacobucci also believes that, overall, the Meech Lake Accord was badly sold, especially in that the strategy did not sufficiently appeal to aspirations. Indeed, instead of appealing to a broader idea of a better Canada, at peace with itself, from which all Canadians would benefit, the accord was essentially presented as a means to right a wrong, that of Quebec's exclusion in 1982.⁷⁰ This may explain why the specific focus on Quebec, which was not *per se* a weakness, became one in a context where other minorities ended up feeling neglected.⁷¹

We suggest that the selling strategy was undermined by statements such as the claim that Meech was the best accord possible or Mulroney's (in)famous 'roll of the dice' declaration. In our view, this speaks to both the strengths and weaknesses of Mulroney as prime minister. Unafraid to tackle a potentially divisive issue such as the constitutional recognition of Quebec, he undeniably showed leadership, and, thanks to his negotiating and interpersonal skills, managed to obtain a consensus, albeit a short-lived one, between parties that had several divergent interests. But this consensus may have come at the expense of a vision that would have appealed to different segments of the Canadian population. Iacobucci contrasts in that regard the philosophies espoused by the Trudeau and Mulroney governments. While at some times, under Trudeau's tenure, the sense was that it was war at any cost between the federal and provincial governments, Mulroney's approach could be better described as 'peace at any price.' Somewhat idealistically, Iacobucci considers that Meech's chances of success would have been better had the accord been defended by a leader who had had both Mulroney's negotiating skills and charm and Trudeau's philosophical and visionary nature.⁷²

Another event, *prima facie* unrelated to Meech, also constituted a 'contributing factor' in Meech's demise, to use Iacobucci's expression. This event was the adoption by the Quebec National Assembly of Bill 178,⁷³ as a reaction to the Supreme Court's ruling on the Charter of French Language in *Ford*, and the resort, in the said bill, to the Canadian Charter's notwithstanding clause. Iacobucci characterized Bill 178 as a 'very critical moment [that] changed the dynamic significantly, [as it] caused reasonable supporters of [Meech] to think more seriously about it.'⁷⁴ Without shattering the accord *per se*, Bill 178 gave ammunition to

69 Ibid. at 14.

70 Ibid. at 22.

71 Ibid. at 19.

72 Ibid. at 5.

73 *An Act to amend the Charter of the French Language*, S.Q. 1988, c. 54. The notwithstanding clause is at s. 10.

74 Iacobucci interview at 17.

Meech's opponents. However, in Iacobucci's view, it was not so much the Bourassa government's use of the notwithstanding clause that caused problems but, rather, Bourassa's hints that he would not need to use that clause in similar circumstances once the 'distinct society' clause was adopted.⁷⁵

What were, in Iacobucci's view, the consequences of the failure of the Meech Lake Accord? The most obvious one, he believes, was that the accord's failure provoked a perception that Quebec had been rejected. This, in turn, led to a string of events. First, it changed the internal political landscape in Quebec. As evidence of this, Iacobucci mentions the rise of Mario Dumont, who eventually left the Quebec Liberal Party to found the Action démocratique du Québec to defend a more robust nationalist agenda and who drifted toward a more sovereigntist position at the time of the 1995 Quebec referendum.⁷⁶ To this we must add that Lucien Bouchard, arguably the most formidable torch-bearer for Quebec sovereignty since René Lévesque, and the Bloc québécois are both offspring, so to speak, of the Meech debacle. Thus, not only was Quebec's internal political landscape changed, but so was Canada's. Secondly, Iacobucci establishes a clear link between the failure of Meech and the alleged rejection of Quebec, on the one hand, and the very close referendum results of 1995, on the other.⁷⁷ As well, the *Secession Reference* and, later, the Clarity Act both came about as a result of this close call.

That is where Iacobucci's story ended, as far as our interview was concerned. If there is a recurring theme in the views he expressed during that interview, it probably lies in a conception of constitutional politics that is grounded on a logic of compromise, rather than on an absolutist logic informed by idealized and partial views of what is best for the country in the abstract. Constitutional politics is thus the art of the possible, which, as demonstrated by Iacobucci's comments, does not necessarily exclude principles and aspirations. As such, Iacobucci's approach to constitution making could be aptly characterized as one of principled pragmatism. One question remains, however, that Iacobucci did not address in our interview. Although he opined that 'Canadians pride themselves in [compromise], [n]ot necessarily *ab initio*, but *ex post* [...],'⁷⁸ the question remains whether the failure of Meech does not reflect the rise of a new society of 'ticklish'⁷⁹ citizens who, unwilling to

75 Ibid.

76 Ibid. at 23.

77 Ibid.

78 Ibid. at 10.

79 See Slavoj Žižek, *The Ticklish Subject: The Absent Centre of Political Ontology* (London: Verso, 1999).

compromise on what they consider, rightly or wrongly, their inalienable rights, are less prone to negotiate or to compromise for the greater good of the federation and are conversely more susceptible to clinging to zero-sum logics.

This question points to the changes that have been brought about by the constitutional enshrinement of fundamental rights in the Charter, especially as it concerns patterns of thought.⁸⁰ Recall here that, in essence, we have argued that the Charter may have induced the expansion of a form of 'radical thought' that is not receptive to claims evincing a 'dual loyalties' understanding of the country.⁸¹ If the hypothesis of a more uncompromising Canadian citizenry after 1982 is true, then politics, as it is fundamentally based on compromises targeted at resolving deep-seated conflicts, is destined to take the back seat to law, or, more accurately, to litigation. But when compromise becomes extremely difficult, if not impossible, to achieve in the political sphere, traditionally conceived, where does it take place? And who is implicitly given the responsibility to maintain, implement, or fabricate the compromises that hold the country together, especially when these compromises are thought to affect rights and thus to raise issues pertaining to justice and not merely politics? Enter the Supreme Court of Canada, with its opinion in the *Quebec Secession Reference*.

v Concluding thoughts: The *Quebec Secession Reference*

Toward the end of our interview, Iacobucci suggested in passing that the failure of Meech led to a string of events that included the *Secession Reference*. The comment was highly suggestive. Iacobucci was a member of the Court that heard the *Secession Reference*. There is no doubt that his first-hand experiences gave him a deepened awareness of the political-legal context within which the case arose. But what we want to suggest by way of conclusion is that they may have shaped the Court's judgment. To be sure, drawing clear links between the reasons and Iacobucci's personal history is difficult. The judgment came collectively from the Court, not from an individual justice. But given Iacobucci's well known status as a consensus builder within the Court, his personal experience with the national unity file, and his keen sense of history, it is reasonable to suspect that he had a hand in the judgment. And,

80 On this point see Lorraine Weinrib, 'The Canadian Charter's Transformative Aspirations' (2003) 19 Sup.Ct.L.Rev. (2d) 17.

81 Historian and sociologist Gérard Bouchard describes 'radical thought' as connoting the idea of a reduction or denial of one or more of the variables implicated in a given equation. See Gérard Bouchard, *Raison et contradiction. Le mythe au secours de la pensée* (Québec: Éditions Nota Bene/CEFAN, 2003) at 37–8.

since Meech itself stems from 1982, to ask about its impact is to ask how the experience of the patriation round is reflected in the Court's judgment. There are two specific questions: how the Court grappled with one of the principal legal legacies of 1982, the new amending rules that did not grant Quebec the kind of veto it had possessed under pre-existing constitutional convention, and the Court's own controversial role in that episode. As we argue, both had a measurable impact upon, and explain important features of, the Court's judgment.

Although the reference's first question – which asked whether Quebec had a right to secede unilaterally under the Canadian Constitution – did not specifically mention the amending rules, they were directly implicated by the *Secession Reference*. The reason is that, in the constitutional provisions assigning powers to the provinces, there is no right for provinces to secede, nor can any of the relevant provisions be interpreted as conferring such a right. The secession of Quebec would accordingly require a number of sweeping constitutional amendments that would authorize Quebec's governing institutions to effect the secession of the province and declare statehood, to transfer areas of existing federal jurisdiction to the province, and to terminate the legal authority of federal institutions over Quebec. The debate over the right to unilateral secession therefore quickly turns into a problem of constitutional amendment. The question is whether Quebec can make the requisite constitutional amendments on its own, or whether more is required. All the amending formulas, save one, absolutely require the consent of the federal government.⁸² Only one amending formula permits provinces to amend the Constitution unilaterally,⁸³ and the prevailing view is that it could be used to adopt the changes necessary to effect the secession of a province. So, under a textual reading of the Constitution of Canada, a province cannot secede unilaterally.

As has been widely discussed, the judgment did not offer this kind of textual analysis of the amending rules. We want to highlight two features of the Court's reasons. The first is its reliance on unwritten constitutional principles instead of on the constitutional text, and the absence of any detailed analysis of the constitutional text. The second is the Court's selective account of Canadian constitutional history.

First, as is well known, the Court's judgment does not begin with the text of the amending formulas. Instead, it opens by signalling the importance of 'underlying principles' and states that it was 'not possible to answer the questions' without considering them.⁸⁴ According to the

82 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 38, 41, 43, 44.

83 *Ibid.* at s. 45.

84 *Secession Reference*, *supra* note 2 at para. 1.

Court, four principles characterize 'the evolution of our constitutional arrangements':⁸⁵ federalism, democracy, constitutionalism and the rule of law, and respect for minorities. The Court then applies these principles to develop the constitutional framework for secession, in the context of a referendum vote that represents 'a clear expression by the people of Quebec of their will to secede from Canada.'⁸⁶ Although the Court notes that a referendum 'could not in itself bring about unilateral secession,'⁸⁷ it goes on to state that a referendum vote that met these criteria 'would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.'⁸⁸ This is the so-called duty to negotiate. The Court also addresses who the participants in such negotiations would be and how negotiations must be conducted. The Court's judgment is unclear, suggesting that negotiations would involve Quebec and shifting combinations of other parties – the federal government, the provinces, and other participants. The Court states that the negotiations must be conducted 'in accordance with the underlying constitutional principles already discussed,'⁸⁹ which seems to have two implications. First, it mandates that negotiators must take into account the four constitutional principles.⁹⁰ Second, the Court also seems to suggest that the constitutional principles impose substantive restraints on the terms of whatever agreement is negotiated when it says that '[t]he negotiation process [...] would require the reconciliation of various rights and obligations.'⁹¹

Second, we turn to the role of history. The political and legal history of Canadian constitutional development also played a central role in the Court's judgment. The Court's historical survey focuses most closely on the political forces that led to Confederation, although there are brief discussions of the expansion of federation, both eastward and westward, and of Canadian independence. As has been documented, none of this history is uncontroversial. But there is a different respect in which the Court's account of history is selective. It is striking how the factual and legal context that gave rise to the reference – the tabling of the Draft Bill on Sovereignty in December 1994; and the introduction of Bill 1 in October 1995; the *Bertrand* litigation challenging both the Draft Bill and Bill 1; the two lower-court judgments that spoke squarely to the constitutional issues raised by unilateral secession; Quebec's more general

85 Ibid. at para. 48.

86 Ibid. at para. 87.

87 Ibid.

88 Ibid. at para. 88.

89 Ibid.

90 Ibid. at para. 90.

91 Ibid. at para. 93.

refusal to accept the jurisdiction of the courts over this matter; and the result of the referendum vote in October 1995 – were not mentioned at all in the judgment. This is all the more striking because the Attorney General of Canada had presented a detailed chronology of the legal and political events that preceded and shaped the reference.⁹² The Court was certainly aware of this history, and, indeed, it is hard to read parts of the judgment – most centrally, the requirement for clarity – without reference to the events of 1995.

Even more striking is the absence of any discussion of the constitutional history that preceded and directly led to the 1995 referendum. The failure of the Charlottetown Accord, and of the Meech Lake Accord before it, are not mentioned at all. The source of both of these attempts at constitutional reform, the patriation of the constitution without the agreement of Quebec and the resulting pressure to respond to those events through constitutional means, barely rates a reference. To be sure, the Court does defend the *Patriation Reference* in passing, as securing the legitimacy of the patriation amendments. And it does acknowledge ‘the refusal of the government of Quebec to join in its [i.e., the Constitution Act, 1982’s] adoption.’⁹³ But the controversy surrounding 1982, the claims of Quebec to a constitutional veto, and, most importantly, the role of the Court itself in legitimizing the 1982 amendments are not discussed at all. Quebec’s refusal to appear before the Court – likely based on the prediction that the Court would side with the federal government, as it had in the *Veto Reference* – is left unmentioned, even though it represented a fundamental challenge to the Court’s own role.

Yet these concerns had also been brought to the Court’s attention, through the efforts of André Joli-Coeur, the *amicus curiae* appointed by the Court to oppose the position of Canada. Although Joli-Coeur only gestured to this history in his written submissions, he gave the events of 1982 considerable prominence in his oral submissions.⁹⁴ He argued that the amendments of 1982 amounted to a repudiation of the Confederation compact between French and English Canada, because they denied Quebec’s status as a founding nation. He characterized Quebecers’ right to choose their political future as a return to the constitutional ‘default’ position – tantamount to an argument that the 1982 constitutional amendments did not govern the process of sovereignty. He also referred directly to the Court’s own judgment in the

92 See the excellent discussion in Warren J. Newman, *The Quebec Secession Reference: The Rule of Law and the Position of the Attorney General of Canada* (Toronto: York University, 1999).

93 *Secession Reference*, supra note 2 at para. 47.

94 Hearing Transcript, Supreme Court of Canada, 18 February 1998.

Veto Reference. In sum, the *amicus* was clearly laying the blame at the feet of the Court, and compelled a response from the Court.

Far more powerful was a memorandum sent to Joli-Coeur by Claude Ryan, which was filed with the Court.⁹⁵ Ryan was arguably the leading Quebec federalist of his generation. Like many, he deeply opposed the patriation package because of its failure to secure Quebec's consent. Ryan's memorandum goes much further than Joli-Coeur. First, he notes that the federal government's position relied on Part v, which Quebec has never accepted. Of course, Quebec challenged the constitutionality of Part v in the *Veto Reference*, which rejected the argument that there was a constitutional convention giving Quebec a veto over constitutional change. Ryan refers to this judgment in a way that makes clear the Court's complicity in the entrenchment of Part v: 'This amendment [*i.e.*, Part v], to which Quebec has never subscribed, was conceived to enable amendments to the Constitution. To uphold that the ruling to amend the Constitution be applied to a declaration of independence or to any process leading to it would be to state that Quebecers' right to freely choose their future is subject to a veto [...].'⁹⁶ Second, Ryan opines that in the *Patriation Reference* 'the Court offered a highly debatable interpretation of the Constitution' that established the convention of substantial provincial consent, which paved the way to the adoption of the 1982 amendments over the opposition of Quebec.⁹⁷ According to Ryan, the events of 1982, in which the Court was deeply implicated, were 'at the root of a constitutional deadlock which lasted for fifteen years and strongly contributed to the rise of a desire for sovereignty in Quebec.'⁹⁸ And then came a warning to the Court: 'A negative answer from the Court to the question submitted by the Federal Government could result into an even more serious deadlock. The Court would be wise to give back to politicians the responsibility of finding answers to the democratic questions brought before the tribunal.'⁹⁹ Ryan charged that the Court was directly responsible for the country's predicament, and, thus, it would be wise to act prudently and withdraw from the constitutional conflict at hand.

In our view, there is a tight and obvious connection between the *Secession Reference*'s atextualism and the Court's sparse and highly selective rendering of recent constitutional history. Had the Court based its judgment on the constitutional text and offered a fuller account of

95 Claude Ryan, 'Mémorandum Sent to the Amicus Curiae Concerning the First Question of the Reference,' 31 January 1998 (QL).

96 Ibid. at para. 15.

97 Ibid. at para. 17.

98 Ibid.

99 Ibid.

constitutional history, it would have drawn attention to the process whereby the amending formulas became part of the constitution, including the *Patriation Reference* and the *Veto Reference*. Given the ongoing controversy in Quebec surrounding the Court's role in the patriation saga, this would have undermined both the Court's role in the *Secession Reference* and the applicability of the amending rules.

Indeed, the desire to avoid the amending formulas and the legacy of 1982 ran so deep that it offers the most plausible explanation for a puzzling aspect of the *Secession Reference* – the failure of the Court to properly engage with Part v. The Court accepted that secession could be achieved through constitutional amendment. But to reach the further conclusion that unilateral secession was unconstitutional required the Court to grapple with Part v. One avenue would have been to specify which amendments would be required, to consider the relevant amending formulas, and to determine whether any of these required the consent of the federal government. The other would have been to look at the one amending formula that allows unilateral constitutional amendment by a province, and to ask whether the internal limits of that provision rendered it inapplicable to secession. The Court did not take either approach. Indeed, the Court does not even refer to the existence of Part v. This failure to engage with Part v meant that, in an important respect, the Court did not properly answer the questions before it in a formal legal sense. The question is what other reasons the Court may have had for framing its judgment in this way.

We conclude by suggesting a final, and dramatic, way in which the Court may have acknowledged the legacy of 1982. The Court clearly stated that for the secession of Quebec to occur legally would require a constitutional amendment. But the Court also said that the negotiations would be very difficult and might be unsuccessful. So, at that point, what would happen? One view is that nothing would happen, and Quebec would stay within Canada, because secession could occur only through constitutional procedures that required provincial consent. But the Court's judgment also says that 'a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process.'¹⁰⁰ As Daniel Turp has consistently argued, this passage sends a rather different message than the rest of the Court's judgment.¹⁰¹ It suggests that if Quebec follows the constitutional rules on secession in

100 Ibid. at para. 103.

101 Daniel Turp & Gibrán van Ert, 'International Recognition in the Supreme Court of Canada's Québec Reference' (2000) 36 Can.Y.B.Int'l L. 335.

good faith, while the other parties do not, its unilateral declaration of independence would be more likely to be recognized.

To be sure, it is anybody's guess how the international community would determine who had negotiated in bad faith and who had not. Indeed, negotiations could break down even if both parties negotiated in good faith, in which case the *Secession Reference* could not be relied on by Quebec in support of attempts to secure international recognition of a unilateral declaration of independence, and Canada could conceivably wield the judgment as part of its campaign to thwart recognition. But what it does suggest is that Quebec could potentially secede unilaterally, with the sanction of the Canadian constitutional order. Remarkably, non-compliance with Part v does not appear to factor into the Court's analysis in this part of its reasons. Perhaps this is the Court's silent acknowledgement of the legacy of 1982, and its own role in that episode.

